

Deadly Discrimination: Police-Involved Deaths and Mental Health Disability in Canada

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Abstract

In Canada, people who experience mental health disability are over-represented among those who die in police interactions. At present, there is sparse national data available about the nature and extent of police-involved deaths of persons who experience mental health disability.

Using mixed methods including access to information requests, media analysis and thematic analysis, this study analyzes data from coroner and medical examiner reports produced from 2004 to 2014, including descriptions of 433 police-involved deaths in Canada to explore the over-representation of people who experience mental health disability. Secondly, it provides a review of contemporary case law on legal liability and accountability of police, comparing traditional tort law and criminal prosecution approaches with the potential for discrimination claims on the ground of disability. This review focuses on police use of force and considers the benefits and drawbacks to tort, criminal and human rights law as means of legal accountability for police-involved injuries and deaths of persons who experience mental health disability.

Employing a typology of police-involved deaths, it is demonstrated that persons who are perceived to experience mental health impairment are over-represented among several types of police-involved deaths subject to coroner or medical examiner proceedings. Further, it is suggested that recommendations stemming from coroner and medical examiner reports offer few helpful suggestions for meaningful reform to prevent such deaths. Lastly, it is suggested that discrimination claims are unlikely to prove more successful than tort claims or criminal prosecution as a means of sparking police reform. However, recognition of the potential for systemic discrimination by police should cause governments to re-evaluate police practices and societal strategies to address mental health crises.

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Introduction

Several recent high-profile deaths of people apparently in mental health crisis who died in police interactions have drawn public attention to the issue of police violence against persons with mental health disabilities in Canada.¹ Previous studies have concluded that people who experience mental health disability are over-represented among recipients of police use of force and among police-involved fatalities in Canada,² as are Black and Indigenous populations.³

Following police-involved injuries or deaths, several channels of legal accountability may be employed, most often including coroner or medical examiner inquests (in the case of deaths only) and tort or Charter litigation brought by surviving family members. However, despite attempts to make police accountable for fatal force, Canadian Broadcasting Corporation (CBC) data reveals that the number of people killed by police each year rose between 2000 and 2020⁴ and the proportion of individuals reported as having “mental health or substance abuse problems” who died in use of force encounters has remained relatively stable.⁵

In response to the persistently high numbers of people who experience mental health disability who die in encounters with police each year, and the apparent deficits in the legal accountability tools to

¹ For example, the death of Sammy Yatim in Toronto in 2013 led to the Iacobucci Report that addressed Toronto Police Service responses to persons in crisis (see Hon. Frank Iacobucci, *Police Encounters with People in Crisis* (Toronto: Toronto Police Service, 2014); Hon. Michael Tulloch, *Report of the Independent Police Oversight Review* (Toronto: Government of Ontario, 2017), online (pdf): www.siu.on.ca/pdfs/report_of_the_independent_police_oversight_review.pdf).

² See Jacques Marcoux & Katie Nicholson, “Deadly Force: Fatal Encounters with Police in Canada: 2000-2017” CBC News (undated), online: <<https://newsinteractives.cbc.ca/longform-custom/deadly-force>> [Marcoux & Nicholson]; Inayat Singh, “2020 already a particularly deadly year for people killed in police encounters, CBC research shows” CBC News (July 23, 2020) online: < <https://newsinteractives.cbc.ca/fatalpoliceencounters/>>. [Singh, 2020]

³ *Ibid.*

⁴ *Ibid.*

⁵ See *ibid* (Marcoux & Nicholson and Singh) which suggest that the proportion of those with mental health or substance abuse problems was 70% in from 2000-2017 and 68% from 2000-2020.

address these deaths, this thesis will consider what we can learn from coroner and medical examiner narratives about these deaths, and whether human rights and equality law might provide an avenue for accountability or guidance on how better to address this issue. Coroner and medical examiner narratives were selected for study because they are the most common official record of these deaths in Canada that provides details about the nature of the lethal encounter, the characteristics of the deceased and recommendations suggested to prevent future deaths.

Research Questions

To address the issues outlined above I undertook this study focusing on the following research questions:

1. What patterns or similarities exist in Canadian coroner and medical examiner reports concerning persons who experience mental health disability, including types of deaths, circumstances of death, and causes of death?
2. What coroner and medical examiner recommendations have been made with respect to policing mental health crises in Canada?
3. What opportunities or barriers does Canadian human rights law provide for legal accountability for excessive or unjustified use of force or police-involved deaths and injuries of persons who experience mental health disability in Canada and what benefits does addressing this issue from the perspective of human rights hold?

Terminology

Before delving into my research and analysis I feel it is important to discuss the terms I have chosen to employ in my thesis. To begin with, the term "person/persons experiencing mental health

disability" is, admittedly, a somewhat cumbersome phrase, and person first language has been rejected by some disability scholars as tending to reinforce that disability is a thing that a person has in the world, as opposed to an experience of barriers produced by the social structures of our society.⁶ The adoption of "person first" language was a movement to emphasize the personhood of those in marginalized labelled categories, that has ebbed somewhat as movements to reclaim the language of disability have been embraced. However, this terminology was chosen, despite some salient critiques of person first language,⁷ because the subject matter of my dissertation which treats questions of law and human rights. As legal scholars Richard Devlin and Dianne Pothier have expressed with respect to person-first language in legal scholarship, this terminology takes on a different meaning in light of the law, emphasizing the legal personhood of the individual described.⁸ Legal personhood is necessary for the assertion of legal rights, including equality and disability rights. Furthermore, drawing from critical disability theory, a "disability" is not a thing an individual has, but is rather an experience of oppression on the basis of an actual or perceived impairment. Consequently, I use the term "experiencing" to consider disability in this context.

Secondly, I have also chosen to use the term "mental health", which is also contentious among Mad Studies and Critical Disability Theory scholars. I acknowledge that this term is frequently used in light of systems that operate from a biomedical standpoint and seek to control rather than empower people

⁶ For example, Anna Lawson and Mark Priestley express their preference for "disabled people" over "people with disabilities" because the latter seems to refute the adoption of the Social Model of Disability, which at its most basic is the premise that people are not disabled by a physical or biomedical condition, but rather by socially constructed barriers. (Anna Lawson and Mark Priestley, "The Social Model of Disability: Questions for Law and Legal Scholarship?" in P. Blanck and E. Flynn, eds, *Routledge Handbook of Disability Law and Human Rights*, (London: Routledge, 2016) at 7. The social model of disability will be discussed in greater detail in chapter 2.

⁷ See *ibid.*

⁸ Richard Devlin and Dianne Pothier, "Introduction: Toward a Critical Theory of Dis-citizenship", c 1 in D. Pothier and R. Devlin, eds., *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* (Vancouver: UBC Press, 2006) at 3.

with disabilities.⁹ Nevertheless, I use this word in part to speak to and about those systems of power (the law being one of them), and I also use it in an attempt to reclaim the meaning of health, which after all is wider than, and not synonymous with, medicine or psychiatry, but rather evokes concepts of wellbeing and having one's needs met. For example, we speak about the social determinants of health, which usually include things like access to housing, food security, socio-economic security and social support. There is a value, I would argue in trying to reclaim "health" from its narrow association with medicine.

On Naming the Deceased

Hundreds of cases of civilian deaths are discussed in this thesis and the descriptions of those who died and the circumstances of their death are often only provided by those involved in their deaths (i.e. the surviving police officers). These accounts can, at times, be biased, inaccurate, and unjust.¹⁰ There is, at present, considerable societal discussion about how we remember those who have been killed in police interactions and some movements have pushed to name the deceased, as a means of preventing dehumanization. Those who die in police interactions have too often been described in reductive, inaccurate and biased ways after their deaths. Naming the deceased can be viewed as a means of urging society to confront the circumstances that led to these deaths and not overlook their humanity in discussions of police violence.¹¹ I am mindful of the dehumanization that can occur when people are

⁹ For a description of such usages, see Iyaylo Vassilev & David Pilgrim, "Risk, Trust and the Myth of Mental Health Services" (2007) 16:3 Journal of Mental Health 347 at 347.

¹⁰ It is worth noting that in some cases contained in this dataset family members of the deceased have actively taken steps to quash the coroners' verdict (e.g. *Silverfox v Chief Coroner*, 2012 YKSC 74 (CanLII), rev'd *Silverfox v Chief Coroner*, 2013 YKCA 11 (CanLII)).

¹¹ For example, the "Say Her Name" campaign has advocated for the recognition of police violence against African American women. The name of this campaign highlights the way in which Black women have been overlooked in public discussion and protest against police violence. As the African American Policy Forum describes: "Black women and girls as young as 7 and as old as 93 have been killed by the police, though we rarely hear their names. Knowing their names is a necessary but not a sufficient condition for lifting up their stories which in turn provides a much clearer view of the wide ranging circumstances that make Black bodies disproportionately subject to police violence. To lift up their stories, we need to know who they are, how they lived, and why they suffered at the hands of

reduced to numbers and statistics and categorized, and so I would like to take a moment to explain how I have determined to write about the reports studied and why.

With respect to naming the deceased the difficulty with using names in a study such as this is that it involves hundreds of people who all have loved ones who may have differing opinions on whether or not they would like their name to be used. On one hand, surviving family members and friends of those killed by police may wish that the details, descriptions and narratives attached to their deceased family member or friend are not repeated publicly and that stories told about these individuals when they could no longer speak for themselves, often reliant on the testimony of those involved in their deaths, not continue to define public narratives about that person or act as a constant reminder of their death and the way that they died. This may be particularly true where such accounts are inaccurate, biased, or unbalanced accounts of the death. Furthermore, this study focuses on perceptions of mental health disability among the deceased, which due to stigma may be a particularly sensitive matter from a privacy perspective. Due to the scope of this study which comprises hundreds of cases, I was unable to ask the permission of the people most affected by these narratives to study the reports and to record and repeat the details contained in them so I have decided that ethically using their full names might produce real harm and pain for the family and loved ones of the deceased, as use of the full names of the deceased would make the identity of these individuals easily searchable alongside quotes and descriptions about their deaths contained in the reports studied.

However, I also strongly believe in transparency of these public records because police-involved deaths are a matter of serious public concern, implicating our most fundamental human rights to life and security of the person, and our right to equality. As a compromise to avoid further publicizing potentially

police.” (African American Policy Forum, “Fill The Void. Lift Your Voice. Say Her Name.”, undated, online: <<https://aapf.org/shn-moms-network>>).

biased posthumous accounts, whilst retaining important public data on the fact of these deaths, the existence of these reports, and the narratives contained in them, I have decided to refer to the individuals named herein using their initials, along with the dates of death.¹² This allows interested researchers to identify the deceased persons described, whose full names are, in any event, listed along with their date of death in Appendix A as they appear in the publicly available documents obtained, while minimizing their direct association with the stories told about them in coroner and medical examiner reports in a manner easily searchable on the internet.

Overview of Chapters

Chapter 1 provides a literature review addressing police involved deaths and injuries in Canada and internationally, along with some of the most common measures suggested to address the over-representation of persons who experience mental health disability among recipients of police use of force. It will introduce a typology of police-involved deaths and injuries in Canada, building on the efforts of other researchers who have previously attempted to categorize the ways that people are injured or die in police encounters, with a particular focus on how these types of death impact people who experience mental health disability.

Chapter 2 describes Critical Disability Theory, a theoretical framework used in my analysis, considering its application to mental health and the law. This chapter addresses the social model of disability and its application to mental health and policing, critical disability theory perspectives on law reform, and the importance of intersectional analysis in addressing mental health disability and policing.

Chapter 3 describes the research methods employed in my study, including access to information requests and media searches as means of data collection and verification, thematic analysis for the

¹² One exception to this rule are cases where the death was subject to a public inquiry, since those deaths have already been heavily publicized, as have the contents of the inquiry reports associated with them.

analysis of coroner and medical examiner reports, and the literature review and legal analysis methods used.

Chapter 4 provides an overview of the dataset as a whole, including a demographic analysis of the coroner and medical examiner reports received, with a focus on how demographic factors relevant to human rights law, such as grounds of discrimination like mental disability and race, were identified within the dataset. It reveals that persons who experience mental health disability appear to be over-represented in many (but not all) types of police-involved deaths, pointing to the possibility that systemic ableism is involved in these deaths. Additionally, this chapter finds that coroner and medical examiner narratives often excluded consideration of socio-economic status or race when describing deaths, and where racism was raised they were often dismissive of its impact on the deaths. Thus, coroner and medical examiner processes have tended to white-wash police deaths and omit information relevant to intersectional analysis.

Chapter 5 provides an analysis of cases of police shootings and conducted energy weapon (CEW) proximate deaths. These cases are addressed together because they are both weapon-involved deaths occurring in the context of use of force, and CEWs are often considered alternatives to firearms. This chapter demonstrates that people perceived to have mental health impairments are over-represented among the victims of police shootings and CEW-proximate deaths. It finds that weapons play an important factor in police-involved shootings in Canada and attempts to reduce police-involved deaths of persons who experience mental health disability need to account for how responses will address the prevalence of sharp objects among those killed. It also finds that police policies or practices dictating lethal responses to sharp objects within proximity of an officer need to be abandoned. It suggests that while many recommendations to address police shootings aim to remove access to firearms to those who experience mental health disability, a more effective solution might be to consider restricting police firearms. While CEWs are often portrayed as alternatives to firearms, this chapter suggests they are often

used against unarmed individuals and the safety of these devices for use against people who experience mental health disability or use substances should be carefully studied before they are promoted as safer alternatives.

Chapter 6 provides an analysis of deaths described as the result of excited delirium, positional/restraint asphyxia, or sudden-in-custody deaths. Descriptions of these types of deaths commonly co-occurred in the same cases, with a single death considering many of these types of deaths, so they are analyzed together. This chapter demonstrates that “excited delirium” is almost exclusively used to describe sudden deaths of persons who are perceived to experience psychosis or use substances. Narratives in these cases showed “excited delirium” is employed to medicalize police-involved deaths and avoid scrutiny of use of force decision-making, or suggest police violence did not cause or contribute to the deaths. This chapter found recommendations often focused on a need for further study of “excited delirium,” as opposed to the safety of police restraint and use of force techniques for those who experience psychosis or use substances.

Chapter 7 provides an analysis of recommendations from the mental health set cases. It finds that many recommendations tended to focus on additional police training or greater cooperation and information sharing between police and health providers. It finds that many of the recommendations are not supported by studies of efficacy in the literature discussed in chapter 1. Furthermore, many recommendations reinforce the role of police in mental health crisis response or target those who experience mental health disability as the “problem,” suggesting greater surveillance, coercion or even forced treatment of this population. It concludes that the coroner and medical examiner recommendations reviewed generally do not provide a strong basis for police reform to protect people who experience mental health disabilities.

Lastly, chapter 8 provides a legal analysis focused on human rights as an alternative means of accountability, when contrasted with traditional legal avenues in tort and constitutional litigation. This chapter describes how judicial interpretation of the statutory use of force defence provisions has tended to be deferential to police discretion and is unlikely to spark more fundamental reform of the policing system. Furthermore, through an analysis of Canadian discrimination law, this chapter suggests that while police have a proactive duty to accommodate mental health disability by ensuring policies, practices and approaches do not disproportionately harm those with disabilities, there are many barriers to employing human rights law to compel meaningful systemic reform.

Conclusions

Ultimately, this study adds additional evidence for the over-representation of people who experience mental health disability in some forms of police-involved deaths involving use of force in Canada, including police shootings, CEW-proximate deaths, and cases described as “excited delirium,” sudden-in-custody deaths, or positional or restraint asphyxia deaths. The analysis of coroner and medical examiner reports reveals that the current very limited national data on police-involved deaths underreports these fatalities. It finds the analyses contained in some inquest or inquiry narratives are ableist, reinforcing tropes about the tragic inevitability of police-involved deaths of persons who experience mental health disability. At times the recommendations produced in these reports have also been problematic, arguing for greater coercion, surveillance and in the most extreme cases forced treatment of persons who experience mental health disability.

However, the thematic analysis also reveals many practical insights that could point towards reducing or eliminating police-involved deaths in this population. Some examples of such insights include:

- the importance of addressing the relationship between police responses and sharp-object-involved interactions to determine whether non-police responders might better de-escalate such situations;
- the importance of ensuring alternative responses to mental health crisis are not only engaged where weapons are not available;
- the importance of studying the safety of use of force techniques on populations that use substances or experience mental health disability to determine if current use of force practices are discriminatory; and
- the general need for greater transparency and data dissemination on use of force practices, outcomes, and impacts on marginalized populations in Canada.

Legally, this study considers the ways in which Canadian jurisprudence on police use of force has tended to provide considerable leniency to police when determining whether force was justified. It suggests that traditional forms of legal accountability, including tort and constitutional litigation and criminal prosecution have failed to adequately protect persons who experience mental health disability from police violence. Furthermore, through a review of human rights case law, and through an analysis of data obtained through access to information requests among other sources, this analysis considers some of the ways that police use of force practices in Canada may discriminate against persons who experience mental health disability. Through an analysis of case law and human rights tribunal decisions, it is argued that hopes of achieving meaningful accountability or reform through legal challenges is unlikely. However, it argues that since the duty to accommodate is proactive in nature, the state has a duty to ensure police practices do not discriminate against this population, in light of current information suggesting their over-representation within some types of fatal force encounters. It suggests human rights law could provide some assistance in evaluating current responses to mental health crises to

determine their efficacy and risks for persons who experience mental health disability and to guide the crafting of solutions aimed at avoiding the reproduction of discrimination. However, it ultimately casts doubt on the use of human rights claims as a means of compelling the fundamental reform required to address the disproportionate effects of police violence on persons who experience mental health disability.

Chapter 1: Mental Health Disability and Police-Involved Injury and Death in Canada

1.1 Introduction

To understand the nature and scope of the issue of police-involved injury, death, and violence in Canada, with a focus on persons who experience mental health disability one might start with the questions:

- How many people die or are injured in police interactions and what are the causes?
- What proportion of use of force injuries and deaths involve persons perceived to experience mental health disability or to be a member of other marginalized groups?
- What proposed solutions have been considered in the literature to address police use of force against persons who experience mental health disability?

Given the plurality of Canadian police forces, which operate at federal, provincial and municipal levels, in addition to the numerous institution-specific forces (e.g. military police, transit police, etc.), getting a national answer to these questions is difficult, if not impossible. Data on police-involved injury and death rates in Canada is scarce, difficult to access, and often unreliable since police forces are often not required to collect and release data about use of force, national data is not collected, and provinces differ in how much data they collect and to what extent this data is checked for reliability and made available to the public. Additionally, several Canadian scholars, activists, and policy-makers have highlighted the dearth of publicly available information and research on police use of force nationally and have called for more robust data collection, including mental health data.¹³ One can achieve some

¹³ See e.g. Hon. Frank Iacobucci, *Police Encounters with People in Crisis* (Toronto: Toronto Police Service, 2014); Hon. Michael Tulloch, *Report of the Independent Police Oversight Review* (Toronto: Government of Ontario, 2017), online (pdf): <www.siu.on.ca/pdfs/report_of_the_independent_police_oversight_review.pdf>; Council of Canadian

understanding of the issue of police-involved injury and death and police use of force in Canada only by reviewing the disparate studies from provinces or territories, individual forces, and the limited available federal data addressing this issue, while recognizing the limitations of these studies – notably, incomplete data sets.

This chapter will consider the above questions through a literature review of Canadian and international studies¹⁴ that shed light on the numbers and nature of police-involved deaths and injuries. It will focus on what current studies say about the impact on persons who experience mental health disability and other marginalized groups. The first part of the following discussion addresses police-involved deaths and injuries generally; the second part describes potential measures to the issue of police use of force against persons who experience mental health disability. The discussion of police-involved injuries and deaths is structured according to a typology that emerged from a review of this literature, informed by the empirical study of police-involved deaths provided in chapters 5 to 8.

This chapter focuses on civilian fatalities in police-citizen interactions for two reasons; first, they are far more common than police officer fatalities¹⁵, and, second, they and the particular human rights

Academies, The Expert Panel on the Medical and Physiological Impacts of Conducted Energy Weapons, *The Health Effects of Conducted Energy Weapons* (Ottawa, ON: Council of Canadian Academies and Canadian Academy of Health Sciences, 2013); Ontario Human Rights Commission, *Report of the Ontario Human Rights Commission on Police Use of Force and Mental Health* (Toronto: Ontario Human Rights Commission, 2014), online: <www.ohrc.on.ca/en/report-ontario-human-rights-commission-police-use-force-and-mental-health>; John Kiedrowski et al, *A Discussion of the Collection and Analysis of Data on the Use of Force in Encounters Between the Police and Members of the Public* (Ottawa: Public Safety Canada, 2015).

¹⁴ International studies were incorporated where they provide information about types of deaths, injuries or use of force not available in Canada or where they provide a useful comparator to provide context for Canadian data.

¹⁵ There are a few studies of police officer deaths and injuries in Canada worth mentioning, although these subjects will not be explored thoroughly. A study of homicides of police officers found that 133 officers had been murdered in a 48year period from 1961-2009, among which 65% of these deaths occurred in the first half of this time period (1961-1984). This study suggests the vast majority of police officer homicides are committed with a firearm (92%). (See Sara Dunn, “Police officers murdered in the line of duty, 1961 to 2009” (26 October 2010), online: *Statistics Canada* <www150.statcan.gc.ca/n1/pub/85-002-x/2010003/article/11354-eng.htm>).

A study of workplace compensation claims for the period of 2006-2015 in Canada suggests that there were a total of 45 workplace fatalities of police officers during this time period, 40 of whom were male and 5 of whom were female (note that 79% of police officers in Canada were men in 2015) see “Table 35-10-0076-01 Police personnel and selected crime statistics” (31 March 2022), online: *Statistics Canada*

implications they raise are the focus of this study. The typology of injuries and deaths provided, along with information about the nature and numbers of such injuries and deaths, is provided to contextualize the groupings of deaths in my dataset. This typology provides information about what is currently known in Canada and internationally about these deaths. It provides information, where relevant, about the impact of such deaths on persons who experience mental health disability, demonstrating which forms of death and injury are currently known to have disproportionate impacts on those who experience mental health disability, as well as identifying which forms of deaths and injuries have unknown impacts on this population.

The discussion of the most common measures discussed to address police use of force against persons who experience mental health disability is provided as context for the discussion of coroner and medical examiner recommendations provided in chapter 8, since the measures considered were raised in many coroner and medical examiner reports studied.

1.2 National Data on Police-involved Injury and Death in Canada

Very little information is available on police-involved death or injuries in Canada. With respect to fatalities, Statistics Canada records deaths caused by "legal intervention" and "legal intervention sequelae" in the Vital Statistics Deaths Database (VSDD), which classified these deaths during my study period (2004-2014) according to criteria found in the International Classification of Diseases 10 (ICD-10) standards developed by the World Health Organization.¹⁶ Legal intervention is defined in the ICD-10 as

<www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510007601>., among which 19 were due to "violent acts" whilst 15 were caused by traffic accidents, 1 by a "fall", 1 by a "fire or explosion", 5 by "exposure to harmful substances of environments", 3 due to "bodily reaction or exertion" and 1 due to "other events or exposures". An average of 1.9 police officers were thus killed due to violence per year in this time period. With respect to injuries, this study reveals that less than one quarter (22.5%) of accepted workplace injury claims were a result of violence (See Irwin Cohen & Len Garis, *Determinants of Injury and Death in Canadian Police Officers* (Langley: University of the Fraser Valley, 2018), online (pdf): *Centre for Public Safety and Criminal Justice Research* <cjr.ufv.ca/wp-content/uploads/2018/09/Determinants-of-Injury-and-Death-in-Police-Officers-August-2018.pdf>.

¹⁶ See "Statistics Canada, Canadian Vital Statistics - Death database (CVSD)" (date modified: 21 January 2022), online: *Statistics Canada* <www23.statcan.gc.ca/imdb/p2SV.pl?Function=getSurvey&SDDS=3233>.

injuries inflicted by the police or other law-enforcing agents, including military on duty, in the course of arresting or attempting to arrest lawbreakers, suppressing disturbances, maintaining order, and other legal action.¹⁷

Thus, the deaths attributed to legal intervention do not include deaths attributed to injuries not caused by police, even where lack of medical intervention on the part of police may have led to a death. These figures may also omit deaths attributed to other primary causes, even where police intervention contributed to death. Causation is often a particularly complex issue to satisfactorily determine in police-involved deaths since the actions of the deceased may contribute to police intervention and the death, along with the actions that officers took. Additionally, some forms of police-involved deaths involve criminal actions on the part of police and may be difficult to detect where officers are willing to lie to protect their own interests. Many of those who die during police interactions may experience problematic substance use, or other health complications that could contribute to their deaths and serve as a relatively easy, measurable alternative explanation for deaths that police actions or inactions may contribute to or cause. Deaths that exist in the common space where the actions of multiple people contributed to the fatality are very unlikely to be represented in simplified counts such as those maintained by Statistics Canada, as are police-involved deaths where there is uncertainty about how the person died, or complexity in the causes of death.

Furthermore, criminologist Richard Parent's study of Canadian police shootings from 1981-2000 revealed that Statistics Canada's figures counted less than half of the annual police shooting deaths he identified, demonstrating that these figures were unreliable.¹⁸

¹⁷ "ICD-10 Version:2016", online: *World Health Organization* <apps.who.int/classifications/icd10/browse/2016/en> at XX, no Y35.

¹⁸ Richard Parent, *Aspects of police use of deadly force in North America: The phenomenon of victim-precipitated homicide* (Simon Fraser University: PhD Thesis, 2004) at 175.

The number of deaths caused by legal intervention in each year of my study according to the Canadian Vital Statistics Death Database¹⁹ is provided in the table below.

Year	Total Legal Intervention Deaths	Legal Intervention Deaths Involving Firearm Discharge	Legal Intervention Deaths Involving Other Specified Means	Legal Intervention Deaths Involving Unspecified Means
2004	13	11	2	0
2005	16	14	2	0
2006	9	7	2	0
2007	13	10	3	0
2008	16	11	5	0
2009	19	14	5	0
2010	18	15	3	0
2011	23	22	1	0
2012	13	13	0	0
2013	16	13	3	0
2014	15	14	1	0
Average	15.45	13.09	2.45	0

Table 1: Legal Intervention Deaths: Canadian Vital Statistics Death Database

1.3 Sub-national Studies of Police-Involved Deaths and Injuries in Canada

While national data is scarce, several localized studies have been conducted in Canada that shed some light on police-involved deaths and injuries in particular jurisdictions. Several provincial police oversight bodies track police-involved deaths and serious injuries in their respective jurisdictions, including Alberta's Serious Incident Response Team, British Columbia's Office of the Police Complaints Commissioner and the Independent Investigations Office, Manitoba's Independent Investigations Unit,

¹⁹ "Table 13-10-0156-01 Deaths, by cause, Chapter XX: External causes of morbidity and mortality (V01 to Y89)" (24 April 2022), online: *Statistics Canada* < www150.statcan.gc.ca/t1/tbl1/en/cv.action?pid=1310015601#timeframe>, DOI: <doi.org/10.25318/1310015601-eng>.

Ontario's Special Investigations Unit, Québec's Bureau des enquêtes indépendantes, Nova Scotia's Serious Incident Response Team, and Prince Edward Island's Police Complaints Commission. Some of the data compiled by these agencies will be provided in greater detail below as it is broken down according to different types of police-involved deaths or injuries. Unfortunately, these bodies do not all have the same mandates or shared typologies of the deaths and injuries they report on, so the data they produce can be difficult to compare between jurisdictions. Furthermore, very few of these bodies track demographic data relevant to determining inequities, limiting the value of the data they do produce to understand their impacts on persons who experience mental health disability or other marginalized groups.

In addition to police oversight data, several studies authored by academics or non-governmental organizations have explored police involved deaths and injuries in one or multiple policing jurisdictions in Canada. The Ontario Human Rights Commission (OHRC) contracted criminologist Scot Wortley to study the Special Investigations Unit (SIU) data concerning the Toronto Police Service for the period of 2013 to 2017 and similarly found an over-representation of Black citizens among use of force deaths in Toronto, noting that this population accounts for 8.8% of the total population of Toronto, but were the subject against whom force was used in 28.8% of use of force cases, 36% of police shootings, 61.5% of deadly encounters with police, and 70% of fatal shootings.²⁰ The OHRC data is particularly helpful as it can be compared to SIU data earlier obtained by Scot Wortley for a report written pursuant to the Ipperwash Commission of Inquiry in Ontario for the 2000-2006 period. The comparison of these data sets reveals that over-representation of the Black population continues and little change can be seen in the intervening years.²¹ The 2013-2017 data suggests that Black people in the City of Toronto are "3.6 times

²⁰ Ontario Human Rights Commission, *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black Persons by the Toronto Police Service* (Toronto: Ontario Human Rights Commission, 2018), online: < <http://ohrc.on.ca/en/public-interest-inquiry-racial-profiling-and-discrimination-toronto-police-service/collective-impact-interim-report-inquiry-racial-profiling-and-racial-discrimination-black> > [A *Collective Impact*] at 19.

²¹ *Ibid* at 19.

more likely than a White person to be involved in a use of force case”, “4.9 times more likely than a White person to be involved in a police use of force shooting case resulting in serious civilian injury or death”, “11.3 times more likely than a White person to be involved in a police use of force case involving civilian death”, and “19.5 times more likely than a white person to be involved in a police shooting that resulted in civilian death.”²²

With respect to gender, men are over-represented and women are under-represented in use of force, regardless of race. Men were involved in over 90% of SIU use of force cases in both the 2000-2006 and 2013-2017 time periods. Black men were particularly over-represented in SIU use of force cases, making up 4.1% of the Toronto population in 2013-2017, but 28.8% of SIU use of force cases.²³ Black women are under-represented (as are all women) in special investigations unit investigations relative to men, but they are more likely to have force used against them than white women.²⁴

With respect to mental health, the OHRC report also found that mental health was identified as a factor in 29.6% of use of force cases in the 2013-2017 time period studied.²⁵ When considered with race, both Black and white persons were over-represented among use of force cases in which the subject was labelled as exhibiting mental health issues.²⁶ White people represented 48.4% of Toronto’s population in the time period 2013-2017, but were involved in 64.9% of the use of force cases in which mental health was considered a factor, while being under-represented in use of force cases where this was not an identified factor (35.2% of cases).²⁷ Black people were also over-represented in mental health use of force cases, though less over-represented than they were in non-mental health cases (16.2% vs 28.8%).²⁸

²² *Ibid* at 19.

²³ *Ibid* at 84

²⁴ *Ibid* at 84

²⁵ *Ibid* at 20.

²⁶ *Ibid* at 94.

²⁷ *Ibid* at 94-95.

²⁸ *Ibid* at 94.

Wortley's report suggests that white people are "most often exposed to police use of force when experiencing a mental health crisis"²⁹ suggesting that mental health may be a risk factor for police use of force independent of race. While this data looked exclusively at Toronto, which has a different demographic makeup from other parts of Canada, this data is helpful in providing more detailed information on the intersections of race and mental health disability than are ordinarily found in Canadian studies of police use of force.

Police researcher Gabriella Pedicelli studied media sources to identify several accounts of police-involved deaths in Toronto and Montréal for the period from 1987 to 1993. While this study is less recent, it is also unique as it included varying forms of police-involved deaths, including deaths deemed to be accidents or suicides which are often excluded from studies. The cases selected for study included shootings, deaths alleged to have been caused by "excited delirium", an alleged heart attack during a barricade situation, a motor-vehicle accident during an emergency response, a firearm suicide in police-presence, a death for unknown reasons after a man was shot with rubber bullets, blunt force injuries, and a motor vehicle accident following a pursuit.³⁰ She found that between 1987 and 1993, there were 11 people killed by police in Montréal and 12 in Toronto.³¹ Black men were over-represented amongst the victims of fatal use of force in these cities, making up about half of the victims, but only making up 1.25% of the population in Montréal, and 3.25% of the population in Toronto at the time.³² Media studies are, however, an imperfect manner through which to study police fatalities because biases in reporting may lead to the underreporting of deaths for some populations and an underestimate of deaths generally.

²⁹ *Ibid* at 19.

³⁰ See Gabriella Pedicelli, *When Police Kill: Police Use of Force in Montreal and Toronto*, (Montréal: Véhicule Press, 1998).

³¹ See *ibid* at 64.

³² See *ibid* at 65.

While these are generalized studies of police-involved deaths, several Canadian studies have also tackled particular forms of death and injury. I will discuss several types of police-involved deaths and injuries below, through a typology developed which structures my analysis of police-involved deaths in chapters 5-8.

1.4 Types of Police-Involved Deaths and Injuries in Canada

Police-involved injuries and deaths follow similar patterns throughout the world. The typology in the following sub-sections was developed during the course of my empirical analysis of police-involved deaths in Canada, as well as through a review of domestic and international literature on police-involved deaths and injuries. I provide a description of the existing Canadian and relevant international literature to describe what is currently known about the nature, number and extent of these forms of death and injury, highlighting where available data exists, how (and whether) these forms of death and injury impact persons who experience mental health disability and other marginalized populations. It should be noted that these “types” of deaths are not mutually exclusive. Rather, they are broad patterns that emerge in the way police-involved deaths are described, and may sometimes overlap. They include some “causes” or “manners” of death, to use coroner/medical examiner terminology, but they also include what might be called “theories” of death, meaning broader explanations of deaths that draw on medical, social or legal ideas to explain and provide context to them. More detail is provided in this typology for the types of deaths I have focused on in chapter 4, and relatively less detail is provided in the descriptions of those omitted from detailed analysis.

1.4.1 Alcohol and/or Drug Overdose

One of the most prevalent and least studied types of police-involved deaths and injuries are those attributed to overdoses or other medical complications relating to the use of drugs or alcohol.

These deaths or injuries occur when an individual is harmed or dies as a result of ingesting drugs or alcohol either prior to police contact or during an interaction with police.

No standardized drug-related overdose death statistics are collected and made available nationally in Canada.³³ My literature review revealed no Canadian studies of police-involved drug overdose deaths that occurred outside of custodial institutions, although several studies have found drug overdoses to be a prominent cause of deaths in Canadian jails and prisons.³⁴ Several studies have, however, documented how the criminalization of drugs in Canada has led to a reluctance on the part of bystanders to call for emergency help who fear arrest in the wake of an overdose.³⁵ This may contribute to drug overdoses by causing drug users to ingest large quantities of drugs in rushed circumstances to avoid police detection.³⁶ The current opioid crisis in Canada has focused some attention on this issue, but it remains a significant problem. As Benedikt Fischer et al, note, for many years Canadian public policy on drug overdoses was heavily bifurcated, with provincial and municipal governments increasingly supporting and endorsing public health approaches to drug use, including providing more harm reduction and treatment access, while federal drug law and policy initiatives remained focused on “repression oriented approaches” to the regulation of illicit drugs, including criminalization and enforcement.³⁷

³³ See Benedikt Fischer et al, “Illicit drug use and harms, and related interventions and policy in Canada: A narrative review of select key indicators and developments since 2000” (2016) 27 *International Journal of Drug Policy* 23 at 25.

³⁴ See e.g. Daniel Antonowicz & John Winterdyk, “A Review of Deaths in Custody in Three Canadian Provinces” (2014) 56:1 *Canadian Journal of Criminology & Criminal Justice* 85; Wendy Wobeser et al, “Causes of death among people in custody in Ontario, 1990-1999” (2002) 167:10 *Canadian Medical Association Journal* 1109; Correctional Service Canada, *Annual Report on Deaths in Custody 2014/25* (Ottawa: Correctional Service Canada, 2016), online: <www.csc-scc.gc.ca/research/005008-3008-eng.shtml>.

³⁵ See e.g. Kayla Follett et al, “Barriers to Calling 9-1-1 during overdose emergencies in a Canadian context” (2014) 15:1 *Critical Social Work* 18; Kara Strike & Tara Marie Watson, “Losing the uphill battle? Emergent harm reduction interventions and barriers during the opioid overdose crisis in Canada” (2019) *International Journal of Drug Policy*, DOI: <10.1016/j.drugpo.2019.02.005>; Thomas Kerr et al, “The public health and social impacts of drug market enforcement: A review of the evidence” (2005) 16:4 *International Journal of Drug Policy* 210; Dan Werb et al, “Effect of drug law enforcement on drug market violence: A systematic review” (2011) 22:2 *International Journal of Drug Policy* 87.

³⁶ See *ibid.*

³⁷ See Fischer, *supra* note 33 at 30.

Aside from the obvious potential connection between drug and alcohol overdose deaths and injuries and addictions or problematic substance use, their relationship to other mental health disability is unclear. One British study of drug-involved police custody fatalities between 1998 and 2002 found that a high proportion of individuals who overdosed in police custody in that country (42%) had been diagnosed with concurrent disorders (i.e. mental health and addiction diagnoses).³⁸ It also found that those with “mental health disorders excluding addictions (primarily those diagnosed with psychotic disorders, depression, or prior suicide attempts) were more likely to be believed to be faking their symptoms by police prior to death than others,³⁹ suggesting that stigma against this population may influence how seriously medical emergencies are taken by police. Domestic data on the connection between police-involved overdose deaths and mental health disabilities other than problematic substance use could not be found.

There is evidence that police officers can play an important role in facilitating harm reduction⁴⁰ and administering life-saving treatment to those experiencing a drug overdose. For example, an American study that tracked opioid deaths in Lorain County, Ohio before and after the implementation of a program supplying police officers with naloxone kits and training found a decrease in opioid fatalities in that county following the initiation of the program, along with several documented recoveries from overdose following the administration of naloxone by police.⁴¹ Drug overdose deaths can be related to addictions, a legally recognized form of mental health disability,⁴² although not all such deaths will occur among those with a disability. When an individual overdoses in police custody, officers have a legal duty

³⁸ D. Best et al, “Drug deaths in police custody: is dual diagnosis a significant factor?” (2004) 11 *Journal of Clinical Forensic Medicine* 173 at 179.

³⁹ *Ibid* at 179.

⁴⁰ See e.g. Devesh Vashishtha, “The North American opioid epidemic: current challenges and a call for treatment as prevention” (2017) 14:7 *Harm Reduction Journal*.

⁴¹ Jessica Rando et al, “Intranasal naloxone administration by police first responders is associated with decreased opioid deaths” (2015) 33:9 *The American Journal of Emergency Medicine* 1201, DOI: <10.1016/j.ajem.2015.05.022>.

⁴² See *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30 (CanLII).

to ensure that necessary care is provided and they can be criminally or civilly liable for failure to take reasonable actions.⁴³

1.4.2 Suicides, Attempted-Suicides, and Self-Inflicted Injuries in the Presence of Police

There are several circumstances where police are present when someone takes actions to end their own life and some policing scholars suggest suicides in police presence are common,⁴⁴ though data to back up this assertion are scarce with respect to suicides occurring outside of cells (i.e. pre-booking). In some situations, the suicidal person, or a friend, family member, or member of the public calls police to report someone threatening to kill themselves or who is in an emotional crisis and believed to be at risk of suicide or self-harm. In other cases, during an interaction with police initiated due to suspected criminal behaviour an individual becomes suicidal. In some situations, when police arrive to confront a person in crisis, that individual kills themselves. Suicides in police presence are varied and suicide is considered a “manner” of death, not a “cause” of death. However, suicides in police-presence are worth considering collectively because unlike other forms of police-involved death, the influence of police on suicides is indirect, and the actions, decisions and behaviour of police who are present for a suicide often do not come under scrutiny or study because these deaths are perceived to be inevitable or at least minimally influenced by police.⁴⁵

⁴³ See Re. Criminal Liability: *Criminal Code*, RSC 1985 c C-46, ss 215(1)(c), (2)(b).

Note: The duty to ensure medical care for those in custody is more thoroughly explained in subsection 5.9 below.

⁴⁴ See e.g. Mark Lindsay & David Lester, “Suicide During Confrontations with Police” in *Suicide by Cop: Committing Suicide by Provoking the Police to Shoot You* (New York: Routledge, 2004) at 21.

⁴⁵ Suicide deaths in the presence of police are often omitted from studies of police-involved deaths, perhaps because it may be difficult to determine in many situations whether police were present during the death or merely responded to a call following the death. However, they do occasionally attract legal attention where the police officer’s actions or inaction are believed to have contributed to the death. For example, see *R v Upjohn*, 2018 ONSC 947, 2018 ONCA 1059 aff’d, in which a police officer was charged with breach of duty for allegedly failing to assist a member of the public to intervene in the hanging suicide of a teenager in High Park, Toronto, but was ultimately acquitted because of insufficient evidence of *mens rea*.

Canada has a suicide rate of approximately 10.4 per 100,000 people, which results in roughly 4,000 suicides per year, according to 2012 data from the Canadian Vital Statistics Database, and the rate has decreased since 1979.⁴⁶ There is some data on suicides in the presence of the police, although these deaths are not tracked in most Canadian jurisdictions.⁴⁷ In Nova Scotia, the Serious Incident Response Team's data records that over five years (2012-2017) there were five suicides in police presence and one attempted suicide resulting in serious injury.⁴⁸ British Columbia's Independent Investigations Office reports on cases of self-inflicted death and serious harm in police-presence, reporting 26 cases of suicides and 17 cases of serious self-inflicted harm from 2013/2014 to 2017/2018.⁴⁹ Much of the literature on suicides in police presence focuses on the concept of "suicide by cop" which will be explored below in sub-section 5.3. However, a few studies have explored this issue in other contexts. One American study, which is one of the few to have considered suicide deaths both inside and outside of cells, reviewed suicide death records between 1984-1992 in Marion County, Indiana, finding that firearm suicides in

⁴⁶ Robin Skinner et al, "Suicide and self-inflicted injury hospitalizations in Canada (1979 to 2014/15)" (2016) 36:11 Health Promotion and Chronic Disease Prevention in Canada, online (pdf): *Government of Canada* <www.canada.ca/content/dam/phac-aspc/migration/phac-aspc/publicat/hpcdp-pspmc/36-11/assets/pdf/ar-02-eng.pdf>.

⁴⁷ For example, suicides and attempted suicides in the presence of police are not tracked by Alberta's Serious Incident Response Team, Manitoba's Independent Investigations Unit, Ontario's Special Investigations Unit, and Québec's Bureau des enquêtes indépendantes.

⁴⁸ Serious Incident Response Team, *Trust Confidence Integrity Independence, Annual Report 2016-2017* (Halifax: Serious Incident Response Team, 2017) at 9; Serious Incident Response Team, *Trust Confidence Integrity Independence, Annual Report 2015-2016* (Halifax: Serious Incident Response Team, 2017) at 9; Serious Incident Response Team, *Trust Confidence Integrity Independence, Annual Report 2014-2015* (Halifax: Serious Incident Response Team, 2017) at 10; Serious Incident Response Team, *Trust Confidence Integrity Independence, Annual Report 2013-2014* (Halifax: Serious Incident Response Team, 2017) at 10; Serious Incident Response Team, *The First Year In Review: 2012-2013 Annual Report* (Halifax: Serious Incident Response Team, 2012-2013) at 8.

⁴⁹ Independent Investigation Office of BC, *Annual Report 2017-2018* (Victoria: Independent Investigation Office, 2018), online (pdf): <iiobc.ca/app/uploads/sites/472/2019/05/17-18-Annual-Report_Web-Version.pdf>; Independent Investigation Office of BC, *Annual Report 2016-2017* (Victoria: Independent Investigations Office, 2017), online (pdf): <iiobc.ca/app/uploads/sites/472/2019/02/IIO-2016-2017-Annual-Report-Final.pdf>; [Independent Investigations Office, Annual Report 2015-2016](http://iiobc.ca/app/uploads/sites/472/2019/02/IIO-2015-2016-Annual-Report-Interactive.pdf) (Victoria: Independent Investigation Office, 2016), online (pdf): <iiobc.ca/app/uploads/sites/472/2019/02/IIO-2015-2016-Annual-Report-Interactive.pdf>; Independent Investigations Office, *Annual Report 2014-2015* (Victoria: Independent Investigations Office, 2015), online (pdf): <iiobc.ca/app/uploads/sites/472/2019/02/IIO_Annual_Report_2014_15.pdf>; Independent Investigations Office, *Annual Report 2013-2014* (Victoria: Independent Investigations Office, 2014), online (pdf): <iiobc.ca/app/uploads/sites/472/2019/02/IIO_Annual_Report_2013_141.pdf>.

police presence made up 1% of all suicides studied and 2% of firearm suicides.⁵⁰ This study found that most of the suicides identified occurred in the context of police responses to domestic disturbances (57%) and only 3 of the 14 cases identified had evidence that the deceased was contemplating suicide prior to police involvement.⁵¹ While this data is somewhat out of date and pertains to America which has unusually high gun ownership rates, it is interesting because it suggests suicides in police presence may be more likely to be spontaneous, potentially arising in the context of the deceased's relationship crises.

With respect to self-inflicted injuries, it is important to note that they are distinct from suicide and attempted suicide because they may not be intentionally inflicted, but can also be accidental. These can occur in a variety of situations, including, for example, during physical altercations with police, during attempts to evade arrest, or somewhat randomly during otherwise peaceful encounters. I was unable to identify any broad studies of this phenomenon in Canada, although some specific forms of self-inflicted injury are described in other subsections of this typology.

Epidemiological research suggests that most suicide cases are related to psychiatric labels, including most prominently depression, substance use disorders, and psychosis.⁵² However, I did not find any sources on the relationship between police-involved self-inflicted injuries or suicides and mental health disability, beyond studies specific to "suicide by cop," discussed below.

1.4.3 "Suicide by Cop", "Police Provoked Suicide", and "Victim-Precipitated Homicide"

⁵⁰ Richard Harruff et al, "Firearm suicides during confrontations with police" (1994) 39:2 Journal of Forensic Sciences 402.

⁵¹ *Ibid.*

⁵² Louise Brådvik, "Suicide Risk and Mental Disorders" (2018) 15:9 International Journal of Environmental Research and Public Health 2028 at 2028. See also Genevieve Arsenault-Lapierre, Caroline Kim & Gustavo Turecki, "Psychiatric diagnoses in 3275 suicides: a meta-analysis" (2005) 4:37 BMC Psychiatry, DOI: <10.1186/1471-244X-4-37>.

The concept of “suicide by cop” has been popularized in policing publications,⁵³ social science and health literature,⁵⁴ and the popular media⁵⁵. While “suicide by cop” may sound like a colloquial term for a type of police-involved death, this terminology is the most frequently used description of this theory found in the media and academic studies on the topic, though other competing terms exist.⁵⁶ There is lack of consensus in the literature on a definition of suicide by cop, but generally the concept is applied to cases meeting three criteria: 1) they must be fatal (or potentially fatal) police use of force cases (usually shootings); 2) the subject of force is retrospectively described as having been suicidal at the time of their death based on witnessed behaviour and speech or background information, although very rarely

⁵³ See e.g. Alejandra Jordan, Nancy Panza & Charles Dempsey, “Suicide by Cop: A New Perspective on an Old Phenomenon” (2019) 23:1 *Police Quarterly* 1; Dragana Kesic & Stuart Thomas, “Attempted suspect-provoked shootings in Victoria: prevalence and characteristics” (2017) 40:4 *Policing: An International Journal of Police Strategies & Management* 704; Vivian Lord, “Police Responses in Officer-Involved Violent Deaths: Comparison of Suicide by Cop and Non-Suicide by Cop Incidents” (2014) 17:1 *Police Quarterly* 79; Brian Kingstott, “Suicide by Proxy: Revisiting the Problem of Suicide by Cop” (2009) 9:2 *Journal of Police Crisis Negotiations* 105; John Crank, “Suicide by Cop: Inducing Officers to Shoot” (2007) 30:1 *Policing: An International Journal of Police Strategies & Management* 158.

⁵⁴ See e.g. H. Range Hutson et al, “Suicide by Cop” (1998) 32:6 *Annals of Emergency Medicine* 665; Lauren Dewey et al, “Suicide by Cop: Clinical Risks and Sub-types” (2013) 17:4 *Archives of Suicide Research* 448; Christina Patton & William Fremouw, “Examining ‘Suicide by Cop’: A Critical Review of the Literature” (2016) 27 *Aggression and Violent Behaviour* 107; Amber Neitzel & James Gill, “Death Certification of ‘Suicide by Cop’” (2011) 56:6 *Journal of Forensic Sciences* 1657.

⁵⁵ For example, it has been used to describe several high profile police-involved deaths around the World, including, among others, those of: Kajieme Powell, St. Louis, USA (see James Queally, “Video emerges in St. Louis fatal police shooting”, *Los Angeles Times* (20 August 2014), online: <www.latimes.com/nation/nationnow/la-na-nn-stl-police-shooting-video-20140820-story.html>); Sammy Yatim, Toronto, Canada (see Jasmin Seputis, “James Forcillo jury didn't hear suicide by cop theory at his murder trial”, *CBC News* (19 January 2016), online: <www.cbc.ca/news/canada/toronto/james-forcillo-jury-didn-t-hear-suicide-by-cop-theory-at-his-murder-trial-1.3410688>); Tyler Cassidy, Melbourne, Australia (see Geesche Jacobsen, “Police pursue 'suicide by cop' angle in teen shooting death”, *Sydney Morning Herald* (13 December 2008), online: <www.smh.com.au/news/national/police-pursue-suicide-by-cop-angle/2008/12/12/1228585118357.html>); David Cerven, Auckland, New Zealand (see “Myers Park shooting: David Cerven was unarmed when police fired”, *New Zealand Herald* (16 September 2015), online: <www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11513839>); and Michael Malsbury, Middlesex, England (see Rebecca Allison, “UK's first 'suicide by cop' ruling”, *The Guardian* (10 May 2003), online: <www.theguardian.com/uk/2003/may/10/ukcrime.ukguns>).

⁵⁶ For example, “suicide by cop” has also been called “law enforcement assisted suicide” (see Vivian Lord, “Law Enforcement Assisted Suicide” (2000) 27 *Criminal Justice & Behavior* 401); “victim-precipitated homicide” (see Richard Parent & Simon Verdun-Jones, “Victim-precipitated homicide: Police use of deadly force in British Columbia” (1998) 21:3 *Policing: An International Journal* 432) and “suicide by police” (see Robert Homant & Daniel Kennedy, “Suicide by Police: A Proposed Typology of Law Enforcement Officer-Assisted Suicide” (2000) 23 *Policing* 339) among other terms.

according to their own account; and 3) the subject must have taken actions interpreted as intentionally provoking a lethal response by police officers.

“Suicide by cop” originated as a policing theory, and was only later taken up by medical and social science researchers. It was most likely coined by Dr. Karl Harris, a former police officer and psychologist who worked for the County of Los Angeles Department of Chief Medical Examiner-Coroner in 1988/1989 as the Chief, Coroner Investigations, and who may have provided volunteer services to that department before his appointment.⁵⁷ Some authors claim that Karl Harris released a report in 1983 on 99 police shootings in Los Angeles County, concluding that “10% to 25% of all shootings he studied involved suicide attempts”⁵⁸ although this report appears never to have been published and is only mentioned in early policing articles on the phenomenon. “Suicide by cop” began to be discussed in non-academic policing literature in the early 1990s in descriptions of case studies.⁵⁹ The concept is theoretically linked to the criminological theory of “victim-precipitated homicide”, that emerged in the 1950s through the work of Marvin Wolfgang, an American psychologist, who drew on psychoanalytic theory to suggest that many

⁵⁷ Note that while most sources in the literature agree that the theory came from Karl Harris, information about Dr. Harris found in much of the academic literature on suicide by cop provides incorrect information suggesting he was a medical examiner (i.e. a medical doctor). For example, articles incorrectly claiming Karl Harris was a former Deputy Medical Examiner, or Acting Chief Medical Examiner for the County of Los Angeles, California, include: Timothy Flynn & Robert Homant, “Suicide by Police in Section 1983 Suits: Relevance of Police Tactics,” (1999-2000) 77 U Det Mercy L Rev 555 at 556, n 3, and Robert Homant, Daniel Kennedy & R. Thomas Hupp, “Real and Perceived Danger in Police Officer Assisted Suicide” (2000) 28 J Criminal Justice 43 at 44; Ralph Rickgarn, “Victim-Precipitated Homicide: Incident and Aftermath” in Donald Sheehan & Janet Warren, eds, *Suicide and Law Enforcement* (Washington, DC: U.S. Dept. of Justice: Federal Bureau of Investigation, 2001) at 678. Information about the background of Karl Harris was provided to the author by email on December 2, 2014 by Craig Harvey, Chief, Coroner Investigations of the County of Los Angeles Department of Medical Examiner-Coroner, in response to a request asking about whether Karl Harris had been employed by the department and in what capacity.

⁵⁸ This quotation from the Dr. Karl Harris’ report was quoted in Cyril H. Wecht et al, *Investigation and Prevention of Officer-Involved Deaths* (Boca Raton, FL: CRC Press, 2011) at 113. The citation provided reads: “Studies by Dr. Karl Harris, former Deputy Medical Examiner, Los Angeles County California, 1983.” The author corresponded with Dr. Cyril Wecht concerning this citation, seeking to get a copy of the report and Dr. Wecht expressed that he no longer had copies of the research material via email on June 16, 2017, which is quite understandable given the significant amount of time that had elapsed since publication.

⁵⁹ One of the earliest known articles on ‘suicide by cop’ is: Vernon Geberth, “Suicide by Cop: Inviting Death from the Hands of a Police Officer” (1993) 41:7 Law & Order Magazine 105.

victims of homicides intentionally provoked their own murder.⁶⁰ Since the concept first emerged, several studies have analyzed fatal and non-fatal police shooting cases, claiming high rates of “suicide by cop” among these incidents, with authors studying this phenomenon in Canada, the USA, Australia, and Britain claiming suicide by cop cases amounts to between 10 and 48% of all police-involved shootings, and Canadian studies showing the highest numbers in the world.⁶¹ However, there is little methodological similarity between studies of suicide by cop and the definition and the criteria for labelling a case as “suicide by cop” differ widely between studies. While intent to commit suicide is a core part of the suicide by cop theory, studies on this phenomenon have differed markedly in the criteria for evidence of intent, and studies show no standardization of how different evidence of intent is to be weighted.⁶² A literature review of suicide by cop studies undertaken by Christina Patton and William Fremouw found that:

Clear evidence of intent (i.e., verbal expression of wish to die by SbC [suicide by cop]) is lacking for many subjects involved in SbC incidents. When evidence of SbC intent is presented, it is more often in the form of disturbed behavior or aggressive gestures, including intoxication, mental health concerns, behavior influenced by domestic disputes, or provoking police to shoot either by

⁶⁰ Marvin Wolfgang studied homicide in Philadelphia from 1948-1952, and claimed that 26% of the killings studied were “victim-precipitated homicides” which he defined as: “criminal homicides in which the victim is a direct, positive precipitator in the crime. The role of the victim is characterized by his having been the first in the homicide drama to use physical force directed against his subsequent slayer. [...] mutual quarrels or wordy altercations do not alone constitute sufficient provocation under law, nor are they included in the meaning of victim-precipitated homicide. Primary demonstration of physical force supplemented by scurrilous language by the victim characterized the most common victim-precipitated homicides.” (Marvin Wolfgang, “Suicide By Means of Victim Precipitated Homicide,” (1959) 20 *J Clinical & Experimental Psychopathology* 335 at 347).

⁶¹ In the USA: H. Range Hutson et al, “Suicide by Cop” (1998) 32:6 *Annals of Emergency Medicine* 665 at 665, claiming they make up 11% of the cases in their American study. In Canada: Richard Parent and Simon Verdun-Jones of cases in B.C. found: “The characteristics associated with victim precipitated homicide appear to be a significant factor in roughly half (48 per cent) of the 58 cases that were analysed for this study.” (Parent & Verdun-Jones, *supra* note 56 at 438). In England David Best, Anna Quigley, and Alan Bailey, found 36.4% of shootings studied were “probable or possible” suicide by cop cases (David Best, Anna Quigley & Alan Bailey, “Police shooting as a method of self-harming: A review of the evidence for “suicide by cop” in England and Wales between 1998 and 2001” (2004) 32 *Institutional Journal of the Sociology of Law* 349 at 357); In Australia, Dragana Kesic, Stuart DM Thomas and James RP Ogloff found that 31.1% of police shootings studied in Victoria Australia met the criteria for suicide by police. (Dragana Kesic, Stuart DM Thomas & James RP Ogloff “Analysis of Fatal Police Shootings: Time, Space, and Suicide by Police (2012) 39:8 *Criminal Justice and Behaviour* 1107 at 1117).

For a review of many of these studies on prevalence, see Christina Patton & William Fremouw, “Examining ‘suicide by cop: A critical review of the literature” (2016) 27 *Aggression and Violent Behaviour* 107 at 108.

⁶² Patton & Fremouw, *supra* note 61 at 114.

refusing to follow instructions or by advancing toward police with a deadly weapon. Researchers have yet to agree on a standard way to conceptualize SbC intent [...]⁶³

Absent clear criteria for intent, categorizing police-involved deaths as suicides ex post facto based, in some cases, solely on the behaviour of the deceased poses many credibility problems for this theory. For example, if refusing to follow the directions of police or engaging in “aggressive gestures” is sufficient, then one might imagine that almost any police use of force death could be so labelled.

Suicide by cop as a concept has frequently been applied to cases in which those who experience mental health disability have been killed by police.⁶⁴ Vivian Lord conducted a study of suicide by cop deaths in North Carolina that found 54% of those deemed to have died by suicide by cop had mental health diagnoses, with the majority of known diagnoses being schizophrenia or bi-polar disorder,⁶⁵ which are quite rare in the general population.⁶⁶ Another study of “clinical risks” associated with suicide by cop in the USA found that “mental illness” was a “primary risk factor in SbC [i.e. “suicide by cop”].”⁶⁷ In Australia, Louise McLeod, Stuart Thomas and Dragana Kesic found that among cases identified as “potential police-provoked shooting” (a.k.a. attempted suicide by cop) incidents by police, 35.1% had diagnoses of depression, 22.8% had diagnoses of schizophrenia, 8.8% had diagnoses of a substance use disorder, 8.8% had diagnoses of bipolar disorder, 8.8% had diagnoses of an anxiety disorder, and 14%

⁶³ Patton & Fremouw, *supra* note 61 at 115.

⁶⁴ Studies suggesting most suicide by cop cases are linked to “mental illness” or “mental disorder” include, for example: Jordan, Panza & Charles Dempsey, *supra* note 53 at 16-17; Kris Mohandie, J.Reid Meloy & Peter Collins, “Suicide by Cop Among Officer-Involved Shooting Cases” (March 2009) 54:2 *J Forensic Sci* 456 at 458; David Best, Anna Quigley & Alan Bailey, “Police shooting as a method of self-harming: A review of the evidence for “suicide by cop” in England and Wales between 1998 and 2001” (2004) 32 *Institutional Journal of the Sociology of Law* 349 at 355.

⁶⁵ Lord, *supra* note 56 at 407.

⁶⁶ For example, the Public Health Agency of Canada estimates the prevalence of schizophrenia and bipolar disorder as 1% of the population respectively (Health Canada, *A Report on Mental Illnesses in Canada* (Ottawa: Health Canada, 2002) at 8). Another large study found that 62% of all suicide by cop victims studied had “mental health disorders.” (Mohandie, Meloy & Collins, *supra* note 64 at 458).

⁶⁷ Dewey et al, *supra* note 54 at 456.

were diagnosed with some other Axis-1 diagnosis (according to the Diagnostic and Statistical Manual), noting that 62% of those labelled as potential police-provoked shooting subjects had Axis-I diagnoses.⁶⁸

In Canada, Richard Parent's study of "victim-precipitated homicide" among police shootings in British Columbia found:

in several of the 28 cases examined, the perpetrator of a lethal threat had a documented history of mental disorder and or suicidal tendencies. In addition, documentation in several of the cases indicate that the victim had a high blood-alcohol reading at the time of his or her death. In some instances, alcohol, substance abuse, mental disorder and suicidal tendencies were added to the complex picture of irrational behaviour.⁶⁹

This suggests that several forms of mental health disability may be associated with this concept (including problematic substance use/addictions). In the United States, studies have also shown that suicide by cop is also more commonly applied to killings of white subjects, than Black or Hispanic subjects, although it is unclear why this is the case.⁷⁰ Perceived race/ethnicity among alleged suicide by cop victims has not been explored in Canada.

The concept of suicide by cop is problematic because it can be used to deflect attention away from police actions and scrutiny of police discretion and toward the intentions and actions of the deceased, that are, of course, described by the surviving party to the incident, the police officers. Many studies of suicide by cop overtly suggest that police actions are "forced" or "compelled" in these contexts by the actions of the deceased, removing any potential culpability from police.⁷¹ In this vein, Homant, Kennedy and Hupp state: "to the extent that a judge or jury is convinced that the decedent was engaging

⁶⁸ Louise McLeod, Stuart Thomas, & Dragana Kesic, "The frequency and nature of resolution of potential police provoked shooting encounters" (2014) 37 International Journal of Law and Psychiatry 383 at 386.

⁶⁹ Parent & Verdun-Jones, *supra* note 56 at 439.

⁷⁰ See e.g. Sarah Degue, Katherine Fowler & Cynthia Calkins, "Deaths Due to Use of Lethal Force by Law Enforcement: Findings From the National Violent Death Reporting System, 17 U.S. States, 2009–2012" (2016) 51 American Journal of Preventative Medicine S173 at S177;

⁷¹ See e.g. Homant, Kennedy & Hupp, *supra* note 57 at 44; H. Range Hutson et al, "Suicide by Cop" (December 1998) 32:6 Annals of Emergency Medicine 665; Geberth, *supra* note 59; Kingshott, *supra* note 53 at 105.

in suicide by cop, it seems likely that the benefit of any doubt would go to the police officer whose hand was more or less forced.”⁷² Richard Parent, in another article on suicide by cop, states:

Individuals predisposed to suicide have, in many instances, confronted armed police in an attempt to escalate the situation in which they have placed themselves...In other instances, this study has noted that alcohol, substance abuse, mental disorder and suicidal tendencies were added to a complex picture of irrational behavior. Individuals acting in a bizarre or irrational manner have confronted armed police with either inferior or imaginary weaponry resulting in their deaths...Regardless of the subject’s motivation or mindset, it remains clear that these individuals *chose to pose a perceived lethal threat to law enforcement personnel*. In this regard, the so-called victims must share some of the responsibility during a police shooting as it is their actions which often precipitate the final outcome [emphasis added].⁷³

This quote demonstrates how those killed in suicide by cop scenarios can at once be described as “acting in a bizarre or irrational manner” as someone with a “mental disorder” and at the same time have their intent to commit suicide established on the basis of assumptions about what a rational person would assume police would do in a given situation – the assumption being that they knew the consequences of their action and chose to be killed, for which they must share responsibility for their own death. They are irrational for the sake of being described as mentally ill and therefore more likely to be suicidal, and yet rational for the sake of ascribing them blame, a sort of catch-22.

While studies of suicide by cop often portray the deceased as causing his or her own death and suggest the police officer’s actions were forced, some recent research on cases labelled suicide by cop suggests that these cases may not be very likely to be lethal at all, when cases involving non-lethal force are included for study⁷⁴ and can often be de-escalated where crisis intervention training is provided to officers.⁷⁵ Nevertheless, labelling a case “suicide by cop” may alter the perceptions of the public with

⁷² Homant, Kennedy & Hupp, *supra* note 57 at 44.

⁷³ Richard Parent, “Suicide by Cop in North America: Victim-Precipitated Homicide” in Donald Sheehan & Janet Warren, eds, *Suicide and Law Enforcement* (Washington, DC: Federal Bureau of Investigation, 2001) at 661.

⁷⁴ For example, Louise McLeod, Stuart Thomas, and Dragana Kesic’s study of attempted “police provoked suicides” documented many cases where police believed the individual was attempting to be killed by police, but ultimately were not killed. (McLeod, Thomas, & Kesic, *supra* note 68).

⁷⁵ For example, Alejandra Jordan, Nancy Panza, and Charles Dempsey conducted a study of all use of force incidents by the LAPD coded as potential suicide by cop situations (rather than focusing on cases where lethal force had been

respect to these killings. For example, one Israeli study of public perceptions of victim-precipitated homicide scenarios determined that this type of killing (described in the study as scenarios where the victim was the first aggressor in a situation where they were subsequently killed) was perceived as being less serious than other police homicides⁷⁶.

Suicide by cop has been introduced and relied upon as a theory in several coroner and medical examiner proceedings in Canada, some of which are included in the dataset studied in chapter 5. At times, these cases result in a verdict of “suicide” as the manner of death, where homicide would otherwise have been likely. These verdicts help to obscure police-involved killings in Canada, by erasing the role of police and classifying police-involved homicides as suicides. Suicide by cop has also come to play a role in legal proceedings in Canada and internationally, where defence counsel representing police officers have attempted to introduce expert evidence of the theory to bolster arguments that the defendant was forced to kill because of the actions of the deceased.⁷⁷ It has also been employed by judges as an aggravating factor in sentencing of non-police offenders claiming an attempted “suicide by cop” to suggest they lacked the *mens rea* for an offence.⁷⁸

As discussed in chapter 6, suicide by cop is a problematic concept from the perspective of critical disability theory because it reframes the problem of police violence against persons who experience

deployed, as previous studies have done). They note that their results are promising, perhaps because the LAPD has engaged in Crisis Intervention Training and other programs to particularly address those in crisis. As they describe: “Given that, of the 419 cases analyzed, only 3% of subjects were injured, 1% were killed, and one officer was injured; this represents a stark contrast to prior studies, like Mohandie et al. (2009), where the rates of subject death have been reported as high as 51%, with 40% of subjects and 16% of officers injured. [...] While the present results clearly need to be replicated, this first look from a wider lens provides more hope for successful resolution of SbC cases than seen in previous studies.” (Jordan, Panza & Dempsey, *supra* note 53 at 19.)

⁷⁶ See S. Herzog, “Public perceptions of the seriousness of victim-precipitated homicides: An empirical analysis of the consensus model of law on homicide in Israel” (2005) 33:3 International Journal of the Sociology of Law 169 at 174.

⁷⁷ See e.g. *R v Forcillo*, 2018 ONCA 402 (CanLII) at paras 53-70; *Boyd v San Francisco (City and County of)*, 576 F (3d) 938 (9th Cir 2009) at 943-946; *Adams v Fremont*, 80 Cal.Rptr.2d 196 (1998) 68 Cal.App.4th 243 at 200-204.

⁷⁸ In Canada, see e.g. *R v Badria*, 2017 ONSC 5389 (CanLII) at paras 34-38; *R v MacLeod*, 2016 NSPC 84 (CanLII) at paras 5-7; *R v McKinnon*, 2011 ONSC 3160 (CanLII) at para 69. Internationally, see *R v Dempsey* [2018] NZDC 7536 (18 April 2018) (AustLII) at para 26.

mental health disability by focusing on the actions of the deceased and suggesting they caused their own death. Police become mere tools in the posthumously narrated story of a deceased who was intent on killing themselves. Rather than having their actions scrutinized as trained professionals who have exercised judgment and chosen to use lethal force among other tactical possibilities, in this narrative police become a weapon wielded by the deceased. Suicide by cop suggests a tragic inevitability to the deaths of persons in crisis, playing into prevalent societal stereotypes.

1.4.4 Non-Pursuit Police Motor Vehicle Accidents

Motor vehicle accidents cause a large percentage of police-involved injuries and deaths each year.⁷⁹ These deaths are best understood if grouped into two categories: those that occur in the context of police pursuits, and those that occur in other on-duty contexts. While police pursuits have been the subject of study in Canada and internationally, non-pursuit accidental motor vehicle deaths have not attracted much attention. Like all other members of the public, police may injure or kill themselves or others in motor vehicle accidents. However, the nature of police work which involves considerable time spent in motor vehicles and their responsibility to respond quickly to emergencies can put police at heightened risk of being involved in motor vehicle accidents. In fact, a Canadian study indicates that one third of motor vehicle accidents involving the RCMP occur when their emergency equipment (e.g. sirens) are activated, though two thirds of accidents occur in situations where emergency equipment was not used.⁸⁰

⁷⁹ For an estimate of pursuit deaths as a proportion of police-involved deaths in Ontario and B.C. see David MacAlister, "Deaths in Police Custody: Towards a Typology" in *Police Involved Deaths: The Need for Reform* (Vancouver: British Columbia Civil Liberties Association, 2012).

⁸⁰ Darryl Plecas et al, *Understanding and Reducing RCMP Motor Vehicle Collisions* (Langley: BC Centre for Social Responsibility and University of the Fraser Valley Centre for Public Safety and Criminal Justice Research, 2011), online (pdf): <www.ufv.ca/media/assets/criminal-justice-research/Police-Motor-Vehicle-Crash-Report.pdf>.

Some data on non-pursuit motor vehicle deaths exists in Canada. In Nova Scotia, the Serious Incident Response Team annual reports data for the 2012-2017 time period indicates that the death of one pedestrian occurred as a result of being hit by a police car, and one other non-pursuit related motor vehicle accident resulted in serious injury in the province during that time period.⁸¹ However, most provinces do not clearly track non-pursuit accidents and it is unclear whether such deaths are higher or lower than what would be expected given the high number of policing hours spent in vehicles. There is no data on the mental health status of individuals killed in non-pursuit motor vehicle deaths involving police and no reason to believe those who experience mental health disability would be at greater risk of this type of death than the general public.

1.4.5 Police Motor Vehicle Pursuits

Police pursuits are particularly important to consider when studying police-involved deaths because studies in Canada and internationally have recognized that they pose acute danger and may attract police liability.⁸² This is also a type of police use of force that has undergone significant policy shifts

⁸¹ Serious Incident Response Team, *Trust Confidence Integrity Independence, Annual Report 2015-2016* (Halifax: Serious Incident Response Team, 2017) at 9; and Serious Incident Response Team, *Trust Confidence Integrity Independence, Annual Report 2016-2017* (Halifax: Serious Incident Response Team, 2017) at 10.

Generally, in Canada between 1,745 and 2,921 people died in motor vehicle collisions annually from 2002 to 2020. See “Canadian Motor Vehicle Traffic Collision Statistics: 2020”, online: *Statistics Canada* <tc.canada.ca/en/road-transportation/statistics-data/canadian-motor-vehicle-traffic-collision-statistics-2020>.

⁸² For Canadian studies of the dangerousness of police pursuits see e.g. RCMP Public Complaints Commission, *Police Pursuits and Public Safety* (Ottawa: RCMP Public Complaints Commission, 1999), online (pdf): <www.publicsafety.gc.ca/lbrr/archives/hv%208080.p9%20r69%201999-eng.pdf>; For international studies of danger see Geoffrey Alpert & Patrick Anderson, “The Most Deadly Force: Police Pursuit” (1986) 3:1 *Justice Quarterly* 1; Conan Becknell et al, “Policy Restrictiveness and Police Pursuits” (1999) 22:1 *Policing: An International Journal* 93; Gabi Hoffman & Paul Mazerolle, “Police Pursuits in Queensland: Research, Review, and Reform” (2005) 28:3 *Policing: An International Journal of Police Strategies & Management* 530; Matthew Lyneham & Alana Hewitt-Rau, *Motor-vehicle pursuit related fatalities in Australia, 2000-11* (Canberra: Australian Institute of Criminology, 2013), online (pdf): <apo.org.au/sites/default/files/resource-files/2013-06/apo-nid34395.pdf>. For examples of successful civil suits holding a police officer, police service, or the Attorney General partially liable for negligence in the death or injury of a third party during a police pursuit, see *Doern v Phillips Estate*, 1994 CanLII 1869 (BC SC), aff’d 1997 CanLII 2433 (BC CA); *Burbank et al v Bolton et al*, 2005 BCSC 1506 (CanLII), aff’d 2007 BCCA 215 (CanLII); *Radke v M.S. et al*, 2005 BCSC 1355 (CanLII), aff’d *Radke v M.S. (Litigation guardian of)*, 2007 BCCA 216 (CanLII); *Kweon v Roy*, 2016 BCSC 2305 (CanLII).

in Canada since the 1980s. Recent Canadian data on injuries and deaths caused by police pursuits are minimal and national data is lacking, but several historical studies have been conducted that shine some light on this issue in Canada. Concerns about the danger of police motor vehicle pursuits primarily began to draw the attention of academics and policy-makers in the 1980s.

Early data on police pursuits suggested many caused collisions. For example, in 1985, the Solicitor General of Ontario's Special Committee on Police Pursuits published a report on police pursuits in the province from 1981 to 1984, which identified 6,757 pursuits, nearly a quarter of which (23%) resulted in accidents, 10% resulted in injuries, and 0.5% resulted in deaths.⁸³ The study also indicated that only 5% of the motor vehicle pursuits were initiated to respond to serious crimes and over half of police pursuits were initiated due to speeding or other traffic offences.⁸⁴ This report suggested the Government of Ontario should change policy, replacing the Police Commission's policies, which were created during the 1970s and 1980s and provided significant discretion to officers to choose whether to engage in motor vehicle pursuits, with more restrictive policy in which motor vehicle pursuits would be restricted to responses to suspected criminal activity. The report suggested that "only where serious criminal offences are suspected should vehicle pursuit be permitted."⁸⁵ Other Canadian data from the 1990s showed similar collision, injury and death rates.⁸⁶

More recently, the CBC submitted an access to information request to the Royal Canadian Mounted Police requesting data on police injuries in motor vehicle collisions for a five-year period (2013-2018) which revealed that three RCMP officers were reported injured during police pursuits across

⁸³ John MacBeth et al, *Solicitor General's Special Committee on Police Pursuits Report* (Toronto: Solicitor General, 1985) at 13.

⁸⁴ *Ibid* at 20.

⁸⁵ *Ibid* at 26-27.

⁸⁶ See e.g. RCMP Public Complaints Commission, *supra* note 82 at 2-3.

Canada.⁸⁷ A further access to information request by CBC to the Civilian Review and Complaints Commission revealed a report finding 77 deaths occurred in motor vehicle pursuits conducted by the RCMP in a ten-year period ending in 2019. The report further noted that 10% of all pursuits involved injury of civilian third-parties, 23% involved injury to pursued drivers or passengers, and 7% involved injuries to police,⁸⁸ drawing into question the RCMPs previously released data. As a proportion of police-involved deaths subject to coroner's inquest in British Columbia and Ontario, a study by David MacAlister for the British Columbia Civil Liberties Association found that one-quarter of police involved deaths for the period 1992-2007 involved police motor vehicle pursuits.⁸⁹ Additionally, a study of Special Investigations Unit data for the City of Toronto between 2000-2006 revealed that 23% of all SIU investigations pertained to traffic accidents, a high proportion of which involved police pursuits, a figure which declined to 12.7% in the 2013-2017 time period.⁹⁰ This study also found that Black people were over-represented among subjects in SIU traffic accident investigations.⁹¹

Several international studies suggest that motor vehicle accidents caused by police pursuits can significantly contribute to police-involved injury and death.⁹² In fact, policing scholars Geoffrey Alpert and Lorie Fridell suggest that police pursuits should be regarded as a type of police use of force akin to shooting at a fleeing suspect, given their high rates of lethality and greater likelihood that they will lead to

⁸⁷ Raffy Boudjikianian, "Rise in RCMP pursuit collisions prompts policy review" *CBC News* (15 October 2019), online: <www.cbc.ca/news/canada/edmonton/rcmp-police-cruiser-pursuit-ramming-collisions-policy-1.5311890>.

⁸⁸ Larry Pynn, "Police pursuits claimed 77 lives over a decade in Canada" *CBC News* (23 April 2022), online: <www.cbc.ca/news/politics/police-pursuits-report-1.6415811>.

⁸⁹ MacAlister, *supra* note 79 at 8.

⁹⁰ *A Collective Impact*, *supra* note 20 at 85.

⁹¹ *A Collective Impact*, *supra* note 20 at 85.

⁹² See e.g. Fred Rivara & C.D. Mack, "Motor vehicle crash deaths related to police pursuits in the United States" (2004) 10:2 *Injury Prevention* 93. The authors found that between 260-325 police pursuit accident deaths occurred annually in the USA in 1994-2002, with 2/3 of the deaths being of the person pursued, 1/3 being persons not pursued, with 30.1% of those killed being uninvolved in the police pursuit (neither the pursuing officers, nor the pursued suspect). See also Hoffman & Mazerolle, *supra* note 82; Matthew Lyneham & Alanna Hewitt-Rau, *Motor vehicle pursuit-related fatalities in Australia, 2000-11*, (Canberra: Government of Australia, 2013), online: <www.aic.gov.au/publications/tandi/tandi452>; Independent Office for Police Conduct, *Deaths During of Following Police Contact: Statistics for England and Wales 2017-2018*, (London: Independent Office for Police Conduct, 2018).

serious injury or death, even when compared to firearms.⁹³ Indeed, as one large national study of American police pursuit fatalities from 1982 to 2004 indicates, only 1% of pursuit related fatalities were police officers, whereas 27% were bystanders and 72% were persons in the vehicle pursued, although 29.5% of the latter were not the person fleeing police, but a passenger.⁹⁴ This study also suggested that a relatively high proportion of these deaths involved children and adolescents (28.2%) and that both African Americans and Native Americans were over-represented among these fatalities.⁹⁵ 81.7% of the pursuit fatalities studied were male, compared to 18.2% female, but these figures include fleeing drivers, passengers, third-parties, and police.⁹⁶ This study suggests that pursuits are often an indirect cause of death, since a majority of the fatalities among the drivers of the fleeing vehicles were caused by a crash into a fixed object, rather than a police vehicle.⁹⁷

The high risk nature of pursuits is recognized in Canadian policing as evinced by the fact that some provinces have introduced regulations requiring police to engage in ongoing risk assessment when deciding to engage in a high risk chase and throughout the course of the pursuit, to rule out all other alternative courses of action,⁹⁸ or to mandate pursuit training for police officers serving in the province⁹⁹ or restrict police cadets from engaging in pursuits.¹⁰⁰ Additionally, some provinces explicitly protect police from internal discipline for exercising their discretion to discontinue pursuits in the interest of public safety.¹⁰¹ Additionally, many, if not all, police forces in Canada now have police pursuit policies that limit

⁹³ See Geoffrey Alpert & Lorie Fridell, *Police Vehicles and Firearms: Instruments of Deadly Force* (Long Grove, IL: Waveland Press Inc., 1992).

⁹⁴ Harold Hutson et al, "A Review of Police Pursuit Fatalities in the United States from 1982-2004" (2007) 11:3 Prehospital Emergency Care 278 at 280.

⁹⁵ *Ibid* at 281.

⁹⁶ *Ibid* at 280.

⁹⁷ *Ibid* at 281.

⁹⁸ See e.g. Emergency Vehicle Driving Regulation, BC Reg 133/98 at s 3; Suspect Apprehension Pursuits, O Reg 266/10 at s 2.

⁹⁹ See Training Regulations, PEI Reg EC143/10 at s 1(d).

¹⁰⁰ See Winnipeg Police Service Special Constables Additional Powers Regulation, Man Reg 167/2010 at s 5.

¹⁰¹ See e.g. Suspect Apprehension Pursuits, O.Reg 266/10 s 12.

these pursuits to circumstances where the fleeing motorist poses a significant risk to the public if not pursued, and where this risk outweighs risks caused by the pursuit itself.¹⁰² These policies provide some restriction on initiating police pursuits, but may still provide a wide discretionary window for officers to initiate pursuits. National data on this issue would be helpful in order to explore the safety results of different pursuit policies employed by police forces in Canada.

The relationship of motor vehicle pursuits to subjects with mental health disability is unclear and hasn't been explored in any of the identified literature on this topic, probably because there is no reason to believe that mental health disability would be an important factor in most of these cases. However, shifting police pursuit policies in Canada provide an example of how legal or policy restrictions on police tactics can reduce risks of death and injury associated with policing practices, where data on injuries and deaths is tracked. These changes reinforce the importance of collecting and disseminating accurate and transparent data on police-involved injuries and deaths.

1.4.6 Exposure, “Dumping”¹⁰³ and “Starlight Tours”¹⁰⁴

Some police-involved injuries and deaths occur in circumstances where police have released a person from custody in unsafe circumstances with respect to the climate, location, and/or the condition of the detained person, leaving them to die or be injured by succumbing to the elements or suffering a health crisis. Such deaths can occur when someone is released from jail or at the immediate site of a police intervention, but they also occur in more calculated situations where police knowingly transport a

¹⁰² For example, according to the CBC, the RCMP's pursuit policy was amended in 2019 to require “that Mounties can initiate or continue a vehicle pursuit only if they reasonably believe the suspect has committed (or is about to commit) a serious act of violence — and only if failing to immediately arrest the suspect would pose a greater risk to public safety than a pursuit.” (Pynn, *supra* note 88).

¹⁰³ William King & Thomas Dunn, “Dumping: Police-Initiated Transjurisdictional Transport of Troublesome Persons” (2004) 7:3 Police Quarterly 339.

¹⁰⁴ The term “starlight tours” is of uncertain origin, but refers to the practice of police intentionally driving a civilian into a rural area and leaving them there to make their own way back home, a practice which is always cruel and abusive, but can be deadly when weather conditions are bad or the individual's state of wellbeing or dress put them at risk.

person to a remote location and leave them stranded there. While there are no statistics available documenting how many of these injuries and deaths occur in Canada each year, there have been two public inquiries into exposure deaths in recent years, the *Commission of Inquiry into Matters Relating to the Death of Neil Stonechild*¹⁰⁵ in Saskatchewan and *The Davies Commission of Inquiry Into the Death of Frank Paul*¹⁰⁶ in British Columbia.

Frank Paul was a Mi'kmaq man labelled as having frequent seizures, alcohol use, and a "history of mental illness of uncertain duration"¹⁰⁷ who died of hypothermia in an alley in Vancouver after being released from custody by the Vancouver Police Department. His death is an example of an exposure death where the individual is released from police custody in ordinary circumstances that may nevertheless pose a danger. Frank Paul was released from police custody in wet clothing, while intoxicated and known to be homeless into the December cold. His death is an example of how an exposure death can occur when police fail to provide those in their custody with appropriate support, access to services, and the care required to ensure their safety upon release. While Frank Paul was arrested because of "intoxication in a public place", he was only provided with incarceration, not care. Exposure deaths are rarely tracked or associated with policing at all, since they occur after release from custody and are linked to police behaviour only indirectly, as the individual is put into a foreseeably dangerous situation upon release. When police forcibly intervene in the lives of people living with disabilities, often ostensibly seeking to restore the public order or protect the individual from self-harm, they have an obligation to ensure that this intervention does not place that person's health or life at increased risk.

¹⁰⁵ See David Wright et al, *Report of the Commission of Inquiry into matters relating to the death of Neil Stonechild*, (Regina: Publications Saskatchewan, 2004).

¹⁰⁶ See: William Davies et al, *Alone and Cold: The Davies Commission Inquiry into the Death of Frank Paul*, Interim Report (Victoria: Davies Commission, 2009).

¹⁰⁷ Davies Inquiry, *Alone and Cold: The Davies Commission of Inquiry into the Death of Frank Paul – Interim Report*, (Vancouver: Davies Commission of Inquiry, 2009) at iv.

Sherene Razack and Elizabeth Comack have separately studied the deaths of Neil Stonechild, Rodney Naistus, and Lawrence Wenger, and the injury of Darrell Night all of which occurred in Saskatoon, Saskatchewan in the 1990s and early 2000s.¹⁰⁸ Stonechild, Naistus and Wenger were Indigenous people who were allegedly driven to the outskirts of Saskatoon by police and left in a rural area in freezing cold conditions. Each died of hypothermia. Neil Stonechild was only 17 years old when he died after allegedly being driven and dumped in -28°C weather by constables Senger and Hartwig of the Saskatoon Police Service.¹⁰⁹ No criminal prosecutions took place for his death and a public inquiry was held in part to examine the circumstances of his death, as well as the failure of the police investigation into his death. Darrell Night was similarly transported by police to a remote area where earlier that week the frozen bodies of Rodney Naistus and Lawrence Wegner had been found. Night was released without warm clothing (no hat, mitts, or scarf) in freezing temperature ranging between -22°C and -25°C,¹¹⁰ but managed to survive with the assistance of a night security guard at a remote power station who heard his knocking and let him in.¹¹¹ The two officers responsible, Kenneth Munson and Daniel Hatchen were charged and convicted of unlawful confinement and sentenced to an 8 month term in a provincial correctional facility.¹¹²

Razack traces starlight tours as a form of police-involved death to colonial violence recognizing the significance that these killings were perpetrated by white police officers against Indigenous men and

¹⁰⁸ While these are some of the most well-known and publicized “starlight tours” deaths and injuries, other fatal cases reported include: Lloyd Dustyhorn, Russell Charles, and Darcy Ironchild, and the non-fatal dumping of Garret Berthelette. See: David Tanovich, “E-Racing Racial Profiling” (2004) 41:4 Alberta Law Review 905 at footnote 17, p. 910.

¹⁰⁹ Note that Constables Hartwig and Senger were never criminally tried for Neil Stonechild’s death. However, the Wright Inquiry finding state: “The evidence did [...] establish on the balance of probabilities: a) that Neil Stonechild was last seen in their custody at approximately 11:56 p.m. on November 24, 1990; b) that he died of cold exposure in a remote industrial area in the early hours of November 25, 1990; and c) that there were injuries and marks on his body that were consistent with handcuffs.” (Wright et al, *supra* note 109 at 194.)

¹¹⁰ *R v Munson*, 2001 SKQB 530 (CanLII) at para 1.

¹¹¹ For a description of the facts of Darrell Night’s experience, in part in his own words, see Tasha Hubbard, “Two Worlds Colliding” (2004), online: *National Film Board* <www.nfb.ca/film/two_worlds_colliding/>.

¹¹² See *R v Munson*, 2001 SKQB 530 (CanLII).

boys. Razack describes the process of coroner's inquests as a colonial venture of meaning-making wherein these deaths are depicted as a sort of colonial "purification" and the inevitable consequence of the failings and nature of the deceased themselves, absolving the police of responsibility and guilt. She writes:

The inquest arranges our understanding of these geographies of violence so that we come to see freezing deaths as the destiny of a people unable to bear the stresses of modern life, the endpoint for those who refuse to be improved. However, the inquest and the inquiry also reveals features of the zone of indistinction. We see its rituals of purification: arrest, detain, evict. In law, these become performances: measure (bruises on wrists), classify (their alcohol consumption and mental illness), and conclude with their difference (not ours, no matter how many deceptions). The full measure of the law does not apply to those in a state of nature since the state of nature is the place where law has authorized its own absence. As waste, as people no one can help or harm, Aboriginal death in custody is banal. Inquests and inquiries ensure that we know this.¹¹³

Indeed, the racism that Razack describes in the state narratives produced about Indigenous deaths play out with the assistance of ableism. She notes that in both the Rodney Naistus and the Lawrence Wegner inquests, considerable attention was given to the theory that these men had simply wandered off in an alcohol or drug induced psychosis, despite the extremely remote area in which they were found, affiliated with previous "starlight tours" cases, and evidence undermining the idea that either had been psychotic or delusional in the past.¹¹⁴

Elizabeth Comack has described the competing narratives about the Starlight Tour deaths that circulated in the media in the wake of Neil Stonechild's death, with many claiming these deaths were a myth, along with disavowing that such deaths could occur as a direct result of racism against the Indigenous population.¹¹⁵ Similar disavowals of racism have been connected to other instances where the

¹¹³ Sherene Razack, "It Happened More Than Once: Freezing death in Saskatchewan" (2014) 26:1 Canadian Journal of Women and the Law 51 at 79-80.

¹¹⁴ *Ibid* at 76-77.

¹¹⁵ Elizabeth Comack, *Racialized Policing: Aboriginal People's Encounters with the Police* (Halifax: Fernwood Publishing, 2012) at 142-146.

forcible displacement of marginalized Indigenous people by police have come to light in Canada.¹¹⁶

Comack connects these deaths with the concept of “dumping” in which police purposefully act to displace persons they feel are undesirable from cities, oftentimes Indigenous people, homeless people, and those labelled as mentally ill.¹¹⁷ “Dumping” conjures up the image of people being treated as waste. It is a poorly studied phenomenon, despite various reports of this behaviour in the media, with nearly all cases involving Indigenous people, homeless people, and those labelled with mental health diagnoses or addictions.¹¹⁸ King and Dunn coined “dumping” as a phenomenon that can occur directly when police drive a “troublesome individual” outside of their policing jurisdiction and leave them there, or indirectly when police place a “troublesome person” on a bus or other transportation.¹¹⁹ As King and Dunn note, “dumping” can be especially dangerous for people who experience mental health disability, as it can deprive them of necessary supports, medication, and familiar surroundings, and expose them to unique social and physical dangers.¹²⁰

1.4.7 Foot Pursuit

Deaths and injuries also occur during foot pursuits as subjects attempting to evade police can fall from great heights, drown when pursued near water, or otherwise harm themselves in an attempt to escape. There is limited data on injuries or deaths sustained during foot pursuits in Canada, and I found

¹¹⁶ See Joshua Friestadt, “No Dumping: Indigenousness and the Racialized Police Transport of the Urban Homeless” in *Indigenous Homelessness: Perspectives from Canada, Australia, and New Zealand* (Winnipeg: University of Manitoba Press, 2016).

¹¹⁷ Comack, *supra* note 115 at 150

¹¹⁸ See e.g. Steve Rukavina, “Two Montreal police officers charged with dumping homeless man near Ontario border” *CBC News* (23 May 2018), online: <www.cbc.ca/news/canada/montreal/two-montreal-police-officers-charged-with-dumping-homeless-man-near-ontario-border-1.4674669>; “Edmonton police found guilty in ‘sweatbox’ case” *CBC News* (5 November 2010), online: <www.cbc.ca/news/canada/edmonton/edmonton-police-guilty-in-sweatbox-case-1.901510>; Meagan Campbell, “New light on Saskatoon’s Starlight Tours” *Maclean’s* (8 April 8, 2016), online: <www.macleans.ca/news/canada/new-light-on-saskatoons-starlight-tours/>; Sidhartha Banerjee, “Montrealer taken on starlight tour by police settles for \$25,000” *CityNews* (21 August 2018) online: <toronto.citynews.ca/2018/08/21/montrealer-taken-on-starlight-tour-by-police-settles-for-25000/>.

¹¹⁹ See King & Dunn, *supra* note 103 at 342.

¹²⁰ See King & Dunn, *supra* note 103 at 342-343.

no domestic studies directly addressing this phenomenon. A few American studies have examined foot pursuits from the perspective of police officer safety, but have not addressed civilian safety or injuries associated with pursuits.¹²¹ Some international studies have found a correlation between foot pursuits and greater use of force against the subject once caught¹²² but there is no data on deaths and injuries incurred by pursuit subjects who are harmed or killed while fleeing police.

Nova Scotia's Special Investigations Response Team (SIRT) publishes an annual report breaking down the nature of the cases they investigate each year, which include cases of serious injury and death. SIRT data over a five-year period suggests that on average the agency investigates 2.6 cases of serious injuries sustained during foot pursuits each year, which accounted for roughly 10% of their cases over a five-year period¹²³. This suggests that foot pursuits may cause injuries relatively frequently. The agency also recorded a single foot pursuit death in the 2016-2017 reporting year.¹²⁴ No other special investigations data on foot pursuit deaths and injuries in Canada was uncovered, nor does any data appear to be available concerning the prevalence of these deaths or injuries among persons who experience mental health disability.

1.4.8 Police Service Dog Bites

¹²¹ See e.g. Robert Kaminski, "Police Foot Pursuits and Officer Safety" (2007) 7:3 Law Enforcement Executive Forum 59; Brandl & Stroshine, "Toward an understanding of the physical hazards of police work" (2003) 6:2 Police Quarterly 172.

¹²² See e.g. Robert Kaminski et al, "The Use of Force Between the Police and Persons with Impaired Judgment" (2004) 7:3 Police Quarterly 311 at 326.

¹²³ Serious Incident Response Team, *Trust Confidence Integrity Independence, Annual Report 2016-2017* (Halifax: Serious Incident Response Team, 2017) at 9; Serious Incident Response Team, *Trust Confidence Integrity Independence, Annual Report 2015-2016* (Halifax: Serious Incident Response Team, 2017) at 9; Serious Incident Response Team, *Trust Confidence Integrity Independence, Annual Report 2014-2015* (Halifax: Serious Incident Response Team, 2017) at 10; Serious Incident Response Team, *Trust Confidence Integrity Independence, Annual Report 2013-2014* (Halifax: Serious Incident Response Team, 2017) at 10; Serious Incident Response Team, *The First Year In Review: 2012-2013 Annual Report*, (Halifax: Serious Incident Response Team, 2012-2013) at 8.

¹²⁴ Serious Incident Response Team, *Trust Confidence Integrity Independence, Annual Report 2016-2017* (Halifax: Serious Incident Response Team, 2017) at 9.

There is no data on police service dog related deaths in Canada and it is possible that there has never been a police service dog caused fatality in this country, because the extreme scarcity of reported fatal police service dog bite cases reported internationally suggests this is a very rare form of police-involved death.¹²⁵ Indeed, a Canadian study reveals that on average there are only 1-2 dog bite deaths in Canada annually, so any dog bite deaths are rare,¹²⁶ and police dog bite deaths would be rarer still. However, police dogs do cause a large number of injuries each year, frequently during foot pursuit. Data on police service dog bites suggest it may be one of the leading causes of police-involved injuries in some Canadian jurisdictions. For example, data from British Columbia's Office of the Police Complaints Commissioner has consistently found that police dog bites make up one of the leading causes of reportable injuries in the province, causing between 102 and 181 injuries per year serious enough to require medical attention between 2014 and 2019.¹²⁷ However, while police dog bites appear to be a significant cause of police-involved injury in British Columbia, other jurisdictions that track only "serious injuries" and deaths report few dog bite cases.¹²⁸ The reason that police service dogs inflict so many injuries is that some police dogs are trained to "bite and hold" meaning that when they reach a subject

¹²⁵ There have been a few reports of police dog caused fatalities in the United States. For example, the case *Robinette v Barnes*, 854 F.2d 909 (1988) arose when Dorothy Robinette, the administratrix of the estate of Daniel Briggs sued Ronnie Barnes, a police officer and dog handler whose police dog "Casey" bit the deceased on the neck prior to his death, causing massive blood loss. The sixth circuit court of appeal held that the dog bite did not constitute the use of "deadly force" as the bites that properly trained police dogs are trained to administer in holding a person do not carry a "substantial risk of causing death or serious bodily injury" and the officer in fact lacked the intention to seriously injure or kill the deceased when he issued his command to his dog. They further held that regardless, if the force had been "deadly force" it was nevertheless "reasonable under the circumstances." A few media reported cases also exist: "Cleveland police death bite dog was 'out of control'" *BBC News* (21 September 2018), online: <www.bbc.com/news/uk-england-tees-45605943>.

¹²⁶ See Malathi Raghaven, "Fatal dog attacks in Canada, 1990-2007" (2008) 49:6 *Canadian Veterinary Journal* 577.

¹²⁷ See Office of the Police Complaints Commissioner, *Annual Report 2018/2019* (Victoria: Office of the Police Complaints Commissioner, 2019) at 44.

¹²⁸ Nova Scotia Serious Incident Response Team recorded only a single serious injury cause by a police dog in the five years of available data for 2013-2017, representing only 0.75% of all investigations into police-involved serious injury or death. See Serious Incident Response Team, *Trust Confidence Integrity Independence, Annual Report 2014-2015* (Halifax: Serious Incident Response Team, 2017) at 10. Similarly, data from ASIRT, Alberta's special investigations body suggests there were 5 police service dog injuries in the five-year period from 2014-2018, representing only about 3% of all investigations of serious injury and/or death. See Alberta Serious Incident Response Team, "Breakdown of ASIRT Files by Category" (Edmonton: Alberta Serious Incident Response Team, 2019), online: <solgps.alberta.ca/asirt/Statistics/Pages/breakdown.aspx>.

they are pursuing they are trained to bite the person and then hold them with their teeth while they wait for the officer handler. In contrast, other police service dogs are trained to “bark and hold,” meaning they will find the suspect and bark to alert the officer of their presence, without automatically resorting to biting.¹²⁹ An American study comparing police service dog bite injuries with other dog bite injuries suggests that police dogs are more likely to bite multiple times and cause more serious injuries resulting in more hospitalizations and invasive medical procedures than other dog bites.¹³⁰ The study is dated, having been conducted over a three-year period (1988-1990) in Los Angeles, where at the time police dogs were trained to “bite and hold” as they are in some Canadian police forces.¹³¹ There is presently no available data on the racial, gender, or mental health status breakdown of those who suffer police dog bites in Canada and I could identify no studies containing such a breakdown among international studies on the topic.

1.4.9 Failure to Provide First Aid or an Appropriate Response to a Medical Emergency

When police officers take an individual into custody they assume a legal duty of care with respect to that person.¹³² Injuries and deaths can occur where police fail to monitor the health and well-being of those in their custody and fail to provide necessary medical services and care in an emergency. Police may be liable in negligence where they fail to act reasonably to prevent harm to an individual in custody, even where that harm is partially or fully self-inflicted, or otherwise contributed to by the actions of the prisoner.¹³³ Police officers can also be criminally liable for failure to provide necessities of life where they

¹²⁹ For a description of this technique see Gordon McGuinness, *Bite and Hold Review Report: Bark and Hold vs Bite and Hold* (Vancouver: Vancouver Police Department, undated), online (pdf): <vancouver.ca/police/assets/pdf/media/2012/bite%20and%20hold%20review%20report.pdf>.

¹³⁰ Peter C. Meade, “Police and domestic dog bite injuries: What are the differences? What are the implications about police dog use?” (2006) 37:11 *Injury Extra* 395.

¹³¹ *Ibid* at 399.

¹³² See *Lipcsei v Central Saanich (District of)*, 1994 CanLII 368 (BC SC), *Fortey (Guardian ad Litem) v Canada (Attorney General)*, 1999 BCCA 314, 125 BCAC 29; *Funk v Clapp* (1986) 68 DLR (4th) 229, 35 BCLR (2d) 222 (BCCA); *Dubé v Montreal (City)*, (1912) 7 DLR 87, 42 Que SC 533 (Que CA).

¹³³ See *Fortey (Guardian ad Litem) v Canada (Attorney General)*, 1999 BCCA 314, 125 BCAC 29; *Funk v Clapp* (1986) 68 DLR (4th) 229, 35 BCLR (2d) 222 (BCCA).

do not provide someone in their custody with reasonable medical assistance resulting in death.¹³⁴

However, the law of consent applies to in-custody situations, such that an individual can refuse medical treatment – provided that they are conscious and capable of doing so.¹³⁵

The consequence of the duty of care between a police officer and the person in custody is such that police officers cannot refuse to take reasonable steps, including the provision of first aid and engaging medical services when an individual in their custody suffers a medical emergency, regardless of its cause. The duty of care police owe to someone in their custody differs from the legal obligations members of society generally have to one another because in Canada the common law recognizes no duty to rescue others when their lives are in danger¹³⁶ (although ethical obligations may nevertheless exist). There is little reliable data on deaths of individuals in police custody (prior to incarceration) that can be linked to a failure to provide first aid or medical care because police failure to act in these cases is generally not the most direct cause of death, but rather a contributing factor. However, cases of criminal charges being brought against police officers who fail to act in a medical emergency have been brought in some circumstances, and some of these cases involve decedents who experienced mental health disability. For example, in *R v Doering*,¹³⁷ Cst. Nicholas Doering of the London Police Service was found guilty of failing to provide the necessities of life contrary to section 215 of the *Criminal Code*¹³⁸ and criminal negligence causing death contrary to section 219 of the *Criminal Code*¹³⁹ when Debra Chrisjohn, an Aboriginal woman in medical distress, died in his custody of a heart attack, for which he did not

¹³⁴ *R v Doering*, 2019 CarswellOnt 18185, 2019 ONSC 6360; *Criminal Code*, RSC 1985 c C-46, s 215.

¹³⁵ *Fortey (Guardian ad Litem) v Canada (Attorney General)*, 1999 BCCA 314, 125 BCAC 29 and *Malette v Shulman*, 1990 CanLII 6868 (ON CA), 72 OR (2d) 417, 67 DLR (4th) 321 (Ont. C.A.).

¹³⁶ *Horsley v MacLaren*, 1971 CanLII 24 (SCC), [1972] SCR 441. However, in Québec, the *Charter of Human Rights and Freedoms*, CQLR c C-12, s 2 provides a right to assistance and corresponding duty to aid anyone whose life is in peril. Furthermore, there are exceptions to the general common law rule where the individual contributed to the risk requiring rescue or where particular forms of reliance occur. See: Bruce Feldthusen & Louise Bélanger-Hardy, *Halsbury's Laws of Canada – Torts* (Toronto: LexisNexis Canada, 2020) at HTO-103.

¹³⁷ *R v Doering*, 2019 ONSC 6360.

¹³⁸ *Criminal Code*, RSC 1985, c C-46, s 215.

¹³⁹ *Ibid*, c C-46, s 219.

provide timely medical assistance, believing the deceased needed to “ride out the high” from methamphetamine use.¹⁴⁰ Cst. Doering responded to various 911 “check welfare” calls concerning a woman who was running into traffic and believed to be in distress due to drug use.¹⁴¹ He dragged and carried Ms. Chrisjohn, believing she was failing to comply rather than incapable of moving herself and transferred her to the custody of the OPP who had an outstanding warrant for her arrest. He told the receiving officers that there were no concerns for her welfare; and lied, claiming that she had been “looked at by EMS”¹⁴², despite having failed to conduct an assessment of her vital signs or to ensure responding paramedics assessed her. Ms. Chrisjohn died in hospital shortly after being assessed as non-responsive by paramedics in OPP cells.¹⁴³ This case provides an example of a situation where a person perceived to experience mental health disability (problematic substance use) is not provided with necessary medical care because their distress is believed to be a natural or commonplace aspect of their disability or of their resistance to police rather than indicative of a potentially life-threatening condition. The case is also an example of how stigma, and although not explicitly addressed in the decision, racism, might play a role in police discretion to refuse medical care.¹⁴⁴ The court also heard evidence suggesting that police actions may have been influenced by the stigma against Ms. Chrisjohn as a drug user. For

¹⁴⁰ *R v Doering*, 2019 ONSC 6360 (CanLII) at para 4.

¹⁴¹ *Ibid* at para 8.

¹⁴² *Ibid* at para 122.

¹⁴³ *Ibid*.

¹⁴⁴ Many scholars have noted that stigma against Aboriginal people can negatively influence the care (or lack thereof) provided to them. For example, Sherene Razack (elaborating on, and quoting in part Jo-anne Fiske & Annette Brown, “Aboriginal citizen, discredited medical subject: Paradoxical constructions of Aboriginal women’s subjectivity in Canadian healthcare policies” (2006) 39 Policy Sciences 91) writes: “Factors such as alcohol abuse, whether or not they are present, ‘discredit’ Aboriginal subjects as deserving of services and of respect, tying in neatly with longstanding racist ideas of Aboriginal people as polluted, child-like, and incapable of being modern subjects.” (Sherene Razack, “Timely Deaths: Medicalizing the Deaths of Aboriginal People in Custody” (2011) 9:2 Law, Culture and Humanities 352 at 359.

Additionally, some inquest reports have found racism can prevent appropriate medical care for Indigenous people leading to deaths. See e.g. *Re Brian Sinclair*, Inquest Report, Provincial Court of Manitoba, December 12, 2014, online (pdf): < www.manitobacourts.mb.ca/site/assets/files/1051/brian_sinclair_inquest_-_dec_14.pdf>; *Re Joyce Echequan*, Rapport d’enquête, Bureau du coroner du Québec, 2020, online (pdf): < www.coroner.gouv.qc.ca/fileadmin/Enquetes_publicques/2020-EP00275-9.pdf>.

example, an employee of a Petro Canada gas station contacted police to report “there is a crackhead outside the store”,¹⁴⁵ which resulted in a dispatch notification to police officers that “EMP [employee] FROM PETRO SAYS THE FEM [female] IS A CRACKHEAD – HAD RUN INTO THE STORE PRIOR – NOW LAYING DOWN OUTSIDE.”¹⁴⁶ These messages, conveying ableist attitudes about drug use emanating from members of the public and employed by police, help structure the police response and detract from the realization of an obligation to medically care for those in distress. The impact of this stigma was discussed by Justice Pomerance in his judgment:

The evidence in this case suggests that stereotypes and generalized assumptions played a role in the events leading to Ms. Chrisjohn’s death. Cst. Doering had definite opinions about how persons on drugs, and persons addicted to drugs, were likely to behave. He had a definite opinion that drug use alone would not be a factor calling for medical intervention. These opinions formed the lens through which he perceived the events in this case. He viewed everything, including signs of medical distress, as nothing more than the stereotypical conduct of a drug user. If Ms. Chrisjohn was aggressive, it was because she was high on methamphetamine. If she was silent and apparently non-compliant, it was because she was high on methamphetamine. If she was lying on the seat, moaning and shaking, she was just “riding out her high.” [...] ¹⁴⁷

Cases such as this are rarely prosecuted and these deaths may be attributed to overdoses, or other “accidental” medical causes of death in official statistics, making it difficult to estimate their prevalence.

1.4.10 Firearms

Police shootings incur far more publicity and scrutiny than other forms of police death and have been the subject of study in Canada and internationally. Because of their lethality, gun-involved deaths are one of the most prevalent forms of police-involved death tracked in Canada. Among the 461 deaths recorded in the CBC Deadly Force database, which recorded police-involved deaths in Canada from 2000-2017, 71.4% of the deaths listed were caused by a gunshot wound.¹⁴⁸

¹⁴⁵ *R v Doering*, 2019 ONSC 6360 (CanLII) at para 14.

¹⁴⁶ *Ibid* at para 15.

¹⁴⁷ *Ibid* at para 125.

¹⁴⁸ Marcoux & Nicholson, *supra* note 2.

Provinces with special investigations units all track deaths caused by police firearms, so there is considerably more reliable officially collected and disseminated data on this type of death in some regions of Canada as the table below reveals.

Province	Time Period	Number of Firearm Deaths / Serious Injuries (Total)	Number of Firearm Deaths/ Serious Injuries (per Year)
British Columbia (IIO) ¹⁴⁹	2013/2014 – 2017/2018	18 / N/A	3.6 / N/A
Alberta (ASIRT) ¹⁵⁰	2014-2018	33 / 31	6.6 / 6.2
Manitoba (IIU) ¹⁵¹	2015/2016 - 2018/2019	8 / 9	2 / 2.25
Ontario (SIU) ¹⁵²	2010-2018	63 / 75	7 / 8.3
Québec (BEI) ¹⁵³	2017/2018 – 2018/2019	13 / 9	6.5 / 4.5
Nova Scotia (SIRT) ¹⁵⁴	2012/2013 – 2016/2017	0 / 2	0 / 0.4

Table 2: Special Investigations Unit Firearm Deaths

Special investigations figures on police firearms are best appreciated when considered in light of the prevalence of deaths and injuries relative to the size of the given province. For example, while Ontario

¹⁴⁹ Independent Investigations Office, *Annual Report 2013-2014* (Victoria: IIO, 2014), online (pdf): <iioabc.ca/app/uploads/sites/472/2019/02/IIO_Annual_Report_2013_141.pdf>; Independent Investigations Office, *Annual Report 2014-2015* (Victoria: IIO, 2015) online: <iioabc.ca/app/uploads/sites/472/2019/02/IIO_Annual_Report_2014_15.pdf>; Independent Investigations Office, *Annual Report 2015-2016*, (Victoria: IIO, 2016) online: <iioabc.ca/app/uploads/sites/472/2019/02/IIO-2015-2016-Annual-Report-Interactive.pdf>; Independent Investigations Office, *Annual Report 2016-2017*, (Victoria: IIO, 2017) online: <iioabc.ca/app/uploads/sites/472/2019/02/IIO-2016-2017-Annual-Report-Final.pdf>; Independent Investigations Office, *Annual Report 2017-2018*, (Victoria: IIO, 2018) online: <iioabc.ca/app/uploads/sites/472/2019/05/17-18-Annual-Report_Web-Version.pdf>.

¹⁵⁰ Alberta Serious Incident Response Team, *Breakdown of ASIRT Files by Category* (Edmonton: Alberta, 2019) online: <solgps.alberta.ca/asirt/Statistics/Pages/breakdown.aspx>.

¹⁵¹ Independent Investigations Unit, *2018-2019 Annual Report* (Winnipeg: Independent Investigations Unit, 2019), online (pdf): <www.iiumanitoba.ca/pdf/iiu_2018_2019_annual_report.pdf> at 14.

¹⁵² Special Investigations Unit, *Annual Report 2018*, (Toronto: Special Investigations Unit, 2019), online: <www.siu.on.ca/pdfs/ar_2018_pdf.pdf> at 23.

¹⁵³ Bureau des enquêtes indépendantes, *Rapport annuel de gestion 2018-2019* (Québec: Bureau des enquêtes indépendantes, 2019), online (pdf): <www.bei.gouv.qc.ca/fileadmin/documents/publications/BEI_Rapport_annuel_2018-2019.pdf> at 17; Bureau des enquêtes indépendantes, *Rapport annuel 2017-2018*, (Québec: Bureau des enquêtes indépendantes, 2018), online (pdf): <www.bei.gouv.qc.ca/fileadmin/documents/publications/BEI_Rapport_annuel_2017-18_WEB.pdf> at 16.

¹⁵⁴ Serious Incident Response Team, *Trust Confidence Integrity Independence, Annual Report 2016-2017* (Halifax: Serious Incident Response Team, 2017) at 9; Serious Incident Response Team, *Trust Confidence Integrity Independence, Annual Report 2015-2016* (Halifax: Serious Incident Response Team, 2017) at 9; Serious Incident Response Team, *Trust Confidence Integrity Independence, Annual Report 2014-2015* (Halifax: Serious Incident

has the highest number of average firearms deaths per year as reported by the SIU (average of 7 per year) compared to other provinces with special investigations unit data available, the population of Ontario is also the largest, estimated to be 14,193,384 by Statistics Canada in 2017. In contrast, British Columbia averaged 3.6 firearm deaths per year, about half the number in Ontario, with a population of 4,817,160 in 2017. Police shootings are therefore more prevalent per capita in British Columbia than Ontario. Tracking other forms of use of force in as reliable a manner as we do firearms would be helpful in Canada because it would allow comparison between different provinces and police forces.

Unfortunately, at present special investigations bodies in Canada are not mandated to track and report on the perceived disability status of individuals who are injured or killed by police. Generally, only the age and gender of the subject are tracked among possible demographic variables, although there has been some movement by policy-makers to increase demographic data collection by some of these agencies as a means of ensuring accountability for marginalized populations. For example, in 2017 Justice Michael Tulloch authored a commissioned report on police oversight in Ontario. His final report recommended that police oversight bodies in Ontario should collect information on “gender, age, race, religion, ethnicity, mental health status, disability, and Indigenous status”, noting that Ontario’s demographic data collection by police oversight agencies “lags behind the United States [and] the United Kingdom”¹⁵⁵. In January 2020 the use of force report form in Ontario began to track the “perceived race” of the subject, but disability status, including perceptions of mental health disability remain absent from

Response Team, 2017) at 10; Serious Incident Response Team, *Trust Confidence Integrity Independence, Annual Report 2013-2014* (Halifax: Serious Incident Response Team, 2017) at 10; Serious Incident Response Team, *The First Year In Review: 2012-2013 Annual Report*, (Halifax: Serious Incident Response Team, 2012-2013) at 8.

¹⁵⁵ Tulloch, *supra* note 13 at 18.

this mandatory reporting.¹⁵⁶ However, tracking perceived mental health disability in use of force reporting remains rare in Canada.¹⁵⁷

With respect to academic research on police-involved firearms deaths and injuries, several Canadian studies have explored police shooting deaths from various theoretical perspectives. Former police officer and criminologist Richard Parent's doctoral thesis research involved the largest study of fatal and non-fatal police shootings in Canada to date. His study included data from across Canada alongside police shootings data from Washington State, and select American cities over a twenty-year time period from January 1, 1980 to December 31, 2001.¹⁵⁸ Parent collected data through requests to coroners offices, some special investigations units, requests made directly to police forces for case records, and through interviews with police and prisoners involved in the incidents.¹⁵⁹ His research is particularly useful because Parent was likely accorded special access to police records for his research because of his status as a police officer and his close connections with police leadership in Canada. His requests for records were, for example, accompanied by "letters of introduction" from the Chief Constable of the Vancouver Police Department, the Chief Coroner of British Columbia, and the Officer in Charge of the North Vancouver RCMP Detachment.¹⁶⁰ His research found that over 200 instances of lethal police shootings occurred in Canada over the 20 years he studied.¹⁶¹ Parent notes: "[d]ue to record keeping practices not all of the fatal police shooting cases can be found."¹⁶² Parent specifically notes that in many cases police forces wilfully refuse to retain data about police involved shootings and will keep the

¹⁵⁶ See O. Reg. 391/19, s 2. A copy of the new Use of Force Report is available at the Government of Ontario's Central Forms Repository at: www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/FormDetail?OpenForm&ACT=RDR&TAB=PROFILE&SRCH=&ENV=WWE&TIT=Use+of+Force+Report&NO=008-0270E.

¹⁵⁷ See Scot Wortley et al, *Police Use of Force in Canada: A Review of Data, Expert Opinion, and the International Research Literature* (Ottawa: Canadian Criminal Justice Association, 2021) at 35.

¹⁵⁸ Parent, *supra* note 18 at 148.

¹⁵⁹ *Ibid* at 151-153.

¹⁶⁰ *Ibid* at 152.

¹⁶¹ *Ibid* at 151.

¹⁶² *Ibid* at 149.

file containing information about the shooting confidential, retaining it only whilst legal proceedings are ongoing with respect to the incident, but purging the information immediately afterwards in order to avoid “any criticism or subsequent legal proceedings surrounding the use of deadly force by its personnel.”¹⁶³

Parent also found that roughly one-third of the cases in his dataset involved subjects identified by police as “individuals rendered vulnerable by factors including suicidal ideation, mental illness, emotional stress and the influence of substances.”¹⁶⁴ Parent’s was the largest Canadian study to suggest that police identify mental health and substance use concerns as contributing factors in a large proportion of police-involved killings, which implies that police are aware of potential disability in many of these interactions.

Using coroner’s data, Parent conducted a further study of police-involved shooting deaths in British Columbia from January 1, 2000 to December 31, 2009 and found that over 25% (8/30) of those killed had “[m]ental illness, suicidal ideation, and other characteristics consistent with irrational behavior”¹⁶⁵ He further noted that “seven of the eight individuals who were killed had a documented history of mental illness.”¹⁶⁶ This study provides further evidence that those perceived to have mental health disabilities frequently experience the use of fatal force, compared to those who are not so labelled.

Sociologists Jason Carmichael and Stephanie Kent studied media reports of police shooting deaths in 39 Canadian cities with populations above 100,000 in the year 2000.¹⁶⁷ They collected data for the years 1996-2010, but have only published an analysis of their data for three years: 1999, 2000, and

¹⁶³ *Ibid* at 159.

¹⁶⁴ *Ibid* at 311.

¹⁶⁵ *Ibid* at 65.

¹⁶⁶ *Ibid* at 65.

¹⁶⁷ Jason Carmichael & Stephanie Kent, “The Use of Lethal Force by Canadian Police Officers: Assessing the Influence of Female Police Officers and Minority Threat Explanations on Police Shootings Across Large Cities” (2015) 40 *American Journal of Criminal Justice* 703.

2006, in order to match the data collected with census information on ethnic minority populations in Canadian cities.¹⁶⁸ They found on average less than one police shooting per city per year studied. Their data shows a correlation between higher populations of visible minorities, immigrants, and Aboriginal people and increased police shooting deaths, providing support for the theory that “police may be more willing to employ deadly tactics to regulate members of minority communities.”¹⁶⁹ However, the data also indicates that where minority populations grow to a numerical majority there is a levelling off of this effect.¹⁷⁰ Interestingly, this study also found no correlation between police shooting rates and homicide rates, suggesting “reactive theories” of use of force, which suggest use of force rates correspond to the rates of lethal violence being policed are not supported by the data.¹⁷¹ The study ultimately supports concerns that ethnic minorities face higher rates of police shooting deaths in Canada, supporting theories that police may be more willing to employ fatal force against minority populations.

The study also rebuts the theory that geographical areas with higher deadly use of force rates by police will have higher homicide rates, violent crime rates, or overall crime rates, because police are responding to greater levels of potentially deadly force in the population. Rather Carmichael and Kent’s study revealed no statistically significant correlation between homicide rates, violent crime rates, or overall crime rates, and police shootings in the Canadian cities studied.¹⁷² One interesting finding was that it found no support for the theory that police shootings may be more likely to occur in cities with higher poverty rates, suggesting that socio-economic status of inhabitants (at least when comparing cities) is not a significant predictor of this form of police violence in Canada.¹⁷³ Their study did not examine mental

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid* at 718.

¹⁷⁰ *Ibid* at 718.

¹⁷¹ *Ibid* at 718.

¹⁷² *Ibid* at 716-717.

¹⁷³ *Ibid* at 713.

health as a factor in police shootings, or evaluate theories suggesting perceived mental health symptomatology may be related to police shooting deaths.

Former Supreme Court Justice Frank Iacobucci authored a report commissioned by the Toronto Police Service entitled *Police Encounters with People in Crisis*, to review use of fatal force, or potentially fatal force, by Toronto police officers against “people in crisis” in the wake of the tragic 2013 shooting death of teenager Sammy Yatim.¹⁷⁴ The Iacobucci Report defined “people in crisis” as people

whose behaviour brings them into contact with police either because of an apparent need for urgent care within the mental health system, or because they are otherwise experiencing a mental or emotional crisis involving behaviour that is sufficiently erratic, threatening or dangerous that the police are called in order to protect the person or those around them. The term “person in crisis” includes those who are mentally ill as well as people who would be described by police as “emotionally disturbed.”¹⁷⁵

This report suggests that the Toronto Police Service identified twenty-seven people as having died in a police interactions between 2002-2012 who were labelled as “emotionally disturbed persons”, a policing term signifying suspected mental health disability.¹⁷⁶ Five of these individuals died as a result of being shot by police. These five individuals make up 20% (5/25) of the total number of people shot and killed by the Toronto Police Service in the ten-year period studied.¹⁷⁷

International data suggests that even using the most conservative estimates, Canada has a higher rate of fatal police shootings than several international jurisdictions that have available national data, although the reason for our higher rates is unclear. For example, data from England and Wales from the 2004/2005-2018/2019 annual reports of the Independent Office for Police Conduct lists 37 shooting

¹⁷⁴ Iacobucci, *supra* note 13.

¹⁷⁵ *Ibid* at 4.

¹⁷⁶ *Ibid* at 73.

¹⁷⁷ *Ibid* at 73.

incidents and 40 fatalities over a 15 year time period, with an average of 2.66 per year.¹⁷⁸ In contrast, Ontario alone averaged 7 police-involved firearm deaths per year, with a population of roughly 14.5 million people in 2019, compared to a population of roughly 59 million in England and Wales in 2019.¹⁷⁹

England and Wales may have much lower police firearm use in part because far fewer police officers are armed. In 2019, roughly 1 in 19 police officers had firearms in England and Wales.¹⁸⁰ In contrast, nearly all Canadian police officers are equipped with one or more firearms, with estimates of the number held by Canadian police in 2017 being 103,000 firearms, held among the 68,773 police officers in Canada.¹⁸¹ A possible reason for the difference in policies on equipping police with firearms in the two countries, is the difference in estimated legal and illegal firearms held by civilians in each country, which by presence alone might, arguably, create a greater threat to police officers operating in these jurisdictions since guns are lethal weapons. A 2017 estimate from the Geneva Graduate Institute's Small Arms Survey estimates Canada had 12,700,000 legal and illegal civilian held firearms in 2017, and approximately 34.7 per 100 residents, a very high number relative to most countries around the globe.¹⁸²

¹⁷⁸ See Independent Office for Police Conduct, *Deaths During of Following Police Contact: Statistics for England and Wales 2018/2019* (London: Independent Office for Police Conduct, 2019), online (pdf): <www.policeconduct.gov.uk/sites/default/files/Documents/statistics/deaths_during_following_police_contact_2018_19.pdf>; Independent Office for Police Conduct, *Deaths During or Following Police Contact: Statistics for England and Wales: Time Series Tables 2004/2005 to 2017/2018* (London: Independent Office for Police Conduct, 2018), online: <www.policeconduct.gov.uk/research-and-learning/statistics/annual-deaths-during-or-following-police-contact-statistics>.

¹⁷⁹ See "Demographic Quarterly: Highlights of first quarter, 2019" (2019), online: *Government of Ontario* <www.fin.gov.on.ca/en/economy/demographics/quarterly/dhiq1.html>; "Population estimates" (2019), online: *Office for National Statistics* <www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates>.

¹⁸⁰ "Police Use of Firearms Statistics, England and Wales: April 2018 to March 2019" (2019), online (pdf): *GOV.UK* <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/820556/police-use-firearms-statistics-england-and-wales-april-2018-to-march-2019-hosb1319.pdf>.

¹⁸¹ Aaron Karp, *Estimating Global Law Enforcement Firearms Numbers* (Canberra: Government of Australia, 2018), online: <www.smallarmssurvey.org/fileadmin/docs/Weapons_and_Markets/Tools/Firearms_holdings/SAS-BP-Law-enforcement-firearms-annexe.pdf> [Karp] at Annexe.

¹⁸² *Ibid.*

England and Wales had an estimated 2,731,000 legal and illegal civilian held firearms, and approximately 4.64 per 100 residents, a much lower number and prevalence.¹⁸³

A further comparator with available national data is Australia, where there were 4 police-involved shooting deaths in 2017.¹⁸⁴ The population of Australia was roughly 24,598,400 in June 2019. In Australia, police held approximately 69,000 firearms among 63,161 police officers in 2017,¹⁸⁵ and civilians held approximate 3,573,000 firearms, with approximately 14.5 per 100 residents.¹⁸⁶ The prevalence of civilian held firearms was thus less than half the rate found in Canada. Australia's police shooting figures are significantly lower than Canada's reported rates, with rates lower than those found in Ontario alone, despite Australia having a bigger population.

In contrast, the United States of America has over 1,000 police-involved shooting deaths each year.¹⁸⁷ However, America is an anomaly in many ways when it comes to firearms and firearm-related violence. The United States has higher levels of civilian gun ownership than every other developed country, with an estimated 393,347,000 civilian legal and illegal firearms in 2017, a rate of 120.5 guns per 100 people.¹⁸⁸ They also have high numbers of police held firearms, with 1.6 per sworn officer.¹⁸⁹ Furthermore, general homicide rates and the rate of homicides of police officers are significantly higher in

¹⁸³ Graduate Institute of Geneva, "Global Firearms Holdings" (Geneva: Small Arms Survey, 2018), online: <www.smallarmssurvey.org/weapons-and-markets/tools/global-firearms-holdings.html>.

¹⁸⁴ Australian Institute of Criminology, "Police Custody and Custody-Related Operations" (Canberra: Australian Institute of Criminology, undated), online: <www.crimstats.aic.gov.au/NDICP/2_police-custody/#numberAge>.

¹⁸⁵ Karp, *supra* note 181 at Annexe.

¹⁸⁶ *Ibid.*

¹⁸⁷ Note, this estimation is based on widely accepted crowd-sourced and alternative data sources. The police shooting estimates produced by official sources in the USA are notoriously inaccurate and under-estimate the actual numbers. For a breakdown of the estimates and their comparison to unreliable national figures see e.g. Howard Williams, Scott Bowman, & Jordan Jung, "The Limitations of Government Databases for Analyzing Fatal Officer-Involved Shootings in the United States" (2019) 30:2 Criminal Justice Policy Review 201.

¹⁸⁸ Karp, *supra* note 181 at Annexe.

¹⁸⁹ *Ibid.*

the United States than Canada.¹⁹⁰ It is unclear why America has such high rates of police-involved shootings, but frequent comparisons between Canada and the United States on the topic of police firearm use are unhelpful, since the USA is in many ways a global outlier when it comes to levels of societal and police gun violence.

These international figures suggest that while Canada may have lower rates of police shootings than the United States, our police forces resort to using firearms at higher rates than other developed countries that collect national data on this issue. The use of firearms by Canadian police is thus important to study in order to understand why our police forces employ lethal force more frequently than other countries, and to question whether changes in policing or social policy could help curb this form of state violence. While the higher number of civilian-held firearms may potentially pose a greater danger to police officers in Canada, there is presently little data to examine whether or not Canadian police are in fact using their firearms because they are faced with firearms. Firearms are regulated at the federal level in Canada through the *Firearms Act*, S.C. 1995, c 39, and the *Criminal Code*, R.S.C. 1998, c C-46, ss.84-117. Federal regulation of firearms provides good reason to keep national data on police shootings and other forms of lethal use of force since an informed understanding of firearms violence to inform national law and policy requires consideration of police and civilian arms, and the relationship (or lack thereof) between the two.

There have also been some international studies that specifically consider police shootings of persons who experience mental health disability. As mentioned above, Richard Parent's study of police shootings in Canada and select American police forces found that in roughly one-third of the cases studied police identified the subjects as "individuals rendered vulnerable by factors including suicidal

¹⁹⁰ See Richard Parent & Catherine Parent, "Canada and the USA: Community Violence and the Use of Police Deadly Force in Bordering Nations" in James Albrecht & Garth den Heyer, eds, *Understanding and Preventing Community Violence: Global Criminological and Sociological Perspectives*, (Springer, 2022) 165-179.

ideation, mental illness, emotional stress and the influence of substances.”¹⁹¹ However, this figure may well be an under-estimation of how frequently those with mental health disabilities are subject to police shootings, since police are unlikely to correctly identify mental health disability in all cases. Moreover, police databases may contain less information on mental health disability in the 1980-2001 time period than they would today, as computer technology and data-keeping practices have presumably changed considerably in this time period, as have societal understandings of mental health.

Internationally, an Australian study of police shootings in Victoria between 1982 and 2007 found that persons with “Axis I” diagnoses (i.e. including mood disorders, anxiety disorders, substance use disorders, psychosis, and schizophrenia) were significantly over-represented among the victims of police shootings, with rates for psychosis between 11.3 and 17.3 times higher than population estimates would predict and significant over-representation among those with mood and anxiety disorders as well.¹⁹² In the United States, the Washington Post’s data suggests roughly one-quarter of police shootings each year involve someone with “mental illness” and the Treatment Advocacy Centre has calculated that someone with “mental illness” is 16 times more likely to be shot to death by police than someone without.¹⁹³

As the data makes clear, mental health disability appears to be a significant demographic factor associated with police shootings, though more particular data on this point is generally unavailable. Data that breaks down what label is applied to those said to be “mentally ill” in these interactions would be useful because different psychiatric labels are associated with differing needs and differing levels of societal stigma. At present, Canada has little data looking beneath the broad category of mental health to shine light on this issue.

¹⁹¹ Parent, *supra* note 18 at 311.

¹⁹² Dragana Kesic, Stuart Thomas & James Ogloff, “Mental illness among police fatalities in Victoria 1982-2007: case linkage study” (2010) 44:5 Australian & New Zealand Journal of Psychiatry 463 at 465.

¹⁹³ Editorial Board, “Almost 1,000 people were killed by police last year. Here’s what to do about it.”, Opinion, Washington Post (19 January 2018), online: <www.washingtonpost.com/opinions/almost-1000-were-killed-by-police-last-year-heres-what-to-do-about-it/2018/01/08/198fb0a0-f4be-11e7-a9e3-ab18ce41436a_story.html>.

1.4.11 Conducted Energy Weapon (“Taser”) Deaths and Injuries

Conducted energy weapons (“CEW”), which are best known under the brand name “Taser” are a relatively new weapon introduced to the arsenal of many Canadian police forces in the late 1990s and early 2000s. CEWs generally have two possible settings: pushstun mode and probe mode. Pushstun mode is used when the CEW is pressed directly into the skin of the subject. In this mode, when the trigger is pressed electric current runs between two electrodes on the end of the weapon, causing pain to the subject. Probe mode involves firing probes shaped like darts with barbed ends, into the subject, puncturing their skin. Once the probes are in place the weapon is fired, sending an electric current into the subject’s flesh causing significant pain and “neuromuscular incapacitation”.¹⁹⁴ They are sometimes described as “intermediate weapons”¹⁹⁵ or “less lethal weapons”¹⁹⁶ because they are considered a less deadly alternative to firearm use.

The use of CEWs by Canadian police has attracted controversy and the attention of several studies, because some see CEWs as a safer alternative to firearms, whereas others are concerned these weapons are being over-used and can be deadly. The nature of CEW-caused injuries varies and estimations of their risk with respect to injury and death vary in the literature and unfortunately, a large number of CEW safety studies are funded by the CEW industry itself, drawing into question the impartiality of research in this field.¹⁹⁷ Generally, CEWs are believed to be safer for police officers

¹⁹⁴ Thomas Braidwood, *Restoring Public Confidence: Restricting the Use of Conducted Energy Weapons in British Columbia* (Victoria: Braidwood Commission on Conducted Energy Weapon Use, 2009) at 7.

¹⁹⁵ For example, The provincial policing standards in B.C. define “intermediate weapons” as including CEWs. See British Columbia, *Provincial Policing Standards*, s. 1.2.2, online: <www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/police/standards/1-2-2-intermediate-weapons.pdf>.

¹⁹⁶ RCMP policy documents often refer to CEWs as “less lethal” weapons, See e.g. “Less lethal intervention options” (2017), online: *Royal Canadian Mounted Police* <www.rcmp-grc.gc.ca/en/conducted-energy-weapon-cew>.

¹⁹⁷ In fact, a study conducted of Taser research studies found that 46% of the research studies on Taser safety were “funded by Taser or authored by an affiliate company” and studies affiliated with Taser were 17.6 times more likely to conclude that CEWs are likely safe or safe, compared to non-Taser supported studies. See Peyman Azadani et al, “Funding source and author affiliation in TASER research are strongly associated with a conclusion of device safety” (2011) 162:3 *The American Heart Journal* 533 at 535.

themselves, with one frequently cited American study finding between a 25-62% reduction in police officer and civilian injuries following the introduction of CEWs.¹⁹⁸ One large international study that was partially funded by Axon (formerly Taser International Inc.), a major law enforcement weapons industry player and manufacturer of CEWs, documented several types of rare injuries and deaths directly caused by CEWs, including: eye penetration injuries (e.g. blindness or enucleation from probes), fall related injuries (which were in some cases fatal), burns caused by the ignition of flammable materials (also potentially fatal where serious burns occur from, for example, the ignition of a gas tank).¹⁹⁹ This study also suggests that reports of CEW-related electrocution deaths identified in the literature were “anecdotal” and do not stand up to scrutiny and that the claim of a risk of electrocution “remains a theoretical concern with an extremely low probability.”²⁰⁰ However, authors of a Canadian study on cardiac death caused by CEWs have suggested it is likely a small but not negligible risk²⁰¹. An American study found that injury rates in conducted energy weapon deployments are relatively common when compared to other types of use of force,²⁰² although this study has been criticized for including the superficial puncture wounds produced by CEW probes among the injuries documented.²⁰³

¹⁹⁸ John MacDonald, Robert Kaminski & Michael Smith, “The Effect of Less-Lethal Weapons on Injuries in Police Use of Force Events” (2009) 99:12 American Journal of Public Health 2268.

¹⁹⁹ See W.M. Kroll et al, “Benefits, Risks, and Myths of Taser® Handheld Electronic Weapons” (2019) 3:7 Human Factors and Mechanical Engineering for Defense and Safety at 4-6. Other studies documenting CEW caused deaths and injuries due to burns and falls include: Mark W. Kroll, Mollie Ritter & Howard Williams, “Fatal and Non-Fatal Burn Injuries With Electrical Weapons and Explosive Fumes” (2017) 50 Journal of Forensic and Legal Medicine 6; Mark W. Kroll, et al, “Fatal traumatic brain injury with electrical weapon falls” (2016) 43 Journal of Forensic and Legal Medicine 12; Bertrand Becour, “Conducted Electrical Weapons or Stun Guns: A Review of 46 Cases Examined in Casualty” (2013) 34:2 American Journal of Forensic Medicine and Pathology 142; Isabelle Le Blanc-Louvry et al, “A brain penetration after Taser injury: Controversies regarding Taser gun safety” (2012) 221 Forensic Science International e7.

²⁰⁰ Kroll et al, “Benefits, Risks, and Myths of Taser”, *supra* note 199 at 9.

²⁰¹ See Ben Rich & James Brophy, “Estimating the Risk of Cardiac Mortality After Exposure to Conducted Energy Weapons” (2015) 31:12 Canadian Journal of Cardiology 1439.

²⁰² For example, one study found use of force encounters involving only a CEW had an injury rate of 41.2%, and those employing other forms of force in addition to CEWs had a 47% injury rate, as compared to an injury rate of 28.9% for use of force encounters in which no CEW was deployed (William Terrill & Eugene Paoline, “Conducted Energy Devices (CEDs) and Citizen Injuries: The Shocking Empirical Reality” (2012) 29:2 Justice Quarterly 153 at 165.

²⁰³ See Robert Kaminski et al, “A Quantum of Force: The Consequences of Counting Routine Conducted Energy Weapon Punctures as Injuries” (2015) 23:4 Justice Quarterly 1745.

Additionally, there are often several contributing factors in CEW deaths that occur proximal to use of force. Since Canada does not collect data on deaths proximal to but not determined to have been primarily caused by any types of use of force interventions, it is very difficult to compare CEW safety with other forms of use of force to gauge its relative danger in the Canadian population.²⁰⁴ In Canada, only two provinces' special investigations units provide CEW-related death and injuries figures in their annual reporting. British Columbia's Independent Investigations Office reported 4 CEW-related deaths and 5 CEW-related serious injuries from the 2013/2014-2017/2018 reportable years.²⁰⁵ Alberta's ASIRT reports 5 CEW related deaths between 2013-2018, and 2 serious injuries caused by CEWs.²⁰⁶ These agencies do not provide documentation on how CEW-related deaths and injuries are tallied, which is striking because as the health literature on CEWs suggests, linking deaths to these weapons, at least medically, has proven difficult. These figures suggest that CEW-related deaths and serious injuries are a small but not an insignificant proportion of overall police-involved deaths and injuries.

In 2013 a study of the medical risks associated with CEWs was undertaken by the Council of Canadian Academies and Canadian Academy of Health Sciences' Expert Panel on the Medical and Physiological Impacts of Conducted Energy Weapons.²⁰⁷ This study reviewed the literature on medical

²⁰⁴ Stephen Goudge et al, *The Health Effects of Conducted Energy Weapons* (Ottawa: Council of Canadian Academies and Canadian Academy of Health Sciences, 2013) at vii, [Goudge] online (pdf):

<secureservercdn.net/166.62.107.204/cpp.178.myftpupload.com/wp-content/uploads/2015/07/CofCA_13-151_CEW_Book_E_New-Font_WEB_v21.pdf>.

²⁰⁵ Independent Investigation Office of BC, *Annual Report 2017-2018*, (Victoria: Independent Investigation Office, 2018) online: <iiobc.ca/app/uploads/sites/472/2019/05/17-18-Annual-Report_Web-Version.pdf>; Independent Investigation Office of BC, *Annual Report, 2016-2017*, (Victoria: Independent Investigations Office, 2017) online: <iiobc.ca/app/uploads/sites/472/2019/02/IIO-2016-2017-Annual-Report-Final.pdf>; [Independent Investigations Office, Annual Report 2015-2016](#), (Victoria: Independent Investigation Office, 2016) online: <iiobc.ca/app/uploads/sites/472/2019/02/IIO-2015-2016-Annual-Report-Interactive.pdf>; Independent Investigations Office, *Annual Report 2014-2015*, (Victoria: Independent Investigations Office, 2015) online: <iiobc.ca/app/uploads/sites/472/2019/02/IIO_Annual_Report_2014_15.pdf>; Independent Investigations Office, *Annual Report 2013-2014*, (Victoria: Independent Investigations Office, 2014) online: <iiobc.ca/app/uploads/sites/472/2019/02/IIO_Annual_Report_2013_141.pdf>.

²⁰⁶ Alberta Serious Incident Response Team, *Breakdown of ASIRT Files by Category* (Edmonton: Alberta, 2019) online: <solgps.alberta.ca/asirt/Statistics/Pages/breakdown.aspx>.

²⁰⁷ Goudge, *supra* note 204.

studies of CEW use on humans and animals and the researchers found that physical injuries (e.g. puncture wounds from probes) are common from CEW use, although they are usually superficial and do not pose a serious health risk. The authors concluded that “[a]lthough it is difficult to state any firm conclusions on the neuroendocrine, respiratory, and cardiac effects of CEWs due to an absence of high-quality evidence, studies suggest that while fatal complications are biologically plausible, they would be extremely rare.”²⁰⁸ With respect to police use of force deaths involving CEWs, the Panel stated:

Sudden in-custody death resulting from a use-of-force event typically involves a complicated scenario that includes multiple factors, all of which can potentially contribute to a sudden unexpected death. This makes it difficult to isolate the contribution of any single factor. Although the electrical characteristics of CEWs can potentially contribute to sudden in-custody death, given the limited evidence, CEW exposure cannot be confirmed or excluded as the primary cause of a fatality in most real-world settings.²⁰⁹

Sudden in-custody death is a phenomenon reported in police use of force literature to describe individuals who rapidly and unexpectedly die while detained.²¹⁰ While this type of death is discussed in greater detail below in subsection 5.12, one of the controversies surrounding CEW use is their alleged relationship to this phenomenon.²¹¹ Ultimately, the expert panel report suggested that much is unknown about CEW safety, noting that experimental study on CEW use “typically involves healthy, physically fit volunteers. There is therefore a paucity of knowledge of the health effects associated with CEW use outside controlled settings and within varying, potentially vulnerable populations.”²¹² There is a “lack of standardization and inconsistent reporting and record-keeping practices related to use-of-force events” and the fact that “[m]any research studies of CEWs appear to be affiliated with, or receive support from,

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

²¹¹ See e.g. Douglas Zipes, “Sudden Cardiac Arrest and Death Following Application of Shocks from a Taser Electronic Control Device” (2012) 125: 20 *Circulation*.

²¹² Goudge, *supra* note 204. This concern has been echoed by several researchers studying CEW health effects, including: S.N. Kunz, G. Grove & F. Fischer, “Acute pathophysiological influences of conducted electrical weapons in humans: A review of current literature” (2012) 221 *Forensic Science International* 1 at 3.

CEW manufacturers or individuals with perceived conflicts of interest (e.g. paid medical experts), and funding sources are not always transparent.”²¹³

Internationally, some studies have demonstrated that CEWs may cause serious injury, and may contribute to deaths, although most studies were conducted in the USA. For example, a national American study of hospital databases found that CEW injuries and deaths were the second most prevalent form of weapon related to hospital use-of-force fatality admissions, second only to firearms. This study found that in 2012 there were 1639 taser-related hospital recorded injuries/deaths, noting that 2.8% of these cases were fatal, although in the large majority of these cases the medicolegal cause of death was determined not to be a taser.²¹⁴ Reuters compiled the largest dataset on CEW-proximate fatalities, documenting 1,081 American CEW proximate deaths sourced from court documents, other public records, and news reports from 2000-2018.²¹⁵ While this dataset includes proximal, and so not necessarily CEW-caused deaths, Reuters has also reported that in 153 cases of American medical examiner and coroner reports they collected, CEWs were listed as a primary or contributing cause of death.²¹⁶

There are some reports of CEW-linked deaths and injuries in other parts of the world. In the UK, Amnesty International has compiled a list of 18 cases of CEW-involved deaths that occurred between the

²¹³Goudge, *supra* note 204. This concern is shared by many other academics who have similarly pointed out that a great number of the studies on CEW safety were funded by the industry, and indeed it is obvious when one reviews the conflict of interest disclosures of major studies on conducted energy weapon safety in both human and animal subjects.

²¹⁴ Ted Miller et al, “Perils of police action: a cautionary tale from U.S. datasets” (2017) 23:1 Injury Prevention 27 at 28.

Note: Other forms of death and injury considered in this study in addition to tasers and firearms included: explosives, gas, (physical) blows, blunt object, sharp object, unspecified and late effect.

²¹⁵ James Benedict et al, “Deaths Involving Tasers”, *Reuters* (last visited: 10 September 2022), online: <www.reuters.com/investigates/special-report/usa-taser-tracker/>.

²¹⁶ Peter Eisler et al, “Shock Tactics Part 1: The Toll”, *Reuters* (22 August 2017), online: <www.reuters.com/investigates/special-report/usa-taser-911/>.

introduction of CEWs in the early 2000s and December 2018.²¹⁷ The UK's Scientific Advisory Committee on the Medical Implications of Less-Lethal Weapons (SACMILL), has also reported that 17 deaths had occurred following the use of a taser by police in the UK, along with two serious injuries, one involving an individual whose heart stopped and required defibrillation, and the other a serious head injury sustained by a tasered person.²¹⁸

In addition to the general health and safety risks associated with CEW use by police, there is concern that these weapons may be used in greater frequency against persons who experience mental health disability and there is concern that the health risks to individuals who are experiencing an emotional crisis, are in a psychotic break, or are intoxicated may be elevated, compared to the ordinary risks associated with CEW use.

In Canada, this issue was explored by the Braidwood Commission of Inquiry into the death of Robert Dziekanski, a 39 year man who died after being tasered at the Vancouver International Airport.²¹⁹ In their investigation, the Braidwood Commission undertook a review of CEW use in British Columbia. This review included policies and data pertaining to CEW use in B.C. and made recommendations concerning the regulation and use of CEWs in the province. The Commission reported that demographic data on subjects of CEW use by municipal (non-RCMP) police departments in British Columbia suggests that 19.8% of CEW uses were in response to "suicide attempt/threat/self-injurious behaviour"²²⁰ and 12.4% of cases were responses to "drug/alcohol intoxication"²²¹ and 10.7% of cases were responses to an

²¹⁷ Amnesty International, "UK: Public should 'resist drum-beat of calls for all police to carry a Taser'", London: Amnesty International, December 13, 2018, online: <www.amnesty.org.uk/press-releases/uk-public-should-resist-drum-beat-calls-all-police-carry-taser>.

²¹⁸ R.J. Flower et al, "*Statement on the Medical Implications of Use of the TASER X2 Conducted Energy Device System*", Scientific Advisory Committee on the Medical Implications of Less-Lethal Weapons, 2016, online (pdf): <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/595242/Medical_Statement_on_the_TASER_X2_system.pdf>.

²¹⁹ Braidwood, *supra* note 194.

²²⁰ Braidwood, *supra* note 194 at 161.

²²¹ Braidwood, *supra* note 194 at 161.

“emotionally disturbed person” (police terminology for someone with a known or suspected mental health condition).²²² The report also noted that the distribution of call types were similar for the RCMP as those found among the municipal police departments, with the exception that “mental health and causing a disturbance calls were higher, and suicidal person calls were significantly lower.”²²³ This data suggests those with perceived mental health disabilities or those otherwise perceived to be in crisis are common targets of these devices in Canada. Similarly, in 2008 the Commission for Public Complaints Against the Royal Canadian Mounted Police provided a final report of their systematic review of RCMP policies and practices following the force’s adoption of the CEW in 2001.²²⁴ The report found that 10.9% of CEW uses in the initial 6 years of use involved “mental health” calls, with this type of call being the most frequent type responded to with taser use, and 3.8% involved calls concerning a “suicidal person.”²²⁵ Additionally, “substance use” was involved in 80.9% of all CEW cases.²²⁶

More recent available data from the Toronto Police Service indicates that in 2016, 21.6% of CEW use cases involved “emotionally disturbed person” calls.²²⁷ Further, in 75.3% of all CEW cases that year the subject was identified as an “emotionally disturbed person”, someone influenced by drugs or alcohol, or a combination of both labels.²²⁸ Emotionally disturbed persons without any drug or alcohol influence made up 30.8% of these subjects.²²⁹ These rates suggest that mental health disability may be involved in the majority of conducted energy weapon use among some Canadian police forces.

²²² Braidwood, *supra* note 194 at 161.

²²³ Braidwood, *supra* note 194 at 170.

²²⁴ Commission for Public Complaints Against the Royal Canadian Mounted Police, *RCMP Use of Conducted Energy Weapons* (Ottawa: Commission for Public Complaints Against the RCMP, 2008).

²²⁵ *Ibid* at 22.

²²⁶ *Ibid* at 33.

²²⁷ Mark Saunders, *Annual Report 2016: Use of Conducted Energy Weapons* (Toronto: Toronto Police Services Board Report, 2017), online: <www.tpsb.ca/component/jdownloads/send/42-2017/557-march-23?option=com_jdownloads> at 154.

²²⁸ *Ibid* at 154.

²²⁹ *Ibid* at 155.

Studies in other countries also appear to suggest greater CEW use in mental health calls relatively high rates of CEW use in mental health contexts, compared to other call types. For example, a study conducted in New Zealand comparing hospital admissions from criminal arrests compared to mental health emergencies found that tasers were more than twice as likely (27% vs. 10%) to be used in mental health emergencies compared to criminal arrests.²³⁰ England and Wales' Independent Police Complaints Commission conducted a study of taser use for the period of 2004 to 2013, which found that mental health/self-harm cases were the most frequent contexts in which a taser was deployed by police.²³¹ Another study of use of force reports in England and Wales found that in 44% of taser-involved use of force incidents, the recipient was identified by police as "someone with mental health issues."²³² An American study from 2002-2004 of a large metropolitan police force found that 94.7% of CEW subjects were "emotionally disturbed" persons.²³³ However, another American study suggests that while use of force against the "mentally ill" appears to be common, CEWs may frequently (45.3% of the time) be used against persons who experience mental health disability in a context wherein lethal force would have been legally appropriate (according to police reports of these incidents), which the authors suggest means that they may be a less lethal alternative in many cases.²³⁴

In addition to taser use being common in mental health call responses, a large prospective study conducted in the United States found that those identified as having a "mental illness" or engaged in

²³⁰ Anthony O'Brien et al, "Use of Tasers on People with Mental Illness: A New Zealand Database Study" (2010) 34 *International Journal of Law and Psychiatry* 39 at 41.

²³¹ Independent Police Complaints Commission, *IPCC review of Taser complaints and incidents, 2004-2013* (London: Independent Police Complaints Commission, 2014), online (pdf): <webarchive.nationalarchives.gov.uk/ukgwa/20170914105300mp_/www.ipcc.gov.uk/sites/default/files/Documents/guidelines_reports/Taser_report_final_2014.pdf>.

²³² Abi Dymond, "Taser, Taser! Exploring factors associated with police use of taser in England and Wales" (2018) *Policing and Society*, DOI: <doi.org/10.1080/10439463.2018.1551392> at 6.

²³³ Michael White & Justin Ready, "The TASER as a Less Lethal Force Alternative: Findings on Use and Effectiveness in a Large Metropolitan Police Agency" (2007) 10 *Police Quarterly* 170 at 179.

²³⁴ Jeffrey D. Ho et al, "Impact of conducted electrical weapons in mentally ill population" (2007) 25 *American Journal of Emergency Medicine* 780 at 782.

“substance use” (i.e. drugs and/or alcohol) received significantly more shocks with CEWs, on average, than those not so identified, suggesting that CEW use may also be more intense when used against this population.²³⁵

With respect to the health effects of CEWs on those who experience mental health disability, there are predominantly only case studies linking these weapons to sudden-in-custody deaths of people identified as experiencing mental health disability.²³⁶ In Canada, a report by John Kiedrowski commissioned by the RCMP and provided to the Canadian Civil Liberties Association through an access to information request suggests that “there is sufficient indication from the literature and the known electrophysiological characteristics of the heart (and the effects of certain drugs) to express a view that excited, intoxicated individuals or those with pre-existing heart disease could be more prone to adverse effects from a CEW.”²³⁷ Studies (industry-funded) on the health risks of CEWs for intoxicated subjects have been conducted on pigs, generally reaching the conclusion that intoxication does not produce significant health impact differences, or in case of cocaine, might even have protective properties.²³⁸

However, many researchers suggest that those who are intoxicated, “mentally ill”, or otherwise in distress may endure worse impacts from CEWs and may be at greater risk of dying in CEW-related

²³⁵ Cassandra Bailey et al, “Conducted-Energy Device (Taser) Usage in Subjects with Mental Illness” (2016) 44:2 *Journal of the American Academy of Psychiatry and the Law Online* 213.

²³⁶ For a review of custody deaths involving CEWs, some of which are linked to mental health and substances use, see Jared Strote & H. Range Hutson, “Taser Use in Restraint Related Deaths” (2006) 10:4 *Prehospital Emergency Care* 447.

²³⁷ John Kiedrowski et al, *An Independent Review of the Adoption and Use of Conducted Energy Weapons by the Royal Canadian Mounted Police* (Ottawa: 5 June 2008) at 65, as cited in Canadian Civil Liberties Association, *A Measured Approach to Conducted Energy Weapons* (Toronto: Canadian Civil Liberties Association, 2010) at 6, n 15.

²³⁸ See e.g. Dhanunjaya Lakkireddy et al, “Effects of Cocaine Intoxication on the Threshold for Stun Gun Induction of Ventricular Fibrillation” (2006) 48:4 *Journal of the American College of Cardiology* 805; Patrick Tchou, “CEW Effects with Illegal Stimulant Intoxication” in Jeffrey Ho & Mark Kroll, eds, *TASER® Conducted Energy Weapons: Physiology, Pathology, and Law* (Boston: Springer, 2009) at 214. Note: Taser research in pigs is also criticized in some of the health literature as an ineffective means of studying potential effects in humans due to significant biological differences in our species and the fact that pig trials require anaesthesia to be administered, which may impact the study results. See JJ Pippin, “Taser research in pigs is not helpful” (2007) 49:6 *Journal of the American College of Cardiology* 731.

incidents.²³⁹ Howard Williams describes this theory as “High-Risk Group Theory” and notes that these theories “permeate recent studies on and reports on taser technology”²⁴⁰ despite the fact that “no experimental human evidence currently exists to support the theory’s assumptions.”²⁴¹ The groups considered to be at high risk in the literature include, significantly for this study, those who experience mental health disability (including problematic substance use), along with other groups like children, the elderly, pregnant women, and those with pre-existing heart conditions.²⁴² Williams conducted a retrospective study of “arrest-related sudden deaths”²⁴³ in the United States between 2006-2011, and found that there was no statistical evidence for high risk group theories (i.e. CEWs leading to higher rates of sudden deaths in certain populations) with respect to substance use, alcohol, race (Black, White, Hispanic), age, or gender, providing some evidence that conducted energy weapons may not cause disproportionate sudden deaths in these groups.²⁴⁴ However, his study did find that deaths of those identified as “mentally ill” did have statistically significant correlations to CEW use.²⁴⁵ Williams concludes that: “It might be that an ECD [electric control device] affects the mentally ill differently than it affects other people, or it might be that the mentally ill cannot judge when to abandon their resistance, and, consequently, more aggressive tactics, such as the use of an ECD, are necessary to subdue them.”²⁴⁶ Williams also found that cases labelled “excited delirium” were statistically more likely to have involved

²³⁹ For a discussion of studies employing this theory, see Howard Williams, *TASERS and Arrest-Related Deaths* (El Paso: LFB Scholarly Publishing, 2015) at 10-14.

²⁴⁰ *Ibid* at 10.

²⁴¹ *Ibid* at 10.

²⁴² For a review of much of the literature suggesting these groups are high risk, see *ibid* at 10-14.

²⁴³ Williams defines these as: “a death that occurs following a collapse within 24 hours after the initial arrest or detention. The death must be unexpected, must not be the result of trauma or injury that a layperson could readily discern needs medical attention, and must follow a sudden change in clinical condition or the beginning of symptoms from which the deceased does not recover.” (*Ibid* at 88).

²⁴⁴ *Ibid* at 139-142, 144-145.

²⁴⁵ *Ibid* at 145. However, note that Williams also considers his findings to be mixed because when cases of deceased identified as “mentally ill” by coroners/medical examiners are combined with cases showing the presence of psychotropic drugs in post-mortem toxicology results (suggesting the person was medicated and so likely had a diagnosed condition), the statistical significance of the results disappear.

²⁴⁶ *Ibid* 145-146.

CEWs, providing support to those who draw a connection between them. “Excited delirium” is a label for deaths, as subsection 5.12 will explain in greater detail, that is most frequently applied to people who are intoxicated with drugs or alcohol, or experiencing psychosis.²⁴⁷ Excited delirium is a forensic pathology theory used to label the deaths of individuals who die in police or medical custody (or theoretically in other circumstances).

While some literature has shown that there might be a link between CEW use and the deaths of those who experience mental health disability, other literature has been dismissive of the potential health risks of CEWs for those who experience mental health disability, including one large CEW industry-funded international study that suggested pain caused by CEWs is “usually irrelevant since 80% of less-lethal force recipient subjects are largely analgised by illegal drugs, alcohol, or psychotic break,”²⁴⁸ a very disturbing statement from a civil and disability rights point of view. The statement is also evidence of how persons who experience mental health disability are dehumanized in some medical literature on this topic by diminishing the significance of pain this population is thought to experience or by suggesting they don’t feel pain at all.²⁴⁹

²⁴⁷ See e.g. James Jauchem, “Deaths in custody: Are some due to electronic control devices (including TASER® devices) or excited delirium?” (2010) 17 *Journal of Forensic and Legal Medicine* 1; J. Strote & H. Range Hutson, “Taser Use in Restraint-Related Deaths” (2006) 10:4 *Prehospital Emergency Care* 447.

²⁴⁸ See Kroll et al, “Benefits, Risks, and Myths of Taser”, *supra* note 199 at 2.

²⁴⁹ Medical literature on psychosis dating back to the works of Eugen Bleuler and Emil Kraepelin at the beginning of the 20th Century has sometimes claimed that those experiencing it do not feel pain or are insensitive to it (see Robert Dworkin, “Pain Insensitivity in Schizophrenia: A Neglected Phenomenon and Some Implications” (1994) 20:2 *Schizophrenia Bulletin* 235 at 235), although this literature has primarily focused on those labelled schizophrenic and this hypothesis remains controversial. For example, reviews of the studies undertaken on this phenomenon reveal that there has been little evidence of a biological explanation for this claimed effect despite different theories being tested, (Malgorzata Urban-Kowalczyk, Justyna Pigonska & Janusz Smigielski, “Pain perception in schizophrenia: influence of neuropeptides, cognitive disorders, and negative symptoms” (2016) 11 *Neuropsychiatry Disease and Treatment* 2023); insufficient evidence establishing that this supposed effect is not a matter of behavioural differences or how medical practitioners interpret the behaviours and conveyed experiences of those labelled as psychotic (A. Autié et al, “Douleur et schizophrénie : mythe et réalité” (2009) 35 *L’Encéphale* 297 at 302) or related to the subjective experience of those labelled as psychotic, since pain is heavily subjective (Lizardo Cruzado et al, “Severe Burns and Amputation of Both Arms in the First Psychotic Episode of a Schizophrenic Patient” (2015) *Case Reports in Psychiatry*, article ID 405713), and a lack of studies on the impact of anti-psychotic medications may play on this reported phenomenon. (See Gwenda Engels & Erik Scherder, “Clinical Pain in Schizophrenia: A Forgotten

Ultimately, little has changed since the 2013 release of the Council of Canadian Academies and Canadian Academy of Health Sciences' Expert Panel on the Medical and Physiological Impacts of Conducted Energy Weapons. There continues to be debate and disagreement in the literature on the health impacts of these devices and while there is now broad consensus that they can be lethal in some contexts, the extent of that risk is difficult to gauge in light of the scientific uncertainty around how and why people are dying following the application of CEWs.

1.4.12 Sudden in Custody Deaths: "Excited Delirium" and Positional or Restraint Asphyxia

"Excited delirium" (also known as "agitated delirium"²⁵⁰ or "sudden in custody death syndrome"²⁵¹) is a medicalized term used to describe the deaths of people in custody shortly after or during arrest and apprehension in a context where the medical cause of death is not immediately clear. By medicalized I mean that medical terminology ("delirium" or "syndrome") is employed to narrow the possible causes of these deaths. Claiming that this is a special medical category means that a medical explanation has to be sought, in the form of an underlying illness or individual pathology, rather than considering the violence and restraint in which they occur as potential explanations.

Area" in Gisele Pickering & Stephen Gibson, *Pain, Emotion and Cognition: A Complex Nexus* (Heidelberg: Springer, 2015) at 226-227), and evidence that analgesia appears to differ in nature and degree when those with different clinical labels are compared. (See Amedeo Minichino, et al, "Pain processing abnormalities in bipolar I disorder, bipolar II disorder, and schizophrenia: A novel trait marker for psychosis proneness and functional outcome?" (2016) 18:7 *Bipolar Disorders* 591).

In light of the significant uncertainty on this point, claiming that pain induced in this population is "irrelevant" is dehumanizing because it removes a common (though by no means necessary) human trait, pain, from a subset of people based on medical labelling alone, suggesting that we need not be concerned about their experiences of violence. With respect to drugs and alcohol, some drugs (e.g. the opiates) obviously have some analgesic effect, but this can by no means be said for all drugs, and results of the analgesic effects of alcohol have been mixed. (See T. Thompson, "Analgesic Effects of Alcohol: A Systematic Review and Meta-Analysis of Controlled Experimental Studies in Healthy Participants" (2017) 18:5 *The Journal of Pain* 499). Consequently, to suggest that the pain of those who have consumed drugs or alcohol is "irrelevant" is a huge generalization given the radically different effects that different individuals, and different drugs, and different amounts, would create.

²⁵⁰ For an example of studies employing this terminology, see Haresh Mirchandani et al, "Cocaine-Induced Agitated Delirium, Forceful Struggle, and Minor Head Injury: A Further Definition of Sudden Death During Restraint" (1994) 15:2 *American Journal of Forensic Medicine and Pathology* 95.

²⁵¹ For an example of the studies employing this terminology, see Debra Robison & Shelby Hunt, "Sudden in custody death syndrome" (2005) 27:1 *Topics in Emergency Medicine* 36.

Some literature on “excited delirium” suggests it is a condition that is not always fatal and although there are some non-fatal cases to which this term has been applied,²⁵² the majority of studies and case reports on excited delirium concern in-custody deaths, usually proximate to arrest by police, or less frequently in psychiatric hospital restraint contexts.²⁵³ These deaths are generally linked to stimulant drug use and mental health diagnoses. While descriptions of it vary in the literature, many “symptoms” are attributed to the notion of excited delirium, which has been described as:

a condition that manifests as a combination of delirium, psychomotor agitation, anxiety, hallucinations, speech disturbances, disorientation, violent and bizarre behavior, insensitivity to pain, elevated body temperature, and extraordinary strength.²⁵⁴

A study reviewing the features most commonly associated with excited delirium in the literature has found they are (in order of frequency):

- “call for disturbance/psychomotor agitation/excitation”²⁵⁵;
- “male subject”²⁵⁶;
- “mean age ~30s”²⁵⁷;
- “psychosis/delusional/paranoid/fearful”²⁵⁸;

²⁵² For examples of non-fatal case reports see Theodore Flush, Walter Shakespeare, & Dorian Jacobs, “Cocaine-induced Agitated Delirium: A Case Report and Review” (2015) 30:1 *Journal of Intensive Care Medicine* 49; Thomas Scraggs et al, “Prehospital Ketamine is a Safe and Effective Treatment for Excited Delirium in a Community Hospital Based EMS System” (2016) 31:5 *Prehospital and Disaster* 563.

²⁵³ For application of this theory to psychiatric restraint case, see Audrey Morrison & David Sadler, “Death of a Psychiatric Patient during Physical Restraint: Excited Delirium – A Case Report” (2001) 41:1 *Medicine, Science and the Law* 46.

²⁵⁴ Keith Wesley, “Excited Delirium Strikes Without Warning” (2011) *Journal of Emergency Medical Services*, online: <<https://www.jems.com/administration-and-leadership/excited-delirium-strikes-without/#:~:text=Excited%20delirium%3A%20A%20condition%20that,body%20temperature%20and%20superhuman%20strength.>>. Note, that this is only one of the somewhat varied definitions for this condition provided in the literature – which differs between studies as this “condition” does not have a set list of symptoms that are medically defined. However, this definition is a useful one because Williams’ description includes the most common symptoms said to be prevalent in those labelled with “excited delirium”.

²⁵⁵ Gary Vilke et al, “Excited Delirium Syndrome (Exds): Defining Based on a Review of the Literature” (2012) 43:5 *Journal of Emergency Medicine* at 901. NOTE: Other factors were also included on this list, but were less prevalent in the literature according to the literature review conducted.

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*

- “sudden collapse after restraint”²⁵⁹;
- “hyperthermia”²⁶⁰,
- “significant resistance to physical restraint”²⁶¹;
- “history of psychostimulant abuse”²⁶²;
- “violent/combative/belligerent/assault call”²⁶³;
- “drug screen positive for psychostimulants”²⁶⁴;
- “history of mental illness”²⁶⁵;
- “superhuman strength”.²⁶⁶

While excited delirium is a medical theory employed usually by medical examiners, coroners, and forensic pathologists, it is not a recognized medical diagnosis,²⁶⁷ unlike “delirium” which is listed in the DSM-5, and is distinct from it since delirium does not share attributes like hyperthermia, violent behaviour, insensitivity to pain, and extraordinary strength, that are included in most accounts of excited delirium.²⁶⁸ While not a listed diagnosis it has received approval from the American College of Emergency

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² *Ibid.*

²⁶³ *Ibid.*

²⁶⁴ *Ibid.*

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*

²⁶⁷ It is not listed in the Diagnostic and Statistical Manual or the ICD-10, the two predominant mental health diagnostic systems in the world. See Asia Tekeuchi, Terence Ahern & Sean Henderson, “Excited Delirium” (2011) XII:1 Western Journal of Emergency Medicine 77 at 77.

²⁶⁸ “Delirium” is defined in the *Diagnostic and Statistical Manual*, 5th Ed. as a “neurocognitive disorder” having the following diagnostic criteria: “A. A disturbance in attention (i.e., reduced ability to direct, focus, sustain, and shift attention) and awareness (reduced orientation to the environment). B. The disturbance develops over a short period of time (usually hours to a few days), represents a change from baseline attention and awareness, and tends to fluctuate in severity during the course of a day. C. An additional disturbance in cognition (e.g., memory deficit, disorientation, language, visuospatial ability, or perception). D. The disturbances in Criteria A and C are not better explained by another preexisting, established, or evolving neurocognitive disorder and do not occur in the context of a severely reduced level of arousal, such as coma. E. There is evidence from the history, physical examination, or laboratory findings that the disturbance is a direct physiological consequence of another medical condition, substance intoxication or withdrawal (i.e., due to a drug of abuse or to a medication), or exposure to a toxin, or is due to multiple etiologies.” (*Diagnostic and Statistical Manual*, 5th ed (Arlington: American Psychiatric Association, 2013) at section II, “Neurocognitive Disorders”).

Physicians Task Force, who stated “Excited Delirium Syndrome is a real syndrome of uncertain etiology. It is characterized by delirium, agitation, and hyperadrenergic autonomic dysfunction, typically in the setting of acute on chronic drug abuse or serious mental illness.”²⁶⁹

A significant feature of excited delirium is that it lacks a medical etiology (although there are several ongoing attempts to find one), such that like most mental health diagnostic labels, it is predominantly a collection of subjectively determined descriptions of behaviour that are purported to frequently co-occur in a person labelled with this term. Some of the potentially clinically verifiable signs of excited delirium like hyperthermia (elevated body temperature), could be objectively recorded, but because these deaths generally occur in non-hospital police restraint situations, many of the testable aspects of the condition have not been tested, and reliance is placed almost exclusively on anecdotal accounts.²⁷⁰ Indeed, this condition is generally diagnosed post-mortem, although some authors estimate that only some people showing signs of the “condition” actually die.²⁷¹

Literature supportive of the existence of excited delirium often traces the historical roots of this “condition” to “Bell’s mania”. This medical diagnosis was introduced in 1894 by Dr. Luther Bell, a psychiatrist at the McLean Asylum for the Insane in Massachusetts, USA to describe often fatal (3/4 of the time) delirium among the “insane”.²⁷² Bell’s mania was employed as a diagnosis until the early 1950s when it seemingly disappeared, which some argue was a result of the introduction of neuroleptic

²⁶⁹ Mark DeBard et al, *White Paper Report on Excited Delirium Syndrome* (American College of Emergency Medicine, 2009) at 15, online: <www.academia.edu/1131068/ACEP_Excited_Delirium_White_Paper_-_Contribution_via_CA_Hall_MD_FRCPC>.

²⁷⁰ Theresa DiMaio & Vincent DiMaio, *Excited Delirium Syndrome: Cause of Death and Prevention*, 1st ed (Boca Raton: CRC Press, 2005) at 2.

²⁷¹ For example, Christine Hall et al, studied police descriptions of excited delirium among police use of force reports and suggests that 15% of those upon whom force is exerted have 3 or more signs of excited delirium. (Christine Hall et al, “Frequency of signs of excited delirium syndrome in subjects undergoing police use of force: Descriptive evaluation of a prospective, consecutive cohort” (2013) 20:2 *Journal of Forensic and Legal Medicine* 102.)

²⁷² Roger Byard, “Ongoing Issues with the Diagnosis of Excited Delirium” (2017) 14 *Forensic Science, Medicine and Pathology* 149 at 149.

drugs.²⁷³ The claim is that “excited delirium” is in fact a long recognized disease that has recently been rediscovered and renamed.²⁷⁴ While Dr. Luther’s work is often cited it is not often quoted. He lays out very thoroughly what this form of mania entails, describing patients as those whose “physiognomy and articulation [...] are those of fever and delirium,”²⁷⁵ along with agitation and violent struggle if approached.²⁷⁶ Among other factors, he notes that “[t]he patient will get so little food, so little sleep, and be exercised with such constant restlessness and anxiety, that he will fall off from day to day. [...] At the expiration of two or three weeks your patient will sink in death ...”²⁷⁷ What is notable about this description is how much longer the timeline is when contrasted with “excited delirium”, which is said to kill very quickly after onset. One rarely mentioned commonality in the excited delirium literature, is that these deaths frequently occur while the individual is restrained. He writes: “I find by our record that almost every one of these cases was treated with the bed-strap to secure recumbency – a measure scarcely ever employed with us in any other case.”²⁷⁸

Perhaps a more realistic history of excited delirium is that this “condition” emerged from the concept of cocaine-induced psychosis, which was first described in the medical literature in the 1970s.²⁷⁹ Indeed, the term “excited delirium” only appeared in medical literature in the 1980s when Wetli and Fishbain used it to describe sudden deaths following cocaine induced psychosis.²⁸⁰ Later, in the 1990s,

²⁷³ *Ibid.*

²⁷⁴ See e.g. James Gill, “The syndrome of excited delirium” (2014) 10 Forensic Science, Medicine and Pathology 223 at 224; Philippe Gonin et al, “Excited Delirium: A Systematic Review” (2018) 28:5 Academic Emergency Medicine 552 at 553.

²⁷⁵ Luther V. Bell, “On a Form of Disease resembling some advanced stages of mania and fever, but so contradistinguished from any ordinarily observed or described combination of symptoms, as to render it probable that it may be an overlooked and hitherto unrecorded malady” (1849) 1 American Journal of Insanity 97 at 100.

²⁷⁶ *Ibid* at 101.

²⁷⁷ *Ibid* at 101.

²⁷⁸ *Ibid* at 100.

²⁷⁹ See e.g. Edith Samuel, Robert Williams & Richard Ferrell, “Excited delirium: Consideration of selected medical and psychiatric issues” (2009) 5 Neuropsychiatric Disease and Treatment 61 at 61; Tekeuchi, Ahern & Henderson, *supra* note 267 at 77-78.

²⁸⁰ C. Wetli & D. Fishbain, “Cocaine-induced psychosis and sudden death in recreational cocaine users” (1985) 30 Journal of Forensic Science 873; D. Fishbain & C. Wetli, “Cocaine, Intoxication, Delirium, and Death, in a Body Packer” (1981) 10:10 Annals of Emergency Medicine 531.

“sudden in custody death syndrome” was coined to describe unexpected deaths in police custody where autopsy and toxicology results failed to establish a cause of death.²⁸¹

In essence, excited delirium and sudden in custody death syndrome arose to answer the question of why people die in violent police encounters or under police restraint – and they suggest that the death is the result of an individual with an as yet undiscovered pathology – rather than a product of the restraint or violence itself. Consequently, sudden in custody death and excited delirium are often described in a context where they are distinguished from positional asphyxia and restraint asphyxia. Positional asphyxia is: “compromise of ventilation because of sustained interference with the chest and/or diaphragm or occlusion of the upper airway due to sustained abnormal positioning of the body.”²⁸² In essence, it occurs when someone is believed to have been deprived of oxygen due to the positioning of their body. The term was popularized in the 1990s and used to suggest that prone positioning, in which a subject is laid face down on their stomach, was related to sudden in-custody deaths.²⁸³ Positional asphyxia can occur in non-restraint and non-police involved situations, such as cases where an intoxicated person or an assaulted person loses consciousness in a position that deprives them of oxygen.²⁸⁴

Restraint asphyxia has been described as “a term coined to suggest that while prone restraint may itself be “physiologically neutral,” the addition of weight force, such as officers holding down an individual in this prone restraint position [...] may further limit ventilation to the point that the subject is

²⁸¹ Debra Robison & Shelby Hunt, “Sudden in custody death syndrome” (2005) 27:1 Topics in Emergency Medicine 36 at 36.

²⁸² Christine Hall et al, “Restraint in police use of force events: Examining sudden in custody death for prone and not-prone positions” (2015) 31 Journal of Forensic and Legal Medicine 29 at 30.

²⁸³ In the 1980s and 1990s many reports of positional asphyxia and restraint asphyxia began to appear in medical journals. See e.g. Donald Reay et al, “Effects of positional restraint on oxygen saturation and heart rate following exercise” (1988) 9:1 American Journal of Forensic Medicine and Pathology 16 [Donald Reay et al, “Effects of positional restraint”]; Donald Reay et al, “Positional asphyxia during law enforcement transport” (1992) 13:2 American Journal of Forensic Medicine and Pathology 90.

²⁸⁴ See e.g. Tarini Fernando & Roger Byard, “Positional Asphyxia without Active Restraint Following an Assault” (2013) 58:6 Journal of Forensic Sciences 1633.

at risk for asphyxiation.”²⁸⁵ In other words, restraint asphyxia suggests that even if the body position of the deceased did not, by itself, prevent them from breathing, police restraints and police force applied to the body may individually, or in conjunction with their positioning, cause asphyxiation. Restraint asphyxia was popularized as a theory in the 1980s and 1990s when studies began to focus on police restraint techniques as potential causes of in-custody deaths.²⁸⁶ Tracking or estimating the number of restraint asphyxia or positional asphyxia deaths in police use of force encounters can be very challenging because there are not always clear physical indications of asphyxia, leading to assumptions that the death was caused by drug toxicity or other possible factors that are more immediately measurable.²⁸⁷

Research on the physiological impacts of restraints suggests that restraint asphyxia is a possible means of death.²⁸⁸ “Hog-tying”, a term describing affixing both the wrists and ankles behind the back and securing them together has been strongly associated with positional asphyxia. One study demonstrated that in healthy subjects, hog-tying leads to increased recovery time, measured by blood oxygen levels, in 90% of subjects, and increased recovery time, measured by heart rate, in 88% of subjects.²⁸⁹ However, other studies refute the possibility that restraint asphyxia could cause death²⁹⁰. For example, in one study volunteers in a lab setting were hog-tied in prone position with 50lbs of weight on their back (to account for the weight of a police officer kneeling on them) and had their breathing and vital signs monitored. The

²⁸⁵ Davut Savaser & Theodore Chan, “Positional and Restraint Asphyxia” in Darrell Ross & Gary Vilke, eds, *Guidelines for Investigating Officer-Involved Shootings, Arrest-related Deaths and Deaths in Custody*, (New York: Routledge, 2017) at 156.

²⁸⁶ See e.g. Donald Reay & John Eisele, “Death from law enforcement neck holds” (1982) 3:3 *American Journal of Forensic Medicine Pathology* 253; Samuel Stratton, Christopher Rogers & Karen Green, “Sudden death in individuals in hobble restraints during paramedic transport” (1995) 25:5 *Annals of Emergency Medicine* 710; Ronald O’Halloran & Larry Lewman, “Restraint asphyxiation in excited delirium” (1993) 14:4 *American Journal of Forensic Medicine and Pathology* 289; Michael Pollanen et al, “Unexpected death related to restraint for excited delirium: a retrospective study of deaths in police custody and in the community” (1998) 158:12 *Canadian Medical Association Journal* 1603.

²⁸⁷ See Reay et al, “Effects of positional restraint”, *supra* note 283 at 16.

²⁸⁸ See e.g. Ronald O’Halloran & Larry Lewman, *supra* note 286; Stratton, Rogers & Green, *supra* note 286.

²⁸⁹ See Reay et al, “Effects of positional restraint”, *supra* note 283 at 18.

²⁹⁰ See Theodore Chan et al, “Weight force during prone restraint and respiratory function” (2004) 25:3 *American Journal of Forensic Medicine and Pathology* 185; Gary Vilke et al, “Does weight force during physical restraint cause respiratory compromise?” (2005) 12:5 *Academy of Emergency Medicine Supplement* 1.

authors concluded that this positioning would have an insufficient impact on oxygen in-take to cause hypoxia (i.e. deprivation of oxygen in tissue) or hypoventilation (insufficiently deep breathing for sufficient gas exchange of oxygen and carbon dioxide).²⁹¹ The difficulty with studies trying to recreate positional asphyxia scenarios is that they do not involve unhealthy individuals who may have high levels of drugs or alcohol in their systems, underlying medical concerns and situational stress. They also generally assume that police follow procedure, which may not always be the case.

Several studies of sudden in custody deaths and their relationship to “excited delirium” and positional/restraint asphyxia have been conducted in Canada. In Ontario, the Office of the Chief Coroner undertook a study of 21 “unexpected deaths associated with excited delirium” that occurred between 1988 and 1995.²⁹² The cases were diagnosed as excited delirium ex post facto by reviewers examining “unexpected deaths”²⁹³ that exhibited “well-described characteristics of excited delirium including bizarre or hyperactive behaviour, paranoia, shouting, thrashing, ranting and performing feats of apparently “superhuman” strength.”²⁹⁴ They found that in 86% of the cases the deceased was in prone position, handcuffed, handcuffed and shackled, or with “chest compression”, and in the other 14% of the cases the deceased had pressure applied to their neck.²⁹⁵ Among those identified as having “excited delirium”, 12 had “psychiatric illness”, 7 had “cocaine-induced psychosis”, and 1 had “toxic effects from other drugs”²⁹⁶ – suggesting that all or most of the cases identified were persons who experienced mental health disability. Pollanen et al., point out that “The most striking finding of this study was that all of those who

²⁹¹ Chan et al, *supra* note 290.

²⁹² Pollanen et al, *supra* note 286.

²⁹³ *Ibid.*

²⁹⁴ *Ibid* at 1605.

²⁹⁵ *Ibid* at 1605.

²⁹⁶ *Ibid* at 1605.

died unexpectedly during or after an episode of excited delirium had been physically restrained.”²⁹⁷ The authors further suggest that restraint could contribute to excited delirium deaths. They wrote:

Our findings indicate that many deaths related to excited delirium are associated with restraint in the prone position. Acute excited delirium resulting from psychiatric illness or cocaine use was the most important underlying cause. It may be that the greater oxygen requirement of people with excited delirium predisposes them to rapid anoxic death if they are restrained.²⁹⁸

A second study of restraint-related excited delirium deaths was conducted in Ontario and examined coroner’s reports for deaths between 2004-2011.²⁹⁹ Michaud identified 20 deaths that took place following police restraint, among whom 70% (14) had “[s]igns and symptoms of ExDS (excited delirium) resulting from drug-induced psychosis or psychiatric illness.”³⁰⁰ His findings reveal that only 2 of the 14 individuals identified as having “excited delirium” had a “psychiatric illness”, whereas 12 had non-lethal drug amounts (11 cocaine, 1 methamphetamine) in their system, and 2 had lethal cocaine levels,³⁰¹ a change from the earlier study where “psychiatric illness” was more significantly linked to excited delirium labelling than drug use. Perhaps most significantly, Michaud’s study considered the timeline in the deaths he studied, noting that some of the individuals were found non-responsive immediately once handcuffs were applied, whereas others became non-responsive after struggling in handcuffs for some time. He also found that all four individuals who were not identified as having excited delirium who were found non-responsive without the application of handcuffs (meaning they went unresponsive before handcuffs could be applied) had been placed in prone position. Three others had chest compressions applied, which draws into question studies that fail to distinguish between deaths in the “control phase”

²⁹⁷ *Ibid* at 1606.

²⁹⁸ *Ibid* at 1607.

²⁹⁹ Unfortunately, methodologically these reports were sourced from public sources including the website of the coroners office and CanLII (where they used to be published), which as the present study demonstrates, is not a reliable means of collecting in custody death coroners reports). Consequently, his study may not reveal accurate trends, particularly given the very small number of such deaths.

³⁰⁰ Alain Michaud, “Restraint-related deaths and excited delirium syndrome in Ontario 2004-2011” (2016) *Journal of Forensic and Legal Medicine* 30 at 31.

³⁰¹ *Ibid* at 32.

– i.e. before handcuffs are applied, and the “restraint phase” – afterwards.³⁰² Interestingly, although Michaud employs the theory of excited delirium in his study, he notes the subjective nature of the term and claims it has been abused. He states: “Identifying individuals in ExDS is a subjective exercise based on non specific clinical features and it has a low specificity.” Michaud gives the example of a case of a young schizophrenic man who died in the custody of police and whose death had none of the features one might expect of the condition (like sudden death and agitation) but whose death was nevertheless presented this way through “expert” opinion, providing some support for the notion that excited delirium is used as a means of medicalizing police-involved deaths of those with mental health disabilities.

In addition to the Ontario studies, the largest Canadian study on sudden in custody deaths reports excited delirium and positional asphyxia in 4,828 use of force events across 3.25 million police-public interactions in seven Canadian police agencies.³⁰³ This study had only one in-custody death among the use of force events that was not caused by an obvious external cause like gunshot wound and the individual died in non-prone positioning “with all 10 features of excited delirium.” Dr. Christine Hall et al., noted that 81.5% of those on whom force was used “exhibited alcohol and/or drug intoxication, and/or emotional distress at the scene.”³⁰⁴ The study claims to add support for the notion that prone and not prone positioning makes little difference as to subject mortality, but also notes that the only sudden in custody death in the study was a single individual identified as “displaying both drug intoxication and mental distress,”³⁰⁵ signs of excited delirium, and who had been subject to a CEW prior to death.

Our data provide evidence that the nature of the subject being restrained, rather than specific positioning is more likely to predict sudden in custody death in the law enforcement environment.³⁰⁶

³⁰² *Ibid.*

³⁰³ Hall et al., *supra* note 282.

³⁰⁴ *Ibid* at 31.

³⁰⁵ *Ibid* at 34.

³⁰⁶ *Ibid* at 33.

And that:

The not-prone position was not protective in this case and we argue that the presence of excited delirium rather than the positioning should be the variable of interest in sudden in custody death.³⁰⁷

Hall's study has been criticized for drawing general conclusions about sudden in custody death based on what was, essentially, a single case.³⁰⁸

In addition to academic studies, excited delirium and sudden in custody deaths have also attracted the interest of police and policy-makers in Canada, largely because of their potential association with the use of CEWs. In 2008, the province of Nova Scotia commissioned the *Report of the Panel of Mental Health and Medical Experts Review of Excited Delirium*, which concluded that,

There is general agreement in the scientific literature that mortality rates are increased in the presence of the signs and symptoms of excited delirium – even with medical intervention or in the absence of use of restraints by law enforcement.

The panel believes it is reasonable to consider that, when further stressed by physical struggle or the application and continuation of physical restraints (including the CED [conducted energy device]), an individual exhibiting the syndrome of excited delirium may be at increased risk for sudden death. Similarly, the pre-existence of a medical or psychiatric condition (such as a psychotic illness, pre-existing cardiac condition, delirium with or without the use of psychostimulant drugs) may increase the risk for sudden death in an individual showing signs and symptoms consistent with excited delirium.³⁰⁹

This review lent support to the concept of excited delirium in Canada, but was followed two years later by more critical consideration of the issue in the Braidwood Inquiry following the CEW-related death of Robert Dziekanski in Vancouver. At the Braidwood Inquiry several medical “experts” testified about the applicability of the concept of excited delirium and sudden in custody deaths.³¹⁰ The police officers

³⁰⁷ *Ibid* at 33.

³⁰⁸ Jared Strote, “Safety of prone positioning still in doubt” (2015) 36 *Journal of Forensic and Legal Medicine* 108.

³⁰⁹ Stan Kutcher et al, *Report of the Panel of Mental Health and Medical Experts Review of Excited Delirium* (Halifax: Minister of Justice and the Attorney General, Nova Scotia, 2009) at ii.

³¹⁰ Thomas Braidwood, *Why?: The Robert Dziekanski Tragedy* (Vancouver: Braidwood Inquiry, 2010), online (pdf): <www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/inquiries/braidwoodphase2report.pdf> at 15.

involved claimed to have considered that Mr. Dziekanski might have had excited delirium when deciding to apply a CEW to him, which was later brought into question by an email suggesting that they had not, in fact, considered excited delirium at the time, but rather determined before the confrontation to resort to a taser if the subject did not comply.³¹¹ Indeed, an email provided to the inquiry very late in the process provides a window into the media strategy discussions being held within the RCMP concerning this very high profile death.

From: Dick (Richard) BENT

To: MACINTYRE, Al

Date: 2007-11-05 13:46

Subject: Media Strategy — Release of the YVR video

Al, spoke with Wayne Rideout today about our strategy for the release of the video. He had a couple of concerns. First, he didn't think we should be providing any explanation for what was transpiring but instead just say the Inquest will take evidence under oath etc. I went through the rationale and said we need to have an explanation otherwise our detractors will put their own spin. Second, as we're going to have someone speak to this, he suggested that it should be someone other than Dale Carr otherwise we may lose the perception of independence. He would rather have someone separate from IHIT [Integrated Homicide Investigation Team – internal to RCMP] do this. We both think a Use of Force expert would be ideal. Gregg Gillis has not been involved in this investigation so is independent. I suggest we have Gregg do the narrative of what is happening. Finally, spoke to Wayne and he indicated that the members *did not articulate that they saw the symptoms of excited delirium, but instead had discussed the response en route and decided that if he did not comply that they would go to CEW*. He has asked investigators for a synopsis and should have it by noon tomorrow. [emphasis added].³¹²

³¹¹ For example of testimony citing “excited delirium” as a reason for tasering see Cst. Rundel, p. 133; Cst. Millington, p. 151, Cpl. Robinson, p. 173l; Braidwood, *supra* note 310.

It is worth noting that two of the officers involved in this inquiry were convicted of perjury with respect to their testimony, so the evidence itself may not be reliable, but it provides evidence of how police services have used excited delirium as a concept to medicalize use of force deaths in Canada. (See *R v Millington*, 2015 BCSC 515, *aff'd* 2016 BCCA 293, 2017 SCC 533; *R v Robinson*, 2015 BCSC 433, *aff'd* 2017 BCCA 6, 2017 SCC 52).

³¹² Braidwood, *supra* note 310 at 174-175.

At the time this email was introduced into evidence several of the police officers involved had already testified that excited delirium was a consideration in their decision of to use force via taser.³¹³ While several inconsistencies in testimony led to charges, and some convictions of perjury against the officers who testified at the Braidwood Inquiry, this controversy also exhibits the value of concepts like excited delirium to police as way of providing a medical cause of death outside of police actions.

Ultimately, Commissioner Braidwood rejected the applicability of the concepts of sudden in-custody death and excited delirium, stating:

In my view, neither term is of much assistance in attempting to ascertain how Mr. Dziekanski died. They are at best descriptive of the cluster of physical symptoms and actions that often surround such deaths, but do not provide any insight into the mechanism of such deaths. For example, ascribing a death to “sudden death during restraint” gives no greater insight into the underlying medical cause of death than would “sudden death during a car accident.” The same can be said for “excited delirium.” It may be a convenient label to cluster frequently recurring physical conditions and activities, but offers no guidance as to the underlying physiological mechanisms that caused the death. In addition, I do not think that either of these postulated conditions have any application to this case, since Mr. Dziekanski was aware of his surroundings, complied with directions, was neither impervious to pain nor intoxicated with an illicit drug such as cocaine, and had no history of serious mental illness.³¹⁴

Indeed the RCMP’s use of “excited delirium” in this case arguably speaks to the imprecision of the “syndrome” and the willingness of many to avoid the possibility that police actions could have caused or contributed to a death, given Robert Dziekanski’s conduct prior to death and the lack of characteristics that are said to be most typical of excited delirium (drug intoxication, mental health diagnosis).

A large systematic review of 66 excited delirium studies lends some credence to Braidwood’s skepticism about the explanatory power of this “syndrome.” The review found that “the literature on excited delirium syndrome shows a global predominance of low to very low levels of evidence”³¹⁵ and

³¹³ *Ibid* at 311.

³¹⁴ *Ibid* at 331.

³¹⁵ Gonin et al, *supra* note 274 at 561.

noted that “excited delirium” studies show significant disagreement on the criteria of excited delirium and how many criteria must be present for “diagnosis,” with studies admitting cases with between 1-6 criteria and some having no required criteria.³¹⁶ The authors nevertheless concluded that “[o]ur results suggest that excited delirium syndrome is a real clinical entity, that it still kills people, and that it *probably* has specific mechanisms and risk factors”³¹⁷ [emphasis added], a confusing statement in light of their other conclusions. This study also, suggested that

Most cases of ExDS occur in the context of psychoactive substance abuse or among psychiatric patients. In more than 90% of cases, the results of toxicology screening tests are positive and 50% of patients have a preexisting psychiatric background. Young age, male sex, African-American race, and being overweight are all independent risk factors for fatal ExDS.³¹⁸

This is notable because with the possible exception of being overweight, these risk factors mirror some of the risk factors of police-involved use of force deaths in North America more generally. Indeed, critics have suggested that “excited delirium” could be a problematic theory because the symptoms it claims are actually quite common in use of force situations and only become part of the syndrome when the rarity of an unexplained death occurs with them, forming a sort of tautology.³¹⁹ Jared Strote has argued that excited delirium could simply provide a means of overlooking or excusing excessive force.³²⁰ Indeed, excited delirium has been suggested to be a situation that cannot be de-escalated by Canadian researchers Christine Hall and Chris Butler. They write:

[...] it is imperative for people to understand that a subject in a state of excited delirium is suffering from severe abnormalities in cognitive thinking and sensory perception. Traditional negotiation techniques are fruitless as the subject cannot interpret his own sensory input

³¹⁶ *Ibid* at 561.

³¹⁷ *Ibid* at 562.

³¹⁸ *Ibid* at 561.

³¹⁹ Jared Strote, “Excited delirium as a potentially dangerous diagnosis” (2014) 31:3 British Medical Journal 256 at 256.

³²⁰ *Ibid* at 256.

correctly or make appropriate judgments from it. The notion that such an individual can be ‘talked down’ reflects a disrespect for and inadequate understanding of delirious states.³²¹

Excited delirium thus effectively removes those so labelled, predominantly people identified as intoxicated or mentally ill, as being susceptible to any police interaction other than forcible restraint in order to bring them to hospital for treatment.

Amanda Truscott has suggested that excited delirium is especially problematic when applied as a cause of death because these deaths may, in truth, be positional or restraint asphyxia deaths³²² and may otherwise be caused, in part or in full, by police use of force. It has also been noted that many studies attempting to prove the existence of excited delirium have been funded by Taser International (now Axon),³²³ a company with a significant interest in proving it is a standalone medical cause of death, given the high frequency of CEW use in incidents labelled as “excited delirium deaths.”³²⁴

Ultimately, the literature on excited delirium is split, with most civil rights groups and physicians outside of the emergency medicine and pathology fields questioning the coherence of this syndrome, whilst medical examiners and coroners, pathologists, emergency medicine physicians and police seem more inclined to believe that excited delirium has a plausible underlying biochemical or genetic cause that is more likely the cause of sudden in-custody deaths than asphyxia.³²⁵ As will be discussed in greater detail in chapter 6, excited delirium remains a commonly employed concept in Canada to describe the police-involved deaths of those who experience mental health disability.

³²¹ Christine Hall & Chris Butler, *National Study on Neck Restraint in Policing* (Canadian Police Research Centre, 2007) at 47.

³²² See e.g. Amanda Truscott, “A Knee in the Neck of Excited Delirium” (2008) 178:6 Canadian Medical Association Journal 669.

³²³ See Wecht et al, *supra* note 58 at 97.

³²⁴ For example, studies have suggested CEWs are used in between 18-33% of “excited delirium” deaths in the USA (see Gonin et al, *supra* note 274 at 557).

³²⁵ See e.g. Kathy Glatter & Steven Karch, “Positional Asphyxia: Inadequate oxygen or inadequate theory” (2004) 141 Forensic Science International 201, in which the authors argue that it makes more sense to explore a genetic cause or pre-existing medical condition, and that the theory behind positional asphyxia is implausible.

1.4.13 The Other “Intermediate Weapons”: Pepper spray, Projectiles, Batons, and “Weapons of Opportunity”

“Intermediate weapon” is a term commonly employed in policing literature to describe police weapons that rarely lead to fatalities and can include any weapon provided to police that is less lethal than a firearm.³²⁶ There are a wide variety of intermediate weapons available to police in Canada and internationally, but some common examples of intermediate weapons include:

- Chemical Irritants: Oleoresin capsicum spray (a.k.a. OC spray or pepper spray) and Tear gas (a.k.a. “agent CS”³²⁷ or 2-chlorobenzalmalonitrile)
- Projectiles: “ARWEN guns,”³²⁸ “impact munitions”³²⁹ (i.e. guns loaded with less-lethal projectiles – e.g. foam, plastic, wood, rubber, or beanbag impact projectiles, teargas cannisters, smoke cannisters, flash/bang rounds, etc. that may cause physical impact, sensory distraction, or chemical irritation when shot, but are not usually not fatal³³⁰)

³²⁶ For example, the British Columbia, *Provincial Policing Standards*, section 1.2, online: <<https://www2.gov.bc.ca/gov/content/justice/criminal-justice/policing-in-bc/policing-standards>> defines “Intermediate weapon” as “a device intended or designed to be used as a weapon, but for which the normal use is not intended or likely to cause serious injury or death. Impact weapons, aerosols, and conducted energy weapons fall within this category. Intermediate weapons may also be referred to as less-lethal weapons.” But see also: Rémi Boivin & Maude Lagacé, “Police Use of Force Situations in Canada: Analyzing the Force or Resistance Ratio Using a Trichotomous Dependant Variable” (2016) 19:2 *Police Quarterly* 180 at 186, where the authors suggest that whether a weapon is considered intermediate or deadly may depend on the nature of its use (i.e. an “intermediate weapon” hit to the head could be deadly).

³²⁷ This terminology is sometimes employed in more technical studies of tear gas. See e.g. Rohini Haar et al, “Health impacts of chemical irritants used for crowd control: a systematic review of the injuries and deaths caused by tear gas and pepper spray” (2017) 17:831 *BMC Public Health*.

³²⁸ ARWEN stands for “Anti Riot Weapon ENfield” and is a common type of intermediate weapon produced in Canada by the Police Ordnance Company. See “ARWEN® Overview”, Police Ordnance Company website, online: <192.139.188.74/PoliceOrdnance/index.asp?id1=64>.

³²⁹ This terminology is sometimes used to describe the many non-traditional less lethal objects that can be fired from a gun or cannon. See e.g. Ken Hubbs & David Klinger, “Impact Munitions: Data Base of Use and Effects” (Not published by, but available from, the U.S. Department of Justice, 2004), online: <www.ncjrs.gov/pdffiles1/nij/grants/204433.pdf>.

³³⁰ Note, however, that there is some evidence that when shot at close range these weapons can be lethal. See e.g. *ibid.*

- Batons.

Generally, CEWs are included among intermediate weapons³³¹ and police service dogs occasionally are, but discussion of both will be omitted here as they are discussed in more detail above.

“Weapons of Opportunity” are unsanctioned weapons or simply objects used as a weapon by police to defend themselves and are usually objects employed to hit someone. There is no data available from special investigations units in Canada specifically tracking deaths or serious injuries associated with intermediate weapons use (aside from CEWs) or the use of weapons of opportunity by police.

A) Chemical Irritants

Among intermediate weapons, with the exception of CEWs, pepper spray has received the most study and attracted the most controversy in Canada and internationally, because it has been associated with otherwise unexplained in custody deaths.

The Correctional Service of Canada published a literature review in 2018 on deaths and injuries proximate to OC spray that notes that very rarely has OC spray been identified as a sole or contributing cause of death by physicians, but is more often identified as a factor among others, in in-custody deaths.³³² In a medical review by RCMP occupational health physician Dr. Jeremy Brown, it was noted that pepper spray “can induce potentially lethal changes in the upper airways in certain circumstances [...]”³³³ further noting that people with asthma and children may be at greater risk.³³⁴ This report also noted that

³³¹ See e.g. Ron G. Bain, “Examination of Less-Lethal Force Options, Including the Possible Expansion of Conducted Energy Weapons (CEWs)” (Toronto: Ontario Association of Chiefs of Police, 2017), online pdf: <www.oacp.ca/en/committee/cscp/public/OACP%20Report%20-%20Examination%20of%20Less-Lethal%20Force%20Options%20and%20Expansion%20of%20CEWs_Oct%2018%202017.pdf> at 2.

³³² Tori Semple & Craig Bennell, *Injuries and Deaths Proximate to Oleoresin Capsicum Spray Deployment: A Literature Review* (Ottawa: Correctional Service of Canada, 2018) at iii.

³³³ Jeremy Brown, *Comments on the Use of Capsaicin Spray*, (Ottawa: Royal Canadian Mounted Police, 1998), online (pdf): <www.publicsafety.gc.ca/lbrr/archives/cnmcs-plcng/cn26707-eng.pdf> at 3.

³³⁴ *Ibid* at 3.

pepper spray could potentially contribute to cardiac problems for those with coronary disease because exposure can cause sudden elevation of blood pressure, and it has been linked to eye injuries, including ones severe enough to require enucleation.³³⁵ Deaths following pepper spray have been documented in several studies, although causation or contribution is rarely clear, and the number of deaths causally attributed to pepper spray is low.³³⁶ Nevertheless, as one American study found, pepper spray may be linked to in-custody deaths of those who use drugs and can play a part in deaths attributed to excited delirium or positional/restraint asphyxia:

Several factors can play a role in RCA[riot control agent]-related deaths including pre-existing medical conditions, such as asthma or cardiovascular diseases; drug use, especially that of stimulants such as cocaine and methamphetamine; excited delirium; and the prone maximal restraint position (PMRP) also known as the hogtie or hobble restraint.³³⁷

Pollanen et al.'s study of excited delirium coroner's cases in Ontario found that 19% of his sample involved the use of pepper spray before death, suggesting pepper spray may be linked to excited delirium and sudden in custody death in Canada.³³⁸

Forensic pathology studies also suggest that there will generally be no clear signs that a death was caused by pepper spray on post-mortem examination, so determining if it contributed to death will often be a matter of excluding other possible causes³³⁹. This fact helps to explain why so few deaths are attributed to pepper spray use, even where there is clear evidence of this weapon being applied shortly

³³⁵ *Ibid* at 3.

³³⁶ See Craig Steffee et al, "Oleoresin capsicum (pepper) spray and in-custody deaths" (1995) 16:3 American Journal of Forensic Medicine and Pathology 185; Sadik Toprak et al, "The pathology of lethal exposure to the Riot Control Agents: Towards a forensics-based methodology for determining misuse" (2015) 29 Journal of Forensic and Legal Medicine 36; Haar et al, *supra* note 327; M.F. Yeung & William Tang, "Clinicopathological effects of pepper (oleoresin capsicum) spray" (2015) 21:6 Hong Kong Medical Journal 542.

³³⁷ Toprak et al, *supra* note 336 at 40.

³³⁸ Pollanen et al, *supra* note 286.

³³⁹ Toprak et al, *supra* note 336 at 41.

before death. Additionally, pepper spray and other chemical agents used by police can contain solvents, alcohols, and other chemicals that may have a deleterious effect in some cases.³⁴⁰

The Office of the Police Complaint Commissioner of B.C. provides some data on OC spray-involved injuries in that province. Statistical data from 2018/2019 reveals 15 cases of OC spray injury requiring medical attention.³⁴¹ There is little information about the use of OC spray on those who experience mental health disability in Canada. One American study found that those identified by police as being mentally ill or intoxicated are often believed to be less affected by OC spray, but the effectiveness of this weapon on these groups shows they are no less efficacious.³⁴² On the contrary, another American study and a Dutch study found that OC spray was, in fact, less effective on subjects intoxicated with drugs, though neither showed evidence of reduced effect on those considered mentally ill.³⁴³ These studies also found that 46% of the people upon whom the Dutch police used OC spray were identified as having a mental disorder, whereas American police in Baltimore only used it on 8.4% of people so identified, suggesting that use rates on those who are perceived to experience mental health disability are not uniformly high.³⁴⁴

³⁴⁰ Haar et al, *supra* note 327 at 2.

³⁴¹ Office of the Police Complaint Commissioner, 2018/2019 – 1st And 2nd Quarter Statistical Report, (Victoria: Office of the Police Complaints Commissioner, 2018), at 5, online: <opcc.bc.ca/wp-content/uploads/2019/02/2018-2019-1st-and-2nd-Quarter-Stats-April-1-to-Sep-30-updated.pdf>; Office of the Police Complaint Commissioner, 2018/2019 – 3rd Quarter Statistical Report, (Victoria: Office of the Police Complaints Commissioner, 2018), at 5, online: <opcc.bc.ca/wp-content/uploads/2019/02/2018-2019-3rd-Quarter-Stats-Sep-30-to-Dec-31.pdf>; Office of the Police Complaint Commissioner, 2018/2019 – 4th Quarter Statistical Report, (Victoria: Office of the Police Complaints Commissioner, 2019), at 5, online: <opcc.bc.ca/wp-content/uploads/2019/08/4th-Quarter-Statistical-Report-2018-2019.pdf>.

³⁴² Eugene Morabito & William Doerner, “Police Use of Less-Lethal Force: Oleoresin Capsicum (OC) Spray” (1997) *Policing: An International Journal of Police Strategies and Management* 688 at 686, 690.

³⁴³ See Robert Kaminski, Steven Edwards, & James Johnson, “Assessing the incapacitative effects of pepper spray during resistive encounters with the police” (1999) 22:1 *Policing: An International Journal of Police Strategies and Management* 7; Otto Adang et al, “Assessing the performance of pepper spray in use-of-force encounters: The Dutch experience” (2006) 29 *Policing: An International Journal of Police Strategies and Management* 282.

³⁴⁴ Kaminski, Edwards, & Johnson, *supra* note 343; Adang et al, *supra* note 343 at 288.

B) Projectiles

There are three broad categories of projectiles that police use (aside from traditional bullets) including: impact projectiles (e.g. bullet or beanbag objects made of less-lethal materials), chemical irritant projectiles (e.g. tear gas cannisters), and sensory distraction projectiles (e.g. smoke or flashbang projectiles). Vilke and Chan suggest that the first impact projectiles to be used as an alternative to firearms by police were wooden projectiles employed during the Hong Kong Riots in the 1950s and 1960s.³⁴⁵ An American study suggests projectiles are most commonly used in “barricade”, “mental health,” “correctional facility” and “civil disturbance/crowd control” contexts, by police.³⁴⁶ Case reports provide medical evidence of serious injuries and deaths using these weapons, particularly when they impact the abdomen, chest, or head of the subject, and they can in some cases (especially at close range or when they malfunction) penetrate the body puncturing internal organs, or cause severe injury that may lead to death.³⁴⁷

However, there is very little information about police-involved impact projectile deaths or injuries in Canada. In British Columbia, the Office of the Police Complaints Commissioner tracks injuries requiring medical attention and their statistical data for 2018/2019 suggests there were 29 injuries caused by Arwen guns or beanbag projectiles in that year.³⁴⁸ Some case law also suggests less-lethal projectile guns

³⁴⁵ Gary Vilke & Theodore Chan, “Less lethal technology: medical issues” (2007) 30:3 Policing: An International Journal of Police Strategies and Management 341 at 342.

³⁴⁶ J. Beatty, J. Stopyra, & W. Bozeman, “Injury Patterns of Less Lethal Kinetic Impact Projectiles Used by Law Enforcement” (2016) 68:4S Annals of Emergency Medicine S126 at S126.

³⁴⁷ See Vilke & Chan, *supra* note 345 at 342-343; Peter Wahl, Nicholas Schreyer & Bertrand Yersin, “Injury Pattern of the Flash-Ball®, a less-lethal weapon used for law enforcement: Report of two cases and review of the literature” (2006) 31:3 Violence: Recognition, Management and Prevention 32; Jeff Grange et al, “Penetrating injury from a less-lethal beanbag gun” (2002) 52:3 The Journal of Trauma: Injury, Infection and Critical Care 576; Thakur et al, “Non-lethal? Penetrating chest injury due to beanbag bullet” (2013) British Medical Journal Case Reports, DOI <doi.org/10.1136/bcr-2012-008482>.

³⁴⁸ Office of the Police Complaint Commissioner, 2018/2019 – 1st And 2nd Quarter Statistical Report, (Victoria: Office of the Police Complaints Commissioner, 2018) at 5, online: <opcc.bc.ca/wp-content/uploads/2019/02/2018-2019-1st-and-2nd-Quarter-Stats-April-1-to-Sep-30-updated.pdf>; Office of the Police Complaint Commissioner, 2018/2019 – 3rd Quarter Statistical Report, (Victoria: Office of the Police Complaints Commissioner, 2018), at 5,

have been implicated in injuries and deaths in Canada, including in cases involving people who experience mental health disability.³⁴⁹

C) Batons

Batons were one of the first weapons carried by police and they have changed and modernized over time.³⁵⁰ They are generally rigid sticks used to physically beat someone and they now come in extendible versions, some with identifiable patterns on them so that they cause identifiable injuries when deployed.³⁵¹ There is limited information about serious injuries caused by police batons available in case law. For example, a lawsuit was brought against the City of Victoria (*Allarie v. Victoria (City)*³⁵²), which assumes legal liability for the acts of municipal police officers, by a man who was left with brain damage requiring long-term disability status caused by being hit in the head by a police baton. In British Columbia, the Office of the Police Complaints Commission statistics suggest batons were involved in only three injuries requiring medical care in 2018/2019, suggesting that serious injuries from these weapons may be rare.³⁵³

online: <opcc.bc.ca/wp-content/uploads/2019/02/2018-2019-3rd-Quarter-Stats-Sep-30-to-Dec-31.pdf>; Office of the Police Complaint Commissioner, 2018/2019 – 4th Quarter Statistical Report, (Victoria: Office of the Police Complaints Commissioner, 2019), at 5, online: <opcc.bc.ca/wp-content/uploads/2019/08/4th-Quarter-Statistical-Report-2018-2019.pdf>.

³⁴⁹ See e.g. *Berntt v Vancouver (City of)*, 1999 BCCA 345 (CanLII); *Laferrière c Québec (Ville de)*, 2010 QCCS 4167 (CanLII); *Bergmann v Neumeier*, 2013 CanLII 48827 (AB LERB); *McLean (Litigation Guardian of) v Seisel*, [2004] O.J. No. 185 (Ont. C.A.).

³⁵⁰ Joel Johnston, *The Use of Impact Weapons By Police Officers in British Columbia* (Commission of Inquiry into Policing in British Columbia, 1993) at 6.

³⁵¹ Jason Payne-James, “Restraint Techniques, Injuries, and Death: Baton” in J Payne-James et al, eds, *Encyclopedia of Forensic and Legal Medicine* (Amsterdam: Elsevier, 2005).

³⁵² [1995] 1 WWR 655 (BC SC).

³⁵³ Office of the Police Complaint Commissioner, 2018/2019 – 1st And 2nd Quarter Statistical Report, (Victoria: Office of the Police Complaints Commissioner, 2018), at 5, online: <opcc.bc.ca/wp-content/uploads/2019/02/2018-2019-1st-and-2nd-Quarter-Stats-April-1-to-Sep-30-updated.pdf>; Office of the Police Complaint Commissioner, 2018/2019 – 3rd Quarter Statistical Report, (Victoria: Office of the Police Complaints Commissioner, 2018), at 5, online: <opcc.bc.ca/wp-content/uploads/2019/02/2018-2019-3rd-Quarter-Stats-Sep-30-to-Dec-31.pdf>; Office of the Police Complaint Commissioner, 2018/2019 – 4th Quarter Statistical Report, (Victoria: Office of the Police Complaints Commissioner, 2019), at 5, online: <opcc.bc.ca/wp-content/uploads/2019/08/4th-Quarter-Statistical-Report-2018-2019.pdf>.

D) Weapons of Opportunity

There is scant literature in Canada and internationally on police use of weapons of opportunity, beyond mere mention of the existence of such weapons or their inclusion in police policies. Domestically, our police forces are equipped with a significant range of weapons so it may be the case that weapons of opportunity are rarely used. However, case law describing police use of force occasionally makes reference to weapons of opportunity, especially the use of flashlights to strike a subject.³⁵⁴ Police cars have also been considered weapons of opportunity when they are used to hit someone.³⁵⁵ It would be useful to track the use of weapons of opportunity by police because it may help us identify what objects police do use as weapons in emergencies and to identify any risks posed by frequently employed, but not formally authorized, weapons.

1.4.14 Non-Weapon Physical Use of Force

While physical use of force without weapons is one of the most common types of force employed by police, it has received less attention by academics than force involving weapons. Physical use of force can include strikes with the hands or feet and various forms of holds. Neck or choke holds have been particularly controversial among police use of force tactics, as police were initially trained to use these techniques in the 1960s and 1970s following techniques developed in judo and jiu jitsu.³⁵⁶ Literature

³⁵⁴ Cases involving use of force with flashlights include: *Nault v Tremblay*, 1995 CanLII 1378 (BCSC); *R v Moffitt*, 1984 CarswellNWT 23; *R v Zheng*, 2011 ABPC 19 (CanLII); *Logeman v Rossa et al*, 2006 BCSC 692 (CanLII); *Swansburg v Smith*, 1994 CanLII 1770 (BCSC).

Interestingly, flashlight are also frequently mentioned in policing publications as “weapons of opportunity”, suggesting that perhaps they should be considered weapons generally since they are de facto part of the policing arsenal. (See e.g. Joel Johnston, Bruce Stuart, & Chris Lawrence, “Police Use of Conducted Energy Weapons in Canada” (2009) 9:3 Law Enforcement Executive Forum 51 at 60; Lorie Fridell, “Improving Use-of-Force Policy, Policy Enforcement, and Training” in Joshua Ederheimer and Lorie Fridell, eds, *Exploring the Challenges of Police Use of Force* (Washington: Police Executive Research Forum, 2009) at 33.

³⁵⁵ See Stephen White, Commissioner’s Response to the Civilian Review and Complaints Commission, Re: Death of Victor Duarte, November 30, 2017, online:< www.crcc-ccetp.gc.ca/pdf/VictorD-CommissionerResponse-en.PDF>.

³⁵⁶ Hall, Butler, *supra* note 321 at 20.

suggests these techniques can pose medical risks including asphyxiation, injury to the spine, and increased risk of stroke or heart attack.³⁵⁷ In Canada, a review of neck restraint techniques by Hall and Butler found that compression of the front of the neck and trachea (i.e. a choke hold) is dangerous and should not be employed except in deadly force encounters where such a technique would be justified.³⁵⁸ They also suggested that vascular neck restraints involving compression of the sides of the neck, but not the airway, should be permitted. Just like the use of CEWs, police restraint techniques and OC spray, those supporting the theory of excited delirium as a cause of death suggest that neck hold related fatalities may be caused by excited delirium.³⁵⁹

Data from British Columbia's Office of the Police Complaint Commissioner suggests that non-weapon injuries are relatively common, compared to other forms of police-involved injury, with 137 injuries requiring medical assistance attributed to empty-hand strikes in 2018/2019 alone.³⁶⁰ Canadian case law also suggests that weaponless use of force has been involved in many injuries.³⁶¹

1.6 Proposed Measures to Address Frequent or Excessive Police Use of Force Against Persons who Experience Mental Health Disability

In Canada and internationally, several studies consider the frequent use of police force against persons who experience mental health disability to be a problem and many have proposed measures

³⁵⁷ Gil Puder, *Neck Restraints as a Use of Force* (Vancouver: Policing in B.C. Commission of Inquiry, 1993) at 3-4, 14-15.

³⁵⁸ Hall, Butler, *supra* note 321 at 22-23.

³⁵⁹ Hall, Butler, *supra* note 321 at 21.

³⁶⁰ Office of the Police Complaint Commissioner, *2018/2019 – 1st And 2nd Quarter Statistical Report*, (Victoria: Office of the Police Complaints Commissioner, 2018), at 5, online: <opcc.bc.ca/wp-content/uploads/2019/02/2018-2019-1st-and-2nd-Quarter-Stats-April-1-to-Sep-30-updated.pdf>; Office of the Police Complaint Commissioner, *2018/2019 – 3rd Quarter Statistical Report*, (Victoria: Office of the Police Complaints Commissioner, 2018), at 5, online: <opcc.bc.ca/wp-content/uploads/2019/02/2018-2019-3rd-Quarter-Stats-Sep-30-to-Dec-31.pdf>; Office of the Police Complaint Commissioner, *2018/2019 – 4th Quarter Statistical Report*, (Victoria: Office of the Police Complaints Commissioner, 2019), at 5, online: <opcc.bc.ca/wp-content/uploads/2019/08/4th-Quarter-Statistical-Report-2018-2019.pdf>.

³⁶¹ *R v Yum* (2000), 277 A.R. 238 (C.A.); *R v Bolianatz*, [2002] A.J. No. 554 (QL) (Q.B.); *Re Cooper* (1991), 1 P.L.R. 256 (R.C.M.P. P.C.C.); *Green v Lawrence* (1998), 163 D.L.R. (4th) 115 (Man. C.A.); *Densmore (Re)*, 2005 CanLII 77787 (NS PRB).

aimed at addressing this issue. In this section I address three of the most prevalent police policy solutions identified in the literature that are employed in Canada: de-escalation, Crisis Intervention Team training, and Mobile Response Teams. I consider the evidence on how these measures fail to address problematic use of force.

1.6.1 De-Escalation

Literature on policing and mental health suggests that police officers often harbour beliefs that those who experience mental health disability are more dangerous than other types of suspects,³⁶² which may cause officers to feel a heightened sense of risk and fear and to expect violence in their interactions with those so labelled. In turn, these perceptions lead officers to behave more aggressively and potentially escalate situations towards violence³⁶³ in a pattern Ruiz and Miller called a self-fulfilling prophecy.³⁶⁴ This understanding of police interactions with those perceived to experience mental health disability suggests that police behaviour and the exercise of police discretion can function to either escalate a situation towards violence, or de-escalate it towards a peaceful outcome. De-escalation as a set of techniques and de-escalation training have frequently been recommended by major reviews concerning police use of force against people in crisis in Canada.³⁶⁵ Techniques associated with de-escalation are generally communication techniques, including:

³⁶² See e.g. Jim Ruiz & Chad Miller, “An Exploratory Study of Pennsylvania Police Officers’ Perceptions of Dangerousness and Their Ability to Manage Persons with Mental Illness” (2004) 7:3 *Police Quarterly* 359; Amy C. Watson, Patrick W. Corrigan & Victor Ottati, “Police Officers’ Attitudes Toward and Decisions About Persons With Mental Illness” (2004) 55:1 *Psychiatric Services* 49;

It is important to note that studies have found that those with “mental illness” are not in-fact more dangerous to police as compared to other people. See e.g. Melissa Schaefer Morabito & Kelly M. Socia, “Is Dangerousness a Myth? Injuries and Police Encounters with Persons with Mental Illnesses” (2015) 14:2 *Criminology & Public Policy* 253;

³⁶³ See Laura Ketteler & Mary Dodge, “Improving Police Interactions With the Mentally Ill: Crisis Intervention Team (CIT) Training” in *Women’s Mental Health Issues Across the Justice System* (Upper Saddle River: Pearson, 2009) at 86; Melissa Morabito et al, “Crisis Intervention Teams and People with Mental Illness: Exploring the Factors that Influence Force” (2012) 58:1 *Crime & Delinquency* 57 at 59.

³⁶⁴ Ruiz & Miller, *supra* note 362 at 361.

³⁶⁵ Iacobucci, *supra* note 13; Tulloch, *supra* note 13; Ontario Human Rights Commission, *supra* note 13.

- Effective communication
 - Active listening (i.e. actually listening to the words being communicated and providing verbal feedback of what is understood)
 - Self-introduction – introducing themselves, their reasons for being there, and asking the subject about who they are
 - Using “I” statements to reflect to the person in crisis their experience of the situation and to sound genuine
 - Mirroring and reflective statements or paraphrasing / summarizing – reiterating what the person has said so they know they have been heard and understood
- Asking open-ended and close-ended questions
 - Open-ended question are broad, allowing a response that will convey what the person in crisis is thinking and feeling and allowing an officer to assess whether they share an understanding of “reality”
 - Close-ended questions are yes/no and can help achieve a commitment – e.g. are you planning to hurt yourself?³⁶⁶

De-escalation as a set of practices has not been widely studied in the field of policing outside of the particular policy contexts described below, and there is no agreed upon definition of what de-escalation entails, despite the term being routinely employed to describe police practices.³⁶⁷ One systematic literature review of de-escalation in policing commissioned by the International Association of Chiefs of Police found that “[w]hile there are value-based and theoretical reasons to support de-escalation training, these are not solid empirical reasons.”³⁶⁸ The authors note that there is “extreme variation” between de-escalation training programs studied,³⁶⁹ but generally these studies show positive effects (although this may be contributed to by publication bias).³⁷⁰ They also note there are no studies

³⁶⁶ See Janet Oliva, Rhiannon Morgan, & Michael Compton, “A Practical Overview of De-escalation Skills in Law Enforcement: Helping Individuals in Crisis While Reducing Police Liability and Injury” (2010) 10 *Journal of Police Crisis Negotiations* 15 at 19-22.

³⁶⁷ Michael White, Victor Mora & Carlena Orosco, “Exploring Variation in Police Perceptions of De-escalation: Do Officer Characteristics Matter?” (2021) 15:2 *Policing* 727 at 728.

³⁶⁸ Robin Engels, Hannah McManus & Tamara Herold, *The Deafening Demand for De-escalation Training: A Systematic Review and Call for Evidence in Police Use of Force Reform* (International Association of Chiefs of Police, 2018) at 33.

³⁶⁹ *Ibid* at 28.

³⁷⁰ *Ibid* at 28.

documenting the long term effects of de-escalation training³⁷¹ and most studies of de-escalation involved surveys or self-reported data, rather than tracking behavioural outcomes.³⁷²

1.6.2 Crisis Intervention Team Training

Crisis intervention team (CIT) training is perhaps the most widely studied, recommended, and implemented police policy response to attempt to address frequent use of force against persons who experience mental health disability. Although it is most widely used in the United States, it has also been adopted by some police forces in Canada³⁷³ and elsewhere. This system is also known as the Memphis Model because it originated in Memphis, Tennessee, where the municipal police force developed a special training system concerning mental health calls in the wake of a 1987 fatal shooting of a man who experienced mental health disability.³⁷⁴ This system involves a group of self-selecting police officers who are provided 40 hours of special training on the identification of mental illness and de-escalation techniques, and who are dispatched to calls identified as involving subjects with mental health concerns.³⁷⁵

Curricula for CIT programs generally involve 40 hours of training, including classes about “mental illnesses,” “addictive diseases,” and developmental disabilities, along with visits to psychiatry wards, and de-escalation and crisis intervention skills training learned and evaluated through role-playing scenarios.³⁷⁶ Police officers voluntarily self-select to obtain this additional training.³⁷⁷ Additionally, Crisis Intervention Team programs are intended to be systemic, providing police with greater contacts with

³⁷¹ *Ibid* at 28.

³⁷² *Ibid* at 29.

³⁷³ For example, it has been implemented by the RCMP in British Columbia (see Lara Davidson, “Crisis Intervention Team” (2009), online (pdf): *Canadian Mental Health Association* <cmha.bc.ca/wp-content/uploads/2016/07/CIT-summary.pdf>.

³⁷⁴ Morabito et al, *supra* note 363.

³⁷⁵ Morabito et al, *supra* note at 59.

³⁷⁶ Oliva, Morgan, & Compton, *supra* note 366 at 16.

³⁷⁷ Morabito et al, *supra* note 363 at 59.

mental health and social service agencies, and options for diversion.³⁷⁸ The original program also included a 24/7 mental health facility with a no-refusal policy, providing police with somewhere to divert those perceived to have mental health concerns rather than arresting them.³⁷⁹

Some studies suggest that Crisis Intervention Team training could lead to lower levels of force employed by police. For example, in the USA, Compton et al. studied police officers described responses to written use of force scenarios involving a subject identified as schizophrenic, finding that CIT trained officers chose less force as an appropriate response and perceived force as less effective in addressing the scenarios compared to non-CIT trained officers.³⁸⁰ Another study by Compton et al. studied use of force reports by CIT and non-CIT trained police officers in six American police departments and found that CIT training was not predictive of the levels of force officers would use, but that CIT trained officers were more likely to report verbal engagement or negotiation as the highest level of force used in an interaction, compared to other officers.³⁸¹ Morabito et al. studied use of force interventions of CIT-trained officers compared with non-CIT trained officers, and found mixed results, with CIT-trained officers more likely to use higher levels of force, but CIT-trained officers nevertheless displaying lower levels of force relative to the resistance displayed by the subject.³⁸² These studies provide limited evidence supporting CIT as a means of reducing use of force.

However, there is a dearth of information available on the efficacy of CIT training in Canada. One study by Koziarski, O'Connor and Frederick noted that while there are reports of CIT training being used in

³⁷⁸ Melissa Morabito et al, *supra* note 363 at 59-60.

³⁷⁹ Jillian Peterson & James Densley, "Is Crisis Intervention Team (CIT) Training Evidence-Based Practice? A Systematic Review" (2018) 41:5 Journal of Crime and Justice 521.

³⁸⁰ Michael Compton et al, "Use of force preferences and perceived effectiveness of actions among crisis intervention team (CIT) police officers and non-CIT officers in an escalating psychiatric crisis involving a subject with schizophrenia" (2011) 37:4 Schizophrenia Bulletin 737.

³⁸¹ Michael Compton et al, "The Police Based Crisis Intervention Team (CIT) Model: II. Effects on Level of Force and Resolution, Referral, and Arrest" (2014) 65:4 Psychiatric Services 523.

³⁸² Melissa Morabito et al, "Crisis Intervention Teams and People with Mental Illness" (2012) 58:1 Crime & Delinquency 57.

various Canadian police services, “little is known empirically” about Canadian CITs.³⁸³ This study also found that most Canadian police services studied employed crisis response teams rather than crisis intervention teams.³⁸⁴

The evidence for the efficacy of Crisis Intervention Team training has been drawn into question because reviewers have found that mixed results and methodological flaws, including over-reliance on self-reported data, lack of control groups, and insufficient follow-up data have tainted CIT studies.³⁸⁵ Indeed, as Steadman and Morrisette note, in 2015 when Crisis Intervention Team training was at an all-time high, with over 1,000 police services employing the system in the United States, those who experience mental health disability still made up roughly one quarter of fatal shooting victims according to the Washington Post dataset.³⁸⁶ A recent review of peer-reviewed crisis intervention training literature by Rogers et al. found that while CIT studies demonstrate that this system has a positive impact on police officer self-perception of a reduction in use of force,³⁸⁷ there was no evidence of effectiveness at reducing the lethality of police interactions with “people with mental health and substance use disorders”³⁸⁸ and studies on injury were not sufficiently well-designed to make any determination about the potential to reduce injury for officers or citizens.³⁸⁹ Indeed, they further concluded that “none of the

³⁸³ Jacek Koziarski, Christopher O’Connor & Tyler Frederick, “Policing mental health: The composition and perceived challenges of Co-Response Teams and Crisis Intervention Teams in the Canadian Context” (2021) 22:1 Police Practice and Research 977 at 980.

³⁸⁴ *Ibid* at 989.

³⁸⁵ See Petersen & Densley, *supra* note 379; Amy Watson, Michael Compton & Jeffrey Draine, “The crisis intervention team (CIT) model: An evidence-based policing practice?” (2017) 35:5 Behavioral Sciences & the Law 431; Amy Watson & Anjali Fulambarker, “The Crisis Intervention Team Model of Police Response to Mental Health Crises: A Primer for Mental Health Practitioners” (2012) 8:2 Best Practice in Mental Health 71.

³⁸⁶ Henry Steadman & David Morrisette, “Police Responses to Persons with Mental Illness: Going Beyond CIT Training” (2016) 67:10 Psychiatric Services 1054 at 1054.

³⁸⁷ Michael Rogers, Dale McNiel & Renée Binder, “Effectiveness of Police Crisis Intervention Training Programs” (2019) 47:4 Journal of the American Academy of Psychiatry and the Law 1 at 4.

³⁸⁸ *Ibid* at 5.

³⁸⁹ *Ibid* at 5.

analyzed studies showed a positive benefit of CIT on use-of-force outcomes,”³⁹⁰ suggesting CIT may not significantly reduce the use of force against those who experience mental health disability.

The underlying premise of CIT-training has been questioned by some academics, who note that the idea that police should be learning de-escalation skills to deal with “mental health crises” may miss the point that de-escalation would be useful in all manner of police interactions and should be a skillset acquired by all police as a core part of their training.³⁹¹ In fact, CIT training may reinforce the stigmatizing link that many make between violence and mental health.³⁹²

Ultimately, CIT training has become one of the most prevalent means of addressing police interactions globally, and while it developed in response to concerns about use of force following the killing of a man labelled mentally ill, evidence of the efficacy of CIT training as a means of reducing police violence in mental health crises in Canada is lacking.

1.6.3 Mental Health Teams / Joint Response Teams / Mobile Crisis Units

Cotton and Coleman note that while Crisis Intervention Team training is by far the most popular program used to address use of force against those who experience mental health disability in the United States, in Canada police services have made greater use of joint mobile response teams.³⁹³ Mobile Crisis Units (aka Mental Health Teams, Joint Response Teams) involve police officers teamed with “mental health professionals,” usually nurses, or sometimes social workers or psychologists, who are dispatched to calls involving mental health crises where this information is available. The theory behind these teams is that mental health workers can provide a “more accurate assessment of the scope of the mental health

³⁹⁰ *Ibid* at 5.

³⁹¹ Petersen & Densley, *supra* note 379.

³⁹² Petersen & Densley, *supra* note 379.

³⁹³ Dorothy Cotton & Terry Coleman, “Reducing Risk and Improving Outcome of Police Interactions with People with Mental Illness” (2010) 10 *Journal of Police Crisis Negotiations* 39 at 44.

problem, and more efficient referral to appropriate mental health services,”³⁹⁴ whilst the police officer is present to provide “immediate safety and stability in the event of violence or danger, and affords the use of police powers pursuant to the Mental Health Act when apprehension is appropriate.”³⁹⁵ While many police services have mental health staff they can call or consult with if needed in the course of negotiations or strategy determinations,³⁹⁶ and some have mental health staff who can provide assistance at police stations where the individual is arrested or otherwise taken into custody,³⁹⁷ mental health teams differ because they involve routine on the ground presence of mental health personnel alongside police. These teams work within a medicalized model in which “mental illness” is considered a disease that requires professional mental health intervention, and in some cases forced hospitalization.

Joint response teams have been studied less than CIT training because this model is less prevalent in the United States where the majority of police use of force studies originate. Evidence of the impact of these teams on use of force is also unclear. They are often suggested as a means of reducing force against persons who experience mental health disability³⁹⁸ but they also have potential impacts on diversion to health services. An international literature review by Lancaster concerning mobile crisis teams found that “there is a lack of evidence comparing standard police responses to MCT [mobile crisis team] approaches” when it comes to addressing mental health crises, and studies noting their use to address violent situations provided no comparison to determine if they effectively de-escalated.³⁹⁹ One study by the Allan Consulting Group in Australia found that a mobile crisis team submitted less use of

³⁹⁴ *Ibid* at 45.

³⁹⁵ *Ibid* at 45.

³⁹⁶ Steadman & Morrisette, *supra* note 386.

³⁹⁷ *Ibid*.

³⁹⁸ For example, one program evaluation on Vancouver Island noted that a program goal was to respond to inquests recommendations concerning the deaths of 2 men identified as experiencing mental health disability in use of force encounters. See Edward Baess, *Integrated Mobile Crisis Response Team: Review of Pairing Police with Mental Health Services* (Victoria: Victoria City Police Department and Vancouver Island Health Authority, 2005), online (pdf): <citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.583.1431&rep=rep1&type=pdf>.

³⁹⁹ Andrew Lancaster, “Evidence for Joint Police and Mental Health Responses for People in Mental Health Crisis” (2016) 19:10 *Mental Health Practice* 20 at 22.

force reports than a control group, but there was no evidence as to the severity of use of force incidents, or any way to discern if there had been less escalation.⁴⁰⁰

Evaluations of mobile response teams in Canada have unfortunately not focused on the impact these teams have on use of force outcomes. Studies have, however, pointed some other benefits of these teams for facilitating access for those in need of social or health services.⁴⁰¹ They have also found some benefits of these services for police. For example, Kiseley et al., evaluated a mobile response team by studying time spent on mental health calls before and after its introduction in Halifax, Nova Scotia. An area without access to the team was included as a control group. The study found that police spent less time on-scene responding to mental health calls when the specialized response team was deployed, and those they interacted with had greater engagement with out-patient mental health services.⁴⁰²

A study of mobile response team officer perceptions in Canada has highlighted perceived challenges these teams face. Significantly, half of police respondents noted that lack of social and medical supports, such as unavailability of hospital beds, lack of community mental health supports for those who don't meet psychiatric hospital committal criteria.⁴⁰³ Additionally, this study revealed that only one mobile response team among the 17 police services studied operated 24 hours per day, with officers noting that lack of availability of these services was an impediment.⁴⁰⁴ Some respondents also noted a

⁴⁰⁰ Allan Consulting Group, *Police, Ambulance and Clinical Early Response (PACER) evaluation: Final report* (Melbourne: Victoria Department of Health, 2012) at 37, online (pdf): content.health.vic.gov.au/sites/default/files/migrated/files/collections/research-and-reports/p/pacer_eval_18april2012_finalfinal---pdf.pdf.

⁴⁰¹ See Stephen Kiseley et al, "A Controlled Before-and-After Evaluation of a Mobile Crisis Partnership Between Mental Health and Police Services in Nova Scotia" (2010) 55:10 *Canadian Journal of Psychiatry* 662; Cheryl Forchuk et al, "Psychiatric Crisis Services in Three Communities" (2010) 29 *Canadian Journal of Community Mental Health* 73; Maritt Kirst, et al, "Examining implementation of mobile, police-mental health crisis intervention teams in a large urban centre" (2015) 24:6 *Journal of Mental Health* 369; Janet Landeen et al, "Delineating the population served by a Mobile Crisis Team: Organizing Diversity" (2004) 49:1 *Canadian Journal of Psychiatry* 45.

⁴⁰² Kiseley et al, *supra* note 401.

⁴⁰³ Koziarski, O'Connor & Frederick, *supra* note 383 at 987.

⁴⁰⁴ Koziarski, O'Connor & Frederick, *supra* note 383 at 988.

lack of sufficient staffing and resourcing of these services.⁴⁰⁵ This study suggests that even if mobile response teams are evaluated outside the context of use of force for their efficacy in providing supports to those in crisis, the structure and systems in which they operate may undermine these objectives.

Ultimately, without domestic studies evaluating these programs from the standpoint of use of force it is difficult to determine to what extent their adoption as a tool to prevent unnecessary force against persons who experience mental health disability is justified.

1.7 Conclusion: A Dearth of Data on the Problem and Solutions

Current literature on police-involved deaths and injuries in Canada reveals that national data is sparse and rarely addresses the perceived or self-identified mental health status or other demographic characteristics of those who die or are injured in police interactions. While shooting data is relatively well tracked provincially, even this data is not collected in a reliable national dataset. The void in data on police-involved injuries and deaths leaves Canadians in the dark as to the human toll and public health impact that policing policies and practices have on citizens. Additionally, lack of demographic information on mental health and other relevant factors (race/ethnicity, sexual orientation, indigenous status, etc.) obscure attempts to understand police use of force and police-involved deaths and injuries from a human rights and equality perspective. The limited data we do keep provides some cause for pessimism about the extent to which Canadian police are successfully avoiding force and de-escalating tensions in their encounters with the public. Data on police shootings, for example, which is our most reliably tracked use of force data, suggests that our rates are higher than many other developed countries currently tracking this information (with the exception of the US). Furthermore, studies suggest that Black and Indigenous people, people who use drugs and persons who experience mental health disability are over-represented

⁴⁰⁵ Koziarski, O'Connor & Frederick, *supra* note 383 at 988.

among victims of use of force. Other countries, including England and Australia have developed more in-depth national data on police-involved deaths that could serve as a model of reform for Canada.

While some solutions have been proposed to address the frequent use of force against persons who experience mental health disability, many of the most studied and adopted strategies lack sufficient evidence of efficacy in reducing use of force. In Canada, there is a dearth of research evaluating strategies for reducing force against persons who experience mental health disability and detailed tracking of use of force incidents would be necessary to evaluate such strategies. Attempts to address this issue at a policing level through de-escalation, Crisis Intervention Team training, and mobile crisis units are ongoing, despite a lack of evidence concerning their efficacy.

Chapter 2: Applying Critical Disability Theory to Mental Health and The Law

2.1 Introduction

My thesis adopts a critical disability theory⁴⁰⁶ perspective, informed by intersectionality. In this chapter I will describe what critical disability theory is and the version of the theory I have adopted. Secondly, I will consider how critical disability theory can be applied in the context of mental health in light of some of the debates within disability and mad studies scholarship about the applicability of a disability frame to matters of mental health. Thirdly, I will discuss how critical disability theory can be applied to law, situating it within legal scholarship and discussing its applicability to law reform in light of critiques of employing law to achieve social transformation. Finally, I will discuss how intersectionality informs my theoretical perspective and its importance in light of my research on police use of force in Canada.

2.2 Defining Critical Disability Theory

Like many theoretical labels, the term "critical disability theory" is contested and there is no agreement among scholars in this field as to its precise definition and limits. Several books and articles

⁴⁰⁶ Note that some legal scholars have employed the term "Disability Legal Studies" to discuss the impact of Disability Studies scholarship on the law. See e.g. Arlene S. Kanter, "The Law: What's Disability Studies Got to Do With It or an Introduction to Disability Legal Studies", (2011) 42 Columbia Human Rights Law Review 43; Sagit Mor, "Between Charity, Welfare, and Warfare: A Disability Legal Studies Analysis of Privilege and Neglect in Israeli Disability Policy" (2006) 18 Yale Journal of Law & the Humanities 63. However, I prefer Devlin and Pothier's use of Critical Disability Theory because it emphasizes both the theory's connections with other critical legal theory (i.e. it is similarly named to critical race theory) and has developed a usage (albeit limited) within Canadian legal scholarship. See e.g. Richard Devlin, "Jurisprudence for Judges: Why Legal Theory Matters for Social Context Education" (2001) 27 Queen's Law Journal 161; Dianne Pothier & Richard Devlin, *Critical Disability Theory: Essays in Philosophy, Policy, and Law* (Vancouver: UBC Press, 2006); David Hosking, "Critical Disability Theory", presented at the 4th Biennial Disability Studies Conference at Lancaster University, UK, Sept. 2-4, 2008, online: <https://www.lancaster.ac.uk/fass/events/disabilityconference_archive/2008/papers/hosking2008.pdf>. [Hosking, 2008]

have been published on the question of how to define this theoretical school, many of which reach differing conclusions.⁴⁰⁷ For my purposes, I have broadly adopted the usage of legal scholars Richard Devlin and Dianne Pothier who suggest that critical disability theory challenges societal understandings of "disability" as an individual biomedical condition or personal tragedy and focuses study on the construction of "disability" in the physical and social world.⁴⁰⁸

In order to explain my interpretation of this theory I will begin by explaining the social model of disability that has been described as the "Big Idea" of the disability rights movement.⁴⁰⁹ Critical disability theory attempts to build upon, reach beyond, critique, or critically engage with the social model of disability.

2.2.1 The Social Model of Disability

The concept of the social model of disability was originally developed in the 1970s by British disability rights activists in the Union of the Physically Impaired Against Segregation ("UPIAS").⁴¹⁰ Disability theorist Michael Oliver named UPIAS' concept of disability the "social model", drawing a conceptual delineation between it and what he referred to as the "individual model" of disability (which is also

⁴⁰⁷ The usage of "critical disability theory" in this thesis is intended to mark this perspective as one aligned with, and similar to, theories like critical race theory, which are part of the broader critical legal studies movement. I do not use it to imply an affiliation exclusively with "Critical Disability Studies", which is a contested label sometimes applied to more inter-disciplinary, post-modernist, poststructuralist, or relational theories of disability that have developed in contrast to materialist or Marxist concepts of disability since the inter-disciplinary field of Disability Studies initially emerged in the twentieth century. See Dan Goodley, "Disentangling Critical Disability Studies" in Anne Waldschmidt, Hanjo Beressem & Moritz Ingwersen, *Culture - Theory - Disability: Encounters Between Disability Studies and Cultural Studies* (Bielefeld: Transcript-Verlag, 2017) at 84; Simo Vehmas & Nick Watson, "Moral Wrongs, Disadvantages, and Disability: A Critique of Critical Disability Studies" (2014) 29:4 *Disability and Society* 638; Helen Meekosha & Russell Shuttleworth, "What's So Critical About Critical Disability Studies" (2009) 15:1 *Australian Journal of Human Rights* 47.

⁴⁰⁸ Richard Devlin & Dianne Pothier, "Introduction: Toward a Critical Theory of Dis-citizenship" in D. Pothier & R. Devlin, eds, *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* (Vancouver: UBC Press, 2005) at 2.

⁴⁰⁹ Frances Hasler, "Developments in the Disabled People's Movement" in J. Swain et al, eds, *Disabling Barriers, Enabling Environments* (London: Sage, 1993).

⁴¹⁰ See Tom Shakespeare, *Disability Rights and Wrongs* (London: Routledge, 2006) at 10-14; Michael Schillmeier, *Rethinking Disability: Bodies, Senses, and Things* (London: Routledge, 2010) at 2-3.

frequently referred to as the 'medical model' in disability studies literature), in which a disability is understood to be an individual biomedically caused limitation and/or personal tragedy.⁴¹¹

The social model focuses reform on the need for a social, legal, and political transformation of society rather than seeking to "heal" or "treat" an individual's impairment as a means of resolving disabling effects. Understanding the social model in this way makes it fit well within critical legal theory, which aims to remedy negative impacts of law on marginalized persons. In this sense it provides a particular theoretical gaze from which to undertake legal research. It forms the foundation of what Julie Avril Minich describes as the "methodology of disability studies" that "involves scrutinizing not bodily or mental impairments but the social norms that define particular attributes as impairments, as well as the social conditions that concentrate stigmatized attributes in particular populations."⁴¹²

2.2.2 Critiques and Defences of the Social Model

In contemporary Critical Disability Theory scholarship, the social model has frequently been criticized for being rooted in modernism, in the sense that it relies on over-simplified dichotomies, between disability and impairment or between the medical and the social, whilst having worn out its value as a tool for social transformation. These appraisals differ in their understanding of the social model, as well as their solutions to the problems they see it creating. While a great many critiques from differing theoretical standpoints have been levied against the social model, I will explore one the earliest and most prominent critiques of the model by Tom Shakespeare, who interprets the social model as not adequately addressing the lived realities of "impairment".⁴¹³ Shakespeare interprets the social model as

⁴¹¹ See Michael Oliver, *The Politics of Disablement* (London: MacMillan Education, 1990).

⁴¹² Julie Avril Minich, "Enabling Whom? Critical Disability Studies Now" (2016) 5:1 *Lateral*, online: <<https://csalateral.org/issue/5-1/forum-alt-humanities-critical-disability-studies-now-minich/>>.

⁴¹³ It is worth noting that in some of Shakespeare's later work, he refers to the "Strong Social Model", recognizing that the model has been reinterpreted by many different scholars from what he perceives to be its roots. See e.g. Tom Shakespeare, "Social Models of Disability and Other Life Strategies" (2004) 6:1 *Scandinavian Journal of Disability Research* 8.

espousing "the political demand that disability be defined entirely in terms of social oppression, social relations, and social barriers" and as having "nothing whatsoever to do with individual bodies and brains."⁴¹⁴ He argues the social model results in the rejection of impairment-specific political organizing and suspicion or rejection of attempts to study, mitigate, or cure medical conditions, rendering an understanding of the nature of the needs of persons who experience disability irrelevant.⁴¹⁵ For Shakespeare, these problems stem from a conceptual problem at the centre of the model, which is the rigid binary between impairment as an individual biological attribute and disability, the social creation that "makes impairment a problem."⁴¹⁶ However, as Shakespeare points out the categories of impairment and disability are porous and mutually dependent as both impairment and disability necessarily imply each other. Shakespeare writes: "There can be no impairment without society, nor a disability without impairment."⁴¹⁷ Disability as a concept is rendered overly broad to the point of defining all socially constructed wrongs absent its connection to a physical impairment. Additionally, impairments themselves are sometimes fully socially created (as in the case of malnutrition caused by extreme poverty), influenced by social factors, (as in the case of pain which has individual psychological and physiological aspects, but is also influenced by socio-cultural factors). Further, whether or not someone is determined to have an impairment is socially determined (potentially by diagnosis or through other cultural understandings).⁴¹⁸

Mike Oliver and other theorists have rebutted Shakespeare's claims that the social model suggests a distinction between disability and impairment in which the former is exclusively caused by social barriers. According to Oliver, the social model was never intended to be more than a "tool" for political mobilization, focusing attention on the societal structures that prevent inclusion. From his

⁴¹⁴ Tom Shakespeare, *Disability Rights and Wrongs* (London: Routledge, 2006) at 31.

⁴¹⁵ *Ibid* at 31-32.

⁴¹⁶ *Ibid* at 34.

⁴¹⁷ *Ibid* at 34.

⁴¹⁸ *Ibid* at 34-35.

perspective, the social model provides a meaningful way for people to organize for rights irrespective of their particular impairments and to aim their efforts at social reform; it was never meant to provide a social theory of disability or a causal explanation for it.⁴¹⁹ I find this framing of the social model as a "tool" helpful, because it suggests it can be used to focus analysis, rather than be relied upon to explain what disability is.

Informed by this debate, I have chosen to embrace the social model of disability in my study as a means of focusing my analysis on the legal and policy structures that shape mental health disability as a "problem" in policing and in society. In keeping with most, if not all, contemporary critical disability scholarship I reject a strict dichotomy, in which impairment is understood as a biological or medical reality and disability as a social construct, that the traditional versions of the model have been characterized as implying. In my understanding of critical disability theory, I interpret the social model as a tool of focus, rather than a description of the "cause" of disability.

Mairian Corker suggests that the social model should not be discarded, but rather treated as "one strand in an emerging social theory of disability" instead of the final word in explaining disability.⁴²⁰ I find this suggestion to be useful because indeed, many concepts originally emanating from other branches of critical theory have been incorporated into critical disability theory literature, going well beyond the social model's framing of the "problem" of disability. I have adopted an understanding of the social model that is heavily influenced by Carol Thomas' "social-relational understanding of disability". The social-relational understanding is a sort of reframing of the social model, or as Thomas argues, a return to its

⁴¹⁹ For examples of such defences of the 'original' social model of disability, see Michael Oliver, "The Social Model of Disability: Thirty Years On" (2013) 28:7 *Disability & Society* 1024; Colin Barnes, "A Working Social Model? Disability, work, and disability politics in the 21st century" (2000) 20:4 *Critical Social Policy* 441 at 443-445.

⁴²⁰ Mairian Corker, "Differences, Conflations and Foundations: The limits to 'accurate' theoretical representation of disabled people's experience?" (1999) 14:5 *Disability and Society* 627 at 629.

roots.⁴²¹ Thomas understands the social model to be a model of limited analytic value, and seeks to inspire a return to the social-relational understanding of disability from which it developed. This “social-relational understanding” sees disability as

a quality and product of the social relationships between those with and those without impairment in society, or more accurately, between those socially constructed as problematically different because of a significant bodily and/or cognitive variation from the norm and those who meet the cultural criteria of embodied normality.⁴²²

In other words, it is a reminder that social relationships, and particularly relationships of relative power are at the root of critical disability theorizing, bringing this theory in line with other critical theory concerned with oppressive social relations based on race, class, gender, etc..⁴²³ Thomas draws a helpful distinction between a “social-relational” understanding of the social model of disability and what she calls the “property approach”, in which disability is “*a property of the person with impairment: ‘a disability is any restriction or lack . . . of ability to perform an activity’*”, which is said to be caused by social barriers.⁴²⁴ Unlike the “property approach”, a social-relational approach understands disability as a form of “social oppression”.⁴²⁵ Understood in this way, disability doesn’t negate the possibility of impairment-caused limitations experienced by disabled persons, but simply uses “disability” to mean the “socially imposed exclusions and disadvantages” facing those socially constructed as having impairments.⁴²⁶

2.3 Ableism and Inclusion/Exclusion

⁴²¹ Carol Thomas sees the social relational model, with its focus on “oppression”, as a reinvigoration of Vic Finkelstein and Paul Hunt’s foundational organizing work in UPIAS. See Carol Thomas, “How is disability understood? An examination of sociological approaches” (2004) 19:6 Disability & Society 569.

⁴²² Carol Thomas, “Rescuing a Social Relational Understanding of Disability (2004) 6:1 Scandinavian Journal of Disability Research 22 at 28.

⁴²³ *Ibid*

⁴²⁴ See Carol Thomas, *Female Forms: Experiencing and Understanding Disability* (Buckingham: Open University Press, 1999) at 40-41.

⁴²⁵ *Ibid* at 40.

⁴²⁶ Thomas, *supra* note 422 at 33.

In addition to the social model of disability, the concept of “ableism” is central to understanding critical disability theory. Ableism (sometimes referred to as disableism) is generally used as concepts similar to "racism" or "sexism". James Cherney defines "ableism" as a rhetoric passed down through culture.⁴²⁷ He writes:

Ableism’s psychological, social, economic, cultural character normatively privileges able-bodiedness; promotes smooth forms of personhood and smooth health; creates space fit for normative citizens; encourages an institutional bias towards autonomous, independent bodies; and lends support to economic and material dependence on neoliberal and hyper-capitalist forms of production.⁴²⁸

As a rhetoric, ableism is a cultural pattern of meaning-making that often goes unchallenged and unrecognized because the rhetoric itself positions itself as natural, obvious, and neutral.

Ableism is relevant to my research since policing practices and the law may contain ableist beliefs and assumptions. These concepts provide a language for challenging how these institutions can operate to reify "ability" and "disability" in harmful ways.

The concept of "inclusion" and it's converse, "exclusion" are also important concepts in critical disability theory, particularly as it applies to human rights law. Inclusion is a protean concept in disability theory that has been used to consider many facets of social life, including politics, employment, education, sexuality, and leisure. It is frequently described as a goal of disability rights movements, but it is difficult to define. Legal scholar Melinda Jones provides a broad description of the concept of inclusion, highlighting social belonging, recognition of a shared identity, and a right of all people to share in the positive aspects of society as important features of this concept. She writes:

The principle of inclusion is simple – it is the opposite of exclusion and also of alienation. It is the principle that says that whatever benefits accrue to members of a society are the heritage of all people,

⁴²⁷ See James Cherney, "The Rhetoric of Ableism" (2011) 31:3 Disability Studies Quarterly, online: <<http://dsq-sds.org/article/view/1665/1606%2019%20pages>>.

⁴²⁸ See *Ibid*.

not just those who are able-bodied. Inclusion means that all people are entitled to full membership of the human family. Within the large group of humanity, just as in any family, people play a number of different roles and bring to the community a variety of needs, vulnerabilities, skills and experiences. Each individual operates in relation with others and each of us is inter-dependent. Inclusion requires the recognition of self in other, and other in self.⁴²⁹

Inclusion and exclusion are particularly important concepts for considering police actions toward people who experience mental health disability, because police actions can fundamentally determine the extent to which those who experience mental health disability are included in society. Police use of force can act, at its most extreme, to eliminate people who experience mental health disability or, in less dire cases, make them feel unsafe and unwelcome. Police discretion can also shape whether persons who experience mental health disability are excluded from broader society through incarceration or involuntary hospitalization/institutionalization.

2.4 Applying Critical Disability Theory to Mental Health

In this sub-section, I would like to take a moment to tease apart the concepts of "impairment" and "disability" when applied to mental health in order to make clear how I employ these terms in light of the social-relational understanding of disability, and to describe how I have come to understand mental health "impairment" and "disability" within this model. This explanation will elucidate how understanding mental health disability from a social-relational perspective differs from traditional biomedical understandings of "mental illness" that often characterize narratives and analyses of police-involved deaths of persons who experience mental health disability. I will then address some of the concerns raised in critical disability and mad studies literature about the applicability of the concept of disability to

⁴²⁹ Melinda Jones, "Inclusion, Social Inclusion and Participation" in Marcia Rioux et al, eds, *Critical Perspectives on Human Rights and Disability Law* (Leiden: Brill Nijhoff, 2011) at 57.

mental health, explaining why I believe it is (in certain contexts) worthwhile to frame mental health difference as disability.

2.4.1 A Social-Relational Understanding of Mental Health Disability and Impairment

A mental health “impairment” can be conceptualized as a socially-constructed behavioural or experiential difference relative to a socially-constructed norm.⁴³⁰ This does not preclude a biological basis for mental health “impairment” in the sense that there is something happening in the brain to effect the behaviours and experiences in question. In fact, I think it’s quite probable that all human behaviour and experience has a biological basis regardless of whether we attach the meaning of impairment to it or not. However, a social-relational concept of mental health impairment treats the underlying condition as socially-constructed, rather than an essential fact. It is given meaning by the individual experiencing it, and those who label it. It therefore differs from a medical model approach that might understand these impairments as “illnesses” or “imbalances”, with an emphasis on the biochemistry of the brain as a “cause”, which must be treated with medicine or other therapies. I acknowledge that some people choose to take drugs (legal or otherwise) to impact their mental experiences and ameliorate what they feel to be a problem and that by changing the brain’s chemistry a person can, in fact, alter their experience of the world. However, I maintain that packaging perceived behaviours as psychiatric diagnoses in need of a cure is a highly subjective endeavour, involving an implicit tendency to view social behaviour that is non-conforming as a biological problem in need of medical solutions.⁴³¹ In fact, while

⁴³⁰ For example, the DSM-5, often describes conditions with specific reference to a norm. With respect to “bipolar disorder” it says that symptoms must be “present to a *significant degree* and represent a *noticeable change from usual behaviour*.” [emphasis added] and may include an “abnormally and persistently elevated [...] mood.” See “Bipolar I Disorder Diagnostic Criteria” in *Diagnostic and Statistical Manual*, 5th ed (Arlington: American Psychiatric Association, 2013).

⁴³¹ For example, the DSM-5 sometimes commits the logical fallacy of “begging the question” within its own criteria for diagnosis, such as in the symptoms of Bipolar I Disorder, which include: “A. A distinct period of abnormally and persistently elevated, expansive, or irritable mood and abnormally and persistently increased activity or energy, lasting at least 1 week and present most of the day, nearly every day (*or any duration if hospitalization is necessary*)” and “C. The mood disturbance is sufficiently severe to cause marked impairment in social or occupational

contemporary medicine has increasingly adopted a “biopsychosocial” concept of health recognizing that an interplay between biological (biochemical, genetic), psychological (personality, behavioural, identity), and environmental/social (cultural, socio-economic) factors explain the etiology of health conditions (including mental health) and require similarly multi-faceted treatments,⁴³² it remains the fact that there are relatively fewer psychological or social interventions available upon receiving a mental health diagnosis in Canada, but biological interventions are routinely provided in the form of psychiatric drugs, and in many cases those who refuse to take them can be forced or coerced into doing so.⁴³³ Furthermore, the fact that we treat mental health conditions through diagnosis and person-centred treatment rather than through an investigation into and manipulation of the social conditions in which a person lives (like focusing on socio-economic factors, familial and community relations, social services, or the political, cultural, and legal environment in which they live), suggests that the social aspects of this model are largely given lip service. While mental health may have a social origin (at least in part), it is treated biologically and individually.

functioning or *to necessitate hospitalization* to prevent harm to self or others, or there are psychotic features". See *ibid.* In my opinion containing the need for hospitalization or fact thereof in criteria for diagnosing a medical condition is circular, since hospitalization would presumably only be appropriate if the person had a medical condition requiring treatment. It is akin to containing within the elements of a criminal offence the criteria that the offender is "deviant to the extent of necessitating incarceration" - a conflation of guilt and sentencing.

⁴³² See George Engel, "The Need for a New Medical Model: A Challenge for Biomedicine" (1977) 196:4286 *Science* 129; George Engel, "The Clinical Application of the Biopsychosocial Model" (1980) 137:5 *American Journal of Psychiatry* 37.

⁴³³ Mental health treatment is regulated by provincial governments in Canada. In Ontario and Québec patients can refuse treatment in all cases if capable. Each province has legislation providing for the treatment of incapable psychiatric patients through a substitute decision-maker, or in the case of British Columbia, by "deeming" them to have consented to the treatment. Additionally, while capable hospitalized patients may refuse treatment in some provinces, in Alberta and New Brunswick hospitalized patients can be treated without their consent, even if capable, in some instances. (For a description of this legislation see Sophie Nunnally, "Involuntary Hospitalization and Treatment: Themes and Controversies" in J. Chandler & C. Flood, *Law and Mind: Mental Health Law and Policy in Canada* (Toronto: LexisNexis, 2016)). Additionally, several provinces have legislation allowing for "community treatment orders", which require patients to comply with a treatment plan (generally involving medication) even when capable and not hospitalized, with failure to comply resulting in apprehension and return to hospital for assessment. See e.g. *Mental Health Act*, RSO 1990, c M.7, s 33.1.

To understand the socially-constructed nature of mental health diagnoses, it is helpful to consider how these “conditions” are viewed in contemporary medicine. I would argue that if mental health conditions are in any way intelligible as a concept, they are concepts of perceived behaviour and/or recounted subjective experience.⁴³⁴ In other words, the diagnoses applied by psychiatrists are categories of described behaviours, and interpretations of recounted subjective experiences of the person being diagnosed (the “patient”), that require value judgments to be made in interpreting whether the criteria are met. For example, the fifth edition of the *Diagnostic and Statistical Manual* (“DSM-5”), which is the standard diagnostic manual employed in North America, provides the following as the first criteria to diagnose schizophrenia:

Two (or more) of the following, each present for a significant portion of time during a 1-month period (or less if successfully treated). At least one of these must be (1), (2), or (3):

- Delusions.
- Hallucinations.
- Disorganized speech (e.g., frequent derailment or incoherence).
- Grossly disorganized or catatonic behavior.
- Negative symptoms (i.e., diminished emotional expression or avolition).⁴³⁵

A physician attempting diagnosis would necessarily have to rely on their beliefs about what reality is, their impression of the coherence of an individual’s communication, their assessment of the

⁴³⁴ This concept is drawn partially from Thomas Szasz, who writes: “In medical practice, when we speak of physical disturbances we mean either signs (for example, fever) or symptoms (for example, pain). We speak of mental symptoms, on the other hand, when we refer to a patient’s communications about himself, others, and the world about him.” See Thomas Szasz, *Law, Liberty, and Psychiatry: An Inquiry Into the Social Uses of Mental Health Practices* (New York: MacMillan & Company, 1963) at 13.

⁴³⁵ “Schizophrenia”, in *Diagnostic and Statistical Manual*, 5th ed (Arlington: American Psychiatric Association, 2013). For diagnostic criteria more commonly used outside of North America, see *International Classification of Diseases*, 10th ed (Geneva: World Health Organization, 2010). For a very thorough critique of the diagnosis of schizophrenia, see John Read, “Does ‘Schizophrenia’ Exist? Reliability and Validity” in J. Read et al, eds, *Models of Madness: Psychological, Social and Biological Approaches to Psychosis* (London: Routledge, 2013).

level of (dis)organization they exhibit in their actions, and their opinion of what normal emoting looks like when reaching a diagnosis. The behaviours that form the basis of diagnosis require interpretation on the part of the physician and it is common for those labelled with some psychiatric diagnoses to disagree with their diagnosis or the grounds on which it is made. For example, according to the DSM-5, “[d]elusions are fixed beliefs that are not amenable to change in light of conflicting evidence. Their content may include a variety of themes (e.g., persecutory, referential, somatic, religious, grandiose).”⁴³⁶ In other words, they are a set of beliefs that the physician cannot convince the individual being diagnosed are untrue, despite providing them with what the physician believes to be sufficient evidence to refute them. The individual who holds a “fixed belief” cannot, by its very definition, agree that it is wrong. So, at the moment of diagnosis, at a minimum, the individual being diagnosed with schizophrenia disagrees with the physician about what constitutes reality. Some people who receive a diagnosis, later express agreement that the belief held at the time was a delusion, however, not everyone psychiatrically labelled will come to agree with their diagnosis, or with the physician’s perspective of reality.⁴³⁷ What constitutes “reality” is highly contestable, and different people will often disagree about what is real and to what extent we can know what is real, as is evinced by the philosophical field of “ontology” wherein theorists have debated the nature of reality for centuries.

⁴³⁶ "Schizophrenia Spectrum and Other Psychotic Disorders" in *Diagnostic and Statistical Manual*, 5th ed (Arlington: American Psychiatric Association, 2013).

⁴³⁷ In fact, the likelihood that a "patient" will disagree with their diagnosis is incorporated into understandings of the symptomology itself. For example, the DSM states: "Some individuals with psychosis may lack insight or awareness of their disorder (i.e., anosognosia). This lack of “insight” includes unawareness of symptoms of schizophrenia and may be present throughout the entire course of the illness. Unawareness of illness is *typically a symptom of schizophrenia itself* rather than a coping strategy. It is comparable to the lack of awareness of neurological deficits following brain damage, termed anosognosia." [emphasis added] See "Schizophrenia Spectrum and Other Psychotic Disorders" in *Diagnostic and Statistical Manual*, 5ed. (Arlington: American Psychiatric Association, 2013). This is, of course, a classic catch-22. The "patient" disagrees about the diagnosis because they are mad, and they are mad because they disagree with the diagnosis.

Furthermore, our beliefs about reality are influenced by the particular cultural traditions we are a part of and the social context we find ourselves in.⁴³⁸ The culturally-contextual nature of mental health diagnoses is also apparent if we consider the historical changes in diagnosis over time. For example, up until the 1970s homosexuality was treated as a mental health condition in North America and it continues to be understood in this way in other parts of the world.⁴³⁹ Even earlier in history, “hysteria” was a gender-specific diagnosis for women, which has more recently been recognized as having “a symptomatology consistent with the normal functioning of female sexuality”.⁴⁴⁰ Ultimately, the nature and number of “mental illnesses” recognized by psychiatry shifts with our cultural understandings of what “normal” is, and these understandings often betray the prejudices of the society that created them.

Suggesting that mental health diagnoses are socially-constructed does not, however, imply that the individual being diagnosed or otherwise considered to be experiencing a mental health condition has no actual shift in their perceptions and experiences corresponding with the behaviours observed.⁴⁴¹ A person may experience differences from internal norms (what they subjectively consider to be normal for them) that form the basis of their “impairment”. Many people with experiences of madness have, for example, written books documenting their experiences from a subjective point of view and describing that experience as different in some way from how they experience themselves usually, or at other times

⁴³⁸ It is worth noting that the DSM-5 recognizes the culturally-contingent nature of these diagnoses to some extent. For example, the DSM notes that “Hallucinations may be a normal part of religious experience in certain *cultural contexts*.”; “Delusions are deemed *bizarre* if they are clearly implausible and not understandable to *same-culture peers* and do not derive from ordinary life experiences.”; and “An individual’s cultural and religious background must be taken into account in evaluating the possible presence of delusional disorder. The content of delusions also varies across cultural contexts.” [emphasis added] See “Schizophrenia Spectrum and Other Psychotic Disorders” in *Diagnostic and Statistical Manual*, 5th ed (Arlington: American Psychiatric Association, 2013).

⁴³⁹ For a description of the changes in psychiatric understandings of homosexuality, see Jack Drescher, “Queer Diagnoses: Parallels and Contrasts in the History of Homosexuality, Gender Variance, and the *Diagnostic and Statistical Manual*” (2010) 39 *Archive of Sexual Behavior* 427 at 431-435.

⁴⁴⁰ See Rachel Maines, *The Technology of Orgasm: “Hysteria,” the Vibrator, and Women’s Sexual Satisfaction* (Baltimore: John Hopkins University Press, 1999) at 2.

⁴⁴¹ For an example of an account of a person who was labelled as mentally ill but did not experience any subjective internal difference in their experience, beyond the generally negative effects of being psychiatrized, see Murray Goddard, “On Being Possibly Sane in Possibly Insane Places” (2011) 62:8 *Psychiatric Services* 831.

in their life.⁴⁴² While the way that people understand their own experiences with madness will be, in part, culturally-determined and often based on learned and internalized norms, a person may also recognize shifts in feeling and thought and changes in the quality of experience that they understand in more idiosyncratic or individual ways that do not conform to common beliefs about mental health. Therefore, there is a distinction to be made between the experience of the person labelled and the label itself. Someone labelled as having a mental health condition may agree that their behaviour differs from a social or internal norm, whilst still rejecting the diagnosis as a misrepresentation of the nature of that experience. They may also disagree that they are experiencing differential behaviour or thinking but nonetheless believe in the validity of the diagnostic categories and criteria, and therefore feel it is being misapplied to them. In other words, challenging the validity of a psychiatric label is not the same as challenging the existence of experiences of madness.

Whereas impairment takes the form of an internal experience of mental difference, or is perceived to exist by a third party, mental health disability arises, according to the social-relational understanding of disability, in experiences of oppression between people. There is no disability internal to the person, it arises between people in the power dynamics at play. In the context of policing, for example, an individual perceived by police to have a mental health impairment can be disabled by the treatment they receive due to that perceived impairment. This might include violence, arrest, forced hospitalization, etc. From a traditional bio-medical understanding of disability police use of force interactions might be explained as a consequence of an individual's failure to take prescribed psychiatric medication, leading to disruptive behaviour attracting the attention of police. In contrast, a social-relational conception of mental health disability would focus explanations of police use of force on the

⁴⁴² See e.g. Elyn R. Saks, *The Center Cannot Hold: My Experience Through Madness* (New York: Hyperion, 2007); Elizabeth Wurtzel, *Prozac Nation* (New York: Penguin, 1994); Robert Pirsig, *Zen and the Art of Motorcycle Maintenance* (New York: Harper Collins, 1974).

power dynamics between police and subjects, the interpretation of mental health impairment by police and the public, police judgments and behaviours, and the nature of the social systems of policing and mental health care.

2.4.2 Can and Should Mental Health be Considered a Disability?

Legally, in Canada, mental health is a recognized form of disability under provincial and federal human rights law.⁴⁴³ However, from a theoretical standpoint some scholars have argued that the issues faced by people who experience mental health disability are substantively different in some ways from the issues facing other persons experiencing "physical disability", and consequently theories of disability and analytic concepts arising out of the disability rights movements are inapplicable or less relevant to the context of mental health. Below, I will describe why I find these arguments unsatisfactory and how to the contrary I believe that critical disability theory is equally applicable to both physical and mental health disability.

Mad studies, which focuses on experiences of psychiatrization has developed as a separate field from critical disability theory (or disability studies), owing in part to the historically different movements (anti-psychiatry/Mad Pride and disability rights) that gave rise to them.⁴⁴⁴ Robert Menzies et. al, have defined mad studies as a field that

incorporates all that is critical of psychiatry from a radical socially progressive foundation in which the medical model is dispensed with as biologically reductionist whilst alternative forms of helping people experiencing mental anguish are based on humanitarian, holistic perspectives

⁴⁴³ For example, mental health is explicitly referenced in all provincial and federal human rights statutes, though the terminology used differs between different jurisdictions.

⁴⁴⁴ For a description of the trajectory of Mad Pride in relation to the disability rights movement, see Bradley Lewis, "A Mad Fight: Psychiatry and Disability Activism" in L. Davis, ed, *The Disability Studies Reader*, 4th ed (New York: Routledge, 2013). It is worth noting however, that there may be considerable overlap between people writing from these perspectives because people who have been psychiatrically labelled and those considered to have physical impairments, particularly given that some treatments for "mental illnesses" can contribute to physical impairment and the oppression faced by persons experiencing disability can also cause distress which may result in psychiatric labelling. See Peter Beresford, "What Have Madness and Psychiatric System Survivors Got To Do With Disability and Disability Studies?" (2000) 15:1 *Disability & Society* 167 at 169.

where people are not reduced to symptoms but understood within the social and economic context of the society in which they live.⁴⁴⁵

As this definition suggests, mad studies shares a common interest with critical disability theory in critiquing the medical model and focusing instead on social conditions. I have incorporated the work of mad studies scholars in my research and consider this scholarship to be applicable to a social relational understanding of disability. However, I use the language of disability rather than employing "mad" terminology because pragmatically as a legal scholar it is helpful to use the terminology employed in the law. I will address a few of the most significant critiques to employing "disability" when discussing mental health below to explain why I think, quite apart from the convenience of the terminology to my project owing to its incorporation in Canadian law, it is also theoretically appropriate to employ a disability frame to discuss mental health.

A) Mental Health as "Unreasonableness"

David Pilgrim and Floris Tomasini claim that the issues facing those with "mental disorders" are different from those facing people with "physical disability" because societal understandings of "mental disorders" are fundamentally centred on the concept of "unreasonableness", which brings into question the extent to which the disability rights movement is relevant to madness. While Pilgrim and Tomasini do not directly define unreasonableness, they do explain that people with mental disorders often engage in "rule infraction", meaning the breaking of social rules (including particularly societal conventions, as opposed to actual legal rules) and not simply "role failure", meaning an inability to meet the expectations of the roles provided for in society, like persons with "physical disabilities".⁴⁴⁶ They suggest that "rule

⁴⁴⁵ Robert Menzies et al, "Introducing Mad Studies" in R. Menzies et al, ed, *Mad Matters: A Critical Reader in Canadian Mad Studies* (Toronto: Canadian Scholars' Press, 2013) at 2.

⁴⁴⁶ David Pilgrim & Floris Tomasini, "On Being Unreasonable in Modern Society: Are Mental Health Problems Special?" (2012) 27:5 *Disability & Society* 631.

breaking" associated with mental health conditions can be plotted on a continuum between being a "nuisance" on the one end and posing a "danger" to the public on the other.⁴⁴⁷ They also note that "unreasonableness" associated with mental health conditions is concerned with risk to self and others, allowing for significant control to be wielded to avoid this risk (e.g. forced hospitalization) despite many socially condoned and celebrated forms of such risks, like rock climbing, car racing, or drinking alcohol (which increases risk of violence) that are widely tolerated or even celebrated.⁴⁴⁸ Finally, they suggest that unreasonableness is about self-centredness and an impaired recognition of others, wherein the unreasonable person transgresses a social rule and then fails in their duty to answer for their actions to other members of the public on shared terms (they are not "intelligible").⁴⁴⁹

Floris and Tomasini do not, ultimately, suggest that the psychiatric survivor [a.k.a. mad] movement should not align itself with the broader disability movement, but simply raise the issue of unreasonableness as an issue facing those labelled with mental health conditions alone, which they argue may be an important consideration that helps to explain why these movements have remained separate and is an important conceptual difference that would have to be addressed if they were to merge.

In my opinion, Floris and Tomasini's theorizing about "mental disorder" as different from "physical disability" because of the concept of "unreasonableness" underplays the inter-personal nature of communication and the history of stigmatization and ignorance which determine intelligibility (with respect to "unreasonableness") and the formation of social rules that constitute a transgression. I see significant commonality between those with impairments traditionally grouped as "physical" and "mental", since disability is a matter of social oppression and not determined by the nature of one's

⁴⁴⁷ *Ibid* at 638.

⁴⁴⁸ *Ibid* at 638-639.

⁴⁴⁹ *Ibid* at 640.

impairment, and a shared struggle towards policies of "inclusion" would benefit all people with disabilities, regardless of the causes of their supposed "role failures" or "rule transgressions".

While we might view "physical disability" as predominantly about "role failure" rather than "rule transgression", I would argue that this is because many physical impairments are visible and people believe them to be understandable on the basis medical explanations, whereas mental impairments more significantly disrupt our core beliefs about ourselves and each other since they can undermine concepts of free will and question the ease with which we form moral judgments about the conduct of others. For example, there are settings in which it is considered a social rule that one should stand (e.g. national anthem, greeting a dignitary; addressing the court, etc.) and this "rule" is routinely broken by those who experience "physical disability" who cannot stand. However, in that context there is often a wheelchair or other mobility device present that signals that this rule breaking is not intentional or a "choice" and if there is no such device present, sometimes a person will be wrongfully admonished because of an impairment and must explain that they cannot abide by the rule. With respect to mental health disability, on the other hand, the reason for the rule transgression is invisible. Consequently, when someone violates a social rule because of a mental health impairment (for example, a person experiencing psychosis who shoplifts because they fail to realize they are in a store) it is often perceived as a "choice". Furthermore, because of the profound stigmatization of some mental health impairments, like "psychotic disorders", for example, there are few to no education campaigns or persons who experience this form of disability speaking out to educate the population about these experiences and challenge our commonly held associations that people who experience mental health disability are always dangerous or irrational. Consequently, many people in society are ignorant about the diversity and nature of these experiences and the ways that these impairments can cause unintentional rule breaking. In other words, physical impairments are implicated in rule transgression in the same way that mental impairments are, but we have arguably made more progress as a society in educating people about the former, whereas the

mental health impairments are both invisible and not well-understood and consequently attract greater skepticism and prejudice.

Secondly, it is important to recognize that social rules and intelligibility are fundamentally interpersonal in nature. It takes more than one person to communicate, so a person experiencing mental health disability is only as "unintelligible" as the person they are communicating to believes them to be. While people with mental health impairments may at times seem unintelligible, this lack of understanding cannot be removed from a social context that often refuses to hear their meaning and to take the time to understand what they are trying to say.

B) Mental Difference as "Valued Capacity" rather than Disability

Some of the arguments against applying a disability lens to mental health may also come down to semantics. For example, as Bradley Lewis has noted, "many in Mad Pride (like many in the Deaf community) express discomfort with the "disability" label. They do not see their mental difference as a disability, but rather as a valued capacity."⁴⁵⁰

This discomfort, in my opinion, relies on a use of the concept of disability in a manner incongruous with all versions of the social model of disability. To begin with, disability is not, according to the social model "their mental difference", it is the oppression faced because of their mental difference. Furthermore, one cannot "have" a disability in the sense of it being a part of one's characteristics, rather, a person experiences disability in a social context. It is therefore completely valid to see one's difference as a "valued capacity" and recognize that in some social contexts one experiences disability.

⁴⁵⁰ Bradley Lewis, "A Mad Fight: Psychiatry and Disability Activism," in Lennard Davis, ed, *The Disability Studies Reader*, 4th ed (New York: Routledge, 2013) at 127. For discussions of this opinion among Mad Movement activists see also Essya Nabbali, "A "Mad" Critique of the Social Model of Disability" (2009) 9:4 International Journal of Diversity in Organisations, Communities and Nations 1 [Nabbali].

Additionally, it is important to recognize that while many mad scholars seek to reclaim and assert the positive nature of their differences in the face of pathologization, this is also common among critical disability scholars who have exposed the way in which individual tragedy understandings of disability leave no space for more multi-faceted accounts that include positive experiences of living with impairments.⁴⁵¹

C) Inapplicability of the Social Model of Disability to Madness

Essya Nabbali has argued that when mad people are considered in light of the social model of disability they are often "inadvertently analysed from a medical model standpoint, whereby madness is indicative of "chemical imbalances" in the brain or "disordered" personalities."⁴⁵² Where madness is considered as an "impairment", "strong social model" theories would ascribe a necessarily biomedical aspect to those experiences, which is a significant problem for many mad people who reject biological explanations of their experiences. However, as I described above, it is possible to recognize impairment as socially-constructed, and in fact many theorists recognize that all impairment, not only mental health impairments, are partially or wholly socially-constructed. In fact, as an anonymous participant in Nabbali's study of the perspectives of mad scholars suggests, concepts of the social model that understand disability in terms of "oppression" (like the social-relational model does) make it compatible with mad scholars who reject a biologically deterministic understandings of madness.⁴⁵³

Ultimately, despite critiques about the applicability of critical disability theory and the social model of disability to mental health or madness, in many ways critical disability theory, understood from

⁴⁵¹ See e.g. Fiona Kumari Campbell, "Exploring Internalized Ableism Using Critical Race Theory" (2008) 23:2 Disability & Society 151 at 153-154; John Swain & Sally French, "Towards an Affirmation Model of Disability" (2000) 15:4 Disability & Society 569.

⁴⁵² Nabbali *supra* note 77 at 1-2.

⁴⁵³ *Ibid* at 6.

a social relational framework, provides a useful theoretical vantage point for considering oppression against those labelled with mental health conditions.

2.5 Applying Critical Disability Theory to Legal Scholarship and Law Reform

Critical disability theory is not yet a well-established school of thought in legal scholarship, though it has traction in other disciplines, including disability studies, cultural studies, and sociology, among others. However, critical disability perspectives espoused by disability rights activists are becoming increasingly influential in law reform initiatives both in Canada and internationally. Domestically, critical disability theory has influenced judicial interpretations of section 15 of the Charter leading to the adoption of the social model of disability in disability rights jurisprudence.⁴⁵⁴ The inclusion of equality rights for persons who experience disability itself was the product lobbying by disability rights activists in Canada, which lead to our adoption of the first constitutionally entrenched equality provisions for disabled people in the world.⁴⁵⁵ Internationally, the United Nations Convention on the Rights of Persons with Disabilities ("UNCRPD") adopts a broadly "social-model" perspective on disability, and was the product of considerable effort by disability rights organizations who called for a disability-specific convention and participated in the debates held during drafting.⁴⁵⁶

Despite the adoption of some critical disability perspectives in law, many disability theorists and activists recognize that law reform can often be a slow, or even glacial, process for creating change. Several scholars have also pointed to the lacklustre results that have often come from attempts to combat

⁴⁵⁴ See Lisa Vanhala, "Twenty-five Years of Disability Equality? Interpreting Disability Rights in the Supreme Court of Canada" (2010) 39:1 Common Law World Review 27. See also Jonas-Sébastien Beaudry, "The Vanishing Body of Disability Law: Power and the Making of the Impaired Subject" (2018) 31 Canadian Journal of Family Law 7. Beaudry traces several "social model" informed descriptions of disability rights in the Supreme Court of Canada, albeit noting that they are not in keeping with much current critical disability theory that explores the social construction of impairments.

⁴⁵⁵ Lisa Vanhala, "Twenty-five Years of Disability Equality? Interpreting Disability Rights in the Supreme Court of Canada" (2010) 39:1 Common Law World Review 27 at 28.

⁴⁵⁶ See Ravi Malhotra, "The United Nations Convention on the Rights of Persons with Disabilities in Canadian and American Jurisprudence" (2015) 32 Windsor Yearbook of Access to Justice 1 at 2-3.

inequality and discrimination on the basis of disability through legal channels, which have included some significant victories, but have also in many cases fallen short of significantly improving the lives of persons who experience disability.⁴⁵⁷ For example, Ravi Malhotra's study of the early impact of the UNCRPD on domestic case law following its ratification by Canada in 2010 found that in some cases, the convention was used to "promote outcomes that are at least arguably counter-productive to the goals of social justice"⁴⁵⁸ such as making it more difficult for disabled people to seek admission to Canada on humanitarian and compassionate grounds.⁴⁵⁹ Additionally, Lisa Vanhala's study of the Supreme Court of Canada's jurisprudence on disability equality rights found that attempts by disability rights activists to promote a substantive equality approach through strategic litigation has seen some "significant gains"⁴⁶⁰, but has also achieved "mixed results"⁴⁶¹ that have limited the expansion of rights. She notes that "[d]isability activists are increasingly fighting battles for what they see as a 'maintenance' of protection from discrimination rather than battles of rights expansion."⁴⁶² The challenges faced when trying to influence legal outcomes suggests that if critical disability theory is to engage with law reform, it must also critique and reform legal institutions themselves.

2.5.1 Situating Critical Disability Theory in the Critical Legal Studies Tradition

⁴⁵⁷ For Canadian examples, see Archibald Kaiser, "Canadian Mental Health Law: The Slow Process of Redirecting the Ship of State" (2009) 17 Health Law Journal 139; Yvonne Peters, *Twenty Years of Litigating for Disability Equality Rights: Has It Made a Difference* (Toronto: Council of Canadians with Disabilities, 2004), online: <<http://www.ccdonline.ca/en/humanrights/promoting/20years>>; Mary-Ann McColl et al, "People with Disabilities and the Charter: Disability rights at the Supreme Court of Canada under the Charter of Rights and Freedoms" (2016) 5:1 Canadian Journal of Disability Studies 183.

⁴⁵⁸ Ravi Malhotra, "The United Nations Convention on the Rights of Persons with Disabilities in Canadian and American Jurisprudence" (2015) 32 Windsor Yearbook of Access to Justice 1 at 18. Note: Malhotra's study considers cases referring to the UNCRPD that were decided between its ratification in 2010 and June 1, 2015.

⁴⁵⁹ *Ibid.*

⁴⁶⁰ Lisa Vanhala, "Twenty-five Years of Disability Equality? Interpreting Disability Rights in the Supreme Court of Canada" (2010) 39:1 Common Law World Review 27 at 45.

⁴⁶¹ *Ibid* at 46.

⁴⁶² *Ibid* at 46.

In situating critical disability theory in legal scholarship, I consider it to be a new and less-recognized branch of critical legal studies (a.k.a. critical legal theory), a broader theoretical movement in legal scholarship. Pothier and Devlin describe "critical disability theory" as being fundamentally concerned with "power(lessness) and context."⁴⁶³ With respect to power, they suggest that "[...] issues of disability are not just questions of impairment, functional limitations, or enfeeblement; they are issues of social values, institutional priorities and political will." With respect to context, they suggest that critical disability theory tackles philosophy and political theory [and arguably, by extension, the law] "with a sharp awareness of the contexts of inequality based on disability" and informed by the lived experiences of persons who experience disability.⁴⁶⁴ The focus of critical disability theory on power, inequality and the social, institutional, and political systems that shape it, mirror similar concerns in critical legal studies scholarship.⁴⁶⁵

Critical legal studies was famously described by Roberto Mangabeira Unger as comprising two predominant trends of thought, one that emphasizes that legal doctrine can be wielded for political aims and is fundamentally malleable according to the interests of the individual employing it, and the other which suggests "law and legal doctrine reflect, confirm, and reshape the social divisions and hierarchies inherent in a type or stage of social organization such as "capitalism"".⁴⁶⁶ Critical Legal Studies was thus initially distinguished primarily as a theory that recognized the law as a politicized field and the interpretation of law as a value-laden activity.

⁴⁶³ Dianne Pothier & Richard Devlin, *Critical Disability Theory: Essays in Philosophy, Policy, and Law* (Vancouver: UBC Press, 2006) at 9.

⁴⁶⁴ *Ibid.*

⁴⁶⁵ Arlene Kanter makes a similar point when addressing the relationship between what she calls "Disability Legal Studies" and Critical Legal Studies. See Arlene Kanter, "The Law: What's Disability Studies Got To Do With It or An Introduction to Disability Legal Studies" (2011) 42:2 Columbia Human Rights Law Review 403 at 439-441.

⁴⁶⁶ Roberto Mangabeira Unger, "The Critical Legal Studies Movement" (1983) 96:3 Harvard Law Review 561 at 563, footnote 1.

The critical legal studies tradition arises out of the theoretical foundations of legal realism and critical theory and challenges understandings of law ascribed to legal "formalism"⁴⁶⁷ and political "liberalism"⁴⁶⁸, which depict it as an abstract or objective rules-based systems involving apolitical decision-making.⁴⁶⁹ Critical legal studies recognizes that law reflects the social hierarchies and power structures in society and acts to maintain them.

Pothier and Devlin highlight that critical theories like feminism, and critical race theory share with critical disability theory an interest in critiquing "liberalism".⁴⁷⁰ From a critical disability theory standpoint, liberalism can be critiqued for embracing a universalist logic that considers people to be independent,

⁴⁶⁷ "Formalism" in critical legal theory refers to an amorphous theory of jurisprudence that is rarely defined but commonly referenced in legal realist, critical legal studies, and law and society literature. Morton Horwitz describes formalism as a view the law that emerged to mask its political nature, depicting it as "scientific, objective, professional, and apolitical" and "an intellectual system that gave common law rules the appearance of being self-contained, apolitical, and inexorable, and which, by making 'legal reasoning seem like mathematics,' conveyed 'an air ... of ... inevitability about legal decisions (Morton Horwitz, "The Rise of Legal Formalism" (1975) 19 American Journal of Legal History 251 at 264 and 252, incorporating quotes from Oliver Wendell Holmes, "Privilege, Malice and Intent" (1894) 8:1 Harvard Law Review 1).

See e.g. Duncan Kennedy, "Toward an Historical Understanding of Legal Consciousness: The Case of Classic Legal Thought in America, 1850-1945" (1980) 3 Research in Law and Sociology 3. However, there have been several critiques questioning whether formalism ever existed as described by the legal realists (i.e. are these just straw-man arguments), see e.g. Brian Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton: Princeton University Press, 2010) and how types of formalism should best be defined and understood if we accept that traits often ascribed to formalism do, in fact, come up in legal theory or are implied by legal argument (See e.g. Brian Leiter, "Legal Formalism and Legal Realism: What's the Issue?" (2010) 16:2 Legal Theory 111).

⁴⁶⁸ Richard Devlin provides the following description of liberalism from a critical legal studies perspective: "Liberal political theory has as its starting point an ontology- a theory of being or person-hood - that assumes a rational, free-choosing, individual who is prior to (and independent of) both the community and other individuals. On this foundation liberalism builds a political and legal philosophy designed to maximize the realm of action open to the individual - a philosophy which argues that society should be governed by the principles of liberty, equality and neutrality. The state and law should strive to provide the citizen with as much space as possible to pursue her own self interests (liberty). Each person should have the equal right to pursue such interests without formal restraints because of his or her identity (equality). The state should remain agnostic as to the nature of a good life, allowing each individual to determine his or her own conception of the good in the marketplace of ideas (neutrality)." See Richard Devlin, "Jurisprudence for Judges: Why Legal Theory Matters for Social Context Education" (2001) 27 Queen's Law Journal 161 at 179. [Devlin, 2001]

⁴⁶⁹ David Hosking provides a description of how these theoretical traditions lay the foundation for critical legal studies, and ultimately critical disability theory in legal scholarship see Hosking 2008, *supra* note 406 at 2-5.

⁴⁷⁰ Dianne Pothier and Richard Devlin, *Critical Disability Theory: Essays in Philosophy, Policy, and Law*, (Vancouver: UBC Press, 2006) at 2.

autonomous, free, and rational selves, and ignoring the realities of human inter-dependency and diversity.

In addition to sharing many traits with broader critical legal studies scholarship, critical disability theory also brings new analytic concerns and tools to critical legal scholarship. Sagit Mor describes some of the new issues that arise for critical legal studies with the introduction of critical disability theory (which she refers to as "Disability Studies"). Mor considers several aspects of laws impact on disablement, ranging from its delineation of entitlements, accessibility and "reasonable accommodation", to its role in the cultural production of disability by employing categories, labels, definitions and representations of disability.⁴⁷¹ Anna Lawson and Mark Priestley further point out that the social model of disability can lead activists to consider the law as a tool or vehicle for social change, which has been the case, for example, in the creation of the UN Convention on the Rights of Persons with Disabilities, which incorporated some aspects of the social model into law and has extended the reach of disability rights to impact a much wider context than traditional anti-discrimination laws had previously done.⁴⁷² However, they note that the law can also serve as an oppressive and disabling system, so it is insufficient to merely consider the law as a tool for change.⁴⁷³ This tension between critiquing the law and trying to employ it to correct broader social wrongs draws into question the relationship between critical disability theory and law reform.

2.5.2 Critical Disability Theory and Law Reform

⁴⁷¹ Sagit Mor, "Between Charity, Welfare and Warfare: A Disability Legal Studies Analysis of Privilege and Neglect in Israeli Disability Policy" (2006) 18:1 Yale Journal of Law and the Humanities 63 at 71-73.

⁴⁷² Anna Lawson and Mark Priestley, "The Social Model of Disability: Questions for Law and Legal Scholarship?" in P. Blanck and E. Flynn, ed, *Routledge Handbook of Disability Law and Human Rights*, (London: Routledge, 2016) at 9-13.

⁴⁷³ *Ibid* at 14-15.

In critical disability theory scholarship, as in other critical legal theory, the extent to which law reform can assist in achieving justice for marginalized people is contentious. In Canada, disability legal scholars have provided historical reviews of disability rights litigation, noting that there have been some significant successes, but also some failures and the legal entrenchment of barriers to substantive equality.⁴⁷⁴ Courts are frequently seen as conservative institutions that tend to reinforce and perpetuate social structures, rather than serving to transform them. Many critical disability scholars have commented on the limits of legal action to transform social biases, promote inclusion, and eliminate discrimination. For example, Oliver and Barnes, have commented that "Focusing on a rights route to emancipation as an end in itself rather than as a means to an end was always likely to be counterproductive. It is becoming increasingly apparent that having legal rights does not mean that they will be enforced and even if they are, that enforcement will achieve the desired ends."⁴⁷⁵

Perhaps one of the most influential analyses of the problem with law reform within critical legal scholarship comes from critical race theorist Derrick Bell Jr.'s concept of the "interest-convergence dilemma".⁴⁷⁶ In analyzing the famous American school de-segregation case *Brown v Board of Education*⁴⁷⁷ Bell famously put forth the theory that the seemingly sudden interest in addressing the problem of school segregation was less attributable to the particular facts and legal arguments raised in that case as to judicial perceptions of the change in material and socio-political interests of upper and middle-class white people at that time, which made de-segregation align with their interests. He writes:

"[...] this principle of 'interest convergence' provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the

⁴⁷⁴ See e.g. Yvonne Peters, *Twenty Years of Litigating for Disability Equality Rights: Has It Made a Difference?* (Toronto: Council of Canadians with Disabilities, 2004) online:

<www.ccdonline.ca/en/humanrights/promoting/20years>; Lisa Vanhala, *Making Rights a Reality? Disability Rights Activists and Legal Mobilization* (Cambridge: Cambridge University Press, 2011).

⁴⁷⁵ Michael Oliver & Colin Barnes, *The New Politics of Disablement* (London: Palgrave MacMillan, 2012) at 151.

⁴⁷⁶ See Derrick Bell Jr. "*Brown v Board of Education* and the Interest-Convergence Dilemma" (1980) 93 *Harvard Law Review* 518 [Bell].

⁴⁷⁷ 347 U.S. 483 (1954).

fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.

It follows that the availability of the fourteenth amendment protection in racial cases may not actually be determined by the character of the harm suffered by blacks or the quantum of liability proved against whites. Racial remedies may instead be the outward manifestations of unspoken and perhaps unconscious judicial conclusions that the remedies, if granted, will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites."⁴⁷⁸

The interest-convergence dilemma has significant ramifications for critical legal theory as it posits that success in legal actions to effect positive change will frequently occur only when it is in the politically dominant group's interest to effect such change. It fundamentally draws into question the power of law to effect social reform for marginalized populations. Bell's interest-convergence dilemma focuses on law as a coercive power imposed on the population. In contrast, and in complement to this critique, other critical legal scholars have employed the Gramscian concept of hegemony to similarly suggest that only legal critique, and not law reform, can lead to social transformation, since legal rights discourses turn real social problems into abstract and manageable categories of disagreement with limits consented to by the population.⁴⁷⁹ This critique is a sort of bottom-up approach to law, in which the whole of society internalizes and reinforces the interests of those in power.

In response to critiques from Critical Legal Studies questioning the value of civil rights law reform to promote equality for black people in the United States, Kimberlé Crenshaw persuasively argues that rights discourse in America has both legitimated racial inequality by only acknowledging formal, but not substantive equality, but has also provided a means by which oppressed groups have been accepted as "formal equals" in the political sphere and has led to some (limited) symbolic and material victories. While acknowledging the duality of rights discourse to co-opt and de-radicalize the goals of social movements,

⁴⁷⁸ *Supra* note 476 at 523.

⁴⁷⁹ See e.g. Alan Freeman, "Truth and Mystification in Legal Scholarship" 90 Yale Law Journal 1229; Robert Gordon, "Unfreezing Reality: Critical Approaches to Law" (1981) 15:2 Florida State University Law Review 195.

she highlights that rights discourse must also be understood in light of the limited options provided to blacks [and arguably other oppressed groups] to have their demands heard by engaging with the "institutional logic of the system".⁴⁸⁰ She writes

As demonstrated in the civil rights movement, engaging in rights rhetoric can be an attempt to turn society's "institutional logic" against itself - to redeem some of the rhetorical promises and the self-congratulations that seem to thrive in American political discourse.⁴⁸¹

Crenshaw can be understood to address, to some extent, both the interest-convergence dilemma and hegemony-based critiques of law reform, in so far as she interprets law as a system that, while supporting the material interests of those in power also contains its own legitimating logic that, when employed to articulate the rights of marginalized groups, risks delegitimizing the system of power itself if it does not acknowledge and address, to some extent, these claims. Law reform remains a potential and perpetually changing avenue of resistance by allowing those in marginalized groups to use legal logic to challenge the power systems themselves.

Some disability scholarship has suggested that litigation may not be the only reason to consider disability from a legal rights perspective. Rights discourse may impact individual and societal understandings of disability, irrespective of the success of legal challenges. For example, law and society scholars David Engel and Frank Munger have studied the relationship persons who experience disability have to rights in grappling with the "paradox of rights", in which a rise of "rights" discourse in American society has allegedly not translated into a greater number of actual human rights legal challenges.⁴⁸² They have documented through a study of personal narratives of persons who experience disability in the USA, the way that rights can significantly impact the internal beliefs and understandings of disabled

⁴⁸⁰ See Kimberlé Crenshaw, "Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-discrimination Law (1988) 101:7 Harvard Law Review 1331.

⁴⁸¹ *Ibid* at 1366.

⁴⁸² David Engel & Frank Munger, "Rights, Remembrance, and Reconciliation of Difference" (1996) 30:1 Law and Society Review 7 at 10.

people and their treatment by others in society, despite the rarity of legal claims brought to enforce such rights.

Viewed from these perspectives, engaging with legal rights discourse serves a wider function than achieving direct reform to enforce minority rights. Law reform can also be used to impact individual and public perceptions of an issue and to communicate values. It is therefore crucial when seeking to use the law as a tool for reform that this does not come at the expense of internal critiques of the law itself that determine what message is being communicated.

In evaluating the law from a critical disability perspective, I have consequently taken direction from David Hosking's description of a "critical jurisprudence of disability" which embraces both internal critique of the law as it is currently construed, in addition to the potential uses of legal tools to effect outward change. According to Hosking, critical jurisprudence:

(1) identifies the overt and covert sources of oppression within the law and legal institutions and, by means of that exposure, seeks to relieve disabled people from that oppression and (2) identifies the potential positive role of law and seeks to create law, use existing law and enlist legal institutions in the struggle for the emancipation of disabled people which is the rationale for CDT itself.⁴⁸³

Practically, this has translated into a dual interest in critiquing the way that coroner and medical examiner inquiries, as a quasi-legal realm, have understood the issue of police-involved deaths, including a critique of the way in which these systems have, in some cases, procedurally and substantively perpetuated ableism, as well as considering how this data, considered through the lens of human rights, might be used to address discrimination in police use of force.

⁴⁸³ David Hosking, "Critical Disability Theory", presented at the 4th Biennial Disability Studies Conference at Lancaster University, UK, Sept. 2-4, 2008, online: <https://www.lancaster.ac.uk/fass/events/disabilityconference_archive/2008/papers/hosking2008.pdf> at 16.

2.6 Intersectionality and Critical Disability Theory

Intersectionality is an approach to studying oppression that seeks to consider the interplay between differing group identities in order that the experiences of less privileged members of a given group, who face multiple intersecting forms of oppression, are not rendered invisible. Legal scholar Kimberlé Crenshaw introduced the concept of intersectionality into feminist legal analysis as a means of challenging the erasure of Black women's experiences within feminist and critical race theory scholarship.⁴⁸⁴ As Sumi Cho, Kimberlé Crenshaw, and Leslie McCall describe it:

"[...]what makes an analysis intersectional—whatever terms it deploys, whatever its iteration, whatever its field or discipline—is its adoption of an intersectional way of thinking about the problem of sameness and difference and its relation to power. This framing—conceiving of categories not as distinct but as always permeated by other categories, fluid and changing, always in the process of creating and being created by dynamics of power—emphasizes what intersectionality does rather than what intersectionality is."⁴⁸⁵

Intersectional analysis has been used as a foundation for critical legal scholarship. For example, with respect to human rights law. Crenshaw employed intersectionality to critique what she refers to as "single-axis analyses", in which a complainant or plaintiff must prove they have been discriminated against as a member of a protected group, but cannot combine groups to prove discrimination. Indeed, Canadian human rights law has broadly come to accept the importance of addressing the intersection between grounds of discrimination.⁴⁸⁶

From the vantage point of intersectionality, "disability" and "race", are similar in so far as both are socially constructed categories that have been falsely promoted as natural, scientific, or neutral

⁴⁸⁴ See Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) 1:8 University of Chicago Legal Forum 139.

⁴⁸⁵ Sumi Cho, Kimberlé Crenshaw & Leslie McCall, "Intersectionality: Theorizing Power, Empowering Theory" (2013) 38:4 Signs 785 at 795.

⁴⁸⁶ See e.g. *Turner v Canada (Attorney General)*, 2012 FCA 159; *Withler v. Canada (Attorney General)*, 2011 SCC 12.

descriptions, and which have historically been employed to segregate, control, and oppress.⁴⁸⁷

Intersectional analyses involving consideration of race, gender, class, and sexuality, and how these shape the lived realities of persons who experience disability and the power dynamics shaping disability are also an accepted feature of critical disability theory.⁴⁸⁸

When discussing policing and use of force in Canada, considering the intersection of race and disability is particularly important in light of the reality of disproportionate use of force against some racialized groups in Canada, which must be acknowledged and addressed. While little data on perceived race is collected with respect to use of force by police in Canada, studies that have attempted to understand race in this context suggest that Indigenous and Black people in Canada face significantly higher rates of police use of force than the white population.⁴⁸⁹

⁴⁸⁷ See David Gillborn, "Intersectionality, Critical Race Theory, and the Primacy of Racism: Race, Class, Gender, and Disability in Education" (2015) 21:3 Qualitative Inquiry 277 at 280.

⁴⁸⁸ Geoffrey Reaume, "Understanding Critical Disability Studies" (2014) 186:16 Canadian Medical Association Journal 1248.

⁴⁸⁹ See e.g. Scot Wortley, *Police Use of Force in Ontario: An Examination of Data From the Special Investigations Unit* (Toronto: African Canadian Legal Clinic, 2006) at 37, online:

https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/projects/pdf/AfricanCanadianClinicpp_erwashProject_SIUStudybyScotWortley.pdf, in which a study of Ontario's Special Investigations Unit completed case investigation for the period of January 1, 2000 to June 6, 2006 revealed that Black Canadians are 3.3 times more likely to be the victim of police use of force in a case investigated by the SIU (which should investigate all serious or lethal uses of force by police in the province) than their representation in the general public would predict, and Aboriginal Canadians are 4.2 times more likely. Black Canadians were also found to be the victims in such cases at 4.5 times the rate of white Canadians, and Indigenous persons at 5.8 times the rate of the white population.

See also Ontario Human Rights Commission, *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black Persons by the Toronto Police Service* (Toronto: Ontario Human Rights Commission, 2018), online: < <http://ohrc.on.ca/en/public-interest-inquiry-racial-profiling-and-discrimination-toronto-police-service/collective-impact-interim-report-inquiry-racial-profiling-and-racial-discrimination-black>>, a study of use of force incidents reported to the SIU in Toronto from 2013 to 2017, that found a Black person in Toronto was nearly 20 times more likely to be the victim of a fatal police shooting than a white person and Black people were over-represented in both lethal and non-lethal force.

See also Peter Kim, "17 Years of Police Violence in Canada", (28 March 2019) online (blog): *Pivot Legal Society* <http://www.pivotlegal.org/17_years_of_police_violence_in_canada>, which employed the CBC Deadly Force database to find that Indigenous people in Canada make up only 4.8% of the population, but represented 15% of police-involved fatalities studied.

To contextualize police violence against Indigenous and Black people, critical scholars have pointed to the continuance of racism and colonialism, which often goes unacknowledged in Canadian society. Racism and colonialism fundamentally structure the life experiences of Black and Indigenous people in Canada, who are socio-economically marginalized, subjected to perpetual surveillance and control by state actors, criminalized, and disproportionately incarcerated.⁴⁹⁰

Sherene Razack has explored colonialism within Canadian inquests held for Indigenous deaths in custody, noting that the stories told about these deaths reinforce colonial narratives of Indigenous people as a "dying race",⁴⁹¹ but that the reality of colonialism is rarely, if ever, acknowledged by these systems.

Razack writes

While colonialism often remains a shadowy event in inquiries and royal commissions, official accounts generally stop short of acknowledging the virulence and persistence of racism. Instead, they reiterate that somehow indifference persists among the police and the health professions, an indifference attributed to systems that have not been properly organized to respond to the problem Indigeneity poses to cities.⁴⁹²

Similarly, Robyn Maynard has remarked on the ways in which state violence against the Black population in Canada has been normalized to the point of invisibility. She writes: Black life has been so effectively stigmatized that even highly spectacular forms of state violence are largely unrecognized as such, and go uncontested by much of mainstream society.⁴⁹³

⁴⁹⁰ For detailed descriptions of the impacts of racism and colonialism in Canada as it relates to policing, See e.g. Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to the Present* (Halifax: Fernwood Publishing, 2017); Elizabeth Comack, *Racialized Policing: Aboriginal People's Encounters with the Police* (Halifax: Fernwood Publishing, 2012); Sherene Razack, *Dying from Improvement: Inquests and Inquiries into Indigenous Deaths in Custody* (Toronto: University of Toronto Press, 2015); Pamela Palmater, *Shining Light on the Dark Places: Addressing Police Racism and Sexualized Violence Against Indigenous Women and Girls in the National Inquiry* (2016) 28:2 Canadian Journal of Women and the Law 253; Wendy Chan & Dorothy Chunn, *Racialization, Crime, and Criminal Justice in Canada* (Toronto: University of Toronto Press, 2014).

⁴⁹¹ Razack *supra* note 490 at 4

⁴⁹² Razack *supra* note 490 at 30-31.

⁴⁹³ Maynard, *supra* note 490 at 84.

In chapter 4 I have considered the notable absence of consideration of perceived race, racism and colonialism in the coroner and medical examiner reports studied, highlighting these issues, where information about them is present, as they intersect with constructions of disability and ableist accounts of the deaths studied.

Other scholars have considered the intersections between disability and race in considering police use of force deaths. For example, Sherene Razack has noted the propensity for Indigenous deaths in custody to be medicalized and explained in relation to concepts of sickness and health, rather than as a consequence of colonial violence. She writes, in the context of describing the inquiry into the death of Frank Paul⁴⁹⁴, an Indigenous man who was abandoned to die in an alleyway behind the police station in Vancouver, and whose death was explained as a consequence of addiction:

As a technology of governance, the inquiry contributes to the management of Indigenous peoples as a collection of individuals, a sick, dysfunctional population, rather than a dispossessed collective against whom violence is authorized. The individualizing and medicalizing move has long been central to settler colonial societies because it confirms that Indigenous peoples are simply people unable to progress from the state of nature.⁴⁹⁵

This description depicts the way in which disability (in this case the concept of "addiction") meets racism (in this case colonialism and its subjugation of Indigenous people) to shape our understandings of police-involved death as problems of individual medical pathology. Intersectional analysis allows for a consideration of the ways in which multiple forms of oppression (e.g. racism and ableism) can impact an individual, but also the ways in which these forms of oppression (axes of power) and the ideas underlying them interact and support each other.

⁴⁹⁴ See Davies Commission, *Alone and Cold: The Davies Commission Inquiry into the Response of the Criminal Justice Branch* (Vancouver: Davies Commission of Inquiry, 2012) online: < <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/inquiries/daviescommission-finalreport.pdf>>.

⁴⁹⁵ Razack, *supra* note 490 at 80-81.

Chapter 3: Methodology

3.1 General Study Design

In this chapter I will provide a description of the methods I employed in the literature review, empirical analysis and legal analysis of this thesis. Briefly, the research and analysis in this thesis involved an initial use of formal and informal access to information requests to Canadian provinces and territories for coroner/medical examiner reports for review processes (inquires, inquests, etc.) that occurred within the time period of January 1, 2004 to December 31, 2014. Secondly, a media analysis was undertaken to identify additional coroner/medical examiner reports not provided in response to the initial information requests, and a second round of formal and informal information requests was used to elicit further reports. A literature review of academic and grey literature pertaining to police-involved deaths in Canada and police training and systems for addressing use of force against persons who experience mental health disability was undertaken. Finally, a legal analysis of Canadian and relevant international human rights law was undertaken to discuss the potential and barriers to employ human rights law to address use of force against or police-involved deaths of persons who experience mental health disability.

In 2014, when I initially set out to study police-involved deaths and injuries of persons who experience mental health disability and the legal dynamics of accountability in this context it quickly became clear that there was little available data on fatal or injurious police interactions involving persons who experience mental health disability in most Canadian provinces and territories, and particularly sparse information about the issue nationally. Media reports circulated of fatal interactions between police and persons who experience mental health disability, but little was known about the nature and scope of the problem of police use of force against this population.

I decided to design a study of national scope for two primary reasons. Legally, police use of force is heavily influenced by federal, constitutional and common law limits, applicable to all Canadian police forces. Policing is a shared constitutional power with both the federal government and provinces regulating police forces.⁴⁹⁶ Canada has many police forces and while most are primarily regulated by provincial law, police use of force powers are predominantly structured by the common law and federal and constitutional law.⁴⁹⁷ While the legal limits on use of force are generally the same between provinces, the operational policies of individual forces differ, providing opportunities to compare and contrast. Furthermore, the Royal Canadian Mounted Police, Canada's largest police force, operates federally but provides policing services to several provinces and municipalities pursuant to Police Service Agreements, in addition to administering national policing databases used to track law enforcement data throughout Canada.⁴⁹⁸ RCMP policy therefore takes on national importance in regulating police practices and circumscribing information available to police officers. Finally, in 2000 the Canadian Association of Chiefs of Police endorsed a "National Use of Force Framework", which provides a model to describe use of force that is currently employed with some variation by many Canadian police forces, contributing to greater national uniformity on police use of force.⁴⁹⁹ For all of these reasons, it is worthwhile to study police-involved injuries and deaths nationally.

Secondly, I determined that in order to study the issue of Canadian police-involved deaths and injuries of persons who experience mental health disability I would need to gather

⁴⁹⁶ See *Constitution Act, 1867*, 30 & 31 Vict, c 3, ss 91(27), 92(14).

⁴⁹⁷ See *Criminal Code*, RSC 1985, c C-46, ss 25, 26, 27, 32; *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 7; *R v Nasogaluak*, 2010 SCC 6.

⁴⁹⁸ See "National Police Services: Building a Sustainable Future", (Ottawa: Government of Canada, 2012), online: *Royal Canadian Mounted Police* <www.rcmp-grc.gc.ca/en/national-police-services-building-a-sustainable-future>. But, note that provincial and force-specific databases also exist, so the RCMP does not monopolize the informational management of Canadian police forces.

⁴⁹⁹ See "A National Use of Force Framework" (November 2000), online (pdf): *Canadian Association of Chiefs of Police* <www.cacp.ca/cacp-use-of-force-advisory-committee-activities.html?asst_id=199>.

data on a large number of such cases in order to establish the nature and dynamics at play in these interactions as a precursor to analyzing legal recourse aimed at respecting the rights of persons who experience mental health disability. Non-fatal police-involved injuries are unfortunately very difficult to study from a critical perspective because descriptions of these cases are generally only contained within use of force reports held by policing agencies, which are generally inaccessible for study without permission from a police force; access to information requests for this information are largely denied because of the private nature of the information contained within them.⁵⁰⁰ On the other hand, it is possible to collect more detailed information on fatal interactions because they often trigger medical examiner or coroner reports that are usually made publicly available. While police-involved deaths are the most consequentially dire cases, they can shine light on the nature of police-involved injuries and serious use of force interactions broadly, and the situational, environmental, and demographic factors at play.

My study has thus been designed to identify and situate the issue of police-involved injuries and deaths of persons who experience mental health disability in Canada, by collecting and organizing a database of publicly available information about police-involved deaths from all provinces and territories, to provide a sufficient number and diversity of cases to explore and analyze, and from which to consider the disability rights of persons involved in such interactions. My analysis is socio-legal in nature, bridging the gap between the rights, duties, and liability

⁵⁰⁰ For example, federally the RCMP's Subjective Behaviour/ Officer Response database which contains all use of force reports collected by the RCMP, including use of force by RCMP members acting pursuant to Police Service Agreements. This information is de-identified after two years and subject to the Privacy Act, which prevents the disclosure of personal information, or information obtained through the provinces, leaving data which will generally only be shared in aggregate form for research purposes. See "Subject Behavior/Officer Response Database" (22 May 2009), online: *Royal Canadian Mounted Police* <www.rcmp-grc.gc.ca/en/privacy-impact-assessment-subject-behaviour-officer-response-database-sbor>.

concerns that shape these interactions from a legal perspective and the policies and context that shape these interactions and societal understandings of them.

3.1.1 Research Questions

The research questions I determined to study include:

1. What patterns or similarities exist in Canadian coroner and medical examiner reports concerning persons who experience mental health disability, including types of deaths, circumstances of death, and causes of death?
2. What coroner and medical examiner recommendations have been made with respect to policing mental health crises in Canada?
3. What opportunities or barriers does Canadian human rights law provide for legal accountability for excessive or unjustified use of force or police-involved deaths and injuries of persons who experience mental health disability in Canada and what benefits does addressing this issue from the perspective of human rights hold?

The first research question is broad and was intended to provide information necessary to understand what types of police-involved deaths of persons who experience mental health disability occur in Canada and to identify situational or contextual factors that might be relevant to understanding these interactions and their legal implications. The second question was aimed at evaluating to what extent those who have already studied particular police-involved deaths have produced recommendations that may address the legal responsibilities of police to accommodate mental health disability. The last question is aimed at exploring how human rights law might provide a means of promoting reform and accountability for police-involved deaths and injuries of persons who experience mental health disability.

3.1.2 The Choice of Coroner/Medical Examiner Reports as a Dataset: Advantages and Limitations

As previously mentioned, the empirical aspect of my study was designed to create a national dataset of police-involved deaths to illustrate the problem and provide necessary information in order to consider it from a legal and policy perspective. There are many police forces in Canada, with varying jurisdictions, including federal, provincial, municipal, tribal, transit-specific, military, and others. Data on police use of force is generally kept by policing agencies, and in some cases is collected provincially. There is, however, currently no single repository for national information on police use of force in Canada. Individual police forces generally collect limited use of force data, often in the form of mandatory reporting systems contained in their policies and procedures.⁵⁰¹ In some cases provincial governments also mandate data collection on serious use of force incidents.⁵⁰²

In 2014, when I began my study, limited national data on police use of force deaths or injuries was available from the Vital Statistics Death Database and the Canadian Coroner and Medical Examiner Database. During the course of my doctoral studies the CBC published its Deadly Force database that lists some police-involved deaths between 2000-2017, and was subsequently updated to include deaths up to June 30, 2020.⁵⁰³ I will briefly describe these sources of national use of force information in order to situate my study and explain the informational gap it fills.

⁵⁰¹ See e.g. Royal Canadian Mounted Police, *Operational Manual* (Ottawa: Government of Canada, 2014), a copy of which the author obtained through an access to information request (#A-2016-08391 - available upon request from the Government of Canada at: <open.canada.ca/en/search/ati>), provides mandatory reporting requirements for officers discharging a firearm (s. 4.8) and using force (s. 17.8).

⁵⁰² See e.g., *Police Service Act*, RSO 1990, c P.15, s 80(1)(k) and *Ontario, Equipment and Use of Force*, RRO 1990, Reg 926, s 14.5.

⁵⁰³ Marcoux & Nicholson, *supra* note 2; Inayat Singh, “2020 already a particularly deadly year for people killed in police encounters, CBC research shows”, *CBC News* (23 July 2020), online: <newsinteractives.cbc.ca/fatalpoliceencounters/>.

The Vital Statistics Death Database (VSDD) contains information on fatalities across the country, classified according to the International Classification of Diseases system developed by the World Health Organization.⁵⁰⁴ Deaths caused by legal intervention⁵⁰⁵ and the sequelae of legal intervention were tracked in the years studied. The number of legal intervention deaths tracked by the VSDD is quite low, averaging 17.1 per year during my study time period (2004-2014).⁵⁰⁶ No deaths from legal intervention sequelae were recorded in the years studied, although these numbers are also tracked. The VSDD thus provides only a glimpse at the issue by indicating the number of deaths that are directly attributed to injuries caused by law enforcement intervention by provincial and territorial officials, as opposed to deaths that were found to have taken place in police presence but which may have had additional or other causes identified beyond actions taken by police. Since determining the cause of a death is complex, databases like the VSDD, which only provide aggregate data on cause of death, may contain misleading information. In fact, as will be explained in chapter 4: *Mental Health Disability and Police-Involved Injury and Death in Canada*, the cases collected in the present study reveal that the VSDD does not account for all police shooting deaths in Canada, under-reporting such deaths in the years studied, which undermines the credibility of this database for information on police-involved deaths.

⁵⁰⁴ See "Classifications", World Health Organization, online: <www.who.int/classifications/icd/en/>.

⁵⁰⁵ The ICD-10 defines legal intervention as including:

injuries inflicted by the police or other law-enforcing agents, including military on duty, in the course of arresting or attempting to arrest lawbreakers, suppressing disturbances, maintaining order, and other legal action.

(See ICD-10 Version: 2016 application, World Health Organization, online: <apps.who.int/classifications/icd10/browse/2016/en> at XX Y35).

⁵⁰⁶ See "Table 13-10-0156-01 Deaths, by cause, Chapter XX: External causes of morbidity and mortality (V01 to Y89)" (2022), online: Statistics Canada <www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1310015601>, DOI: <doi.org/10.25318/1310015601-eng>.

Another potential avenue of information concerning police-involved deaths is the Canadian Coroner and Medical Examiner Database (CCMED) maintained by Statistics Canada. This database was created through an information sharing agreement between the provinces, territories, and the federal government whereby most provinces and territories (excluding Manitoba, Nova Scotia, Newfoundland & Labrador, and Nunavut⁵⁰⁷) submit cases investigated by a coroner or medical examiner each calendar year.⁵⁰⁸ The database is a potentially useful repository of information about deaths in Canada, though limited information is published about it. Unfortunately, while some limited aggregate data is available from this database, the source documents within it, coroner and medical examiner reports, are protected from government disclosure by law and researchers cannot obtain access to these reports from the federal government. In 2015, I made an informal request to access these files to Statistics Canada and was told that the reports in the database cannot be accessed by researchers as they are provided to the federal government under an agreement with the provinces and territories and can only be obtained by contacting those governments directly.⁵⁰⁹ Section 13(1)(c) of the federal Access to Information Act excludes the disclosure of information obtained in confidence from the provincial governments.⁵¹⁰ Furthermore, since the CCMED is comprised of investigation reports, rather than simply public verdicts from coroner and medical examiner proceedings, these documents are not

⁵⁰⁷ See “Canadian Coroner and Medical Examiner Database Annual Report” (February 2012) at 8, online (pdf): *Statistics Canada* <www150.statcan.gc.ca/n1/en/pub/82-214-x/82-214-x2012001-eng.pdf?st=2W6SpU9g>.

⁵⁰⁸ *Ibid.*

⁵⁰⁹ Note: I obtained this information after requesting access to this data from Statistics Canada, where ATIP Advisor Tim McSorley referred me to Infostats on April 24, 2015. I contacted Infostats and was told that because the data within the CCMED contains personal information and was obtained under an agreement from the provincial and territorial governments, it cannot be provided to researchers.

⁵¹⁰ *Access to Information Act*, RSC 1985 c A-1 at 13(1)(c).

admissible under section 13(2) of the Act, which provides for the disclosure of documents that are made public.⁵¹¹

In addition to the above-mentioned sources of national information on use of force interactions, in April 2018 the Canadian Broadcasting Corporation (CBC) released a database of police-involved deaths in Canada from 2000 to 2017 that were collected predominantly from media reports, independent investigation reports, coroner reports, court records and family interviews.⁵¹² This database was not available at the outset of my study. It contains useful basic information about many police-involved fatalities in Canada. The CBC Database contained 555 police-involved deaths for the January 1, 2000 to June 30, 2020 time period.⁵¹³ The dataset is organized by year and province/territory of death and provides approximate numbers of police-involved deaths in Canada for the years it covers, although it contains some omissions, errors and partial information, because obtaining and verifying this data is challenging.⁵¹⁴ However, it

⁵¹¹ *Access to Information Act*, RSC 1985 c A-1 at 13(2).

⁵¹² The author obtained a copy of the CBC database and a description of their methods used from Jacques Marcoux on November 7, 2018. The source of the data is not described in great detail as the study was not academic in nature, but the provided informational document states:

"In 2017, a team of CBC researchers began the process of tracking details surrounding the deaths of citizens during encounters with police by culling thousands of independent investigator reports, coroner reports, court records and news reports, and by conducting family interviews.

"It was not always possible to confirm details using official reports (e.g. In some jurisdictions [sic], coroner reports are not publically available, many provinces did not have independent investigators until only very recently). While we made every effort to capture all incidents, it is possible some were missed, especially those in the earlier years.

"In some cases, newspapers that would have reported on the incidents in smaller communities no longer exist; making it more difficult to track them down. It is also worth noting that 17 years ago it was not nearly as common to digitize and post records online as it is today.

"Best efforts were made to ensure the accuracy of the data, but ultimately some of it relies on third party media reports or even family interviews. It is possible some details captured in our database are incorrect. In some cases, families have contested some of the findings in the official reports."

See also Jacques Marcoux, "Deadly Force: How CBC Analyzed the Details of Hundreds of Fatal Encounters Between Canadians and Police", *CBC News* (15 April 2018), online: <www.cbc.ca/news/canada/manitoba/iteam/deadly-force-cbc-analysis-1.4603696>.

⁵¹³ See Jacques Marcoux & Katie Nicholson, "Deadly Force: Fatal Encounters with Police in Canada: 2000-2017" *CBC News* (5 April 2018), online: <newsinteractives.cbc.ca/longform-custom/deadly-force>.

⁵¹⁴ In the course of conducting my media search I found some instances of inaccuracy in the information described in the database, and errors with respect to dates and names.

contains several cases from the province of Nova Scotia, a province which is not represented in my dataset due to provincial privacy law restrictions. The CBC Database also excludes police-involved deaths that occurred in correctional facilities or jails and deaths that were found to have occurred through suicide or "fatal accident" (which includes police-involved drug overdoses, motor vehicle accidents, and fatal falls during police pursuits).⁵¹⁵ It is therefore a narrower dataset than the one I collected which includes deaths categorized as "accidental" and "suicides" since these can be relevant to the legal responsibilities of police. It is particularly important to include suicides and accidents when considering police actions concerning persons in crisis, because accidental and suicide deaths in the presence of police may be impacted by crisis intervention policies and practices. Furthermore, in some jurisdictions deaths labeled "suicides" may be substantially caused by police in scenarios deemed to be a suicide-by-cop, meaning that the deceased was believed to have intentionally provoked a police shooting.⁵¹⁶ Consequently, eliminating deaths from study because of their classification can hide very relevant cases from scrutiny. Nonetheless, this dataset was very helpful to check the results of my own data collection and has contributed considerably to public knowledge surrounding police-involved deaths in Canada. The database contains short summaries of the known circumstances of death in these cases, but generally provides much less detail for analysis than coroner and medical examiner reports, and arguably less reliable information as more of the data is sourced from media reports.

Given the limitations of the available national datasets described above, I determined it would be helpful to compile coroner and medical examiner inquest/fatality inquiry reports. These

⁵¹⁵ The inclusion criteria were described in the information document provided to the author by Jacques Marcoux on November 7, 2018.

⁵¹⁶ See, for example, *Re D.J.M.*, Ontario, Date of Death: June 2, 2000, in which the deceased's death was ruled a suicide despite the fact that he died from a gunshot fired by police; *Re G.T.C.*, British Columbia, Date of Death: June 20, 1988, in which the deceased was shot by police after ignoring their commands to drop a knife. The death was ruled a suicide.

reports are frequently generated in the wake of police-involved fatalities, often mandated by statute, and they provide a narrative describing what took place in addition to recommendations for changes to policy and practice aimed at preventing future deaths. Furthermore, all provinces and territories have some medical examiner or coroner system in place, although these systems differ widely with respect to the qualifications and roles of coroners/medical examiners, the nature of the investigations, inquests/fatality inquiries undertaken, and reports produced. Coroners' inquests and fatality inquiries are public hearings, which generally result in at least some public documents describing the cause of death (e.g. gunshot wound, asphyxiation, etc.), the manner of death (e.g. homicide, suicide, accident, etc.), demographic information about the deceased, and the circumstances of their death. In most jurisdictions, coroner and medical examiner investigation reports, which document the death investigation that initially occurs prior to any inquiry being held, are not publicly accessible as they fall within privacy protections designed to shield personal health information and investigative records from disclosure. In several jurisdictions inquests or inquiries are required in police-involved deaths, while others use them only in discretionary circumstances dictated by the public interest.⁵¹⁷

While inquests and fatality inquiries generally provide more in-depth publicly accessible information about police-involved deaths than some other sources like media reports, news releases, or special investigations unit data, studying them as a means of obtaining an understanding of the nature and scope of this problem nationally has several limitations, which will be described below.

A) Mandatory vs Discretionary Inquests / Fatality Inquiries

⁵¹⁷ See Appendix E for a description of when and in what circumstances inquests or reviews are mandatory.

The difference in whether and to what extent coroner and medical examiner inquest/fatality inquiry processes are required by statute in the provinces and territories leads to significant differences between the number of reports accessible for different jurisdictions relative to their population. Some jurisdictions have mandatory inquests or fatality inquiries when a person dies in police custody, however coroner and medical examiner data about these deaths may nonetheless be incomplete if officials fail to comply with their statutes, or interpret their statutory responsibility narrowly. Furthermore, some coroner/medical examiner statutes provide exceptions to mandatory inquests for cases where the death was natural, unpreventable, unconnected to the treatment of police, or where a public inquiry is to take place into the death.⁵¹⁸ They can thus be avoided in some cases due to medical or political decision-making. In order to partially address this concern, I added public inquiries revealed by my data collection methods to the inquests/fatality inquiries studied, since they involve a similar fact-finding and recommendations-producing structures. Some jurisdictions provide only discretionary inquests, which are required only if a coroner or the chief coroner determines it is necessary in order to determine the identity of the deceased and circumstances in which they died, or where calling an inquest would be in the public interest.⁵¹⁹ In some jurisdictions mandatory coroner or medical examiner investigations take place when someone dies in police detention/custody, but these processes are private in nature and do not involve the publication of documents intended for the public or result in public hearings.⁵²⁰ Nova Scotia, for example, rarely holds any inquests as they are not required to by statute, but the medical examiner is mandated to conduct investigations into deaths of persons in police detention or custody.⁵²¹ Because of these differences between

⁵¹⁸ See *Coroners Act*, SBC 2007 c 15, s 18; *Fatality Inquiries Act*, RSA 2000, c F-9, ss 10, 19, 32, 33; *Coroners Act*, RSO 1990 c C.37.

⁵¹⁹ See Appendix E.

⁵²⁰ See e.g. *The Coroners Act*, 1999, SS 1999, c C-38.01, ss 9, 11.

⁵²¹ *Fatality Investigations Act*, SNS 2001, c 31, ss 5(1), 11.

provincial and territorial requirements, coroner and medical examiner reports can provide a window into police-involved deaths, but are not a comprehensive source for collecting or understanding all police-involved deaths nationally, provincially, or territorially.

B) Lack of National Standards on Death Investigation and Classification

At present, despite the importance coroner and medical examiner data plays in documenting and preventing deaths, Canada lacks any national consensus concerning standards for coroners and medical examiners, including qualifications to hold these positions, training for these roles, standards for death classification, investigatory standards, recognized credentials for these roles, and evaluation criteria to judge performance in these roles.⁵²² This lack of standardization is largely because these departments are within provincial jurisdiction. Consequently, medical examiner and coroner reports must be studied more deeply than the classification level to understand the nature of the deaths being tracked by these systems. One cannot assume particular procedures have been followed in a given case, or that the coroner/medical examiner, inquiry judge or jurors were instructed to make their determinations in similar ways. So while coroner and medical examiner systems may have similar categories for the manner and cause of death, how these decisions are made and what types of deaths fit into each label can differ. In my study I am discussing and evaluating the reports with consideration

⁵²² See Diane Kelsall & Matthew Bowes, "No Standards: Medicolegal Investigation of Deaths" (2016) 188:3 Canadian Medical Association Journal 169.

One significant difference between jurisdictions is the qualifications of the individual presiding over the hearing and whether or not a jury is involved. In several jurisdictions, including British Columbia, coroners preside over inquests and there are no legislated criteria for appointment. In others, and in all medical examiner jurisdictions, the coroner/medical examiner must be a physician. However, in many medical examiner jurisdictions provincial judges conduct the fatality inquiries. The qualifications and background of the coroner/medical examiner are relevant, in so far as they are often the fact finder and decision-maker and they are generally responsible for writing the summary of the circumstances of death found in the reports. Consequently, their background, training, and worldview will inevitably shape the narrative about the incident itself.

given to the summaries provided, which may help to shed light on the circumstances of death irrespective of the labels attached to them.

C) Differing Practices and Legal Requirements Concerning Privacy

When I requested coroner and medical examiner reports, some provinces provided heavily redacted responses or refused my requests as a consequence of the differing privacy protections afforded by provincial and territorial statutes. For example, Nova Scotia's *Fatality Investigation Act*, provides that reports produced pursuant to the act are "the property of the Government of the Province" and specifies that aside from medical certificates of death, no other records other than those released in a public inquiry can be provided to the public without the permission of the Chief Medical Examiner.⁵²³ Since public inquiries are rarely held in Nova Scotia and are not required by their statute for police-involved fatalities,⁵²⁴ the few reports I was able to obtain from the coroner were heavily redacted investigation reports, provided discretionarily with little information contained within them aside from providing evidence that at least some police-involved fatalities occurred in the province during the decade studied. These reports were redacted pursuant to Nova Scotia's Freedom of Information and Protection of Privacy Act, which protects personal information, the disclosure of which "would be an unreasonable invasion of a third party's personal privacy" and protects personal information relating to "medical, dental, psychiatric, psychological or other health-care history, diagnosis condition, treatment, or evaluation" from disclosure.⁵²⁵

⁵²³ *Fatality Investigations Act*, SNS 2001, c 31, s 23(1).

⁵²⁴ See *Fatality Investigations Act*, SNS 2001, c 31.

⁵²⁵ *Freedom of Information and Protection of Privacy*, SNS 1993 c 5, ss 20(1), 20(3)(a).

In some cases the reports provided contained very little information about the circumstances of death beyond classification. For example, the relevant report provided for Nunavut provided no information beyond classification and recommendations. Some other Canadian jurisdictions have legislation and reporting practices more conducive to disclosure and provided responsive reports with relatively detailed information about the deaths, including descriptive summaries, basic demographic factors, names, and the manner and cause of death.

D) Time Lapses Between Death and Inquest/Review and Cancelled or Precluded Cases

One limitation with respect to coroner and medical examiner reports is their inability to accurately reflect or approximate the number of police-involved deaths that have occurred in a given year, even in jurisdictions with mandatory inquests, due to the possibility of considerable time delays or cancellations.

Delays between the date of death and the inquest of over a year in length are common in many jurisdictions and sometimes inquests take over five years to begin, often owing to other legal or investigative procedures that must be completed before they commence, such as special investigations unit investigations. Cases in which the officer(s) involved in the death are charged with criminal offences will generally cause an inquest to be significantly delayed, stayed, or in some cases prevented altogether, and if the inquiry proceeds, it will generally be altered to preclude the testimony of the officer charged. While the prosecution of police in the case of police-involved fatalities is rare in Canada, these cases do occur⁵²⁶ and there were police-involved

⁵²⁶ See "Criminal consequences for police officers are rare", *CBC News* (6 April 2018), online: <www.cbc.ca/news/canada/manitoba/deadly-force-police-criminal-charges-1.4607134> and Shannon Kari, "A Timeline of Police Charged with Murder or Manslaughter in Canada", *Globe and Mail* (25 January 2016),

deaths of persons with mental health disabilities for which a coroner's inquest or fatality inquiry might have taken place within the time period I studied, but for delays caused by criminal charges.⁵²⁷ My dataset also includes cases that likely would not have had an inquest within the time period absent a delay caused by criminal charges.⁵²⁸ Despite the difficulty delays pose for obtaining a clear picture of the number of police-involved deaths occurring in a given time period, as described above, alternative means of obtaining this data are not available nationally.

E) Procedural and Structural Biases

Where inquests or fatality inquiries are held with respect to a death, the process involves inequities and biases inherent in the procedures followed. The procedures involved in inquests and fatality inquiries differ somewhat between provinces and territories, but all processes involve hearing evidence, making findings of fact with respect to the deaths, and a power to provide recommendations.

online: <www.theglobeandmail.com/news/toronto/a-timeline-of-police-charged-with-murder-or-manslaughter-in-canada/article28374533/>.

⁵²⁷ See, for example, the 2012 death of M.B., a man described by the coroner's report as having "suffered from episodes of depressed mood and problematic behaviour over many years" prior to his death in British Columbia, which led to charges of murder against Const. Jordan MacWilliams of the Delta Police Force. The inquest was announced three years following the death after the Crown stayed charges against MacWilliams. (See Sunny Dhillon, "B.C. police officer who shot man outside casino says he feared for his life" *Globe and Mail* (11 February 2016), online: <www.theglobeandmail.com/news/british-columbia/officer-who-shot-man-outside-bc-casino-says-suspect-pointed-gun/article28735561/>; Kim Bolan, "Delta Police Officer Charged with Murder After 2012 Starlight Casino Standoff", *Vancouver Sun* (18 March 2015), online: <vancouver.sun.com/news/metro/delta-police-officer-charged-with-murder-after-2012-starlight-casino-standoff>.

⁵²⁸ See, for example, the inquest into the death of O.V., a man labelled with bipolar disorder who was shot to death by police in Ontario in 2000, but whose inquest was delayed until 2006 owing to charges of manslaughter brought against four officers involved in his death, which were subsequently stayed. ("Toronto police cleared in death of Otto Vass" *Globe and Mail* (5 November 2003), online: <www.theglobeandmail.com/news/national/toronto-police-cleared-in-death-of-otto-vass/article22618259/>; Re Vass, Office of the Chief Coroner of Ontario (November 23, 2006)).

⁵²⁸ For example, the Canadian special investigations units of British Columbia, Ontario, Nova Scotia, Manitoba and Alberta all have a policy of refusing to disclose the name of the deceased in order to protect their privacy, unless the family of the deceased instructs otherwise. See "Joint Statement from Canadian Civilian Oversight Agencies on Release of Names" (2015), online (pdf): *Independent Investigations Office of BC* <iioabc.ca/app/uploads/sites/472/2019/02/Joint_Statement_Release_of_Names_2015.pdf>.

In almost all Canadian jurisdictions there is the potential for conflicts of interest for coroners or medical examiners because they are employed within, and have their budgets determined by the same ministry or department responsible for policing.⁵²⁹ Where coroners and medical examiners are employed by the same ministry or department involved in a death they are investigating there may be a conflict of interest and bias similar to situations in which police forces are responsible for investigating their own wrongdoing. While coroner and medical examiner inquests/fatality inquiries do not make determinations about criminal or civil liability, they can be processes that draw considerable public scrutiny and in some cases negative attention from the media. Consequently, the degree of independence a coroner or medical examiner office has from the minister or departmental head responsible for policing may impact inquests. In some jurisdictions, the relevant minister or departmental head has little power to prevent or influence inquests or fatality inquiries beyond setting a budget for the office, appointing coroners or medical examiners (or in some cases merely the Chief) and in many cases having the power to order that an inquest or review take place in the absence of a statutory requirement.⁵³⁰ In some jurisdictions decision-making with respect to the office of the coroner or medical examiner is delegated to an oversight board that insulates its operations from the ministry or department to some degree and which may act as a complaints body in lieu of the minister.⁵³¹ At the opposite extreme, in Nova Scotia and Newfoundland and Labrador the same minister responsible for policing and corrections hold considerable power under these provinces' medical examiner legislation to determine whether or not a fatality inquiry will take place, allowing them to effectively prevent scrutiny of deaths in which their ministry or department was

⁵²⁹ Saskatchewan is the sole Canadian jurisdiction whose coroners' office operates in a separate ministry from that responsible for policing services.

⁵³⁰ See e.g. *Coroners Act*, SBC 2007, c 15; *The Fatality Inquiries Act*, CCSM c F52.

⁵³¹ See e.g. *Coroners Act*, RSO 1990, c C.37, ss 8-8.4.

involved. These statutes provide that medical examiners may recommend to the Minister of Justice that a fatality inquiry should be held with respect to a death, but ultimately the minister has discretion as to whether or not to hold such an inquiry.⁵³² This feature of their legislation, combined with the shared jurisdiction of the responsible department or ministry may help to explain why inquiries into deaths are so rare in these jurisdictions (although Newfoundland and Labrador also has a small population). Furthermore, in most jurisdictions coroners and medical examiners work closely with policing agencies to effect investigations, a relationship formalized in their statutes, wherein local police officers are often required to assist in coroner or medical examiner investigations or are seconded to these offices. All of these factors lead coroner and medical examiner inquests and fatality inquiries to be potentially subject to financial, political, and social pressures, which may bring the independence of these bodies into question.

In addition to the potential biases of the decision-makers in inquests and fatality inquiries, the evidence heard in these processes may favour government and police perspectives due to a lack of standing and legal representation for the families of the deceased and other parties. With respect to standing, most coroner and medical examiner inquest/fatality inquiry laws in Canada, with the exception of New Brunswick and the Yukon, provide standing by right, or the express ability to request standing for victim's families within their legislation.⁵³³ However, most jurisdictions in Canada do not provide funding for legal counsel for the families of the deceased where the individual died in a police interaction.⁵³⁴ Police agencies and police unions,

⁵³² See *Fatality Investigations Act*, SNS 2001, c 31, ss 26-27; *Fatality Investigations Act*, SNL 1995, c F-6.1, ss 25-26.

⁵³³ In New Brunswick interested parties cannot be granted standing, including both victim's families and police agencies. See *Forestell v Regional Health Authority B.*, 2014 NBCA 40 (CanLII). The legislation in the Yukon is silent on the issue of standing for interested parties or families. However, there appears to be an accepted practice in the Yukon of granting standing at inquests to the families of the deceased as noted in obiter in *Blackjack v Yukon (Chief Coroner)*, 2016 YKSC 53.

⁵³⁴ However, note that this is changing in some jurisdictions due to pressure from the public to remedy the power imbalance found in these processes. For example, in July 2017, the Office of the Chief Coroner for

on the other hand, generally have ample budgets providing them with legal representation in inquest and fatality inquiry proceedings, enabling them to ensure that the information provided in these proceeding is not prejudicial to the agency or union members' interests, and allowing them the ability to expertly cross-examine witnesses called by other parties. Furthermore, counsel can assist in securing expert witness testimony by "use of force experts" who can help bolster police narratives by speaking to the acceptability of the practices employed in the arrest or the inevitability of the death. Coroner and medical examiner proceedings include many procedural aspects similar to a trial, as witnesses are called, evidence is accepted as exhibits, and direct examinations and cross-examinations of witnesses take place. Without counsel, grieving families are put in a difficult position of trying to make their voices heard in this process, at a very emotional time without necessarily having the skills or procedural familiarity required to bring forth evidence they feel is relevant to understanding the death. Consequently, policing narratives are often better presented in these proceedings and may skew the perspectives of jurors or other decision-makers.

F) Relaxed Rules of Evidence

Generally, the rules of evidence for inquests and fatality inquiries are more relaxed than those found in courtrooms so evidence will not be as carefully scrutinized for relevance or

Ontario provided a new reimbursement program for the families of deceased persons who secure representation in an inquest relating to a police-involved death. See "Coroner's Inquest Family Reimbursement Program Guidelines" (Toronto: Government of Ontario, 2017) online <web.archive.org/web/20181224095723/https://www.mcscs.jus.gov.on.ca/sites/default/files/content/mcscs/docs/CIFRP%20Guidelines.pdf>. Media in several other provinces have highlighted this issue in recent years. See e.g. Katie May, "Legal Fee Burden Shuts Families Out of Inquests: Lawyer", *Winnipeg Free Press* (14 August 2016), online: <www.winnipegfreepress.com/local/legal-fee-burden-shuts-families-out-of-inquests-lawyer-390136681.html>; Ashley Joannou, "Inquests are a slog for affected families", *Yukon News* (17 January 2014), online: <www.yukon-news.com/news/inquests-are-a-slog-for-affected-families/>.

prejudicial impact.⁵³⁵ As mentioned above, in some jurisdictions, the coroners, medical examiners, or other decision-makers charged with making determinations about the admissibility of evidence have no legal training and consequently, while generally they have counsel assisting them in the inquest, they will not necessarily be able to rely on background knowledge of evidentiary principles to make determinations. In some cases, the decisions of coroners are reviewable by the courts, although this process may be particularly inaccessible for those without legal counsel. Consequently, there is an increased risk that prejudicial evidence concerning the deceased will be admitted, and relevant information that is contrary to police interests will not.

Despite these shortcomings, coroner and medical examiner data represents some of the only publicly accessible information concerning the circumstances of police-involved deaths. The accounts of the deaths contained in these reports must be understood and evaluated as narratives produced in systems with unequal power dynamics, and procedural particularities that may tend to favour some viewpoints and voices above others, rather than factual value-neutral representations of what took place. Nevertheless, they offer a record of the occurrence of these deaths and some indication of the issues at play in their production, as well as insight into how we understand and tell the stories of these deaths in Canada. In the following section I describe how I collected the coroner and medical examiner reports used for this study.

3.2 Access to Information Requests as a Data Collection Method for Legal Research

3.2.1 Access to Information Requests as a Socio-Legal Research Method

⁵³⁵ For example, many coroner or medical examiner statutes explicitly provide that evidence not ordinarily admissible in court may nonetheless be admissible in an inquest or fatality inquiry. See e.g. *Coroners Act*, RSO 1999, c C-37, s 44; *Coroners Act*, SBC 2007 c 15, s 34.

Access to information regimes in Canada emanate from statutory law. Federal, provincial, territorial and municipal governments all generally have access to information laws. Access to information (sometimes also referred to as "freedom of information") statutes generally provide a means by which members of the public can request and obtain access to documents in the possession of government that are not otherwise published.

The use of access to information requests as a research method in Canada has the potential to provide academics with access to otherwise opaque and unstudied realms of government, including the internal working of police forces. This is particularly true for legal researchers or those conducting policing research since access to information requests provide the opportunity for scholars to access, among other records, policy and training documents that practically operationalize the law. However, using such access to information regimes to engage in research also creates a host of problems for the researcher, who can be stymied purposefully or inadvertently by government employees seeking to protect against disclosure or simply failing to conduct a timely, meaningful search for records. Indeed, if the records disclosed are not especially reflective of the request made, or if the documents do not appear to be comprehensive, it is difficult to determine whether deliberate actions or the time, funding, political, and operational challenges facing access to information clerks is the cause. These issues can create particular difficulties where access to information is being relied upon in the absence of other research methods. As other scholars evaluating this research tool have noted, access to information as a research method often entails difficulties, including costs levied by the government to access data, significant delays in processing requests, and information being withheld legally or otherwise, through redactions and exemptions.⁵³⁶ Furthermore, access to

⁵³⁶ See Kevin Walby & Alex Luscombe, "Criteria for quality in qualitative research and use of freedom of information requests in the social sciences" (2017) 17:5 Qualitative Research 537 at 539; Randy Lippert,

information clerks are subject to unknowable political, operational, temporal, and financial constraints, in addition to human error, from which none of us are immune. Thus, while in some cases my initial requests, as will be discussed below, did not reveal the full set of records I eventually obtained, the particular government employees responding to my requests are not necessarily to blame.

3.2.2 Access to Information Requests for Inquest and Fatality Inquiry Reports of Police-Involved Deaths in Canada

The initial access to information requests for my study were filed in 2015. In order to collect the relevant reports from each Canadian province and territory, I drafted a written request for documents listing the following two criteria:

1. an inquest or fatality inquiry concerning the death of the deceased was held between January 1, 2004 and December 31, 2014; and
2. the deceased died during the course of arrest by police or in police custody or detention in the relevant province or territory.

Most of these requests were initially sent as informal requests (not using the statutory request mechanism) by email or fax to the coroner or medical examiner offices of all provinces and territories with the exception of Québec. Informal requests are advised by most jurisdictions to avoid the costs associated with access to information requests that may be unnecessary where a document can be readily provided to the public. Indeed, in those jurisdictions where I had to file a formal request, I was generally required to pay an initial fee to process the request, and in some cases additional fees charged for the time spent processing my request were invoiced,

Kevin Walby & Blair Wilkinson, "Spins, Stalls, and Shutdowns: Pitfalls of Qualitative Policing and Security Research" (2016) 17:1 Forum Qualitative Social Research Art 10.

although generally waived upon my request owing to my limited financial means as a graduate student and the public interest nature of my study.

The coroner's office of Québec provided detailed summaries of the conditions of all deaths reviewed by the coroner on their website. As a result, I personally reviewed all coroner's report summaries in Québec for the relevant time period and then sent a particularized request to the coroner's office listing all reports of police-involved deaths meeting the criteria sent to the other provinces and territories, and additionally requesting any other cases meeting my inclusion criteria not specifically mentioned.

The governments of Ontario, Québec, Alberta, Saskatchewan, New Brunswick, the Northwest Territories and the Yukon, provided all of the relevant documents by email or mail, responding directly to my informal request.

The governments of British Columbia and Manitoba provided some of the reports not found on their websites by email and I additionally reviewed the reports accessible on their websites to select the relevant cases meeting my criteria. In the case of Manitoba, I filed a formal access to information request after receiving insufficient feedback about the information contained on the website, but withdrew this request when the information was provided.

The governments of Nova Scotia, Newfoundland and Prince Edward Island required that I apply through formal freedom of information / access to information processes, and as a result the same request was sent through the relevant access to information offices. In Nova Scotia, I received a response that no fatality inquiries meeting my criteria had been conducted in the time period, indicating that Nova Scotia rarely makes use of their inquiry process for this purpose. However, due to the recent establishment of Halifax's Serious Incident Response Team (SIRT), a special investigations body established in 2012 that responds to police-involved injuries and

deaths and publishes publicly accessible reports concerning police-involved deaths⁵³⁷, I was aware that at least some police-involved deaths had occurred during the relevant time period. As a result, I filed a second request for medical examiner "investigation" records, which are records of the private investigation conducted by medical examiners into deaths meeting the criteria for an investigation which occur whether or not a fatality inquiry will be held. This request, while beyond the scope of inquest/fatality inquiry study, was an attempt to expand my pool of documents to include at least some cases occurring in that province to aid in a discussion of the issue. However, once the request was submitted I was issued an invoice of \$1,575.00 to search the medical examiner investigative records for those pertaining to my criteria within the time period, an amount which the office only agreed to waive if I would restrict my request to the 2008-2014 period for which digital records exist. I agreed to this as the records collected would not, in any event, be fatality inquiry reports within the terms of my study, so the narrower time range would not significantly impact the comprehensiveness or outcome of my study.

Furthermore, I was forewarned that since Nova Scotia protects the privacy of investigation reports and provides no right for the disclosure of personal information, the information received would be heavily redacted. When received, I obtained only 6 investigation reports with extremely little information provided. The name, date of birth, date of death, place of death, residence at death, cause of death, and manner of death were all redacted as were nearly all notes contained in each report, with the exception of some very minimal descriptions, like, for example: "On [redacted] the decedent was taken by [redacted] Police to the QE11 Emergency Department after breaking a window and jumping out of the second story at [redacted] where [redacted] was in custody. [Redacted] had [redacted]." Consequently, my data for Nova Scotia is much less

⁵³⁷ See "Recent Publications", online: *Serious Incident Response Team* <sirt.novascotia.ca/publications> .

informative and comprehensive than in all other jurisdictions owing to the particularities of their legislation.

My request for Nunavut was initially sent informally to the coroner's office, but as I received no response to my requests, I eventually filed a formal request. In response to this request, I was told that I would need to provide a request on university letterhead with the signature of my thesis supervisor before it could be processed. This formal request was submitted and after much delay denied so I pursued the records through a request for review filed with the Nunavut Access to Information and Privacy Commissioner. This process involved filing a request for review that expressed why I believed a review of the decision to deny the records was necessary, along with supporting legal arguments. The Nunavut Department of Justice responded to my arguments with their own legal arguments and after submitting a reply, I awaited a decision by the Commissioner. Eventually, I was successful and a few reports were provided by the coroner in response to my request.⁵³⁸

Ultimately, my initial document collection requests yielded 236 coroner and medical examiner reports, including some reports from each jurisdiction, with the exception of Prince Edward Island and Newfoundland and Labrador, where the coroner and medical examiner offices confirmed that no such cases existed within the 2004-2014 timeframe of my study. As noted, the 6 reports from Nova Scotia are not fatality inquiry reports.

As will be discussed in greater detail in the "Media Search" section below, in the course of researching the topic of police-involved deaths I found new information alerting me to previously undisclosed coroner and medical examiner cases that took place in the time period

⁵³⁸ For the decision of the Information and Privacy Commissioner, see Review Report 15-093 (Re), 2015 NUIPC 6 (CanLII).

studied. This discovery led me to submit additional follow up requests seeking these potentially missing cases. These requests, unlike the initial requests, were targeted, seeking only the specific cases identified in the course of my media search, in order to ensure that my database was as comprehensive as possible.

3.2.3 Media Search

The media search was introduced as a component of my study after initial data collection had already taken place through informal and formal access to information requests. It was added as a means of "method triangulation",⁵³⁹ to use Denzin's terminology as employed by Lincoln and Guba, who suggest one form of triangulation involves the application of different methods of data collection in order to improve the credibility of a study by providing additional contextual information to counteract biases in a source (in this case, coroner and medical examiner access to information offices) and to provide additional information about the subject studied (like, for example, the inclusion of additional situational and demographic data contained in news reports).⁵⁴⁰ Furthermore, Lippert et al., have emphasized the value of employing multiple research methods when attempting to access records from public bodies through access to information requests, as this allows the researcher to better avoid attempts by public agencies to "spin" the information provided, "stall" the process through lengthy delays, or "shutdown" the research by refusing to provide data.⁵⁴¹ This process was added when, upon reviewing my initial dataset, I recognized that certain inquests I was familiar with from my ongoing review of media reports of police-involved deaths in Canada were missing from the sample. I realized that further confirmation of my data would be necessary and determined that a media search would be an

⁵³⁹ See Norman Denzin, *The Research Act* (Chicago: Aldine, 1970).

⁵⁴⁰ Yvonna Lincoln & Egon Guba, *Naturalistic Inquiry* (Beverly Hills: Sage Publications, 1989) at 305.

⁵⁴¹ See Lippert, Walby & Wilkinson, *supra* note 536.

imperfect but helpful way to bolster the comprehensiveness of my data, since police-involved deaths are frequently the subject of media reports, as are inquests and fatality inquiries.

The media search was intended to identify whether any additional coroner or medical examiner reports exist that were not identified by the government staff who responded to my provincial and territorial access to information requests. The initial media search involved a search of the CBC News and Radio Canada website archives; an "advanced search" of full article results in the *Canada Major Dailies* newspaper database for the time period January 1, 2004-January 7, 2015; as well as an advanced search of selected publications in Eureka.cc, a newspaper database of smaller local publications in Canada for the same time period. The date range was selected to ensure reports addressing inquests or fatality inquiries taking place in December 2014 could be identified as they may be reported on in the following year. Separate English language searches were conducted for "fatality inquiry" vs "inquest" and both included "police" as a search term. This research protocol was selected because it ensures that both the medical examiner and coroner systems are covered through the use of the "inquest" and "fatality inquiry" terminology employed by these systems, and the inclusion of "police" narrows the field to articles discussing police, but ensures that the data collected is broad enough to potentially include all police-involved deaths, among others. An additional search for "inquiry" and "police" was conducted of the CBC Newfoundland News archives since that jurisdiction uses the term "public inquiry" for their fatality inquiries. For French language coverage of inquests in Québec and other predominantly French areas, a separate search of French language publications was conducted in the Eureka.cc database for the same time period, as well as within the Radio Canada News archives. The translated search terms used included "enquête", "police", "policier", and "policière", which were selected in order to include the predominant ways police are discussed including both masculine and feminine versions of the word.

The number of responsive results for each newspaper search was recorded and the media articles were then reviewed for relevancy. Cases were identified as "not relevant", "relevant", or "possibly relevant". Relevant cases included those for individuals who had died in police detention/custody or in the course of arrest for which there was evidence that an inquest or fatality inquiry had occurred in the 2004-2014 timeframe. Possibly relevant cases included police-involved deaths for which there was no indication of an inquest or fatality inquiry, but for which one might have occurred in the relevant time period, usually because the death had occurred between January 1, 2000 and the end of 2014. Not relevant cases included deaths for which no inquest/fatality inquiry was held, deaths for which an inquest/fatality inquiry was held outside the time period, articles pertaining to non-Canadian deaths, or articles that were otherwise not about police-involved deaths (e.g. descriptions of T.V. shows, etc.). The reason why a report was deemed irrelevant was recorded, but irrelevant reports were not examined further. For relevant reports, the information was reviewed to determine whether the reported inquest or fatality inquiry appeared in the database of access to information request responses or not. The informational content recorded in all cases included:

1. name of the deceased,
2. date of death;
3. whether not the case was relevant

The relevant news articles were retained to aid in future analysis of the dataset, if necessary, as they often provided additional information not contained in the inquest/fatality inquiry reports (e.g. perceived race of deceased).

In addition to the search of media articles, in the archives and databases described above, I also compiled relevant lists of police-involved deaths from several known sources that

contained lists of police-involved deaths to compare these lists with my data and identify previously undisclosed cases. These additional sources included:

1. The CBC's Deadly Force Database;⁵⁴²
2. Special Investigations Unit reports (including public reports, bulletins, news releases);⁵⁴³
3. Sherene Razack, *Dying from Improvement: Inquests and Inquiries into Indigenous Deaths in Custody* (Toronto: University of Toronto Press, 2015)⁵⁴⁴;
4. Linda Michel, *Le rapport du coroner du Québec : Un discours complexe de déresponsabilisation policière sur les décès causés par le SPVM* (MA Thesis (Criminology), University of Ottawa, 2017)⁵⁴⁵;
5. Travis Lupick, "B.C. Deaths Involving Police (Public)", (Vancouver: Georgia Straight, last updated 2017) online:
<docs.google.com/spreadsheets/d/1aLNSF4Hkk9XdVKeuVU6ZrRO6GtSxT4t8TiMiQ6ptLrY/edit#gid=0>.⁵⁴⁶
6. The Coalition contre la répression et les abus policières website.⁵⁴⁷

⁵⁴² *Supra* note 513

⁵⁴³ Special investigation units can be a source of information about police-involved deaths because they are generally mandated to investigate these deaths and provide at least some information about their findings. However, they only exist in some Canadian jurisdictions and in most cases were only operational in the latter years of my study. The jurisdictions with reports available in the time period studied included:

British Columbia (Independent Investigations Office) (est. April 2012);

Alberta (Alberta Serious Incident Response Team) (est. January 2008);

Ontario (Special Investigations Unit) (est. September 1990) (but public reports only available from January 2005);

Nova Scotia (Serious Incident Response Team) (est. April 2012).

⁵⁴⁴ Sherene Razack's book contains a list of deaths of Indigenous people in police custody and corrections in Saskatchewan from 1995-2013. See Sherene Razack, *Dying from Improvement: Inquests and Inquiries into Indigenous Deaths in Custody* (Toronto: University of Toronto Press, 2015) at 211-219.

⁵⁴⁵ Linda Michel, a University of Ottawa Criminology student's 2017 MA thesis titled "*Le rapport du coroner du Québec : Un discours complexe de déresponsabilisation policière sur les décès causés par le SPVM*" contains a list of 14 Québec coroner's reports for individuals killed by gunshot by the Service de Police de la Ville de Montréal (SPVM) between 2000 and 2014.

⁵⁴⁶ Journalist Travis Lupick has published an online database of British Columbia police-involved deaths produced for the Georgia Straight newspaper, which contains a list of some police-involved death cases from 2003-2017 that were compiled from IIO and coroner reports in British Columbia.

⁵⁴⁷ The Coalition contre la répression et les abus policières, is a community group formed in the wake of the fatal shooting of Fredy Villanueva in Montreal in 2008. (See "À propos", online: *Coalition contre la répression et les abus policières* <lacrap.org/a-propos>.) This website contains a list of the names and dates of death of individuals who died in police interactions across Canada, although without specifying identifiable sources and with little to no information provided about the nature of the deaths beyond whether they occurred as suicide in the presence of police, during police interventions, in custody, or as a result of police-involved motor-vehicle accidents. The website is most comprehensive concerning cases in Québec.

With respect to these additional sources, in order to compile only cases likely to be relevant to my study's time period, I only considered deaths listed as occurring between January 1, 2000 and December 31, 2014, since inquests/fatality inquiries can take place years after a death. I compiled a list of relevant and possibly relevant cases.

A list of 359 missing and potentially missing inquest/fatality inquiry reports was produced from my media search and used to make a second round of access to information requests seeking inquests and fatality inquiry reports for the deceased persons identified. In preparing this list, I sought any additional information about the deaths possible by searching the names, locations, dates of death, and "inquest/fatality inquiry" in Google. I also reviewed all of the coroner and medical examiner websites and those of the provincial and territorial governments prior to issuing my follow-up requests because several had been updated since my original search and in some cases additional relevant cases were listed or could be accessed electronically. In the case of the government of Alberta, for example, since the time of my initial request, all (or nearly all) fatality reports for the time period studied had been made available online, so where available these reports were downloaded directly, rather than proceeding to a secondary request. 208 additional inquest/fatality inquiry reports were received following my second round of requests and added to my initial database and I recommenced the process of review and familiarization with my data that had prompted the media search, prior to conducting the coding and analysis of the entire dataset.

Additionally, the media search identified a few public inquiries pertaining to police-involved deaths that contained similar structures and findings. Examples include, the Braidwood Inquiry into the death of Robert Dziekanski who was tasered before dying at the airport in

Vancouver⁵⁴⁸; the Wright Inquiry into the Death of Neil Stonechild, who was in all probability killed in a “starlight tour” when he was left in a remote area in the outskirts of Saskatoon, Saskatchewan in freezing temperatures;⁵⁴⁹ and the Ipperwash Inquiry which documented the shooting death of Dudley George in Ontario.⁵⁵⁰

While the media search provided a check on the data collected, the method has limitations. Media coverage of police-involved deaths likely differs throughout Canada, and deaths in remote parts of the country or in provinces with lower populations, which have fewer media sources servicing them may be inadequately covered, while the location of multiple national newspapers in urban centres like Toronto may result in these areas having disproportionately high levels of coverage. The inclusion of local city newspapers and smaller community newspapers which service more rural areas was intended to ensure that the media search would not be overly biased toward cases from major municipalities. While larger better resourced news networks generally had archived publications available for the entire time period, some of the smaller newspapers surveyed in Eureka.cc were not available for the entirety of the relevant time-period, but were included nonetheless. Another limitation of this method is that it may be less likely to identify less violent police-involved deaths, including suspected overdose deaths occurring in police custody or deaths believed to have occurred “naturally”, which produce less sensational news stories and may be less likely to be afforded news coverage or draw the attention of external studies. Despite these limitations, the media currently plays an

⁵⁴⁸ Thomas Braidwood, *Why? The Robert Dziekanski Tragedy* (Vancouver: Braidwood Commission of Inquiry, 2010).

⁵⁴⁹ David Wright, *Report of the Commission of Inquiry into Matters Relating to the Death of Neil Stonechild* (Saskatoon: Wright Commission of Inquiry, 2004).

⁵⁵⁰ Sidney Linden, *Report of the Ipperwash Inquiry* (Toronto: Ipperwash Commission of Inquiry, 2007).

important role in providing information about police-involved deaths in Canada, especially in jurisdictions that provide little public information about these deaths.

The name and time period available for each publication reviewed is provided in Appendix C, as are the results from the media searches conducted.

3.2.4 Thematic Analysis

The analysis of the coroner and medical examiner reports I undertook was conducted using thematic analysis, a flexible research method developed for qualitative analysis in the social sciences. Thematic analysis is, in essence, a method for analyzing any type of dataset through the identification of themes. Themes are patterns in the data related to the research questions posed and are determined through the application of the researcher's judgment.⁵⁵¹ Thematic analysis can be used in conformity with diverse theoretical and methodological traditions.⁵⁵² I chose this method because of its adaptability and because it allows for both theory-driven and inductive analysis, as well as for its workability with my critical disability theory perspective. Thematic analysis, unlike many qualitative methods derived from the social sciences, is not embedded in any particular theoretical perspective.⁵⁵³ Consequently, it can be more easily adapted for use in the discipline of law and with critical disability theory since it doesn't imply a particular worldview, types of research questions, or research paradigm. Furthermore, thematic analysis allows inductive (data-driven) and deductive (theory-driven) approaches to analysis and the identification of patterns and themes can occur at both the semantic level, meaning the direct

⁵⁵¹ Virginia Braun & Victoria Clarke, "Using thematic analysis in psychology" (2006) 3 *Qualitative Research in Psychology* 77 at 82.

⁵⁵² See *ibid* at 101.

⁵⁵³ Virginia Braun, Victoria Clarke, & Nicola Rance, "How to use thematic analysis with research data" in Karen Wharton, ed, *The Counselling and Psychotherapy Research Handbook* (London: Sage Publications, 2015) at 185.

interpretation of the *prima facie* meaning of the words themselves and the latent level, meaning conceptual patterns found through interpretation informed by theory.⁵⁵⁴ I developed themes deductively and inductively at both the semantic and latent levels. Semantically, coroner and medical examiner reports contain similar types of basic demographic information and factual determinations, such as the age of the deceased, date of death, manner and cause of death, etc.. However, the reports could also be expected to contain value-laden data like implicit characterizations of mental health symptoms that would be driven by theoretical concepts like the construction of normalcy and psychiatric labeling. Thematic analysis' allowance for deductive and inductive code development and its openness to a mixed methods approach that enables diversity of types of analysis (including limited quantitative analysis) made this approach more suitable to my purposes than other methods considered.

I have broadly followed Virginia Braun and Victoria Clarke's descriptions and guidelines pertaining to thematic analysis, which is one tradition among the many versions of thematic analysis.⁵⁵⁵ I chose Braun and Clarke's version of thematic analysis because unlike other versions of the method, which take a positivist or realist theoretical perspective, their version was developed from a more critical perspective, in their case critical psychology. Braun and Clarke's method of thematic analysis, therefore, eschews the use of some quality controls developed for quantitative empirical research as a means of establishing "validity". However, Braun and Clarke provide guidelines for ensuring that researchers employing thematic analysis in more critical or constructivist frameworks do so in a manner structured to achieve rigorous and trustworthy results.

⁵⁵⁴ *Ibid* at 186.

⁵⁵⁵ For descriptions of this method, see *supra* note 551 at 101; Virginia Braun & Victoria Clarke, "Thematic Analysis" in Harris Cooper et al, ed, *APA Handbook of Research Methods in Psychology*, 2nd ed (Washington: American Psychological Association, 2012) at 57-71 [Handbook]; *Supra* note 553 at 183-197.

I have followed many of Braun and Clarke's guidelines for conducting a good thematic analysis and have chosen to build on their method slightly to include some quality control measures suggested by other scholars as appropriate for achieving rigour in qualitative research. Below, I describe the phases involved in a thematic analysis as described by Braun and Clarke, explaining the particular choices I made for each phase, and describing some of the benefits and drawbacks of the particular decisions made, in addition to highlighting any modifications to the method.⁵⁵⁶

Phase 0 (Prior to implementing Thematic Analysis): Formulating the Research Questions, Collecting the Data, and Making Explicit Decisions about Theoretical and Methodological Orientation

Prior to engaging with thematic analysis, a researcher must formulate their research questions and engage in data collection. Research questions in thematic analyses can be broad and fluid in nature, unlike the more circumscribed research questions commonly posed in quantitative studies. As discussed above, my thesis as a whole considers three distinct research questions:

1. What patterns or similarities exist in Canadian coroner and medical examiner reports concerning persons who experience mental health disability, including types of deaths, circumstances of death, and causes of death?
2. What coroner and medical examiner recommendations have been made with respect to policing mental health crises in Canada?
3. What opportunities or barriers does Canadian human rights law provide for the legal accountability of police for excessive or unjustified force or other police-involved deaths

⁵⁵⁶ These steps are described in *supra* note 551 and Handbook *supra* note 555 at 57-71.

and injuries of persons who experience mental health disability in Canada and what benefits for advocacy does reframing policing persons who experience mental health disability as a disability discrimination issue hold?

The thematic analysis undertaken addresses only the first two questions directly. With respect to the collection of the fatality inquiry and inquest data itself, I have discussed my methods and choices above. However, it is worth noting that while many of the thematic analyses discussed in the literature on this method involve interview or focus group data, the method can be usefully applied to a wide range of types of datasets, including textual documents.⁵⁵⁷ Braun, Clarke and Weate warn that while there is no recommended sample size for thematic analyses, the dataset must be sufficiently large to allow for meaningful pattern recognition across the sample.⁵⁵⁸ My study was designed to use a very large dataset in order to ensure that my data would be sufficiently large to reasonably detect patterns in both the larger sample and the subsample of deaths involving or relevant to the rights of persons who experience mental health disability.

Because thematic analysis is an adaptable framework, Braun and Clarke emphasize the importance of making explicit well-considered choices about what version of thematic analysis one will use and how this will fit into one's theoretical orientation.⁵⁵⁹ In my case, I took a critical disability theory perspective and knew that I would be engaging with both inductive and deductive research, which lead me to explore versions of thematic analysis that are blended to allow for structured deductive codes and inductive open coding procedures. As discussed more

⁵⁵⁷ Handbook *supra* note 555 at 58.

⁵⁵⁸ See Virginia Braun, Victoria Clarke & Paul Weate "Using Thematic Analysis in Sport and Exercise Research", in Brett Smith & Andrew Sparkes, ed, *Routledge Handbook of Qualitative Research in Sport and Exercise* (New York: Routledge, 2017).

⁵⁵⁹ *Supra* note 551 at 81.

fully in chapter 2, critical disability theory is intended to be "explanatory, practical, and normative" making no claim to "normative objectivity".⁵⁶⁰ As such, it is critical of attempts to mask the researcher's subjectivity. Consequently, I sought to include practices in my method that would maximize the transparency of the research process as a means of validating my research, without attempting to apply practices aimed to bolster the supposed "objectivity" of the analytic work undertaken. For this reason, I preferred Braun & Clarke's version of the method over versions incorporating more realist or positivist elements like pre-determined precise coding frameworks, multiple researchers with checks for "intercoder reliability", and employing external coders, as used, for example, in the thematic analysis versions described by Fereday Muir-Cochrane⁵⁶¹ and Guest, MacQueen and Namey.⁵⁶² Nevertheless, I have incorporated many suggestions drawn from these other approaches, and from other qualitative research practices, to bolster the rigour of my analysis, albeit adopting only those methods which seek to promote transparency of my methods, and promote more thorough investigation and a more detailed description of my process and assumptions, rather than those seeking to ensure the objectivity in the analysis.

Phase 1: Familiarization with the Data

The first phase in Braun and Clarke's method requires that the researcher familiarize herself with the data, which involves reading and rereading the data multiple times in order to

⁵⁶⁰ See David Hosking, "Critical Disability Theory" (Paper presented at the 4th Biennial Disability Studies Conference, Lancaster University, UK, 2008), online (pdf): www.lancaster.ac.uk/fass/events/disabilityconference_archive/2008/papers/hosking2008.pdf [Hosking] at 8.

⁵⁶¹ See Jennifer Fereday & Eimear Muir-Cochrane, "Demonstrating rigour using thematic analysis" (2006) 5:1 International Journal of Qualitative Methods 80.

⁵⁶² Note that Guest, MacQueen and Namey acknowledge their own method as "biased towards a positivist perspective" and this is not merely my characterization of their version of thematic analysis. See "Introduction to Applied Thematic Analysis" in Greg Guest, Kathleen MacQueen, & Emily Namey, *Applied Thematic Analysis* (Thousand Oaks: Sage Publications, 2012) at 14.

critically engage with it in light of the theoretical framework or concepts being mobilized for the study and the guiding research questions. This phase also includes the transcription of data or its organization.⁵⁶³ I began this phase of the review of my data by scanning and uploading all of the reports collected into Atlas.ti, a computer assisted qualitative data analysis software (CAQDAS). Atlas.ti permitted me to code my data in a computer database and to link codes into larger themes.

One of the purposes of the familiarization phase is to provide the researcher with some sense of what they might code for by allowing for immersion in the dataset and basic note taking to record initial observations.⁵⁶⁴ I read the entire dataset twice before coding, noting interesting occurrences. During this phase, unlike in Braun and Clarke's method, which does not advocate developing a preset coding framework,⁵⁶⁵ I built a very limited framework for coding certain aspects of data that I knew would be found in all (or nearly all) of the coroner and medical examiner reports collected. I also created a code for cases not meeting my study inclusion criteria as it became apparent during the review of the cases collected that several of the police-involved deaths provided in response to my requests occurred after booking into jail and which therefore did not actually meet the inclusion criteria I had provided to the coroner and medical examiner offices. It included the year of death, year of inquest and the province of the inquest/death. These codes were designed to provide a means of immediately recording the number of relevant cases meeting my study criteria in each province and identifying cases that were not relevant for exclusion from further study (e.g. because inquest fell outside time period of study). The use of *a priori* codebooks within a blended thematic analysis (involving deductive and inductive coding) is

⁵⁶³ See *supra* note 551 at 87.

⁵⁶⁴ See *supra* note 551 at 87.

⁵⁶⁵ See *supra* note 558

suggested by Fereday and Muir-Cochrane, building on Crabtree and Miller's discussions of the creation of codebooks or templates as a data-management tool.⁵⁶⁶

During the process of familiarizing myself with the cases by reading the complete set I had collected, I realized that some cases I was aware of based on my extensive reading of media reports and articles in this field were not in the sample, although they ought to have been. This realization sparked the media search and subsequent requests for further information from some provinces, as described above. When the revised dataset was obtained, I repeated this step with the full sample of cases, prior to proceeding to coding. Given that this phase allowed me to identify a problem with my data before undertaking the coding and a more in-depth analysis, this step proved very important.

Phase 2: Initial Code Development

The coding process I used was predominantly exploratory in nature in the sense that most codes were arrived at inductively and were not pre-selected prior to the process of reading and rereading the cases and coding.⁵⁶⁷ However, some codes were arrived at deductively, in the sense that they were heavily influenced by my literature review and knowledge of the field of study, rather than simply their frequency or apparent emphasis in the dataset. Braun and Clarke note that codes will ordinarily be a combination of descriptive or semantic codes and interpretive or latent codes. Descriptive or semantic codes are those which seem to the researcher to be

⁵⁶⁶ See *supra* note 561 at 84, referencing Benjamin Crabtree & William Miller, "A template approach to text analysis: Developing and using codebooks" in B. Crabtree & W. Miller, ed, *Doing Qualitative Research* (Newbury Park: Sage, 1999).

⁵⁶⁷ The distinction between "exploratory" and "confirmatory" qualitative research is described by *supra* note 562 at 6-7.

readily apparent and close to the actual language used in the documents coded. Interpretive or latent codes, on the other hand, require greater interpretation, abstraction, and theory.⁵⁶⁸

My coding process involved several rounds of coding applied to three hierarchical groupings of cases collected:

- 1) the dataset as a whole, i.e., every case provided by the relevant coroner and medical examiner offices ("the whole set"),
- 2) the whole set once irrelevant cases were removed ("the relevant set"); and
- 3) the subset of cases coded as involving persons described with psychiatric labels or descriptions of medical or psychiatric treatment (e.g. "schizophrenia," "addiction," prior hospitalization under mental health legislation, etc.) or those described in a manner suggestive of perceived mental health impairment (e.g. "history of suicide attempts", "erratic", "irrational", "paranoid", etc) ("the mental health set").

In addition to the division of cases according to the "whole set," "relevant set" and "mental health set," I also divided cases according to an inductive set of "type of death" codes, that allowed for further focus on particular theories of death. The type of death codes described causal or explanatory theories of death, such as police shooting, excited delirium, motor vehicle pursuit, etc. and could be applied singly or in combination to a single case where multiple theories of death were explored in a single report. To determine the "type" of death codes to assign to a particular case, the coroner or medical examiner narrative was reviewed and discussions of the causes and contributors to the death were considered. Thus, if for example, a case involved discussion of "excited delirium" as contributed to by the positioning of the subject

⁵⁶⁸ Handbook *supra* note 555 at 62.

prior to death, it might be coded as both “excited delirium” and “positional asphyxia.” A description of the types of deaths considered is included in chapter 1, where the typology was established based on a review of prior literature and the dataset of this thesis.

In the analysis, the types of deaths focused on were those most strongly associated with the mental health set cases and coding was undertaken iteratively within these code groups.

The whole set was only coded for province of death and inquest, year of death and inquest and relevance. Coding for relevance involved reviewing the cases for indicators that the death occurred after booking or was otherwise non-responsive to my request for information and therefore ineligible for inclusion in my study. These codes were aimed at providing very general background information about all of the cases to equip me with the information necessary to accurately describe the access to information method I chose and the types of responses I received in relation to these requests.

In addition to coding certain details for the whole set, the relevant set was coded for basic information common to most reports, including basic demographic factors about the deceased (e.g. age at time of death, gender, race/ethnicity, perceived physical impairment, perceived socioeconomic factors (e.g. homelessness, unemployment, etc.) where provided), the manner of death (e.g. homicide, suicide, accident, etc.), and the type of death (e.g. police shooting, excited delirium, motor vehicle pursuit, etc.). This coding was designed to provide basic information about the dataset as a whole for comparison with the mental health subset and to identify relevant cases for further scrutiny.

The mental health set was then identified by coding the relevant set iteratively to develop “mental health codes” that include both semantic and latent codes relating to mental health and problematic substance use. With respect to indications of mental health impairment, I

identified and coded descriptions of the deceased wherein the reporting coroner, medical examiner, or presiding judge, as the case may be, mentioned mental health related “diagnoses” (e.g. depression, schizophrenia, addiction), along with behavioural descriptions or non-medical descriptions such as “crazy”, “bizarre”, “abnormal”, or “irrational”, suicidal behaviour, indications of intoxication, etc. (including post-mortem toxicology results that were sometimes provided), and circumstantial descriptions (e.g. location of death in a psychiatric ward or supported living residence for those with mental health issues). These cases were grouped into a “medicalized mental health set” where diagnostic language was used and a “perceived mental health set” where descriptions associated with mental health impairment absent a diagnosis were used. Together these groups formed the “mental health set”.

To refine my mental health codes I considered what information would be relevant as evidence of mental health disability in the context of a human rights claim in Canada. This might include evidence of medical diagnoses, descriptions of historical experiences of impairment, or perceptions of mental health disability by others. Mental health disability, in the context of human rights law, it should be remembered, includes perceptions of disability – meaning that the individual claiming a disability need not identify as “having” a disability or an impairment, but can claim that others perceived them to be disabled or to have an impairment.

Consequently, my coding first drew out what might be described as medical evidence of disability (which is the most common type of evidence of disability proffered in Canadian human rights law) meaning specific medical mental health labels as applied by medical professionals (e.g. “paranoid schizophrenic”, “addict”, etc.), and descriptions of the medical history of the deceased, by their family, medical practitioner witnesses, or the coroner, medical examiner, or judge describing the deceased, as well as other information suggesting a history of psychiatric involvement (e.g. previous mental health act hospitalizations or drug treatment, living in a mental

health assisted living facility, prescriptions for psychiatric medications, etc.). Documents with codes suggesting medicalization of disability were organized into a “Medical Mental Health Set”.

Secondly, I coded descriptions of behaviour, circumstances, or emotional tone descriptions suggesting that a perception of mental health disability existed (e.g. “bizarre behaviour”, “screaming incoherently”, “suicidal vocalizations”, “intoxication”, “seemed depressed” etc.). This allowed me to differentiate between cases in which there was medicalized evidence of disability, and cases in which there were circumstantial factors and descriptions of the deceased suggesting a perception of mental health disability, absent any formal diagnoses or psychiatric, psychological, or other medical treatment. These descriptive codes included the use of medical labelling terminology by laypersons who were not describing an actual medical diagnosis, but rather using these terms as they are commonly used in our society, as descriptors (e.g. he was “depressed”, or she is “addicted”). They also included indicators of suicidality as suicide is associated with many mental health “diagnoses” listed in the 5th edition Diagnostic and Statistical Manual (DSM-5)⁵⁶⁹ and is frequently discussed as a feature of mental health disability in Canadian civil society⁵⁷⁰ but suicide is not a medical mental health “diagnosis” itself. Documents containing descriptive mental health codes were organized into a “Perceived Mental Health Set”. However, because most if not all cases of police-involved death involve some description of factors that could be indicative of a mental health disability (e.g. a description of intoxication due to drugs or alcohol might be an indicator of perceived addiction, but is not strongly indicative of disability) I limited the “perceived mental health set” to only include cases with multiple (2 or more) mental health description codes. Furthermore, where descriptors in a case only referenced

⁵⁶⁹ *Diagnostic and Statistical Manual*, 5th ed (American Psychological Association, 2013).

⁵⁷⁰ See e.g. “Suicide Prevention” (2020), online: *Mental Health Commission of Canada* <www.mentalhealthcommission.ca/English/what-we-do/suicide-prevention>; “Mental Illness and Addiction: Facts and Statistics” (last visited 9 September 2022), online: *Canadian Mental Health Association* <www.camh.ca/en/driving-change/the-crisis-is-real/mental-health-statistics>.

substance use or intoxication (e.g. “cocaine user”, “intoxicated”), at least one secondary descriptor pointing to perceived mental health impairment unrelated to substance use and intoxication was required, or alternatively, evidence suggesting a history of problematic substance use prior to the fatal interaction with police. Similarly, where descriptors only referenced suicidality (e.g. “died by suicide”), at least one secondary descriptor pointing to perceived mental health impairment unrelated to suicidality was required, or alternatively, evidence suggesting a history of suicidality pre-dating the lethal interaction with police. Substance use and suicidality were treated differently in this way because neither is exclusively associated with mental health impairment (i.e. using cocaine does not necessarily imply that individual experiences problematic substance use).⁵⁷¹

What particular information was present in a given case and what language was actually employed in the report resulting in a case being listed as a “perceived mental health set” case is provided at Appendix D for transparency in this coding.

Cases coded with the types of deaths most associated with the mental health set were subjected to further rounds of coding in the analysis of specific types of deaths. The inductive coding of these cases was determined based on patterns that emerged from the set, informed by the literature review. With respect to recommendations, while the entire relevant set recommendations were coded for patterns emerging from them, the majority of my coding focused on the mental health set, as I engaged in an in-depth review of these cases to elicit the circumstances and recommendations relevant to prevent future deaths of persons experiencing mental health disability.

⁵⁷¹ For a list of the descriptive mental health codes applied to cases in the perceived mental health set, see Appendix D.

Braun, Clarke and Rance provide some guidance on how a researcher should code, suggesting that researchers should code their entire dataset (or in my case the relevant subset) while attempting to maintain consistency in their method of coding.⁵⁷² Braun, Clarke and Weate also suggest a researcher can (and often will) change coding throughout the process by expanding or contracting a code or splitting or unifying codes, and consequently coding is an iterative process in which earlier coding should be revisited as the process unfolds.⁵⁷³ As my codes evolved I revisited the subset of data I was working with to ensure consistency.

I employed several coding techniques described by Strauss and Corbin.⁵⁷⁴ These techniques included: questioning the data; "making comparisons", paying attention to language, and searching out "negative cases".⁵⁷⁵ Using questions to code involves literally asking oneself questions about the information you are reading to flush out additional ideas and connections regarding it. Making comparisons involves comparing cases or coded text to elicit how and why differences exist in the data. When focusing on language, I kept in mind how language was used to describe the police and deceased (especially with respect to constructions of disability) from my theoretical vantage point. Paying attention to negative cases involves seeking out counter-examples to theoretical or conceptual codes, which is helpful for understanding the limits of a concept and for challenging the patterns identified. My coding always focused on my research questions and was informed by critical disability theory, such that throughout my analysis as I

⁵⁷² Virginia Braun, Victoria Clarke & Nicola Rance, "How to use thematic analysis with interview data" in A. Vossler & N. Moller, ed, *The Counselling and Psychotherapy Research Handbook*, (Thousand Oaks: Sage Publications, 2015) at 188.

⁵⁷³ See *supra* note 558 at c 15; Handbook *supra* note 555 at 63.

⁵⁷⁴ Juliet Corbin & Anselm Strauss, "Grounded Theory Research: Procedures, Canon, and Evaluative Criteria" (1990) 17:9 *Zeitschrift für Soziologie* 418 at 423-424

⁵⁷⁵ See Juliet Corbin & Anselm Strauss, "Strategies for Qualitative Data Analysis" in *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory*, 3rd ed (Thousand Oaks: Sage Publications, 2008).

read, coded, and refined my codes, I sought to understand and situate them in the context of my study.

In some cases, I added notes about a particular line of text or concept for use at the writing stage, rather than codes that were standardized, coded consistently across the dataset and applied to multiple documents for theme development.

My coding and note-taking generated a very large number of codes and notes (3,183), however a great many of these codes and notes were not used in the final analysis, either because the information contained in them was not provided in enough cases to form part of the analysis, the information coded lacked sufficient uniformity in how it was described to be meaningfully compared between cases, or the case coded did not form part of the types of deaths analyzed in depth.

Phase 3: Initial Theme Development

Once I developed a consistent set of codes I began the process of developing themes. Themes are patterns identified within one's dataset that speak to important concepts and organize the codes identified, although not all codes need to be covered by or included as an aspect of a theme.⁵⁷⁶ Themes are driven by the qualitative research questions posed. They can also be organized hierarchically into overall themes and sub-themes.⁵⁷⁷ I used a hierarchical method to arrange my themes, sub-themes and codes as a means of clarifying the relationship between themes and linking them to my research questions. The codes were arranged into 51 code groups. Atlas.ti was then employed to query the use of these codes in particular groupings of documents, a process which assisted theme development.

⁵⁷⁶ See *supra* note 572 at 191-192.

⁵⁷⁷ See *supra* note 551 at 82.

Phase 4: Reviewing Potential Themes

Once my codes were organized into potential themes, I reviewed the potential themes identified to evaluate whether they were responsive to my research questions and how they related to one another (including checking for conceptual overlap between them). At this stage I decided to restrict my focus to matters relating to the demographics of the set as a whole, since some of these demographic groups are legally protected groups under human rights law; the types of police-involved deaths that most significantly related to the mental health set; and the recommendations contained in the mental health set since these relate to preventing future deaths of persons who experience mental health disability. The types of deaths, relevant demographic characteristics (perceived race, gender, etc.) became significant themes for my analysis, as did patterns found when comparing the recommendations contained in the mental health set.⁵⁷⁸ The review process involved reading and rereading the relevant parts of my dataset carefully to check for anecdotalism (i.e., relying on a single case or very few cases but describing a pattern in broad terms) and to record where few cases supported a theme that was nevertheless considered important. This process was taken to ensure that the themes were broadly representative of all the data or at least counter-examples were identified where the theme was nuanced, or an explanation was provided of the scope of the theme. At this stage I was also careful to remain alert to the importance of including and acknowledging negative cases, meaning those that oppose, contrast, or may be interpreted as drawing into question a given

⁵⁷⁸ Some codes and themes developed from them were not significantly included in the final analysis, such as the nature of the caller (family member, member of public, no call – direct police response) and call type (e.g. wellness check or domestic violence, etc.) associated with the fatal interaction. While such codes were helpful when describing the details of particular cases mentioned in the analysis, they weren't sufficiently uniform in their description in reports to generate usable themes. Additionally, some types of deaths and associated themes were excluded from the final analysis because they were less common within the mental health set and could not be included due to length constraints.

theme or pattern.⁵⁷⁹ I made note of exceptions to any generalizations drawn from my themes in order to ensure that, when considered as a whole the theme still seemed significant in light of exceptions, which were noted in order to ensure that their mention at the writing phase, as well as to potentially identify counter-trends.

Phase 5: Defining Themes

I collected representative quotes, passages, and concepts for each theme to be discussed in my analysis. This stage of the process involved working with each theme to determine how I wanted to present it. Furthermore, it involved determining more or less representative quotations, among those identified in coding, for each theme.

Phase 6: Writing

I wrote my analysis structured around the themes identified. This phase involved addressing my research questions through a narrative structured according to my themes and employing the quotes and concepts earlier identified in each theme.

3.2.5 Literature Review

The literature review focused on two overarching goals: 1) to identify and discuss literature on police-involved injuries and deaths on police use of force against persons with mental health disabilities in Canada and internationally, and 2) to identify and discuss literature on police strategies and techniques designed to prevent police-involved injuries or deaths of persons who experience mental health disability.

⁵⁷⁹ "Negative case analysis" as a means of bolstering the credibility of qualitative research is suggested by Yvonna Lincoln & Egon Guba, *Naturalistic Inquiry* (Beverly Hills: Sage Publications, 1989) at 309-313.

My review of the literature resulted in the creation of a typology of police-involved deaths that informed and structured my deductive coding in my empirical analysis. It also provided an overview of some commonly studied suggestions for improving police responses to persons in crisis to assist in analyzing the feasibility of coroner recommendations as potential disability accommodations.

In order to compile a list of relevant literature on the first point, I conducted searches of Google Scholar and the University of Ottawa's library catalogue using the keywords "police" and "use of force" and "mental health"/"mental illness"/"psychosocial disability" "emotionally disturbed person", with and without the additional term "Canada", in order to find broadly relevant literature domestically and globally. I excluded all articles, books, and cases addressing the mental health of police officers themselves, rather than those addressing police-involved injuries or deaths. Articles were also excluded where they were not relevant to the research questions, such as where they addressed "use of force" between states in international law, or where they addressed use of force by medical personnel in psychiatric facilities. I excluded sources that dealt with carceral use of force or deaths, and exclusively focused on use of force and deaths in the context of arrest or apprehension.

Secondly, after reviewing many relevant articles and after considering the value of a "typology" of police-involved deaths that emerged from early reviews of my coroner and medical examiner reports, I focused on particular types of police-involved deaths and searched for articles on these types in general and their relationship to mental health disability in particular using keywords, including the type of death (e.g. "police shooting," "excited delirium," "starlight tours," etc.). I applied a "snowballing" technique to search the reference lists of the articles identified for

additional relevant articles.⁵⁸⁰ I reviewed the literature amassed and described it in the structure of a typology of police-involved deaths. As I wrote about each type of death, I further searched for articles and studies responding to issues that arose when explaining the type of death and its impact on persons who experience mental health disability.

With respect to the second question: concerning policing strategies and techniques, I built on the information found in articles from the initial search described above, and engaged in more particular keyword searches using terminology found in these articles. These included: combining "police" and "mental health" with: "de-escalation", "crisis intervention training"/"CIT"/"Memphis Model", "mental health team", etc. to yield more targeted literature on this subject. I began my searches including the keyword "Canada" in order to flush out domestic studies and sources, and later removed it to seek out relevant international literature.

In analyzing the literature collected, I focused on Canadian studies to the extent possible, employing international sources primarily where domestic studies and data left unanswered questions or a dearth of information on a particular subject. My discussion of the literature review provides some general information about how the issue of police-involved injuries and deaths of persons who experience mental health disability has been explored in the past in Canada and the state of evidence concerning potential alternative strategies for addressing it.

3.2.6 Legal Analysis

My legal analysis involved a review and discussion of available domestic case law and legislation that shape police use of force interactions against persons who experience mental

⁵⁸⁰ The "snowballing" technique and its use in legal research is described in Marnix Snel & Janaina de Moraes, *Doing A Systematic Literature Review In Legal Scholarship* (The Hague: Eleven Publishing, 2018) at 52.

health disability and police-involved deaths of persons who experience mental health disability. I began by reviewing available case law on tort actions and criminal prosecutions of police officers for police-involved injuries and deaths in Canada. I also reviewed relevant legal treatises and literature pertaining to human rights and the Charter right to equality. I employed searches of legal databases, including CanLII, WestLaw, and Quicklaw for relevant domestic cases pertaining to human rights actions against the police for use of force or discrimination by searching the relevant human rights statutes in provinces or section 15 of the Charter along with the term “police”. My review and discussion of human rights law includes some theoretical literature addressing human rights as an instrument for social change and the intersection between human rights and mental health, drawing on critical disability theory and other scholarship from critical perspectives.

Chapter 4: Demographic Overview of Police-Involved Deaths in Canada and Mental Health Disability

4.1 Introduction

An unknown number of civilians die each year in Canada during interactions with police. The number is impossible to accurately estimate given the current state of Canadian data collection on police-involved fatalities. In this chapter, I consider demographic patterns found within accounts of 433 such deaths contained in the relevant set that were the subject of coroner and medical examiner reports from January 1, 2004 to December 31, 2014. While the reports studied do not represent the full number of police-involved deaths in any of the years in this time period, the large number of cases provides some insight into who dies in police interactions in Canada and what demographic factors coroners and medical examiners consider relevant or irrelevant to understanding and preventing police-involved deaths.

This chapter addresses perceived mental health disability along with other relevant demographic or contextual factors that were described or meaningfully absent from official descriptions of the deaths studied. This overview includes an examination of the province or territory of death, descriptions of the cause and manner of death, the types of deaths identified, and demographic factors relevant to human rights, such as perceived mental health status, race/ethnicity, gender, age, and socioeconomic status.⁵⁸¹

4.2 Province or Territory of Death

⁵⁸¹ Note: some other human rights characteristics, like citizenship, sexual orientation, or physical disability, for example are not included in the analysis because they were rarely, if ever, mentioned in the cases provided.

The number of cases provided from different provinces is indicated in figure 1, and the numbers varied greatly between jurisdictions, owing to differences in population size and in what specific types of deaths are subject to coroner or medical examiner proceedings and public reporting. While coroner or medical examiner reports are often required for deaths in police custody or detention, how this requirement is interpreted by coroner and medical examiner offices varies and these offices do not generally produce a detailed explanation of how they apply their discretion to determine if a case will be considered subject to a mandatory or discretionary inquest or inquiry. To illustrate this point, Québec had the largest number of relevant cases collected (207) and over twice as many as the second highest reporting province (British Columbia, with 93 cases). The high number of cases in Québec is due to policies that mandate coroners to author a publicly available report for a much wider range of police-involved deaths than in other provinces, including suicides that were committed in police presence, motor vehicle accidents involving police, and motor vehicle pursuit deaths.⁵⁸² In contrast, none of the cases from Ontario, Saskatchewan, Manitoba, Yukon, Northwest Territories or Nunavut involved motor vehicle deaths, suggesting these deaths are generally not subject to inquest or fatality review proceedings in those jurisdictions, since it is very unlikely that not a single motor vehicle accident death involving police occurred in a province as populous as Ontario, for example, over the relevant time period.⁵⁸³ Additionally, the majority of suicide or self-inflicted injury deaths in police

⁵⁸² In Québec, Coroner's Investigation reports, which contain information about the identity of the deceased, the date and place of death, probable causes of death, circumstances of death and recommendations provided for under section 92 of the *An Act respecting the determination of causes and circumstances of death*, CQLR c. R-02, are publicly available, unlike in most other provinces and territories.

⁵⁸³ In fact, motor vehicle accidents involving police, both related to high speed pursuits and unrelated, account for relatively large numbers of deaths in Canada when compared to other types of deaths, as is evident from studies suggesting they may represent nearly a quarter of police-involved fatalities in some jurisdictions. See David MacAlister, "Deaths in Police Custody: Towards a Typology" in *Police Involved Deaths: The Need for Reform* (Vancouver: British Columbia Civil Liberties Association, 2012) at 8; Ontario Human Rights Commission, *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black Persons by the Toronto Police Service* (Toronto: Ontario Human Rights Commission, 2018) online: < <http://ohrc.on.ca/en/public-interest-inquiry-racial-profiling-and-discrimination-toronto->

presence (44) occurred in Québec, with only 19 reported in the rest of Canada, suggesting that either Québec has a much higher incidence of these deaths (which is possible but unlikely), or that other jurisdictions are routinely declining to perform inquests or fatality reviews in these cases. The significant variation between what types of deaths trigger the creation of publicly available coroner or medical examiner reports makes gaining a clear quantitative comparison between provinces impossible, but this variation does allow researchers to appreciate the range of ways in which civilians die in police encounters within Canada.

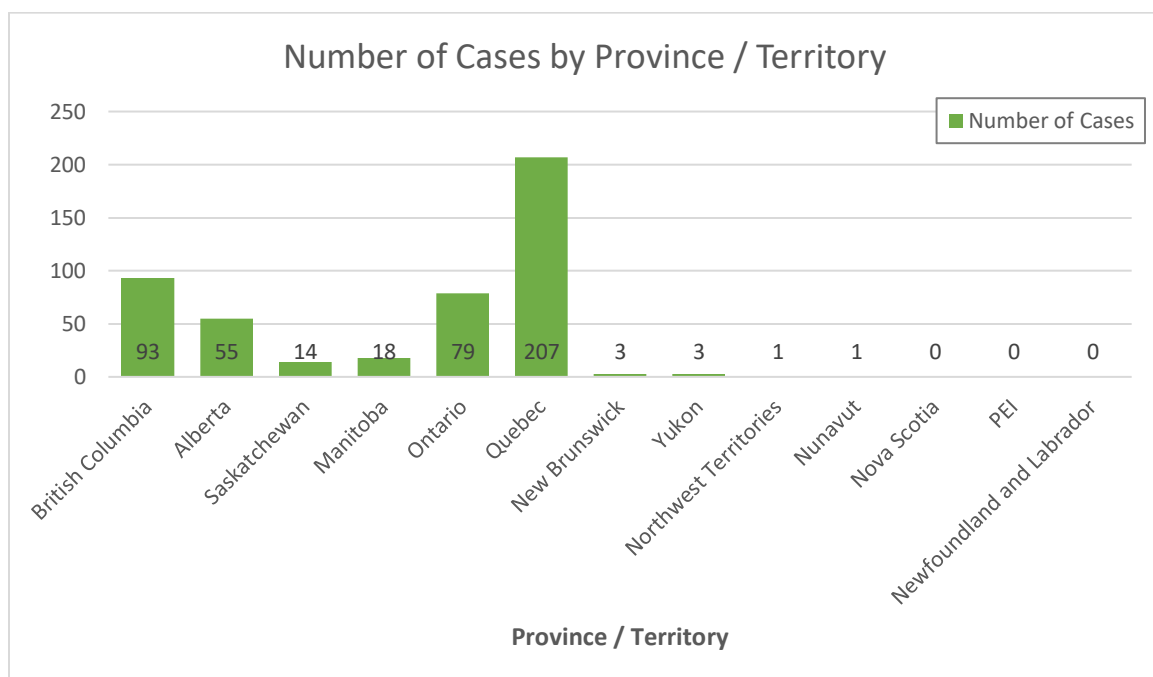


Figure 1: Number of Cases in Relevant Set by Province/Territory

4.3 Manner of Death

Manner of death, as discussed in chapter 3, is a common description used in coroner and medical examiner reports across most Canadian jurisdictions. My coding for manner of death

police-service/collective-impact-interim-report-inquiry-racial-profiling-and-racial-discrimination-black> at 85.

revealed that the deaths studied included those labelled as suicides, homicides, natural deaths, accidental deaths, and deaths for which the manner was left undetermined or unclassified. Québec had slightly different descriptions of the manner of death in many of the reports reviewed that align with the language in the province's coroner's statute.⁵⁸⁴ Some of these deaths in Québec were described as suicides or accidents in a similar vein to other provinces, but they also included less specific descriptors, including "décès violent" and "autodestruction" which were unique to the province.⁵⁸⁵

⁵⁸⁴ In Québec, the law requires that deaths that occurred in "violent circumstances" be reported to a coroner, triggering an investigation for which a report is provided. See *An act respecting the determination of the causes and circumstances of death*, CQLR c R-02, ss 34, 36, 43, 45; 91.

⁵⁸⁵ A "décès violent" [translation by author: "violent death"] was used to describe any type of violent death, and did not necessarily imply homicide (e.g. a car crash or a police shooting could both be classified as a "décès violent". Cases that in other jurisdictions might have been deemed suicides or undetermined were also sometimes referred to as "autodestruction" [translation by author: self destruction], which implies that the individual killed themselves, but removes the intentionality assumption inherent in suicide. Some cases in Québec were, however, labelled as a "suicide." (E.g. Re É.H., Québec, DoD: April 23, 2010).

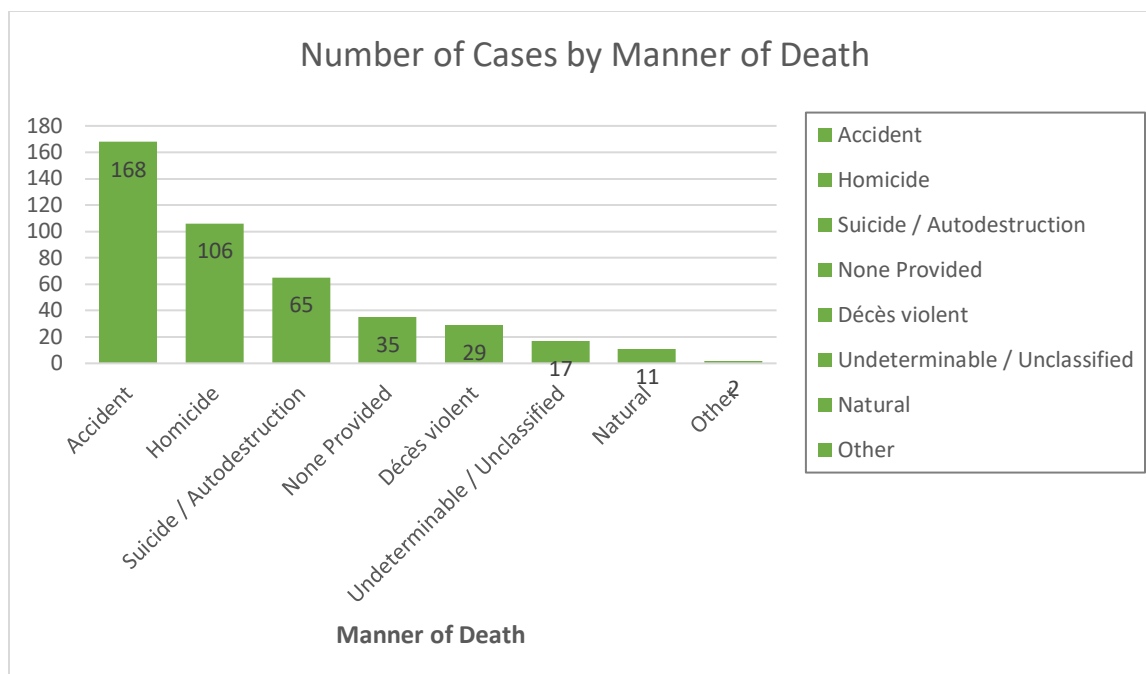


Figure 2: Number of Cases in Relevant Set by Manner of Death

In 35 cases no manner of death was provided and the report did not list the death as undeterminable or unclassified. The manner of death descriptions generally explain little about the nature of the deaths because there appeared to be a lack of any standardized way of classifying them and the terms used can be misleading. For example, two cases in my dataset involved police shooting fatalities (i.e. the deceased was killed by a bullet from a police gun fired by an officer) that were classified as “suicide”, without further elaboration.⁵⁸⁶ In several cases “accidental” deaths involved significant use of force by police, but the deaths were attributed to “excited delirium”, drug or alcohol overdoses, or underlying health conditions, with use of force or restraints occasionally referenced as a contributing factor. Descriptions of the manner of death

⁵⁸⁶ These refer to two inquests held in Saskatchewan in 2009 that concerned the deaths of: Re D.C.D., DoD: December 22, 2007; and Re K.C.W.S.-M., DoD: June 14, 2008. Another case in Alberta, coded as “Other” for manner of death, described a police shooting as “victim-precipitated homicide (suicide)” leaving the manner ambiguous (Re C.A.P., DoD: June 10, 2011). In an additional case in Ontario, the manner of death was recorded as suicide in a case where a man was shot twice by police, in a context where it was unclear from the description whether or not he had shot himself, in addition to being shot by police. The case provides no explanation of why the deceased was classified as having committed suicide (Re J.M., DoD: September 18, 2005).

can provide insight into the meaning attached to particular types of deaths, since, for example, “suicide” connotes intentionality, “homicide” connotes killing by another person, and “accident” suggests the death was unintentional.

4.4 Cause of Death

With respect to cause of death, coding revealed a lack of consistency in how causality was described across Canada or even within a given province or territory, with some reports having highly medical and biological descriptions of causation, where others had less technical and more general descriptions. For example, the primary cause of death in cases where the predominant theory of death was “excited delirium” could be described very technically as “anoxic encephalopathy and rhabdomyolysis,”⁵⁸⁷ or very broadly as “excited delirium due to multiple drug toxicity.”⁵⁸⁸ Consequently, while cause of death descriptions sometimes provided insight into the broader theories of causation around the death, in many cases they were more descriptive of the biomedical process by which the death occurred (i.e., heart stoppage, failure to breathe, and insufficient oxygen getting to the brain).⁵⁸⁹ The causes of death also routinely contained a lot of complexity, listing many factors that the coroner, medical examiner, or other decision-maker believed had contributed to the death. For example, one case described the cause of death as: “[s]udden unexpected cardiac death due to: acute mania, excited delirium, in a man with long-standing bi-polar disorder; in association with cardiovascular stress resulting from

⁵⁸⁷ See Re R.T.K., British Columbia, DoD: November 24, 2007.

Note: “Anoxic encephalopathy”, occurs when blood stops flowing to the brain for a variety of reasons, including cardiac arrest, injury, or drug overdose. See Zachary Messina, Angela Hays Shapshak & Rebecca Mills, “Anoxic Encephalopathy” (Treasure Island, FL: Statpearls, 2020) online: <<https://pubmed.ncbi.nlm.nih.gov/30969655/>>. “Rhabdomyolysis” refers to the dissolution of skeletal muscle following injury. (Patrick A. Torres et al, “Rhabdomyolysis” (2015) 15:1 The Ochsner Journal 58 at 58.)

⁵⁸⁸ Re T.G., Alberta, DoD: October 29, 2008.

⁵⁸⁹ Canadian law contains recognition of both “brain death” and “cardiorespiratory death.” The former occurs with “irreversible cessation of all brain function” (para. 26) and the latter occurs when the “heart and lungs irreversibly stop working.” (para.17) (*McKitty v Hayani*, 2019 ONCA 805 (CanLII)).

violent struggle and morbid obesity.”⁵⁹⁰ The medicalization and lack of standardization in terminology and means of determining cause of death makes these determinations unreliable as a guide to understanding the theories of police-involved death found in the descriptions of the death from a strict law and policy perspective, a deficit that led me to develop a typology of police-involved deaths, as described in chapter 1, which takes account of the listed cause of death, but did not use this classification as determinative of how the case was predominantly described, understood or theorized.

4.5 Type of Death

A review of the narratives written about each case in the relevant set, including the causes of death described, the manner in which the deaths occurred (e.g. suicide, homicide, natural, accidental, undetermined, etc.), and descriptions of testimony, informed by literature on police-involved deaths led to the creation of a typology of deaths. All cases in the dataset were assigned at least one “type of death” code, with some receiving multiple type of death codes where competing narratives of the death were raised or where the categories otherwise conceptually overlapped. The total number of cases associated with each type of death are depicted in figure 3, along with the prevalence of cases involving medicalized evidence of mental health disability or evidence of perceived mental health disability.

⁵⁹⁰ Re O.V., Ontario, DoD: August 9, 2000.

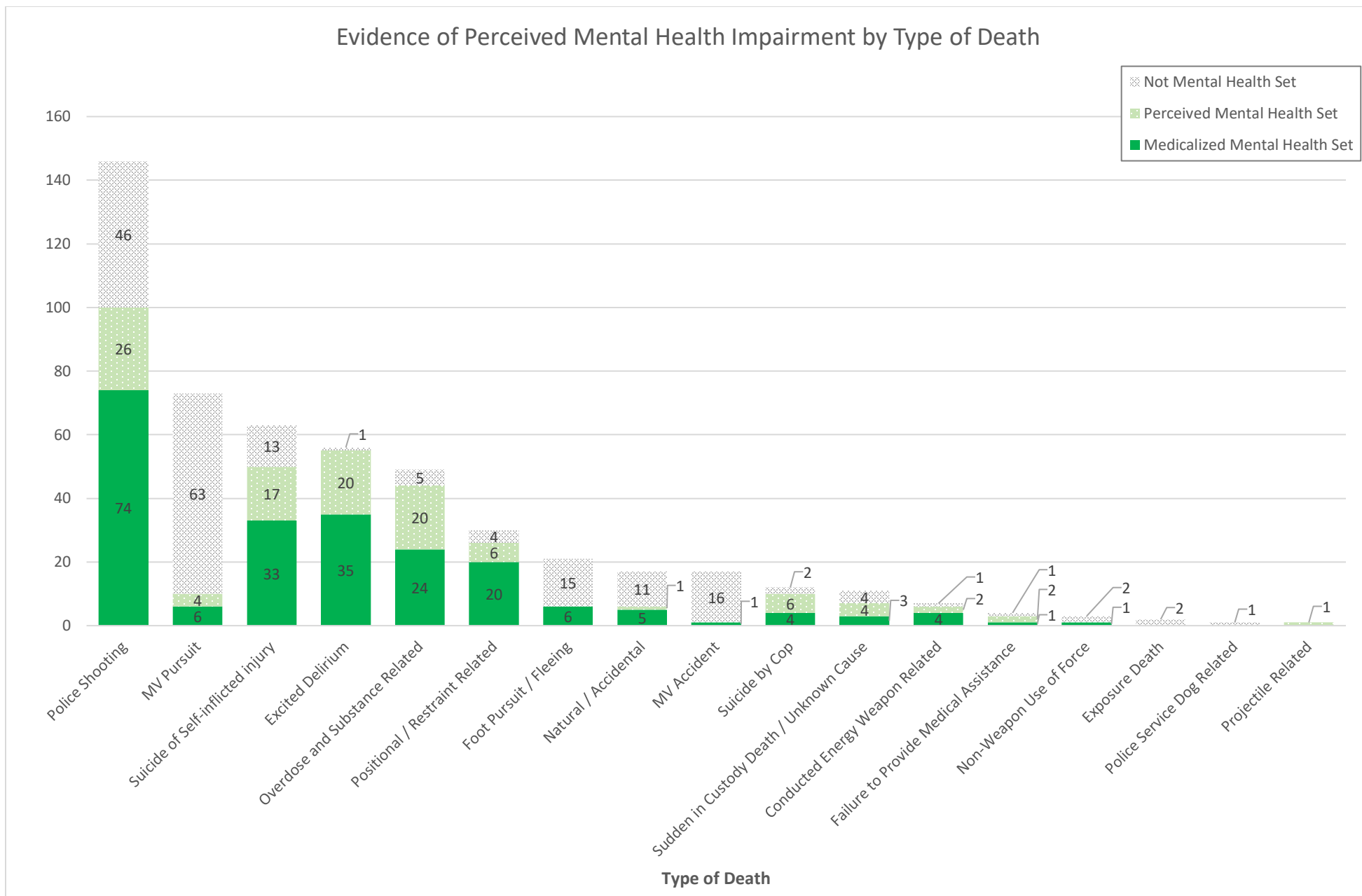


Figure 3: Evidence of Perceived Mental Health Impairment by Type of Death

As figure 3 illustrates, there is great variation between different types of police-involved deaths and the likelihood that the case was within the mental health set. For example, only 1 case involving a non-pursuit motor-vehicle accident death was in the mental health set (6%). In contrast, 55 excited delirium deaths (98%) were in the mental health set indicating excited delirium cases almost always involve a deceased person who is perceived to have experienced a mental health impairment. The types of deaths most strongly related to perceived mental health impairment are excited delirium, restraint/positional related, CEW related, sudden in custody deaths, police shootings (incl. “suicide by cop”), drug/alcohol overdoses, suicide/self-injury, and failure to provide medical assistance.

4.6 Perceived Mental Health Impairment of the Deceased

In total, 172 cases (40% of the relevant set) contained descriptions suggesting a history of psychiatrization or involved the medical labelling of the deceased with a mental health “disorder” or “illness” (the “medicalized mental health set”), and a further 86 cases (20%) were identified as having two or more non-medicalized descriptions indicative of a perceived mental health impairment or “emotionally disturbed person” in policing terminology (e.g. behavioural descriptions like “irrational,” “paranoid,” “agitated,” etc.; toxicological evidence of substance use or intoxication, suicidality, etc.) (the “perceived mental health set”).⁵⁹¹ Together these 258 cases made up the “mental health set.” Additionally, 175 cases were identified as not having met these criteria (40%).

⁵⁹¹ As mentioned in chapter 3, where one of the descriptions of mental health was “intoxication” or substance-use (and synonyms or other signs thereof) a second description suggesting perceived mental health impairment other than intoxication or substance-use was required for inclusion in the “perceived mental health set”. Additionally, where suicide or suicidal vocalizations were descriptions of perceived mental health impairment, secondary non-suicide indicators were required, or suicidality had to be discussed as a factor prior to police involvement (e.g. a history of suicide attempts). A list of the perceived mental health codes employed is found at Appendix E.

The fact that 60% of cases fell within the mental health set suggests that those perceived to have mental health impairments may be over-represented in the reports of police deaths collected when compared to the prevalence of self-identified or medically labelled mental health conditions in the Canadian population, though estimates vary between sources.⁵⁹² Generally, studies suggest between 11 and 20% of the population has a self-perceived or externally-labelled mental health issue in a given year.⁵⁹³ While the 60% of cases involving a perceived mental health impairment is lower than the CBC's Deadly Force dataset figure of 68% described in chapter 1, the CBC's dataset excluded forms of police-involved death like motor vehicle accidents, self-inflicted deaths, or deaths as a result of attempting to evade police, which are included in this study. As will be discussed in greater detail below, cases in the mental health set were far more prevalent among some types of deaths than others, including police shootings, deaths involving substance overdose, suicide, and deaths deemed to be the result of "excited delirium", positional or restraint-related, or sudden in custody deaths. There is also considerable diversity among psychiatric labels within the mental health dataset itself. Individuals labelled with some conditions (like problematic substance use and psychotic conditions) are over-represented relative to their prevalence in the general population.⁵⁹⁴ Additionally, some psychiatric labels (like problematic substance

⁵⁹² It is unclear whether this over-representation is due to higher incidence of police interactions with people who experience mental health disability or whether this population is simply more likely to die in police interactions, or both.

⁵⁹³ For example, in a report prepared for the Mental Health Commission of Canada, Paul Smetanin et al. estimate that in any given year 20% of Canadians "experience a mental illness or addiction problem" and by age 40 50% of Canadians will have experienced a "mental illness." (Paul Smetanin et al, "The life and economic impact of major mental illnesses in Canada" (Ottawa: Mental Health Commission of Canada, 2011). In contrast, self-reported "perceived mental health" in 2019 was rated as "fair or poor" rather than "very good or excellent" by 5.2%-11.8% of Canadian (depending on age group). See "Perceived mental health, by age group" Table 13-10-0096-03 (Ottawa: Statistics Canada, n.d.) online: <<https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1310009603>>. In a study of the perceived need for mental health care in 2018, 24,607,300 people answered that they had no perceived need for mental health care, and 3,000,500 rated their needs for mental healthcare as met, while 2,341,200 people rated their needs as partially or fully not met. ("Mental health characteristics: Perceived need for mental health care," Table 13-10-0619-01 (Ottawa: Statistics Canada, n.d.) online: <<https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1310061901>>. Thus, among the 27,607,800 respondents, 89% perceived no need for mental healthcare. Whereas 11% had perceived met or unmet mental healthcare needs.

⁵⁹⁴ In 2012, 1.3% of the population was reported as having been diagnosed with schizophrenia or a psychotic disorder in their lifetime (See Statistics Canada, *Mental health indicators*, Table 13-10-0465-01 (Ottawa: Statistics

use / addiction and psychotic conditions) were more prevalent among police-involved deaths than other psychiatric labels (like eating disorders, obsessive compulsive disorder, etc.).

4.7 Socioeconomic Status (Homelessness, Poverty, and Unemployment) of the Deceased

Few coroner and medical examiner reports mentioned factors pertaining to the socioeconomic status of the deceased, suggesting such factors were rarely considered salient circumstances influencing these deaths and the police behaviour exhibited in them. Despite this general silence, in 14 (3%) of the relevant set cases the deceased was identified as homeless, a population that estimates suggest makes up approximately 0.6% of the Canadian population each year, which indicates that this population is over-represented in the cases studied.⁵⁹⁵ Furthermore, all but two of the individuals identified as homeless were in the mental health set (12), including 10 in the medicalized mental health set and 2 in the perceived mental health set. Five of the deceased described as homeless were labelled with a psychotic disorder (42%).⁵⁹⁶ In 5 cases a homeless deceased was labelled as having an addiction or problematic substance use (42%). In 13 cases, the deceased was described as “unemployed” and in the majority of these cases (10) there was evidence of medicalized mental health disability, with evidence of perceived mental health disability in the other two.⁵⁹⁷

Canada, online: <<https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1310046501>>. Statistics Canada suggests that 21.6% of the Canadian population “met the criteria for a substance use disorder during their lifetime” according to the 2012 Canadian Community Health Survey – Mental Health. (See *Mental and Substance Use Disorders in Canada* by Caryn Pearson, Teresa Janz, and Jennifer Ali, Catalogue no. 82-624-X (Ottawa: Statistics Canada, November 27, 2015)).

⁵⁹⁵ Estimates suggest the homeless population in Canada is approximately 235,000 people per year or higher. This figure would suggest roughly 0.6% of the population experiences homelessness annually. See Stephen Gaetz et al., *The State of Homelessness in Canada, 2016*, (Toronto: Canadian Observatory on Homelessness Press, 2016) at 5.

⁵⁹⁶ “Psychotic disorder” excludes bipolar where not specified as including psychosis and “paranoia”, but includes substance-induced psychoses.

⁵⁹⁷ The unemployment rate in Canada for those aged 15 and older ranged from 7.5-6.9% in the years 2011-2014. See *Employment and unemployment rate, annual, population centres and rural areas*, Table: 14-10-0106-01, (Ottawa: Statistics Canada, n.d.) online: <<https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1410010601&pickMembers%5B0%5D=1.1&pickMembers%5B1%5D=4.1&pickMembers%5B2%5D=5.1&cubeTimeFrame.startYear=2014&cubeTimeFrame.endYear=2011&referencePeriods=20110101%2C20140101>>.

These figures suggest that socioeconomic precarity may play a role in police-involved deaths of those perceived to have a mental health impairment and understanding how experiences of poverty, homelessness, and unemployment impact these deaths is a factor that should be considered when seeking to reduce fatal police interactions. For example, some studies of policing have examined the over-policing and criminalization of socioeconomically marginalized communities,⁵⁹⁸ including focused police attention on socioeconomically disadvantaged racialized communities⁵⁹⁹ or the racial profiling of racialized individuals in white and socioeconomically advantaged neighbourhoods.⁶⁰⁰ The concentration of policing surveillance and resources on socioeconomically marginalized individuals and communities may expose them to greater risk of police interactions and police-involved deaths.

Where socioeconomic factors were mentioned in describing deaths, the recommendations produced in the coroner and medical examiner processes rarely discussed economic inequality or experiences of socioeconomic deprivation as a problem to be addressed to prevent future police-involved deaths, and never acknowledged concerns about over-policing socio-economically marginalized communities. Instead, they generally focused on the mental health of the deceased. For example, among the deaths involving homeless individuals, only one case made a recommendation relevant to housing. In that case, a 32-year-old man from the Opasquia Cree Nation was said to have died of “excited delirium” after a prolonged struggle and being handcuffed in prone position by RCMP members and hospital staff in the psychiatric ward. He was an involuntary patient described as “suffering from delusions and

⁵⁹⁸ See e.g. Todd Gordon, “The Political Economy of Law and Order Policies: Policing, Class Struggle and Neo-Liberal Restructuring” (2005) 75:1 *Studies in Political Economy* 53.

⁵⁹⁹ Sunghoon Roh and Matthew Robinson, “A Geographic Approach to Racial Profiling: The Microanalysis and Macroanalysis of Racial Disparity in Traffic Stops,” (2009) 12:2 *Police Quarterly* 137; Mariama Zaami, “‘I fit the description’: experiences of social and spatial exclusion among Ghanaian immigrant youth in the Jane and Finch neighbourhood of Toronto” (2015) 47:3 *Canadian Ethnic Studies Journal* 69.

⁶⁰⁰ See Yunliang Meng, “Racially biased policing and neighbourhood characteristics: A case study in Toronto, Canada” (2014) 665 *Cybergeo: European Journal of Geography*, online, DOI : <https://doi.org/10.4000/cybergeo.26165>.

hallucination and clearly in a psychotic state.”⁶⁰¹ Among the recommendations included in that case was that,

A properly staffed and well funded supportive housing unit be operated by the department of family services and housing with involvement from community mental health for individuals in [P.S.]’s situation.⁶⁰²

This case recognized the potential impact of homelessness as a source of distress and instability, whilst also employing a medical frame and suggesting housing should be tied to “monitoring” the use of medication. The judge conducting the fatality inquiry opined:

One cannot help but wonder that if proper housing options existed for [P.S.] if he would, in fact, in the end have been required to have been in hospital and if he would have suffered from the symptoms of schizophrenia to the extent that he did, especially, if there had been proper monitoring of his medications from the onset of his illness.⁶⁰³

According to the narrative provided, multiple attempts were made to find the deceased suitable accommodations prior to his death, but none of the available supportive housing initiatives could accommodate him.

The general silence of coroner and medical examiner reports on socioeconomic disparity, and the failure to consider it as a relevant factor in preventing police-involved deaths, may be an example of what China Mills has referred to as the “psychiatrization of poverty”, which is a process whereby human suffering caused by inequality, deprivation, and other socially determined factors is repackaged as “mental illness”, fit into psychiatric labels, and consequently addressed as a problem of individual pathology, rather than societal inequality.⁶⁰⁴ As Mills notes, there is considerable scholarship on the

⁶⁰¹ Re P.S., Manitoba, DoD: September 2, 2004.

⁶⁰² *Ibid* at 79.

⁶⁰³ *Ibid* at 73.

⁶⁰⁴ China Mills, “The psychiatrization of poverty: Rethinking the mental health-poverty nexus” (2015) 9:5 Social and Personality Psychology Compass 213.

interplay between poverty and “mental illness”, some focusing on the causal role of poverty in producing symptoms of mental illness, and others focusing on the impact of mental illness on the individual’s ability to avoid or rise out of poverty.⁶⁰⁵ However, the literature on the intersection of poverty and mental illness often employs psychiatric categories to describe human distress, re-centering social issues as individual problems to be treated medically. This process was apparent in the coroner and medical examiner cases studied. By ignoring socioeconomic stressors experienced by the deceased these cases also avoid consideration of relevant inequalities in policing that lead some communities and individuals, generally poorer and racialized communities and individuals, to be over-policed, a factor which may help to prevent future deaths.

4.8 Gender of the Deceased

The majority of those who died in police interactions in my dataset were described as men either through the use of pronouns (“he/his”) or direct description (“male”, “man”). Among the 433 deaths in the relevant set, only 35 (8%) were described as women or female, or used “she”/“her” pronouns in the narrative. One of the women in the dataset was identified as transgender, and none of the men were identified as transgender.

⁶⁰⁵ *Ibid.*

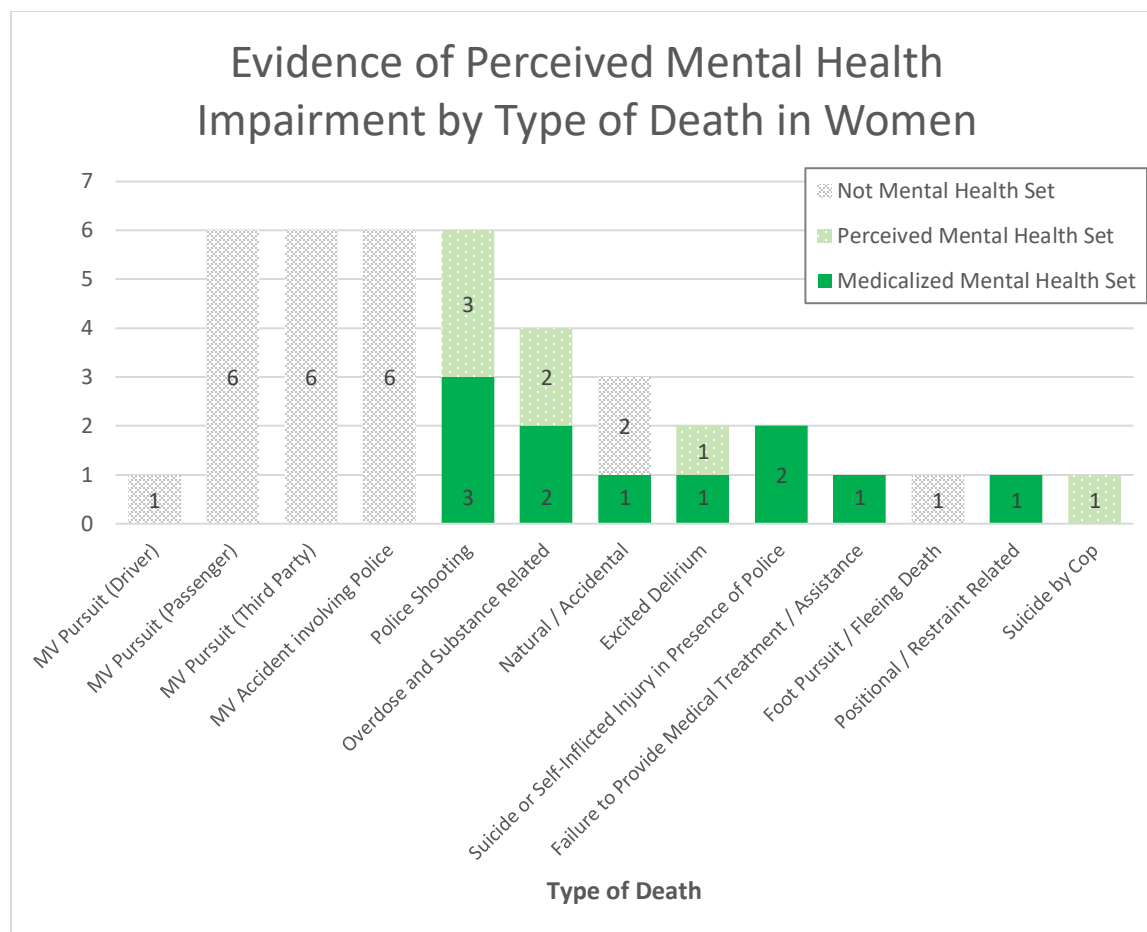


Figure 4: Evidence of Perceived Mental Health Impairment by Type of Death (Women)

As figure 4 demonstrates, cases involving women were far more prevalent in some types of deaths. For example, 37% (13) of the cases involving a woman deceased occurred in the context of motor vehicle pursuits, and specifically in 34% (12) of the total cases involving women the deceased woman was either a passenger in a fleeing vehicle or a third party (i.e. a pedestrian or a driver in an unrelated non-chased vehicle who is hit by someone fleeing from the police). This suggests that many police involved deaths of women in Canada are situations in which the woman was not the subject of the police response, but rather a bystander who is put at risk circumstantially.

In contrast, six women in my dataset were killed in a police shooting,⁶⁰⁶ which represents 4% of the police shootings studied. While a very small number of police shooting cases of women were identified, significantly, four out of the six women subject to police shootings were either identified as Indigenous (First Nations or Inuit) or had indications suggesting but not confirming this.⁶⁰⁷ Indigenous women thus appeared to be significantly over-represented relative to other women among police shooting victims within the cases studied given that this population makes up roughly 4% of the Canadian female population⁶⁰⁸ but 66.6% of police shootings involving women. This supports the many previous studies that have shown that Indigenous women in Canada face disproportionate levels of violence and homicide in Canada, including police violence.⁶⁰⁹ Additionally, all 6 women killed in police shootings were

⁶⁰⁶ See Re B.M.A., Alberta, DoD: January 16, 2010; Re L.S.M., British Columbia, DoD: February 28, 2003; Re K.A.M.H.A.-L., Northwest Territories, DoD: March 14, 2012; Re A.L., Québec, DoD: January 1, 2010; Re J.M., Saskatchewan, DoD: March 18, 2008; Re S.K., Ontario, DoD: August 29, 2010.

⁶⁰⁷ Indigeneity could be inferred by the participation in the inquest by Indigenous groups, recommendations for programs targeting Indigenous people, or the jury being described as composed of 50% Indigenous people to meet statutory requirements. In Saskatchewan section 29(3) of the *The Coroner's Act, 1999*, S.S. c. 38.01, specifies, with respect to jury selection: "... where, in the opinion of the chief coroner, the circumstances surrounding the death require the jury to be composed, wholly or in part, of persons from a specific racial or cultural group, the coroner shall summon the jury in accordance with the regulations." Section 12(1) of the *The Coroners Regulations, 2000*, RRS c C-38.01 Reg 1, specifies a process by which the coroner can ensure Aboriginal representation on a jury in cases where "in the opinion of the Chief Coroner, the circumstances surrounding the death require the jury to be composed, wholly or in part, of persons of Aboriginal ancestry."

⁶⁰⁸ See *Aboriginal female population, by province or territory, Canada, 2006*, Table 89-503-X, (Ottawa: Statistics Canada, n.d.), online: <<https://www150.statcan.gc.ca/n1/pub/89-503-x/2010001/article/11442/tbl/tbl002-eng.htm>>; *First Nations, Métis, and Inuit Women*, by Paula Arriagada, (Ottawa: Statistics Canada, 2016) online: <<https://www150.statcan.gc.ca/n1/pub/89-503-x/2015001/article/14313-eng.htm>>.

⁶⁰⁹ For a detailed discussion of the general pattern of violence against Indigenous women and girls in Canada, See Marion Buller et al., *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (National Inquiry into the Missing and Murdered Indigenous Women, 2019) online: <<https://www.mmiwg-ffada.ca/final-report/>>.

For discussions of police violence against Indigenous women and girls See Pamela Palmater, "Shining Light on the Dark Places: Addressing Police Racism and Sexualized Violence against Indigenous Women and Girls in the National Inquiry" (2016) 28:2 Canadian Journal of Women & the Law 253; Human Rights Watch, *Those Who Take Us Away: Abusive Policing and Failures in Protection of Indigenous Women and Girls in Northern British Columbia, Canada* (New York: Human Rights Watch, 2013) online: <https://www.hrw.org/sites/default/files/reports/canada0213webwcover_0.pdf>; Human Rights Watch, *Submission to the Government of Canada: Police Abuse of Indigenous Women in Saskatchewan and Failures to Protect Indigenous Women from Violence*, (Human Rights Watch, 2017) online: <https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Documents_deposes_a_la_Commission/P-421.pdf>; Catou MacKinnon, "Quebec's police watchdog flooded with complaints from Indigenous people about police misconduct", CBC News, June 15, 2019, online: <<https://www.cbc.ca/news/canada/montreal/bei-indigenous-complaints-1.4978180>>.

in the mental health set (3 medicalized mental health set; 3 perceived mental health set). The disproportionate use of police violence against racialized women (especially Black and Indigenous women) who are perceived to experience mental health disability has been noted by critical scholars studying police violence in the United States, where, as in Canada, there is a dearth of data on police violence against women generally.⁶¹⁰

4.8 Age of the Deceased

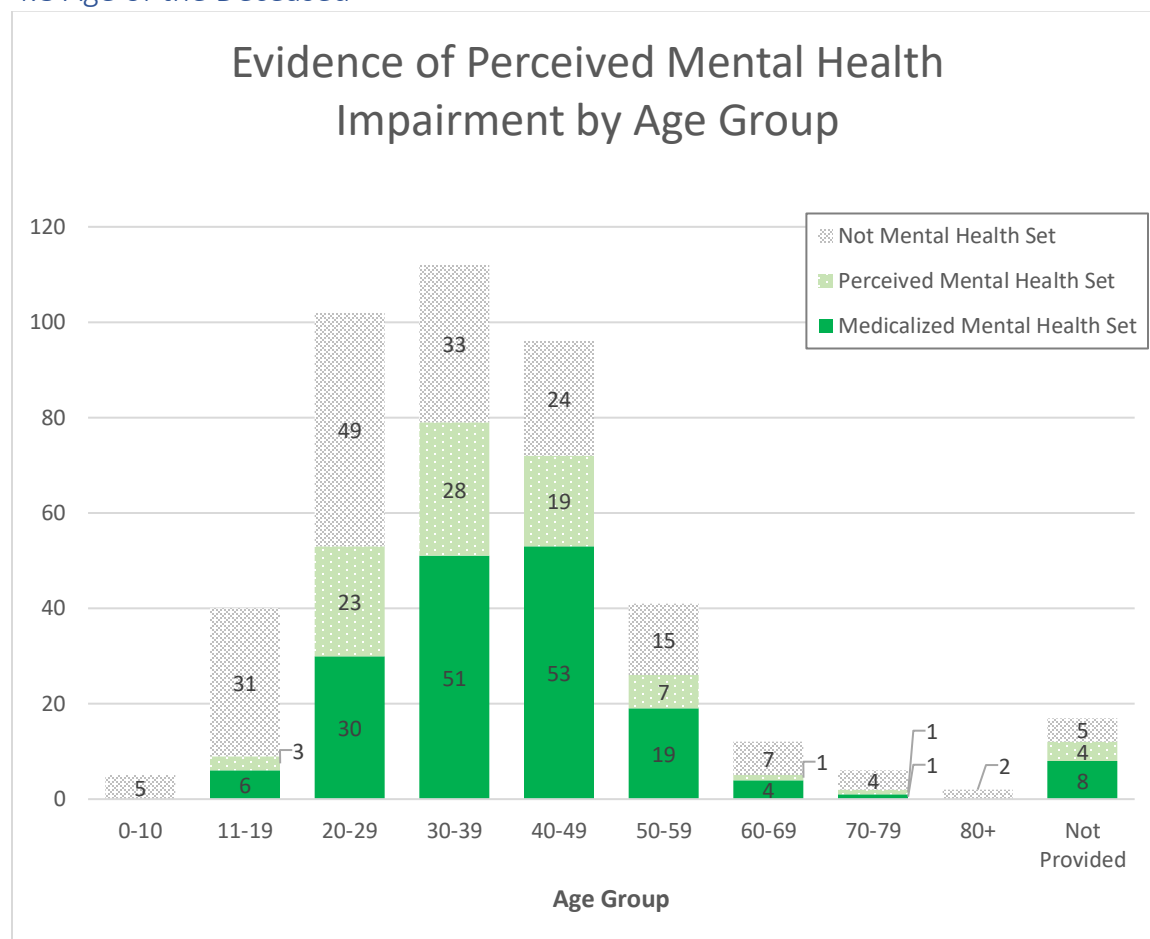


Figure 5: Evidence of Perceived Mental Health Impairment by Age Group

As figure 5 indicates, those who died in police-involved deaths in my dataset were most frequently in their 20s to 40s and those in their 30s to 50s were most likely to be in the medicalized and

⁶¹⁰ See Andrea J. Ritchie, *Invisible No More: Police Violence Against Black Women and Women of Color* (Boston: Beacon Press, 2017).

perceived mental health sets. This may be due to those in the mental health set making up a larger proportion of older cases where people may be acquiring psychiatric labels throughout their 20s and 30s. With respect to the youngest and oldest deaths (10 and younger and 80 and older), these individuals invariably died as a result of motor vehicle accidents, or as third parties killed during police pursuits (i.e. they were never the subject of intentional police actions). Motor vehicle accidents and motor vehicle pursuits are especially unlikely to involve those perceived to have a mental health impairment because many of these deaths account for members of the general population who were accidentally killed, rather than the subject of a police intervention and it would be unlikely that their mental health status would be explored as they were victims of chance.

4.9 Race/Ethnicity of the Deceased

In Canada, coroner and medical examiner reports contained little to no information about the race and ethnicity of the deceased in police-involved deaths during the time period studied. No Canadian jurisdiction systematically recorded police perceptions of race/ethnicity in coroner and medical examiner reports during the time period studied and it was very rare that any mention was made of race/ethnicity. However, some jurisdictions provided scant information about the perceived race or ethnicity of the decedent. In total, only 80 (18.5%) of the 433 cases reviewed contained any information about the perceived race, ethnicity, nationality or country of birth of the deceased, and where included, the information provided was generally very minimal.

Among cases in which some information about these factors was present, 25 cases (31%) involved an Indigenous person and 35 cases (44%) involved someone who was identified as not Indigenous (“not native”). These results reflect the fact that in British Columbia limited race/ethnicity data was mandatorily collected from 2004 to 2007 when coroners’ reports included a single check box indicating whether the deceased was “native” or not, with no description of the nations or communities

these individuals were a part of. This practice appears to have been discontinued in 2008. During the 2004-2007 time period, my dataset contains 41 coroners reports in British Columbia, among which 6 decedents were identified as “native” (roughly 15%), which suggests this population is over-represented among the cases studied (at a ratio of 3:1) since the Indigenous population represented approximately 5% of the British Columbian population according to the 2006 census.⁶¹¹

The other race/ethnicity data available resulted from individual coroner or medical examiners providing a description of the deceased with reference to their background. These descriptions were very rare, occurring in only 33 cases (7.5% of relevant cases). Notably, in only 5 cases the deceased was described as having a country of origin with a majority Black population or described as Black, making up 15% of cases involving a racial descriptor other than the “native”/ “not native” checkboxes. As discussed in chapter 1, previous research has shown that the Black population in Canada is over-represented among some types of police-involved deaths,⁶¹² so the low number of cases among the relevant set describing the deceased as Black likely speaks to the tendency of coroner and medical examiner proceedings to ignore perceptions of race (and racism) when providing narratives about police-involved deaths. Indeed, the deceased in some cases studied were identified as Black, Indigenous or persons of colour in media reports, yet this information was not included in the coroner and medical examiner descriptions of death.

With respect to the intersection between mental health disability and race/ethnicity/country of origin, among the 37 cases in which the deceased was identified as a racialized or Indigenous person, or where they were identified as being from a country of origin in which the majority of citizens are not

⁶¹¹ *Aboriginal identity population by age groups, median age and sex, 2006 counts for both sexes, for Canada, provinces and territories – 20% sample data* (Ottawa: Statistics Canada, n.d.) online: <<https://www12.statcan.gc.ca/census-recensement/2006/dp-pd/hlt/97-558/pages/page.cfm?Lang=E&Geo=PR&Code=01&Table=1&Data=Count&Sex=1&Age=1&StartRec=1&Sort=2&Display=Page>>.

⁶¹² See Jacques Marcoux & Katie Nicholson, "Deadly Force: Fatal Encounters with Police in Canada: 2000-2017 (CBC News, April 5, 2018) online: <<https://newsinteractives.cbc.ca/longform-custom/deadly-force>>.

white, 29 cases (78%) were in the mental health set, including 15 cases (40.5%) in the medicalized mental health set and 14 cases (38%) with indicators of perceived mental health disability. However, given the very small number of cases that referenced the race/ethnicity of the deceased, it is difficult to draw firm conclusions. It is notable that from the limited available data, the police-involved deaths of individuals who are Indigenous or racialized appear to be more likely to be associated with perceived mental health instability than those within the dataset as a whole (38% vs. 20%).

Previous studies on the intersection between mental health and race in police shootings have found that Black people in Toronto were less over-represented among police shootings associated with mental health than white people, though both groups were over-represented.⁶¹³ It is possible that Black people are less likely to have formal psychiatric diagnoses and/or a history of psychiatric hospitalization and treatment,⁶¹⁴ but may nevertheless be perceived to be experiencing forms of distress or exhibiting behaviours that tend to be associated with mental health impairment when they are subject to police-involved deaths. Absent standardized record keeping on perceived race/ethnicity and mental health in police-involved fatalities, studying and understanding the way that these factors interact is challenging. Yet, as several critical scholars have noted, perceptions of race can fundamentally impact how mental health is understood, the degree of stigma faced by those subject to psychiatric labels, which psychiatric labels are applied, and what treatment is provided or withheld.⁶¹⁵ Furthermore, racism hurts and the

⁶¹³ Public Fatality Inquiry into the death of A.S.M. (Date of Death ("DoD"): September 25, 1999) and H.D.P. (DoD: September 24, 1999), Alberta, at 6.

⁶¹⁴ The Mental Health Commission of Canada has found that between 2001 and 2014, "38.3% of Black Canadian residents with poor or fair self-reported mental health used mental health services compared with 50.8% White Canadian residents" ("Shining a Light on Mental Health in Black Communities" (Mental Health Commission of Canada, 2021) online: *Mental Health Commission of Canada* <https://mentalhealthcommission.ca/resource/shining-a-light-on-mental-health-in-black-communities/>).

⁶¹⁵ See e.g. Ruby Dhand, "Access to Justice for Ethno/Racial Psychiatric Consumer/Survivors in Ontario" (2011) 29 Windsor Yearbook of Access to Justice 127; Camille A. Nelson, "Racializing Disability, Disabling Race: Policing Race and Mental Status" (2010) 15:1 Berkeley Journal of Criminal Law 1; Suman Fernando, "Racialisation of the Schizophrenia Diagnosis", c 22 in Bruce M.Z. Cohen (ed.), *Routledge International Handbook of Critical Mental Health*, (London: Routledge, 2017).

harm and trauma it causes for racialized and Indigenous people, either through the systemic impacts that lead to excluding racialized people from equal access to the social determinants of health or through persistent experiences of direct racism, have been framed by some scholars as an issue of mental health or “illness”,⁶¹⁶ despite the latter descriptor’s tendency to suggest individual and biomedical rather than social pathology. Understanding police-involved deaths of those who experience mental health disability would thus be greatly improved through the collection of both perceived race/ethnicity and perceived mental health data.

The lack of any mention of the race or ethnic background of the deceased in the majority of the coroner and medical examiner reports suggests that this information was not considered relevant by those authoring these reports, despite significant and consistent evidence (as discussed in greater detail in chapter 1) on the over-representation of Black and Indigenous people among police use of force fatalities in Canada.⁶¹⁷ It also suggests that coroner and medical examiners and their policies have failed to capture the impact that racism, including systemic and structural racism and colonialism exerts on in-custody deaths. Furthermore, in the context of coroner and medical examiner data it suggests a lack of recognition that addressing racism and ongoing colonial violence can work to prevent future deaths. In fact, there is a history of legal challenges in Canada by groups or individuals seeking to bring forward

⁶¹⁶ See e.g. Sheela Subramaniam and Seble Makonnen, “Racial and Mental Health Profiling in Ontario: Exploring the Links” Ontario Human Rights Commission, (2017) 14:1 *Canadian Diversity* 25; Sannisha Dale & Kimberly Merren, “The Legacy of Slavery in Thoughts, Emotions, and Behaviors: Using Cognitive Behavioral Therapy to Frame the Impact of Slavery on African Americans”, in Morgan Medlock et al, eds, *Racism and Psychiatry: Contemporary Issues and Intervention*, (Cham: Humana Press, 2019) [Dale & Merren] at 21-34; Sarah Nelson and Kathi Wilson, “The Mental Health of Indigenous Peoples in Canada: A Critical Review of Research” (2017) 176 *Social Science & Medicine* 193.

⁶¹⁷ See e.g. Jacques Marcoux and Katie Nicholson, “Deadly Force: Fatal Encounters with Police in Canada: 2000-2017 (CBC News, April 5, 2018) online: <<https://newsinteractives.cbc.ca/longform-custom/deadly-force>>; Ontario Human Rights Commission, *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black Persons by the Toronto Police Service*, (Toronto: Ontario Human Rights Commission, 2018), online: <<http://ohrc.on.ca/en/public-interest-inquiry-racial-profiling-and-discrimination-toronto-police-service/collective-impact-interim-report-inquiry-racial-profiling-and-racial-discrimination-black>>.

evidence of racism in coronial and medical examiner proceedings on police-involved deaths and who were initially refused participation in these processes .⁶¹⁸

Among the police-involved deaths studied, very few cases made any mention whatsoever of racism and when a party to the inquest sought to bring forward evidence of racism or to discuss racism as a factor in the death, this evidence was generally ignored, glossed over, or left unaddressed in the analysis of the deaths because it was found not to be credible, or otherwise discounted in favour of other “race-neutral” theories of the death, which focused on the behaviour of the deceased, or their alleged criminality as the sole determinative factor shaping police actions.⁶¹⁹ Indeed, in some cases where one might say that racism was one of the predominant ways in which the media and public perceived a death, racism was not directly acknowledged. For example, in the case of Neil Stonechild, a 17-year-old Salteaux youth who was, in all probability,⁶²⁰ left by police in a remote location outside of Saskatoon in -28°C

⁶¹⁸ See e.g. *Re McDougall*, 2016 MBPC 77 (CanLII) in which A.C.J. Krahn held that the scope of the inquiry into the death of Craig McDougall, a Black man shot by a member of the Winnipeg Police Service, should include consideration of structural racism and the expert witness testimony of Dr. Elizabeth Comack; *Black Action Defence Committee v Huxter (Coroner)*, [1992] OJ No 2741 (QL) (CanLII) in which Justice Adams, for the majority, granted standing to the Black Action Defence Committee (but not the Urban Alliance on Race Relations for Metropolitan Toronto) to participate in the inquest into the death of L.D., a Black man labelled as “schizophrenic” who has shot by police in Toronto.

⁶¹⁹ One notable exception is the discussion of racism in the Ipperwash Inquiry Report, which documents the fatal shooting of Dudley George, an Anishinabek man of the Kettle and Stony Point First Nation who was unarmed when he was killed.

In Hon. Sidney B. Linden, *The Report of the Ipperwash Inquiry*, (Toronto: Ipperwash Inquiry, 2007), many instances of overt racism by police officers involved in Dudley George’s death were documented, including racist comments made by Cst. Jim Dyke to Cst. Darryl Whitehead, police officers involved, concerning both Indigenous people and Black people (see 645 to 647); and several additional conversations involving racist comments about Indigenous people made by police officers employed by the OPP (see 647-648). Additionally, following the fatal shooting of Dudley George members of the OPP procured commemorative t-shirts and mugs of the operation adorned with overtly racist symbolism like a feather on its side suggestive of the death of an Indigenous man; a sword adorned with the Tactical Response Unit logo breaking an arrow over an anvil symbolizing the Emergency Response Team, and an OPP logo with an arrow piercing it. The practice of selling paraphernalia for large-scale policing operations did not begin with this event, but the act of selling memorabilia and the objectionable content on it was clearly racist, profoundly offensive, and wildly insensitive in light of the tragic killing of Dudley George. This practice was known about and participated in by many who were directly involved in the operation that led to Mr. George’s death, including the Incident Commander, and no one intervened to stop this practice, until a Ministry of Natural Resources staff member pointed out how offensive this paraphernalia is to Indigenous people (see 655-663).

⁶²⁰ Cst. Brad Senger and Cst. Larry Hartwig of the Saskatoon Police Service, in whose presence Neil Stonechild was last seen and who were connected to his death by virtue of witness testimony that he had been apprehended by them and was last seen in their presence, along with the fact that he had marks of handcuffs on his wrists at the

temperatures to die of cold exposure in what would become known as the “starlight tours”, racism was barely mentioned in the public inquiry into his death, despite having been raised by his family in the media, and despite the fact that several Indigenous men had died or been injured in similar circumstances in Saskatoon.⁶²¹ This absence of considering race in the public inquiry into Neil Stonechild’s death occurred despite the fact that Stonechild died with marks of handcuffs on his wrists, having last been seen in the company of Cst. Senger and Cst. Hartwig of the Saskatoon Police Service, and that the criminal investigation into the deaths was discontinued due to knowledge or suspicion that police were responsible for the death.⁶²² While the inquiry mentions allegations of racism, it did not explore this issue in depth, though the inquiry did suggest the Saskatoon Police Service required more “racial and cultural diversity.”⁶²³ When addressing the reality that Neil Stonechild was an Indigenous youth killed by white police officers, the inquiry framed the issue at play as a divide between cultures, rather than colonial violence perpetrated by one group against the other. Justice Wright wrote:

As I reviewed the evidence in this Inquiry, I was reminded, again and again, of the chasm that separates Aboriginal and non-Aboriginal people in this city and province. Our two communities do not know each other and do not seem to want to.

The void is emphasized by the interaction of an essentially non-Aboriginal police force and the Aboriginal community. The justice system produces another set of difficulties.⁶²⁴

While there may have been a divide between cultures and an under-representation of Indigenous people in the Saskatoon police force, by treating “starlight tours” as a problem of cultural divide or lack of diversity, the inquiry ignores the racial violence animating these killings and avoids acknowledgement of

time of death, were never charged in relation to the death, and the criminal investigation into his death was closed by another member of the Saskatoon Police Service.

⁶²¹ Including Lawrence Wenger, Rodney Naistus, Dusty Dean Ironchild, Lloyd Dustyhorn, and Darrell Night See Joyce Green, “From Stonechild to Social Cohesion: Anti-Racist Challenges for Saskatchewan” (2006) 39:3 Canadian Journal of Political Science 507.

⁶²² See Justice David Henry Wright, *Report of the Commission of Inquiry into Matters Relating to the Death of Neil Stonechild*, (Regina: Government of Saskatchewan, 2004).

⁶²³ See *Ibid* at 206.

⁶²⁴ See *Ibid* at 208.

the role policing has historically played and continues to play in colonial violence against Indigenous people.

The silence of coronial and medical examiner proceedings on racism, colonialism, and perceptions of race and ethnicity obscures understanding of the role of mental health disability in the deaths studied. Several scholars have recognized that perceptions of race fundamentally impact how people are perceived as having mental health disabilities, what labels are attached to them, and how they are ultimately treated; notably, racialized people often refuse treatment or are coerced into treatment for mental health conditions, and they are more frequently labelled with “serious mental illnesses”.⁶²⁵ Furthermore, experiences of colonialism and racism can lead to alienation, fear, trauma, and socioeconomic deprivation, which can ultimately lead to crises or states of distress that are often labelled as indicators of an underlying mental health condition.⁶²⁶ With respect to policing, Camille A. Nelson describes the “disabling of race and the racing of disability”⁶²⁷ to describe the intersection of race and mental health disability and the way that police treat racialized people who are perceived to be “mentally ill” more harshly than others, criminalizing them rather than providing them with access to treatment, and subjecting them to police brutality.⁶²⁸ Nelson points out that the criminalization of racialized people who are in mental health crisis and the disproportionate violence they are subjected to is influenced by perceptions of race, and ultimately by racism.

⁶²⁵ See Magnus Mfoafo-M’Carthy, “Community treatment orders and the experiences of ethnic minority individuals diagnosed with serious mental illness in the Canadian mental health system” (2014) 13:69 *International Journal of Health Equity* 1; Kwame McKenzie & Kamaldeep Bhui, “Institutional racism in mental health care” (2007) 334 *British Medical Journal* 649.

⁶²⁶ For examples of literature framing trauma from experiences of racism in terms of mental health See Christina Hackett, David Feeny & Emile Tompa, “Canada’s residential school system: measuring the intergenerational impact of family attendance on health and mental health outcomes” (2016) 70 *Journal of Epidemiology and Community Health* 1096; Dale & Merren, *supra* note 616.

⁶²⁷ Nelson, *supra* note 615 at 5.

⁶²⁸ *Ibid* at 6-7.

The intersection of mental health disability and race was apparent in the report into the death of R.C. (Date of death: October 26, 2006), an Indigenous man,⁶²⁹ who died suddenly after being “hogtied” by staff of a hotel and bystanders and later handcuffed by the Winnipeg Police Service who took custody of him prior to his death. The deceased in that case was described as “agitated, raising or waving his arms and saying that he was crazy or going crazy.”⁶³⁰ The inquiry concluded that R.C. died of “atheromatous coronary artery disease”⁶³¹ with a “hyper-excitabile state with agitation”⁶³² listed as a contributing condition because he failed to meet the criteria of “mental illness” or drug/alcohol use required of excited delirium.⁶³³ His heart was described as a “ticking time bomb which could have caused a cardiac arrest at any time.”⁶³⁴ However, ultimately he did not die until he was restrained, hogtied, and knelt on by several people. R.C.’s behaviour was post-humously explained by a state of low blood sugar, as he was diabetic. However, according to the report, “[p]eople who saw him and interacted with him at the hotel thought he was drunk or high on drugs.”⁶³⁵ R.C.’s lethal interaction with the public and police took place after he hit a woman with his car while illegally driving at “very slow”⁶³⁶ speed onto a sidewalk prior to entering a local hotel. The woman who was hit ran off, injured.⁶³⁷ R.C. exited his car and went into the Hotel where he was initially described as “calm”⁶³⁸ and “disoriented or lost”⁶³⁹ and later became

⁶²⁹ The fatality inquiry report referred to the deceased as “Aboriginal” without any further qualification.

⁶³⁰ Report on Inquest into the death of R.C., Manitoba, DoD: October 26, 2006 at 1.

⁶³¹ *Ibid* at 2, para 7.

Note: Atheromatous coronary artery disease takes place when atheroma (fatty deposits) build up on the walls of the arteries surrounding the heart, restricting the flow of blood. See “Causes: Coronary Artery Disease”, (London: National Health Service, n.d.) online: <[https://www.nhs.uk/conditions/coronary-heart-disease/causes/#:~:text=Coronary%20heart%20disease%20\(CHD\)%20is,This%20process%20is%20called%20atherosclerosis](https://www.nhs.uk/conditions/coronary-heart-disease/causes/#:~:text=Coronary%20heart%20disease%20(CHD)%20is,This%20process%20is%20called%20atherosclerosis)>.

⁶³² *Ibid* at 92.

⁶³³ *Ibid*.

⁶³⁴ *Ibid* at 2.

⁶³⁵ *Ibid* at 7.

⁶³⁶ *Ibid* at 16, 49.

⁶³⁷ *Ibid* at 16.

⁶³⁸ *Ibid* at 7.

⁶³⁹ *Ibid* at 7.

“agitated”, “waving his arms in the air” and stating that he was “crazy” when confronted.⁶⁴⁰ The evidence also suggests someone yelled that he had a gun at some point during the interaction, although it was determined at the inquiry that he was in fact unarmed.⁶⁴¹ R.C. was “tackled [...] from behind”⁶⁴² in an attempt at a citizen’s arrest in a context where he had not initiated any violence but had attempted to flee from those confronting him. He was hogtied and the police handcuffed him prior to checking his breathing and realizing there was none. In light of this, counsel for the deceased’s family suggested in their submissions that the hogtying of R.C. was a result of “the racist attitude of St. Regis [the hotel] staff that ‘manifested in the assumption that [R.C.] was a ‘drunk and violent indian’.”⁶⁴³ Judge Linda Giesbrecht rejected this assertion stating:

[370] I don’t doubt that racism exists and is a reality for many aboriginal people who live in or visit Winnipeg. But there is simply no evidence before me that racism had anything to do with the way [R.C.] was restrained at the St. Regis Hotel. Some of the persons involved in restraining [R.C.] are aboriginal themselves. Clearly this fact alone does not mean that racist attitudes didn’t play some role. However there is simply nothing in the evidence before me to support the suggestion that [R.C.] was restrained or hogtied because he was an aboriginal man. Certainly persons who observed him at the hotel thought he was drunk or high or both. I am satisfied that this opinion was based on observations of his behaviour not his race. [Common law partner of R.C.] herself agreed that anyone who did not know that [R.C.] was diabetic would think that he was drunk, having regard to how he was acting when she was with him.⁶⁴⁴

What this description of the case overlooks is that behaviour does not hold a fixed, neutral meaning, rather it is interpreted in light of the beliefs and assumptions that we make about the person engaging in it, including their perceived race, their perceived disability, and any stereotypical views we hold about these categories individually, or in combination. This is especially important to appreciate in the context of policing because police are trained to take behaviours as signs of risk and to engage in use

⁶⁴⁰ *Ibid* at 7.

⁶⁴¹ *Ibid* at 7-8.

⁶⁴² *Ibid* at 93.

⁶⁴³ *Ibid* at 88.

⁶⁴⁴ *Ibid* at 88.

of force proportionate to that risk.⁶⁴⁵ Those who judged R.C.'s behaviour to be indicative of substance use and his action of hitting a pedestrian to be criminal interpreted the situation this way, despite other possible explanations and information to the contrary. As R.C.'s family suggested, this interpretation may have been influenced by negative stereotypes surrounding Indigenous people and alcohol use. The stereotype of the "drunken Indian" has been a prevalent prejudice in Canadian society.⁶⁴⁶ This is a form of racism that has contributed to the deaths of countless Indigenous people⁶⁴⁷ and continues to be an expression of colonial violence in Canada.

The individuals who restrained R.C. were also reacting to his behaviour with force based on a risk perception, a belief that he would be violent. One wonders if, for example, a white woman would have engendered similar treatment for erratic behaviour, or whether the possibility of a medical or mental health emergency would have been a more likely frame applied.

⁶⁴⁵ For example, see "Threat Cues", as described in Royal Canadian Mounted Police's Royal Canadian Mounted Police, "Incident Management Intervention Model", provided to the author in response to Access to Information request #A201607856 at 3-6 (request p. 77). A copy of this information can be provided by the Government of Canada, available at: Government of Canada, "Completed Access to Information Requests" (Ottawa: Government of Canada, n.d.) online: < <https://open.canada.ca/en/search/ati> >.

⁶⁴⁶ This stereotype has been described in several human rights cases concerning discrimination against Indigenous people, including: *Radek v Henderson Development (Canada) and Securiguard Services (No. 3)*, 2005 BCHRT 302 (CanLII), paras 574-575; *Carpenter v Limit Night Club*, 1999 BCHRT 50 (CanLII); In *Radek*, above, the tribunal states at para 574: "the stereotype of the "drunken Indian" is endemic in our [Canadian] culture."

⁶⁴⁷ Particular examples of such deaths include: 1) the inquest into the death of B.L.S. [see Appendix A], date of death September 21, 2008, a 45-year-old Indigenous man described as having physical and cognitive disabilities who died of an acute inflammation of the abdominal cavity while waiting in a wheelchair in the emergency room of Winnipeg's Health Sciences Centre 34 hours after he had originally arrived. B.L.S.' death was only discovered by staff in the ER hours after his death, and he was incorrectly perceived to be homeless (he in fact lived in an assisted living facility) and believed by staff to be "drunk" and sleeping it off", when in fact he was in profound medical distress and had never received triage or healthcare services.; 2) the death of P.K., (DoD: October 29, 2012), an Inuit man who was found unconscious and placed in a cell by the Royal Canadian Mounted Police who assumed he was intoxicated, when in fact he was suffering from a stroke (See Beth Brown, "Nunavut RCMP should not assume unconscious inuit are intoxicated: inquest" *Nunatsiaq News* (August 1, 2017)) This form of racial discrimination has also been documented in: Ontario Human Rights Commission, "Under Suspicion: Issues Raised by Indigenous People", in *Under Suspicion: Research and Consultation Report on Racial Profiling in Ontario*, (Toronto: Ontario Human Rights Commission, 2017) online: <http://codp1961.ohrc.on.ca/sites/default/files/Under%20suspicion_research%20and%20consultation%20report%20on%20racial%20profiling%20in%20Ontario_2017.pdf>.

The use of hogtying and the belief that it was necessary to violently restrain R.C. also speaks to societal discrimination and indifference against those who use drugs and those who experience problematic drug or alcohol use. The risks of physically restraining someone in a position where one cannot monitor their vital signs suggests that the physical distress and risk he was experiencing was not a serious consideration of those involved. False beliefs that the deceased was drunk were treated as exculpatory – explaining the violent treatment R.C. received as a socially acceptable alternative to the theory that he received this treatment because he was Indigenous. Ableism can thus work to perpetuate racism, serving as a sort of racism-by-proxy, providing a discriminatory but socially acceptable excuse for violent or dehumanizing treatment of racialized people by explaining stereotypes common to both mental health disability and race, such as assumed dangerousness, irrationality, irremediability and criminality, in terms of mental health disability, rather than race or ethnicity. Indeed, laws criminalizing drug use emerged in the context of racism in Canada⁶⁴⁸ (and the United States) and efforts to punish drug offenders through imprisonment has powerfully contributed to the vast over-representation of racialized people in Canadian prisons⁶⁴⁹ providing further evidence of how racism and ableism are fundamentally interwoven in the production of inequality in Canadian criminal justice systems, including policing.

While stereotyping and unspoken racial prejudices can be difficult to prove, even where evidence of overt racism was provided in coroner or medical examiner reports, it seemed to make little impact on the narratives told. For example, one case involved the death of a 21-year-old man (A.S.M., date of death: September 25, 1999) and a 15-year-old boy (H.D.P., date of death: September 24, 1999)

⁶⁴⁸ For descriptions of how the evolution of Canadian criminalization of drugs emerged from racism against Chinese and Black people, see Susan Boyd, Donald MacPherson and the Vancouver Area Network of Drug Users, “Community Engagement: The Harms of Drug Prohibition: Ongoing Resistance in Vancouver’s Downtown Eastside” (2018/2019) 200 BC Studies 89.

⁶⁴⁹ For a discussion and evidence of the over-representation of Black people among those refused pre-trial release, those who police discretionarily decide to charge for drug offences, and those incarcerated for drug charges in Canada, see Margaret Gittens et al, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, (Toronto: Queen’s Printer, 1995).

who died after falling from a balcony during an organized police raid by the Edmonton Police Service. The raid involved an armed entry at an apartment believed by police to be used by an organized crime group, the Tran Organization. The witness officers claim that the two deceased ran from the apartment onto the balcony, swung themselves over the railing, and let go, falling to their deaths, a set of events witnessed by several people. There was, however, concern about whether the deceased had in fact intended to fall, since a police officer in the parking lot below the balcony had fired a diversionary device⁶⁵⁰ that exploded immediately prior to the fall or simultaneous with it and one of the police officers involved testified that he had been told by the officer who fired the diversionary device that it had hit the balcony railing (contrary to that officer's testimony at the inquiry), raising questions about whether this contributed to the deaths. In this case, evidence was provided to the fatality inquiry by a police officer witness that during the post-incident debriefing, the officer who launched the diversionary device referred to the two deceased using a racist term targeting people of Asian descent. The judge described the responsible police officer's testimony in which the officer acknowledged using the term, but "denie[d] that it had a racist connotation" stating that he "used it as a compendious way of describing the inappropriateness of the actions of the deceased"⁶⁵¹. The judge found that the racist term used by the officer in the debriefing immediately after the deaths did not bring into question that officer's testimony, and they made no further mention of the role racism may have played in the deaths.

What the coroner and medical examiner reports described above make clear is that perceived race/ethnicity is largely ignored and actively avoided in these processes, and the impact of racism is generally not considered, or is addressed superficially at best, permissively at worst, and with little

⁶⁵⁰ Diversionary devices, sometimes called "flashbangs", are incapacitating weapons that "produces a loud explosion accompanied by a bright flash of light and causes a temporary sensory overload thus preventing any deliberate actions for roughly eight seconds." (Bradley Runions, "Less-lethal weapons in peace operations: Broadening the spectrum of response" (1996) 25:1 Peacekeeping and International Relations 8).

⁶⁵¹ Public Fatality Inquiry into the death of A.S.M. (DoD: September 25, 1999) and H.D.P. (DoD: September 24, 1999), Alberta, at 6.

consideration given to systemic racism. Several scholars and commentators have noted the way in which race and ethnicity are erased from the context of police-involved deaths or so normalized as to make them invisible in mainstream analyses of this issue, allowing injustice to persist largely unacknowledged.⁶⁵² Criminologists Paul Millar and Akwasi Owusu-Bempah have highlighted the way that police forces in Canada have systematically “whitewashed” police collected data, suppressing information on perceived race, and shielding themselves from the equity concerns such data would undoubtedly raise.⁶⁵³ Similarly, I would argue the coroner and medical examiner processes in Canada, in their overwhelming failure to make mention of the perceived race or ethnicity of the deceased or to acknowledge the relevance of even blatant acts of direct racism, whitewash the stories of these deaths, avoiding questions of a causal role that racism and colonialism play in these deaths and obscuring the need to address these injustices as means of preventing future deaths.

4.10 Conclusion

As a breakdown of the available demographic information about the deceased in coroner and medical examiner reports indicates, persons perceived to experience mental health disability appear to be over-represented among the police-involved deaths studied, pointing to the possibility that systemic ableism plays a role in police-involved deaths. The data further suggests that most people who die in police interactions are relatively young men (20s-40s). The data also provides insight into demographic factors not considered important enough by coroners and medical examiners to be explored as relevant to these deaths. Perceived race or ethnicity of the deceased was rarely mentioned, as were indications of the socio-economic status of the deceased. Furthermore, where racism was explicitly raised in cases, the

⁶⁵² See e.g. Sherene Razack, *Dying from Improvement: Inquests and Inquiries into Indigenous Deaths in Custody*, (Toronto: University of Toronto Press, 2015) at 30-31; Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to the Present*, (Halifax: Fernwood Publishing, 2017) at 84.

⁶⁵³ Paul Millar and Akwasi Owusu-Bempah, “Whitewashing Criminal Justice in Canada: Preventing Research Through Data Suppression” (2011) 26:3 Canadian Journal of Law and Society 653.

narratives were dismissive of the possibility that racism or colonialism contributed to the deaths. As a consequence, while demographic descriptors in these reports suggest over-representation of persons who experience mental health disability, they too frequently overlook other relevant characteristics of the deceased that would allow for intersectional analysis.

Chapter 5: Mental Health Disability Among Police Shootings and CEW-Proximate Fatalities

5.1 Introduction

Police shootings and conducted energy weapon (CEW) proximate deaths were some of the most common types of police-involved death represented in my dataset. As discussed in chapter 1, CEWs are often presented as helpful weapons that avoid police use of firearms. This chapter will address the over-representation of persons perceived to experience mental health disability among those fatally shot by police and will address common themes raised in the narratives of these cases, including consideration of weapons as a factor in these deaths, and theories of “suicide by cop”. Secondly, it will address the police-involved death cases proximate to CEW use as these weapons are often understood as alternatives to firearms. The discussion of CEW-proximate deaths will consider themes arising in these cases, such as the use of expert witnesses affiliated with Axon (the manufacturer of Tasers) and the high numbers of individuals labelled with substance-use or psychotic conditions among CEW-proximate fatalities. In both the case of firearms and CEW-proximate deaths, recommendations provided to address these particular types of fatalities will be reviewed.

5.2 Police Shootings Overview: Numbers and Demographics

Among the 433 police-involved deaths in my dataset, approximately one third (146 cases, 34%) were the result of a police shooting. Just over half of these deaths (74/146 – 51%) were in the medicalized mental health set. An additional 26 cases (18%) had indications of perceived mental health disability. In total, in 68.5% of police shootings cases were in the mental health set.⁶⁵⁴

⁶⁵⁴ This figure is notably very close to the figure of 68% of police-involved deaths involving those with “mental illness” and/or “addictions”) collected by the CBC between January 1, 2000 to June 30, 2020. See Inayat Singh,

The coding for mental health descriptors provided a means to further consider what types of diagnostic labels were used or perceptions of mental health impairment were present in the descriptions of the deceased. Codes were assigned for particular diagnostic labels used to describe deceased in the medicalized mental health set. The most common form of mental health impairments among the police shooting cases were those involving a deceased perceived to experience delusions, hallucinations and psychosis or who had been labelled with a psychotic disorder. In 29 of the 146 police shooting cases (20%) the deceased had a history of medical involvement (e.g. medical treatment, hospitalization, psychiatric appointments, diagnostic labelling etc.) for psychosis or a psychotic disorder (i.e. schizophrenia, schizoaffective disorder, bipolar disorder with psychosis, delusional disorder, paranoia if specified with psychosis, delusions, or hallucinations). This is a very high figure given that the 2012 Canadian Community Health Survey, which provides self-reported data on persons aged 15 and older in Canada, has reported that 1.3% of the population reported having been “diagnosed” during their lifetime with schizophrenia or psychosis⁶⁵⁵, suggesting these diagnoses are relatively rare. This over-representation is comparable to, though slightly lower than, international data from the Australian Institute of Criminology, that found those with psychotic disorders made up 24.75% of police shooting victims between 1989 and 2011 in that country.⁶⁵⁶ This figure would suggest that those who are perceived to experience psychosis are significantly over-represented among the police shooting fatalities studied at a rate of 15:1.⁶⁵⁷ This figure may also be an underestimation of those perceived to be psychotic, since several cases specified the deceased had a psychiatric label but did not specify what type

“2020 already a particularly deadly year for people killed in police encounters, CBC research shows” *CBC News* (July 23, 2020), online: < <https://newsinteractives.cbc.ca/fatalpoliceencounters/>>.

⁶⁵⁵ Statistics Canada, *Mental health indicators*, Table 13-10-0465-01 (Ottawa: Statistics Canada, 11 February 2014) online: <<https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1310046501>>.

⁶⁵⁶ *Police shootings of people with a mental illness* (Canberra: Australian Institute of Criminology, 2013) online: *Australian Institute of Criminology* < <https://aic.gov.au/publications/rip/rip34>>.

⁶⁵⁷ This over-representation may be greater, since in some cases the particular nature of a mental health diagnosis was not mentioned, making it difficult to determine with any certainty how prevalent certain psychiatric labels are among those killed by police. The figures provided only represent known psychiatric labels.

of mental health condition the person had been labelled as having (8 additional cases), or specified bipolar disorder without sufficient information to determine whether psychosis was a factor.⁶⁵⁸ This figure also omits many other cases where the coroner or witnesses suggested the deceased behaved as though they were experiencing delusions, paranoia, delirium, or some combination thereof, raising the likelihood of perceived psychosis.⁶⁵⁹ Those labelled with substance use disorders or with a history of drug or alcohol treatment and those labelled with depression or who were taking anti-depressant medication at the time of death were also relatively common among police shooting fatalities, making up 25 cases (17%) and 22 cases (15%) respectively. However, these rates do not necessarily suggest over-representation since problematic substance use and depression are relatively common labels in Canadian society.⁶⁶⁰

5.3 Weapons as a Factor in Police Shootings

Information about the deceased's use of a weapon in police shootings is generally very thorough because police and their legal counsel have a significant interest in ensuring that information about the risk of grievous bodily harm or death is included, as required for the legal deployment of fatal force.⁶⁶¹

Weapons were coded according to who had them (deceased or police) the nature of the weapon (e.g.

⁶⁵⁸ Re R.J.-D., Ontario, Date of Death ("DoD"): August 29, 2010; Re L.S., Ontario, DoD: June 24, 2009; Re J.S.H., British Columbia, DoD: October 23, 2009; Re O.C.-R., Ontario, DoD: June 13, 2004; Re H.J.M., Ontario, DoD: September 18, 2005; Re T.C.G., Ontario, DoD: November 20, 2007; Re N.Q., Québec, DoD: August 17, 2013; Re W.D., Ontario, DoD: August 19, 2010.

⁶⁵⁹ See e.g. Re M.A.B., Québec, DoD: December 1, 2005; Re A.M., Québec, DoD: April 12, 2011; Re A.W.M., Saskatchewan, DoD: April 30, 2004; Re D.E.B., British Columbia, DoD: July 22, 2011.

⁶⁶⁰ For example, Statistics Canada suggests that 21.6% of the Canadian population "met the criteria for a substance use disorder during their lifetime" according to the 2012 Canadian Community Health Survey – Mental Health. See Statistics Canada, *Mental and Substance Use Disorders in Canada*, by Caryn Pearson, Teresa Janz & Jennifer Ali, Catalogue no. 82-624-X (Ottawa: Statistics Canada, November 27, 2015). However, there is no data on the lifetime or annual prevalence of substance use disorder diagnoses in Canada.

Lifetime prevalence rates of major depression in Canada have been reported between 2-19% of the population and 12% of average for adults. Statistics Canada, *Section A – Affective Disorders*, Catalogue no. 82-619-M (Ottawa: Statistics Canada, November 27, 2015). Lifetime prevalence of a diagnosis of depression in Canada has been estimated to be 13.6%. See Sabrina T. Wong et al, "The diagnosis of depression and its treatment in Canadian primary care practices: an epidemiological study" (2014) 2:4 Canadian Medical Association Journal Open E337.

⁶⁶¹ See *Criminal Code*, RSC 1985, c 46, s 25(3).

firearm, knife, etc.); whether it was displayed or actively used; and how (e.g. tasers can be used in probe mode or push stun mode; firearms can be shot, but can also be used to inflict blunt force injuries).

A weapon, or something believed to be a weapon or conceived of as a weapon by police⁶⁶² was held or employed by the subject in the majority of police shootings studied. In only 15 cases (10%) the deceased was described as unarmed when killed in the relevant coroner or medical examiner report, though in an additional 7 cases (5%) the deceased was in fact not armed with a usable weapon, but had a toy or imitation firearm which was mistaken for an actual firearm.

⁶⁶² It is worth noting that any object that can theoretically be used to cause bodily harm can be seen as a weapon. In policing objects that are not designed as weapons but can be employed as weapons are commonly referred to as “weapons of opportunity”. Indeed, objects interpreted as weapons included a broken table leg, motor vehicles, part of a window frame, scissors, screwdrivers, hammers, a flashlight, a shovel, a drywall saw, and a golf club.

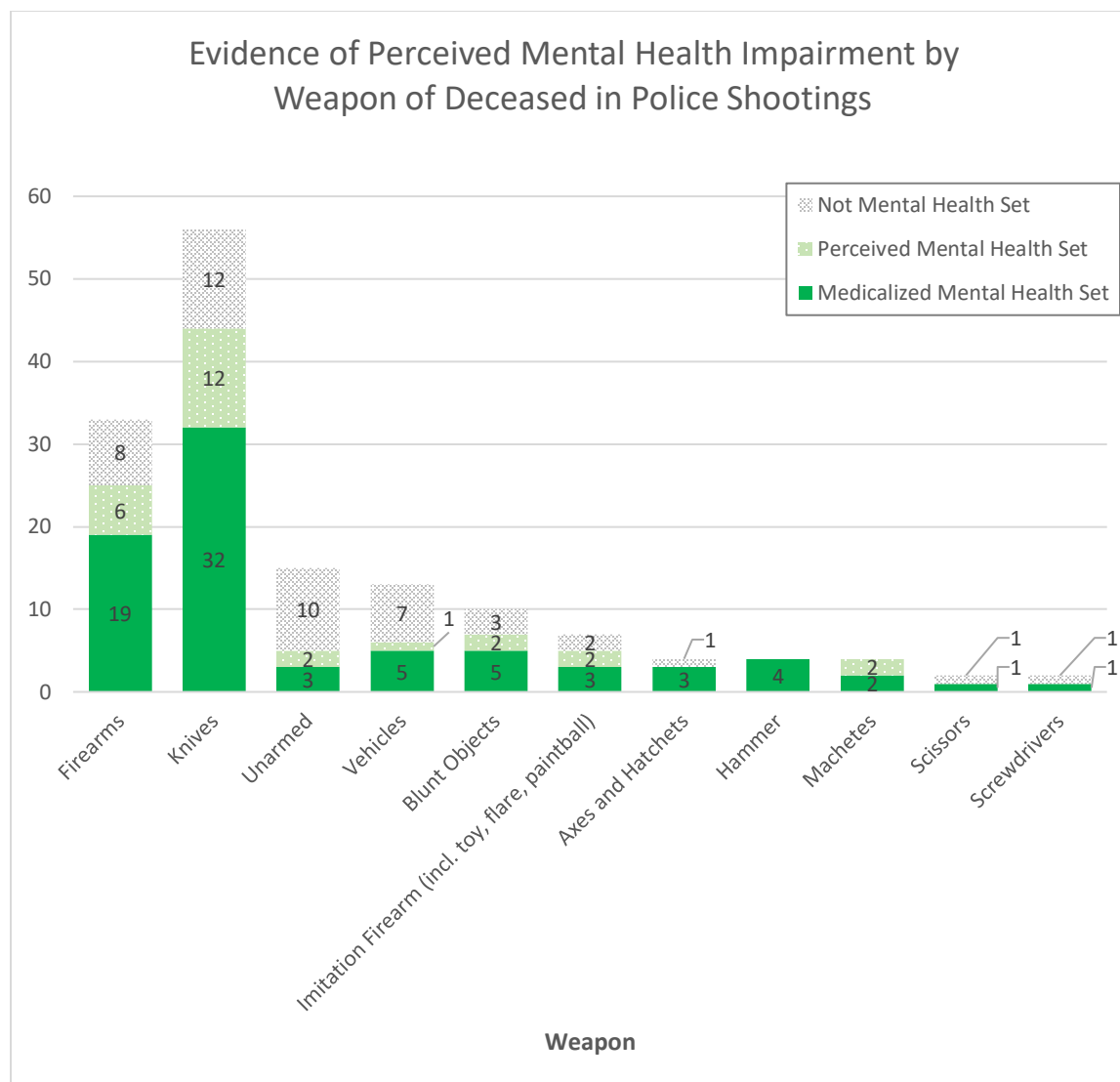


Figure 6: Evidence of Perceived Mental Health Impairment by Weapon of the Deceased

In addition to the cases where the deceased was reported as having a weapon, in several cases police believed or claimed to believe objects were firearms and responded with lethal force. For example, in one case the deceased was shot because police interpreted a computer mouse in his hand to be a gun,⁶⁶³ in another case hands alone beneath a jacket sufficed,⁶⁶⁴ and in other cases a cellphone,⁶⁶⁵ an

⁶⁶³ Re J.E.S., Ontario, DoD: November 5, 2005.

⁶⁶⁴ Re P.S., Québec, DoD: February 6, 2011.

⁶⁶⁵ Re M.J.W., British Columbia, DoD: January 10, 2010.

umbrella,⁶⁶⁶ and a stick (although this claim was found not to be credible) were wrongly identified as firearms.⁶⁶⁷ What is notable about the nature of the “weapons” deceased had in roughly two thirds of the police shootings is that they are, for the most part, common household items, tools, and other non-controlled items, so attempting to prevent police shootings by removing such items from society is unlikely. Indeed, many of these “weapons” were weapons of opportunity in the sense that they were items at hand picked up by the deceased in the course of their interaction with police. The prevalence of firearms and knives, however, is worth considering in greater detail because they were a factor in 23% and 38% of the police involved shootings studied respectively.

5.3.1 Firearms in the Possession of Subjects in Police Involved Shootings

The data on weapons held by the deceased among fatal shootings by police described above reveals a difference between Canada and the United States. Data from *the Guardian’s* “The Counted” dataset on police shootings in the USA reveals that in 2016 nearly half of police shootings in the USA (46%) reportedly involved a subject armed with a firearm.⁶⁶⁸ In contrast, my data suggests only 23% of those shot by police in the cases studied were armed with a firearm, and in fact this figure is slightly higher than the CBC’s Deadly Force Database, which found 19% of the deaths they studied involved someone armed with a firearm.⁶⁶⁹

One result of this difference is that studies, training programs, practices and policies developed in the United States, where guns are involved in a higher proportion of police shootings may be inappropriate when used in Canada given that this form of risk to police officers is less common in

⁶⁶⁶ Re C.J.L., Alberta, DoD: July 18, 2010.

⁶⁶⁷ Sidney B. Linden, *Report of the Ipperwash Inquiry*, vol. 1, (Toronto: Ministry of the Attorney General of Ontario, 2007).

⁶⁶⁸ Jon Swaine et al, 2015 “The Counted” Database, *The Guardian*, online: <<https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database>>.

⁶⁶⁹ Katie Nicholson, “More than 20 Canadians shot dead by police since 2000 were unarmed” *CBC News* (April 7, 2018) online: <<https://www.cbc.ca/news/investigates/more-than-20-canadians-shot-dead-by-police-since-2000-were-unarmed-1.4605021>>.

Canada. This difference reinforces the importance of domestic evidence for policing practices and ensuring that we are not employing policing strategies or training that exaggerates the actual risk officers face concerning firearms in the field, particularly where wrongly perceiving an object to be a firearm can result in civilian deaths.

Additionally, with respect to firearms among those fatally shot by police, shotguns and rifles were more prevalent than handguns, with shotguns or rifles being involved in 21 cases (64% of firearm cases); handguns in 8 cases (24% of firearm cases), and an unspecified type of gun involved in 4 cases (12%), with 1 case involving a deceased who was allegedly armed with a police firearm, which was likely a handgun. The prominence of long arms in police shootings is interesting in light of the fact that handguns are more frequently used in criminal homicides in Canada than shotguns and rifles. In 2014, for example, Statistics Canada reports there were 155 total police-reported firearm homicides in Canada (including murder, manslaughter and infanticide), among which 103 were perpetrated with a handgun, and 34 with a rifle or shotgun, suggesting the former are three times more likely to be used in homicides.⁶⁷⁰ The reason for the higher prevalence of shotguns and rifles in police-involved shootings, when compared with their prevalence in homicides generally is unclear, but it suggests at a minimum that those armed with firearms who are shot by police may differ somewhat from the population of offenders responsible for homicide in Canada. In fact, historical Canadian data on homicides of police officers involving a firearm suggests police officers were somewhat more likely to be killed with a shotgun (56%) than a handgun (44%).⁶⁷¹

There is evidence to suggest that firearms pose a much greater lethal risk to police officers than other forms of weapons. Statistics Canada found that over a 48-year period, from 1961 to 2009, 133 police officers were killed by homicide related to their work and 92% of these deaths were the result of

⁶⁷⁰ Statistics Canada, *Number and percentage of homicide victims, by type of firearm used to commit the homicide*, Table: 35-10-0072-01, (Ottawa: Statistics Canada, July 22, 2019).

⁶⁷¹ Statistics Canada, *Police Officers Murdered in the Line of Duty, 1961-2009*, by Sara Dunn (Ottawa: Statistics Canada, 2010) online: < <https://www150.statcan.gc.ca/n1/pub/85-002-x/2010003/article/11354-eng.htm>>.

shooting, with nearly 80% of such fatalities involving officers who were not wearing protective Kevlar vests at the time, as they were not yet standard issue in the 1960s and 1970s.⁶⁷²

The vast majority of police shootings in my dataset were, according to descriptions of these cases, prompted by a fear for the police officer's own life and safety or that of another police officer, and were not shootings responding to a direct threat to the life or safety of a third party. In 140 of the 146 police shootings in my dataset, the grounds the police would rely on to justify their shooting legally was determinable either through direct testimony of the police officer or a description of the shooting that identified who was present at the time and how the decision to shoot was made, such as, if police officers were alone with the subject or if they described shooting out of fear they or their partner would be injured or killed. In 130 of these 140 cases (93%) the decision to shoot was taken to protect the shooting officer's life or the life of a fellow officer. In 4 of the 140 cases (3%) the shooting was to protect both the police officer's life and the life of a third party and in 6 of the 140 cases (4%) the shooting was to protect the life of a third party alone. This suggests that in most cases, at the time fatal force was used it was intended to protect a police officer from immediate risk of injury or death, rather than a third party.

It is not surprising that when police decide to use fatal force it is usually in self-defence (or defence of another officer), rather than directly in defence of the public, since police will in many cases attempt to remove bystanders from the vicinity of an intervention to protect them. However, what this does suggest is that the perceived risk to the life and safety of police officers is one of the primary determining factors in police shootings and the risk perception of police officers or the level of protection they have in interactions could play a significant role in determining the outcome of police shootings.

5.3.2 Perceived Mental Health Impairment and Weapons in Police Shootings

⁶⁷² *Ibid.*

Among the 100 cases of police shootings that are part of the mental health set, 44 (44%) were armed with a knife, and 25 (25%) were armed with a firearm. Among all police shootings where the deceased was allegedly armed with a knife, 44 of the 56 cases (78.5%) were cases in the mental health set and 12 (21.5%) were not in the mental health set, suggesting knives are more prevalent in cases with evidence of mental health disability than without. With respect to firearms, those in the mental health set made up 25 out of 33 cases (76%), and those without significant evidence of mental health disability made up 24% (8) of these cases. When all sharp objects (including knives, machetes, scissors, screwdrivers, sharp piece of metal) are considered together, 50 of the 64 cases (78%) were in the mental health set. This data suggests those perceived to have a mental health impairment were more likely to be armed with a knife or firearm when killed by police than those without significant evidence of perceived mental health impairment. Moreover, half the cases of police shootings involving someone with a perceived mental health impairment involved a sharp object, which suggests that addressing the risk posed by sharp objects may be particularly significant when addressing the police shootings of persons who experience mental health disability.

Firearms factually pose the greatest lethal threat to police in Canada, and it is possible that some types of guns could be banned, heavily regulated, or subject to more stringent border controls to diminish their availability. In contrast, sharp object risks cannot be removed through regulation. Knives are prevalent in our society and predominantly serve non-violent purposes. Consequently, they may often be weapons of opportunity employed by those in crisis as a form of self-protection.

5.3.3 Sharp Objects and Knives in Police Shooting Cases

Evidence was presented in several cases suggesting knives (and other sharp objects) are considered an exceptionally grave danger to police. Police use of force experts or other police officers

who testified in proceedings⁶⁷³ described versions of the “21 foot rule”⁶⁷⁴ or the “Tueller Drill”⁶⁷⁵. One such case, in which police shot and killed an Indigenous⁶⁷⁶ man who was noted as being on anti-depressants at the time of his death, and who is alleged to have swung a knife towards police, provides this description of the 21 foot rule theory:

The evidence of Sergeant Laidlaw with regard to the “use of force” model and training received by police officers with regard to use of force was consistent with the deadly use of force by a police officer when faced with the threat of grievous bodily harm or death by a suspect with a bladed weapon when the subject is within 21 feet. There was also testimony that new tests have been created that show that 21 feet should be expanded to 30 or 31 feet. In other words, a person with a bladed weapon within the 21 or 31 feet can cause grievous bodily harm or death to a police officer before the police would be able to unholster their firearm and shoot and stop the suspect.⁶⁷⁷

In this case the coroner noted that the police officers’ actions were consistent with this rule (i.e. they shot the deceased within less than 21 feet of themselves) and that this fact “formed a strong basis [...] for the lack of recommendations contained in the jury report.”⁶⁷⁸ This suggests the coroner felt that the death was unavoidable given the compliance with the 21 foot rule, because recommendations in coroner proceedings are intended to prevent future deaths. In another case the death of a 30-year-old man of South Asian descent, the expert witness testimony was described as suggesting that: “officers are trained that if an assailant with an edged weapon is within 30 feet of the officer, and starts to approach, the officer must be prepared to use his firearm in order to stop the assailant”⁶⁷⁹ suggesting that this

⁶⁷³ This theory was mentioned in at least 7 cases, spanning 4 provinces.

⁶⁷⁴ See Lindsey Bertomen, “What the 21-foot rule is ... and what it is not: in an encounter in the danger zone, the best you can hope for is a tie” (2016) 43:12 *Law Enforcement Technology*.

⁶⁷⁵ See Ron Martinelli, “Revisiting the “21-Foot Rule” *Police* (2014), online: <<https://www.policemag.com/341203/revisiting-the-21-foot-rule>> [Martinelli, 2014];

⁶⁷⁶ Deceased described as “Aboriginal” with no further information about what community he came from reported by the coroner.

⁶⁷⁷ Re R.N-M., Saskatchewan, DoD: July 9, 2013, at 4.

⁶⁷⁸ *Ibid* at 4.

⁶⁷⁹ Re H.S.C., Alberta, DoD: January 21, 2005, at 10.

practice of preparing for attack based on whether someone is holding a knife within a particular spatial perimeter of an officer, has been employed in at least some Canadian jurisdictions.

The “21 foot rule” is not, as many articles in policing publications have noted, a rule at all,⁶⁸⁰ but rather a description developed by Dennis Tueller, a police officer from the Salt Lake City Police Department, who published an article in 1983 in *SWAT Magazine*, a policing publication, that explained drills conducted in which he timed people running at an officer from different distances to ascertain how far a subject would have to be from an officer to allow them time to unholster their gun and fire twice before someone could get close enough to stab them. His article suggested that anyone with a knife, or other sharp or blunt weapon, could be expected to present a potentially lethal danger to an individual with a gun if they are within 21 feet, because the average person would then be able to sprint towards the officer and attack them before the officer was able to draw their firearm from their holster and shoot the suspect twice at centre mass to stop them.⁶⁸¹ This theory, given its use in several police shootings involving edged weapons, is prominent as a means of communicating how knives and other non-projectile weapons can pose a lethal threat to officers, legally justifying shooting subjects who are proximate to the officer. In addition to the 8 cases in my study in which the 21 foot rule was mentioned, it has been employed in legal cases in Canada by at least some police use of force experts or police officers to explain and justify shootings or describe the risk posed by assailants with edged or blunt weapons.⁶⁸² However, the significance of the 21 foot rule has been debated in policing publications, with some suggesting that an officer should have their firearm unholstered if someone with an edged weapon is

⁶⁸⁰ See e.g. Martinelli, 2014, *supra* note 675; Aaron White, “Edged Weapons Response” *Blue Line Magazine* (August 23, 2013) online: <https://www.blueline.ca/edged_weapons_response-2799/>.

⁶⁸¹ Dennis Tueller, “How close is too close?” (Spofford: Police Policy Studies Council, 2004), reprint from *SWAT Magazine* (March 1983), online: <http://www.theppsc.org/Staff_Views/Tueller/How.Close.htm>.

⁶⁸² See e.g. *R v Mohamad*, 2018 ONCA 966 (CanLII) at para 47; *Steele v Edmonton (Police Service)*, 2015 ABLERB 28 (CanLII) at para 77; *Re Mason*, 1998 CanLII 18229 (NS PRB); *Buttar v Halton Regional Police Services Board*, 2013 HRT0 1578 (CanLII) at para 119; *R v Phoummasak*, 2013 BCPC 391 (CanLII) at para 88.

within 21 feet,⁶⁸³ and others suggesting this rule poses a risk that officers will engage in unnecessary (and consequently unlawful) force based on it.⁶⁸⁴

Indeed, one coroner's jury in an inquest held into three separate deaths of people killed while experiencing mental health crises, all of whom had edged weapons (knives or scissors) when shot by police recommended that:

It should be emphasized and clarified in training that there is no fixed distance from a subject with an edged weapon at which officers should either draw or fire their firearms and that the reactionary gap (which in this case would be the time it takes to discharge a firearm) is much shorter once the firearm is drawn.⁶⁸⁵

The coroner in this case, pointed out that this recommendation responded to expert testimony that "officers should be conscious of this [21 foot rule] and recognize that a person armed with an edged weapon and at or within 21 feet represents a potential lethal threat."⁶⁸⁶

The jury's recommendation in this case is, in my opinion, sound. Regardless of the intention behind the 21 foot theory (or similar theories suggesting the appropriate range is 30 ft⁶⁸⁷), it is a fundamentally problematic way to communicate the risk that police officers may face to those reviewing their behaviour as it provides a concrete measurement (distance) as its focus, which while a relevant factor in assessing risk, is much less important than questions of the probability of attack, potential to shield oneself or create distance, and the possibility of avoiding threats through inter-personal communication and de-escalation. The fact that someone *could* lethally attack tells you nothing about

⁶⁸³ See e.g. Force Science Institute, "Edged Weapon Defense: Is or was the 21-foot rule valid? (Part 1)" *Police1*, online: <<https://www.policeone.com/edged-weapons/articles/edged-weapon-defense-is-or-was-the-21-foot-rule-valid-part-1-72xXzcruzNfY45GU/>>.

⁶⁸⁴ See e.g. Martinelli, 2014, *supra* note 675.

⁶⁸⁵ Re, R.J-D., Ontario, DoD: August 29, 2010, S.K., Ontario, DoD: October 7, 2011, and M.E., Ontario DoD: February 3, 2012, at 16.

⁶⁸⁶ *Ibid* at 16.

⁶⁸⁷ See e.g. Re C.A.P., Alberta, DoD: January 10, 2011, at 101; Re H.S.C., Alberta, January 21, 2005, at 10.

whether they *will* attack you and if police are psychologically and physically preparing for attack in accordance with this principle, they will also be communicating that fear, expectation, and preparation for violence to those they encounter because police interactions are social situations and humans react to each other. If police officers respond to theoretical risk by unholstering their firearm or drawing other weaponry like CEWs they risk communicating to someone in crisis who may already be fearful, that they must defend themselves. Furthermore, theoretical risk can be amplified by ableist beliefs concerning the inherent danger posed by those experiencing mental health crises, or other discriminatory stereotypes.

In 2000, psychologist Randolph Dupont and police officer Sam Cochran critiqued the 21 foot rule in the context of a discussion of police responses to “mental illness”, noting that in the United States, this “rule” is taught in police academies, often in tandem with graphic videos depicting the lethal risk to police officers if they fail to respond to someone armed with a knife in a timely way.⁶⁸⁸ Dupont and Cochran note the problem with this training:

This approach tends to emphasize only the outcome of one particular moment in the interaction between a citizen and an officer. It ignores the process that leads up to that moment and opportunities to impact on the nature of the event itself.⁶⁸⁹

The 21 foot rule is thus one way in which consideration of use of force is focused on the moment in which lethal force was deployed, reducing use of force decision-making to a “split second”, and ignoring crucial information in police decision-making concerning the approach to the subject, how police chose to communicate with and behave in relation to the subject, and the decisions they made to bring them into violent conflict with the deceased. Indeed, in my dataset some of the edged weapons cases show police decisions and approaches to armed subjects perceived to have a mental health impairment

⁶⁸⁸ Randolph Dupont & Sam Cochran, “Police Response to Mental Health Emergencies – Barriers to Change” (2000) 28 *Journal of the American Academy of Psychiatry and Law* 338 at 342.

⁶⁸⁹ *Ibid* at 342.

that put officers at risk, necessitating lethal force. One example is the death of G.J.M., a man described as “diagnosed with Post-Traumatic Stress Disorder (PTSD), the underlying cause of which was attributed to an assault he experienced while on a peacekeeping mission in Bosnia”.⁶⁹⁰ In this case the deceased was allegedly involved in assaulting his brother, and police attended at the rural family home where he lived, aware of notations about the possibility of “mental illness” and notations for violence and possible access to firearms from the police database. They attempted to lure the deceased to an open space on his property to arrest him by lying about their intention to investigate his brother (who the deceased claimed violated a peace bond leading to their conflict). The deceased caught onto the police deception and retreated into his home where police attempted to negotiate a surrender, while installing the Emergency Response Team (ERT - a tactical unit), dressed in camouflage on site.⁶⁹¹ Negotiations by phone took place and several friends, the deceased’s mother, and the deceased’s psychiatrist offered to assist but were refused. At one juncture the deceased agreed to surrender to police on the edge of the property and left his house but the sounds of a hovering police helicopter conducting an “aerial search of the property”⁶⁹² frightened him and he retreated once more.⁶⁹³ Finally, the deceased emerged from the house with his dog, and four concealed camouflage wearing ERT members some of whom were armed with firearms, followed his movement as he walked down the long driveway of the property. Eventually two ERT members announced their presence, identified themselves as police and stated the deceased was under arrest. The deceased produced a small hatchet from his jacket. One of the two ERT members ran 50 meters towards the deceased and unsuccessfully deployed a CEW in probe mode. This officer was then reported to be within 12 to 14 meters of the deceased and an officer with a rifle, judging him to be at imminent risk of bodily harm or death, fired his rifle killing the deceased.⁶⁹⁴

⁶⁹⁰ Re G.J.M., British Columbia, DoD: September 10, 2012, at 3.

⁶⁹¹ *Ibid* at 5.

⁶⁹² *Ibid* at 5.

⁶⁹³ *Ibid* at 5.

⁶⁹⁴ *Ibid* at 6.

The death of G.J.M. is a case where police actions ultimately produced a situation deemed to be a lethal risk because the police failed to appropriately de-escalate, forced close proximity with the deceased, and then justified the shooting based in part on this proximity. If the focus were solely on proximity to an edged weapon, then the analysis would have missed the highly risky and unwise approach police took in the first place, engaging in what was a pseudo military operation with camouflage, long arms and helicopters in response to a man with known PTSD related to prior military experience. It would also miss the fact that police themselves caused the risk to their lives by running at the deceased instead of distancing and attempting to further de-escalate.

While the 21 foot rule has persisted for decades despite critiques, there is some more recent evidence that the 21 foot rule is beginning to fall out of fashion and being seriously reconsidered within policing theory. For example, the Police Executive Research Forum, an American-based independent research organization led by police personnel, authored a report in 2016 in which it called for the 21 foot rule to be abandoned as “old ways of thinking”⁶⁹⁵, noting that while officers are generally not trained about this rule, it “continues to be disseminated informally”⁶⁹⁶ and noting it has been employed in explaining and justifying force in contemporary legal proceedings in the United States, as it has in Canada.⁶⁹⁷ Evaluating and replacing outdated policies, beliefs and police practices concerning edged weapons, like the 21 foot rule, is particularly necessary if we are to reduce police violence against those who experience mental health disability and achieve accountability for violence against this population.

What the prevalence of knives and other sharp objects in police shootings involving perceived mental health impairment suggests is that alternative approaches to addressing mental health crises may be unsuccessful or less successful if they are predicated on the individual being unarmed in order to be

⁶⁹⁵ *Guiding Principles on Use of Force*, (Washington: Police Executive Research Forum, 2016) online: < <https://www.policeforum.org/assets/30%20guiding%20principles.pdf> > at 19-20.

⁶⁹⁶ *Ibid* at 20.

⁶⁹⁷ For examples, see *supra* note 682.

operationalized. For example, programs that dispatch mental health responders in lieu of police, or mental health teams involving police, but only do so in the context of individuals who are unarmed, may fail to significantly decrease the number of deaths suffered by this population.

Research on whether sharp objects are generally known about prior to a police response when the call is dispatched or whether individuals are arming themselves with sharp objects in response to police presence is important to consider, since it is possible that sending unarmed non-police responses to mental health calls could result in fewer sharp objects being used at all if individuals are less likely to arm themselves in response. In other words, it is unclear whether the commonality of sharp objects in these deaths is due to individuals feeling a need to protect themselves from police, or whether it is a factor that is not impacted by the presence of police. There were case examples of situations where an individual armed themselves with a knife upon police arrival, and others where the individual had already armed themselves with a sharp object and this fact was relayed to dispatch among the cases studied. However, lack of detailed information about what information was relayed at dispatch in coroner and medical examiner reports in general makes it difficult to determine this matter.

5.3.4 The Risk of Police Weapons to Police

In some cases, the weapons the deceased allegedly had access to at the time of their deaths were not weapons they themselves brought to the confrontation, but rather police weapons obtained in the struggle with police. In 8 cases (5% of the police shooting cases studied), the deceased was killed when police officers were defending themselves in relation to their own weapon. In fact, in four cases the officer involved explained the shootings by claiming the deceased (or in one case a third party) had control of their firearm⁶⁹⁸, and in 3 cases it was claimed the deceased had attempted to get control of a

⁶⁹⁸ Re H.J.M., Ontario, DoD: September 18, 2005.

police firearm.⁶⁹⁹ In one additional case the officer claimed to have fired because he feared being disarmed, though this claim was not considered to be credible by the coroner.⁷⁰⁰ In an additional three cases shootings took place when the deceased was allegedly, or possibly armed with a police baton.⁷⁰¹ These cases suggest that police weapons may contribute to the risk police face, in addition to acting as a protection for them, and may add additional risk for those struggling with police who may be perceived as posing a risk by way of disarming them. This is a factor that should be considered when evaluating the relative risk of equipping police with weapons.

5.4 “Suicide by Cop”

Among the police shooting reports, 12 cases (8%) discussed suicide by cop as a theory relevant to understanding the death. 10 of the cases (83%) were in the mental health set (4 medicalized mental health set; 6 perceived mental health set), and in many such cases the deceased were labelled as, or perceived to be, depressed and had a history of prior suicidal statements or attempts.

Half of the deaths described as suicide by cop took place in Alberta (6), with five fatality inquiries concerning suicide by cop occurring in Alberta in 2012-2014 time period. The other cases were spread across the country with 1 in Ontario, 2 in Québec, 2 in Saskatchewan and 1 in Manitoba. The high number of these cases in Alberta, particularly during the later years of the time period of this study, is perhaps explainable by the use of two particular police expert witnesses, Inspector Chris Butler and Sergeant Rick Parent (Ph.D.), whose testimony individually or in tandem formed the basis of five of the suicide by cop determinations in Alberta.⁷⁰²

⁶⁹⁹ Re D.J.V., Alberta, DoD: October 3, 1999; Re S.M.P., Alberta, DoD: May 10, 2009; Re A.A-N., Ontario, DoD: October 31, 2007.

⁷⁰⁰ Re F.V., Québec, DoD: August 9, 2008.

⁷⁰¹ Re D.St..P., Manitoba, DoD: January 3, 2005; Re F.M., Québec, DoD: January 6, 2012; Re C.K., Ontario, DoD: March 12, 2011.

⁷⁰² See Re H.S.C., Alberta, DoD: January 21, 2005; Re C.A.P., Alberta, DoD: June 10, 2011; Re B.M.A., Alberta, DoD: January 16, 2010; Re J.S.B., DoD: January 10, 2011; and Re W.M.M., Alberta, DoD: September 4, 2008.

5.4.1 Evidence of Suicidal Intent (Or Lack Thereof)

The purported evidence of intent to commit suicide by cop varied substantially between cases, a problem that Patton and Fremouw prominently identified in the literature.⁷⁰³ In one case there was relatively incontrovertible evidence that the deceased, a 39-year-old “Caucasian”⁷⁰⁴ man labelled as experiencing depression and anxiety and prescribed anti-depressant medications at the time of his death, intended to evoke a lethal reaction by police. In that case the deceased had written a suicide note and affixed it to himself before kneeling before an armed Emergency Response Team, with waiting snipers. He pointed a long black object at them, which turned out, posthumously, to have been an umbrella taped to his hands, and not a shotgun.⁷⁰⁵ This case suggested that the deceased, who had been involved in a protracted standoff with police and had barricaded himself in his residence with firearms following a domestic dispute, had planned, in the hours prior to his death, to get himself killed, though it was unclear that he intended suicide prior to the arrival of the police. The note written constituted direct evidence of an intent to commit “suicide by cop”. In another fairly convincing application of the theory, the deceased was described as calling 911 himself when drunk and distressed, hanging up, and then proceeding to tape knives to his wrists with which he ran at police when they arrived.⁷⁰⁶

In contrast, in another case the deceased was hospitalized under the *Mental Health Act*, R.S.O. 1990, c. M.7, following a suicide attempt and left hospital without being discharged.⁷⁰⁷ After leaving hospital he attempted twice to throw himself in front of oncoming vehicles, both of which avoided him, before returning to his house on foot. The deceased tried to break into his own house with a shovel (presumably because he had no key). The police had been alerted by drivers concerned about his

⁷⁰³ See Christina Patton & William Fremouw, “Examining ‘suicide by cop’: A critical review of the literature” (2016) 27 *Aggression and Violent Behavior* 107 [Patton & Fremouw, 2016] at 115.

⁷⁰⁴ Re C.J.L., Alberta, DoD: July 18, 2010.

⁷⁰⁵ *Ibid.*

⁷⁰⁶ Re D.C.D., Saskatchewan, DoD: December 22, 2007.

⁷⁰⁷ Re M.M., Ontario, DoD: June 7, 2013.

behaviour running into traffic and followed him home where they confronted him believing he was committing a break and enter as they were unaware it was his house. The deceased approached the police with the shovel he had been using to break in and failed to heed their commands to drop it, leading to his fatal shooting. This case had circumstantial evidence of suicide by cop in the form of evidence showing the deceased had in the very recent past tried to kill himself, but lacked any direct evidence that he intended the police to kill him since he had not tried to attract police or called them himself and his behaviour at the time of death was not suggestive of suicide beyond failing to obey the verbal directions of police. In another case the deceased was alleged to have been involved in an armed home invasion in which the suspects fled police resulting in a motor vehicle chase.⁷⁰⁸ The vehicle police were chasing crashed and the deceased successfully fled the scene, but was later identified in the area with a leg injury consistent with one of the suspects. Police confronted this man and he was shot unarmed because he failed to obey police commands to show his hands and get on the ground.⁷⁰⁹ In this case, the only evidence of suicidality was a failure to obey police commands and there was no evidence prior to the interaction with police of suicidality on the part of the deceased, but arguably contrary evidence in the sense that he tried to evade police. What these cases demonstrate is that “suicide by cop” is a theory that is not restricted in application to cases that have clear suicidal intent on the part of the deceased, but is also used to describe cases in which there is only circumstantial evidence of suicidality, or in some cases essentially no evidence of suicidal intent beyond a failure to comply with police directives.

With respect to cases that impute suicidality on the basis of a deceased’s failure to comply with police commands or aggression, in the case of H.S.C.,⁷¹⁰ expert testimony of Rick Parent provides an

⁷⁰⁸ Re P.S., Québec, DoD: February 6, 2011.

⁷⁰⁹ *Ibid* at 2.

⁷¹⁰ Re H.S.C., Alberta, DoD: January 21, 2005.

example of how this theory discursively works to connect failure to obey police commands with “mental illness”, and suicidal intent. The judge wrote:

According to the Sergeant [Rick Parent], until the mid-90’s, it was believed that an individual who attacked a police officer was mentally insane. However, his research and that of others leads him to believe that roughly ten percent (10%) of the people who are killed by police are individuals who actually want to die and use the police as a mechanism of committing suicide. According to Sergeant Parent, such individuals “have a calculated, deliberate and purposeful plan when they attack the police because they want the police to kill them.”⁷¹¹

Here, the suicide by cop theory is described as replacing a prior theory that everyone who “attacks” police are “insane”. In other words, we are replacing a theory that everyone who behaves aggressively towards police is “seriously mentally ill”⁷¹² with a theory that at least some are “suicidal”, taking what was once evidence of irrationality to be evidence of suicidal intent.

Imputing suicidality based on failure to heed police commands is concerning from a disability perspective because it fully negates the possibility that an individual can, by virtue of a mental health impairment or communication barrier, fail to understand the consequences of not abiding by police commands or simply not understand what those commands are. It is also concerning from the perspective of civil rights more generally because it suggests that it is normal for police to employ lethal force if not immediately obeyed and that use of fatal force by police in these circumstances would be obvious and predictable to the general population. In light of cases where cognitive or mental health disability or language differences may cause miscommunication or misunderstanding, the assumption that disobedience of police is indicative of suicidality is factually unsupportable and ableist.

⁷¹¹ *Ibid* at 10-11.

⁷¹² “Insane” is defined as “In a state of mind which prevents normal perception, behaviour, or social interaction; seriously mentally ill.” (See “insane”, *Lexico* (Oxford: Oxford University Press: Lexico, 2020) online: <<https://www.lexico.com/definition/insane>>).

For example, one case deemed “suicide by cop”, involved a man labelled as “paranoid delusional”⁷¹³ and described as “irrational”⁷¹⁴, “hearing voices”⁷¹⁵, and feeling “everyone was against him, especially the police, the military and the government.”⁷¹⁶ Prior to the fatal encounter he told the police by phone that he believed the Hell’s Angels were working with the police⁷¹⁷ and accused them of “taking his wife”.⁷¹⁸ Police testified the deceased mentioned “suicide by cop” and threats to police including that he would “bring war to them” in one of several conversations with negotiators before his death.⁷¹⁹ He was shot after trying to flee from his barricaded home. He exited the house and got into his vehicle carrying a shotgun. His vehicle was rammed by a police car when he was pulling out of the driveway, pinning it in. Tragically, the deceased responded by fatally shooting a police officer and in turn being shot to death by Emergency Response Team personnel. This case was described as “suicide by cop”, because of the deceased’s comments on the phone in the hours prior to his death. However, his suicidality seems very speculative since the subject was arguably fearful of the police (believing they were in cahoots with organized crime) and trying to escape in his vehicle (rather than confronting the ERT members surrounding his house), so at a minimum it was unclear that he was consciously bringing about his own death. In that case, Judge Ayotte wrote:

When tragedies do occur, it would be a mistake to assume that the blame must inevitably fall on those who had the greatest resources. There are at least two players in police stand-offs and one of them is, almost by definition, unpredictable. That was the case here. Given the abundant evidence of [M.C.O.]’s apparent determination, as a result of his mental illness, to confront police and bring about his own death, there was nothing in what I heard to suggest a less tragic result would have necessarily achieved different results. [...] ⁷²⁰

⁷¹³ Re M.C.O., Alberta, DoD: February 28, 2004, at 2.

⁷¹⁴ *Ibid* at 3.

⁷¹⁵ *Ibid* at 2.

⁷¹⁶ *Ibid* at 3.

⁷¹⁷ *Ibid* at 3.

⁷¹⁸ *Ibid* at 3.

⁷¹⁹ *Ibid* at 5.

⁷²⁰ *Ibid* at 7.

This is an example of how, within theories of suicide by cop, a subject can at once be described as irrational and “mentally ill”, and yet we can nevertheless assume and affix intent to die premised on their presumed ability to correctly understand and predict the consequences of their actions and the nature of police conduct and practices (even in the presence of clear evidence that they hold beliefs about the police that are outside of mainstream understandings). Indeed, intent to die serves an important role in suicide by cop, shifting focus in a review of use of force from the police to the deceased.

5.4.2 Forced to Shoot: Suicide by Cop as a Rhetorical Shield

The ascribed intent to die in suicide by cop cases does the work of narrating these deaths as inevitable tragedies and unpreventable because the deceased themselves are working to cause the police killing. It also provides a means of redirecting scrutiny and responsibility away from police actions, practices, and policies and towards the subject who becomes solely responsible for their death as police responses were forced by the subject. Indeed, language suggesting that the police were “forced” to shoot, or had “no choice” but to shoot repeatedly appears in these cases⁷²¹ as do descriptions of the deaths as “unpreventable” and “inevitable”.⁷²² In one case, the officer who shot the deceased testified that: “right from the beginning, it looked to me like a lethal force encounter,” noting that the deceased had “no facial expression” and “appeared intent.”⁷²³ Such descriptions of an impossibility of avoiding the death or that it was pre-determined were common. By focusing on the deceased’s intent to die, the deceased becomes the agent of their own death and the police are lethal weapons wielded by them,

⁷²¹ For example, in *Re H.S.C., Alberta*, DoD: January 21, 2005, ; in *Re BMA, Alberta*, DoD January 16, 2010, at 3, suicide by cop is described as “forcing the police to shoot”; in *Re M.W., Québec*, DoD: March 8, 2005, at 4, the coroner wrote: “En provoquant les policiers, il ne laisse aucune chance à ces derniers.” [Translation by author: “By provoking the police, he didn’t leave them any choice”].

⁷²² For example, in *Re J.S.B., Alberta*, DoD: January 10, 2011, Judge Barley states “his death was inevitable”; in *Re C.A.P., Alberta*, DoD: June 10, 2011, Judge Van Harten states: the officer’s actions “were dictated by the use of force guidelines” and the death “could not otherwise have been prevented.”

⁷²³ *Re H.S.C., Alberta*, DoD: January 21, 2005, at 6.

rather than trained professionals who have the ability to apply discretion and make tactical decisions with consequences.

Language about being forced to shoot even occurred in cases where the deceased could not have known the reason the police decided it was necessary to pull the trigger. For example, in one case a 40-year-old man allegedly committed suicide by cop as he armed himself with a knife prior to police arriving to a “check on welfare” call. The deceased’s wife had reported in a 911 call that she was struck on the arm by the deceased. During the wife’s call, the deceased made suicidal remarks in the background of the call stating that “Today is the day I die,”⁷²⁴ that he was not going back to jail, and that if the police didn’t “take him out” he would “take them out”.⁷²⁵ However, this information was incorrectly passed on through dispatch to police as the deceased stating “You will die today”, suggesting he was an immediate homicidal risk to his wife (the 911 caller), rather than being suicidal and potentially a homicidal risk to police. When police arrived, they found the deceased holding a knife in proximity to his wife and daughter and immediately shot him fearing he would harm them. Dr. Rick Parent, a criminologist and former police officer who appeared as an expert witness on this phenomenon made the following remarks in an expert report provided to the inquiry:

[C.A.P.] made a conscious choice to end his life, engaging in a series of calculated events that were certain to cause him bodily harm or death. While he was confrontational and threatening, he was also suicidal.

There were several opportunities for [C.A.P.] to alter the course of events that ultimately occurred. Instead, [C.A.P.] dictated a deadly force response by police personnel. It is my opinion that [C.A.P.] brought about the events that resulted in his demise, an act of suicide.⁷²⁶

This description of the facts of the case reveals how suicide by cop cases depict these deaths as an orchestrated choice, even in a context where factors unknown to the deceased formed a large part of the

⁷²⁴ Re C.A.P., Alberta, DoD: June 10, 2011, at 2, para 5.

⁷²⁵ *Ibid* at 2, para 5.

⁷²⁶ Re C.A.P., Alberta, DoD: June 10, 2011, at 20.

reasoning for the shooting, suggesting the deceased could not have knowingly exercised the degree of control over police actions alleged. Furthermore, because police parties tend to be the only ones in a financial position to hire expert witnesses, police narratives that highlights the agency of the deceased and risk to police are privileged over accounts that might be provided by those with expertise in mental health or human crisis, which might highlight failures to de-escalate or the importance of interpersonal communication.

Indeed, several “suicide by cop” cases provided no recommendations for preventing future deaths,⁷²⁷ which on the whole was relatively uncommon in the inquests and fatality inquiries reviewed,⁷²⁸ and which suggests that these deaths were seen to be unpreventable. Suicide by cop, as a concept, fits neatly into the “tragedy model” of disability that focuses on an impairment (or perceived impairment) as inexorably leading to suffering and death. While the deaths of individuals in police shootings are in many respects tragic, the tragedy model of disability understands the lived experience of those with impairments as fundamentally tragic as it is seen as leading to a life of insurmountable obstacle and loss.⁷²⁹ As Swain and French note, the tragedy model of disability removes consideration of the need to accommodate those with impairments and has been a rationale for oppressive policy and practice towards disabled people.⁷³⁰

The work of suicide by cop in redirecting responsibility and blame is apparent in the unusual “manner of death” descriptions in several cases in which suicide by cop was a predominant theory of

⁷²⁷ See Re B.M.A., Alberta, DoD: January 16, 2010; Re J.S.B., Alberta, DoD: January 10, 2011; Re M.F.M., Alberta, DoD: January 16, 2011; Re H.G.F., Manitoba, DoD: December 3, 2005; Re D.C.D., Saskatchewan, DoD: December 22, 2007. Note: Additionally, in both Québec suicide by cop reports there were no recommendations provided, but this is common among the coroner investigation reports from that province.

⁷²⁸ 74 out of the 433 reports contained no recommendations. However, among Québec cases this was common, and recommendations were the exception.

⁷²⁹ See Sally French & John Swain, “There But For Fortune” in John Swain & Sally French, eds, *Disability on Equal Terms* (London: Sage, 2008) at 4.

⁷³⁰ *Ibid* at 4.

death. While several cases were simply referred to as “homicides”, which would be the ordinary description attached to police shootings, the manner of death in several cases was formally labelled “suicide by cop”. In *Re H.S.C., Alberta*, Date of Death: January 21, 2005, the judge presiding over the fatality inquiry seemed concerned with the connotations of homicide. He wrote:

I find that the manner of death was “homicidal”, but hasten to add that there is no culpability attached to that term, due to the fact that in the immediate circumstances that presented themselves to police, the shooting of [H.S.C.] was an appropriate response.⁷³¹

Similar proclamations were made in other suicide by cop cases, describing the manner of death as “victim-precipitated homicide (suicide).” The reluctance to attach the term “homicide” to these cases speaks to a discomfort with acknowledging that police played a role in these deaths. In fact, in one case in which the Judge conducting the fatality inquiry refused to describe the case as “suicide” rather than “homicide”, he describes submissions by counsel for the involved police service requesting that the manner of death be deemed a suicide. They provided several reasons, including: “the beneficial impact on officers who understandably perceive themselves as having been manipulated into a situation where they had no choice but to shoot.”⁷³² This is an open acknowledgement that the theory of suicide by cop serves a rhetorical purpose of shielding police from scrutiny or blame and redirecting this attention onto the deceased. There was evidence in some cases that attempts to describe the case as a suicide were met with resistance by family members and other concerned parties. For example, in one case where the manner of death was deemed “Suicide – Alcohol contributing factor”, counsel for the deceased’s family and the First Nation of which he was a member brought what was described as a “rather heated and protracted challenge” to the charge to the jury arguing suicide ought not to have been included as a potential manner of death.⁷³³

⁷³¹ *Re H.S.C., Alberta*, DoD: January 21, 2005, at 1.

⁷³² *Re W.M.M., Alberta*, DoD: September 4, 2008, para. 43.

⁷³³ *Re K.C.W.S-M, Saskatchewan*, DoD: June 14, 2008, at 5.

5.5 The Inaccuracy of National Data on Police Shootings

The data on police shootings in my dataset reveals the incompleteness and inaccuracy of Statistics Canada's national data on law enforcement shooting deaths, as my data includes more cases of police-involved shootings that took place in the years 2004 (14 vs. 11), 2005 (15 vs. 14), 2006 (8 vs. 6), 2007 (16 vs. 10), and 2009 (20 vs. 14), than those contained in the federal figures.⁷³⁴ This highlights the inadequacy of our tracking of police-involved deaths in Canada, because shootings are generally the most easily identified police-involved deaths (i.e. they generally do not involve any complicating causal questions about medical predispositions as are common among other types like restraint/positional-related or drug/alcohol toxicity deaths). Indeed, as explained in chapter 3 my data do not reflect a complete number of police-involved deaths for the years studied, and it is impossible to determine how many cases are missed because litigation, criminal processes, and the exercise of coroner/medical examiner discretion that may result in no inquest/fatality inquiry being called, or a significant delay.

The only way to know the scope of police-involved shooting deaths in Canada would be to implement national mandatory reporting requirements, with accountability checks, and if necessary, penalties for failing to report. Constitutionally, the federal government has the power to legislate with respect to "statistics and the census" pursuant to section 91(6) of the *Constitution Act, 1867*.⁷³⁵ There are pre-existing models of such programs where data predominantly in the control of the provinces and territories is collected on a mandatory reporting basis by the federal government through Statistics Canada. For example, the Uniform Crime Reporting survey is compiled annually from Canadian police forces in the country by Statistics Canada's Canadian Centre for Justice Statistics.⁷³⁶ This program involves

⁷³⁴ See Statistics Canada, *Deaths, by cause, Chapter XX: External causes of morbidity and mortality (V01 to Y89)*, Table 13-10-0156-01 (Ottawa: Statistics Canada, 2022), online: <<https://www150.statcan.gc.ca/t1/tbl1/en/cv.action?pid=1310015601#timeframe>>.

⁷³⁵ *Constitution Act, 1867*, 30 & 31 Vict, c 3, s 91(6).

⁷³⁶ Statistics Canada, *Uniform Crime Reporting Survey*, (Ottawa: Statistics Canada, August 2, 2022), online: <<https://www23.statcan.gc.ca/imdb/p2SV.pl?Function=getSurvey&SDDS=3302>>.

the cooperation of all federal, provincial, and territorial justice departments to compile this data through the National Justice Statistics Initiative.⁷³⁷ Over 1,000 distinct police departments and detachments provide data for the survey, which is mandatory.⁷³⁸ Given that such programs already exist for crime incidence data, it is not difficult to imagine that such reporting could be extended to facilitate use of force data collection from the same police forces if political will existed to do so. Indeed, section 22(c) and (d) of the *Statistics Act*, RSC 1985, c S-19, provides Statistics Canada with the ability to collect data concerning “health and welfare” and “law enforcement, the administration of justice and corrections”.⁷³⁹ Furthermore, section 8(1) of the *Statistics Act*, provides the Chief Statistician with the power to determine if a request for information is mandatory or voluntary, and sections 31 and 32 of the Act provide monetary penalties to be paid for failing to provide information required by a request, providing false information in response to a request, refusing access to records in their care or custody, or otherwise wilfully obstructing any person in their duties under the Act.⁷⁴⁰ Consequently, the federal government does have the power to compel the provinces to provide this data on a mandatory basis and could exercise that power for the benefit of the country to shed light on this issue.

5.6 Recommendations to Prevent Police Shootings of People Experiencing Mental Health Disability

When reviewing coroner and medical examiner recommendations made in cases in the mental health set, many of the same patterns of recommendations prominent in other police use of force deaths, which will be discussed in greater detail in section 5 below, were present. However, some recommendations were specific to police shootings or more prominent in this type of death. In general, roughly one fifth of police shooting cases involving an individual in the mental health set (40/100)

⁷³⁷ *Ibid.*

⁷³⁸ *Ibid.*

⁷³⁹ *Statistics Act*, RSC 1985, c S-19, s 22(d).

⁷⁴⁰ *Ibid* at ss 31-32.

provided no recommendations. Some recommendations provided in police shootings of those perceived to experience mental health disability are discussed below.

5.6.1 Recommendations Pertaining to Sharp/Edged Object Encounters

Given the prevalence of sharp or edged objects among those shot by police one might expect many recommendations addressing police tactics pertinent to these situations. In fact, recommendations directly addressing sharp/edged objects were relatively rare. However, in one inquest into the deaths of three individuals with medical evidence of mental health impairment in Toronto, the coroner's jury did consider this issue in some depth and suggested that the Toronto Police Service evaluate the possibility of adopting types of body armour that offer greater protection against edged weapons and shields to disarm and control subjects armed with edged weapons.⁷⁴¹ The same inquest further recommended that the Ontario Police College should track statistics about the frequency of edged weapons in police use of force interventions.⁷⁴² As mentioned above, this jury also recommended clarifying police training to ensure officers recognize that the 21 foot rule is invalid and that there is no distance from a subject with an edged weapon that prescribes a firearm response.⁷⁴³ Given the relatively high number of fatal police shootings of persons perceived to have a mental health impairment who are armed with sharp objects, attention should be paid to the evidence supporting or refuting current police practices for addressing sharp object encounters.

5.6.2 Recommendations to Restrict Firearm Ownership by the “Mentally Ill” and The Conspicuous Absence of Recommendations to Restrict Police Firearms

⁷⁴¹ Re: R. J.-D., S.K. and M.E., Ontario, Dates of Death: August 29, 2010, October 7, 2011, February 3, 2012, at 20.

⁷⁴² *Ibid* at 12.

⁷⁴³ *Ibid* at 16.

Two coroner reports suggested tighter restrictions on firearms ownership to ensure guns were not owned by the “mentally ill”.⁷⁴⁴ These recommendations begin from the faulty premise that there is a detectable behavioural distinction between those who are labelled as “mentally ill” and everyone else and that firearms are a more significant risk in the hands of those labelled “mentally ill” than others.

A belief that firearm control can and should be limited to those who are not “mentally ill” is fundamentally ableist, constructing a normal and mentally well gun owner, or prospective owner whose firearm ownership is safe, compared to a detectable mentally unwell individual in whose hands firearms pose a significant threat to public safety. Psychiatric labels are neither strongly correlated with violence, nor based on stable human traits that are readily assessable, so attempts to make society safe by removing firearms from the hands of those who have received a psychiatric diagnosis would be unlikely to have a significant impact on firearm violence. All human beings experience crises and our experiences of the world and of mental health/distress change over time. While there are many coherent arguments suggesting that gun ownership should be reduced in the general population since guns are lethal weapons, trying to protect against gun violence by deciding who is and is not a risk on the basis of psychiatrization reinforces ableist beliefs about the dangerousness of “mental illness” and “others” people who are psychiatrized, pretending they are a separate, distinct, and non-porous population that must be controlled.

Interestingly, in response to police shootings none of the coroner or medical examiner reports reviewed recommended removing firearms from police, though this is a strategy that, unlike restricting gun ownership for psychiatrized people, would doubtlessly decrease police shootings. One coroner’s inquest into the deaths of three individuals with histories of psychiatrization in Ontario, all of whom were in possession of sharp objects at the time of death, recommended that research and consideration of

⁷⁴⁴ See *Re A.D.M.*, British Columbia, DoD: May 30, 2012; *Re C.J.L.*, Alberta, DoD: July 18, 2010.

police policies in other jurisdictions where “either not all police are equipped with firearms or where police are prohibited from drawing their firearm unless they face a subject armed with a firearm” be undertaken by Ontario’s Ministry of Community Safety and Correctional Services.⁷⁴⁵ In many countries in the world, including the United Kingdom (except Northern Ireland), Ireland, New Zealand, Iceland, and Norway, police officers are not uniformly armed with firearms when responding to calls. In the UK, “authorised firearms officers”⁷⁴⁶ receive special training and are authorized by the Chief Officer of a police force to respond to crime requiring a firearms response. According to the Home Office roughly 1 in every 19 police officers in the UK was authorized to carry a firearm in 2019, a proportion that has remained fairly stable since 2010.⁷⁴⁷ In New Zealand, police officers do not ordinarily carry firearms on their person, but firearms are available in police vehicles and specialized armed units exist to respond to threats requiring a firearm.⁷⁴⁸ A trial to expand the number of police units carrying firearms was discontinued in 2020.⁷⁴⁹ In Norway, all police are issued firearms but they remain in police vehicles or at the police station in secured boxes and can only be retrieved and deployed in particular circumstances.⁷⁵⁰ A study comparing data from the 1980s and 1990s in Sweden which arms all police officers with firearms, and Norway, which does not, found that Sweden had higher injury rates in police shootings among suspects, but also among police officers than Norway,⁷⁵¹ suggesting that arming officers with firearms will not necessarily be protective of officers, in addition to creating risks for suspects. Another study of

⁷⁴⁵ See *Re R.J.-D.*, Ontario, DoD: August 29, 2010, *Re S.K.*, Ontario, DoD: October 7, 2011, *Re M.E.*, Ontario, DoD: February 3, 2012, at 10.

⁷⁴⁶ *Authorised Firearms Officer*, College of Policing, 2019, online: < <https://profdev.college.police.uk/professional-profile/authorised-firearms-officer-afp/>>.

⁷⁴⁷ Home Office, *Police Use of Firearm Statistics: England and Wales: April 2018 to March 2019*, (London: Home Office, 2019) online: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/820556/police-use-firearms-statistics-england-and-wales-april-2018-to-march-2019-hosb1319.pdf>

⁷⁴⁸ *Ibid.*

⁷⁴⁹ *Armed Response Team Trial*, 2020, online: New Zealand Police < <https://www.police.govt.nz/can-you-help-us/armed-response-team-trial>>.

⁷⁵⁰ See Johannes Knutsson & Jon Strype, “Police Use of Firearms in Norway and Sweden: The Significance of Gun Availability” (2003) 13:4 *Policing and Society* 429.

⁷⁵¹ *Ibid.*

Scandinavian police forces, found that a required delay among Norwegian police officers to seek authorization to employ firearms was perceived by Norwegian police officers to increase, rather than decrease officer safety because it meant additional time to prepare mentally, determine the best tactical approach, and allow additional officers to arrive on scene.⁷⁵²

In Canada, crime involving firearms makes up less than one half of one percent of overall crime,⁷⁵³ making situations in which the police would require a firearm for their safety and the safety of the public quite rare, and suggesting arming only specialized units should be considered. In one case reviewed, the deceased was a 25-year-old man, engaged in a pre-planned shooting spree at Dawson College in Montréal prior to being shot by police.⁷⁵⁴ He murdered one woman and injured several other people. The coroner recommended in that case that long arms, which can be necessary when addressing heavily armed assailants like the deceased, should be kept at each police station where some officers would be trained to use them, allowing them to be accessed quickly in the event they are necessary to address an active shooter.⁷⁵⁵ Keeping firearms accessible but not on the immediate person of police officers seems a reasonable compromise to explore when addressing police violence in light of its success in other countries. While there may be an argument that police require firearms to address the threat posed by knives and other sharp objects, the experiences of other countries that do not arm most of their police can set an example. Knives are prevalent as cooking and household implements all over the world and if they do not pose such a significant threat as to necessitate the uniform use of firearms among other police forces, it is unclear why Canada would be unique in this regard.

⁷⁵² Ross Hendy, "Routinely Armed and Unarmed Police: What can the Scandinavian Experience Teach Us?" (2014) 8:2 Policing 183.

⁷⁵³ Yvan Clermont, *Firearm-related crime in Canada*, Powerpoint Presentation to the Standing Senate Committee on National Security and Defence, February 18, 2019, online: <https://sencanada.ca/content/sen/committee/421/SECD/Briefs/Stats_Can_Presentation_ppt_e.pdf>.

⁷⁵⁴ Re K.G., Québec, DoD: September 13, 2006.

⁷⁵⁵ Re K.G., Québec, DoD: September 13, 2006.

5.6.3 Recommendations in Suicide by Cop Cases: Mental Health System Reforms, Training on Mental Health and Suicide by Cop, and Access to Less Lethal or Intermediate Weapons

Classifying a death as a suicide versus a homicide has several significant implications for how we understand and try to prevent such deaths. If a death is described as a suicide, meaning it is an intentional choice of the deceased, then this would militate in favour of solutions addressing the mindset of the deceased, often leading to recommendations focused on mental health as a means of getting at individual motivations on a population-wide level. In contrast, if the death is understood to be a homicide, this would weigh in favour of recommendations focused on police behaviours, since it acknowledges the role they played in the death. This relationship between the classification or narration of deaths as suicides and mental health focused recommendations is borne out by the nature of the recommendations provided (where any at all were suggested).

Among the twelve cases in which a “suicide by cop” theory played a significant role in the explanations of the death, over half (7) contained no recommendations at all, which speaks to beliefs about the inevitability of these deaths, though two were Québec cases, which rarely contained recommendations. The other seven cases had recommendations that tended to include suggestions aimed at addressing perceived problems in the mental health system, promoting the adoptions of intermediate or less lethal weapons, including beanbag canons, CEWs and police service dogs,⁷⁵⁶ or promoting training on mental health generally, or suicide by cop specifically, for law enforcement and dispatch personnel.

Some recommendations aimed at fixing the mental health system focused on psychiatry and psychiatric medications as a prevention of future suicide by cop deaths.⁷⁵⁷ For example, in the case of

⁷⁵⁶ See *Re K.C.W.S-M, Saskatchewan*, DoD: June 14, 2008; *Re H.S.C., Alberta*, DoD: January 21, 2005.

⁷⁵⁷ See *Re M.M., Ontario*: DoD: June 7, 2013; *Re M.C.O., Alberta*, DoD: February 28, 2004;

M.C.O, the judge conducting the fatality inquiry described the deceased as “paranoid delusional,”⁷⁵⁸ “not taking his medications,”⁷⁵⁹ and as having “a history of mental illness which often expressed itself in extreme antipathy towards the police.”⁷⁶⁰ M.C.O. was fatally shot by an Emergency Response Team. The judge conducting the fatality inquiry recommended additional funding to hire more psychiatrists in the province and for more PACT Teams (police and crisis teams), which include mental health therapists with police officers who “facilitate access for persons with mental health problems into care”⁷⁶¹ and divert those accused of petty offences into the mental health system and away from the criminal justice system. Furthermore, the judge recommended amendments to the *Mental Health Act* to allow a treating physician to detain an individual as an involuntary patient for 30 days regardless of whether or not the criteria for the initial committal continue to be met, provided another physician agrees with them that “extended treatment is necessary to ensure a safe and stable discharge.”⁷⁶² Additionally, it was recommended that *the Act* be amended to create community treatment orders, which are legally binding agreements formed between a patient and their psychiatrist that specifies conditions which must be met (such as compliance with psychotropic medication treatment), which if breached can lead to the apprehension of the patient by police and their transportation to hospital for assessment.⁷⁶³ Finally, it was recommended that *the Act* be amended to make it compulsory for a patient to contact their family physician upon discharge from psychiatric hospitalization and necessary for the hospital to contact the family physician prior to discharge to communicate concerning ongoing treatment.⁷⁶⁴ Recommendations of this nature seek to increase the power of the state to coercively intervene to ensure that an individual is receiving and complying with prescribed psychotropic drugs. These types of recommendations suggest

⁷⁵⁸ Re M.C.O., Alberta, DoD: February 28, 2004, at 2.

⁷⁵⁹ *Ibid* at 2.

⁷⁶⁰ *Ibid* at 2.

⁷⁶¹ *Ibid* at 16.

⁷⁶² *Ibid* at 19.

⁷⁶³ *Ibid* at 20.

⁷⁶⁴ *Ibid* at 21.

that psychiatric medication is seen as a solution to fatal police interactions between those perceived to have a mental health impairment and police. They suggest, in other words, a belief that these fatalities can be avoided by ensuring that no one becomes sufficiently dangerous enough due to a “mental illness” to cause their own death. The deceased is situated as someone with a biological problem to be solved, and police violence is viewed as a necessary outcome of unmedicated illness.

Furthermore, increasing involuntary hospitalization in the manner suggested would be expected to have a profound impact on the rights of those involuntarily hospitalized since medical professionals might routinely believe that longer treatment in hospital would lead to “a safe and stable discharge,” leading to routine long-term detention. Furthermore, given that in most provinces (with some exceptions e.g. British Columbia⁷⁶⁵) an individual can be involuntarily hospitalized but still capable to refuse treatment, it is unclear that such provisions could legally ensure prolonged treatment.

However, if one steps back from this framing and considers the issue from a social angle, increasing legal coercion in psychiatry is far more likely to increase, rather than reduce police-involved deaths of persons who experience mental health disability. “Fixing” the problem of medication non-compliance through greater exertion of control, enforced by treatment teams involving police, community treatment orders enforced by police, or the longer term incarceration of those perceived to be mentally ill in hospital, ignores the uncertain causes of medication non-compliance. It assumes that psychiatric theories of anosognosia, a lack of awareness of the mental “disease”, better explains treatment non-compliance than a lack of efficacy of psychotropic drugs to reduce some experiences of human suffering. Rather than reducing violence, systems that build wider powers of coercion increase the likelihood that an individual will be subject to police interactions, through mental health monitoring and enforcement that can lead to conflict. Coercive solutions aimed at pharmaceutical fixes also tend to

⁷⁶⁵ See *Mental Health Act*, RSBC 1996, c 228, s 31.

preclude consideration of the social and environmental contributors to crises, carving off some people as needing to be drugged and monitored as biological anomalies, rather than humans reacting to and being shaped by cultural and social norms.

Several recommendations suggested increased training for police on mental health in general.⁷⁶⁶ The recommendations aimed at training on suicide by cop included that police should be trained to recognize “pre-incident indicators,”⁷⁶⁷ that emergency call takers should be trained to identify potential suicide by cop cases,⁷⁶⁸ and police should be taught potential strategies for managing these cases. This assumes that there are a coherent set of signs that accurately distinguish suicide by cop cases from non-suicide by cop cases, and that any particular techniques exist, or could be developed to address this phenomenon. However, the literature on suicide by cop shows that this theory has been applied to a very wide variety of case types, including hostage/barricade situations, mental health or suicide crises, domestic violence cases, and crimes committed for which the suspect did not wish to experience reincarceration.⁷⁶⁹ This diversity is exemplified in in my dataset, which include domestic disputes, assaults, and homicides,⁷⁷⁰ barricade situations,⁷⁷¹ arrests for robbery or home invasion,⁷⁷² a “check on welfare” call,⁷⁷³ a suicide call,⁷⁷⁴ a 911 – person running in traffic call,⁷⁷⁵ and 911 hang-up calls.⁷⁷⁶ Furthermore, as discussed in chapter 1, there is no agreement in suicide by cop scholarship on the

⁷⁶⁶ See *Re M.C.O.*, Alberta, DoD: February 28, 2004; *Re C.J.L.*, Alberta, DoD: July 18, 2010; *Re M.M.*, Ontario, DoD: June 7, 2013.

⁷⁶⁷ See *Re C.A.P.*, Alberta, DoD: June 10, 2011 and *Re W.M.M.*, Alberta, DoD: September 4, 2008.

⁷⁶⁸ *Re C.A.P.*, Alberta, DoD: June 10, 2011 and *Re W.M.M.*, Alberta, DoD: September 4, 2008.

⁷⁶⁹ See Patton & Fremouw, 2016, *supra* note 703 at 116.

⁷⁷⁰ *Re H.S.C.*, Alberta, DoD: January 21, 2005; *Re W.M.M.*, Alberta, DoD: September 4, 2008; *Re H.G.F.*, Manitoba, DoD: December 3, 2005; *Re K.C.W.S-M.*, Saskatchewan, DoD: June 14, 2008.

⁷⁷¹ *Re M.C.O.*, Alberta, DoD: February 28, 2004; *Re C.J.L.*, Alberta, DoD: July 18, 2010.

⁷⁷² *Re J.S.B.*, Alberta, DoD: January 10, 2011; *Re M.W.*, Québec, DoD: March 8, 2005; *Re P.S.*, Québec, DoD: February 6, 2011.

⁷⁷³ *Re C.A.P.*, Alberta, DoD: June 10, 2011.

⁷⁷⁴ *Re M.F.M.*, Alberta, DoD: January 16, 2011.

⁷⁷⁵ *Re M.M.*, Ontario, DoD: June 7, 2013.

⁷⁷⁶ *Re B.M.A.*, Alberta, DoD: January 16, 2010; *Re D.C.D.*, Saskatchewan, DoD: December 22, 2007.

definition of suicide by cop and what indicators are necessary to prove suicidal intent, meaning that all sorts of incidents can be assigned this name without any necessary similarity between studies.⁷⁷⁷ Absent any studies in Canada demonstrating that a particular incident factor is more likely to result in a credible instance of “suicide by cop” with reliable evidence of suicidal intent (such as a suicide note) than not, training on factors associated with these cases could cause misidentification of “suicide by cop” by police, or an overemphasis on this theory in lieu of training geared toward crisis intervention or de-escalation.

Furthermore, there is no evidence that labelling a case as suicide by cop in advance, or during a police interaction would assist in changing the police approach resulting in the use of life-saving techniques. Studies of techniques responding to cases deemed to be “suicide by cop”, which are all American,⁷⁷⁸ have shown mixed results. For example, Mohandie and Meloy suggest de-escalation and negotiation strategies are ineffective in hostage/barricade suicide by cop cases, whereas McLeod et al. found that de-escalation could be successful in these cases when CIT (crisis intervention training) was provided to police.⁷⁷⁹ Both Mohandie and Meloy and Hutson et al. found that attempts at verbal negotiation and less-lethal forms of use of force are frequently employed in suicide by cop cases but with little to no effect.⁷⁸⁰ However, a large recent American study by Alejandra Jordan et al., cast doubt on these claims, finding injury or death to be rare among cases with indicators of suicide by cop, suggesting they are frequently resolved without violence.⁷⁸¹ As Fremouw and Patton point out, studying police

⁷⁷⁷ See Patton & Fremouw, 2016, *supra* note 703 at 113-115.

⁷⁷⁸ It is worth noting that American literature on this issue has questionable applicability in Canada owing in part to important cultural differences in gun culture between Canada and the United States. As discussed in chapter 1, the United States has higher rates of gun ownership than Canada and American officers are equipped with more firearms than Canadian officers.

⁷⁷⁹ Kris Mohandie & J. Reid Meloy, “Hostage and Barricade Incidents Within an Officer-Involved Shooting Sample: Suicide by Cop, Intervention Efficacy, and Descriptive Characteristics” (2010) 10:1-2 *Journal of Police Crisis Negotiations* 101 [Mohandie & Meloy 2010]; Louise McLeod, Stuart Thomas & Dragana Kesic, “The frequency and nature of resolution in potential police provoked shooting encounters” (2014) 37 *International Journal of Law & Psychiatry* 383.

⁷⁸⁰ Mohandie & Meloy 2010, *ibid*; Hutson et al, “Suicide by Cop” (1998) 32:6 *Annals of Emergency Medicine* 665.

⁷⁸¹ See Alejandra Jordan, Nancy Panza & Charles Dempsey, “Suicide by Cop: A New Perspective on an Old Phenomenon” (2020) 23:1 *Police Quarterly* 82 at 93.

strategies responding to “suicide by cop” with respect to lethality is hampered by the fact that few studies of this phenomenon include non-fatal cases.⁷⁸²

Ultimately, as discussed in chapter 1, there is no consensus among researchers on what factors are required for a case to be labelled as suicide by cop, huge diversity in how researchers determine suicidal intent, and limited study of non-fatal suicide by cop interactions. In such a context there is a real risk that training police to identify these cases may lead to more fatalities, rather than prevent them, particularly if police are trained that less lethal techniques may be ineffective in these cases and that many studies show suicide by cop is especially dangerous for police and the subject. Relying on the literature to date to train police and dispatchers could cause police to assume they are facing fatal risk when responding to mental health crises, increasing the lethality of such encounters.

5.7 Conducted Energy Weapon-Involved Deaths Overview: Numbers and Demographics

Conducted energy weapons were less common than police shooting deaths. In total, CEWs were used by police in 33 cases in my dataset, but in only 7 cases CEWs were described as a cause of death or considered as a significant explanation of death⁷⁸³ within coroner or medical examiner narratives. Among the 7 cases that focused on CEW use, the manner of death in two cases was deemed to be “accidental” and in one case (Robert Dziekanski) it was deemed a “homicide.” No manner of death was provided in the remaining four cases. In one case, that of Robert Dziekanski, the coroner’s inquest took place following a public inquiry and contained no recommendations and only a cursory description of the death because it had been explored in detail previously. Among the seven cases where taser use was a focus on the inquiry, the primary or immediate cause of death was most often described as a heart problem (e.g.

⁷⁸² Patton & Fremouw, 2016, *supra* note 703.

⁷⁸³ Where CEW use was not listed as a cause or contributor to the death, it was considered as a “significant explanation” of death if the issue was dealt with substantially, indicated by the calling of witnesses or evidence on whether CEW use caused or contributed to the death.

“cardiac arrhythmia”,⁷⁸⁴ cardiac arrest,⁷⁸⁵ “maladie coronarienne athérosclérotique”⁷⁸⁶ [Translation by author: atherosclerotic coronary heart disease]], etc. with CEW use, struggle with police and stress from exertion or restraint listed as contributing factors or causes of death. In two cases where a CEW was not determined to be the primary cause of death, the report writer acknowledged it as potential contributing factor.⁷⁸⁷ In *Re Q.R.*, the pathologist concluded that the CEW could not have caused the death, but the coroner noted that medical opinions by the emergency physicians suggested that a “mauvais cocktail”⁷⁸⁸ [Translation by author: “bad cocktail”] of factors including cocaine ingestion, a car crash suffered prior to the encounter, and the use of a Taser could have contributed to the death. Ultimately, the coroner concluded that:

Même si l’utilisation du pistolet Taser par les policiers ne peut être considérée comme la cause médicale du décès de [Q.R.], il appert que le fait qu’il ait, dans un contexte d’agitation et d’intoxication, reçu plusieurs charges électriques a possiblement contribué à son décès.⁷⁸⁹
[Translation by author: Even if the police use of a Taser cannot be considered the medical cause of death of Q.R., it seems that the fact that he received multiple electric shocks in a state of agitation and intoxication potentially contributed to his death.]

In other cases, substance use was considered a direct or indirect cause of death, through overdose or by causing fatal medical conditions.⁷⁹⁰ In three cases “excited delirium” was considered.⁷⁹¹

A notable feature of the inquests and inquiries for CEW-proximate deaths was that half of these reports mentioned testimony that was provided by expert witnesses who were paid by, or who were representatives of, Taser International (now Axon), the corporation that sells CEW devices known

⁷⁸⁴ *Re R.D.*, British Columbia, DoD: October 14, 2007, at 1.

⁷⁸⁵ *Re M.B.L.*, Manitoba, DoD: July 22, 2008.

⁷⁸⁶ *Re D.M.*, Québec, DoD: November 11, 2013, at 2.

⁷⁸⁷ See e.g. *Re R.D.*, British Columbia, DoD: October 14, 2007; *Re D.M.*, Québec, DoD: November 11, 2013; *Re Q.R.*, Québec, DoD: October 18, 2007.

⁷⁸⁸ *Re Q.R.*, Québec, DoD: October 18, 2007.

⁷⁸⁹ *Ibid* at 2.

⁷⁹⁰ *Ibid*; *Re G.S.S.*, British Columbia, DoD: June 30, 2005.

⁷⁹¹ *Re K.G.*, New Brunswick, DoD: May 5, 2005; *Re R.W.B.*, British Columbia, DoD: June 23, 2004; *Re G.S.S.*, British Columbia, DoD: June 30, 2005.

colloquially as “tasers”.⁷⁹² For example, in one case in which Taser International was granted standing at the inquiry into the death of 17-year-old boy who died after being subject to a taser in probe mode, three American expert witnesses were flown in to testify, paid for by Taser International, all of whom were members of the Taser International Inc. Scientific and Medical Advisory Board.⁷⁹³ The Judge conducting this fatality inquiry noted, in all three cases that the evidence they provided was “credible and compelling.”⁷⁹⁴ No expert witnesses were called by other parties to the inquest, which included the Winnipeg Police Service and the parents of the deceased, possibly because such opinions are expensive and most parties to an inquest would not have the means to acquire them and police services would not have an interest in challenging these testimonies. Dr. Michael Graham, the first Taser International witness, testified that

[M.B.L.] died as the result of a sudden cardiac rhythm disturbance (VF) [ventricular fibrillation] that was precipitated by the effect of the incident’s stress (physical and emotional) on his structurally abnormal heart (HCM [hamartoma of mature cardiac myocytes] and, possibly left ventricular hypertrophy). Acute ethanol intoxication was a contributory factor in his death.⁷⁹⁵

Secondly, Prof. Mark Kroll, the author of several taser safety studies discussed in chapter 1, testified that “electrocution inducing ventricular fibrillation” causing cardiac arrest could be ruled out as a cause because the probe darts were not close enough to the heart in the deceased’s body. He testified that “prompt defibrillation shock failed to reverse his cardiac arrest,” and the deceased had a radial pulse and agonal breathing following tasering,⁷⁹⁶ according to police on the scene, though no pulse or breathing was detected on arrival of the paramedics.

⁷⁹² See Thomas Braidwood, *Why: The Robert Dziekanski Tragedy*, (Vancouver: Braidwood Inquiry, 2010) online:<<https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/inquiries/braidwoodphase2report.pdf>> [Braidwood]; Re G.S.S., British Columbia, DoD: June 30, 2005; Re R.W.B., British Columbia, DoD: June 23, 2004; Re M.B.L., Manitoba, DoD: July 22, 2008.

⁷⁹³ Re M.B.L., Manitoba, DoD: July 22, 2008.

⁷⁹⁴ *Ibid* at 20, 22, 25.

⁷⁹⁵ *Ibid* at 20.

⁷⁹⁶ *Ibid* at 22.

The final expert witness, Dr. Richard Luceri testified, according to the inquiry report, that “the Taser ECD did not more than minimally, trivially, or negligibly, if at all, contribute to the death of [M.B.L.] by mechanism of direct electrical charge to his heart inducing cardiac arrest.”⁷⁹⁷

This opinion, once again, was based in part on noting the possibility of non-taser related sudden death, such as suggesting “Sudden unexpected cardiac arrest in young persons who have no clinical heart disease is not uncommon,”⁷⁹⁸ that “alcohol intoxication is a well-known factor in provoking spontaneous cardiac arrest”; and “a high percentage of patients with hamartoma tumours of the heart develop spontaneous ventricular arrhythmias and die suddenly.”⁷⁹⁹

Ultimately, the Judge in this fatality inquiry determined that M.B.L. died of “cardiac arrest as a result of exertion and stress following a pursuit, combined with a hamartoma, a type of heart tumour.”⁸⁰⁰ The use of a CEW was not mentioned as even a contributing cause of death although he had been tasered, hit his head in the fall, and had not regained consciousness. Emphasis on pre-existing medical conditions to explain sudden deaths proximate to CEW use was common, found in 17 of the 33 cases involving a CEW that were reviewed, though in most cases the underlying medical condition pointed to was some form of cardiac condition,⁸⁰¹ “excited delirium,”⁸⁰² cocaine toxicity or medical issues related to chronic cocaine use,⁸⁰³ rather than being described as a “sudden-in-custody death”.

In one case the presiding judge outright rejected the possibility that a CEW could be involved in the death, whereas four others ultimately came to the same conclusion but without suggesting such

⁷⁹⁷ *Ibid* at 25.

⁷⁹⁸ *Ibid* at 26.

⁷⁹⁹ *Ibid* at 26.

⁸⁰⁰ *Ibid* at cover page.

⁸⁰¹ See *Re R.D.*, British Columbia, DoD: October 14, 2007; *Re M.B.L.*, Manitoba, DoD: July 22, 2008.

⁸⁰² See *Re K.G.*, New Brunswick, DoD: May 5, 2005; *Re R.A.P.*, Alberta, DoD: March 23, 2003; *Re G.B.*, Alberta, DoD: November 2, 2008; *Re T.G.*, Alberta, DoD: October 29, 2008; *Re G.W.P.*, Alberta, DoD: May 6, 2009; *L.C.V.*, British Columbia, DoD: November 29, 2003; *Re P.L.*, Ontario, DoD: May 14, 2004; *Re J.K.*, Ontario, DoD: July 17, 2004.

⁸⁰³ See *Re A.F.*, Alberta, DoD: December 24, 2005; *Re C.A.W.*, British Columbia, DoD: July 22, 2003; *Re T.B.H.*, British Columbia, DoD: April 20, 2003; *Re G.S.S.*, British Columbia, DoD: June 30, 2005; *Re Q.R.*, Québec, DoD: October 18, 2007; *Re J.F.*, Ontario, DoD: July 1, 2005; *Re C.W.*, Yukon, DoD: September 28, 2003.

causation was impossible in the narrative. In *Re T.G.*, the deceased was said to have died of “excited delirium due to multiple drug toxicity”⁸⁰⁴ shortly after several attempts to taser the deceased, one of which involved being shocked in stun mode on his neck. The judge presiding at that inquiry suggested, based on the medical evidence, that the CEW use could not have been a factor in the death because more than 15 seconds had passed between the last stun and the deceased losing consciousness, too long a time period for the CEW to have caused the underlying ventricular fibrillation (which causes the heart to cease to properly circulate blood).⁸⁰⁵ Timing was often raised as evidence CEW use did not contribute to a death, suggesting that only direct electricity causing heart stoppage arrhythmia was considered, rather than considering whether CEW use might in other ways contribute to death due to the physical stress it causes. In contrast, in *Re A.F.*, the deceased was described as having “complained of snakes and bees on his skin” and was “yelling and screaming in the middle of the road” provoking calls to the police. The deceased was tasered three times before experiencing a cardiac arrest en route to the hospital where he was determined to have died of a “massive cocaine overdose.”⁸⁰⁶ In the fatality report Judge F.A. Day noted:

[A.F.]’s heart failed due to a massive overdose of cocaine. Current medical (scientific) research shows tasering does not cause death. That is, it is not a direct cause of death. Whether further research will show otherwise remains to be seen. There is an ever increasing body of anecdotal evidence about “death due to tasers.” They tend to show “casual” rather than “causal” connection. The extent to which tasering may be a contributing factor to a condition which is later determined to be the direct cause of death also remains to be seen.⁸⁰⁷

It should be noted, however, that this report was relatively early in the time period studied and before the larger shift toward recognizing CEWs as “less lethal weapons” rather than “non-lethal weapons”. In many other cases in which a CEW was used proximate to a death that was not obviously caused by

⁸⁰⁴ *Re T.G.*, Alberta, DoD: October 29, 2008, at 1.

⁸⁰⁵ *Ibid* at 2.

⁸⁰⁶ *Re A.F.*, Alberta, DoD: December 24, 2005.

⁸⁰⁷ *Ibid* at 2.

physical trauma like a shooting, the potential contribution of a CEW was not explored at all. However, several reports contained statements like the one described above, that CEWs are not considered “direct” causes of death, but also noted that they have been considered contributing causes of death in several cases, even where the most direct cause of death is heart stoppage, sometimes related to pre-existing medical conditions. In fact, in one case the coroner described the testimony of Dr. Patrick Reilly, a bioelectricity expert, as follows:

He [Dr. Reilly] did not provide any evidence to indicate Taser application had fatal consequences. However, he was unable to rule out the possibility that a Taser application has never caused death; he noted that further study would be useful to fully understand its effects on certain members in society that may have more risk factors, such as those with pre-existing cardiac disease and drug-induced individuals [*sic*].⁸⁰⁸

In another case, the coroner remarked on the lack of current knowledge about the health effects of CEWs on populations at risk and the paucity of independent research in the field, stating:

En fait, le problème tel que défini par le Centre canadien de recherche policière (CCRP) dans son rapport de 2005 précité, est qu’il manque d’études faites sur les personnes à risque, les personnes vulnérables (malades ou sous l’emprise de drogues). Par ailleurs, il semble que la plupart des recherches qui portent l’utilisation du dispositif à impulsions sur des personnes saines ou des animaux et qui concluent à la non-létalité de ces armes (et même à l’absence de danger lié à leur utilisation) ont été commandées ou commanditées par la compagnie Taser, seule compagnie qui les commercialise.⁸⁰⁹ [Translation by author: In essence, the problem described by the Canadian Police Research Centre (CPRC) is that we lack studies on people at risk and vulnerable people (those who are sick or under the influence of drugs). Additionally, it seems that most of the studies of conducted energy weapons involving healthy people or animals that have concluded these weapons are non-lethal (or suggest there are no dangers associated with their use) have been conducted by or sponsored by the Taser company, the sole company selling them.]

While the causality or contribution of CEWs in police-involved deaths was generally treated with uncertainty or denial of the possibility, the fact that there is little understanding of their impact on at risk

⁸⁰⁸ Re G.S.S., British Columbia, DoD: June 30, 2005, at 5.

⁸⁰⁹ Re Q.R., Québec, DoD: October 18, 2007, at 7.

individuals is significant because as will be discussed below, most CEW-proximate deaths involved those with perceived mental health impairments, some of which are associated with a heightened risk of sudden cardiac death and arrhythmia.

5.8 Perceived Mental Health Impairment and Substance Use Among CEW-Related Fatalities

Among the seven cases in which CEWs were considered as a potential cause of death, 4 cases (57%) involved a deceased described as currently taking neuroleptic (a.k.a. anti-psychotic) medications,⁸¹⁰ and/or described as “psychotic” or experiencing hallucinations or delusions at the time of their death, or described as having escaped from involuntary hospitalization for a “psychotic disorder”.⁸¹¹ Two cases involved significant cocaine ingestion (i.e. at levels known to be toxic) at the time of death.⁸¹² In only one case, that of Robert Dziekanski, there was no intoxication or pre-existing history of psychiatrization at the time of death, though he was described as behaving in an “agitated state”⁸¹³ prior to death and appearing “drunk”⁸¹⁴ by some witnesses, descriptions that were contested by others.

The prevalence of those perceived to be experiencing psychosis or who were receiving psychiatric medication or hospitalization for psychosis, and those who have consumed cocaine among this small sample of cases is concerning because these groups are at heightened risk for some cardiac conditions and sudden cardiac death. For example, some prior research has suggested that neuroleptic medication (“anti-psychotics”) puts individuals at heightened risk of sudden cardiac death and arrhythmias and involves side effects, including weight gain, that can also increase the risk of such deaths,⁸¹⁵ a fact that

⁸¹⁰ Re K.G., New Brunswick, DoD: May 5, 2005; Re D.M., Québec, DoD: November 11, 2013.

⁸¹¹ Re R.W.B., British Columbia, DoD: June 23, 2004; Re G.S.S., British Columbia, DoD: June 30, 2005; Re K.G., New Brunswick, DoD: May 5, 2005; Re D.M., Québec, DoD: November 11, 2013.

⁸¹² Re G.S.S., British Columbia, DoD: June 30, 2005; Re R.W.B., British Columbia, DoD: June 23, 2004.

⁸¹³ Re R.D., British Columbia, DoD: October 14, 2007, at 2.

⁸¹⁴ See Braidwood *supra* note 792 at 73.

⁸¹⁵ See e.g. Charles Leonard et al, “Antipsychotics and the Risks of Sudden Cardiac Death and All-Cause Death: Cohort Studies in Medicaid and Dually-Eligible Medicaid-Medicare Beneficiaries of Five States” (2013) Suppl. 10(6)

warrants consideration of whether CEW use is in fact safe in this population. Additionally, cocaine use has been associated with a wide variety of heart problems including arrhythmias and sudden cardiac death.⁸¹⁶ Furthermore, as discussed in chapter 1, there is mixed evidence on whether those labelled with “mental illness” disproportionately die when subjected to CEW use.

Although few cases considered CEWs as a possible cause of death, in total, CEWs were mentioned as having been deployed at some point in the police interaction leading to death in 33 cases, (7.5% of the relevant set). In an additional three cases, a CEW was drawn but not deployed in the interaction leading to death.⁸¹⁷ Significantly, in 30 of the 33 cases (91%) in which a CEW was described as having been deployed prior to death in my dataset, the deceased was in the mental health set, suggesting perceived mental health impairment cases are over-represented among deaths proximate to CEW use among the cases studied. 18 of these cases were in the medicalized mental health set, and 12 were in the perceived mental health set. In fact, in 22 of the 33 cases in which CEWs were deployed prior to death, 22 cases (73%) involved a deceased who had used cocaine, been labelled with psychosis or both. However, it is worth noting that not all of these deaths were potentially contributed to by a CEW as several (6) were shooting deaths. Rather, as prior academic and policing literature has suggested, this commonality may

Journal of Clinical and Experimental Cardiology 1; Wayne Ray et al, “Atypical Antipsychotic Drugs and the Risk of Sudden Cardiac Death (2009) 360(3) New England Journal of Medicine 225; Chi Shin Wu, Yu-Ting Tsai & Hui-Ju Tsai, “Antipsychotic Drugs and the Risk of Ventricular Arrhythmia and/or Sudden Cardiac Death: A Nation-wide Case-Crossover Study” (2015) 4:2 Journal of the American Heart Association, <https://doi.org/10.1161/JAHA.114.001568>; Jingling Zhu et al, “Antipsychotic drugs and sudden cardiac death: A literature review of the challenges in the prediction, management, and future steps” (2019) 281 Psychiatry Research <<https://doi.org/10.1016/j.psychres.2019.112598>>.

⁸¹⁶ See e.g. Katharine Phillips et al, “Cocaine cardiotoxicity: a review of the pathophysiology, pathology, and treatment options” (2009) 9:3 American Journal of Cardiovascular Drugs 177; Bryan Schwartz, Shereif Rezkalla & Robert Kloner, “Cardiovascular Effects of Cocaine” (2010) 122:24 Circulation 2558.

⁸¹⁷ Re B.R.M., British Columbia, DoD: October 21, 2004; Re T.D.O., Alberta, DoD: March 18, 2009; Re D.S.I., British Columbia, DoD: July 16, 2004.

be because CEWs are frequently use against those perceived to have a mental health impairment more broadly.⁸¹⁸

It is also notable that CEWs were deployed in 16 of the 57 cases in which excited delirium was discussed as a possible cause of death (28%), suggesting CEWs may commonly be deployed in situations involving an individual perceived to be experiencing psychosis and/or substance use who dies suddenly.⁸¹⁹ Indeed, prior research has found that those said to be experiencing “excited delirium” and individuals who are intoxicated are over-represented among CEW-proximate fatalities.⁸²⁰ While CEW use was not considered a potential contributor to death in many cases because of the timing of stuns relative to heart stoppage, its role along with other forms of use of force and restraint in causing sudden deaths is unclear.

While it is impossible to draw any definitive conclusions about the danger posed by CEWs for cocaine-using people and people who experience psychosis or who are psychiatrized due to perceived psychosis from the data in this study, the high number of cases involving individuals with known cardiac risk factors and the frequency in which CEWs are employed in cases involving those perceived to be “mentally ill” raises questions about whether these groups may disproportionately experience CEW-related harm or death. However, perhaps in response to the uncertainty concerning CEW safety for those experiencing psychosis or involved in cocaine use, some cases suggested that further research should be

⁸¹⁸ See e.g. *RCMP Use of Conducted Energy Weapons*, (Ottawa: Commission for Public Complaints Against the RCMP, 2008); Mark Saunders, *Annual Report 2016: Use of Conducted Energy Weapons*, (Toronto: Toronto Police Services Board Report, 2017) online: *Toronto Police Service Board* < http://www.tpsb.ca/component/jdownloads/send/42-2017/557-march-23?option=com_jdownloads> ; Cassandra Bailey et al, “Conducted-Energy Device (Taser) Usage in Subjects With Mental Illness” (2016) 44:2 *Journal of the American Academy of Law and Psychiatry Online* 213.

⁸¹⁹ As discussed in chapter 6, excited delirium cases almost invariably involve evidence of substance-use and/or psychosis.

⁸²⁰ See e.g. James Jauchem, “Exposures to Conducted Electrical Weapons (Including TASER® Devices): How Many and for How Long are Acceptable?” (2014) 60:1 *Journal of Forensic Sciences* S116.

conducted on the effectiveness of CEWs for use in cases of excited delirium (which are almost exclusively made up of individuals who are perceived to be psychotic and/ or cocaine users).⁸²¹

5.9 CEWs and Use of Force: Use Against Unarmed and Sharp-object armed Subjects, Multiple Applications

CEWs were often used in cases involving other forms of force. For example, in 10 cases CEWs were initially used before a police shooting (with a firearm) caused a fatality. Several cases involved use of multiple intermediate or lethal weapons alongside CEWs, including batons (4 cases), pepper spray (11 cases), police service dogs (1 case) guns (drawn but not used) (2 cases), guns (fired) (8 cases). Additionally, physical use of force techniques or struggles were commonly described in these cases, including: putting bodyweight on the deceased (2 cases), use of chemical restraints (i.e. provision of injectable sedatives by medical staff) (1 case), compliance techniques (1 case), dragging (2 cases), kicks (4 cases), knee strikes (2 cases), punches and hand strikes (4 cases), and “struggle” or synonyms (15 cases).

In over half of the cases collected, CEWs were used against individuals who were unarmed (17 cases, 51.5%), in one third of cases (11 cases or 33%) the deceased was armed with a knife or other sharp object, and in the remaining cases the deceased had a blunt object (e.g. stick, golf club) or it was unclear whether they were armed or not (13 cases, 40%). In only one case a CEW was used against an individual who had a firearm, and in that case, it was not a planned use, but rather due to police officers being surprised to find someone with a firearm when searching a house. The officer only had a CEW in their hands at the time they recognized the threat. The deceased was unsuccessfully tasered and shot a police officer before being fatally shot by police.⁸²² Indeed, in some cases involving firearms where a CEW was not used, coroners or medical examiners made clear in their narratives that CEWs are inappropriate for

⁸²¹ See e.g. *Re D.O., Alberta*, DoD: February 5, 2003, at 4; *Re C.C., Ontario*, DoD: June 21, 2013; *Re J.K., Ontario*, DoD: July 17, 2004, at 5.

⁸²² *Re D.J.C., Alberta*, DoD: June 30, 2006.

use with a subject armed with a firearm because it is not uncommon for them to unsuccessfully deploy, if for example, both probes fail to make contact with the subjects flesh, so they are not a suitable alternative to firearms where police are facing a highly lethal threat like a firearm.

In several cases CEWs were compared to firearms, which as particularly lethal weapons, help to portray CEWs as relatively benign. For example, in one inquest involving the deaths of three individuals in the mental health set, the jury recommended a change in policy to ensure that when an “emotionally disturbed person” was identified in a call, a sergeant of the type equipped with CEWs should be dispatched. The coroner noted CEWs “may represent a less-lethal option than a firearm in certain circumstances.”⁸²³ In several other cases it was suggested that shootings may be avoided if CEWs were available to officers or CEWs were portrayed as an effective alternative to firearms.⁸²⁴

While many cases depicted CEWs as a safe alternative to firearms, in one case where the coroner seemed particularly attuned to the potential risk of CEWs, they were compared to firearms in a more nuanced manner, accepting the uncertainty and risk involved for vulnerable populations:

Cela dit, si on met dans les mains de tous les policiers des armes à feu, on peut également leur permettre d'utiliser le pistolet Taser. Je considère en effet que le dispositif à l'impulsion a sa place dans la problématique de l'emploi de la force qu'il devrait être utilisé à la place de l'arme à feu chaque fois que cela est possible. Il est clair que les policiers doivent lors de leurs interventions utiliser le minimum de force nécessaire à chaque situation. On doit leur apprendre que le pistolet Taser n'est pas une arme inoffensive (la converse que son utilisation dans le monde prouve certainement) et qu'il peut entraîner des blessures sérieuses. Je pense en outre que tant que des études sérieuses portant sur des personnes intoxiquées ou malades ne seront concluantes, le Taser doit également être considéré comme pouvant entraîner la mort. Il est essentiel que les circonstances entourant son utilisation soient clairement précisées et assimilées par les policiers.⁸²⁵ [Translation by author : That said, if we equip all police officers with firearms we can similarly permit them to use Tasers. I believe Tasers have a role in the continuum of force and should be used instead of firearms whenever possible. It is clear that police must employ the minimum amount of force possible in light of the circumstances. We should teach them that the

⁸²³ Re R.J.-D., S.K., and M.E., Ontario, Dates of Death: August 29, 2010; October 7, 2011 and February 3, 2012, at 22.

⁸²⁴ See e.g. Re K.T., Ontario, DoD: August 1, 2011, at 8-9; Re M.H.R., Ontario, DoD: May 2, 2012, at 5; Re T.C.G., Ontario, DoD: November 20, 2007.

⁸²⁵ Re Q.R., Québec, DoD: October 18, 2007, at 12.

Taser is not a benign weapon (it's use has in reality definitively proven otherwise) and that it is capable of causing serious injuries. Additionally, I believe that until serious studies evaluating their effects on intoxicated or ill people have been concluded, Tasers must also be considered to be lethal. It's necessary that the circumstances in which they may be used are clearly specified and understood by police officers.]

In fact, in one case involving the sudden death of a 17-year-old boy from ventricular fibrillation who lost consciousness and died after being subject to a CEW (though the judge conducting the inquiry concluded the CEW had not caused the death), the police officer who had deployed the CEW's testimony was described: "His experience was that pointing a Taser ECD at someone normally de-escalated the situation very quickly"⁸²⁶ suggesting it may even be viewed as a means de-escalation, rather than escalation in the sense that employing a weapon usually would be. Similar claims were heard by "several witnesses" in an inquest into three mental health set deaths in Ontario.⁸²⁷ Language like this suggests a certain lack of acknowledgement for the harm and violence involved in CEW use as well as a fundamental misunderstanding of what de-escalation means. The gulf between displaying a weapon and using verbal communication to create a rapport and calm someone down is vast. These descriptions demonstrate the lack of coherence and agreement on what de-escalation means, as described in chapter 1, which allows an implied threat (i.e. displaying a weapon) to be dressed up in the language of interpersonal communication and conflict avoidance.

In many of the cases (6/7) in which CEW were discussed as a possible cause of death, the CEW was deployed multiple times or continuously, or police witnesses were uncertain of the extent of use. For example, in one case, involving a 38-year-old man described as experiencing "excited delirium" the taser was deployed six times in probe mode as the officer claimed the deceased had repeatedly refused to put their hands behind their back.⁸²⁸ In another case involving the death of a 34-year-old man described as

⁸²⁶ Re M.B.L., Manitoba, DoD: July 14, 2006, at 11.

⁸²⁷ Re R.J.-D., S.K., and M.E., DoD: August 29, 2010; October 7, 2011; February 3, 2012, at 12.

⁸²⁸ Re Q.R., Québec, DoD: October 18, 2007.

having “disorganized speech, delusions, agitation, and psychotic, aggressive behaviours” who escaped from involuntary hospitalization in the context of a mental health act apprehension, the coroner noted that:

Another officer arrived on scene to assist as well. [K.G.] was very agitated, running around the establishment and jumping over tables. He lunged at the officers, broke tables and bit one of the officers. Initially they were unable to place him in any type of restraint. They subsequently deployed a taser, discharging the weapon several times. The taser was initially deployed in probe mode but both probes did not attach properly and did not immobilize him. Subsequently another officer used Oleoresin Capsicum (OC) spray and the taser in touch mode on the shoulders several times. Since [K.G.] was moving a lot, the officer was not able to say how many times he used it and testified it may have been continuously.⁸²⁹

In another case, that of a 41-year-old man described as “acting crazy” and “possibly coked up”, “exhibiting paranoid behaviour” and “hallucinating”, police officers fired their tasers in probe mode and may have used them in stun mode but could provide no details on how many cycles or for how long stuns were employed.⁸³⁰

The number and duration of CEW cycles is fundamentally important when considering the risk CEWs represent because, as discussed in chapter 1, longer CEW discharges and multiple discharges represent a greater health risk to an individual. Ordinarily, CEW technology records the time, duration and nature of deployment so it is unclear why certain cases failed to identify a clear answer to these questions. It is possible that coroners and medical examiners simply failed to recognize that this information is available and compel its production and police forces may have been reluctant to voluntarily offer it if the length and number of taser applications would be cause for concern.

5.10 Recommendations Pertaining to CEW-Proximate Deaths: More weapons needed, more research needed

⁸²⁹ Re K.G., New Brunswick, DoD: May 5, 2005.

⁸³⁰ Re G.S.S., British Columbia, DoD: June 30, 2005.

In a great many cases CEWs were recommended as helpful equipment for all police officers, particularly in cases where the deceased was killed in a police shooting, since these weapons are significantly less lethal than firearms despite open questions about their safety. Indeed, in 17 cases involving a deceased in the mental health set, recommendations suggested either looking into or directly implementing the expanded use of CEWs for police officers, often specifying that these weapons may be useful for responding to persons in crisis. For example, in one case involving a police shooting of a 48-year-old man during an attempted mental health act apprehension, the jury recommended front-line police officers be given access to CEWs with appropriate training. The coroner commented that:

The jury heard from an expert in Use of Force training, as well as front-line officers, that conducted energy weapons (Tasers™) have reduced the need for multiple officer physical interactions when apprehending emotionally disturbed persons.⁸³¹

While CEWs are doubtlessly safer than firearms, increasing CEW use is not confined to circumstances where a firearm would otherwise be deployed. Using more CEWs would add an additional potentially lethal weapon to the police arsenal for deployment against “resisting” subjects. If recommendations to expand CEW use are to protect those who are perceived to have mental health impairments, their use should be tightly restricted to circumstances where a firearm would otherwise be appropriate.

In relatively fewer cases (7), recommendations suggested more research or data collection was necessary to determine the effectiveness of CEWs for subject control, or their impact on the health and safety of subjects, sometimes in addition to recommending increased use of CEWs. For example, in three cases the coroner’s jury suggested studying whether CEWs were an effective means of “subduing”⁸³² those said to be experiencing excited delirium.⁸³³ In one inquest concerning three deaths in the mental

⁸³¹ Re D.A.M., Ontario, DoD: July 5, 2009, at 3.

⁸³² Re D.O., Ontario, DoD: February 5, 2003, at 2;.

⁸³³ Re D.O., Ontario, DoD: February 5, 2003, at 2; Re J.K., Ontario DoD: July 17, 2004, at 5; Re C.C., Ontario, DoD: June 21, 2013.

health set the coroner's jury recommended that the Ontario Ministry of Community Safety and Correctional Services: "[c]ommission a study of CEWs to determine if there are any special risks or concerns associated with the use of this device on EDPs [Emotionally Disturbed Persons]"⁸³⁴ with the coroner noting in relation to this recommendation that: "[p]ersons with serious mental illness are more likely than the general population to face CEW use during police interactions."⁸³⁵ Despite these calls for more information, overall, the bulk of reports suggested an optimism towards CEWs as a tool to prevent future deaths. None contained recommendations seeking to prevent their use for potentially at-risk groups or to restrict use to contexts involving an imminent risk of grievous bodily harm or death.

5.11 Conclusion

As the data in this chapter demonstrates, people perceived to have mental health impairments were over-represented among those shot to death by police and among CEW-proximate fatalities. Narratives in the reports studied suggested these deaths were caused intentionally or unintentionally by the subject of force or their underlying medical pathologies.

With respect to police shootings, the data demonstrates that current national figures on police shootings maintained by Statistics Canada under-report these fatalities. It also shows an over-representation of those with perceived mental health impairments among shooting fatalities, making up 68.5% of such cases. The data on police shootings reveals that in 85% of all cases, the deceased had some form of weapon and with respect to shootings of persons who experience mental health disability, in 78% of such cases the deceased had a sharp object (most often a knife) at the time of death, and in 25% of cases the deceased had a firearm. This suggests that focusing on interventions tailored to addressing those armed with sharp objects may be especially important for reducing fatalities in this population, a

⁸³⁴ Re R.J.-D., S.K., and M.E., Ontario, DoD: August 29, 2010; October 7, 2011 and February 3, 2012, at 10.

⁸³⁵ *Ibid* at 10.

recommendation also found in reports studied. Furthermore, coroner and medical examiner narratives on police shootings sometimes involved discussion of strict rules instructing the use of deadly force if an individual armed with a sharp object was a particular distance from the officer, practices or approaches that fail to allow for meaningful de-escalation or repositioning and may contribute to the deaths of persons who experience mental health disability in police shootings. Recommendations suggested police services abandon such rules. Some reports also considered the theory of “suicide by cop”, relying on use of force expert witnesses to paint narrative of shooting deaths of persons who experience mental health disability as intentional and inevitable byproducts of the deceased, shielding police practices and approaches from scrutiny. Recommendations to prevent police shootings tended to focus on removing firearms from those who experience mental health disability and notably did not consider the more direct issue of whether police firearms should be restricted.

With respect to CEW-proximate deaths, while CEWs are often suggested to be a helpful alternative to firearms in the police arsenal, the over-representation of those in the mental health set in each of these types of deaths raises questions about to what extent providing more weapons to police can be considered protective of this population. The data indicated that in 91% of cases involving CEW use, the subject was in the mental health set, and these weapons tended to be used against unarmed individuals (51.5% of cases), those armed with a sharp object (33%) or those armed with a blunt object (40%). The relatively high use of these weapons against unarmed subjects suggests they are not simply a safer replacement for police firearms.

Recommendations in coroner and medical examiner reports frequently advocated greater use of CEWs in police services, but in some cases further study of their safety and efficacy were suggested.

Chapter 6: Excited Delirium, Sudden in custody and Restraint/Positional-Related Deaths

6.1 Introduction

As discussed in chapter 1, there is considerable controversy surrounding police-involved deaths that are deemed “excited delirium,” or said to be “restraint or positional asphyxia” or “restraint/positional-related” or simply “sudden in custody deaths.” Often, when someone dies during an interaction with police without an obvious physical trauma precipitating the death (like a shooting), questions are raised about whether the individual did or did not have an underlying medical condition that caused death, and questions are raised about the impact restraint or use of force might have had in obstructing breathing and causing death. The cases in which “excited delirium” was described as a potential cause or contributor to the death often also considered other possible causes of death such as “positional or restraint related deaths” or “sudden-in custody-deaths” (including “sudden death” or synonyms). For example, in one case the death was described as “neck compression and sudden death associated with restraint”,⁸³⁶ and excited delirium was explored as a potential explanation for the death, as was positional asphyxia or simply “sudden death”. Due to the frequency of explanations employing excited delirium, sudden in custody death, and restraint/positional-related death as explanations for the death, I explore these types of deaths together in this chapter.

This chapter will begin with a description of the number, causes and manners of deaths found in reports of “excited delirium”, sudden in custody death, and restraint or positional asphyxia deaths, focusing on demographic factors relevant to human rights. Secondly, this chapter will discuss how excited delirium has been employed in coroner and medical examiner proceedings to “medicalize” police-

⁸³⁶ Re C.L.E., British Columbia, DoD: August 1, 2002.

involved deaths, removing consideration of the safety and efficacy of police use of force against persons who use substances or who experience psychosis. Lastly, this chapter will address coroner and medical examiner recommendations particular to excited delirium cases, describing how these recommendations tend to focus on greater research into excited delirium as a medical syndrome, rather than more research into the impacts of police use of force and restraint techniques on people who experience mental health disability.

6.2 Overview: Numbers, Manners, and Causes

In total, in 56 cases (13% of the relevant set cases) the medical examiner or coroner's report described the death in terms of "excited delirium", "agitated delirium" or other synonyms, and several additional cases mentioned or discussed the theory, but did not rely upon it or consider it significantly when describing the death. The relatively large number of cases described as excited delirium suggests this may be a relatively common type of police-involved death in Canada, at least among those for which there are publicly available coroner and medical examiner reports. However, these deaths may also attract more coroner or medical examiner attention as they are generally sudden deaths of relatively young people which may be challenging to explain. Among the cases studied, 0 were under age 20, 11 were in their 20s (19%), 24 were in their 30s (42%), 19 were in their 40s (33%), 2 were in their 50s (3.5%), and all were between the ages of 20 and 55. Two cases involved women (3.5%). In sum the majority of the deceased were relatively young and predominantly male, as is true for most types of police-involved deaths.

Among these cases, excited delirium was listed as the primary cause of death or an aspect of the cause of death (e.g. "cocaine toxicity complicated by excited delirium") in 32 cases. In many cases where it was considered but not listed as the cause of death, the cause was attributed to drug or alcohol toxicity

/ overdose / or a complication related to substance ingestion (12 cases).⁸³⁷ In several other cases the cause of death was simply a medical description of heart problems and stoppage (10 cases)⁸³⁸ (e.g. cardiac arrest, cardiac arrhythmia, myocardial infarction, etc.) or medical descriptions describing not breathing⁸³⁹ (e.g. hypoxic ischemic encephalopathy, asphyxia, etc.), often with additional factors (like restraint or exertion) mentioned. In many cases several factors were listed as contributing to these deaths, for example: “restraint-associated cardiac arrest due to or as a consequence of, acute cocaine intoxication”⁸⁴⁰; or “Sudden Unexpected Cardiac Death Due to: Acute Mania, Excited Delirium, In a man with long-standing Bipolar Disorder; in association with Cardiovascular Stress resulting from violent struggle and morbid obesity.”⁸⁴¹ These sorts of complex descriptions of cause reveal the significant uncertainty and multifactorial nature of many deaths deemed “excited delirium.”

In the majority of the 56 cases where excited delirium was considered a dominant theory of death, the manner of death, if provided, was classified as accidental (40 cases), and less frequently as unclassified/undetermined (7 cases), or natural (3 cases). In 5 cases no manner of death was provided. In only one case was an excited delirium death classified as a homicide. In that case, a 29-year-old man died following a struggle with police during which he was pepper sprayed, tasered in drive stun mode, and hog tied.⁸⁴² The cause of death was listed as “restraint asphyxia following prolonged struggle, due to cocaine-

⁸³⁷ Re J.B.D., British Columbia, DoD: July 9, 2010; Re T.B.H., British Columbia, DoD: April 20, 2003; Re J.D.L., British Columbia, DoD: May 19, 2006; Re C.A.W., British Columbia, DoD: July 22, 2003; Re G.S.S., British Columbia, DoD: June 30, 2005; Re L.M., British Columbia, DoD: August 28, 2007; Re G.O.S., Ontario, DoD: July 22, 2004; Re O.V.R., Ontario, DoD: July 25, 2007; Re B.C.M., Ontario, DoD: June 15, 2004; Re R.W., Ontario, DoD: February 16, 2004; Re S.D., Québec, DoD: June 27, 2005; Re L.L.D., Manitoba, DoD: February 23, 2002.

⁸³⁸ Re R.A., British Columbia, DoD: May 1, 2004; Re C.K.T., British Columbia, DoD: August 5, 2007; Re D.P.M., British Columbia, DoD: June 7, 2006; Re R.W.B., British Columbia, DoD: June 23, 2004; Re R.L.S., British Columbia, DoD: February 18, 2004; Re R.C., Manitoba, DoD: October 26, 2006; Re E.M., Ontario, DoD: February 6, 2003; Re M.B., Québec, DoD: June 28, 2003; Re C.K.T., British Columbia, DoD: August 5, 2007; Re B.J.Z., British Columbia, DoD: August 15, 2010.

⁸³⁹ Re J.W.D., Alberta, DoD: August 30, 2008; Re C.R., Québec, DoD: June 28, 2010.

⁸⁴⁰ Re R.L.S., British Columbia, DoD: February 18, 2004.

⁸⁴¹ Re O.V., Ontario, DoD: August 9, 2000.

⁸⁴² Re J.K., Ontario, DoD: July 17, 2004.

It is worth noting that “excited delirium” was also considered in the public inquiry into the death of Robert Dziekanski, but this theory was rejected in that inquiry and not a significant theory of death discussed in the

induced excited delirium.”⁸⁴³ In that case the recommendations included a focus on informing police of the dangers of “neck restraint techniques” and banning the use of “hog tying” and training officers on the dangers of prone position and hog tying, and the provision of better restraint devices to police,⁸⁴⁴ suggesting the coroner’s jury may have been concerned about the way in which the deceased was restrained as a significant contributor to death. With the exception of this case, the manner of death descriptions in these cases tended to suggest that these deaths were unintentional and caused by chance, or naturally occurring, rather than caused by the intentional actions of others.

In total, 30 cases in my dataset (7% of the relevant set cases) restraint or positional asphyxia were cited as a potential cause or contributor to the death in the narratives. In all of these cases “restraint”, “restraint asphyxia”, “positional asphyxia,” or “body position” was listed as an actual or potential primary or contributing cause of death in the coroner/medical examiner report received, or in an autopsy report or forensic pathology report for the death referred to in them. However, in the vast majority of cases “restraint” or “position” were only listed as contributing causes. In only 4 cases were these factors noted as the primary cause of death and interestingly, none of these cases involved an individual in the mental health set, perhaps because such deaths are likely to be labelled “excited delirium” when underlying mental health or substance use factors are present.

Only one positional/restraint related death involved a woman. In 22 positional/restraint related cases (73%) excited delirium was also a significant theory of death, as some excited delirium cases found that restraint may have contributed to the death or considered this a possibility. In two of the positional/restraint related cases “sudden in custody death” was also an explored cause or contributor to the death. Twenty-five positional/restraint related cases were deemed “accidental (83%),” one was

coroner’s report for his death, which was deemed a “homicide”, so it was not included in this type of death. A description of the analysis in the Braidwood Inquiry can be found in chapter 1.

⁸⁴³ *Ibid.*

⁸⁴⁴ *Ibid.*

“natural,” one was a “homicide,” and three provided no manner of death. The majority of decedents were young, ranging in age between 18 to 55. One death involved a teenager, 6 involved persons in their 20s, 14 involved persons in their 30s, 8 involved persons in the 40s and one involved a 55-year-old man. In sum, similar to excited delirium (and in many cases over-lapping with these cases), restraint/positional related deaths tended to be described as accidental, and tended to involve young males.

While most recommendations in positional/restraint deaths were similar to those found in excited delirium cases due to the significant overlap between these types of death, a few cases provided recommendations specific to this type. For example, in three cases recommendations were put forth suggesting the need for police training on the dangers of positional asphyxia⁸⁴⁵ and/or the dangers of restraint in prone position.⁸⁴⁶

In 11 cases (2% of the relevant set cases) the death was described as being a “sudden death,” or simply undeterminable as to cause and occurring suddenly in custody. Deaths deemed “sudden in custody deaths” or synonyms often overlapped with excited delirium cases, and restraint or position-related deaths. Among the sudden in custody death cases, in 6 cases (54.5%) “excited delirium” was a significant theory of death,⁸⁴⁷ and in one additional case this theory was raised by police witnesses, but it was unclear to what extent it informed the jury’s decision.⁸⁴⁸ In one other case a testifying forensic pathologist raised excited delirium, but only to negate it as a possible cause of death.⁸⁴⁹ Two sudden in custody death cases contained all three categories: “sudden in custody death”, “excited delirium” and “restraint/positional-related as significant theories of the death.”⁸⁵⁰

⁸⁴⁵ Re C.L.E., British Columbia, DoD: August 1, 2002.

⁸⁴⁶ *Ibid*; Re N.B., Ontario, DoD: June 23, 2002; Re J.A.M., Ontario, DoD: May 5, 2010.

⁸⁴⁷ Re J.W.D., Alberta, DoD: August 30, 2006; Re L.M., British Columbia, DoD: August 28, 2007; Re N.J., Ontario: DoD: May 12, 2007; Re C.C., Ontario, DoD: July 21, 2013; Re O.V., Ontario, DoD: August 9, 2000.

⁸⁴⁸ Re K.P., Ontario, DoD: July 24, 2011.

⁸⁴⁹ Re C.M., Ontario, DoD: August 1, 2011.

⁸⁵⁰ Re N.J., Ontario, DoD: May 12, 2007; Re C.L.E., British Columbia, DoD: August 1, 2002.

The cause of death varied in the “sudden in custody death” cases but it was often a medicalized description of the death itself, rather than suggestive of a theory of death. For example, several cases provided a medical description of brain death or cardiorespiratory death without determined causes.⁸⁵¹ For example, in one case the death was described as caused by “complications of hypoxic/ischemic encephalopathy”⁸⁵² (i.e. brain lacking oxygen). In other cases, the cause of death suggested uncertainty; for example, “probably cardiac arrhythmia.”⁸⁵³ In others “sudden death” or synonyms were listed as the cause of death.⁸⁵⁴ Similar in pattern to excited delirium and positional /restraint-related deaths, the manner of death was accidental in six cases and undeterminable or unclassified in three cases, and not provided in one. The decedents were all men, and ranged in age between 23 and 55. Furthermore, because of uncertainty surrounding these deaths, they tended to have recommendations speaking to restraint, excited delirium, or both, in addition to general mental health recommendations, suggestions for improved medical emergency responses (e.g. equip police with defibrillators), or no recommendations at all.

6.3 Mental Health Impairment and Excited Delirium, Sudden in Custody Deaths, and Positional/Restraint-Related Deaths: Psychosis and Substance Use

In nearly all of the 56 cases in which excited delirium was an important or predominant theory used to explain the death, the deceased were in the mental health set, including 32 cases in the medicalized mental health set and 23 cases in the perceived mental health set. Only one case in which excited delirium was a predominant theory of death was not in the mental health set. In that case the label was applied to the deceased and there was no reported substance use at the time of death. Here, the coroner noted that the deceased, a 20-year-old man, suffered a grand mal seizure and was

⁸⁵¹ Re C.M., Ontario, DoD: August 1, 2011; Re J.W.D., Alberta, DoD: August 30, 2006; Re K.P., Ontario, DoD: July 24, 2011.

⁸⁵² Re J.W.D., Alberta, DoD: August 30, 2006.

⁸⁵³ Re W.L.A., Manitoba, DoD: September 2, 2007.

⁸⁵⁴ Re L.M., British Columbia, DoD: August 28, 2007; Re N.J., Ontario, DoD: May 12, 2007.

subsequently described as “acting aggressively” at the group home where he lived. Police arrived and four officers restrained him in prone position, using wrist and ankle restraints. He was given an injected sedative. His cause of death was listed as “Cardiorespiratory Arrest due to, or as a consequence of, post-ictal state of excited delirium.”⁸⁵⁵

Thus, the coroner and medical examiner reports in which excited delirium was a significant theory of death reveal that it is a description applied almost exclusively to police-involved deaths of individuals labelled as having or perceived to have a psychotic disorder, a substance use disorder, or both. Descriptions of the deceased as having a history of problematic substance use or addiction, and psychiatric labelling of psychosis or psychosis-related conditions, were especially prevalent among the excited delirium cases. In 13 excited delirium cases (23%), the deceased was described as addicted to drugs or alcohol or involved in problematic substance use.⁸⁵⁶ In 18 cases (32%) the deceased was labelled as experiencing psychosis (including drug-induced psychosis) or a condition-related to psychosis.⁸⁵⁷ Among the remaining half of the excited delirium cases there were descriptions suggesting a perceived mental health impairment, often including suggestions of intoxication leading to agitated behaviour or drug-induced psychosis.

The positional/restraint-related deaths included 26 out of 30 cases (81%) that were in the mental health set, including 20 (66%) in the medicalized mental health set and 6 (20%) in the perceived mental health set. There was significant overlap between these cases and the excited delirium cases, with 14 (67%) also involving excited delirium as a primary theory of death. Consequently, 4 cases among this set

⁸⁵⁵ Re L.S., Ontario, DoD: August 3, 2010.

⁸⁵⁶ Re T.S.R., Alberta, DoD: September 4, 2002; Re J.B.D., British Columbia, DoD: July 9, 2010; Re B.S.K., British Columbia, DoD: June 22, 2010; Re C.K.T., British Columbia, August 5, 2007.

⁸⁵⁷ These included: Bipolar Disorder with psychosis, Schizophrenia, Schizoaffective Disorder, Delusional Disorder, Drug-induced psychosis, and descriptions of medical “symptoms”, including psychosis, hallucinations, delusions, and “hearing voices”.

(13%) involved individuals labelled with “psychotic disorders”⁸⁵⁸ and 3 cases involved individuals labelled as having an “addiction”⁸⁵⁹ (10%) though in several additional cases the deceased’s diagnosis was unspecified.

Among the 11 cases in which the death was described as a “sudden in custody death” or in which the deceased died suddenly of undetermined cause, 7 cases (64%) were in the mental health set, with 3 in the medicalized mental health set and 4 in the perceived mental health set. Among these cases, 6 out of 7 also had “excited delirium” as a primary theory of death. Among the three sudden in custody deaths in the medicalized mental health set, all cases involved a deceased labelled with bipolar disorder,⁸⁶⁰ in two cases a history of psychosis was also specified.⁸⁶¹

In sum, while excited delirium was almost exclusively associated with perceived mental health impairment, problematic substance use and psychosis, both restraint/positional related deaths and sudden in custody deaths similarly showed a significant over-representation of cases in the mental health set. As the descriptions above suggest, these types of deaths tended to include uncertainty or multiple potential causes. Since excited delirium deaths were the most common type, and both sudden in custody deaths and positional/restraint deaths often also considered excited delirium as a cause or contributor to death, these cases provided similar recommendations and only excited delirium death recommendations will be explored in detail below.

6.4 Excited Delirium and the “Medicalization” of Police-Involved Deaths of People Who Use Substances and those Perceived to Experience Psychosis

⁸⁵⁸ Re C.L.E., British Columbia, DoD: August 1, 2002; Re P.S., Manitoba, DoD: September 2, 2004; Re K.G., New Brunswick, DoD: May 5, 2005; Re S.M., Ontario, DoD: June 5, 2005.

⁸⁵⁹ Re B.S.K., British Columbia, DoD: June 22, 2010; Re P.S., Manitoba, DoD: September 2, 2004; Re P.L., Ontario, DoD: May 14, 2004.

⁸⁶⁰ Re C.L.E., British Columbia, DoD: August 1, 2002; Re C.J.C., Ontario, DoD: June 21, 2013; Re O.V., Ontario, DoD: August 9, 2000.

⁸⁶¹ Re C.L.E., British Columbia, DoD: August 1, 2002; Re C.J.C., Ontario, DoD: June 21, 2013.

The strong association between substance use, psychosis and “excited delirium,” raises many questions about the nature of “excited delirium” as a “syndrome” and what role it plays in explanations of the police-involved deaths of those perceived to have mental health impairments. As discussed in chapter 1, excited delirium is fraught with controversy and some have critiqued the coherence of this “syndrome,” questioned its existence, and suggested that it is employed to divert attention from deaths in contexts of police use of force and restraint. In the following sub-sections I consider the excited delirium cases in light of these critiques, focusing on how it medicalizes police-involved deaths. I begin with a discussion of what a “syndrome” is and the lack of consistency in the underlying “signs” of “excited delirium,” and how it is employed in substance use and overdose cases and in cases involving “psychosis” to suggest biomedical factors caused these deaths, whilst ignoring medical risk factors that may predispose substance users and psychiatrized people to experience more severe impacts of police violence and restraint than other groups. Next, I discuss how “excited delirium” works to depict police-involved deaths of substance users and individuals perceived to have psychosis as “inevitable.” Finally, I will discuss the recommendations contained in excited delirium cases, noting the strong tendency for these cases to suggest training and research on this “syndrome” rather than addressing use of force and restraint applied to those perceived to have a mental health impairment.

6.5 Descriptions of Excited Delirium: “Syndromes,” “Symptoms,” Causation, and the Lack of Consistency in Application of the Term

The predominance of cases labelled “excited delirium” in the mental health set is unsurprising since the signs of excited delirium as described in the literature are behavioural traits associated with mental health diagnoses (especially psychosis and substance use disorders). These cases almost invariably involved some form of perceived intoxication or mental health condition, and generally both. As one judge presiding over a fatality inquiry succinctly remarked:

Unfortunately, there is no way to predict excited delirium and the symptoms, other than death, are similar to those exhibited by abusers of cocaine, alcohol, or people with psychotic disorders.⁸⁶²

These signs or “symptoms,” which are predominantly behavioural descriptions suggestive of intoxication or perceived mental health impairment, were described by medical or policing witnesses in several reports, though their descriptions differed between reports. This lack of specificity about what constitutes excited delirium and how many signs of this syndrome need to be present is a problem in excited delirium literature more broadly. As a “syndrome,” rather than a “disease,” excited delirium does not have any particular set of diagnostic criteria agreed upon in the medical community, nor an agreed upon underlying medical etiology that explains how people said to be displaying “excited delirium” die.⁸⁶³

Examples of descriptions of “excited delirium” from expert witnesses included, for example:

Altération de l'état de conscience, agressivité extrême, combativité avec force surhumaine, hyperthermie, tachycardie, insensibilité à la douleur, attirance à briser du verre ou des miroirs.⁸⁶⁴
[Translation by author: an altered state of consciousness, extreme aggression, combativeness with superhuman strength, hyperthermia, tachycardia, impervious to pain, tendency toward breaking glass or mirrors].

This condition [excited delirium], also known by other names, is a state in which a person demonstrates symptoms such as delirium, agitation, superhuman strength, heat and sweating, and lack of response to pain.⁸⁶⁵

The jury heard evidence that [J.K.] exhibited many of the symptoms of Excited Delirium, including bizarre and aggressive behaviour, hyperactivity, shouting, apparent superhuman strength, profuse sweating, ineffectiveness of pepper spray, increased pain tolerance, and eventual sudden tranquility after severe exertion.⁸⁶⁶

⁸⁶² Judge F.E. LeReverend, Re D.O., Alberta, DoD: February 5, 2003.

⁸⁶³ Note that there is some disagreement and variety in theoretical perspectives on what does or does not constitute a disease or syndrome, but the latter generally lacks a biomedical explanation of how it causes the symptoms seen. So, syndromes are really a grouping of signs or symptoms, whereas diseases require, according to some, an identified biomedical pathway leading from a cause to the symptom. See Franz Calvo et al, “Diagnoses, Syndromes, and Diseases: A Knowledge Representation Problem” (2003) American Medical Informatics Association Symposium Proceedings 802, online: <
https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1480257/pdf/amia2003_0802.pdf>.

⁸⁶⁴ Re M.B., Québec, DoD: June 28, 2004 at 8.

⁸⁶⁵ Re O.V.R., Ontario, DoD: July 25, 2007 at 3.

⁸⁶⁶ Re J.K., Ontario, DoD: July 17, 2004 at 3-4.

Dr. Palatnick described excitable delirium or agitated delirium as that physical state (arising from cocaine “binging”) which results in a visible euphoria, agitation, aggressiveness, and oftentimes paranoia.⁸⁶⁷

The behaviour that is observed [in excited delirium cases] is a continuum from obtunded to extreme agitation. Features of ED may include bizarre, irrational behaviour, constant yelling/screaming, aggression towards inanimate objects, glass attraction and often naked or semi-clothed. Other features include not responding to police presence, insensitive to pain, may have very hot skin, may sweat profusely, apparent superhuman strength and violent struggles despite futility.⁸⁶⁸

What is notable about the descriptions of excited delirium “symptoms” provided in these reports, aside from the diversity of what factors they describe, is that many of these signs are fundamentally subjective evaluations about the mental state of the subject or the perceived “abnormality” of the subject (e.g. “bizarre behaviour,” “irrational behaviour” or “altered state of consciousness”) and many include factors that would only be observable in the context of use of force or restraint (e.g. “ineffectiveness of pepper spray,” “impervious to pain,” “violent struggles despite futility”) which builds use of force and restraint right into the syndrome. In light of these factors, it is hardly surprising that these deaths are powerfully associated with restraint and use of force against those perceived to have a mental disorder since many “symptoms” are merely descriptors of such perceived mental health disorder or use of force and restraint interactions.

Further, with respect to descriptors like “super human strength,” in her examination of two Alberta fatality reports that are also contained in this study, Seantal Anaïs, has argued that “‘unusual strength’ is regularly included in the symptom cluster of excited delirium [...] which fits in with the consistent observation that arrests of excited deliriant require use of police force. It is the unusual strength of excited deliriant that is believed to necessitate extreme force, but unlike the medical condition of excited delirium extreme police use of force was never put forward as a possible cause of

⁸⁶⁷ Re L.L.D., Manitoba, DoD: February 23, 2002 at 6.

⁸⁶⁸ Re D.P.M., British Columbia, DoD: June 7, 2006 at 5-6.

death in either case.”⁸⁶⁹ As her analysis suggests, the descriptions of this syndrome bear a synergy with *justifications* for use of force.

While some of the descriptors of “excited delirium” could be objectively or medically verifiable, like hyperthermia (elevated body temperature), tachycardia (a fast heart beat), pupil dilation, and foaming at the mouth, these descriptions were relatively rare among the cases and are not signs of physical or medical distress exclusively associated with “excited delirium” but also with other potential physical or medical events like significant physical exertion, substance use, and overdoses (as will be described in greater detail below). Furthermore, as discussed in chapter 1, medical personnel are rarely on the scene to observe or measure these symptoms, which results in a reliance on police witness perspectives.

Furthermore, among all relevant set cases in this study, several cases in which excited delirium did not appear as a significant theory of the death, involved the application of this label by police in contexts that did not seem to align with any concept of excited delirium shared by expert witnesses. In fact, descriptions of “excited delirium” by police witnesses or coroners and medical examiners even took place in some cases where the death was unquestionably caused by injury or trauma rather than sudden cardiac death. For example, in one case the coroner described a man who was subsequently shot to death by police as being “on a major binge of cocaine injections to the point of paranoid psychosis, leading to a probable excited delirium,”⁸⁷⁰ suggesting the term is used interchangeably with cocaine-induced psychosis. It is unclear whether this coroner meant to imply that the subject would have died anyways, given that excited delirium is generally described as a lethal condition. Another example is the description of the death of a man who was pepper-sprayed by police before he jumped out a window, later dying from complications caused by the injury sustained. In this case, the coroner writes of the

⁸⁶⁹ Seantel Anaïs, “Making Up Excited Delirium,” (2014) 39:1 Canadian Journal of Sociology 45 [Anaïs] at 59.

⁸⁷⁰ Re M.K., Ontario, DoD: October 29, 2005.

aftermath of the jump: “Il est sérieusement blessé mais conscient. Les policiers observent ce qu’ils qualifient de delirium agité. Il est menotté.”⁸⁷¹ (Translation by author: He is seriously injured but conscious. The police officers observe what they describe as agitated delirium. He is handcuffed.) It was unclear what the observed behaviours were, but one must question whether this description was used to justify handcuffing a critically injured person. These unusual descriptions reveal that “excited delirium” may be used as a behavioural descriptor by police to suggest an individual is perceived to be experiencing psychosis and/or to require restraint. In fact, in one case, the pathologist’s testimony pointed to the use of excited delirium as signifying mental health-related deaths:

Dr. Currie commented on the term ‘excited delirium’ (ED). He described ED as a state of mind rather than a cause of death. He said that ED is a state for which there are many potential diagnoses: psychiatric illness, drug intoxication, combination of psyche and drugs, etc.⁸⁷²

The lack of any shared criteria for “excited delirium” and the fact that the signs of this condition predominantly connote perceptions of psychosis (drug-induced or otherwise) or substance use, describe use of force, or describe symptoms of medical distress, substance use, or simply physical exertion raise the prospect that this “syndrome”, rather than describing a singular medical condition of unknown etiology, is simply a description of police-involved deaths of persons perceived to experience mental health impairment, without providing any assistance in answering the question of why they died.

However, as described above, a great many cases (30) described “excited delirium” as the “cause” or a “contributing factor” when describing the cause of death, suggesting that while this “syndrome” is more or less a set of behavioural and distress signs in search of a cause, it is being treated as a cause itself. An example of discussions of causation in excited delirium cases shows the work this “syndrome” does in medicalizing death to avoid questions of use of force and restraint. For example, one

⁸⁷¹ Re C.R., Québec, DoD: June 28, 2010 at 2.

⁸⁷² Re D.P.M., British Columbia, DoD: June 7, 2006 at 5.

case involving the death of a 27-year-old man said to have died of “cocaine-induced excited delirium during restraint,” the fatality inquiry report stated:

The medical cause of [T.S.R.]’s death was cocaine-induced excited delirium during restraint.

Dr. Litwin [Assistant Chief Medical Examiner] described excitation delirium as: “...a state of profound instability of the nervous system, which is typically described as a series of symptoms consisting of bizarre, agitated behaviour, elevated body temperature, difficulty breathing and respiratory arrest, which frequently culminates in the individual’s death.” [...] It was his opinion that the occurrence of excitation delirium in [T.S.R.] had nothing to do with his restraint by the police. [...] Excitation or excited delirium is a life-threatening condition requiring prompt medical attention.”⁸⁷³

The confusion of what “excited delirium” is and its use as a cause of death serves a useful function for law enforcement interests at coroner and medical examiner proceedings as it allows these processes to name a medical entity as the cause of death, avoiding questions about and aiding in the justification of the use of force and restraint. The fact that excited delirium itself remains unexplainable as to causation is subsequently lost in the mire.

6.6 Substance Use and Overdose Among Excited Delirium Cases

Most of the reports in which excited delirium was considered an important explanation of death contained descriptions of substance use prior to the fatal incident with police or toxicological results showing substance use (48 cases, 86%), and only 6 cases (11%) had evidence suggesting no substance use by the deceased prior to death,⁸⁷⁴ with the remaining cases providing insufficient information one way or the other. Among the substance use cases, the majority involved individuals who were described as having consumed cocaine prior to their death. In 40 cases (71%), cocaine was ingested by the deceased prior to death, although in some cases only trace amounts were detected in the post-mortem blood

⁸⁷³ Re T.S.R., Alberta, DoD: September 4, 2002 at 6.

⁸⁷⁴ Re J.W.D., Alberta, DoD: August 30, 2006; Re N.J., Ontario, DoD: May 12, 2007; Re N.B., Ontario, DoD: June 23, 2002; Re C.C., Ontario, DoD: June 21, 2013; Re S.M., Ontario, DoD: June 5, 2005; Re L.S., Ontario, DoD: August 3, 2010.

toxicology results. There were a few cases describing other substance use, either alone or in combination with cocaine (notably methamphetamines, alcohol, opiates, cannabis, and ketamine). In fact, blood toxicology results were frequently mentioned in these cases and revealed significant variation in the quantity of cocaine or other substances detected from one case to the next. Significantly, in 20 cases (36%) the blood toxicology revealed substance levels known to be fatal, and in all of these cases drug overdose was a significant theory of death in addition to excited delirium. Most of these cases involved causes of death describing either overdose, or overdose with “excited delirium” as a descriptor or contributing cause. In contrast, 28 other cases (50%) involved substance use amounts as determined by post-mortem toxicology that were considered too low to be associated with overdose or not specified as within lethal ranges, or involved substances known not to cause overdose (e.g. cannabis).

When considering the prevalence of cocaine use associated with these deaths, it is interesting to contrast the “symptoms” of excited delirium with those present in cocaine overdoses. For example, in one case in which the deceased was described as experiencing “cocaine induced delirium” the cause of death was described as “acute cocaine intoxication,”⁸⁷⁵ and a paramedic who testified at the inquest described the state of the deceased prior to his death in the following way:

[T.B.H.] was sweating, warm to the touch, and extremely agitated. He [the paramedic] advised the Jury that these are common symptoms of cocaine psychosis, a phenomenon often seen in overdose situations.⁸⁷⁶

This explanation is significant because “hyperthermia” is one of the only medically verifiable signs of excited delirium, yet its association with cocaine overdoses raises the prospect that some “excited delirium” cases may simply be linked to cocaine toxicity. An additional symptom that appeared in several

⁸⁷⁵ Re T.B.H., British Columbia, DoD: April 20, 2003.

⁸⁷⁶ *Ibid* at 4.

cases was “foaming at the mouth”⁸⁷⁷ which is also a symptom of stimulant overdoses, among other life threatening medical conditions,⁸⁷⁸ and was also noted in a non-excited delirium cocaine overdose case.⁸⁷⁹ In fact, all excited delirium cases that described the deceased as “foaming at the mouth” involved cocaine use, two of which were within the potentially “fatal” range and two of which were not. Similarly, “tachycardia,” which is a rapid pulse was described in several cases, but is a symptom which “can be part of the body’s normal response to anxiety, fever, rapid blood loss, or strenuous exercise”⁸⁸⁰ or associated with a wide variety of medical conditions or the side effect of medications, or substance use.⁸⁸¹ What the physical “symptoms” of excited delirium have in common is that they are not specific to this condition and were not uniformly described as being present in the cases studied. Many are physiological symptoms associated with cocaine toxicity or other forms of medical distress.

While “excited delirium” could be used as a descriptor of overdose symptoms, in many cases report writers described substance use as itself causative of or having “induced” excited delirium. For example, in the death of a 40-year-old man, the medical examiner’s Medical Certificate of Death listed the cause of death as “Cocaine-induced Excited Delirium During Restraint” and the report suggested that this was based upon:

- (a) the autopsy revealing no cause of death;
- (b) the anecdotal information that [T.J.M.] was in a state of extreme agitation and exhibiting bizarre behavior shortly before his death; and
- (c) the toxicology results showing a high level of cocaine and its metabolites in [T.J.M.]’s system at the time of his death.

⁸⁷⁷ See, for example, Re L.L.D., Manitoba, DoD: February 23, 2002; Re A.R.G., Manitoba, DoD: February 10, 2002; Re T.J.M., Alberta, DoD: March 26, 2006; Re B.J.Z., British Columbia, DoD: August 15, 2010.

⁸⁷⁸ See “Preventing and Responding to an Overdose,” (Ottawa: Ottawa Public Health, n.d.), online: <<https://www.ottawapublichealth.ca/en/public-health-topics/signs-of-overdose.aspx>>.

⁸⁷⁹ Re R.M.B., British Columbia, DoD: July 23, 2007.

⁸⁸⁰ “Tachycardia: What is it?,” (Boston: Harvard Health Publishing, 2019) online: <https://www.health.harvard.edu/a_to_z/tachycardia-a-to-z> .

⁸⁸¹ *Ibid.*

While it appears that T.J.M. stopped breathing while he was restrained, the evidence of the Chief Medical Examiner of Alberta, Dr. Dowling, was clear that the trigger for [T.J.M.]’s “excited delirium” was the high level of cocaine in his system as his cause of death was the “excited delirium,” not the restraint.⁸⁸²

In another case, the deceased, a 38-year-old man who was subjected to multiple CEW shocks in probe and stun mode, pepper spray, and restraint in handcuffs and a spit mask following a struggle with police was described as having high amounts of both MDMA and ketamine in his blood according to the toxicology results, along with trace amounts of cocaine and an antihistamine. The judge wrote:

The level of MDMA (“extacy”[sic]) was sufficient to cause death by itself as was the level of Ketamine. That is, either drug, on its own, at the levels found, could cause death. Thus, while Excited Delirium is the immediate cause of death he would not be in Excited Delirium but for the presence of these levels of drugs.⁸⁸³

In addition to showing how drug use is described as the “cause” of excited delirium, this description is interesting with respect to ketamine, because this drug is in fact considered to be preventative of excited delirium fatalities (presumably in much lower doses than the deceased in this case ingested) and has been recommended for use in sedating those in suspected excited delirium in medical literature.⁸⁸⁴ As this case acknowledged: “it is not known with certainty in the medical community why drugs cause Excited Delirium.”⁸⁸⁵

Cases like these raise questions about the extent that these death review processes and the pathologists giving expert testimony have critically explored the medical theories of excited delirium before employing this label to explain police-involved deaths, particularly where overdose might be an equally plausible cause. It is unclear what extra level of explanation “excited delirium” can provide in these cases. The overdose excited delirium cases reveal that while this term is used to describe a

⁸⁸² Re T.J.M., Alberta, DoD: March 26, 2006 at 2.

⁸⁸³ Re T.G., Alberta, DoD: October 29, 2008 at 2.

⁸⁸⁴ See e.g. Laura Linder, Clint Ross & Kyle Weant, “Ketamine for the Acute Management of Excited Delirium and Agitation in the Prehospital Setting” (2018) 38:1 Pharmacotherapy 139.

⁸⁸⁵ Re T.G., Alberta, DoD: October 29, 2008 at 2.

biological theory of death in some cases, in others it is used more or less to describe behaviour that is associated with drug-induced psychosis or along with symptoms of overdoses.

6.6 The Relationship Between Psychosis, Mental Health Impairment and Excited Delirium

Many cases deemed “excited delirium” included descriptions of the deceased as experiencing drug-induced psychosis or noting the relationship between drug-induced psychosis and excited delirium. For example, in one case the testimony of an emergency medical physician was described in the following way:

He testified that in his practice as an emergency physician he has had the opportunity to treat a number of individuals who have presented with symptoms indicative of excited delirium (hallucinations, agitation, super human strength, altered perception). [...] He stated that the onset of excited delirium can be attributed to many factors including drug use; he specifically noted that these symptoms are common in cocaine psychosis.⁸⁸⁶

The relationship between excited delirium and “cocaine psychosis” helps to explain why this syndrome links together the deaths of people who use substances (especially cocaine and other stimulants) and those who are psychiatrically labelled with psychotic conditions. Excited delirium is employed to describe sudden deaths of people perceived to be experiencing psychosis.

There were cases where no drugs or alcohol were detected in the post-mortem toxicology, which is a routine aspect of coroner and medical examiner cases. In these cases, and in cases where the amount of drugs found were minimal, or the type of drug ingested is not associated with overdose (e.g. cannabis), underlying non-addiction mental health conditions were perceived and/or labelled.⁸⁸⁷ Where no drug use took place prior to death, if any medical label was provided, the deceased were almost always labelled as having psychotic disorders, including bipolar disorder (with specified psychosis), schizophrenia, and

⁸⁸⁶ Re G.S.S., British Columbia, DoD: June 30, 2005.

⁸⁸⁷ Re E.M., Ontario, DoD: February 6, 2003.

delusional disorder,⁸⁸⁸ though in one case the deceased's behaviour, including delusions, was linked to a complication of diabetes rather than a "mental illness".⁸⁸⁹

The necessity of individual medical pathology and the fact that several of these sudden cardiac deaths have befallen people with no drugs or alcohol in their system, have also led report writers to seek a history of mental health impairment in the deceased, even where it was not identified in their medical history or familial description of the deceased, in order to explain a sudden in custody death as biologically caused, rather than linked to use of force. For example, in the fatality report into the death of J.W.D., a 28-year-old man who died suddenly after being chased, tasered, forced to the ground and handcuffed by police, the blood toxicology results revealed no drugs or alcohol in his system. The presiding Judge also noted that the deceased "had no known history of being under the care of any Psychiatrist or Psychologist, and there was no evidence of him ever being diagnosed with a psychiatric illness."⁸⁹⁰ This led to a problem for the fatality inquiry in terms of explaining his sudden in custody death, and the reports of "bizarre behaviour", "extreme agitation", and "yelling and screaming gibberish and threats" that led bystander witnesses to *assume* "he was on drugs."⁸⁹¹ Provincial Court of Alberta Judge M.R. Bast explored the possibility that the deceased may have suffered excited delirium absent any underlying psychiatric condition or drug use, but he quotes Dr. Christine Hall, the leading Canadian expert witness on excited delirium as refuting this possibility.

Dr. Hall agreed that stress could potentially bring on a state of excited delirium, but in her opinion an underlying psychiatric condition or mental illness would also have to be present, with the person presenting in the state of excited delirium getting there as a result of a psychotic break.⁸⁹²

⁸⁸⁸ Mental health diagnostic labels other than addictions were also associated with some deceased who were identified as having died in the context of drug-induced excited delirium.

⁸⁸⁹ Re R.C., Manitoba, DoD: October 26, 2006.

⁸⁹⁰ J.W.D., Red Deer, Alberta, Data of Death: August 30, 2006.

⁸⁹¹ *Ibid.*

⁸⁹² *Ibid.*

Absent any evidence of drug or alcohol use or a psychiatric diagnosis, the coroner in this case settled on referring to the death as a case of “probable excited delirium.”⁸⁹³ The necessity of an underlying mental health diagnosis reveals how excited delirium is invariably associated with a pre-existing biomedical condition (mental health diagnosis or substance use). Medicalizing these deaths allows us to remove or underplay police actions when narrating the causation of death, erasing violence as an unpalatable fact in these deaths, and replacing any impact it may have had with medical pathology. The deceased’s aberrant mental health is situated as the problem to be solved, rather than police restraint and force or police responses to human distress. It is not simply, as other critics of excited delirium have suggested, that this medicalization of police-involved deaths draws attention away from police use of force,⁸⁹⁴ but specifically that it obscures lethal police violence against persons perceived to be experiencing psychosis.

6.7 Pre-Existing Health Conditions as Determinative Causal Factors Rather than Risk Factors for the Adverse Impact of Use of Force and Restraint

The rhetoric used to describe “excited delirium” frequently suggested that it is a medical condition or individual pathology arising from drug use or “mental illness” that requires urgent medical attention, including police restraint to facilitate treatment. An example of the medicalization of excited delirium deaths that treat restraint as a necessary precursor to treatment was found in the report concerning the death of a 28-year-old man who was subjected to five CEW applications, “head stuns,” handcuffing and ankle restraints “pulled within a foot of his wrists,” physical restraint by “four to seven officers” and chemical restraint in the form of the sedatives Haldol and Ativan injected immediately prior to death.⁸⁹⁵ In this case, Judge Lereverend of the Provincial Court of Alberta described excited delirium as:

⁸⁹³ *Ibid.*

⁸⁹⁴ Anaïs, *supra* note 869 at 48.

⁸⁹⁵ Re R.A.P., Alberta, DoD: March 23, 2003 at 2.

A medical condition describing physiological symptoms of increased heart rate and blood pressure, erratic combative behaviour, incomprehensible or inappropriate speech, purposeless destruction of property, constant activity, yelling, screaming or keening, imperviousness to pain, unawareness of police or medical attendants who are on scene, superhuman strength and frequently inappropriate state of dress. It involves an altered level of consciousness affecting thinking and perception.

People suffering from this condition need medical help. They need to be restrained to get that help. Death frequently ensues once they are restrained. This condition although rare, arises from several different causes including illicit drug use.⁸⁹⁶

The medicalization of excited delirium, which portrays it as a lethal condition in its own right, dissociated from police use of force and restraint, and in fact requiring this restraint to facilitate life-saving medical care, acts to erase these factors as potential contributors when explaining police-involved deaths. These descriptions reinforce the perspective that underlying mental health conditions (i.e., problematic substance use or a psychotic disorder) caused these deaths or that “excited delirium” itself is a fatal condition. Expert opinions in several cases suggested that an individual with excited delirium must be restrained immediately in order to help them – reshaping aggressive intervention by police as a treatment facilitator, instead of a lethal risk factor. According to this rhetoric, police are involved in these incidents to assist someone in a medical crisis by providing necessary restraint to facilitate potentially life-saving treatment.

Significantly, in most cases the medicalization of these deaths did not lead the judges, coroners, and medical examiners authoring these reports to describe excited delirium deaths as the result of police violence or restraint applied to someone with a pre-existing health condition rendering them particularly vulnerable to adverse effects from force and restraint, though this was suggested in a few cases. From a medical perspective one might expect more severe impacts of violence and use of restraints on an individual with a history of problematic substance use or otherwise psychiatrized person because some

⁸⁹⁶ Re R.A.P., Alberta, DoD: March 23, 2003.

forms of substance use can cause damage to a person's heart and lungs,⁸⁹⁷ and individuals who have been labelled with psychotic disorders have high rates of premature sudden cardiovascular death relative to the general population, potentially related to the ingestion of certain neuroleptic drugs⁸⁹⁸ and/or lifestyle factors and socioeconomic disparity.⁸⁹⁹ In other words, rather than causing excited delirium, psychiatrized people and those engaged in substance use may suffer disproportionate impacts from use of force or restraint techniques that are benign when used on the healthy volunteers who are studied.

Few cases considered the possibility that the sudden cardiac death of a young person could be related to psychotropic medication, though in five cases with no cocaine use individuals experiencing excited delirium were noted to have been taking psychiatric drugs at the time of death.⁹⁰⁰ In four of these cases at least one of the drugs consumed by the deceased was a neuroleptic (a.k.a. anti-psychotic) drug, including quetiapine, aripiprazole, olanzapine, and clozapine. In the fifth case the medication consumed was not specified, but the deceased was being treated with unspecified medication for "acute mania" with a diagnosis of bipolar disorder and a previous diagnosis of schizo-affective disorder, making it very likely that he had been prescribed an anti-psychotic.⁹⁰¹ While the possibility that neuroleptic drugs might predispose individuals to sudden cardiac death when faced with use of force and restraint was usually

⁸⁹⁷ See e.g. Sung Tae Kim & Taehwan Park, "Acute and Chronic Effects of Cocaine on Cardiovascular Health," (2019) 20:3 *International Journal of Molecular Science* 584; Joyce Akwe, "Pulmonary Effects of Cocaine Use," (2017) 4:2 *Journal of Lung, Pulmonary & Respiratory Research* 54.

⁸⁹⁸ See e.g. Charles Hennekens, "Schizophrenia and increased risk of cardiovascular disease," (2005) 150:6 *American Heart Journal* 11115; Charles Leonard et al, "Antipsychotics and the Risks of Sudden Cardiac Death and All-Cause Death: Cohort Studies in Medicaid and Dually-Eligible Medicaid-Medicare Beneficiaries of Five States" (2013) *Suppl. 10(6) Journal of Clinical and Experimental Cardiology* 1; Wayne Ray et al, "Atypical Antipsychotic Drugs and the Risk of Sudden Cardiac Death (2009) 360(3) *New England Journal of Medicine* 225; Chi Shin Wu, Yu-Ting Tsai & Hui-Ju Tsai, "Antipsychotic Drugs and the Risk of Ventricular Arrhythmia and/or Sudden Cardiac Death: A Nation-wide Case-Crossover Study" (2015) 4:2 *Journal of the American Heart Association*, <https://doi.org/10.1161/JAHA.114.001568>; Jingling Zhu et al, "Antipsychotic drugs and sudden cardiac death: A literature review of the challenges in the prediction, management, and future steps" (2019) 281 *Psychiatry Research* <<https://doi.org/10.1016/j.psychres.2019.112598>>.

⁸⁹⁹ See e.g. Cherrie Ann Galletly, "Premature death in schizophrenia: bridging the gap" (2017) 4:4 *The Lancet Psychiatry* S2215.

⁹⁰⁰ Re P.S., Manitoba, DoD: September 2, 2004; Re K.G., New Brunswick, DoD: May 5, 2005; Re S.M., Ontario, DoD: June 5, 2005; Re C.C., Ontario, DoD: June 21, 2013; Re J.G., Québec, DoD: June 11, 2011.

⁹⁰¹ Re C.C., Ontario, DoD: June 21, 2013.

ignored, in one case in which the deceased had been taking neuroleptic drugs at the time of death, the possibility that this medication could have contributed to the death was mentioned by the judge conducting the fatality inquiry. That case involved a 30-year-old Indigenous man whose death was attributed to “sudden cardiac arrest consistent with agitated delirium.”⁹⁰² The deceased was described as suffering from a number of psychiatric and psychological diagnoses, including fetal alcohol syndrome, a low I.Q., schizophrenia, and suspected alcoholism. At the time of his death the decedent was an involuntary patient in a psychiatric ward. The inquiry report noted:

It appears to be the case that the R.C.M.P. are regularly called to the hospital to pick up and detain violent psychiatric patients who are then placed in the R.C.M.P. cells. This had been the plan once again on September 2, 2004, the day that [P.S.] died.⁹⁰³

The hospital contacted the RCMP as the deceased was described as “yelling,” “agitated” and having thrown a chair.⁹⁰⁴ Three hospital staff members struggled with the deceased and proceeded to restrain him in prone position on the ground, holding his limbs above him. There was inconsistent evidence from witnesses on whether body weight was applied to the deceased. The RCMP officers arrived and handcuffed the deceased who was still in prone position, shortly after which it was realized he was no longer breathing and had lost consciousness.⁹⁰⁵ The deceased in this case was being treated with clozapine after a lack of success with other neuroleptic drugs. Provincial Judge Gregoire noted that:

In the opinion of his psychiatrist, there was a necessity to attempt treatment with clozapine, a much more effective but also a potentially dangerous drug. Careful titration and monitoring for possible life threatening side effects were necessary and hence the reason for the rather lengthy involuntary stay of [P.S.] on his last admission to The Pas Hospital.⁹⁰⁶

⁹⁰² Re P.S., Manitoba, DoD: September 2, 2004 at 2.

⁹⁰³ *Ibid* at 6.

⁹⁰⁴ *Ibid* at 15.

⁹⁰⁵ *Ibid* at 16.

⁹⁰⁶ *Ibid* at 5.

Evidence was presented at this fatality inquiry that clozapine, an atypical neuroleptic (“anti-psychotic”) drug can have life-threatening side effects. The following excerpt from the Canadian Reference for Health Professionals published in 2003 by the Canadian Pharmacists Association was also quoted:

A minority of clozapine treatment patients experience ECG repolarization changes similar to those seen with other anti-psychotic drugs, including S-T segment depression and the flattening or inversion of T waves. There have been reports of ischemic changes, myocardial infarction, non fatal arrhythmias, sudden unexplained deaths and congestive heart failure associated with clozapine use. Causally assessment was difficult in many of these cases due to serious pre-existing cardiac disease and possible alternative causes. Rare instances where sudden death have been reported in psychiatric patients with or without associated anti-psychotic drug treatment and the relationship with these events to anti-psychotic drug use is unknown.⁹⁰⁷

The pathologist who conducted the autopsy listed clozapine, along with alcohol consumption (the deceased had been on a temporary leave from hospital immediately prior to this event) as contributing factors and he was described as providing evidence that the exact role they played was uncertain, but that:

There have been some cardiac deaths associated with clozapine and that this is found in the information supplied by the drug manufacturer. He also indicated that many of the anti psychotic drugs are associated with sudden cardiac death as are some illegal drugs.⁹⁰⁸

The judge conducting the inquiry noted:

There is so much that is unknown about what role clozapine may have played in [P.S.]’s death. I recommend further scientific study be encouraged to determine if possible how clozapine contributed if at all to sudden cardiac death.⁹⁰⁹

⁹⁰⁷ *Ibid* at 60.

⁹⁰⁸ *Ibid* at 44.

⁹⁰⁹ *Ibid* at 80-81.

In fact, many recent studies have demonstrated clozapine use, along with use of other neuroleptic drugs (a.k.a. anti-psychotics) is a risk factor for sudden cardiac death.⁹¹⁰

In one other case the role of psychiatric medication was explored. This case involved the sudden death of a 25-year-old man following police use of force and restraint. The man was labelled with bipolar disorder and was prescribed several psychiatric medications including a prescription psychostimulant for ADHD. The coroner in that case noted that excited delirium deaths can be associated with stimulant use according to the literature; consequently a review was conducted to eliminate a potential link between prescription psychostimulant use and excited delirium.⁹¹¹ The coroner concluded that toxicology indicated the deceased was not taking the psychostimulant at the time of death and cited a 2011 study conducted outside the context of police restraint or police-involved deaths that found that prescription psychostimulant use is not associated with higher rates of serious cardiovascular events among young and middle aged adults.⁹¹² They determined that there was no link based on this evidence. Potential associations between the other psychiatric drugs the deceased was taking, including Abilify (apripazole), an anti-psychotic, were not considered.⁹¹³

While the cases described above concerning psychotropic medication and the cases addressing substance use (and especially) cocaine sometimes considered whether these factors contributed to or caused death, by creating “excited delirium” as a distinct medical “syndrome” the issue of police failing to

⁹¹⁰ See Jingjing Zhu et al, “Antipsychotic drugs and sudden cardiac death: A literature review of the challenges in the prediction, management, and future steps” (2019) 281 Psychiatry Research DOI: <<https://doi.org/10.1016/j.psychres.2019.112598>>.

⁹¹¹ Re J.G., Québec, DoD: June 11, 2011 at 2.

⁹¹² The study cited is: Laurel Habel et al, “ADHD medications and risk of serious cardiovascular events in young and middle-aged adults” (2011) 306:24 Journal of the American Medical Association 2673.

⁹¹³ See e.g. Re J.G., Québec, DoD: June 11, 2011, in which the deceased, a 29-year-old man labelled with bipolar disorder and who was taking medication (lithium and Abilify) for that disorder, Wellbutrin (for an unspecified reason), in addition to medication (Vivance) for ADHD, was said to have died of excited delirium. The coroner considered whether medication for ADHD might have had an impact, quoting a study claiming no link between the drug and sudden cardiac death. The potential effect of other psychotropic drugs was not considered, despite research suggesting a link between anti-psychotic medications, like Abilify, and sudden cardiac death and arrhythmia.

consider the health needs of at-risk populations when responding to a crisis is obviated. Excited delirium acts as a sort of causal middle man, allowing inquest and inquiries to debate whether it exists and what may cause it (including substance use or mental illness) without connecting these deaths directly to underlying medical vulnerabilities. Excited delirium may thus obscure actual biological vulnerability to use of force and restraint of persons who experience cardiovascular risk due to psychiatrization or problematic substance use in the framing of these deaths. It can be a means of avoiding the question of whether tasering, striking with a baton, pinning down in prone, hog tying, placing body weight on an individual who is at a heightened risk of sudden cardiovascular death might be negligent and a direct or indirect contributor to or cause of their death. Describing such deaths as caused by “excited delirium” rather than the restraint and application of force to an individual at heightened risk of sudden cardiac death paints these deaths as the result of a medical pathology instead of a failure to accommodate the needs of an expressly vulnerable population known to be over-represented in police use of force encounters.

6.8 The Inevitability or Likelihood of Fatality in Excited Delirium: “Ticking Time Bombs” and “Life Threatening Conditions”

Like many other types of police-involved deaths of persons perceived to have mental health impairments, excited delirium deaths were often depicted as an inevitability brought about by the actions of the deceased. For example, in one inquest into two separate deaths of individuals, the 39-year-old woman and 45-year-old man were described as using cocaine prior to dying of excited delirium in Winnipeg. As Judge Glenn D. Joyal wrote:

According to the medical evidence (which I will review later in greater detail), while the causes or inciting factors which lead to a state of excitable delirium are not mysterious, its occurrence or manifestation remains nonetheless rare. Once an individual has reached this point of physiological agitation and trauma (as a result of cocaine “binging” over an intense period of time) he or she is nothing less than a “ticking time bomb”. Once in a state of excitable delirium, individuals pose an immediate threat to both themselves and others. In light of the complicated

diagnostic, medical and public safety issues surrounding each case, the presentation of such emergencies pose what can only be characterized as one of the most difficult challenges facing police officers, first responders and paramedics. [...] Indeed, the tragedy of both deaths is heightened by the sad reality that by the time emergency intervention was required, the cocaine ingestion by both individuals was such that the bomb that is “excitable delirium” had already started to tick. Based on the evidence at this inquest nothing that anyone did or did not do to [L.L.D.] and [A.R.G.] triggered that bomb. The helplessness that surrounds that proposition not only defines the tone of the evidence, but regrettably, it also limits the extent to which this court is able to make constructive recommendations to avoid such deaths in the future.⁹¹⁴

The description of these individuals as a ticking time bomb or a deadly disaster waiting to happen removes any possibility that police actions contributed to these deaths.

In another case, that of a 44-year-old man who was described as experiencing “psychosis” at the time of his death, a pathologist’s testimony suggested:

She also stated that chronic cocaine users are more susceptible to experiencing excited delirium, a recognized medical condition or state that has caused death in many reported cases with and without the presence of cocaine acting on the system. It was called a ‘fatal disease.’⁹¹⁵

As discussed in chapter 1, while there are claims in some “excited delirium” studies that this phenomenon causes death in the absence of police intervention, these claims tend to be made anecdotally in individual case reports⁹¹⁶ or are mentioned absent any cited studies.⁹¹⁷ Few studies have examined non-lethal cases and one literature review found that the term “agitated delirium” tends to be

⁹¹⁴ Re L.L.D., Manitoba, DoD: February 23, 2002 and Re A.R.G., Manitoba, DoD: February 10, 2002 at 3, 5.

⁹¹⁵ Re R.W.B., British Columbia, DoD: June 23, 2004 at 8.

⁹¹⁶ See e.g. Theodore Plush, Walter Shakespeare, and Dorian Jacobs, “Cocaine-induced Agitated Delirium: A Case Report and Review” (2015) 30:1 *Journal of Intensive Care Medicine* 49; Thomas Scraggs et al., “Prehospital Ketamine is a Safe and Effective Treatment for Excited Delirium in a Community Hospital Based EMS System” (2016) 31:5 *Prehospital and Disaster* 563.

⁹¹⁷ See, for example, Charles Wetli, Deborah Mash and Steven Karch, “Cocaine-Associated Agitated Delirium and the Neuroleptic Malignant Syndrome,” (1996) 14:4 *American Journal of Emergency Medicine* 425 at 425, where the authors reference nothing for the assertion that “[...] it is important to note that many victims of this disorder [agitated delirium] die suddenly and without the application of any law enforcement restraining techniques.” The authors later on the same page state: “Approximately 39% of the victims of excited delirium deaths in Miami occurred in police custody” citing “Mash, Rutten-ber, et al, personal communication, August 1995” (i.e. not a published study).

used in studies involving non-lethal cases, rather than “excited delirium”.⁹¹⁸ Suggesting, in the absence of a coherent biomedical explanation of death that “excited delirium” is a lethal condition or inevitably leads to death is a means of individualizing these deaths, narrating them as the product of individual pathology rather than negligence or discrimination in police use of force.

6.9 Excited Delirium: The Erasure of Police Use of Force and Restraint, and the Rejection of De-escalation

When cases are described as “excited delirium” it suggests a medical condition led to the death. However, fatalities associated with this “syndrome”, which almost invariably takes place in contexts of police use of force or restraint, should arguably be understood at least in part as a reaction to those conditions rather than as the result of an underlying medical pathology. Among the cases in which “excited delirium” was a significant theory presented to explain the death, in all cases but one (98%) restraint and/or use of force were described as having been employed.⁹¹⁹ The significant tendency of excited delirium cases to be associated with use of force and restraint aligns with prior research that suggests that in published cases deemed “excited delirium,” only 1.7% of contained no use of force or restraint.⁹²⁰ In the one case not involving restraint or use of force in the current study, the deceased was voluntarily placed in the back of a police cruiser fearing “someone was ‘after him’”⁹²¹ and he was ultimately determined to have died of a cocaine overdose, having experienced several seizures in the car and at the police station. “Excited delirium” was identified by one of the attending police officers and it was described as being one among “other significant conditions contributing to death”.⁹²² The fact that

⁹¹⁸ Ellen Strömmer et al, “The role of restraint in fatal excited delirium: a research synthesis and pooled analysis” (2020) 16 Forensic Science, Medicine, and Pathology 680 [Strömmer].

⁹¹⁹ In 54 of the 56 excited delirium cases use of force and/or restraint was explicitly described. However, in one case it could be inferred because the coroner noted: “The three police officers testified that they used standard techniques to arrest the deceased who resisted arrest” and two use of force experts were described as having testified, suggesting a high likelihood of use of force. See *Re W.S.D., Ontario*, DoD: November 15, 2003.

⁹²⁰ See Strömmer, *supra* note 918.

⁹²¹ *Re C.K.T., British Columbia*, DoD: August 5, 2007 at 3.

⁹²² *Re C.K.T., British Columbia*, DoD: August 5, 2007 at 1.

symptoms of cocaine overdose overlap with descriptors of “excited delirium” undermines the validity of applying this term to cases where blood toxicology reveals that levels were lethal. In these cases, it becomes at best an unnecessary synonym for a perception of cocaine-induced psychosis during an overdose and at worst a means of obscuring questions about use of force and restraint against those in medical crisis.

Significantly, there were no cases that were not consistent with overdose (i.e. toxicology did not show lethal levels of a substance) and in which excited delirium was considered a possible cause or contributor to death, where the deceased was described as having lost consciousness prior to the application of police used force or restraint. In other words, while excited delirium is said to be a fatal condition in its own right and apart from the use of restraint, none of these cases involved a death where police responded and engaged with a deceased who suffered an “excited delirium” death, or loss of consciousness that could not be explained by overdose. One might expect at least one case where the police responded and attempted to, for example, verbally de-escalate the situation, but the deceased lost consciousness before anyone laid hands on them if restraint and force actually have no role to play in causing these deaths. It is, of course, impossible to determine with the current dataset if such cases have ever taken place, since they may not have been subject to an inquest or inquiry, yet no cases meeting the typically described “excited delirium” characteristics involving no use of force or restraint come up when one considers the “sudden in custody deaths” and “natural” deaths either, many of which describe sudden deaths of distinctly non-agitated people in police custody, sometimes due to traumas and falls, or medical conditions like heart disease or pneumonia. This seems to undermine the theory put forth in some literature on excited delirium that such deaths occur regularly absent restraint. Or, in contrast, it could be that police did not adequately try to de-escalate such cases verbally and instead resorted to use of force and restraint almost immediately when confronted with individuals perceived to be psychotic, which narrowed the window in which someone could experience a naturally occurring excited delirium

death in their presence. The current state of Canadian police-involved death data collection makes it impossible to answer these sorts of questions, but the lack of naturally occurring excited delirium deaths in police presence that have been subject to coroner and medical examiner reports undermines claims that this condition kills absent restraint.

Not only was force used in many excited delirium cases studied, but several involved descriptions of significant use of force and restraint prior to death, including 35 cases (62.5%) describing a “struggle,” “physical altercation” or other synonyms, 16 cases where a taser was used (28.5%) including 5 cases in which a taser was deployed multiple times (9%); 16 cases where pepper spray was used (28%); 14 cases where the deceased had both their hands and feet bound or were hog tied (25%); 19 cases described the deceased as handcuffed in prone position (34%); in 9 cases a baton was used (16%), 8 cases described body weight exerted on the deceased (14%) (often from multiple officers); 7 cases described kicks (12.5%); 4 cases describing punches and strikes (7%), 3 cases described use of a spit hood or mask (5%), and 3 cases described knee strikes (5%) prior to death. Most cases involved several forms of force and/or restraint and few cases involved little use of force or restraint beyond handcuffing. Additionally, not all cases contained detailed descriptions of the types of force employed.

As described above, frequently use of force was frequently depicted as necessary and unavoidable in excited delirium cases, as a means of ensuring immediate medical treatment. In some cases, expert testimony negated the possibility that force or restraint could contribute to these deaths. For example, in one case the testimony of Dr. Andrews (no first name provided) the Chief Medical Examiner who had performed the autopsy on a man who died of “excited delirium as a consequence of cocaine toxicity”, was described in the following way:

Dr. Andrews informed the court that although in the past Excited Delirium [sic] Syndrome has been associated with police restraint methods, physical force methods, and pepper spray method, each has been discounted as a causal factor in connection with Excited Delirium.

Similarly, in the opinion of Dr. Andrews the Taser should be discounted as a relevant factor in the death of G.B.⁹²³

This opinion rejects the possibility that restraint and force can contribute to excited delirium (which is no longer an accurate description of the medical literature on this phenomenon if it ever was) and was proffered in a case involving significant use of force and restraint. In this case, the police were called about a “suspicious person complaint specifically a possible break and enter and an unknown male who was acting strangely.”⁹²⁴ At least five police officers responded to the call and initially struggled to restrain the deceased who was described as “on his back with a fist clenched making grunting and gurgling sounds.”⁹²⁵ The deceased was described as being kicked (eliciting no reaction from him), subject to “knee strikes”, “quick stuns” (not defined but possibly a type of hit), a punch to the face, an “unsuccessful” taser deployment in probe mode and an “extended physical struggle with police” before he was handcuffed. It was noted that:

It took four police officers administering various police actions and commands to bring [G.B.] into position of control. In fact, the body weight of four persons were on [G.B.] at the point of cuffing. At this time, that is the time of cuffing, [G.B.] was grunting, snorting, and breathing heavily.⁹²⁶

While the deceased was in prone position when being handcuffed, he was placed on his side in “recovery position” once handcuffed.⁹²⁷ Clearly, in this case, the level of force and restraint used was significant and could cause strain and stress even for a healthy individual. In another case, a 27-year-old man, described prior to police arrival at the motel where the incident took place as “acting in a bizarre manner, screaming incoherently, repeatedly opening and closing the door in his room and seeming to be in great distress,”⁹²⁸ was said to have died of “cocaine-induced excited delirium during restraint.”⁹²⁹ The

⁹²³ Re G.B., Alberta, DoD: November 1, 2008 at 3.

⁹²⁴ *Ibid* at 2.

⁹²⁵ *Ibid* at 2.

⁹²⁶ *Ibid* at 2.

⁹²⁷ *Ibid* at 2.

⁹²⁸ Re T.R., Alberta, DoD: September 4, 2002 at 2.

⁹²⁹ *Ibid* at 1.

deceased was “struggling vigorously”⁹³⁰ with police officers prior to his death, who used an “arm bar takedown”⁹³¹ and handcuffed the deceased in prone position prior to his death. The Assistant Chief Medical Examiner who conducted the autopsy was described as being of the opinion that “the occurrence of excited delirium in [T.R.] had nothing to do with his restraint by police. [...] Excitation or excited delirium is a life-threatening condition requiring prompt medical attention.”⁹³²

While it was rare for judges, coroners or medical examiners to attribute police use of force as a causal factor in the death, remarks to this effect were made in a few cases.⁹³³ For example, in one case:

Dr. Hall did agree that the risk of death can increase with physiologic stress such as physical encounter with police and she did agree that attempts are required to minimize the physical stress experienced by these patients who are in the course of being taken into police custody while they are experiencing the metabolic changes brought about by Excited Delirium.⁹³⁴

This description subsumes restraint and force as an added risk factor within excited delirium, rather than as a cause or contributor to death. In another case, the coroner wrote:

Toutefois, les circonstances ayant précédé le décès, soit le comportement bizarre, paranoïaque, agressif et violent sans raison apparente, de même que la sudation profuse, les propos incohérents, rappellent l'état de « delirium agité » chez un homme sous l'influence de la cocaïne. Il est connu qu'au cours de cet état de « delirium agité », la personne peut sécréter beaucoup de catecholamines. Lors de la mise sous contention, donc lorsque immobilisé, il y aurait ainsi une surcharge d'hormones adrénérgiques circulantes dans le sang qui auraient une action directe sur le cœur déjà sensibilisé par la cocaïne. Ceci aurait tendance à provoquer des arythmies cardiaques fatales.⁹³⁵ [Translation by author: However, the circumstances preceding the death, bizarre behaviour, paranoia, aggression and violence without apparent reason, in addition to profuse sweating, incoherent speech, suggests the state of “excited delirium” in a man under the influence of cocaine. It’s known that during this state of “excited delirium,” the person may secrete a lot of catecholamines. When they are detained and immobilized, there will

⁹³⁰ T.R., Alberta, DoD: September 4, 2002 at 2.

⁹³¹ *Ibid* at 3.

⁹³² *Ibid*.

⁹³³ See Re M.B., Québec, DoD: June 28, 2003 at 8-9;

⁹³⁴ Re G.B., Alberta, DoD: November 2, 2008 at 5.

⁹³⁵ Re M.M., Québec, DoD: September 4, 2002 at 1.

consequently be a surge of adrenergic hormones circulating in the blood that directly impact the heart which is already sensitized by cocaine. This would tend to cause fatal cardiac arrhythmias.]

Here, detention and immobilization (a.k.a. restraint) are built into the explanation of “excited delirium,” subsuming it once again within a medical description of the death. The resulting cause of death: “Arythmies cardiaques létales survenus lors d’une mise en contention au cours d’un épisode de « delirium agité » post-consommation de cocaïne.”⁹³⁶ [Translation by author: Lethal cardiac arrhythmias during detention during an episode of “excited delirium” following cocaine consumption.”] depicts detention as a description of the circumstance, rather than a potential underlying cause or contributor to the death. In 14 cases (25%) the cause of death included mention of “restraint,” though in 5 cases this was similarly termed “during restraint,” and in only 9 cases (16% of excited delirium cases) was the cause of death described as “associated with,” or “as a consequence of” restraint, suggesting some causality. Additionally, 2 cases (3.5%) mentioned “struggle” among the causes or contributing factors to the deaths. Despite these occasional acknowledgements, the narratives in excited delirium cases tended to focus heavily on medical evidence and questions of whether or not the case was “excited delirium” or descriptions of biomedical theories of the causality of excited delirium deaths as opposed to questions of whether the force options used or the restraints applied might have contributed to the death and whether any of these weapons, tactics and approaches have been studied for their effects on at risk populations.

6.10 Recommendations to Address Excited Delirium: Research and Training on Excited Delirium Rather Than Force and Restraint

The most common recommendations in excited delirium cases suggested education about and training for police, paramedics and dispatch to recognize the signs and symptoms of excited delirium.

⁹³⁶ *Ibid* at 1.

Suggestions for excited delirium education and training were found in nearly all excited delirium cases that contained recommendations. These recommendations often focused on training police to identify those with excited delirium through the recognition of “symptoms”. For example:

In order to assess situations of drug-induced excited delirium more quickly, mandatory training of all peace officers on the medical symptoms and complications of excited delirium should occur. Special attention should be given to the medical risks the victim could experience.⁹³⁷

Establish scenario based training respecting recognition of the signs and symptoms of suspected agitated delirium situations and the appropriate use of force required to ensure safety of the patient, first responders, and bystanders.⁹³⁸

Additionally, given the scientific uncertainty surrounding this syndrome, recommendations for police forces and medical personnel to engage in more research and data collection to determine best practices were frequently made.

The Canadian Institute of Health Research should support research into excited delirium, restraint in prone position, and related conditions.⁹³⁹

If possible, attempts should be made to ensure data involving suspected ExD be forwarded to experts for compilation and analysis in order to gain more knowledge concerning ExD and its causes and effects.

Rationale:

ExD study is, comparatively, in its infancy. Any information that would allow experts and researchers to gain greater insight into it would potentially be of significant benefit to front line service providers.⁹⁴⁰

Some recommendations for additional research suggested systems for data collection on excited delirium and use of force with consistent terminology be applied on a provincial⁹⁴¹ or national scale.⁹⁴²

⁹³⁷ Re F.W.C.R., British Columbia, DoD: February 6, 2005.

⁹³⁸ Re J.B.F., British Columbia, DoD: July 9, 2010.

⁹³⁹ Re N.J., Ontario, DoD: May 12, 2007.

⁹⁴⁰ Re G.W.P., Alberta, DoD: May 6, 2009.

⁹⁴¹ Re G.B., Alberta, DoD: November 2, 2008.

⁹⁴² *Ibid.*

Training and research recommendations that focused on excited delirium generally treated it as a medical condition and suggested research was needed to improve patient outcomes. The focus placed on medical treatment was further reinforced by recommendations suggesting specific dispatch protocols or procedures, whereby police officers who encounter someone believed to have excited delirium should order an ambulance to come to the scene immediately.⁹⁴³ In some cases it was mentioned that the ambulance should be prepared to administer “chemical restraint” (a.k.a. sedatives) on scene as a treatment for the delirium,⁹⁴⁴ a practice that was attempted in four excited delirium cases in my dataset.⁹⁴⁵

Few recommendations identified concerns with the level of force employed by police, the use of weapons in these cases, or the use of restraints. However, some cases contained recommendations that addressed “hog tying” or “prone”⁹⁴⁶ positioning suggesting these factors were considered possible contributors to death.⁹⁴⁷ In a few cases specific types of restraints, such as “strap restraints”⁹⁴⁸ were recommended for use. One case recommended general training on “the risks associated with the physical restraint of persons experiencing an episode of excited delirium”⁹⁴⁹ and another recommended “increased research and training in Excited Delirium and restraint: including, the advisability of using the Taser in drive stun mode and pepper spray.”⁹⁵⁰

Ultimately, excited delirium cases tended to seek additional research and training on this condition while few questioned the use of restraint and force. The recommendations in excited delirium

⁹⁴³ See e.g. Re J.I.R., British Columbia, DoD: July 12, 2009; Re B.S.K., British Columbia, DoD: June 22, 2010; Re K.G., New Brunswick, DoD: May 5, 2005; Re J.K., Ontario, DoD: July 17, 2004.

⁹⁴⁴ See e.g. Re M.B., Québec, DoD: June 28, 2003 at 8; Re P.L., Ontario, DoD: May 14, 2004; Re S.M., Ontario, June 5, 2005.

⁹⁴⁵ See Re R.A.P., Alberta, DoD: March 23, 2003; Re S.M., Ontario, DoD: June 5, 2005; Re L.S., Ontario, DoD: August 3, 2010; Re T.S.R., Alberta, DoD: September 4, 2002.

⁹⁴⁶ See e.g. Re P.S., Manitoba, DoD: September 2, 2004; Re S.M., Ontario, DoD: June 5, 2005.

⁹⁴⁷ Some literature on sudden in custody deaths suggests such a connection as discussed in chapter 1.

⁹⁴⁸ Re R.A., British Columbia, DoD: May 1, 2004.

⁹⁴⁹ Re N.B., Ontario, DoD: June 23, 2002.

⁹⁵⁰ Re J.K., Ontario, DoD: July 17, 2004.

cases evince the power this “syndrome” has to erase questions about the safety and appropriateness of use of force and restraint against persons perceived to have a mental health impairment and particularly those perceived to experience psychosis.

6.11 Conclusion

As a form of police-involved death that almost exclusively befalls those perceived to experience psychosis or substance use, addressing “excited delirium” deaths may be particularly important when seeking to reduce police-involved fatalities of people who experience mental health disability. The fact that many coroner and medical examiner narratives explored “excited delirium” along with “sudden in custody deaths” or positional/restraint asphyxia” as causes or contributors to deaths, suggests this syndrome overlaps with these other attempts to explain sudden deaths of relatively young people faced with police use of force.

A review of the narratives in coroner and medical examiner reports shows that “excited delirium” was employed to medicalize police-involved deaths, suggesting a medical pathology was responsible and shielding police use of force and restraint from scrutiny. As discussed above, while only “excited delirium” cases with potentially lethal blood toxicology levels involved deaths without force or restraint, coroners and medical examiners frequently discounted the possibility that police actions caused or contributed to these deaths. Recommendations in these cases tended to focus on a need to study “excited delirium,” rather than a need to study whether police use of force and restraint techniques may have disproportionately lethal impacts on those who use substances and people who experience psychosis.

Chapter 7: Inquest and Inquiry Recommendations Pertaining to Police-Involved Deaths and Mental Health Disability

7.1 Introduction

When considering all cases in the mental health set, some recommendations were common across several types of deaths and addressed the mental health of the deceased. Some of the most common such recommendations pertinent to mental health disability included:

1. Improving, increasing, restructuring or requiring mental health training for police;
2. Provision of de-escalation, crisis intervention, or conflict resolution training for police;
3. Establishing or ensuring the availability of mobile crisis teams that include both mental health professionals and police;
4. Improving or expanding mental health information keeping by police and information sharing between medical service providers, social and community services, and policing;
5. Voluntary mental health and social services provision; and
6. Ensuring psychiatric medical compliance through continuum of care systems, surveillance, legal coercion, and involuntary service provision.

These recommendations will be discussed below.

7.1 Mental Health Training for Police

Recommendations suggesting increased mental health training for police or a review of training to evaluate the sufficiency of mental health training were reasonably common, recommended in 25 cases of the 144 cases in the mental health set that contained recommendations. The recommendations

differed somewhat between cases, with some reports suggesting this training should be provided by mental health professionals,⁹⁵¹ while in other cases it was suggested that it should involve presentations by “consumer survivors” or other descriptions of those who identify as having a mental health “condition” or “illness.”⁹⁵² In some cases, training by those with lived experience and mental health professionals was recommended.⁹⁵³ Furthermore, some of these recommendations suggested better or lengthier training for cadets or recruits,⁹⁵⁴ whereas others suggested this training should be ongoing.⁹⁵⁵ While many cases did not specify exactly what the nature of this training would be, where it was specified the recommendation tended to be geared towards recognizing the signs and symptoms of “mental illness” or techniques for dealing with those so labelled, sometimes referencing crisis intervention or de-escalation within these descriptions.⁹⁵⁶ For example, in one case the coroner’s jury recommended “increased mandatory training for police officers interacting with persons suffering from mental health issues with emphasis on effective de-escalation tactics.”⁹⁵⁷ In another case, the coroner’s jury recommended that the RCMP:

Develop and implement ongoing or periodic refresher training for responding officers to identify whether or not a subject is suffering from a medical or psychological condition, and consider the implementation of a policy making it mandatory for officers directly involved with an individual to make this assessment⁹⁵⁸

⁹⁵¹ See e.g. *Re M.C.O., Alberta, Date of Death (“DoD”)*: February 28, 2004; *Re B.R.D., Ontario, DoD*: February 16, 2008.

⁹⁵² *Re O.V., Ontario, DoD*: August 9, 2000 at 8; *Re R.J.-D., Re S.K., and Re M.E., Ontario, Dates of Death*: August 29, 2010; October 7, 2011; February 3, 2012 at 13; *Re M.S.M., Ontario, DoD*: June 7, 2013 at 6.

⁹⁵³ See e.g. *Re O.C.-R., Ontario, DoD*: June 13, 2004.

⁹⁵⁴ See e.g. *Re M.C., British Columbia, DoD*: July 11, 2004;

⁹⁵⁵ See e.g. *Re C.J.L., Alberta, DoD*: July 18, 2010; *Re M.D., Ontario, DoD*: March 7, 2006 at 6; *Re K.P., Ontario DoD*: July 24, 2011 at 3.

⁹⁵⁶ See e.g. *Re C.J.L., Alberta, DoD*: July 18, 2010; *Re M.H.R., Ontario, DoD*: May 2, 2012 at 4; *Re D.K.P., Saskatchewan, DoD*: November 13, 2006.

⁹⁵⁷ *Re P.G.B., British Columbia, DoD*: August 13, 2007 at 4.

⁹⁵⁸ *Re C.L.K., British Columbia, DoD*: July 2, 2011 at 5.

In some cases, recommendations for more mental health training were specific to particular psychiatric labels. For example, in one case the coroner's jury recommended that:

RCMP have training/instruction in relation to how to deal with individuals who are exhibiting symptoms of "excited delirium", bi-polar disorder, or any disorder/spectrum similar to the above.⁹⁵⁹

Descriptions like this suggest that there was a belief among those proffering recommendations that psychiatrized individuals must be "dealt with" differently from others, including others in crisis, which suggests that police responses should be tailored to perceived psychiatric profiles. Sometimes such reasoning was clear, such as in a case where it was suggested that there be mandatory training on "cocaine associated confusional state" and the coroner noted that "individuals displaying such behaviours are oftentimes in need of immediate medical attention thus an ability to recognize such symptoms swiftly may assist in preventing a tragic outcome."⁹⁶⁰

It was often not made clear how the identification of "mental illness" would assist police in their work. In fact, in one inquest the coroner's jury suggested a shift away from the medical model and attempts by police to try to psychiatrically label those they interact with:

Modify the OPC [Ontario Police College] EDP [emotionally disturbed person] and de-escalation training model and materials, so that less attention is paid to specific diagnosis and the medical model. This should include input from consumer/survivors.⁹⁶¹

However, it was unclear whether the crisis intervention or de-escalation techniques to be taught in this context were specific to those labelled as "mentally ill" or "emotionally disturbed."

Recommendations generally did not include any requirement for the evaluation of the efficacy of mental health training in preventing injury or death, although one case did recommend that Ontario's

⁹⁵⁹ Re J.D.L., British Columbia, DoD: May 19, 2006 at 7.

⁹⁶⁰ Re C.L.K., British Columbia, DoD: July 2, 2011 at 5.

⁹⁶¹ Re R.J.-D., Re S.K., and Re M.E., Ontario, Dates of Death: August 29, 2010; October 7, 2011; February 3, 2012 at 18.

Ministry of Community Safety and Correctional Services and the Ontario Police College should “fund and/or perform research into the effective training of police officers in regard to interaction with emotionally disturbed persons (EDP).⁹⁶² Another recommended that the Centre for Addiction and Mental Health and the Mental Health Commission of Canada:

Explore the feasibility and request proposals for research projects related to evidence based best practice guidelines for police interactions with persons with mental illness⁹⁶³

This recommendation suggests that questions about the efficacy of police practices concerning this population (emotionally disturbed persons) were raised in at least one case. Additionally, in some cases commentary about the nature of mental health training provided to police officers raised concerns. For example, in one Ontario case the coroner noted that:

Police training, to some extent, has taught that EDPs [emotionally disturbed persons] can at times be dangerous and unpredictable, leading to a state of wariness and heightened caution on the part of officers when interacting with EDPs.⁹⁶⁴

If police training reinforces beliefs about dangerousness, risk, and violence that are already commonly associated with mental health disability, it is possible that such training will increase rather than decrease police violence towards this population by portraying perceived mental health impairment as a risk to officer safety or the safety of the public. Indeed, commentary in the reports reviewed evinced mixed beliefs among police witnesses about the nature of mental health disability and its import for policing, with some witnesses suggesting “mental health issues” are themselves a sign of increased risk and suggesting that no change in police practices is necessary to accommodate difference in such cases. For example, in one case involving the shooting death of a 39-year-old man who was described as “suffering

⁹⁶² Re M.H.R., Ontario, DoD: May 2, 2012 at 4.

⁹⁶³ Re E.T.J., Ontario, DoD: August 25, 2010 at 15.

⁹⁶⁴ Re O.V., Ontario, DoD: August 9, 2000 at 10.

from depression, anxiety, and mood swings,”⁹⁶⁵ Inspector Frank Shields of the Calgary Emergency

Response Team’s testimony was described:

When asked about the importance of a mental health issue in an incident and whether anything is done differently when responding to such cases, Inspector Shields stated that the mental health aspect may elevate the risk for all involved, but that nothing would necessarily be done differently, because a person with a mental health issue is at least as dangerous as someone who is not.⁹⁶⁶

If mental health is understood as a safety risk factor in accordance with the above logic, rather than a cue to employ some form of disability accommodation such training may simply increase officer perceptions of risk without causing a change in the approach police employ. Similar logic was described in a coroner’s report into three shooting deaths of individuals perceived to experience mental health impairment. The coroner in that report wrote:

Once a police officer or a bystander is at serious risk of actual harm from a person armed with an edged weapon, the police officer is trained to respond to the person’s *behaviour* (the potential for imminent use of the edged weapon); rather than the person’s *condition* (e.g. whether or not the person’s threatening behaviour is due to mental illness). There was mixed evidence about the extent, if any, to which police should (or even can, given how quickly events unfold, and that police are not health professionals) be trained to assess and take into account the presence of mental illness when responding to a person with an edged weapon. Once an attacker is close to the officer and wielding an edged weapon, undue delay in use of force by police can result in increased risk of preventable death or serious harm to the officer or others. The jury recommended taking the presence of mental illness into account, but only if the safety of officers and bystanders is not compromised.⁹⁶⁷ [emphasis from original]

As this quote suggests, teaching police about “mental illness” may be ineffective when it does not translate into a specific change in policies or practices. Suggestions that it is impossible to consider perceived disability given the speed and urgency of crisis situations, particularly those involving weapons,

⁹⁶⁵ Re C.J.L., Alberta, DoD: July 18, 2010 at 5.

⁹⁶⁶ *Ibid* at 19.

⁹⁶⁷ Re R.J.-D., Re S.K., and Re M.E., Ontario, Dates of Death: August 29, 2010; October 7, 2011; February 3, 2012 at 16.

negates to some extent the purpose of mental health training which is presumably geared at changing police behaviours and approaches to better accommodate difference.

Ultimately, the frequency of recommendations for improved mental health training suggests a perception that deaths can be avoided through recognition of the “symptoms of mental illness” and the application of techniques that are specifically adapted for responding to those perceived to be in a mental or emotional crisis. However, there is a lack of evidence-based training programs proven to decrease use of force or police-involved deaths of persons who experience mental health disability and training that teaches officer “mental health symptoms” in the context of risk may result in this population being more effectively targeted by use of force under the guise of officer protection. Furthermore, training on mental health absent clear guidance on how to accommodate mental difference through changes to police behaviour is unlikely to be effective in preventing violence, since ultimately psychiatric labels carry heavy stigma in Canadian society and reinforcing this labelling could produce greater bias.

7.2 De-escalation, Crisis Intervention and Conflict Resolution Training for Police

In addition to training for police specific to mental health, another common type of recommendations was those geared towards de-escalation, crisis intervention or conflict resolution training (15 cases), suggesting communication skills were considered an important means of preventing future deaths. Additionally, in two cases in Québec, recommendations were made to engage in research to determine best practices and strategies for crisis intervention.⁹⁶⁸ For example, in one inquest addressing the deaths of three individuals in the mental health set, the coroner’s jury suggested the need to:

⁹⁶⁸ See: Re F.M., Québec, DoD: January 6, 2012; Re M.H., Québec, DoD: June 7, 2011.

Maximize emphasis on verbal de-escalation techniques in all aspects of police training at the Ontario Police College, at the annual in-service training program provided at Toronto Police College and at the TPS [Toronto Police Service] divisional level.⁹⁶⁹

Several recommendations specifically addressed a perceived need for Crisis Intervention Team (CIT) training, a specific model for police training discussed in chapter 1 that has been widely implemented in the United States and to some extent in Canada. Several recommendations suggested mandatory force-wide training in crisis intervention for all officers, or all front-line officers,⁹⁷⁰ or expanding this training beyond specialized mental health response units.⁹⁷¹

These recommendations suggested a belief that additional training in de-escalation, conflict resolution and crisis intervention is necessary for all police officers, and a tacit recognition that in depth communication skills and understandings of how to defuse a situation cannot be left up to specialized units like mobile crisis teams, emergency response units, and the like, since these skills may be necessary at any time in the course of police work. Indeed, the majority of cases in the mental health set did not involve a specialized response team, suggesting systems that limit in depth de-escalation or conflict resolution training to these units would be ineffective in significantly reducing police-involved deaths, if indeed these training systems achieve results. Unfortunately, none of the recommendations sought outcome evaluations of these training programs, which would be important in evaluating their utility in policing, since de-escalation programs and strategies vary widely and little research exists suggesting the efficacy of these programs at changing police behaviours or avoiding use of force.

Furthermore, with respect to de-escalation, some reports contained police witness testimony or descriptions of policing policies that suggested use of force training and practices may contradict or

⁹⁶⁹ Re R.J.-D., Re S.K., and Re M.E., Ontario, Dates of Death: August 29, 2010; October 7, 2011; February 3, 2012 at 13.

⁹⁷⁰ See, for example: Re M.V.H., British Columbia, DoD: March 20, 2009; Re B.J.Z., British Columbia, DoD: August 15, 2010; Re O.V.O., Ontario, DoD: July 25, 2007.

⁹⁷¹ Re R.J.-D., Re S.K., and Re M.E., Ontario, Dates of Death: August 29, 2010; October 7, 2011; February 3, 2012 at 17.

counteract de-escalation. For example, the judge conducting one fatality inquiry described the “one plus one” doctrine:

Officers are trained not to respond at the same level of violence but rather one level higher. For example, if a person is displaying active aggression, putting his fists up in a combative stance, officers are not trained to put their fists up in response. They are trained to go one level higher and respond with use of an intermediate weapon. Factors an officer might consider in either going levels higher, or not going even to the person’s level, could include age, size and skill level of the person, as well as how many officers are present.⁹⁷²

The one plus one doctrine, is in essence training officers to escalate a situation towards rather than away from violence. While this doctrine speaks to consideration of the subject, it also affords police with a justification for pre-emptive and disproportionate use of violence provided they can describe the subject as someone who looked sufficiently threatening. Where police are trained on de-escalation strategies that directly conflict with their use of force training, officers are unlikely to be able to de-escalate effectively. In such situations there is a lack of accountability for excessive or unnecessary use of force, since, no matter how police behave (in accordance with use of force training or with de-escalation training), they would be complying with their training. It gives police the option to ignore de-escalation altogether.

7.3 Mobile Crisis Units and the Involvement of Mental Health Professionals in Police Responses

The implementation of mobile crisis units where a police officer is partnered with a mental health or social work professional to respond to crisis situations,⁹⁷³ or the expansion of existing services geographically or temporally to ensure 24/7 coverage in all regions⁹⁷⁴ were the focus of

⁹⁷² Re Z.R.B., Manitoba, DoD: December 31, 2005 at 10.

⁹⁷³ See e.g. Re M.J.W., British Columbia, DoD: January 10, 2010 p. 4; Re G.J.M., British Columbia, DoD: September 10, 2012 at 9; Re M.H., Québec, DoD: June 7, 2011 at 10; Re F.M., Québec, DoD: January 6, 2012 at 7.

⁹⁷⁴ See e.g. Re M.C., British Columbia, DoD: July 11, 2004 at 12; Re P.G.B., British Columbia, DoD: August 13, 2007; Re E.M., Ontario, DoD: February 6, 2003 at 4-5; Re O. C.-R., Ontario, DoD: June 13, 2004; Re E.T.J., Ontario, DoD: August 25, 2010; Re R.J.-D., Re S.K., and Re M.E., Ontario, Dates of Death: August 29, 2010; October 7, 2011; February 3, 2012 at 22.

recommendations in 15 cases. Additionally, in one inquest into three deaths in the mental health set the coroner's jury suggested the formation of an advisory committee including "mental health professionals" and "consumer/survivors" to review and consider the preferred model of mobile crisis response services, the hours of delivery, policy and procedures to be followed, dispatch procedures and deployment, partnerships (e.g. with services, hospitals, community, etc.) and the goals and performance of such programs.⁹⁷⁵ As discussed in chapter 1, mobile crisis units are one of the most commonly used mental health-specific policing programs in Canada, though there is no evidence to suggest they reduce use of force. Indeed, in one Québec inquest the stated purpose of implementation of such units was to avoid the criminalization of people with mental health problems,⁹⁷⁶ a goal which would not necessarily impact use of force against this population.

With respect to recommendations pertaining to mobile crisis units, some Canadian police services now provide these services 24 hours a day and 7 days a week, though in many cases they remain available only during certain hours. There is reason to be skeptical that even if these types of services are made more available they will be effective in preventing use of force deaths or injuries of those who experience mental health disability. As discussed in chapter 1, there is a dearth of evidence about the effectiveness of such units to de-escalate situations and avoid use of force. Another significant problem with these units is that in many cases they are "secondary response units" and are only dispatched to calls in which there is no risk of violence and no weapons, which is suggestive that these calls reflect situations that were already de-escalated or that did not require de-escalation. For example, in a recent Special Investigations Unit report from 2020 pertaining to a police shooting death in Brampton, Ontario of a Black man labelled as "schizophrenic", the COAST (Community Outreach Assessment Support Team), a

⁹⁷⁵ Re R.J.-D., Re S.K., and Re M.E., Ontario, Dates of Death: August 29, 2010; October 7, 2011; February 3, 2012 at 21.

⁹⁷⁶ Re M.H., Québec, DoD: June 7, 2011 at 10.

partnership between the Canadian Mental Health Association and the Peel Regional Police was referenced. COAST involves a mental health professional and plainclothes police officer who respond to calls “that may involve an emotionally disturbed person or someone with a mental illness or disorder.”⁹⁷⁷ In this case the determination of whether to dispatch a call to COAST was described as being determined by the following criteria:

- The call involved someone 16 years of age and over with a mental illness;
- The call is not of an emergent nature;
- There are no weapons involved in the call; and
- The situation is calm.⁹⁷⁸

As these criteria demonstrate, secondary response mobile crisis units are not in fact very useful tools for de-escalation because their use is often premised on the situation already being “calm,” “weaponless” and non-dynamic or of a known context (which one would assume is what is meant by “not of an emergent nature”). In other words, these units are not being used to respond to individuals who are aggressive, agitated, and may have access to or be holding sharp objects or other “weapons,” or situations where these criteria cannot be determined. So, while such services are said to provide “crisis intervention,”⁹⁷⁹ they are not being dispatched to many of the types of crisis situations that result in police-involved deaths. Similarly, the Toronto Police Service’s Mobile Crisis Intervention Team (MCIT) is described as a program that “partners a mental health nurse and specially trained police officer to

⁹⁷⁷ SIU Director’s Report – Case #20-OFD-075, online:
<https://www.siu.on.ca/en/directors_report_details.php?drid=1010>.

⁹⁷⁸ SIU Director’s Report – Case #20-OFD-075, online:
<https://www.siu.on.ca/en/directors_report_details.php?drid=1010>.

⁹⁷⁹ See Government of Ontario, “Health Care Options – Crisis Outreach and Support Team (COAST) – Peel,” (Toronto: Government of Ontario, n.d.) online:
<<https://www.ontario.ca/locations/health/locationDetails.php?location=29426534&lang=en>>.

respond to situations involving individuals experiencing a mental health crisis.”⁹⁸⁰ This team’s mandate is to:

- Make an immediate on-site clinical assessment of the person in crisis;
- Attempt to stabilize and defuse the crisis;
- Assist in removing the individual from serious harm to themselves or others;
- Provide supportive counselling, as needed;
- Arrange appropriate mental health treatment through referrals to an appropriate agency or apprehension under the Mental Health Act; and
- Coordinate and facilitate transportation to the hospital emergency department if further psychiatric and medical assessment is required.⁹⁸¹

However, this service is only available between the hours of 11:00am and 11:00pm and the MCIT website specifies that they do not provide any first response services, noting:

Priority Response Units (PRU) are the officers that respond to all calls for service including 911 emergency calls. They will attend calls for individuals experiencing a mental health crisis first to ensure it is safe for the nurse. The MCIT will then attend as secondary responders when the PRU indicates it is safe to do so.⁹⁸²

In other words, these units do not provide de-escalation services and do not intervene in a crisis until after police officers have intervened, making this service largely irrelevant for preventing use of force.

While this may not be the intended function of such units, as discussed in a 2015 evaluation report of the MCIT, these units have in many cases been treated as predominantly providing transportation for taking those perceived to require psychiatric treatment to hospital once PRU officers have taken the individual

⁹⁸⁰ Toronto Police Service, “Mental Health: Mobile Crisis Intervention Teams (MCIT),” (Toronto: Toronto Police Service, n.d.) online: < <http://www.torontopolice.on.ca/community/mcit.php>>.

⁹⁸¹ *Ibid.*

⁹⁸² *Ibid.* Additional information on the dispatch of these units following the Priority Response Units is available in Denise Lamanna et al., *Toronto Mobile Crisis Intervention Team (MCIT): Outcome Evaluation Report*, (Toronto: Centre for Research on Inner City Health and St. Michael’s Hospital, 2015) online: < <http://stmichaelshospitalresearch.ca/wp-content/uploads/2016/12/MCIT-outcome-evaluation-Final-report.pdf>>.

into custody, a fact that was suggested is a result of “confusion regarding MCIT mandate.”⁹⁸³ In some Canadian cities, police services have begun forming partnerships with mental health service providers to provide genuine first response to 911 calls,⁹⁸⁴ though these initiatives are for the most part very new and no Canadian studies have demonstrated that these services reduce use of force or fatalities. Furthermore, it is unclear what percentage of mental health calls and what nature of calls they are being dispatched to because criteria for responses are rarely publicized.

Absent data evaluating the effectiveness of such units at preventing use of force and fatalities of persons perceived to be in mental health crisis, the expansion of these programs as a means of de-escalating or avoiding force is speculative. The availability of these units to respond to calls involving crises regardless of time and location, and the dispatch of such units instead of police-only responses would be necessary, if they are proven effective, to address known crisis situations. However, these services tend to expand or entrench the role of police as a primary crisis response, which may incidentally lead to more police interactions with those experiencing crises, particularly in models where these units are rarely or never dispatched directly to dynamic crisis situations.

In contrast to mobile crisis units, very few cases seemed to suggest the implementation of a non-police crisis response service. For example, in *Re B.M.*, a 27-year-old man from the Neskantaga First Nation Community died from a self-inflicted gunshot wound following a response from the Nishnawbe-Aski Police Service and the Ontario Provincial Police’s Emergency Response Team and Tactical Response

⁹⁸³ Denise Lamanna et al., *Toronto Mobile Crisis Intervention Team (MCIT): Outcome Evaluation Report*, (Toronto: Centre for Research on Inner City Health and St. Michael’s Hospital, 2015) online: < <http://stmichaelshospitalresearch.ca/wp-content/uploads/2016/12/MCIT-outcome-evaluation-Final-report.pdf> > at 21.

⁹⁸⁴ See e.g. A discussion of the Hamilton Mobile Crisis Rapid Response Team in Christine Fahim, Valbona Semovski and Jodi Younger, “The Hamilton Mobile Crisis Rapid Response Team: A First-Responder Mental Health Service” (2016) 67:8 *Psychiatric Services* 929; See also, the description of the Peel Regional Police’s new Mobile Crisis Rapid Response Team that began operation in January 2020: Canadian Mental Health Association, “Peel Regional Police launches Mobile Crisis Rapid Response Team (MCRRT),” (Toronto: Canadian Mental Health Association, 2020) online: < <https://cmhapeeldufferin.ca/news/peel-regional-police-launches-the-mobile-crisis-rapid-response-team-mcrrt/> >.

Unit.⁹⁸⁵ The police response took roughly 17 hours from the time of reported shots fired to contact the deceased, who at that time was still alive but had shot himself and was in medical distress. The response was slow as police flew tactical units from other parts of the province into the community before approaching the residence and making contact with the deceased through a window. The deceased eventually died of the wounds sustained. The coroner's jury recommended that the Ministry of Health and Long Term Care and Health Canada:

Investigate the establishment of crisis resources that includes, but is not limited to, support personal teams accessible by First Nations for immediate response to mental health crisis where the community identifies the need. The community needs to be consulted for the duration of support.⁹⁸⁶

While this recommendation does not specify that these "support personal teams" are to be made up of non-police personnel, one would assume that may be the case. This jury also recommended that "[p]rovincial crisis intervention hot lines should have a protocol in place that has relevance to each local First Nation community, to contact and mobilize a local community support network ready to assist in the event of a crisis,"⁹⁸⁷ similarly suggesting a greater role for local non-police crisis responses. In another case, the coroner's jury for an inquest into three shooting deaths of individuals in the mental health set recommended the provision of "further funding to expand community resources with Mental Health crisis support,"⁹⁸⁸ suggesting community service providers should have a greater role in addressing crises.

In a few cases (3), reports also suggested improving partnerships between police services and mental health professionals in the context of crisis negotiations, though commentary to the contrary also existed. For example, in one case a judge conducting a fatality inquiry recommended that:

⁹⁸⁵ Re B.M., Ontario, Date of Death: December 11, 2006.

⁹⁸⁶ *Ibid.*

⁹⁸⁷ *Ibid.*

⁹⁸⁸ Re R.J.-D., Re S.K., and Re M.E., Ontario, Dates of Death: August 29, 2010; October 7, 2011; February 3, 2012 at 32.

If the police respond to a person exhibiting symptoms of a mental disorder, who is endangering himself or herself or others, or threatening to endanger himself or herself or others, a mental health practitioner such as a psychologist, psychiatrist, or social worker should be consulted, if possible, for advice and assistance.⁹⁸⁹

In another case the coroner's jury recommended that "[c]onsideration should be given to utilizing crisis workers in interactions with EDP [emotionally disturbed persons]."⁹⁹⁰ The theory behind these types of recommendation is, presumably, that mental health practitioners and social workers have expert knowledge and skills about how to address a psychiatrized individual in a crisis. In contrast, in one fatality inquiry the judge noted that counsel for the deceased's family suggested a recommendation that "psychiatric or psychological resources be made immediately available to ERT [emergency response team] negotiators and ERT team commanders."⁹⁹¹ However, the judge declined to make such a recommendation on the basis that these mental health experts would not be helpful in the "high-charged atmosphere of a critical incident response",⁹⁹² basing this opinion on a psychiatrist who noted that psychiatrists have no training or special skillset in negotiation tactics. In fact, when mental health professionals are included in police responses it is often assumed that these professionals have a particular ability to communicate effectively with psychiatrized people or to defuse emotionally charged situations. However, in some cases mental health professionals' training may predominantly involve providing psychiatric medication, and perhaps counselling, rather than crisis intervention. In fact, in many cases the involvement of mental health professionals in police responses involves "clinical assessment" for the purpose of psychiatrization, rather than a primary role in de-escalation. For example, the goal of the Hamilton Mobile Crisis Rapid Response Team is to:

Redirect people with mental illness who are unnecessarily brought to an emergency department (ED) and link them to the appropriate community resources, urgent services, or crisis beds. In

⁹⁸⁹ Re K.K.I., Alberta, DoD: June 14, 2008 at 12.

⁹⁹⁰ Re M.H.R., Ontario, DoD: May 2, 2012 at 5.

⁹⁹¹ Re M.C.O., Alberta, DoD: February 28, 2004 at 12.

⁹⁹² *Ibid.*

addition, the MCRRT program seeks to divert individuals with mental illness from entering the criminal justice system.⁹⁹³

This suggests a role focused on clinical assessment, service provision, and diversion, rather than de-escalation. It is unclear whether mental health professionals would have a greater capacity to de-escalate crises than others, absent specialized training in this field. When considering the expansion of mobile crisis units from the perspective of avoiding police-involved injury and death, it is thus important to consider whether these teams will be directed to a predominantly first-response de-escalation role or whether they will be used as secondary responders geared towards service referral. While some Canadian studies support their efficacy in diversion from hospital and the criminal justice system, their impact on injuries and deaths is uncertain.

Furthermore, expanding mobile crisis teams or other joint responses necessarily means reinforcing the role of police as primary responders to crises, a role which has been questioned by those calling for a shift towards civilian crisis response systems.⁹⁹⁴ In fact, some cases studied suggest that police responses to crises were problematic, particularly in light of a lack of available health and social services. For example, with respect to the shooting death of a 34-year-old man of Iranian descent who was described as homeless and experiencing psychosis and delusions at the time of his death, one coroner noted:

Encore une fois il faut déplorer la mort d'une personne souffrant d'un problème de santé mentale. Encore une fois, des policiers se sont retrouvés en première ligne d'intervention auprès d'une personne nécessitant des soins de santé et des services sociaux plutôt qu'une intervention policière.⁹⁹⁵ [Translation by author: Once again we must deplore the death of a person suffering

⁹⁹³ Christine Fahim, Valbona Semovski & Jodi Younger, "The Hamilton Mobile Crisis Rapid Response Team: A First-Responder Mental Health Service" (2016) 67:8 Psychiatric Services 929.

⁹⁹⁴ See e.g. Rafik Nader Wahbi, Sterling Johnson & Leo Beletsky, *From Crisis Response to Harm Prevention: The Role of Integrated Service Facilities*, (Health in Justice Action Lab, Date for Progress and the Justice Collaborative Institute, 2020), online: < <https://ssrn.com/abstract=3685890>>; Wendy Glauser, "Why some doctors want to defund the police," (2020) 192:48 Canadian Medical Association Journal E1644.

⁹⁹⁵ Re F.M., Québec, DoD: January 6, 2012.

from a mental health problem. Once again police officers were put in the position of first responders to a person who needed healthcare and social services rather than a police intervention.]

As this quote implies, it is not clear that expanding the role of police as first responders is a preferable means of addressing crises, particularly where experiences of distress are shaped by scarcity in services and resources. Indeed, many coroner and medical examiner reports in the mental health set noted that the deceased was particularly fearful of police, or felt animosity towards them prior to their fatal encounter.⁹⁹⁶ For example, in another case the 39-year-old deceased, who was described as experiencing “the dual scourges of mental illness and drug addiction,” phoned 911 asking for protection because police were at his house.⁹⁹⁷ The police were not in fact there, but did end up responding to this call determining a Mental Health Act apprehension was necessary. Police surrounded his trailer and eventually fatally shot him when he grabbed a kitchen knife in reaction to an attempt to taser him. It is unclear whether a non-police response is more likely to be able to assist individuals like the deceased, who fear police, or to develop positive long-term relationships with those who experience repeated crises, but attempting to implement unarmed responses to crises in the community is worthwhile and not without precedent.⁹⁹⁸

7.4 Mental Health Information Collection by and Sharing with Police

Many reports included recommendations that suggested a need for improved or increased information collection by police, and information sharing with police concerning the mental health of the subjects with whom police interact. In 15 cases, recommendations focused on the

⁹⁹⁶ See e.g. Re J.L.J.Z., British Columbia, DoD: September 24, 2011; Re C.K., Ontario, DoD: March 12, 2011; Re D.W.W., British Columbia, DoD: March 1, 2009; Re M.V.H., British Columbia, DoD: March 20, 2009.

⁹⁹⁷ Re D.W.W., British Columbia, DoD: March 1, 2009.

⁹⁹⁸ For an example on a non-police crisis response system dispatched to mental health crises, see this case study on “CAHOOTS,” a non-police crisis response service currently operating in Eugene, Oregon: Jackson Beck, Melissa Reuland, and Leah Pope, *Case Study: CAHOOTS*, (New York: Vera Institute of Justice, 2020), online: <<https://www.vera.org/behavioral-health-crisis-alternatives/cahoots>>.

importance of ensuring police can access health and/or social service information pertaining to mental health treatment and service use or that they be able to maintain their own database of information on subject mental health. These recommendations included ensuring police mental health response programs (e.g. mobile crisis units) have access to health records,⁹⁹⁹ the creation of a “joint databank”¹⁰⁰⁰, a 24-hour link for data sharing,¹⁰⁰¹ and information sharing protocols¹⁰⁰² between mental health agencies and police departments. The cases containing these recommendations provided little explanation about why this information would be helpful, though presumably it might be expected to alter police tactics if particular practices specific to mental health are addressed in training.

Additionally, some recommendations suggested reviewing or expanding the police services own criteria for notation of mental health information¹⁰⁰³ and retention periods for mental health and suicidality information in police databases to ensure information remains available for future reference.¹⁰⁰⁴ One report recommended police officers should record suicidal risk and “mental health issues” in policing databases and recommended a review to create a simplified process for doing so¹⁰⁰⁵ and in another it was recommended that a review should be conducted on the feasibility of tracking this information.¹⁰⁰⁶ Explanations for these recommendations noted that in some cases policing databases did not allow for this information to be flagged and in other cases had processes that were cumbersome for doing so.

⁹⁹⁹ Re C.L.E., British Columbia, DoD: August 1, 2002 at 12.

¹⁰⁰⁰ Re P.G.B., British Columbia, DoD: August 13, 2007 at 4.

¹⁰⁰¹ Re J.S.H., British Columbia, DoD: October 23, 2009 at 4.

¹⁰⁰² Re M.H.R., Ontario, DoD: May 2, 2012 at 5.

¹⁰⁰³ Re H.J.M., Ontario, DoD: September 18, 2005; Re B.R.D., Ontario, DoD: February 16, 2008; Re W.D., Ontario, DoD: April 19, 2010.

¹⁰⁰⁴ Re P.R.W., British Columbia, DoD: May 10, 2011 at 4.

¹⁰⁰⁵ Re E.T.J., Ontario, DoD: August 25, 2010 at 9.

¹⁰⁰⁶ Re B.R.D., Ontario, DoD: February 16, 2008.

Some reports recommended more specific information sharing, such as a requirement for physicians conducting an evaluation under provincial mental health legislation following a mental health act apprehension involving a firearm, to report the outcome of their assessment to police and the Chief Firearms Officer.¹⁰⁰⁷ Additionally, in one case the coroner's jury recommended that local agencies, including police, mental health and addictions services, and local hospitals be notified by the British Columbia Review Board when an individual is given an absolute discharge against medical advice, suggesting an interest in facilitating more transparent information flow to mental health services and police from the forensic mental health system.¹⁰⁰⁸

These recommendations address the legal divide between police and healthcare providers created by provincial and federal privacy laws that protect personal health information from disclosure in many circumstances. For example, in Ontario, the *Personal Health Information Protection Act, 2004*, protects "personal health information", which includes identifying information that relates to the physical or mental health of the individual, when providing healthcare to an individual.¹⁰⁰⁹ This Act governs the collection, retention and disclosure of personal health information and prevents it from being disclosed except where there is legal authority to do so, or where necessary with the consent of the individual to whom it relates.¹⁰¹⁰ As a consequence of provincial privacy legislation, healthcare providers are generally not free to share information about mental health assessments, diagnoses, treatment, or hospitalization with police officers. Furthermore, police information keeping with respect to mental health is subject to privacy legislation restrictions pertaining to its collection, use and disclosure.¹⁰¹¹ Privacy of personal health information is particularly important in the context of policing because mental health diagnoses

¹⁰⁰⁷ Re A.D.M., British Columbia, DoD: May 30, 2012 at 6.

¹⁰⁰⁸ Re D.W.W., British Columbia, DoD: March 1, 2009 at 5.

¹⁰⁰⁹ *Personal Health Information Protection Act, 2004*, S.O. 2004, c. 3, Sched. A, s 4.

¹⁰¹⁰ *Ibid* at s 29.

¹⁰¹¹ See e.g. "Police and Public Safety" (Ottawa: Office of the Privacy Commissioner of Canada, n.d.) online: <<https://www.priv.gc.ca/en/privacy-topics/surveillance/police-and-public-safety/>>.

may lead to stigma by police, including assumptions about dangerousness or assessments that an individual is not credible because of a mental health diagnosis. A Canadian study by Johann Brink et al., for the Mental Health Commission of Canada found that concerns about mental health stigma (especially beliefs about dangerousness) and concerns about biased assessments of credibility were among concerns expressed by those identifying as “having a mental illness” shared about the prospect of mental health data sharing with police.¹⁰¹²

While the vast majority of these information sharing recommendations were focused on automatic information sharing absent consent, which would be prohibited under current privacy legislation, in one case a coroner’s jury recommended that a mental health group should consider creating a system for the voluntary sharing of mental health information by “psychiatric consumers and survivors” with police to identify “triggers and de-escalation techniques that are applicable in their own cases.”¹⁰¹³ Given that many consumer/survivor groups have campaigned to ensure data on mental health apprehensions is not tracked and shared by police agencies, this is an odd suggestion.¹⁰¹⁴

The implicit assumption of these information sharing recommendations is that if police had information that suggested a potential subject suffered from a psychiatric label that they would alter their behaviour, or perhaps adopt an approach to the call that might prevent future deaths. In fact, training and resources for police have been developed suggesting different interaction approaches be used that correspond to different psychiatric diagnostic labels.¹⁰¹⁵ However, it remains unclear whether

¹⁰¹² See Johann Brink et al., *A Study of How People With Mental Illness Perceive and Interact with Police*, (Calgary: Mental Health Commission of Canada, 2011) at 73-74.

¹⁰¹³ Re O.V., Ontario, DoD: August 9, 2000 at 13-14.

¹⁰¹⁴ See e.g. “Police Record Checks” (Toronto: Canadian Mental Health Association – Ontario, n.d.) online: <<https://ontario.cmha.ca/documents/police-record-checks/>> which describes the work of the Record Checks Coalition.

¹⁰¹⁵ For an example of such materials see: *Not just another call . . . police response to people with mental illness in Ontario*, (Toronto: Centre for Addictions and Mental Health, St. Joseph’s Hospital and the Ontario Police College, 2004).

the informational value of disclosing medical or service records to police would outweigh the potential harms of that disclosure, such as the potential for increased stigma that is attached to many psychiatric labels and which could influence police perceptions and the potential for such disclosure to undermine trust or openness with medical and social services staff, particularly among those who lack trust in the police or have had previous negative experiences with police.

There are also privacy concerns that arise with police service data collection and retention. There have been several problems involving police services sharing sensitive mental health information with potential employers through criminal record checks and with American border guards in the past, with employment and mobility consequences for persons who experience mental health disability that may undermine faith that this data would be properly safeguarded and not used to further criminalize, stigmatize and disadvantage psychiatrized people.¹⁰¹⁶

It is also worth taking a step back to consider whether mental health information sharing between police and medical and social service providers is wise. To evaluate whether this information sharing is necessary and appropriate, it would be important to study whether, and if so how, police behaviour is changed through access to psychiatric records. In practice, it may be difficult to understand how specific knowledge about personal health information would better inform police behaviour than direct observation of an individual. After all, mental wellness is not a static trait in people, but rather changes over the course of a lifetime and there will always be people experiencing crisis for the first time in the community. Consequently, police policies and practices need to be adapted to ensure that they take into account the cultural, psychological, and experiential differences between people, not only when a notation tells them that individual has been psychiatrized. Furthermore, with respect to those who have

¹⁰¹⁶ See Ann Cavoukian, *Crossing the Line: The Indiscriminate Disclosure of Attempted Suicide Information to U.S. Border Officials via CPIC: A Special Investigation Report*, (Toronto: Information and Privacy Commissioner of Ontario, 2014) online: < https://www.ipc.on.ca/wp-content/uploads/Resources/indiscriminate_disclosure.pdf>.

repeated interactions with the police when the latter are enforcing mental health statutes, it is time to ask what causes the police to be so intimately involved in the mental health system that there is a perceived need for access to private health data. Instead of asking how police can get access to health data to facilitate mental healthcare related enforcement tasks, perhaps it would be better to ask why police are involved in this work to begin with, and whether they can be removed from these roles by reshaping the health and social systems that rely on them.

7.5 Voluntary Mental Health and Social Service Provision

Many recommendations suggested improvements for mental health service provision and expansion of the provision of psychiatric and substance use treatment services,¹⁰¹⁷ suggesting that such services are difficult to access, insufficient to meet societal needs, unavailable when needed, and underfunded. In fewer cases, the funding or expansion of non-medical crisis support services were also recommended,¹⁰¹⁸ and in one case these services were described as “overtaxed alternatives to hospitalization and criminalization,”¹⁰¹⁹ suggesting they are understood to assist those who might otherwise end up incarcerated or psychiatrically committed.

In some cases, recommendations were made to review, expand or improve social service provision, including counselling, access to educational resources, reintegration programs for offenders, employment programs, housing, etc.¹⁰²⁰ though these recommendations were less common than those suggesting medical responses. Some of these recommendations were specifically targeting those who

¹⁰¹⁷ See e.g. Re C.G., Ontario, DoD: November 2, 2004; Re P.S., Manitoba, DoD: September 2, 2004; Re K.A.M.H.A. - L., Northwest Territories, March 14, 2012; Re G.S., Ontario, DoD: July 22, 2004; Re D.K.S., British Columbia, DoD: October 6, 2006; Re K.K.B., British Columbia, DoD: July 15, 2009.

¹⁰¹⁸ See e.g. Re O.V., Ontario, DoD: August 9, 2000; Re B.M., Ontario, DoD: December 11, 2006.

¹⁰¹⁹ Re O.V., Ontario, DoD: August 9, 2000 at 10.

¹⁰²⁰ See e.g. Re C.G., Ontario, DoD: November 2, 2004; Re L.M., Ontario, DoD: August 28, 2007; Re K.T., Ontario, DoD: August 1, 2011.

experience mental health disability, such as recommendations for supportive housing available to those who experience mental health disability.¹⁰²¹

The expansion, improvement, and development of voluntary health and social service provision may help to avoid some crises altogether where crises are related to a lack of supports or an individual's basic needs not being met. Some of these services may also assist to defuse crisis situations without requiring police intervention.

7.6 Surveillance, Coercion, Involuntary Hospitalization, and Forced Treatment

While some recommendations suggested improved voluntary service provision, other recommendations suggested mental health system and policing reforms aimed at increasing coercive mechanisms for ensuring psychiatrically labelled individuals accept and comply with medical treatment. These recommendations implicitly accept the “medical model” of disability and understand the police-involved deaths of those who experience mental health disability as a product of untreated illness, rather than a result of systemic forces and interpersonal dynamics. Many recommendations were focused on ensuring treatment compliance of mental health “patients.” Some of these recommendations focused on mechanisms to ensure treatment compliance in the community. Examples of such recommendations, included:

Escorts for psychiatric assessment should be specified on all documents and contacted to assist in ensuring the patient is aware of the appointment and both are in attendance.¹⁰²²

For a community follow-up, we recommend a review be done on a possibility of having outreach workers [...] go to residential area [sic] for administering medication on non-compliant patient [sic], as per psychiatrist. This would encourage compliance from patients to take their medication and also develop the patient's wellness.¹⁰²³

¹⁰²¹ Re P.S., Manitoba, DoD: September 2, 2004; Re C.P.K., Ontario, DoD: December 27, 2007; Re B.R.D., Ontario, DoD: February 16, 2008.

¹⁰²² Re B.M., Ontario, DoD: December 11, 2006.

¹⁰²³ Re K.G., New Brunswick, DoD: May 5, 2005.

The Ministry of Health and Local Health Integration Networks, LHINs, should study the concept of regular testing and medication compliance for psychiatric consumers/survivors who have a history of criminal conviction for violent acts while in a manic state.¹⁰²⁴

In contrast, other recommendations sought to consider how involuntary hospitalization could be ensured, to enforce treatment compliance. Examples of such recommendations included:

Support services to families of individuals with mental illness should include direct assistance with the application for a Form 2 – Order for Examination [a form that allows a court to order the involuntary psychiatric assessment of an individual (enforced by police)] under Section 16 of the MHA [Mental Health Act].¹⁰²⁵

The Ministry of Health and Long-Term Care, along with mental health law experts, police, and others in the field of mental health, should review the mental health legislation regarding involuntary admission and treatment, to better address the needs of those who do not or cannot avail themselves of services and treatment because of their illness.¹⁰²⁶

In some cases, recommendations sought greater restrictions on people who experience psychosis, effectively lengthening the period of time over which the state can exercise control following a period of involuntary hospital admission. For example, in a case of suicide in police presence in which a 28-year-old man described as “demonstrating clear signs of paranoia and delusion”¹⁰²⁷ and “diagnosed with a psychotic disorder”¹⁰²⁸ stabbed himself to death, the coroner’s jury recommended ensuring:

Involuntarily admitted patients having suffered a psychotic crisis meet and confer with a social worker prior to discharge. The patient should, where feasible, be placed in a transition type of home before being fully discharged, especially if they are living alone.¹⁰²⁹

This recommendation seems to assume that individuals with psychotic disorders lack suitable housing and require supervision even when they do not meet the criteria for involuntary hospitalization, but also

¹⁰²⁴ Re O.V., Ontario, DoD: August 9, 2000.

¹⁰²⁵ Re M.H.R., Ontario DoD: May 2, 2012.

¹⁰²⁶ Re B.R.D., Ontario, DoD: February 16, 2008.

¹⁰²⁷ Re K.M.V., British Columbia, DoD: July 16, 2011 at 2.

¹⁰²⁸ *Ibid* at 3.

¹⁰²⁹ *Ibid*.

proposes use of a halfway house for those who have been hospitalized, which assumes that structured living and supervision would prevent relapse or social dysfunction. In another case involving the shooting death of a 28-year-old man who had been labelled with “psychosis” and “fetal alcohol spectrum disorder,” the coroner’s jury recommended:

The Ministry of Long-Term Care should launch a study to assess the need for supportive housing facilities (voluntary and involuntary) for persons who suffer from mental illness/disability and/or addiction and, if indicated to establish such a facility or facilities to include programs that will meet the needs of the intended residents, including Aboriginal peoples.¹⁰³⁰

While this recommendation appears to suggest the incarceration of people who experience mental health disability, which would in essence be what “involuntary” supportive housing would mean, and a return to the asylums of the past, the coroner further clarified their point, writing:

The jury felt that all levels of supportive housing should be available to those who need it and that, in particular, levels with more rather than less supervision should be available to similarly situated persons. By “involuntary” the jury meant this higher level of supervision. They recognized that, short of incarceration, persons like the deceased could leave the facility at will.¹⁰³¹

While supportive housing, and housing generally, can be important to help those who need assistance meeting their needs or who require accommodation but are unable to access it for behavioural or other reasons, these recommendations can also have the effect of extending psychiatric control over the lives of individuals in the community.

In some cases suggestions that sought to place increased pressure and surveillance on those living in the community with psychiatric diagnoses to take psychiatric medications were proffered. While some of these recommendations described purely medical system interventions or policy reform, in other cases recommendations sought to increase (rather than decrease) police involvement in psychiatric

¹⁰³⁰ Re B.R.D., Ontario, DoD: February 16, 2008.

¹⁰³¹ *Ibid.*

treatment provision and access. For example, some recommendations called for the establishment of more Assertive Community Treatment (ACT) teams, which involve mental health and social work professionals alongside police officers to “serve mentally disordered people in the community.”¹⁰³² The use of community treatment orders and extended leave provisions as a response to medication non-compliance were also the subject of several recommendations.¹⁰³³ Community treatment orders are a legal mechanism within provincial mental health legislation in several Canadian provinces that allow physicians to create a community treatment plan with persons hospitalized under mental health legislation and that require the patient to comply with particular criteria in order to be released from hospital. These plans require the patient to engage in treatment in the community and include enforcement provisions that authorize police to apprehend an individual who has failed to comply and to bring him or her to the hospital for a psychiatric assessment.¹⁰³⁴ Extended leave is similar and allows an involuntary patient to leave hospital provided they comply with conditions for specified time period.¹⁰³⁵ Examples of such recommendations include:

The Ministry of Health and Long-Term Care should revisit the Mental Health Act to consider whether legislative criteria for a Community Treatment Order are too restrictive, with the specific recommendation that it should be adjusted to encompass those who have been inmates in correctional psychiatric facilities.¹⁰³⁶

We recommend mandatory utilization of extended leave, as defined in the Mental Health Act, for a person(s) suffering from a serious mental illness to ensure the person’s well-being, mental health, and safety for the public.¹⁰³⁷

¹⁰³² *Ibid.*

¹⁰³³ See e.g. Re K.G., New Brunswick, DoD: May 5, 2005; Re M.J.O., Alberta, DoD: February 28, 2004.

¹⁰³⁴ Examples of community treatment order provisions (or synonyms like supervised community care plans), include: *Mental Health Act*, RSA, 2000, c. M-13, s 9.1 and *Community Treatment Order Regulation*, Alta Reg 337/2009; *Mental Health Act*, RSO 1990 c M.7, s 33.1; *Mental Health Services Act*, SS 1984-85-86, c M-13.1, s 24.3; *Mental Healthcare and Treatment Act*, SNL 2006, c M-9.1, s 40; *Involuntary Psychiatric Treatment Act*, SNS 2005, c 42, s 47; *Mental Health Act*, RSNB, 1973, c. M-10, s. 34.01.

¹⁰³⁵ See e.g. *Mental Health Act*, RSBC 1996, c 288, ss 37, 39.

¹⁰³⁶ Re B.R.D., Ontario, DoD: February 16, 2008.

¹⁰³⁷ Re P.G.B., British Columbia, DoD: August 13, 2007.

In one case a coroner's jury recommended going further, suggesting a review of community treatment order legislation to consider involuntary orders that could be triggered by third parties like "Courts, or Probation Officers, or Mental Health Services,"¹⁰³⁸ which would create a sort of civil parole system, subjecting those who have never committed an offence to monitoring and surveillance used in criminal justice. Recommendations for community treatment orders (voluntary and involuntary) clearly demonstrate that the deceased's perceived mental illness is situated as the "problem" to be solved rather than being the result of problematic policing practices. Community treatment orders may be expected to increase, rather than decrease police-involved deaths among persons who experience mental health disability when considered from a systemic point of view, since these systems create police enforcement for medication non-compliance, bringing police repeatedly into contact with a group that may be at heightened risk from police violence and restraint, and whom are more likely to be killed by police. Trying to avoid police-involved deaths by ensuring police are more commonly engaged in mental health treatment coercion assumes policing policies and practices have no role to play in the disproportionate numbers of persons with perceived mental health impairments among police-involved deaths.

Some recommendations focused on involving mental health service providers within the criminal justice system, such as recommendations that mental health case managers be provided access to mental health, medical, and criminal records and be involved in ensuring and monitoring that bail and probation conditions are met,¹⁰³⁹ increasing access to non-forensic mental health assessment for those in custody,¹⁰⁴⁰ or reviewing the lack of mental health courts.¹⁰⁴¹ Blending the psychiatric and criminal justice systems through such information sharing and cooperation is likely to increase police involvement in mental health care as police are called upon to enforce criminal justice system requirements and

¹⁰³⁸ Re G.P., Ontario, DoD: November 29, 2008.

¹⁰³⁹ Re E.T.J., Ontario, DoD: August 25, 2010.

¹⁰⁴⁰ Re E.T.J., Ontario, DoD: August 25, 2010.

¹⁰⁴¹ Re E.T.J., Ontario, DoD: August 25, 2010.

conditions relating to mental health treatment. Furthermore, enlisting mental health professionals in criminal law enforcement is likely to undermine trust in these professionals by patients who have faced criminalization.

Some police shooting and excited delirium cases involved a deceased who had escaped from a psychiatric ward or hospital immediately prior to being killed by police or dying in their presence. In these cases, increases in hospital security to avoid other escapes were frequently recommended. Examples included creating locked areas in emergency departments and procedures for constant supervision,¹⁰⁴² increasing security in all psychiatric wards,¹⁰⁴³ reviewing “pass” policies in psychiatric facilities to avoid elopement,¹⁰⁴⁴ a review and practice of responses to elopement,¹⁰⁴⁵ reviewing client observation processes and considering the use of:

Arm band bar-code scanning systems or including patient photos in client profiles to facilitate accurate observations, increase meaningful interactions between staff and clients and provide precise documentation of client location.¹⁰⁴⁶

These recommendations aimed to prevent patient escape from mental health treatment facilities also illustrate an interest in further securitizing these facilities, amplifying their nature as sites of imprisonment. For example, the recommendation that we use an “arm band bar-code scanning system” in psychiatric wards to help staff account for patients in order to “increase meaningful interaction between staff and clients.”¹⁰⁴⁷ This recommendation is dehumanizing, suggesting that patients should be routinely scanned like commercial goods. Subjecting those in hospital to overt mechanisms of surveillance would be expected to create barriers between staff and patients and would amplify the

¹⁰⁴² Re R.J.-D., S.K., and M.E., Ontario, Dates of Death: August 29, 2010; October 7, 2011; February 3, 2012.

¹⁰⁴³ Re E.T.J., Ontario, DoD: August 25, 2010.

¹⁰⁴⁴ Re M.D., Ontario, DoD: March 7, 2007.

¹⁰⁴⁵ Re K.G., New Brunswick, DoD: May 5, 2005.

¹⁰⁴⁶ Re M.M., Ontario, DoD: June 7, 2013.

¹⁰⁴⁷ Re M.M., Ontario, DoD: June 7, 2013.

carceral nature of psychiatric wards. In another case, in which the deceased died while being restrained by police in a psychiatric ward, the judge conducting the inquiry recommended that handcuffs be provided for security personnel at the hospital.¹⁰⁴⁸ The justification provided was that the deceased was throwing objects prior to his death and was restrained by hospital staff in prone while waiting for police to arrive. If the staff had access to handcuffs he would have been in prone position (which is believed to be a risk factor for sudden in custody death) for a shorter period of time. These recommendations reveal the tension between societal beliefs about the helpful and pro-social purpose of mental health care and the lived experience of coercion and imprisonment that is a feature of involuntary psychiatric hospitalizations. When seeking to minimize police-involved deaths these recommendations seem geared towards reproducing criminal justice structures within the civil mental healthcare environment. These recommendations assume that expanding criminal control and policing mechanisms will avoid deaths that may be caused by or contributed to by these systems of control.

Some recommendations addressing mental health and substance use went further still, suggesting forced medical treatment. In the case of a 21-year-old man who was said to have died of “methamphetamine toxicity”, the coroner’s jury recommended:

That legislation be enacted to allow individuals identified as addicted to illegal drugs or suffering specified mental illness be detained for treatment in a treatment centre.¹⁰⁴⁹

In another case, involving a police shooting death of a man whose family believed suffered from addiction, the coroner’s jury recommended:

- (1) Construction of a facility or facilities that are of a closed-custody nature for treatment of users of illicit substances.

¹⁰⁴⁸ Re P.S., Manitoba, DoD: September 2, 2004 at 79.

¹⁰⁴⁹ Re D.L.R.S., British Columbia, DoD: July 16, 2011.

- (2) Legislation allowing the justice system to detain suspected illicit substance users and the ability to place that into a closed-custody treatment facility.
- (3) Medical professionals to report suspected drug users to the justice system.¹⁰⁵⁰

These recommendations seek the enactment of legislation that would imprison those who experience mental health disability and subject them to medical battery. In Canada, the common law requires voluntary informed consent¹⁰⁵¹ for medical treatment intervention, meaning that treatment without consent constitutes battery.¹⁰⁵² The right to refuse treatment is also guaranteed under section 7 of the *Canadian Charter of Rights and Freedoms*.¹⁰⁵³ While some exceptions exist, such as court orders to treat an individual found unfit to stand trial¹⁰⁵⁴ or pursuant to public health law to prevent the spread of communicable diseases,¹⁰⁵⁵ such exceptions are rare. Beyond the possible unconstitutionality of these recommendations, they also betray a belief that the deceased themselves are the problem and overlook ethical issues relating to medical incarceration and forced treatment, like the trauma, disruption, and violence these experiences can cause.

What recommendations suggesting coerced, involuntary, or forced treatment reveal is a powerful reliance on the medical/individual model of disability, which situates the person experiencing disability as the problem to be solved medically, and through force if necessary. The coerced or forced treatment, involuntary hospitalization, and medication compliance monitoring recommendations explicitly or implicitly involve police as the coercive force to ensure these systems of control. They suggest a belief that such structures, which increase the role of police in the lives of those who experience mental health disability, will decrease police-involved deaths by changing the behaviour of those who would be

¹⁰⁵⁰ Re A.W.M., Saskatchewan, DoD: April 30, 2004.

¹⁰⁵¹ *Reibl v Hughes*, [1980] 2 SCR 880.

¹⁰⁵² *Malette v Shulman*, 1990 CanLII 6868 (ON CA).

¹⁰⁵³ *Fleming v Reid*, (1991), 4 OR (3d) 74 (CA).

¹⁰⁵⁴ See *Criminal Code*, RSC 1985 c C-46, s 472.58.

¹⁰⁵⁵ See *Quarantine Act*, SC 2005, c 20, s 26.

killed in these interactions. However, by blending mental healthcare and criminal justice structures and sanctions, these types of responses are very likely to increase conflict with police and lead to more, rather than less, police-involved deaths. These recommendations also serve to punish those who require help and exacerbate the trauma, stigma, exclusion, of those who experience mental health disability.

7.7 Conclusion

As this chapter has demonstrated, the recommendations provided to prevent future deaths of persons who experience mental health disability in police interactions tended to focus on additional police training, greater cooperation and information sharing between mental health professionals and police, and police-involved crisis responses. As discussed in chapter 1, many of these recommendations lack strong support in the literature and all of them tend to reinforce the role of police in mental health responses, rather than addressing alternatives to policing. In fact, in some cases recommendations sought to increase surveillance, coercion, and even forced treatment of persons who experience mental health disability, suggesting a tendency to view these individuals as the “problem” to be solved, rather than addressing violence in policing. Ultimately, these recommendations do not seem to provide a helpful basis for considering police reform in this field, or for ensuring the needs of those with mental health disabilities are accommodated.

Chapter 8: Accommodation During Arrest?: Discrimination Against Persons who Experience Mental Health Disability in Police Interactions

8.1 Introduction

Chapters 4 to 7 described the over-representation of persons perceived to experience mental health impairment among victims of some types of police-involved deaths, such as fatal police shootings, CEW-proximate deaths and “excited delirium,” among others. Furthermore, the narratives contained in many of the coroner and medical examiner reports reviewed reveal an understanding of police-involved deaths marred by ableism, racism and a reluctance to consider systemic discrimination as a cause of such deaths. The recommendations reviewed in chapter 7 suggest a focus on additional police training, modified police responses to crises and increased coercion and surveillance of those with mental health disabilities. These reforms are likely to increase police involvement in mental health crises and fail to consider more fundamental reform or restructuring of societal responses to mental health crises. In light of these findings, this chapter considers to what extent legal claims, might contribute to accountability and systemic reform to address police-involved deaths of persons who experience mental health disability.

The over-representation of persons who are perceived to have a mental health impairment, or who have been psychiatrically labelled, among recipients of police use of force,¹⁰⁵⁶ and among some forms of police-involved deaths¹⁰⁵⁷ raises questions about the extent to which those who experience mental health disability may be discriminated against, directly or indirectly, in police use of force practices, policies, and decision-making. While tort claims, criminal prosecution, and Charter claims have tended to be the predominant mechanisms of legal redress for unnecessary or disproportionate use of

¹⁰⁵⁶ See chapter 1.

¹⁰⁵⁷ See chapters 4-7.

force by police in Canada, the statutes structuring use of force law and the caselaw interpreting it have some significant limitations for providing redress for systemic ableism and other forms of discrimination in policing or for initiating policy reforms. This chapter analyzes some of the potential benefits and some of the significant drawbacks of employing discrimination claims when seeking to challenge policing policies, practices and individual exercises of police discretion that result in injuries or deaths of persons who experience mental health disability. Specifically, it seeks to answer the research question:

What opportunities or barriers does Canadian human rights law provide for legal accountability for excessive or unjustified use of force or police-involved deaths and injuries of persons who experience mental health disability?

The relevance of discrimination law to police injuries and deaths (both with respect to federal and provincial human rights statutes and section 15(1) Charter rights) arises due to the disproportionately negative outcomes contemporary policing practices have on persons who experience mental health disability, some racialized groups in Canada, Indigenous people, and those within intersecting groups, such as Indigenous women.

Courts in Canada have recognized that disproportionate negative impacts from facially neutral laws, policies and practices may raise concerns about adverse effects discrimination. For example, in *Fraser v Canada (Attorney General)*,¹⁰⁵⁸ Justice Abella, writing for the majority, quoted the following passage from the “Abella Report” (as excerpted in *CN v. Canada (Canadian Human Rights Commission)* [“*Action Travail*”]):

“It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is *affecting certain groups in a disproportionately negative way*, it is a signal that the practices that lead to this adverse impact may be discriminatory.”¹⁰⁵⁹

¹⁰⁵⁸ 2020 SCC 28 [*Fraser*].

¹⁰⁵⁹ *Ibid* at para 39 citing *CN v. Canada (Canadian Human Rights Commission)*, 1987 CanLII 109 (SCC), [1987] 1 SCR 1114, Dickson CJ, citing Abella, Rosalie S., *Report of the Commission on Equality in Employment* (Ottawa: Minister of Supply and Services Canada, 1984) [the “Abella Report”].

This chapter will address legal accountability of police for use of force against persons who experience mental health disability. It will begin with a discussion of some of the limitations of traditional approaches to legal accountability for police-involved deaths in tort, criminal, and constitutional law,¹⁰⁶⁰ suggesting some possibilities for reform or clarification of the law to improve accountability. Secondly, it will consider domestic constitutional and human rights discrimination claims as an avenue for litigating discrimination in the application of force by police. Specifically, it will consider “adverse effects” discrimination law in the context of the over-representation of persons who experience mental health disability among police-involved injuries and fatalities linked to use of force. As has been discussed in earlier chapters, there are many different types of police-involved deaths and injuries, which have significant differences in terms of which police policies and practices may be relevant when considering discrimination in policing. This analysis will focus on use of force policies and training shaping police discretion to use force and human rights arguments pertaining to the accommodation of disability in use of force contexts. Specifically, it will consider the value of discrimination law in two contexts:

1. Discrimination in police exercises of discretion to employ force: Considering use of force models and “threat cues”; and
2. Discrimination in failures to accommodate mental health disability by dispatching policing alternatives or employing interventions tailored to addressing persons in crisis.

¹⁰⁶⁰ This chapter will not address accountability through the police complaint and discipline processes as this regime is generally restricted in its impact to employment-related dispositions (e.g. suspension, dismissal, demotion, forfeiture of pay, etc.) or in some jurisdictions fines. The range of dispositions differs according to jurisdiction as provinces have different statutes providing powers to complaint and discipline bodies. These systems may provide a form of accountability for individual officers, but ultimately fail to produce systemic change as they target individual wrongdoing.

It will address legal, theoretical, and practical barriers and benefits to using discrimination law to challenge police use of force and seek redress for persons who experience mental health disability who are injured or killed by police.

Lastly, this chapter will consider the potential for (and limits of) human rights law to inform fundamental reform or replacement of policing, drawing on the concept of inclusion and critiques of the human rights system to achieve systemic change. It will be suggested that human rights legal actions are unlikely to lead to fundamental reforms required, but may assist in drawing attention to the need for policing alternatives and improved data on crisis interventions.

8.2 Traditional Forms of Legal Redress for Police-involved Injuries and Deaths: Tort Law, Criminal Law, and Sections 7 and 12 of the Charter

Discrimination claims have tended not to play a significant role when those injured by police or the families of those killed by police seek legal accountability.¹⁰⁶¹ In these contexts, recourse to tort law, and especially assault, battery, and negligence, often in conjunction with claims under section 7 of the Charter, and in rarer and more severe cases of violence, section 12, are more commonly pled.¹⁰⁶²

¹⁰⁶¹ There are exceptions to this rule. For example, there are several human rights claims that have been successfully brought before provincial and federal tribunals arguing, at least in part, that police use of force was discriminatory. See, for example: *Maynard v. Toronto Police Services Board*, 2012 HRT0 1220 (CanLII); *A.M. v. Durham Regional Police Service*, 2015 HRT0 792 (CanLII); *Commission des droits de la personne et des droits de la jeunesse (Miller et autres) c. Ville de Montréal (Service de police de la Ville de Montréal) (SPVM)*, 2019 QCTDP 31 (CanLII).

There are also cases where complainants have argued that they were discriminated against specifically on the ground of mental health disability in which unnecessary use of force was a part of the discrimination claimed, although searches of CanLII, Westlaw, and Quicklaw databases by the author found no such claims that were ultimately successful. See *Commission des droits de la personne et des droits de la jeunesse (Miller et autres) c. Ville de Montréal (Service de police de la Ville de Montréal) (SPVM)*, 2019 QCTDP 31 (CanLII); *A.M. v. Durham Regional Police Service*, 2015 HRT0 792 (CanLII).

¹⁰⁶² Available data from the Toronto Police Service indicates that they have received, on average, 11.4 human rights claims pertaining to disability per year for the 2016-2020 time period, making this type of claim second most common after human rights claims alleging racial discrimination. However, there are far fewer human rights claims brought against the Toronto Police Service than civil litigation claims, which saw an average of 64.4 claims brought per year from 2016-2020. See Toronto Police Service, *Corporate Risk Management Annual Report, 2020*, (Toronto: Toronto Police Service, 2020) at 11-12, online: <<http://www.torontopolice.on.ca/publications/files/reports/crm2020annualreport.pdf>>.

Additionally, police-involved injuries and deaths can in some cases lead to criminal prosecution of the involved officers, though charges are relatively rare and findings of guilt even rarer. In this section, I will consider the case law on these more common forms of accountability, first explaining the structure of the three types of legal procedures and claims (criminal prosecution, tort claims, and constitutional claims), and then highlighting why these particular legal actions are unlikely to produce meaningful change to prevent the deaths and injuries of persons who experience mental health disability through police use of force. I will also suggest some clarifications of avenues for law reform to improve accountability using these mechanisms.

8.2.1 Criminal Prosecution

Some police actions and omissions in the context of arrest and apprehension can lead to criminal charges against the officer. In many provinces, serious injuries and deaths that occur during police interactions are subject to investigation by special investigations units (SIUs) to avoid situations where members of a police force investigate themselves.¹⁰⁶³ Following an investigation, special investigations units are empowered to have criminal charges laid against a police officer, or to recommend charges be laid in provinces where this determination is made by the Crown.¹⁰⁶⁴

The report notes: “In the majority of cases, claims are made on the basis of allegations of false arrest, negligent investigation, malicious prosecution, excessive use of force, Service vehicle collisions, and violations of the Canadian Charter of Rights and Freedoms.” (p. 11) However, no further breakdown is provided to indicate how many of each type of claim exists.

¹⁰⁶³ While concerns about the independence of special investigations bodies is beyond the scope of this chapter (which focuses on legal challenges rather than investigations), special investigations bodies in Canada have been criticized for their practice of hiring retired police officers as investigators, undermining their credibility as “independent” investigators of police-involved injuries and deaths. See, for example: André Marin, “The Ontario Special Investigation Unit: Securing Independence and Impartiality” in David MacAlister, ed, *Police Involved Deaths: The Need for Reform* (Vancouver: British Columbia Civil Liberties Association, 2012) at 114-117.

¹⁰⁶⁴ See, for example, *Special Investigations Unit Act, 2019*, SO 2019, c 1, Sch 5, s 32. There are differences between provinces in how criminal charges are actually brought. For example, while in Ontario police themselves can lay charges, in British Columbia, charges are not laid by police, but are rather approved by Crown counsel following a report from police and then laid by a justice of the peace. See British Columbia, “Laying Charges”, website: <https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bcs-criminal-justice-system/understanding-criminal-justice/how-works/laying-charges>.

Practically, criminal charges against police officers are rare, and convictions of police officers for offences leading to injury or death are extremely rare. For example, from April 2020 to March 2021, Ontario's Special Investigations Unit investigated 397 cases and charges were only laid in 12, against 14 officers – a rate of approximately 3%.¹⁰⁶⁵ British Columbia's Independent Investigations Office concluded 104 investigations¹⁰⁶⁶ and referred 8 cases to Crown counsel for charges in the April 2020 to March 2021 year – a rate of approximately 7.5%, and at least two of these charges were not subsequently approved by Crown counsel.¹⁰⁶⁷ The CBC has found that out of 461 police-involved fatalities studied over an 18 year time period, only 2 resulted in criminal convictions of a police officer involved.¹⁰⁶⁸ Notably, one of these cases, *R v Forcillo*,¹⁰⁶⁹ involved a lethal shooting of a teenager, Sammy Yatim, who was believed to have been experiencing a mental health crisis at the time of his death.¹⁰⁷⁰

Some American studies of criminal prosecution of police have found a reluctance among prosecutors to pursue criminal charges against police,¹⁰⁷¹ sometimes due to a conflict of interest because of the close proximity in which police and prosecutors work in some jurisdictions.¹⁰⁷² In Canada, Kate Puddister and Danielle McNabb studied completed SIU investigations in Ontario from January 1, 2005 to

¹⁰⁶⁵ Special Investigation Unit, *Annual Report 2020-2021* (Toronto: Ontario, 2021) at 19, online: <https://www.siu.on.ca/pdfs/2020-21_siu_annual_report_final_july_28_2021_-_clean.pdf>.

¹⁰⁶⁶ Independent Investigations Office, *Annual Report 2020-2021* (Surrey, IIO, 2021) at 14, online: <https://iio.bc.ca/app/uploads/sites/472/2021/07/IIO-Annual-Report_2020_2021.pdf>.

¹⁰⁶⁷ *Ibid* at 14.

¹⁰⁶⁸ Kristin Annabale & Vera-Lynn Kubinek, "Criminal Consequences for Police Officers are Rare When a Civilian Dies" *CBC News* (April 6, 2018) online: <<https://www.cbc.ca/news/canada/manitoba/deadly-force-police-criminal-charges-1.4607134>>.

¹⁰⁶⁹ 2018 ONCA 402.

¹⁰⁷⁰ See Paul Dubé, *A Matter of Life and Death*, (Toronto: Ombudsman of Ontario, 2016) <https://www.ombudsman.on.ca/Files/sitemedia/Documents/OntarioOmbudsmanDeescalationEN_1.pdf>; Hon. Frank Iacobucci, *Police Encounters with People in Crisis: An Independent Review*, (Toronto: Toronto Police Service, 2014). Online: <https://www.torontopolice.on.ca/publications/files/reports/police_encounters_with_people_in_crisis_2014.pdf>.

¹⁰⁷¹ Asit Panwala, "The Failure of Local and Federal Prosecutors to Curb Police Brutality" (2002) 30 *Fordham Urban Law Journal* 639; Kate Levine, "Who Shouldn't Prosecute the Police" (2016) 101 *Iowa Law Review* 1447; Douglas Colbert, "Prosecuting Baltimore Police Officers" (2016) 16:2 *University of Maryland Law Journal of Race, Religion, Gender & Class* 185.

¹⁰⁷² See Kate Levine, "Who Shouldn't Prosecute Police" (2016) 101 *Iowa Law Review* 1447.

May 31, 2020. They found that while the SIU conducted on average 302 investigations per year, there were only 159 incidents in the 15 year time period of the study in which police were charged with criminal offences, almost 30% of charges against officers were withdrawn prior to trial and officers were acquitted in another 30% of all cases.¹⁰⁷³ Officers are less likely to be convicted (33%) than the general population (56%); are given less punitive sentences for assault and driving convictions; and are less likely to receive custodial sentences than the general population.¹⁰⁷⁴ As this data makes clear, even where charges are laid, the low likelihood of conviction makes criminal law a fairly minor means of achieving accountability. Prosecution of police is generally considered to be challenging because studies suggest police may be considered particularly credible witnesses by juries,¹⁰⁷⁵ police are generally paid very well in Canada and consequently have access to the resources necessary to secure better legal services,¹⁰⁷⁶ and police are less likely than the general population to plead guilty to offences with which they are charged.¹⁰⁷⁷ The burden of proof in criminal proceedings (beyond a reasonable doubt) is also much higher than the civil standard, so it is unsurprising that criminal convictions of police officers are rare. Furthermore, as will be discussed below, police have statutory justifications available to them to justify their use of force, which may protect officers from criminal and civil liability. These statutory justifications do not contain any explicit requirements concerning de-escalation or policing approaches or techniques sensitive to mental health disability, and have been interpreted in a manner providing leniency to police who use unnecessary or disproportionate force in the course of duty.

¹⁰⁷³ Kate Puddister & Danielle McNabb, “When Police Break the Law: The Investigation, Prosecution and Sentencing of Ontario Police Officers” (2021) 11:2 Canadian Journal of Law and Society, DOI: 10.1017/cls.2021.3.

¹⁰⁷⁴ *Ibid* at 17-18.

¹⁰⁷⁵ See Jonathan Warren, “Hidden in Plain View: Juries and the Implicit Credibility Given to Police Testimony” (2018) 11:5 De Paul University Journal for Social Justice Art. 4.

¹⁰⁷⁶ The average police pay in Canada (including regular pay, overtime and other pay) was \$118,000 in 2018/2019 according to Statistics Canada. See Patricia Connor et al, “Police Resources in Canada, 2019,” (Ottawa: Statistics Canada, 2020) online: < <https://www150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00015-eng.htm>>.

¹⁰⁷⁷ See Puddister & McNabb, *supra* note 1073 at 12-13.

Ultimately, the rarity of criminal prosecution of police and even greater rarity of conviction suggests this route may be ineffective at achieving accountability for the disproportionate impact of police-involved injuries and deaths of persons who experience mental health disability.

To understand why successful criminal prosecutions are rare, it is necessary to consider sections 25(1) and (3) of the *Criminal Code*. Section 25(1) provides a justification for police use of force as a defence to criminal charges or civil liability for trespasses against the person for anyone who on reasonable grounds uses proportionate and necessary force in the administration or enforcement of the law.¹⁰⁷⁸ Section 25(3) restricts the justification of use of force likely to cause “grievous bodily harm or death” to contexts where the person has reasonable grounds to believe it’s necessary to prevent such harm or death to themselves or someone under their protection.¹⁰⁷⁹

When a police officer is faced with a civil lawsuit for an act of force they bear the onus of proving all elements of the statutory defence on a balance of probabilities.¹⁰⁸⁰ In criminal contexts where the police officer is prosecuted, the burden initially falls on the accused to point to evidence putting the statutory defences in issue (i.e. the “air of reality test”¹⁰⁸¹), but once this has been established the Crown is responsible for proving guilt beyond a reasonable doubt and “must negative a justification or excuse.”¹⁰⁸² In criminal contexts where section 25 is raised by police in the context of a challenge under the *Canadian Charter of Rights and Freedoms* concerning use of force where the subject of force (the

¹⁰⁷⁸ *Criminal Code*, RSC 1985 c C-46, s 25(1), states:

(1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law
(a) as a private person,
(b) as a peace officer or public officer,
(c) in aid of a peace officer or public officer, or
(d) by virtue of his office,
is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

¹⁰⁷⁹ *Criminal Code*, RSC 1985 c C-46, s 25(3).

¹⁰⁸⁰ See *Crampton v. Walton*, 2005 ABCA 81; *R v Davis*, 2013 ABCA 15, para 43; aff’d: SCC 4 (CanLII), [2014] 1 SCR 78.

¹⁰⁸¹ See *R v Cinous*, 2002 SCC 29 (CanLII) at para 82.

¹⁰⁸² See *R v Desjourdy*, 2013 ONCJ 170 (CanLII) at para 95.

person against whom it is used) is being prosecuted, the burden of proof is on the Crown to prove the section 25 justification, despite the general requirement that a Charter litigant bears the onus of proving violation of their rights.¹⁰⁸³ The burden of proof is the same for both sections 25(1) and 25(3).¹⁰⁸⁴

The analysis conducted for section 25(1) is essentially divided into three steps which will be described below.

8.2.1.1 “Whether the police officer is required or authorized by law to perform an action in the administration or enforcement of the law”¹⁰⁸⁵

Section 25(1) is a defence against criminal or civil liability for force used to accomplish a lawful purpose,¹⁰⁸⁶ which must correspond to an act authorized by law, which is “usually an arrest or detention.”¹⁰⁸⁷ At the first stage of the analysis, the court is required

to review the type of action undertaken by the police officer (rather than the manner in which the action was carried out) to determine whether it was something the police officer was required or authorized by law to perform in the administration or enforcement of the law. Essentially, the court decides whether the type of action was within the scope of the police officer’s law enforcement duties.¹⁰⁸⁸

Justification for the police action can come from a statute directly, such as the power to arrest without a warrant contained in s. 495 of the *Criminal Code*; from a warrant issued pursuant to statute, or from the common law. Common law police powers include an ever expanding list of duties and corresponding powers,¹⁰⁸⁹ including, among others, the duty to preserve the peace (including the

¹⁰⁸³ See *R v Davis*, 2013 ABCA 15; aff’d 2014 SCC 4.

¹⁰⁸⁴ *Ibid.*

¹⁰⁸⁵ *Crampton v Walton*, 2005 ABCA 81 (CanLII), para 14.

¹⁰⁸⁶ See Paul Ceyssens, *Legal Aspects of Policing*, loose-leaf (Saltspring Island, BC: EarlsCourt Press, 1997, last update 2012) [“Ceyssens”] at 3-62.

¹⁰⁸⁷ Vladimir Zaychenko & Simon Verdun-Jones, “Police Use of Conducted Energy Weapons: A Review of the Canadian Jurisprudence” (2011) 49:1 Alta L R 149 at 158.

¹⁰⁸⁸ *Crampton v. Walton*, 2005 ABCA 81 (CanLII) para 15.

¹⁰⁸⁹ Common law police powers in Canada are recognized pursuant to the *Waterfield Test* (aka the “ancillary powers doctrine”). See *R v Stenning*, [1970] SCR 631; *Dedman v The Queen*, 1985 CanLII 41 (SCC), [1985] 2 SCR 2; *R v Mann*, 2004 SCC 5; *R v MacDonald*, 2014 SCC 3. Several common law duties of police have been recognized in Canadian

prevention of a breach of the peace¹⁰⁹⁰),¹⁰⁹¹ the duty to enforce the law and investigate crimes,¹⁰⁹² and the duty to protect life and property.¹⁰⁹³ This latter duty arises in contexts of “wellness checks” and police responses to suicidality, for example.¹⁰⁹⁴ If the police action being performed is not authorized or required by law the statutory defence will not apply.¹⁰⁹⁵

Practically, in addition to preventing breaches of the peace and enforcing the criminal law, police use of force interventions impacting persons perceived to have a mental health disability may be authorized by provincial mental health statutes that provide police with authority to take those perceived to be experiencing mental health disability into custody for psychiatric assessment.¹⁰⁹⁶ Some older cases

law, and as Paul Ceyssens explains: “A complete formulation of police duties is an elusive goal, in part because courts have historically resisted setting out an exhaustive list of police duties.” (Ceyssens, *supra* note 1086 at 2-2.

The ancillary powers doctrine has been widely critiqued by those concerned with its impact on civil rights, since it provides police with an ever-expanding list of duties (and corresponding powers) that can justify otherwise illegal conduct by police. See, for example: James Stribopoulos, “The Limits of Judicially Created Police Powers: Investigative Detention After *Mann*” (2007) 52 Crim LQ 299; Vanessa McDonnell, “Assessing the Impact of the Ancillary Powers Doctrine on Three Decades of Charter Jurisprudence” (2012) 58 SCLR 225; Terry Skolnik & Vanessa MacDonnell, “Policing Arbitrariness: Fleming v. Ontario and the Ancillary Powers Doctrine” (2021) 100 SCLR 187; Terry Skolnik, “Racial Profiling and the Perils of Ancillary Police Powers” (2021) 99 Can Bar Rev 429.

¹⁰⁹⁰ The power to arrest for an apprehended (rather than committed) breach of the peace has been recognized at common law in Canada. See; *Brown v Regional Municipality of Durham Police Service Board*, 1998 CanLII 7198 (ON CA).

¹⁰⁹¹ This common law police power was codified. See *Criminal Code*, RSC 1985, c C-46, ss 30 and 31.

¹⁰⁹² See *R v Beaudry* 2007 SCC 5 at para 35.

Note: This duty has been codified in most provincial and federal policing legislation in Canada.

¹⁰⁹³ In *R v MacDonald*, SCC 2014 3, Justice LeBel (for the Court) expressed (para 43): “[T]he execution of the police duty to protect life and safety lies at the very core of the existence of the police as a social entity.”

¹⁰⁹⁴ See, for example, *R v Dietrich*, (1978) 39 CCC (2d) 361 (BC SC).

¹⁰⁹⁵ See *Fleming v. Ontario*, 2019 SCC 45 (CanLII).

¹⁰⁹⁶ For example, section 17 of Ontario’s *Mental Health Act* authorizes police officers to take a person into custody for psychiatric evaluation if they have

“reasonable and probable grounds to believe that a person is acting or has acted in a disorderly manner and has reasonable cause to believe that the person,

(a) has threatened or attempted or is threatening or attempting to cause bodily harm to himself or herself;

(b) has behaved or is behaving violently towards another person or has caused or is causing another person to fear bodily harm from him or her; or

(c) has shown or is showing a lack of competence to care for himself or herself,

and in addition the police officer is of the opinion that the person is apparently suffering from mental disorder of a nature or quality that likely will result in,

(d) serious bodily harm to the person;

(e) serious bodily harm to another person; or

(f) serious physical impairment of the person.

have suggested that section 25 is inapplicable as a justification in contexts where police are enforcing a provincial statute (like the mental health acts), leaving police to seek justification in provincial policing statutes or the common law.¹⁰⁹⁷ However, more recently in *R v Power* the Saskatchewan Court of Appeal applied section 25 in the context of enforcing provincial liquor laws, suggesting this section is applicable in relation to other provincial statutes including in mental health contexts.¹⁰⁹⁸ Furthermore, section 25 has been applied by some courts in recent years in contexts of police actions pursuant to provincial mental health legislation.¹⁰⁹⁹ As a result, while there is some legal uncertainty as to whether the *Criminal Code* justifications for use of force apply in contexts of mental health apprehensions, recent jurisprudence would suggest that they do.

8.2.1.2 Whether “the police officer acts on reasonable grounds in performing the action he or she is required or authorized by law to perform”¹¹⁰⁰

At the second stage of the analysis, the court examines “the basis for the action and manner in which the action was carried out. The police officer must act on “reasonable grounds.”¹¹⁰¹ The court asks whether “there was an objectively reasonable basis, given the circumstances faced by the police officer, for the actions undertaken (including the intervention broadly and the use of force specifically).”¹¹⁰² Courts routinely recognize at this stage that leniency should be applied to police decision-making given the dangerous and exigent circumstances in which they work. As Justice Binnie expressed in *R v Asante-*

¹⁰⁹⁷ See, for example, *Rumsey v The Queen*, [1984] FCJ No. 529, 27 ACWS (2d) (QL).

¹⁰⁹⁸ *R v Power*, 2016 SKCA 29 (CanLII), leave to appeal dismissed, 2016 CanLII 53912 (SCC).

Note: The question of the applicability of s. 25 when police are enforcing provincial statute rests on whether Parliament can, through its exercise of the criminal law power, incidentally affect civil rights that are not directly engaged in the enforcement of the criminal law. This matter has not been resolved with certainty by the courts.

¹⁰⁹⁹ See, for example: *Camaso Estate v Saanich (District)*, 2013 BCCA 6 (CanLII), leave to appeal dismissed, 2013 CanLII 40334 (SCC); *Quartey v Peel Regional Police Services Board*, 2012 ONSC 2260 (CanLII); *Meadus v The Royal Newfoundland Constabulary Public Complaints Commission*, 2013 CanLII 13365 (NL SC).

¹¹⁰⁰ *Crampton v Walton*, 2005 ABCA 81 (CanLII) at para 19.

¹¹⁰¹ *Crampton v Walton*, 2005 ABCA 81 (CanLII) at para 19.

¹¹⁰² *Crampton v Walton*, 2005 ABCA 81 (CanLII) at para 21.

Mensah: “A certain amount of latitude is permitted to police officers who are under a duty to act and must often react in difficult and exigent circumstances.”¹¹⁰³

8.2.1.3 Whether “the force used was objectively reasonable in light of the circumstances faced by the officer.”¹¹⁰⁴

The third stage of the analysis focuses on the quantum of force used and determines whether the amount of force used was excessive. As described in *Crampton v Walton*, this stage of the analysis is often blurred with the second stage of the analysis, but technically the second stage focuses on reasonable grounds for the police action, whereas the third stage focuses on the amount of force used. In *Levesque v Zanibbi*, Ontario’s Superior Court of Justice enunciated that police will not be held liable “if they use no more force than is necessary having regard to their reasonably held assessment of the circumstances and dangers in which they find themselves.”¹¹⁰⁵ Typically, courts have treated police officers with some leniency at this stage of the analysis in recognition of the fact that they may face exigent circumstances and must react quickly in situations of risk and violence. Courts have emphasized that officers cannot “be expected to measure the force used with exactitude,”¹¹⁰⁶ and that use of force “must not be weighed to a nicety,”¹¹⁰⁷ suggesting a degree of leniency provided to police in miscalculating and slightly overusing force. However, as described in *Crampton v Walton*, “[t]he police are entitled to be wrong, but they must act reasonably.”¹¹⁰⁸ In *R v Nasogaluak*, Justice Lebel (for the Court) expressed that the degree of force used must be “constrained by the principles of proportionality, necessity and reasonableness.”¹¹⁰⁹

¹¹⁰³ *R v Asante-Mensah*, 2003 SCC 38 (CanLII) at para 73.

¹¹⁰⁴ *Crampton v Walton*, 2005 ABCA 81 (CanLII) at para 42.

¹¹⁰⁵ 1992 CarswellOnt 2832 at para 17.

¹¹⁰⁶ *R v Bottrell*, 1981 CanLII 339 (BC CA) (CanLII) at para 16.

¹¹⁰⁷ *R v Power*, 2016 SKCA 29 (CanLII) para 54.

¹¹⁰⁸ *Crampton v Walton*, 2005 ABCA 81 (CanLII) at para 22.

¹¹⁰⁹ *R v Nasogaluak*, 2010 SCC 6 at para 32.

The section 25(1) defence to liability is further qualified and clarified by sub-sections 25(3) and 25(4) of the Criminal Code (among other less commonly used sections). Section 25(3) specifies that

a person is not justified for the purposes of subsection (1) 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 any one under that person's protection from death or grievous bodily harm.¹¹¹⁰

This provision is particularly relevant to police use of lethal weapons such as firearms. It restricts the use of potentially lethal force to contexts where an officer is acting to prevent "grievous bodily harm" or death to the officer or anyone under their protection.¹¹¹¹ Section 25(4) further provides a defence to a police officer who uses "force that is intended or is likely to cause death or grievous bodily harm to a person to be arrested"¹¹¹² if the police officer is proceeding to arrest the person, the individual to be arrested *could* be arrested without a warrant, the individual flees to avoid arrest, the officer believes the force is necessary for self-protection or the protection of someone else from "imminent or future death or grievous bodily harm",¹¹¹³ and the flight of the individual "cannot be prevented by reasonable means in a less violent manner."¹¹¹⁴

The legal test for determining whether a statutory defence is made out when the degree of force used was "likely to cause grievous bodily harm or death" is described as a "subjective-objective" standard.¹¹¹⁵ This means that the officer using such force must subjectively believe that it is necessary to

¹¹¹⁰ *Criminal Code*, RSC 1985, c C-46, s 25(3).

¹¹¹¹ "Grievous bodily harm" is not defined in the *Criminal Code*, but it has been defined by Justice Charron in *R v Paice*, 2005 SCC 22 at para 41, as "harm or injury that is "very severe or serious" (quoting *The Canadian Oxford Dictionary*, 2 ed, 2004 at p. 664). Justice Charron further noted that it "is not limited to harm or injury that is permanent or life-threatening." (para 41). While these remarks were made in the context of interpreting s. 34 of the Code (self-defence), they are likely applicable to s. 25 as well, since these sections similarly address justifications for force.

¹¹¹² *Ibid* at s 25(4).

¹¹¹³ *Ibid* at s 25(4)(d).

¹¹¹⁴ *Ibid* at s 25(4)(e).

Note: Additional sections of the *Criminal Code* provide defences for use of force in contexts of an individual escaping a penitentiary (s 25(5)) and where the officer is preventing a riot (s 32) the commission of an offence (s 27) or a breach of the peace (s 30) among other situations

¹¹¹⁵ *Chartier v Greaves*, [2001] O.J. No. 634 at para 39, 2001 CarswellOnt 563 [*Chartier*].

protect themselves or someone under their protection from grievous bodily harm or death, and their belief must be objectively reasonable.¹¹¹⁶

When the amount of force employed exceeds the limits of section 25, section 26 of the *Criminal Code* provides that an individual is “criminally responsible” for any excess force used.¹¹¹⁷ This section makes clear that police officers can face criminal liability for use of force that is unnecessary or excessive.

In addition to the statutory defences focused on legally sanctioned use of force, police may also avail themselves of the general self-defence provision in section 34 of the *Criminal Code*.¹¹¹⁸ While a detailed discussion of section 34 is beyond the scope of this analysis, section 34 provides alternative justifications to police who employ force in self-defence.

The statutory justification provisions for use of force provided in the *Criminal Code* limit criminal consequences for police officers who use force, but these justifications also limit tort liability for police use of force, as outlined below.

8.2.2 Tort Claims

Tort claims are another potential legal avenue for accountability with respect to police use of force. This section will discuss some of the most common forms of tort claims levied against police in contexts of force and some of the challenges inherent in using tort litigation for compensation in use of force cases.

Claims of trespass against the person (assault and battery) and negligence are the torts most commonly employed to address police use of force that injures or kills someone.¹¹¹⁹ The tort of battery

¹¹¹⁶ *R v Nasogaluak*, 2010 SCC 6 at para 34, 2010 1 SCR 206 [*Nasogaluak*].

¹¹¹⁷ *Ibid* at s 26.

¹¹¹⁸ *Criminal Code*, RSC 1985, c C-46, s 34. For the applicability of s. 34 to police officers, see *R v Bengy*, 2015 ONCA 397; *R v Evans*, 2015 BCCA 46; *R v Power*, 2016 SKCA 29.

¹¹¹⁹ See Ceyssens, *supra* note 1086 at 3-62.

requires the plaintiff prove direct interference with the person, meaning interference that “is the immediate consequence of a force set in motion by an act of the defendant.”¹¹²⁰ As described in *Malette v Shulman*, “[b]asically, any intentional nonconsensual touching which is harmful or offensive to a person's reasonable sense of dignity is actionable.”¹¹²¹

The tort of assault is, in essence “the threat of an immediate battery”¹¹²² such that “[a]ny direct and intentional act that causes a person to apprehend immediate harmful or offensive contact is an assault.”¹¹²³ In contexts of use of force, for example, a police officer pointing a gun at an individual could be an assault, even where the weapon is not fired, provided the action is not legally justified. It is distinct from battery in the sense that a surprise attack on a person might result in battery but not assault, and a threat of force without carrying it out would be an assault but not battery.

There are benefits and drawbacks to bringing a claim in battery and assault compared to negligence. Battery actions do not limit liability to the foreseeable consequences of the act as negligence actions do,¹¹²⁴ so more extensive damages may be available in some cases. A plaintiff does not need to prove damage in a battery claim as they would in negligence.¹¹²⁵

The burden of proof for battery (or assault) is easier to meet for the plaintiff than negligence, although all of these torts can be pled where, as in the case of police use of force, direct force caused injury to the plaintiff. In a battery action, the plaintiff only needs to prove direct interference with the person that is harmful or offensive on a balance of probabilities and then the burden shifts to the defendant to justify their conduct, through a defence such as claiming the interference was unintentional or consensual, or justified through application of statutory defence. In contrast, in negligence actions the

¹¹²⁰ *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24 (CanLII), para 8, McLachlin J.

¹¹²¹ *Malette v. Shulman* (Ont. C.A.), 1990 CanLII 6868 (ON CA), Robins JA.

¹¹²² Philip Osborne, *The Law of Torts*, 6 Ed (Toronto: Irwin Law, 2020) at 272.

¹¹²³ Philip Osborne, *The Law of Torts*, 6 Ed (Toronto: Irwin Law, 2020) at 272.

¹¹²⁴ See *Bettel et al v Yim*, 1978 CanLII 1580 (ON SC), Borins, CoCtJ.

¹¹²⁵ *Norberg v Wynrib* 1992 CanLII 65 (SCC), [1992] 2 SCR 226, La Forest J.

plaintiff must prove that a duty of care was owed to the plaintiff, that the duty was breached, that damage was suffered and that the negligent act caused the damage.

In the context of police use of force, negligence actions have some advantage for plaintiffs because the statutory defences available to police officers in section 25 of the *Criminal Code* RSC 1985 c C-46 are not an available defence to negligence.¹¹²⁶ As will be discussed below, these defences can shield officers from civil or criminal liability for use of force undertaken in fulfillment of their duties. Negligence in policing contexts is judged on the standard of the “reasonable police officer” who is said to be “acting reasonably and within the statutory powers imposed upon him or her, according to the circumstances of the case.”¹¹²⁷ Generally in negligence actions compliance with police policies will be significant in determining whether the standard of care has been met so these actions are unlikely to provoke systemic changes in use of force. Furthermore, negligence actions in the context of use of force may prove problematic for achieving compensation for subjects of force because of arguments of contributory negligence.¹¹²⁸ Additionally, with respect to the liability of individual officers, in some jurisdictions tort liability of individuals is statutorily restricted. For example, section 21 of British Columbia’s *Police Act*,¹¹²⁹ provides that individual officers are not liable for torts committed in the course of their duties unless they have “been guilty of dishonesty, gross negligence or malicious or wilful misconduct” with respect to the subject matter of the action. Consequently, achieving even direct accountability of the officers involved may be difficult in tort law.

¹¹²⁶ See Paul Ceyssens, *supra* note 1086 at 3-60.

Note: The statutory defences only apply to intentional torts and criminal offences, in part because use of force must be “reasonable” in order to be statutorily justified.

¹¹²⁷ *Doern v. Phillips Estate* (1994), 1994 CanLII 1869 (BC SC), 2 BCLR (3d) 349 at 372 (SC). This description was accepted by the Court of Appeal 1997 CanLII 2433 (BCCA) at para 13.

¹¹²⁸ Cases in which contributory negligence was found or considered to have been applicable if negligence were found include, for example: *Klyne v Rae*, 2002 SKQB 139 (CanLII).

¹¹²⁹ RSBC 1996 c 367.

Claims concerning fatal trespasses against the person or negligence leading to death can be brought through tort claims in Canadian common law jurisdictions¹¹³⁰ because family members of a deceased person can bring claims for damages for losses stemming from the death where statutes provide that option.¹¹³¹ At common law, no claim was possible by an estate where a tortfeasor caused the death of an individual, though all Canadian provinces and territories have since crafted legislation to allow some limited damages to be claimed by particular claimants in contexts of wrongful death.¹¹³² Statutes provide that a deceased's estate can sue for damages incurred prior to death due to a tortious act (e.g. loss of earning while hospitalized, etc.).¹¹³³ However, the types of damages available in posthumous tort actions are narrow, when compared to the potential compensation available to a living plaintiff. For example, in Ontario section 61(1) of the *Family Law Act*,¹¹³⁴ provides specified family members with a right to "recover their pecuniary loss resulting from the injury or death of a person injured or killed if the "person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled if not killed."¹¹³⁵ The restriction to pecuniary damages incurred by family members themselves significantly restricts damage recovery by making unavailable other heads of damage (e.g. general, aggravated, etc.). Furthermore, compensation is restricted to the economic value the deceased represented for their family. As a result, those killed by

¹¹³⁰ Note, in Québec, a claim can be brought under the civil law of delict. See *Civil Code of Québec*, CCQ-1991, s 1457. For an example of such an action in the context of a police shooting, see *Augustus v Gosset*, [1996] 3 SCR 268.

¹¹³¹ See Philip Osborne, *The Law of Torts*, 6 ed (Toronto: Irwin Law, 2020) at 135-136.

¹¹³² See Philip Osborne, *The Law of Torts*, 6 ed (Toronto: Irwin Law, 2020) at 135-136.

¹¹³³ See *Estate Administration Act*, RSBC 1996, c 122, s 59; *Survival of Actions Act*, RSA 2000, c S-27, ss 2, 4; *The Survival of Actions Act*, SS 1990-91, c S-66.1, s 3; *The Trustee Act*, RSM 1987, CCSM c T160, s 53; *Trustee Act*, RSO, 1990, c T.23, s 38; *Survival of Actions Act*, RSNB 2011, c 227, ss 3, 5; *Survival of Actions Act*, RSNS 1989, c 453, ss 2(1), 3; *Survival of Actions Act*, RSPEI 1988, c S-11, ss 3, 4; *Survival of Actions Act*, RSNL 1990, c S-32, ss 2, 3; *Survival of Actions Act*, RSY 2002, c 212, ss 2, 4; *Trustee Act*, RSNWT 1988, c T08, s 31; *Trustee Act*, RSNWT(Nu) 1988, c. T08, s 31. Note: In Québec, article 1610 of the *Civil Code of Québec*, SQ 1991, c. 64 provides the right for damage claims to be assigned or transmitted, including to heirs.

¹¹³⁴ RSO 1990 c. F.3.

¹¹³⁵ *Family Law Act*, RSO 1990 c F.3, s 61(1).

police who, as described in chapter 4 are often young men with mental health disabilities, may tend to be dependents rather than breadwinners, and generally will not allow significant damages to be recouped.

While tort actions may provide some damages to those injured by police or the family of someone killed by police, these actions may have little impact on the enduring problem of police-involved deaths of persons who experience mental health disability due to the likelihood that strong cases will be settled out of court, subject to confidentiality clauses limiting broader public discussion (as may also be the case for human rights settlements),¹¹³⁶ and the fact that their payment does not generally come from police budgets, but rather the deep pockets of municipal or provincial governments¹¹³⁷ so they are unlikely to impact available police resources or spark change in policing organizations.

8.2.3 Sections 7 and 12 of the Charter

In addition to criminal prosecutions or tort actions, plaintiffs seeking redress for use of force in Canada can plead violation of their section 7 and 12 rights under the *Canadian Charter of Rights and Freedoms*.¹¹³⁸ This section will outline how sections 7 and 12 of the Charter arise in legal proceedings pertaining to police use of force and note some of the limitations of Charter damages or other Charter remedies for providing accountability.

Section 7 of the Charter provides:

¹¹³⁶ Confidentiality clauses are frequently attached to out of court settlements in litigation against police (see for example, commentary by lawyer Peter Rosenthal in: Michele Mandel, “Taxpayers on hook for outcome of Yatim civil lawsuits,” *Toronto Sun* (January 26, 2016) online: < <https://torontosun.com/2016/01/26/taxpayers-on-hook-for-outcome-of-yatim-civil-lawsuits>>. Similar patterns of use of confidentiality clauses and settlements leading to a dearth of reported lawsuits against police are documented in Australia. See Janet Ransley, Jessica Anderson and Tim Prenzler, “Civil Litigation Against Police in Australia: Exploring its Extent, Nature and Implications for Accountability” (2007) 40:2 *The Australia and New Zealand Journal of Criminology* 143 at 150.

¹¹³⁷ In Canada, statutes generally make municipalities or provincial governments liable for damages from actions against police services. See, e.g., *Police Act*, RSBC 1996, c 367, s 11; *Police Services Act*, RSO 1990 c P.15, s 50.

¹¹³⁸ *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Charter].

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.¹¹³⁹

Police use of force generally engages an individual's security of the person interest where it involves the interference with bodily integrity or "serious state-imposed psychological stress",¹¹⁴⁰ and may engage the life interest where it "imposes death or an increased risk of death"¹¹⁴¹ on the subject.

Section 7 is commonly pled alongside tort actions for use of force, and section 7 claims are often brought in the criminal process where a defendant argues police use of force was unnecessary or excessive. However, provincial criminal courts lack jurisdiction to award Charter damages under section 24(1), so those who experience unnecessary or unreasonable use of force by police and are subject to criminal charges by the officer(s) who assaulted them cannot seek damages unless they bring a civil claim.¹¹⁴² Accused persons can, however, seek remedies pursuant to section 24(1), such as a reduction in their sentence or a stay of proceedings.

When analyzing use of force pursuant to section 7, courts will generally consider section 25 of the Criminal Code and if the use of force is determined not to be justified under section 25 it will amount to a breach of section 7 of the Charter as well.¹¹⁴³ As expressed in *R v Nasogaluak*, a substantial interference with a subject's physical and psychological integrity in the form of use of force will be sufficient for a breach of section 7.¹¹⁴⁴ In *R v Davis*, the Alberta Court of Appeal clarified that although Charter applicants have the onus of proving a breach of their rights, in the context of police use of force the applicant need only prove that they were subject to use of force implicating a section 7 interest (i.e. life and/or security

¹¹³⁹ *Charter supra* note 1138 at s 7.

¹¹⁴⁰ See *R v Morgentaler*, [1988] 1 SCR 30, p 56, Dickson CJ; and see *R v Nasogaluak*, 2010 SCC 6, para 38, for the application of this principle in the context of police use of force.

¹¹⁴¹ *Carter v Canada*, 2015 SCC 5, para 62.

¹¹⁴² Provincial criminal courts lack jurisdiction to award Charter damages. See *Ward v Vancouver (City)*, 2010 SCC 27 at para 58 (McLachlin CJ for the Court).

¹¹⁴³ In *R v Nasogaluak*, 2010 SCC 6 (CanLII) at para 38 it is noted that an excessive and unjustified force pursuant to s. 25 of the Code "confirms" a breach of s. 7 of the Charter.

¹¹⁴⁴ *R v Nasogaluak*, 2010 SCC 6 (CanLII) at para 38.

of the person) and the Crown must prove a justification pursuant to section 25, not the Charter applicant.¹¹⁴⁵ Where police employ fatal force, a *prima facie* breach of s. 7 is made out and the burden shifts to the Crown to prove that the force used was justified.¹¹⁴⁶

With respect to section 12 of the Charter, it applies to significantly excessive or grossly disproportionate use of force. Section 12 of the Charter provides:

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Use of force has been held in some cases to be a “treatment or punishment” for the purposes of section 12 of the Charter. Police use of force will violate section 12 where it is grossly disproportionate or “so excessive as to outrage our society’s sense of decency.”¹¹⁴⁷

Several lower courts have found a violation of section 12 occurred through excessive use of force by police, though whether section 12 appropriately applies to police use of force is subject to some controversy.¹¹⁴⁸ In criminal law contexts where the subject of force was charged with an offence, violations of sections 7 and/or 12 by police force have in some cases merited a stay of proceedings pursuant to s. 24(1).¹¹⁴⁹

¹¹⁴⁵ *R v Davis*, 2013 ABCA 15 (CanLII) at para 43; rev’d on other grounds, but this point affirmed in *R v Davis*, 2014 SCC 4 (CanLII), [2014] 1 SCR 78.

¹¹⁴⁶ See *R v Jarrett*, 2021 ONCA 758 (CanLII) at para 61.

¹¹⁴⁷ See *R v Roger*, [2008] O.J. No. 23 (SC) (QL) at para 12.

¹¹⁴⁸ For cases finding a breach of s. 12 through excessive police use of force see, for example, *R v Jackson*, 2011 ONCJ 228; *R. v. Wiscombe and Tenenbein*, 2003 BCPC 418 (CanLII); *R. v. Tang*, 2011 ONCJ 525 (CanLII); *R v Kim*, 2017 ONSC 5034 (CanLII); *R v Young*, 2014 ONCJ 171 (CanLII); *Regina v. Walcott*, 2008 CanLII 11374 (ON SC); *R v Maskell*, 2011 ABPC 176 (CanLII). However, a lack of appellate decisions finding a breach of s 12 through excessive use of force leaves the applicability of s. 12 in this context in question. In *R v Douglas*, 2020 SKQB 57 (CanLII), Justice Scherman declined to find s. 12 was violated by police use of force and expresses the opinion that it may not apply in this context at all, noting the lack of appellate authority on this point.

¹¹⁴⁹ *R v Gladue*, [1993] A.J. No. 1045, 23 W.C.B. (2d) 342 (Prov. Ct., Crim. Div.); *R v Spannier*, [1996] BCJ No. 2525, 33 WCB (2d) 145 (SC); *R v Murphy*, 2001 CanLII 358 (SK PC), [2001] SJ No. 582, 2001 CarswellSask 613 (Prov Ct); *R v Wiscombe*, [2003] BCJ No. 2858, 2003 BCPC 418; *R v Markowska*, [2004] OJ No 5153, 2004 ONCJ 332; *R v Fryingpan*,

8.3 The Limitations of Litigation to Address Police Accountability and Reform

While criminal prosecution and civil or constitutional litigation can provide redress to individuals injured by police, or in some cases the surviving family members of those killed, the value of legal actions to achieve systemic reform is questionable in light of prior studies on police litigation and the state of Canadian case law interpreting police statutory defences. This section will discuss how current interpretations of use of force law in Canada limit legal accountability of police for unnecessary or otherwise unjustifiable use of force, and how accountability could be improved with modifications to legal understandings of the justifications for use of force.

Some studies suggest that litigation against governments (including police) is ineffective as a strategy for reform.¹¹⁵⁰ While the direct impact of litigation on police reform may be questionable, Law and Society scholar Charles Epp suggests litigation may be effective at reshaping societal understandings of policing and undermining police legitimacy, leading to reform. Epp studied tort litigation against police in the United Kingdom and the United States and the impact this litigation had on reform efforts. His study, described in *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State*, suggests that:

In both settings [UK and USA], activists pressed the message that police abuses were the product not of individual bad apples but of systemic failings, particularly improper policies; inadequate training, supervision and discipline of officers; and inadequate systems of oversight and accountability. In both settings, as jury awards increased, media coverage came to reflect the activists' message. In both settings, mainstream professional policing remained deaf to complaints of racial harassment and abuse until prodded by tort liability into addressing the problem. In both settings, tort liability's sanction was reputational rather than monetary: a powerful synergy developed between tort lawsuits, the institution of the jury, and news media coverage. [...] the popular news media have an affinity for tort litigation, since an individual

[2005] AJ No 102, 2005 ABPC 28 (Crim Div); *R v Cheddie*, [2006] OJ No 1585 (SCJ); *R v Merrick*, [2007] OJ No 2266, 2007 CarswellOnt 3855 (CJ).

¹¹⁵⁰ See, for example, Nirej Sekhon, "Police and the Limit of Law" (2019) 119 Columbia LR 1711; Megan Quattlebaum & Tom Tyler, "Beyond the Law: An Agenda for Policing Reform" (2020) 100 Boston University LR 1017; Michael D. White et al., "Federal Civil Litigation as an Instrument of Police Reform: A Natural Experiment Exploring the Effects of the *Floyd* Ruling on Stop-and-Frisk Activities in New York City" (2016) 14:9 Ohio State Journal of Criminal Law 9.

plaintiff, graphic complaints, and money awards make compelling news. Finally, in both settings lawsuits and damage awards carry a disruptive potential widely perceived to threaten the stability of institutionalized power by reframing the key issues in the media. What mattered to police officials, it seems clear from a distance, was not the size of jury awards but their significance in the battle over how to frame the issue of police accountability.¹¹⁵¹

In Canada, instances of high-profile police-involved deaths leading to calls for reform are plentiful, but it is unclear to what extent litigation has furthered (or hindered) actual reform efforts. Litigation may keep issues of police violence in the public consciousness through media, sparking a push for changes. However, the lenient approach Canadian courts have taken to analyzing the section 25 justifications for police use of force are likely to undermine the success of litigation.

In tort, criminal law, and Charter claims, courts in Canada have been reluctant to question the appropriateness of the particular police actions chosen in an intervention when compared to other possibilities. This reluctance to evaluate whether use of force decision-making was objectively reasonable by considering what else could have been done is explained through courts describing (or arguably misdescribing) such questioning as impermissible “hindsight bias”. For example, in several cases courts have held that police are not required to justify why a particular alternative approach considered appropriate by the court was not engaged in by police, as this would amount to the sort of hindsight analysis the courts have been careful to avoid.¹¹⁵² In *R v Power*,¹¹⁵³ the Saskatchewan Court of Appeal criticized the trial court for engaging in hindsight-reasoning by suggesting “lesser degrees of force” could have been taken and ultimately concluding “a fairly minimal level of force by Constable Power was all that was reasonable and justifiable in the circumstances.”¹¹⁵⁴

¹¹⁵¹ Charles Epp, *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State* (Chicago: University of Chicago Press, 2009) at 163.

¹¹⁵² See Ceyssens, *supra* note 1086 at 3-69.

¹¹⁵³ 2016 SKCA 29 (CanLII).

¹¹⁵⁴ *Ibid* at para 88.

Similarly, in *R v Campbell*,¹¹⁵⁵ Justice Park expressed: “a court must not use hindsight in order to determine whether a lesser amount of force or different force techniques could have been used.”¹¹⁵⁶ In *Campbell*, the trial judge was said to have engaged in such “hindsight bias” when he suggested that the defendant police officer ought to have approached a situation where a subject was touching a breathalyzer machine after being instructed not to differently, rather than punching the man in the face and taking him down. In that case, Justice Park wrote:

Although the trial judge warned himself of the mistake in looking at Campbell’s use of force in hindsight, it is my view that is exactly what the trial judge did. In examining the amount of force used by Campbell the trial judge suggested after Campbell observed Guthrie touch the breathalyzer instrument on one occasion it became objectively reasonable to anticipate Guthrie would touch it again. The trial judge believed Campbell should have anticipated a second touching and an appropriate response be considered. In using the lens of hindsight the trial judge stated:

Constable Campbell testified that he did not consider any other alternative course of action, that he simply reacted out of reflex when he punched Mr. Guthrie in the mouth.

When considering the proportionality of Constable Campbell’s actions I find that there was little or not (sic) harm that could have reasonably been occasioned to the Breathalyzer instrument and that punching Mr. Guthrie in the face was grossly disproportionate. The subsequent take down was also grossly disproportionate.

Constable Campbell could have verbally directed Mr. Guthrie to release his hold on the breath tube, an action which worked the first time. He could have manually removed Mr. Guthrie’s hand from the breath tube, or he could have held the Breathalyzer instrument in place so as to avoid any risk or damage to it. Even if a sudden application of force to the body of Mr. Guthrie was called for, which I’ve concluded it was not, he could have batted away or otherwise struck at Mr. Guthrie’s arm. Accordingly, I find that Constable Campbell used more force than was necessary and that the force used was unreasonable and excessive.

In his assessment the trial judge failed to appreciate the exigency of the situation and Campbell’s concern respecting the immediate injury to the integrity of the breathalyzer instrument.”¹¹⁵⁷

This analysis is an example of courts being largely unwilling to allow careful consideration of the appropriateness of police actions and to justify this deference to police conduct on the grounds of

¹¹⁵⁵ 2012 ABQB 466 (CanLII).

¹¹⁵⁶ *R v Campbell*, 2012 ABQB 466 (CanLII) para 37.

¹¹⁵⁷ *R v Campbell*, 2012 ABQB 466 (CanLII) at paras 38-39.

exigency, even in contexts where the risks are only to property and not people. If judges are precluded from questioning the reasonableness of police actions based on immediately obvious alternative courses of action, what is being prevented isn't hindsight, but a requirement for justified police decision-making leading to use of force. In *Campbell*, Justice Parks suggested that "a judge must only look at Campbell's actions in the exigency of the moment,"¹¹⁵⁸ suggesting that even his own analysis rebutting the suggested alternative courses of action by the trial judge amounts to hindsight bias.¹¹⁵⁹ This narrow focus on exigency fails to make police accountable because "exigency" here functions as a shield against questioning the appropriateness and utility of routine violence in policing. If the possibility (but by no means certainty) of property damage is sufficient to justify a pre-emptive assault by police, then "exigency" is being used to protect police who use violence, even in contexts where they (or others) are not at risk of violence. It amounts to an assumption that police actions are justified because of the uncertainty inherent in police interactions. As Justice Parks expressed in *Campbell*:

At the moment of intervention Campbell would have no means of knowing the possible extent of any imminent and serious injury to the breathalyzer instrument by Guthrie's actions or Guthrie's possible subsequent actions, had intervention not occurred.¹¹⁶⁰

Officer Campbell's action to punch a man in the face was considered justified as a response to this uncertainty.

In *Gamache c. R.*, Justice Ruel's reasons provide another example of courts using concerns about "hindsight bias" to refuse to consider alternative options not actually pursued by the defendant police officer. Justice Ruel wrote:

Trial judges should be mindful that, in assessing the reasonableness of police conduct, they have the benefit of hindsight. Quick decisions have to be made by police officers in the course of law

¹¹⁵⁸ *Ibid* at para 40.

¹¹⁵⁹ *Ibid* at para 40.

¹¹⁶⁰ *Ibid* at para 49.

enforcement activities. Trial judges have the advantage of time to “minutely dissect the significance of the events” [quoting *Chartier v Greaves*, [2001] O.J. No. 634 (Ont S.C.) para 64] or reflect from the comfort of their offices on the propriety of decisions made by law enforcement in the exigencies of the moment.

The conduct of law enforcement officials should therefore be assessed at the time and in circumstances of the events in question, and it will generally be unfair to judge on the basis of hindsight.

From this perspective, the question was not whether, after careful consideration and analysis, Gamache could have used other techniques or methods to subdue the suspect. The question was whether Gamache had a subjective belief for using pepper spray and whether that belief was objectively reasonable.¹¹⁶¹

Determining the objective reasonableness of police actions, however, requires consideration of other available techniques or methods. After all, what can reasonableness entail if it is not considered in light of alternatives? It cannot be evaluated in a vacuum with a sole focus on what happened, but must consider what a reasonable officer faced with similar circumstances would have done. In *Gamache*, the court relied on reasoning in *Chartier v Greaves*, [2001] O.J. No. 634 (Ont. S.C.), one of the most widely cited cases on the principles to be considered by courts when evaluating police use of force because Justice Power summarizes several principles from precedents in the field. *Chartier* was also cited by the Supreme Court’s leading case on use of force, *Nasogaluak*, for its description of the subjective-objective standard applicable to s. 25(3). Among the principles provided by Justice Power in *Chartier* is the statement:

(j) “Some allowance must be made for an officer in the exigencies of the moment misjudging the degree of force necessary to restrain a prisoner”. The same applies to the use of force in making an arrest or preventing an escape. Like the driver of a vehicle facing a sudden emergency, the policeman “cannot be held to a standard of conduct which one sitting in the calmness of a court room later might determine was the best course.” (*Foster v. Pawsey*) Put another way: It is one thing to have the time in a trial over several days to reconstruct and examine the events which took place on the evening of August 14th. It is another to be a policeman in the middle of an emergency charged with a duty to take action and with precious little time to minutely dissect

¹¹⁶¹ *Gamache c R*, 2015 QCCS 5175 (CanLII) at paras 61-64.

the significance of the events, or to reflect calmly upon the decisions to be taken. (*Berntt v. Vancouver*).¹¹⁶²

This description of the concern that courts will hold police to too high a standard if their actions are subject to the calm and reasoned consideration of what the best course of action would have been is an example of how legal discourse about exigency is martialled to avoid probing consideration of police decision-making. What is missing from this description of the role of “exigency” in use of force law is the question of whether exigency should produce judicial leniency towards police where exigent circumstances were, in part, determined by police actions themselves. For example, the death of G.J.M.,¹¹⁶³ discussed in chapter 5 in the context of police shootings, is arguably an example of police-produced exigency. In that case, the deceased, a 40-year-old man who was a veteran who experienced PTSD, depression and alcoholism related to his experiences as a peacekeeper in Bosnia, was the subject of an Emergency Response Team intervention on his property. The intervention included a police helicopter and many officers dressed in camouflage. G.J.M.’s psychiatrist warned that he would defend himself if confronted due to his PTSD and offered to communicate with G.J.M., but this offer was refused by police.¹¹⁶⁴ The officers surrounded G.J.M. concealed by bushes and then emerged to arrest him. The deceased took a hatchet out of his coat and an officer with a CEW sprinted towards G.J.M. and unsuccessfully deployed it. G.J.M. was subsequently shot by police fearing for the life of the officer with the CEW who had run towards the deceased. Here, exigent circumstances were produced, in part, by running towards an armed individual with a known mental health disability with a weapon that frequently mis-fires, placing the officer in imminent danger and necessitating a lethal shooting. The police response in this context was militarized and aggressive, particularly in the context of seeking to arrest someone with known PTSD related to military service, and police did not make use of several individuals who

¹¹⁶² *Chartier, supra* note 1115.

¹¹⁶³ Re G.J.M., British Columbia, DoD: September 10, 2012.

¹¹⁶⁴ *Ibid* at 6.

volunteered to communicate with G.J.M. to de-escalate the situation, nor did they attempt to maintain a distance from him and de-escalate the situation themselves. In cases like this, or those employing the “21-foot rule”, where the appropriateness of a police shooting is evaluated based on the imminent danger to a police officer who has chosen an approach placing themselves in close proximity to an armed individual in crisis courts will always fail to adequately address failure to de-escalate if they refuse to consider alternative approaches for fear of “hindsight bias”.

In *Chartier*, it is likely that Justice Power was not, in fact, intending to suggest courts could not engage in an analysis of alternative courses of action, because another principle he cites is:

A police officer is not at liberty to shirk his/her duty. If he/she does, he/she may be charged with "neglect of duty". A police officer should, where possible, explain why an obvious alternative but less dangerous course of action was not taken.¹¹⁶⁵

However, many subsequent cases have ignored this point while emphasizing the former, producing a strong trend in section 25 case law to emphasize deference to police decision-making, while failing to carefully consider alternative courses of action open to police.¹¹⁶⁶

The above cases reflect a misinterpretation of what the rule against employing “hindsight” is meant to achieve. The rule against employing hindsight should be interpreted as precluding a judge from considering information that was not reasonably available to the officer making use of force decisions

¹¹⁶⁵ *Ibid* at para 64.

¹¹⁶⁶ In Ontario, a recent example of emphasizing the importance of avoiding hindsight bias and affording judicial leniency to police due to “exigent circumstances” can be seen in *R v Hannaford*, 2020 ONSC 1388, in which Justice Skarica describes in detail the many precedents emphasizing the importance of avoiding hindsight bias and judging police use of force in light of exigency, but does not discuss corresponding principles requiring police to address alternative actions. Additional recent examples in other jurisdictions include: *R c Gilbert*, 2021 QCCQ 620 at para 111;

At the appellate level, in Alberta, *Webster v Wasylyshen*, 2007 ABCA 23 (CanLII), the Court of Appeal overturned a trial decision finding unjustified use of force on the grounds that the trial judge had engaged in inappropriate “hindsight” by suggesting that the police ought to have obtained more information before calling in a tactical team, and by accepting a report suggesting police decision-making to use a tactical team was inappropriate. While it will always be somewhat unclear if other courses of action would have been successful (since they were not in fact taken), finding fault in failures to properly attempt to obtain information and plan prior to employing force is not hindsight bias unless these options would only have been reasonable with information not available to the officer.

during the incident, since it would be unfair to suggest someone was acting unreasonably if that determination is based on information they could not have known at the time. It also recognizes the reality that some police decision-making necessarily takes place under time pressures that require an immediate response rather than careful reflection on alternatives. However, it is not impermissible hindsight to ask whether other techniques or approaches would have been more appropriate and avoided the use of force or reduced the quantum of force employed in contexts where police had the opportunity to plan their response and failed to do so effectively. Nor is it inappropriate to question whether police adequately apprised themselves of the information necessary to respond appropriately to a situation. Furthermore, the uncertainty and risk involved in policing must be kept in perspective, the fact that people may act in unpredictable and dangerous ways should not provide police with *carte blanche* to pre-emptively assault or batter subjects of police intervention, or to forego careful planning when engaging with a subject. If courts are to better hold police accountable for use of force decision-making they should carefully weigh police opportunities for planning an intervention and ensure that police-produced exigency does not limit liability. Failure to place a legal expectation on police to plan effectively when possible allows violent and escalatory police conduct to become acceptable and routine.

A preferable interpretation of the statutory defence provisions is found in *R v Davis*,¹¹⁶⁷ (reversed on other grounds) where the Alberta Court of Appeal recognized that courts must in fact consider alternative approaches to the use of force actually engaged in by the officer:

[I]n assessing whether the police officer's belief that deadly force was necessary was objectively reasonable as the *Code* requires, it would not have been hindsight for the trial judge to consider whether other reasonable options existed short of shooting Davis twice in rapid succession: *R v Aucoin*, 2012 SCC 66 at paras 39-42. This is precisely the analytical exercise that a trial judge is required to undertake in determining whether the Crown has met the evidentiary burden imposed on it to justify the use of deadly force once the defence has established, as it did here, a *prima facie* breach of s. 7."¹¹⁶⁸

¹¹⁶⁷ 2013 ABCA 15 (CanLII) rev'd on other grounds, *R v Davis*, 2014 SCC 4 (CanLII), [2014] 1 SCR 78.

¹¹⁶⁸ *R v Davis*, 2013 ABCA 15 (CanLII) at para 89.

This interpretation of the rule against hindsight bias is much more reasonable than interpretations that preclude careful consideration of alternatives, because ultimately the reasonableness of an action can only really be determined in the context of other possibilities. Failure to pursue this form of analysis amounts to a refusal to apply an objective standard, as required by the subjective-objective test. The description in *Davis* also conforms to the Supreme Court's explanation of "hindsight bias" in *R v Cornell* 2010 SCC 31 (Binnie J., for the majority):

First, the decision by the police must be judged by what was or should reasonably have been known to them at the time, not in light of how things turned out to be. Just as the Crown cannot rely on after-the-fact justifications for the search, the decision about how to conduct it cannot be attacked on the basis of circumstances that were not reasonably known to the police at the time: *R. v. DeWolfe*, 2007 NSCA 79, 256 N.S.R. (2d) 221, at para. 46. Whether there existed reasonable grounds for concern about safety or destruction of evidence must not be viewed "through the 'lens of hindsight'": *Crompton v. Walton*, 2005 ABCA 81, 40 Alta. L.R. (4th) 28, at para. 45.

Second, the police must be allowed a certain amount of latitude in the manner in which they decide to enter premises. They cannot be expected to measure in advance with nuanced precision the amount of force the situation will require: *R. v. Asante-Mensah*, 2003 SCC 38, [2003] 2 S.C.R. 3, at para. 73; *Crompton*, at para. 45. It is often said of security measures that, if something happens, the measures were inadequate but that if nothing happens, they were excessive. These sorts of after-the-fact assessments are unfair and inappropriate when applied to situations like this where the officers must exercise discretion and judgment in difficult and fluid circumstances. The role of the reviewing court in assessing the manner in which a search has been conducted is to appropriately balance the rights of suspects with the requirements of safe and effective law enforcement, not to become a Monday morning quarterback.¹¹⁶⁹

In *Cornell* Justice Binnie explains that hindsight bias concerns avoiding assessing officers' actions in light of unknown facts, and latitude given to police concerning their discretion is linked in his reasons to concerns that force must be tailored to the situation but judged in light of its uncertainty. However, the rule that courts are "not to become a Monday morning quarterback"¹¹⁷⁰ can be taken too far when judges believe scrutiny of police approaches and tactics are unnecessary or should be avoided to prevent

¹¹⁶⁹ *R v Cornell* 2010 SCC 31 at paras 23-24.

¹¹⁷⁰ *Ibid* at para 24.

implementing too exacting a standard. Such approaches to the rule against “hindsight” can prevent courts from considering the approach an officer takes from the beginning of an interaction, and rather focus on the narrow options available to the officer once a confrontation has occurred. This goes beyond a protection from hindsight bias to insulating police use of force approaches from judicial scrutiny. As Patricia Williams suggests, the term “hindsight” in American policing case law may be “used as a euphemism for short-circuited foresight”¹¹⁷¹ when used to deflect questions about police actions prior to a shooting. In trying to avoid impermissible “hindsight”, at times courts fail to appropriately question whether police should have had the foresight to see how their actions may have worked to produce instances of violence or put themselves or others at risk. While there are many contingencies at play in use of force scenarios, sometimes decision-making well in advance of the moment when a particular use of force action is taken can be quite relevant to determining its necessity and proportionality.

However, there will never be certainty at the outset of a police call as to whether a use of force confrontation can be avoided by employing tactics or options believed, for example, to better accommodate disability. Thus, instances where police officers fail to take steps that might accommodate someone who experiences mental health disability, such as choosing to employ crisis intervention or de-escalation techniques, contacting policing teams specialized in mental health,¹¹⁷² calling an ambulance and waiting for it to arrive before proceeding, requesting alternative non-police responders, or simply waiting to see if the subject of the call will calm down before engaging them, can be lost in analysis that focuses too narrowly on whether the decision to use force was justified in response to an immediate threat. Too strict an approach to hindsight bias reduces the scope of judicial oversight of police use of force to considering a “reactive account” of force alone – i.e. the description provided by the officer to

¹¹⁷¹ Patricia Williams, *The Alchemy of Race and Rights: Diary of a Law Professor*, (Cambridge: Harvard University Press, 1991) at 138.

¹¹⁷² These are examples of recommendations proposed in coroner and medical examiner reports (see chapter 8). However, see chapter 1 regarding the evidentiary uncertainty about the effectiveness of police-involved mental health teams at reducing incidents of force.

explain why in the moment they decided to pull the trigger, or throw the punch, or deploy their taser. Reactive accounts of force leave out consideration of whether police intervention was necessary, whether the choice to use force and the choice to use the particular form of force was necessary, and consideration of alternatives in light of what was known to the officer(s) at the time.

Police officer and legal commentator Kevin Cyr suggests that Canadian judicial analysis of use of force should distinguish more fully between its analysis of proportionality and necessity. The proportionality analysis, according to Cyr, should consider whether the force used was proportionate to the threat faced by the officer, whereas necessity would consider “the circumstances as a whole and a question of whether the police intervention that required the force was actually necessary.”¹¹⁷³ Courts need to find a way to tease out these two separate understandings of necessity (the necessary use of force in reaction to a threat and the necessity of a police intervention of the nature engaged in by police) and ensure that interactions are evaluated on both fronts.

With respect to exigency of use of force situations, Cyr notes that officers should be required to avoid actions that produce “exigency”, for which he provides the example of a police officer stepping in the way of a stolen vehicle, creating the exigent circumstance of the risk of being hit which then provides justification for fatal force.¹¹⁷⁴ In person-in-crisis contexts, failure to consider options to contain the individual in distress in non-confrontational circumstances may amount to producing exigency, where police force a confrontation with an armed individual who is not an immediate threat to others. Policing failures to appropriately plan and de-escalate should not be awarded with greater leniency for unnecessary force because of the exigent circumstances police imprudence produced. Courts need to

¹¹⁷³ Kevin Cyr, “Police Use of Force: Assessing Necessity and Proportionality” (2016) 53:3 Alberta Law Review 663 at 664.

¹¹⁷⁴ *Ibid* at 668.

carefully consider the circumstances of a use of force interaction to ensure that true necessity is demonstrated and police-produced exigency does not cloud this analysis.

Ultimately, contemporary criminal and civil caselaw on police use of force reveals considerable deference to police decision-making based on assumptions about exigency and concerns about hindsight bias. When courts fail to adequately consider police choices on how to approach a situation and alternatives available to the force used, they undermine litigation as a tool of accountability, particularly for those with disabilities who may require proactive measures of accommodation in the context of arrest or apprehension that must be considered well before police confront an individual. For example, calling for the dispatch of police-based or civilian mobile crisis units, or responses by individuals trained in de-escalation or crisis negotiation suggested in many coroner and medical examiner recommendations reviewed in chapter 7 are examples of police decision-making that may occur before, or instead of police attempting to engage with a person in crisis. Failures in these forms of decision-making will never be subject to scrutiny by the courts if concerns about hindsight bias are allowed to prevent judges from considering decision-making occurring before a use of force interaction.

To improve the cogency of Canadian caselaw in this field it would be helpful for the Supreme Court to clarify the nature of the rule against hindsight bias in this context, as one requiring courts to avoid employing information not available to the police officer in assessing their actions. Further, explicit direction on the importance of evaluating police approaches, and not merely reactive accounts of force, when evaluating whether force was justified would be helpful. Lastly, the Court should clarify how and when “exigency” should be treated as a factor in determining the justifiability of use of force, and expressly mention evidentiary requirements where it is used to provide leniency to police to justify somewhat deficient choices about use of force. Police should be required to prove exigency if they wish to suggest that flawed decision-making was nevertheless legally justified. In this regard, it may also be helpful for Parliament to consider reforming the statutory justification provisions to prescribe particular

factors to be considered by courts when determining if force is justified. Such factors might include the availability of alternative approaches to intervening with the subject and de-escalation. Judging force based on a list of factors is already a feature of the section 34 self-defence provision of the Code, so such a reform would not be without precedent.

The following section will consider how equality and discrimination law differs from the traditional avenues of legal redress described above, and why despite more directly addressing disability accommodation concerns discrimination claims may be unlikely to better achieve accountability.

8.4 Discrimination Claims as an Avenue for Legal Accountability for Police-Involved Injuries and Deaths of Persons Who Experience Mental Health Disability

Discrimination claims brought through human rights tribunals or in courts through section 15 of the Charter are less common means of seeking redress for police-involved injuries and deaths. Mental health disability is a protected group under both provincial, territorial and federal human rights statutes and the Charter, and police are subject to this legislation. In contrast to tort litigation and criminal prosecution of police described above, human rights tribunals are intended to be more accessible than traditional legal processes for individuals seeking redress for discrimination, which may make them a preferable avenue for seeking accountability. These systems tend not to have fees associated with filing a claim (unlike courts), they often have human rights commissions or other associated bodies that can assist complainants seeking to file a complaint and which may provide general research and reporting pertaining to human rights.¹¹⁷⁵ Section 15 of the Charter is not an especially accessible route for

¹¹⁷⁵ There is diversity in Canada with respect to the role of human rights commissions. For example, federally, the Canadian Human Rights Commission is empowered by the *Canadian Human Rights Act*, RSC 1985, c H-6 to accept filed complaints (s. 40(1)), conduct investigations into these complaints (s. 40(3)), dismiss complaints (s. 44), approve or reject a settlement (s. 48), request an inquiry into a complaint (s. 49) and engage in studies and author reports and guidelines pertaining to human rights (s. 27), among other powers. In contrast, Ontario's Human Rights Commission does not fulfill a gatekeeping function with respect to the Tribunal, but rather engages in research, review and activities promoting human rights in the province, pursuant to the *Human Rights Code*, RSO 1990, c H.19, s 29.

attempting to address discrimination, but may hold benefits in some cases when compared to actions under human rights statutes because it allows, for example, direct challenges to legislation.

Claims that police have discriminated against an individual on the basis of disability are not uncommon in Canada,¹¹⁷⁶ though claims against police on any ground of discrimination that proceed to a hearing and are successful are rare.¹¹⁷⁷ Successful claims against police have tended to allege discrimination on the grounds of race or gender, rather than disability. This section will begin by describing the current legal tests for discrimination in Canada as they relate to discrimination by police. Secondly, it will review several types of discrimination claims filed against police through human rights legislation in Canada to consider what types of legal arguments have been made in the past.

8.4.1 Discrimination in the Context of Policing

Provinces and territories in Canada have human rights statutes that codify human rights guarantees in the province or territory. They also have human rights tribunals that adjudicate these

¹¹⁷⁶ There is relatively little data on the number of human rights claims against police services annually in Canada. However, the Toronto Police Service has recently begun releasing information about human rights claims against police. The data indicates that in the 2016-2020 time period, there were an average of 11.4 disability human rights claims filed against the TPS per year, though the majority of the claims were withdrawn or dismissed, and a few settled. See Toronto Police Service, *Corporate Risk Management Annual Report, 2020*, (Toronto: Toronto Police Service, 2020) at 12, online:

<<http://www.torontopolice.on.ca/publications/files/reports/crm2020annualreport.pdf>>.

¹¹⁷⁷ A search of CanLII human rights decisions in Canadian jurisdictions revealed hundreds of cases alleging discrimination against police, but very few had successful final decisions published, and successful claims were frequently alleging discrimination on the ground of race (or ethnic origin or colour) or sex (pertaining to discrimination against transgendered people). Examples of successful human rights discrimination claims against police in Canada include: *Campbell v Vancouver Police Board (No 4)*, 2019 BCHRT 275 (CanLII) (successful discrimination claim re race/colour/ancestry concerning an Indigenous man); *Dawson v Vancouver Police Board (No 2)*, 2015 BCHRT 54 (CanLII) (successful discrimination claim re sex (gender identity)); *Abbott v Toronto Police Services Board*, 2009 HRT0 1909 (CanLII) (successful discrimination claim re race/colour/gender); *Briggs v Durham Regional Police Services Board*, 2015 HRT0 1712 (CanLII) (successful discrimination claim re race); *McKay v Toronto Police Services Board*, 2011 HRT0 499 (CanLII) (successful discrimination claim re race); *Maynard v Toronto Police Services Board*, 2012 HRT0 1220 (CanLII) (successful discrimination claim re race/ethnic origin/colour); *Forrester v Peel (Regional Municipality) Police Services Board et al.*, 2006 HRT0 13 (CanLII) (successful discrimination claim re sex (gender identity)); *JKB v Peel (Police Services Board)*, 2019 HRT0 172 (CanLII) (successful discrimination claim re race); *Aiken v Ottawa Police Services Board*, 2013 HRT0 901 (CanLII) (successful discrimination claim re race).

complaints.¹¹⁷⁸ Federally, Canada also has a human rights act applicable to federal bodies and the Canadian Human Rights Tribunal that adjudicates cases under federal jurisdiction.¹¹⁷⁹ Additionally, in some jurisdictions human rights actions can be brought before the courts when they are pled alongside civil claims, or by administrative tribunals deciding a matter with a human rights component under their own jurisdiction, rather than providing the human rights tribunals with exclusive jurisdiction.¹¹⁸⁰ Human rights legislation in Canada prohibits discrimination in particular contexts, and all human rights statutes include protections with respect to service provision.¹¹⁸¹ When police services engage in mental health apprehensions, arrests, or other law enforcement activities they are providing a “service” within the meaning of provincial, territorial, and federal human rights legislation and are legally obliged to provide these services in a manner that does not discriminate against recipients on the basis of protected grounds, including mental health disability.¹¹⁸²

Section 15 of the Charter (and its other sections) can be used to challenge laws and policies structuring policing federally and provincially, as well as the actions or exercise of discretion taken by police under statutory authority.¹¹⁸³ While the Charter is most commonly used to challenge legislation, it

¹¹⁷⁸ *Human Rights Code*, RSBC 1996, c 210; *Alberta Human Rights Act*, RSA 2000, c A-25.5; *The Saskatchewan Human Rights Code, 2018*, SS 2018, c S-24.2; *The Human Rights Code*, CCSM, c H175; *Human Rights Code*, RSO 1990, c H.19; *Charter of Human Rights and Freedoms*, CQLR, c C-12; *Human Rights Act*, RSNB 2011, c 171; *Human Rights Act*, RSNS 1989, c 214; *Human Rights Act*, RSPEI 1988, c H-12; *Human Rights Act, 2010*, SNL 2010, c H-13.1; *Human Rights Act*, RSY 2002, c 116; *Human Rights Act*, SNWT 2002 c 18; *Human Rights Act, Human Rights Act*, SNU 2003, c 12.

¹¹⁷⁹ *Canadian Human Rights Act*, RSC 1985, c H-6.

¹¹⁸⁰ See, for example, *Human Rights Code*, RSO 1990, c H.19 at s 34(11) that disallows parallel proceedings before the Tribunal and a court and precludes a human rights action where a court has already decided the issue and s. 45.1 that permits the Tribunal to dismiss cases already appropriately with in another proceeding (which includes other administrative proceedings).

¹¹⁸¹ See *Human Rights Code*, RSBC 1996, c 210; *Alberta Human Rights Act*, RSA 2000, c A-25.5; *The Saskatchewan Human Rights Code, 2018*, SS 2018, c S-24.2; *The Human Rights Code*, CCSM, c H175; *Human Rights Code*, RSO 1990, c H.19; *Charter of Human Rights and Freedoms*, CQLR, c C-12; *Human Rights Act*, RSNB 2011, c 171; *Human Rights Act*, RSNS 1989, c 214; *Human Rights Act*, RSPEI 1988, c H-12; *Human Rights Act, 2010*, SNL 2010, c H-13.1; *Human Rights Act*, RSY 2002, c 116; *Human Rights Act*, SNWT 2002 c 18; *Human Rights Act*, SNU 2003, c 12.

¹¹⁸² See, for example: *Maynard v Toronto Police Services Board*, 2012 HRT0 1220; *Dawson v Vancouver Police Board*, 2015 BCHRT 54; *Commission des droits de la personne et des droits de la jeunesse (Miller et autres) c Ville de Montréal (Service de police de la Ville de Montréal) (SPVM)*, 2022 QCTDP 6.

¹¹⁸³ See *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 at s 32.

may also be employed to challenge police actions taken in the enforcement of the law as they can arguably result in depriving an individual of their equal protection or equal benefit of the law. Arguably policing services are a “benefit” of the law, though they may not seem particularly beneficial to the individual being arrested or detained. Policing also concerns “equal protection of the law” in the context of law enforcement. The powers and duties of police officers to enforce the law are laid out in policing statutes, the criminal code and the common law.

Comparing discrimination claims under human rights statutes to Charter claims, there are some differences relevant to discrimination claims against police between the two. The following section will describe contemporary discrimination law in Canada in the context of policing persons who experience mental health disability.

8.4.2 Tests for Discrimination Under Section 15 of the Charter and Human Rights Legislation in Canada

The legal understanding of equality rights in Canada has evolved over time. Early human rights statutes provided a right to formal equality, meaning that they required the same treatment be provided to protected groups as to others. For example, in the context of service provision, such statutes could require services available to the public to be provided to customers or clients regardless of their race, religion or another protected ground. This form of equality is particularly ill-suited to addressing disability or systemic forms of discrimination as it ignores the reality that human cultures, structures, and norms have been shaped by dominant groups in a manner that can fail to include and accommodate the needs of minority groups.

However, since the coming into force of section 15 of the Charter, Canadian law has adopted a “substantive” understanding of equality in both its section 15(1) Charter jurisprudence, and in the

interpretation of federal, provincial and territorial human rights statutes.¹¹⁸⁴ As Justice Abella summarized in *Fraser v Canada (Attorney General)*:

[S]ubstantive equality requires attention to the “full context of the claimant group’s situation”, to the “actual impact of the law on that situation”, and to the “persistent systemic disadvantages [that] have operated to limit the opportunities available” to that group’s members (*Withler*, at para. 43; *Taypotat*, at para. 17; see also *Quebec v. A*, at paras. 327-32; *Alliance*, at para. 28; *Centrale*, at para. 35).¹¹⁸⁵

Substantive equality can support claims of “indirect” or “adverse effects” discrimination and systemic discrimination. Adverse effects discrimination refers to contexts in which a seemingly neutral law or policy operates in practice to create “built-in headwinds”¹¹⁸⁶ for a protected group, causing disproportionately negative outcomes for that group. Adverse effects discrimination can also involve a failure to accommodate the needs of a protected group, such as contexts where the lack of a particular adaptation impacts a protected group by excluding them from a benefit shared by others, or substantially and disproportionately reducing the quality of that benefit to group members.¹¹⁸⁷

Discrimination claims under section 15 of the Charter and the provincial, territorial and federal human rights statutes may differ somewhat, though the legal tests developed in these systems have been evolving towards greater similarity in very recent years as the section 15 discrimination analysis has undergone many changes.¹¹⁸⁸

¹¹⁸⁴ See *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143.

¹¹⁸⁵ *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 42.

¹¹⁸⁶ *Fraser v Canada*, 2020 SCC 28 at para 53, Abella J.

¹¹⁸⁷ See, for example, *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, in which the failure of the province of British Columbia to include sign language interpretation as an insured benefit under the provincial healthcare plan was held to violate the section 15 rights of the appellants who were deaf.

¹¹⁸⁸ The test for discrimination under section 15 of the *Charter* began in *Andrews* closely resembling the tests developed by the human rights tribunals. However, in subsequent cases the Supreme Court’s interpretation of s. 15 added additional layers and burdens for claimants not found in human rights tribunal discrimination law. The height of this dis-similarity arguably arrived with *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497. The test expressed in *Law* was subsequently revisited in *R v Kapp*, [2008] 2 SCR 483, 2008 SCC 41.

The leading case on the test for discrimination in the provincial/territorial and federal human rights context is *Moore v British Columbia (Education)*.¹¹⁸⁹ In *Moore*, discrimination was alleged in the context of educational service provision to students with learning disabilities, Justice Abella, for the Court, described the three-part test required to prove “*prima facie* discrimination”, the first stage of the discrimination test in the human rights context:

to demonstrate *prima facie* discrimination, complainants are required to show [1] that they have a characteristic protected from discrimination under the *Code*; [2] that they experienced an adverse impact with respect to the service; and [3] that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.¹¹⁹⁰

The burden of proof in discrimination claims initially rests with the party alleging discrimination, but shifts once a *prima facie* case has been made out to the respondent to prove a justification. If a justification is successfully raised, the burden returns to the applicant to rebut the justification and demonstrate that it is pretextual or otherwise erroneous.¹¹⁹¹

In conjunction with the right to be free from discrimination comes the concept of “reasonable accommodation”, which is a duty placed on the defendant in a discrimination action (e.g. an employer or service provider) to take steps to reasonably accommodate the complainant to the point of “undue hardship”. In *Council of Canadians with Disabilities v VIA Rail Canada Inc.*,¹¹⁹² Justice Abella, writing for the majority, defined reasonable accommodation as a concept that:

[...] recognizes the right of persons with disabilities to the same access as those without disabilities, and imposes a duty on others to do whatever is reasonably possible to accommodate this right. The discriminatory barrier must be removed unless there is a bona fide justification for

¹¹⁸⁹ 2012 SCC 61, [2012] 3 SCR 360.

¹¹⁹⁰ *Moore v. British Columbia (Education)*, 2012 SCC 61 (CanLII), [2012] 3 SCR 360.

¹¹⁹¹ See *Garofalo v Cavalier Hair Stylists Shop Inc.*, 2013 HRTO 170 at para 155.

¹¹⁹² [2007] 1 SCR 650, 2007 SCC 15 (CanLII).

its retention, which is proven by establishing that accommodation imposes undue hardship on the service provider [...]¹¹⁹³

In other words, the duty to accommodate places a positive obligation on service providers, including police officers, to remove discriminatory barriers for which there is no *bona fide* justification up to a limit of "undue hardship" which has been defined on a case-by-case basis in Canadian law. However, common factors considered in the "undue hardship" analysis include the costs associated with accommodation¹¹⁹⁴ and impacts on the health and safety of the person to be accommodated and others (including public safety).¹¹⁹⁵

In contrast to the human rights test for discrimination, the contemporary test for a violation of section 15(1) of the Charter, was recently enunciated, by Justice Abella for the majority of the Court, in *Fraser v. Canada (Attorney General)*. Justice Abella stated:

To prove a *prima facie* violation of s. 15(1), a claimant must demonstrate that the impugned law or state action:

- on its face or in its impact, creates a distinction based on enumerated or analogous grounds; and
- imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.¹¹⁹⁶

¹¹⁹³ Abella J, [2007] 1 SCR 650, 2007 SCC 15 (CanLII) at para 121, citing *Commission scolaire régionale de Chambly v Bergevin*, 1994 CanLII 102 (SCC), [1994] 2 SCR 525 at 546.

¹¹⁹⁴ While costs is often considered in relation to undue hardship, the Justice McLachlin, for the Court, expressed that if the government claims undue hardship due to costs they will need to provide strong evidence and have considered whether cost reductions are possible. See *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, 1999 CanLII 646 (SCC), [1999] 3 SCR 868 at para 41.

¹¹⁹⁵ For an example of a case where safety risk posed by an individual to be accommodated was found to meet the undue hardship requirement see *Barton v Loft Community Centre*, 2009 HRTO 647.

¹¹⁹⁶ 2020 SCC 28, para 27, citing (*Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 (CanLII), [2018] 1 SCR 464, at para 25; *Centrale des syndicats du Québec v Quebec (Attorney General)*, 2018 SCC 18 (CanLII), [2018] 1 SCR 522, at para 22).

Once a *prima facie* violation of section 15(1) is made out, the burden shifts to the defendant (the government body responsible for policing) to justify, if possible, the limit on the claimant's section 15 right. This has generally been accomplished through the framework laid out in *R v Oakes*, [1986] 1 SCR 103 or the Doré-Loyola framework applicable in contexts of exercises of administrative discretion.¹¹⁹⁷ However, where the infringement of a Charter right occurs by virtue of discriminatory actions of the state like the individual discretion to use unnecessary force of a police officer, as opposed to through the application of a law (or a binding general norm or standard), section 1 generally does not apply because the infringing conduct will usually not be "prescribed by law."¹¹⁹⁸ As a consequence, where police actions themselves are discriminatory, as opposed to policing legislation, section 1 will often offer no possibility for justification in contexts of police-involved injuries and deaths. This raises some confusion about how to address the question of the accommodation of disability in the context of section 15 where the failure to accommodate is the result of the actions of police, as opposed to prescribed by statute. The Supreme Court of Canada's current position, as expressed in *Eldridge*, is that accommodation of disability is most appropriately addressed at section 1, not section 15,¹¹⁹⁹ but this is of course not an option in such cases, raising the likelihood that space would need to be made within the section 15 analysis itself for such justifications.

Practically, under section 15 a claimant who was challenging policing conduct as discriminatory would have to prove that they have a "disability" which brings them within the enumerated grounds of section 15, often accomplished through provision of medical evidence. Secondly, they would have to prove a "distinction." In the context of adverse effects discrimination, the "distinction" required is

¹¹⁹⁷ See *Doré v Barreau du Québec*, 2012 SCC 12 and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12.

¹¹⁹⁸ See *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*, 2009 SCC 31; *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, [2000] 2 SCR 1120.

¹¹⁹⁹ See *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 SCR 624 at para 79.

demonstrated through an examination of the impact of the law, policy, or practice. As Justice Abella expressed in *Fraser*:

... [I]n order for a law to create a distinction based on prohibited grounds through its effects, it must have a disproportionate impact on members of a protected group. If so, the first stage of the s. 15 test will be met.¹²⁰⁰

In elaborating on how to fulfill the “distinction” stage of the test, Justice Abella explained in *Fraser* that such a “distinction” could take the form of a neutral law, policy, or practice that creates “‘built-in headwinds’ for members of a protected group”¹²⁰¹ or it might take the form of an “*absence* of accommodation for members of protected groups.”¹²⁰² Furthermore, she explains that disproportionate impact can be proven in different ways, such as demonstrating a lower *quality* in the service accessible to members of a protected group than other, or a higher *rate* of negative impact on members of a protected group when compared to service recipients more broadly.¹²⁰³ Lastly, she explains that two types of evidence are particularly relevant to establishing a disproportionate impact. The first is evidence about the situation of the claimant’s group, including “physical, social or cultural barriers” that impact this group and that may reveal that some facially neutral laws, policies, or practices are designed well for some, but not the claimant group. Secondly, evidence about the results produced by the impugned law, policy or practice, including where available comparative statistics for both members of the claimant group and members of more advantaged groups.¹²⁰⁴ As she explains:

Ideally, claims of adverse effects discrimination should be supported by evidence about the circumstances of the claimant group *and* about the results produced by the challenged law. Evidence about the claimant group’s situation, on its own, may amount to merely a “web of instinct” if too far removed from the situation in the actual workplace, community or institution subject to the discrimination claim (*Taypotat*, at para. 34). Evidence of statistical disparity, on its own, may have significant shortcomings that leave open the possibility of unreliable results. The weaknesses with each type of evidence can be overcome if they are both present (Braun, at

¹²⁰⁰ *Fraser v Canada (Attorney General)* 2020 SCC 28 at para 52.

¹²⁰¹ *Ibid* at para 53.

¹²⁰² *Ibid* at para 54.

¹²⁰³ See *Ibid* at para 55.

¹²⁰⁴ See *Ibid* at para 55.

p. 135; Vizkelety, at p. 192; *Vancouver Area Network of Drug Users v. Downtown Vancouver Business Improvement Association* (2018), 10 B.C.L.R. (6th) 175 (C.A.), at para. 98).¹²⁰⁵

Significantly, in *Fraser*, Justice Abella clarifies that a complainant is not obliged to explain *why* a law, policy, or practice disadvantages the claimant group, in the sense that they do not need to bring evidence explaining the reason or causal mechanism through which the disadvantage is experienced, rather discrimination is the experience of disadvantage itself.¹²⁰⁶ Nor is the complainant required to prove that the protected characteristic caused the disadvantage, or that the impugned law, policy, or practice “was responsible for creating the background social or physical barriers which made a particular rule, requirement or criterion disadvantageous for the claimant group.”¹²⁰⁷

In *R v Sharma*,¹²⁰⁸ Justices Brown and Rowe recently provided additional “guidance” on the first step of the section 15 analysis. They suggest that “the claimant must present sufficient evidence to prove the impugned law [or state action], in its impact, *creates or contributes to* a disproportionate impact on the basis of a protected ground,”¹²⁰⁹ though they acknowledge claimants are under no burden to explain why the law has such an impact.¹²¹⁰ This description of the test highlights that there is a burden to show some form of causation at the first stage of the analysis, though they acknowledge that an inference can be drawn where the available evidence supports it.¹²¹¹

The second stage of the section 15(1) test asks “whether the law has the effect of reinforcing, perpetuating, or exacerbating disadvantage.”¹²¹² In *Fraser*, Justice Abella clarifies that there is no “rigid template” to follow in answering this question. Rather, evidence can be brought concerning several types

¹²⁰⁵ *Ibid* at para 60.

¹²⁰⁶ *Ibid* at para 63.

¹²⁰⁷ *Ibid* at para 71.

¹²⁰⁸ 2022 SCC 39.

¹²⁰⁹ *Ibid* at para 42.

¹²¹⁰ *Ibid* at para 46.

¹²¹¹ *Ibid* at para 49.

¹²¹² *Fraser v Canada*, 2020 SCC 28, Abella J at para 76, citing *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 SCR 464 at para 25.

of harms, including economic, social, psychological, physical or political harms, and harm is assessed in the context of systemic or historical disadvantages experienced by the protected group.¹²¹³ Proof of social prejudice or stereotyping is not a requirement at this stage of the test, though it may assist a claimant in proving harm suffered.¹²¹⁴ Furthermore, whether or not the state was attempting to achieve a valid objective through the distinction made is *not relevant* to this analysis and is a question that is addressed in section 1 of the Charter, not section 15(1).¹²¹⁵

Section 15(1) Charter claims have several potential disadvantages for claimants seeking redress for discrimination. As Anne Levesque has summarized, section 15(1) Charter challenges “are generally slower, more expensive and less welcoming to discrimination claims.”¹²¹⁶ Claims under section 15(1) of the Charter have historically been less likely to succeed in a final determination than discrimination claims made under human rights statutes, likely due in part to past tests for discrimination under the Charter that were far more onerous than tests developed for human rights statutes. For example, Bruce Ryder conducted a study comparing Ontario and British Columbia human rights tribunal decisions with section 15(1) Charter claims decided in the *Law*¹²¹⁷ era of section 15(1) jurisprudence, finding that final determinations of Charter discrimination claims in this era were significantly less likely to have been successful than statutory human rights claims and the number of Charter claims precipitously declined in the years following the *Law* decision.¹²¹⁸ Historically, jurisprudence on section 15(1) has been marked by

¹²¹³ *Fraser v Canada*, 2020 SCC 28 at para. 76.

¹²¹⁴ *Ibid* at para 78.

¹²¹⁵ *Ibid* at para 79.

¹²¹⁶ Anne Levesque, “Gaming the [Human Rights] System?: A Critical Look at Discrimination Complaints Involving Government Services,” (2020) 9:1 Canadian Journal of Human Rights 35 at 55.

¹²¹⁷ Justice Iacobucci’s judgment in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 laid out a new test for section 15 of the Charter which emphasized “dignity” as an important element of section 15 claims, a choice that was heavily criticized by equality law scholars as creating an unworkable test for discrimination. See, for example: Sonia Lawrence, “Harsh, Perhaps Even Miguidded Development in *Law*, 2002” (2003) 20 Supreme Court Law Review 93; Sheilah Martin, “Balancing Individual Rights to Equality and Social Goals” (2001) 80 Can Bar Rev 299; Jennifer Koshan, ““Arbitrary Disadvantage? A Slip of the Pen or Something More?” ABLawg (June 18, 2014) online: <<https://ablawg.ca/2014/06/18/arbitrary-disadvantage-a-slip-of-the-pen-or-something-more/>>.

¹²¹⁸ Bruce Ryder, “The Strange Double Life of Canadian Equality Rights” (2013) 63 Supreme Court Law Review 261.

challenging legal tests, requiring selection of the correct comparator group, or evidence of “dignity” harms, which together made recourse to other sections of the Charter, like section 7, more beneficial to many claimants. In many cases courts have declined to address cases using section 15(1) where section 7 was also pled.¹²¹⁹ Furthermore, as Fay Faraday has described, even after the court changed the legal test for section 15 again in *Kapp*¹²²⁰ and *Withler*,¹²²¹ section 15(1) Charter jurisprudence has continued to display “perpetual instability [that] makes equality litigation extremely unpredictable.”¹²²² So unpredictable, perhaps, that plaintiffs seeking to challenge policing actions or laws may be better served trying to rely on section 7 of the Charter or other available means of redress (such as human rights claims) simply to avoid the court’s core uncertainty on basic principles of equality and discrimination constitutional law.

Section 15(1) claims have been particularly challenging in contexts of “adverse effects” discrimination, (i.e. where a facially neutral law, policy or standard results in adverse differential impacts on a protected group) and there have only been three successful section 15(1) adverse effect discrimination claims under the Charter in Supreme Court jurisprudence (*Eldridge v. British Columbia (Attorney General)*¹²²³; *Vriend v. Alberta*¹²²⁴, and *Fraser v. Canada (Attorney General)*).¹²²⁵ Mary Eberts and Kim Stanton suggest that one of the reasons for the failures of substantive equality arguments under section 15 of the Charter results in part from the Court’s “hesitancy to give systemic discrimination any place in its analysis of equality issues under s. 15.”¹²²⁶ They note that while systemic discrimination is

¹²¹⁹ See Jennifer Koshan & Jonette Watson Hamilton, “The Continual Reinvention of Section 15 of the Charter” (2013) 64 UNBLJ 19.

¹²²⁰ *R v Kapp*, 2008 SCC 41.

¹²²¹ *Withler v Canada (Attorney General)*, 2011 SCC 12.

¹²²² Fay Faraday, “One Step Forward, Two Steps Back? Substantive Equality, Systemic Discrimination and Pay Equity at the Supreme Court of Canada” (2020) 94:12 Supreme Court Law Review 301 at 303.

¹²²³ 1997 CanLII 327 (SCC), [1997] 3 SCR 624.

¹²²⁴ 1998 CanLII 816 (SCC), [1998] 1 SCR 493.

¹²²⁵ 2020 SCC 28.

¹²²⁶ Mary Eberts & Kim Stanton, “The Disappearance of the Four Equality Rights and Systemic Discrimination from Canadian Equality Jurisprudence” (2018) 38:1 National Journal of Constitutional Law 89 at 91.

routinely acknowledged in section 15 cases, arguments pertaining to systemic discrimination rarely factor into the court’s decision-making, leaving each case to be decided as an individual discrimination claim in which systemic discrimination is relegated to a contextual factor.¹²²⁷

The uncertainty that mires equality jurisprudence in Canada and the repeated failure of adverse effects claims at the Supreme Court raises real questions about the utility of section 15 in addressing discrimination in police use of force because many claims would articulate “adverse effects discrimination” as opposed to “direct discrimination.”

8.4.3 An Overview of The Types of Mental Health Disability Discrimination Claims Against Police Previously Adjudicated in Canada

A review of reported human rights tribunal decisions concerning police conduct in Canada reveals that while discrimination claims against police are fairly common, successful claims against police are very rare.¹²²⁸ The majority of successful human rights discrimination claims against police in contexts of service provision in Canada¹²²⁹ to date have involved allegations of race discrimination (often combined with other grounds such as colour or ethnic origin) generally in the context of racial profiling. Where mental health disability has been raised in reported human rights decisions involving police services, it has tended to arise in claims of direct discrimination, often where someone was apprehended by police under mental health legislation and they are alleging their apprehension was the result of bias, or where a “wellness check” or other mental health police visit is believed by the subject to have been unnecessary and discriminatory.¹²³⁰ In many instances these claims argue multiple protected grounds (especially race

¹²²⁷ *Ibid.*

¹²²⁸ A review of cases on CanLII revealed 18 successful human rights claims finding discrimination against police with the keyword “police” in searches of provincial, territorial and federal human rights jurisdictions. The vast majority of successful human rights decisions were racial profiling claims, and in some cases discrimination against transgendered persons. The search revealed no successful human rights claims alleging discrimination by police on the ground of mental health disability.

¹²²⁹ There have been many employment discrimination claims brought against police services.

¹²³⁰ See, for example, *MB v Oak Bay Police Department*, 2007 BCHRT 289 (CanLII); *Tensuan v Vancouver Police Board and others*, 2007 BCHRT 280 (CanLII); *Sparks v Vancouver Coastal Health Authority and Vancouver Police*

and disability). Discrimination claims against police for apprehending an individual under mental health legislation have generally been dismissed because the complainant fails to prove discrimination. For example, in *Sparks v. Vancouver Coastal Health Authority and Vancouver Police Department*,¹²³¹ the BC Human Rights Tribunal remarked that perceiving a harm suffered by virtue of apprehension and the fact that this is based on mental health disability is insufficient to prove discrimination in the context of provincial mental health legislation enabling such measures. Tribunal member Lindsay Lyster writes:

“[W]hen what is alleged by a mentally ill person is discrimination on the basis of mental disability in relation to treatment related to that disability, the allegations and context in which they arise must be carefully considered to determine if any element of discrimination is potentially present. Not every differentiation in treatment arising due to a person’s mental disability, real or perceived, will be sufficient to establish discrimination contrary to the *Code*. In some cases, differentiation in treatment is necessary in order to address people’s real needs and circumstances.

[...]

[M]ost if not all decisions relating to persons apprehended and detained under the relevant provisions of the *Mental Health Act* will have some connection with mental disability, real or perceived. That is not sufficient to ground a human rights complaint. A complainant alleging discrimination in this context must allege that they were in some way adversely treated because of their mental disability, real or perceived. It is not enough that they disagree with the fact that they were apprehended or detained or the conditions under which they were detained.

Were it otherwise, any person who felt aggrieved by the fact that they were detained or apprehended or treated under the *Act* could file a complaint with the Tribunal. It is not the Tribunal’s proper role to sit in second judgment of the decisions made by police officers and physicians under the *Act*.¹²³²

As this language makes clear, when acting to apprehend someone under mental health legislation police are acting pursuant to duties set out in statute and provided they can explain their grounds for intervention they will generally be protected from a successful claim of discrimination on those

Department, 2006 BCHRT 575 (CanLII); *Complainant v City of New Westminster Police Service*, 2011 BCHRT 313 (CanLII); *Harris v Murdoch and others*, 2005 BCHRT 189 (CanLII); *Rots v Toronto Police Services Board*, 2020 HRTO 398 (CanLII); *A.M. v Durham Regional Police Service*, 2015 HRTO 792 (CanLII).

¹²³¹ 2006 BCHRT 575 (CanLII).

¹²³² *Ibid* at paras 15, 17-18.

grounds.¹²³³ *Sparks* and other challenges to mental health apprehension provide evidence that police involvement in enforcing the mental health system causes perceptions of mistreatment by some of those apprehended or surveilled when the system works as it was designed to, raising questions about whether we should as a society be exploring alternative means of ensuring people receive support.

In other cases, persons identifying as having mental health disabilities have alleged discrimination in policing services where officers are said to have failed to appropriately investigate a complaint or take other law enforcement action because of a belief that the complainant had a mental health disability.¹²³⁴ Again, these are cases alleging direct discrimination of individual police officers, as opposed to systemic discrimination and they rest on concerns about stereotyping and stigma. Some human rights complaints have alleged “mental health or psychiatric profiling” where police are believed to have detained, followed, interacted with someone, or treated them adversely because they believed them to have a mental health condition along with attendant stereotypes such as dangerousness.¹²³⁵

Overall, very few human rights claims identified in a search of legal databases involved systemic arguments pertaining to mental health disability discrimination in the context of policing,¹²³⁶ or arguments pertaining to a failure to accommodate mental health disability.¹²³⁷ Consequently, reported

¹²³³ However, direct challenges to coercive mental health laws that have been brought using sections 15(1) and/or 7 of the Charter and have achieved some success in reshaping the rights of those subject to coercive healthcare.¹²³³

¹²³⁴ See, for example, *Foley v Abbotsford Police Department*, 2020 BCHRT 137 (CanLII); *Emmal and Vancouver Police Board and another*, 2007 BCHRT 315 (CanLII); *William v City of Vancouver and another*, 2010 BCHRT 248 (CanLII); *Christianson v Office of the Independent Police Review Director*, 2014 HRTD 1445 (CanLII); *J.M. v. Toronto Police Services Board*, 2017 HRTD 1087 (CanLII).

¹²³⁵ See, for example, *Sipes v West Vancouver Police Department (No 2)*, 2010 BCHRT 281 (CanLII); *Iler obo others v Corporation of Delta and others (No. 2)*, 2015 BCHRT 47 (CanLII); *Commission des droits de la personne et des droits de la jeunesse (Miller et autres) c Ville de Montréal (Service de police de la Ville de Montréal) (SPVM)*, 2019 CarswellQue 12231, 2019 QCTDP 31.

¹²³⁶ For an example of such a case, see *Sasse v Ontario (Solicitor General)*, 2020 HRTD 209 (CanLII), (regarding mental health discrimination in firearms screening).

¹²³⁷ However, for an example of mental disability accommodation arguments in the context of policing, see *Childs v The Regional Municipality of Peel Police Services Board*, 2014 HRTD 1829 (CanLII) (regarding mental health discrimination – claustrophobia, and the placement in a small cell) and *Commission des droits de la personne et des droits de la jeunesse (Miller et autres) c Ville de Montréal (Service de police de la Ville de Montréal) (SPVM)*, 2019

human rights decisions provide limited guidance on how human rights tribunals would address a claim about systemic mental health discrimination in the context of use of force as opposed to claims based on allegations of direct discrimination. No successful systemic mental health discrimination claims concerning use of force were identified.

8.5 Benefits of and Barriers to Discrimination Claims in the Context of Police Use of Force and Police-Involved Injuries and Deaths

Discrimination claims can be employed to legally challenge the appropriateness of a police officer's use of force in an individual case, or to challenge policing policies structuring use of force that have an adverse impact on people who experience mental health disability.¹²³⁸ The following section will begin by discussing some of the possibilities for employing discrimination claims, under human rights or the Charter, to seek accountability for the over-representation of persons who experience mental health disability among individuals injured or killed by police through use of force. By accountability, I mean, variously, compensation in damages from police, acknowledgement of discrimination by the courts or tribunals, the promotion of systemic reform by legally compelling or putting pressure on policing agencies to reform discriminatory policies and practices, or by pressing government to otherwise address violence in policing, potentially through abolition and the creation of alternatives to police. This analysis will begin by addressing some general benefits of and barriers to achieving meaningful accountability through discrimination law applicable to all claims against police focused on standing, remedies and the medicalization of disability in human rights law. Next, it will consider two contexts where discrimination

CarswellQue 12231, 2019 QCTDP 31. (regarding failure to engage in mental health accommodations in the context of use of force).

¹²³⁸ Examples of discrimination claims challenging (in part) use of force decision-making in the context of mental health disability include: *RG v Toronto Police Services Board*, 2019 HRT0 1457 (CanLII) (unsuccessful challenge to mental health apprehension involving use of force and handcuffing by police on the grounds disability and gender); *Rots v Toronto Police Services Board*, 2020 HRT0 398 (CanLII), (unsuccessful challenge to mental health apprehension and use of force resulting in broken arm on the grounds of disability, family status, marital status, age, receipt of public assistance and reprisal).

law could be employed, based on the patterns and issues arising from my empirical analysis of police involved deaths and literature review of types of police-involved deaths and injuries:

3. Discrimination in police exercises of discretion to employ force: Considering use of force models and “threat cues”; and
4. Discrimination in failures to accommodate mental health disability by dispatching policing alternatives or employing interventions tailored to addressing persons in crisis.

The first context addresses intentional use of force against persons who experience mental health disability, such as deployment of firearms and conducted energy weapons, which chapter 5 has demonstrated have a disproportionate impact on persons who experience mental health disability. The second context addresses the problem of police as responders to mental health crises, which responds to my empirical data as a whole, which shows that persons who experience mental health disability disproportionately die in police interventions.

I will conclude this section by suggesting that as a whole, discrimination law is unlikely to be an effective means of achieving meaningful change in policing to prevent future injuries and deaths of persons who experience mental health disability, though it may play a limited role in drawing attention to the issue of police violence, structuring societal understandings of how to address it, and maintaining pressure on the state to take action. I will also suggest some changes or clarifications that could be made to make discrimination law more helpful in the context of police-involved injuries and deaths.

8.5.1 Standing in the Context of Police-Involved Deaths

In order for a discrimination claim to be decided by the courts or human rights tribunals the party initiating the complaint must have standing to bring the claim. Where an individual is harmed by allegedly discriminatory police action, but not killed by police, standing is relatively straight forward. Section 15(1)

confers its equality rights on “individuals,” which includes living people, but is generally believed to exclude “legal persons” such as corporations, despite no decision from the Supreme Court directly addressing this issue to date.¹²³⁹ The human rights acts provide standing to bring a claim to the individual alleging discrimination, and may in some cases allow “legal persons” to bring claims.¹²⁴⁰

However, one significant barrier to achieving accountability for discrimination in police-involved deaths of persons who experience mental health disability is that a deceased’s estate may be barred from bringing a discrimination claim pertaining to police actions leading to death in some contexts and in some jurisdictions. The law pertaining to standing for an estate to posthumously initiate or continue a discrimination claim under section 15 of the *Charter* or under human rights legislation is considered below.

8.5.1.1 Section 15(1) Charter Claims

In *Canada (Attorney General) v. Hislop*, the Supreme Court of Canada held that the terminology in section 15 conferring equality rights to every “individual” is to be interpreted narrowly to exclude the estate of a deceased. In that case, the court held:

In the context in which the claim is made here, an estate is just a collection of assets and liabilities of a person who has died. It is not an individual and it has no dignity that may be infringed. The use of the term “individual” in s. 15(1) was intentional. For these reasons, we conclude that estates do not have standing to commence s. 15(1) *Charter* claims. In this sense, it may be said that s. 15 rights die with the individual.¹²⁴¹

¹²³⁹ In *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326, Justice LaForest expresses (dissenting in part) that s. 15(1) does not apply to corporations, but the majority chose not to address this issue. For appellate decisions determining that corporations are not included in “everyone” for the purpose of s. 15 see, for example, *Park Avenue Flooring, Inc. v EllisDon Construction Services Inc.*, 2016 ABCA 327; *R v Rockwood*, 2007 NLCA 68; *Canada (Attorney General) v Central Cartage Co. (C.A.)*, 1990 CanLII 8009 (FCA).

¹²⁴⁰ See *Brockie v Brillinger (no. 2)* (2002), 2002 CanLII 63866 (ON SCDC).

¹²⁴¹ See *Canada (Attorney General) v. Hislop*, [2007] 1 SCR 429, 2007 SCC 10, para 73.

This decision has been interpreted to block section 15 claims brought by an estate for violation of a deceased's equality rights in some cases.¹²⁴² Estates have also been held by the Ontario Court of Appeal, to be unable to bring claims under section 7 of the Charter, which provides: "Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."¹²⁴³ In *Giacomelli Estate v. Canada (Attorney General)*, a case concerning the unequal treatment of Italian Canadians with respect to compensation for internment and other wrongful treatment during World War II, the Ontario Court of Appeal held that claims under sections 7 and 15 of the Charter could not be continued by a deceased's estate.¹²⁴⁴

However, there is currently no legal certainty on whether the rule in *Hislop* that section 15 Charter rights die with the individual applies in the context where the rights violation alleged may have caused or contributed to the death. While *Hislop* and *Giacomelli Estate* appear to limit the possibility of posthumous Charter claims brought by a deceased's estate, in *Grant v. Winnipeg Regional Health Authority et al.*,¹²⁴⁵ the Manitoba Court of Appeal overturned a decision to strike Charter claims brought under sections 7, 12, and 15 of the Charter from pleadings of the estate of Brian Sinclair in a lawsuit alleging rights violations respecting his death. In that case the Charter claims pertained directly to state actions or omissions that were alleged to have caused or contributed to the death of the deceased, an Indigenous man who died in an emergency waiting room where he waited for an extended period of time without receiving necessary medical assistance. Justice Mainella of the Manitoba Court of Appeal held that the decisions in *Hislop* and *Giacomelli Estate* denying standing to an estate to bring Charter claims

¹²⁴² Note: There are exceptions to the rule that an estate cannot be granted standing to bring section 7 and 15 claims. An estate may continue the claim where it has already been heard but the decision has not yet been released and where a decision is being appealed. See *ibid.*

¹²⁴³ See *Giacomelli Estate v. Canada (Attorney General)*, 2008 ONCA 346 (CanLII), application for leave to appeal denied 2008 CanLII 48615 (SCC) [*Giacomelli Estate*].

¹²⁴⁴ *Ibid.*

¹²⁴⁵ 2015 MBCA 44 (CanLII).

did not make it “plain and obvious”¹²⁴⁶ that such claims can never be advanced, even in contexts where the alleged rights violations contributed to the death. He consequently refused to strike the pleadings on those grounds. Justice Mainella distinguished the decision in *Hislop*, noting that the decision was specific to a particular context, one in which the deceased whose rights are alleged to have been violated was already dead when the alleged rights violation occurred, which is dissimilar to a situation where a living rights holder’s rights are violated leading to death. *Giacomelli Estate* was also distinguished as a case in which the estate of a section 7 claimant was held not to be able to continue a claim begun by the deceased because such a claim was not supported by Ontario’s survival legislation (the *Trustee Act*, R.S.O., 1990, c. T.23). Justice Mainella distinguished *Giacomelli Estate* on the grounds that the rights violations in that case were not a violation alleged to have contributed to the deceased’s death. Ultimately, in *Grant* the Charter claims pertaining to Brian Sinclair’s death were permitted to proceed for consideration by the court as to whether the estate could be granted public interest standing to advance the claims. This decision has subsequently been followed by courts in other provinces similarly considering claims by an estate for alleged Charter violating actions that caused or contributed to the rights holder’s death.¹²⁴⁷ Additionally, in the recent case *Selkirk et. al. v. Trillium Gift of Life Network et. al.*,¹²⁴⁸ Justice Akbarali considered whether claims for the violation of a man’s section 7, 12, and 15 rights could be brought by his estate where it was claimed the rights violations caused his death. In *Selkirk*, a man who was diagnosed with acute alcoholic hepatitis and required a liver transplant was denied access to the liver transplant waiting list in Ontario because he did not meet the criteria. The plaintiff in *Selkirk* argued that the case was distinguishable from *Hislop* because the context of that case pertained to monetary relief; and argued it was distinguishable from *Hislop* and *Giacomelli Estate* because the alleged

¹²⁴⁶ *Grant v Winnipeg Regional Health Authority et al.*, 2015 MBCA 44 (CanLII) at para. 40.

¹²⁴⁷ See, for example, *Selkirk et al. v Trillium Gift of Life Network et. al.*, 2021 ONSC 2355 (CanLII); *Gill v Fraser Health Authority*, 2022 BCSC 1533 (CanLII) (refusing summary determination of the issue).

¹²⁴⁸ 2021 ONSC 2355 (CanLII), aff’d 2022 ONCA 478 (CanLII).

Charter infringement in those cases was not “directly related to the death.”¹²⁴⁹ Justice Akbarali held that the claim for declaratory Charter relief under all three sections (7, 12, 15) was available to an estate in the context:

I do not think that either *Hislop* or *Giacomelli Estate* determine whether a *Charter* claim may be asserted by an estate in circumstances where the alleged *Charter* violation is said to contribute to or cause the death of the decedent. In my view, *Hislop* clearly raised the question of private interest standing; neither case considered public interest standing.¹²⁵⁰

While absent a Supreme Court of Canada decision there is legal uncertainty about whether a deceased’s estate may be considered an “individual” who can bring a claim for the violation of the deceased’s section 15 rights, estates can apply to bring Charter claims through public interest standing. Public interest standing is a discretionary form of standing that permits someone other than a plaintiff with standing as of right to bring a claim. The test for public interest standing was described by Justice Cromwell (for the Court) in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45:

In exercising the discretion to grant public interest standing, the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts: *Borowski*, at p. 598; *Finlay*, at p. 626; *Canadian Council of Churches*, at p. 253; *Hy and Zel’s*, at p. 690; *Chaoulli*, at paras. 35 and 188. The plaintiff seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favour granting standing.¹²⁵¹

The estate of a deceased could meet these requirements in many cases of discriminatory police action leading to death as estates generally have, at a minimum, a personal interest in the outcome of

¹²⁴⁹ *Selkirk et. al. v Trillium Gift of Life Network et. al.*, 2021 ONSC 2355 (CanLII) at para 43.

¹²⁵⁰ *Ibid* at para. 63.

¹²⁵¹ *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, Cromwell J. at para 37.

litigation pertaining to the deceased and are arguably the most effective way to bring litigation pertaining to a person's death.

However, while public interest standing provides an option for the estate of a deceased rights holder to bring a claim, the requirement to apply for public interest standing creates an additional barrier in the form of costs, time, and the uncertain exercise of judicial discretion, for claimants seeking to challenge discriminatory policing.

8.5.1.2 Federal, Provincial or Territorial Human Rights Legislation

In some provinces and territories courts and tribunals have held that human rights actions for damages cannot be brought on behalf of, or continued on behalf of, deceased persons, as some or all human rights die with the person.¹²⁵² For example, in *British Columbia v. Gregoire*,¹²⁵³ the British Columbia Court of Appeal held that a deceased's estate was not a "person" in the meaning of the *Human Rights Code* and that an individual's human rights are personal rights that die with the person. Consequently, a mother claiming her disabled son's rights had been violated when he was not provided "proper care, treatment, drugs and supervision"¹²⁵⁴ to prevent his reoffending as a sex offender could not proceed. This decision has subsequently been applied to prevent the continuation of claims commenced by a complainant who died before the final resolution of their complaint.¹²⁵⁵ Additionally, in *Chugh Estate v. Avens – A Community for Seniors*,¹²⁵⁶ the Northwest Territories Human Rights Adjudication Panel held that a human rights complaint alleging discrimination on the basis of age and disability in service provision could not be continued by the estate of the complainant because the remedies sought were

¹²⁵² See, for example, British Columbia: *British Columbia v Gregoire*, 2005 BCCA 585 (CanLII), leave to appeal denied, 2006 CanLII 11838 (SCC); *Dennis v Ministry of Health and others*, 2020 BCHRT 176 (CanLII); Northwest Territories: *Chugh Estate v AVENS – A Community for Seniors*, 2020 CanLII 19007 (NT HRAP); Manitoba: *Mousseau v Southern Health / Santé Sud*, 2019 MBHR 8 (CanLII).

¹²⁵³ *British Columbia v Gregoire*, 2005 BCCA 585.

¹²⁵⁴ *British Columbia v Gregoire*, 2005 BCCA 585 at para. 3.

¹²⁵⁵ See *Lovado v BC Ministry of Public Safety and Solicitor General (No. 2)*, 2020 BCHRT 25 (CanLII).

¹²⁵⁶ 2020 CanLII 19007 (NT HRAP).

personal in nature (an apology, reinstatement in a program run by the respondent, and a lump sum for legal costs) rather than contractual in nature.¹²⁵⁷ This case leaves open the question of whether a claim for public interest remedies could continue. In *Viner v. Hudson's Bay Company (Zellers Greenwood)*, the Nova Scotia Board of Inquiry held that the estate of a woman who claimed discrimination on the basis of race in service provision after being accused of shoplifting did not have standing to continue her claim after she died, though the Board held that the Nova Scotia Human Rights Commission, who was also a party to the proceedings, could continue the claim against the respondent.¹²⁵⁸

However, in other provinces such claims have been allowed or permitted to continue to avoid a situation where the party alleged to have discriminated gains a windfall by delaying resolution of a claim. For example, in Ontario, in *Morrison v. Ontario Speed Skating Association*, the Ontario Human Rights Tribunal held that a human rights action against a private entity could continue after the death of the applicant.¹²⁵⁹ Claims pertaining to a deceased's treatment, (e.g. denial of an inquest) have also been successful when brought by a deceased's family on their own behalf (not as executors of an estate), claiming that they were discriminated against through the differential treatment afforded to the deceased. For example, in *Braithwaite v. Ontario (Attorney General)*, 2006 HRTO 15 (CanLII), the refusal to call a coroner's inquest into deaths that occurred in psychiatric detention (as contrasted with mandatory inquests for those dying in correctional facilities) was held to discriminate against the family members of the deceased.¹²⁶⁰ However, claims of discrimination brought by the estate of a deceased itself (rather than on behalf of the deceased) are afforded no standing because the estate is a legal entity without human rights.¹²⁶¹

¹²⁵⁷ See *Chugh Estate v Avens – A Community for Seniors*, 2020 CanLII 19007 (NT HRAP).

¹²⁵⁸ *Viner v. Hudson Bay Co.*, 2013 CanLII 148580 (NS HRC).

¹²⁵⁹ *Morrison v Ontario Speed Skating Association*, 2010 HRTO 1058 (CanLII).

¹²⁶⁰ *Braithwaite v Ontario (Attorney General)*, 2006 HRTO 15 (CanLII).

¹²⁶¹ See *Adamson Estate v Toronto Police Services Board*, 2013 HRTO 1983 (CanLII).

Federally, the Canadian Human Rights Tribunal has also held in *Stevenson v. Canadian National Railway Company*,¹²⁶² that the common law principle *action personalis moritur cum persona*, (i.e. that a common law complaint terminates with the death of the complainant), is not applicable to complaints filed with the Canadian Human Rights Tribunal allowing claims begun by a living plaintiff to be continued by their estate after death. Furthermore, in *Oleson v. Wagmatcook First Nation*,¹²⁶³ the CHRT denied an application by a respondent that compensation for lost wages, compensation for costs or expenses incurred in seeking alternative goods, facilities, services, or accommodations or other expenses incurred due to the discrimination, or compensation for pain and suffering were not recoverable by an estate because these are “personal remedies.”¹²⁶⁴ The Tribunal held that there is no such distinction to be made between “public interest” and “personal remedies” under the CHRT since all monetary remedies “can serve to educate the public with respect to human rights law and can help prevent a similar act of discrimination from occurring in the future.”¹²⁶⁵

Limitations on standing to bring human rights actions on behalf of deceased persons, or to continue an action following a death may create barriers to addressing fatal forms of discrimination in Canada.

8.5.1.3 Estates Should Always Have Standing to Bring or Continue Charter Claims and Human Rights Complaints in Contexts Where Discrimination Contributed to the Death

Restricting Charter claims under sections 7 and 15 to preclude a claim being advanced by a deceased’s estate in any circumstance would fail to appropriately protect Canadians’ right to life and equal protection and benefit under the law. Such a rule would afford legal protection to governments for the most egregious consequences of rights violations and could even provide the perverse incentive for

¹²⁶² 2001 CanLII 38288 (CHRT).

¹²⁶³ 2020 CHRT 29.

¹²⁶⁴ *Oleson v Wagmatcook First Nation*, 2020 CHRT 29.

¹²⁶⁵ *Ibid* at para 48.

Charter or human rights defendants to delay the litigation process in contexts where the rights holder's life is in jeopardy, or to ensure a rights holder is killed rather than injured.

Furthermore, in a capitalist society where wealth is transferable through one's estate to beneficiaries, who are most often immediate family, refusing an estate the right to bring or continue a discrimination action could help to aggravate some forms of systemic discrimination by permitting losses incurred through discriminatory acts to harm the financial well-being of descendants who may share the protected characteristic in question (e.g. exacerbating systemic wealth inequality of racialized groups when someone is killed by an act of racism). Failure to allow claims in the context of fatal discrimination results in vicarious harm based on discrimination to family members or dependents of someone in a protected group. It is worth noting that some human rights legislation explicitly considers discrimination by association, such as section 12 of Ontario's *Human Rights Code*, which provides that a right protected under the Code "is infringed where the discrimination is because of relationship, association or dealings with a person or persons identified by a prohibited ground of discrimination"¹²⁶⁶ recognizing that discrimination has social and relational aspects. Negative impacts on the estate of an individual may tend to compound systemic discrimination, allowing discriminatory acts to have harmful intergenerational ripple effects contrary to the purposes of human rights laws.

Ultimately, while it remains legally unclear whether estates have standing necessary to bring Charter equality claims with respect to police-involved deaths, and while only some human rights systems currently allow for posthumous claims by an estate or the continuation of a claim following the death of complainant, estates should always be provided standing to bring claims pertaining to fatal acts of discrimination. While there may be policy reasons to limit posthumous claims in some contexts, lethal acts of discrimination should be pursuable by an estate and Canadian jurisdictions that do not currently

¹²⁶⁶ *Human Rights Code*, RSO 1990 c.H.19, s 12.

provide for this should reform their law to remedy this problem. Discrimination pertaining to police-involved deaths, such as “excited delirium” or “sudden-in-custody deaths” require an avenue for redress, as without a remedy there is no meaningful right.

8.5.2 Remedies Under Human Rights Statutes and the Charter

Human rights tribunals in Canada and courts considering section 15 Charter claims have the ability to provide unique remedies to address systemic discrimination, which go beyond the compensatory function of remedies in tort law and may provide some comparative advantage for claimants seeking systemic change.¹²⁶⁷

With respect to the Charter, legal scholar Kent Roach notes that section 24(1) clearly provides for remedial discretion given its language allowing for such remedies “as the court considers appropriate and just.”¹²⁶⁸ However, Charter jurisprudence suggests courts are reluctant to provide remedies that might intrude into the realm of the legislatures,¹²⁶⁹ limiting the likelihood that courts will employ more intrusive remedies aimed at systemic change, such as structural or legislative injunctions, rather than declarations aimed at promoting legislative action.¹²⁷⁰

Human rights statutes in Canada often provide systemic remedies.¹²⁷¹ Provision for remedies ordering the respondent in a human rights action to take steps to remedy the discrimination, prevent

¹²⁶⁷ In personal injury tort law damages are generally accepted as being awarded to make the complainant whole, i.e. put them in the position they would have been in but for the tort committed against them. In other words, the courts seek to compensate for the injury to the plaintiff. See *Livingston v Rawyards Coal Co* (1880), 5 App Cas 25 at 39 (HL (Sc)) (Lord Blackburn).

¹²⁶⁸ Kent Roach, “Principled Remedial Discretion Under the Charter” (2004) 25 SCLR (2d) 101 at 106.

¹²⁶⁹ See *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 (CanLII), [2003] 3 SCR 3, one of the few cases where a court remained seized of a matter to ensure constitutional compliance, but where the court expressed the importance of not intruding on the proper role of the legislatures in crafting judicial remedies under s. 24(1).

¹²⁷⁰ For a discussion of injunctions as a constitutional law remedy and the court’s reluctance to use them see Jeffrey Berryman, *The Law of Equitable Remedies*, 2nd Ed (Toronto: Irwin Law, 2013) at 258-267.

¹²⁷¹ See, for example, *Canadian Human Rights Act*, RSC 1985, c H-6, s 53(2).

future discrimination, and compensate the complainant for the harm experienced are contained in all provincial and territorial human rights statutes.¹²⁷²

Where human rights tribunals have previously found discrimination in policing, they have often provided public interest or systemic remedies exercised as a “broad remedial power”¹²⁷³ to address discrimination within policing organizations and practices. In some cases tribunals have remained seized to ensure compliance and monitor the remedies ordered.¹²⁷⁴ For example, in *Campbell v Vancouver Police Board (No 4)*,¹²⁷⁵ a claim pertaining to discriminatory treatment of an Indigenous woman by police, the British Columbia Human Rights Tribunal ordered the Vancouver Police Board, among other remedies, to train its officers who are engaging with Indigenous people, and specified particular content that, at a minimum, this training should entail, such as “understand[ing] how stereotypes operate in a policing context”¹²⁷⁶ and “[u]nderstand[ing] and be[ing] prepared to address the particular needs that Indigenous people may have in an encounter with the police, arising from the long legacy of colonialism and ongoing distrust of the police.”¹²⁷⁷ Similarly, in *Johnson v Halifax Regional Police Service*,¹²⁷⁸ a successful racial profiling claim in which the claimant, a Black man, was stopped, fined and had his car towed by police, the police service was ordered to hire independent local consultants to prepare a needs assessment of its current policies and practices on anti-racism education and diversity training within 6 months and to

¹²⁷² See *Human Rights Code*, RSBC 1996, c 210, s 37; *Alberta Human Rights Act*, RSA 2000, c A-25.5, s 32(1); *The Saskatchewan Human Rights Code*, SS 2018, c S-24.4, ss 39, 40; *The Human Rights Code*, CCSM c H175, s 43(2); *Human Rights Code*, RSO 1990 c H-19, ss 45.2, 45.3; *Charter of Human Rights and Freedoms*, CQLR c C-12, s 49; *Human Rights Act*, RSNB 2011, c 171, s 23; *Human Rights Act*, RSNS 1989 c 214, s 34(8); *Human Rights Act*, RSPEI 1988 c H-12, s 28.4(1)(b); *Human Rights Act, 2010*, SNL 2010, c H-13.1, s 39(1)(b); *Human Rights Act*, RSY 2022, c 116, s 24; *Human Rights Act*, SNWT 2002 c 18, s 62(3); *Human Rights Act*, SNU 2003 c 12, s 34(3).

¹²⁷³ See *Aiken v Ottawa Police Services Board*, 2019 HRT0 934 (CanLII) at para 21.

¹²⁷⁴ See, for example, *Johnson v Halifax Regional Police Service*, 2003 CanLII 89397 (NS HRC).

¹²⁷⁵ 2019 BCHRT 275 (CanLII).

¹²⁷⁶ *Ibid* at para 176.

¹²⁷⁷ *Ibid* at para 176.

¹²⁷⁸ 2003 CanLII 89397 (NS HRC). Note: The part of the award providing legal costs to the claimant was overturned (2005 NSCA 70 (CanLII)) as the *Human Rights Act*, RSNS 1989, c 214 provides no power for the tribunal to award legal costs.

make the report public provide a response to it publicly indicating what steps the service would take to respond.¹²⁷⁹

While previous caselaw shows a propensity to provide public interest remedies aimed at police training and policies, attempts to seek orders for the production of data on potential systemic discrimination have been less successful. For example, in *Aiken v Ottawa Police Services Board*,¹²⁸⁰ the complainant sought a remedy ordering the continuation of an ongoing data collection and analysis project concerning traffic stops, which was the subject of a settlement agreement between the parties, along with the creation of a similar project pertaining to pedestrian stops. The tribunal declined to make such orders, though Adjudicator Mark Hart acknowledged it was in their jurisdiction to do so, noting the significant efforts currently being made by the police service to address the issue, concerns about a lack of factual foundation in the claim for data collection on pedestrian stops (the facts of the case did not include a pedestrian stop), and the fact that the traffic stop program was continuing without any order so none was needed.

The acknowledgement that data collection public interest remedies would be within the jurisdiction of a human rights tribunal's broad remedial powers is significant in the context of police discrimination because frequently discrimination is hidden by the fact that the government publishes little information on systemic inequalities and the data revealing it which is held by these bodies, or within the power of these bodies to collect, is not available to the public.¹²⁸¹ As discussed in chapter 1, there is little accurate Canadian data on many forms of police-involved injuries and deaths and their impact on marginalized groups. Human rights tribunals and courts may be in a position to shine light on

¹²⁷⁹ 2003 CanLII 89397 (NS HRC).

¹²⁸⁰ 2019 HRT0 934 (CanLII).

¹²⁸¹ An example of this problem is provided by the case *Ewert v Canada*, 2018 SCC 30, (discussed in greater detail in below) in which a section 15(1) claim concerning systemic discrimination in the correctional system failed due to a lack of data, when ultimately the correctional service itself holds a monopoly on the ability to produce such data.

patterns of discrimination within these institutions in fulfillment of their objectives to ensure constitutional compliance equality, inclusion and non-discriminatory service provision through the use of public interest or systemic remedies.

Human rights laws and the Charter are forward-looking in nature. Both consider the experiences of the particular complainant and allow for damages to be awarded, but they can also provide remedies aimed at preventing future non-compliance with the human rights codes or constitution. In this way they differ from the compensatory nature of tort remedies which are intended to compensate the harmed individual, generally through damages. While the Charter and human rights statutes provide the possibility for remedies tailored to achieving systemic reform or compliance, available damages are a major practical barrier to employing discrimination claims to address police-involved injuries or deaths. Human rights claims have generally attracted relatively low damage awards as have Charter violations for which damages are awarded. As lawyer Selwyn Pieters has pointed out, damages in Ontario human rights discrimination claims against police generally fall within the \$5,000-40,000 range.¹²⁸² Some human rights statutes also contain monetary award caps, such as the *Canadian Human Rights Act*, which caps compensation for pain and suffering arising from the discrimination at \$20,000 and damages for willful or reckless acts of discrimination at \$20,000.¹²⁸³ With respect to Charter damages, awards have often been relatively low¹²⁸⁴ or refused altogether¹²⁸⁵ and they are often much lower than damages awarded as

¹²⁸² Selwyn Pieters, “Access to Justice for Community Users: A Litigator’s Perspective” CanLII Authors Program, 2021 CanLII Docs 1516, <<https://canlii.ca/t/t92k>>.

¹²⁸³ For example, the *Canadian Human Rights Act*, RSC 1985, c H-6, s 53(2),(3) caps damages for compensation for pain and suffering at \$20,000 and *The Human Rights Code*, CCSM c H175, s 43(2.1) caps damages for “injury to dignity, feelings or self-respect” at \$25,000.

¹²⁸⁴ In W.H. Charles, *Understanding Charter Damages: The Evolution of a Charter Remedy*, (Toronto: Irwin Law Inc., 2016) [Charles 2016], the author reviewed Charter damages in the post-*Ward* era, finding that when especially high awards were included the average amount of Charter damages was \$12,500, and when excluded it was \$8,633.

¹²⁸⁵ See *ibid* at 103-104.

compensation for torts.¹²⁸⁶ However, notably some of the largest Charter damage awards have been awarded in cases involving police misconduct leading to injury.¹²⁸⁷

The amounts provided to compensate for discrimination under the Charter or human rights statutes are typically lower than a plaintiff might expect for a successful assault, battery, or negligence claim against police. For example, the cap on non-pecuniary damages (also known as “general damages”) available in tort litigation was approximately \$386,338 in 2021¹²⁸⁸ and pecuniary damages can be much higher where significant injury occurs. Furthermore, aggravated and punitive damages have been awarded in some tort cases involving police violence or other serious types of misconduct¹²⁸⁹ further exacerbating the difference between what a plaintiff might expect through human rights or Charter claims compared to tort. Damages have historically been particularly low in human rights service discrimination contexts (which includes policing), one factor which may dissuade complainants from employing the human rights system.¹²⁹⁰ Furthermore, a study by Audra Ranalli and Bruce Ryder of general

¹²⁸⁶ For example, see *Fleming v Ontario*, 2019 SCC 45 (CanLII), in which the trial court awarded only \$5,000 in Charter damages for violation of the appellant’s sections 2(b), 7 and 9 after he was illegally arrested in a manner that caused him injury by the Ontario Provincial Police. In contrast, tort-related damages awarded in the case amounted to \$134,711.90.

¹²⁸⁷ See, for example, *Elmardy v Toronto (City) Police Services Board*, 2017 ONSC 2074, where the plaintiff was awarded \$50,000 in Charter damages in a case of battery and racial profiling; and *Taylor v P.C. Koc*, 2016 ONSC 5839 (CanLII), where the plaintiff was awarded \$32,500 in Charter damages for violation of the plaintiff’s section 8 rights.

¹²⁸⁸ The cap on non-pecuniary damages in Canada was established in 1978 in what has become known as the “Damages Trilogy” in which a cap of \$100,000.00 was set. This cap is subject to inflation and the figure referenced is the amount of the cap, according to the Bank of Canada’s inflation calculator, for 2021. See *Andrews v Grand & Toy Alberta Ltd.*, [1978] 2 SCR. 229, 83 DLR (3d) 452; *Arnold v Teno*, [1978] 2 SCR 287, 83 DLR (3d) 609; *Thornton v Prince George School District No. 57*, [1978] 2 SCR 267, 83 DLR (3d) 480.

¹²⁸⁹ For examples of tort lawsuits awarding punitive and/or aggravated damages against police defendants see *Rollins v Niagara Regional Police Service et al.*, 2016 ONSC 7735 (CanLII); *Pike v RCMP*, 2008 BCPC 426 (CanLII); *Parsons v Woodfine*, 2009 CanLII 33053 (ON SC); *OCB et al. v The City of Winnipeg*, 2019 MBQB 84 (CanLII); *Lynch v Hashemian*, 2006 SKCA 126 (CanLII); *Chopra v T. Eaton Co. Ltd.*, 1999 ABQB 201 (CanLII).

¹²⁹⁰ See Judith Mosoff, “Is the Human Rights Paradigm Able to Include Disability: Who’s In Who Wins - What - Why” (2000) 26:1 Queen’s LJ 225, where the author explains the relatively fewer service discrimination cases compared to employment discrimination cases among human rights decisions studied:

“Marginal or inadequate remedies for successful non-employment cases may explain, in part, why the majority of cases adjudicated in the fourteen-year period analyzed in this study were employment cases. Complainants who are discriminated against in the area of employment may be less likely to win their case, but if they do win, they also appear to have more to gain financially.” (p. 266)

damages in Ontario discrimination claims from 2000 to 2015 found these awards have actually decreased over time when adjusted for inflation,¹²⁹¹ suggesting the gulf between expected damages in tort vs human rights may be widening in some jurisdictions.

Ultimately, while the availability of public interest remedies aimed at systemic reform could provide some benefit to those seeking to foment change in policing, on a practical level low damage awards may act as a disincentive to claimants who would be better off pursuing individual remedies in tort. Removing or expanding the caps on damages in human rights actions would help to ensure these systems can be used to achieve accountability for egregious and deadly forms of discrimination.

8.5.3 The Medicalization of Disability as a Barrier to Access to Justice for Persons who Experience Mental Health Disability in Canadian Discrimination Law

The treatment of “disability” as a legal concept in Canada presents conceptual difficulties for persons who experience mental health disability when seeking legal redress for discrimination by police. Canadian discrimination law has tended to claim adherence to the social model of disability, but has failed in practice to adequately account for the social construction of “disability” and “impairment”. It has tended to medicalize “impairment” and reinforce biological understandings of “disability”.

Legal scholar Jonas Sebastian-Beaudry describes the challenge of legal mechanisms which exert power over an individual who experiences disability, involving them unwillingly or willingly in legal proceedings, and which also involve the disabled individual in the production of information (often in the form of evidence) structured according to the concepts, frameworks, and tests of the law or regulatory

¹²⁹¹ Audra Ranalli & Bruce Ryder, “Undercompensating for Discrimination: An Empirical Study of General Damage Awards Issued by the Human Rights Tribunal of Ontario, 2000-2015, (2017) 13 JL & Equal 91.

structures it relies on. Beaudry refers to this process as “confessional knowledge,” using Foucault’s terminology of “confession” from the *History of Sexuality*, Volume 1.¹²⁹² He writes:

This notion emphasizes that “disabled people” are invited or pressured to identify themselves within legal (and other social) frameworks that not only serve their explicit purposes but also mold the social roles, self-understanding, relations with others, and agency of DEP [differently embodied people].¹²⁹³

In other words, the legal system compels disabled individuals to become co-creators in a narrative about themselves, their experiences and their relationship to others, which may assist them in some way to achieve an outcome from the system (as, for example, in the context of receiving a remedy for discrimination), but may also circumscribe which particular roles, identities, and narratives they must display to achieve this end. These stories can in some cases reinforce ableism or stereotypes and may be internalized by the individual.

In Canadian disability law, the price that is paid for a disability claim is often the medicalization of an experience of disability, in which medical professionals are provided a gate-keeping and definitional role of providing evidence of disability. For example, the definition of “disability” contained in the Ontario Human Rights Code states:

“disability” means,

- (a) any degree of physical disability, infirmity, malformation or disfigurement that is *caused by* bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
- (b) a condition of mental impairment or a developmental disability,

¹²⁹² See Jonas-Sebastien Beaudry, “The Vanishing Body of Disability Law: Power and the Making of the Impaired Subject,” (2018) 31 Canadian Journal of Family Law 7 at 28.

¹²⁹³ Jonas-Sebastien Beaudry, “The Vanishing Body of Disability Law: Power and the Making of the Impaired Subject,” (2018) 31 Canadian Journal of Family Law 7 at 28.

- (c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
- (d) a mental disorder, or
- (e) an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*; (“handicap”) [Emphasis added]¹²⁹⁴

As sub-section (a) of this definition makes clear, disability in law may be viewed as caused by “injury, birth defect or illness,” rather than a product of social or structural exclusion as the social model would suggest. The result of such definitions is that an applicant must provide evidence of disability when asserting a discrimination claim and will have to fit their particular circumstances within the definitions provided by statute or jurisprudence, to show on a balance of probabilities that they in fact “have” a disability. In the context of mental health disability the claimant will provide evidence of having a “mental disorder.” The concept of “disorder” itself implies a defect or variation from “order” or a norm. To suggest this is a disability is to remove understandings of disability as oppression and replace this with a focus on the individual. Taking a true social model approach, one cannot “have”¹²⁹⁵ a disability because it is an experience of social oppression. Disability arises between people, though it can be experienced by an individual. Disability in human rights law, however, generally reduces the concept to an “impairment” for which medical or other proof is required.

In *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*,¹²⁹⁶ the Supreme Court considered the definition of “handicap”, which is the equivalent of

¹²⁹⁴ *Human Rights Code*, RSO 1990 c H.19, s 10.

Note: While different provinces employ slightly different terminology and definition of “disability” or “handicap”, Justice Lamer, for the majority, noted in *University of British Columbia v Berg*, 1993 CanLII 89 (SCC), [1993] 2 SCR 353, that “If human rights legislation is to be interpreted in a purposive manner, differences in wording between provinces should not obscure the essentially similar purposes of such provisions, unless the wording clearly evinces a different purpose on behalf of a particular provincial legislature.” (p. 373). Consequently, provincial differences in definitions of disability are largely immaterial and the statutes have been interpreted similarly.

¹²⁹⁵ Human rights bodies typically employ the language of “having” a disability. See, for example, *Nichols v Henniges Automotive*, 2010 HRTO 915 (CanLII), para. 14 where the Tribunal asks: “Did the applicant have a disability within the meaning of the Code?”.

¹²⁹⁶ 2000 SCC 27 (CanLII).

“disability” in the language of the Québec Charter.¹²⁹⁷ Justice L’Heureux-Dubé (for the Court) explained that:

a “handicap” may be the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all of these factors. Indeed, it is the combined effect of all these circumstances that determines whether the individual has a “handicap” for the purposes of the *Charter*.

Courts will, therefore, have to consider not only an individual’s biomedical condition, but also the circumstances in which a distinction is made. In examining the context in which the impugned act occurred, courts must determine, *inter alia*, whether an actual or perceived ailment causes the individual to experience “the loss or limitation of opportunities to take part in the life of the community on an equal level with others”: *McKenna, supra*, at pp. 163 and 164. [...]

It is important to note that a “handicap” may exist even without proof of physical limitations or the presence of an ailment. The “handicap” may be actual or perceived and, because the emphasis is on the effects of the distinction, exclusion or preference rather than the precise nature of the handicap, the cause and origin of the handicap are immaterial. Further, the *Charter* also prohibits discrimination based on the actual or perceived possibility that an individual may develop a handicap in the future.¹²⁹⁸

As this definition makes clear, hypothetically proof of disability should not require medical evidence proving a health condition or functional limitation. The court’s point that the “cause and origin” of a disability is immaterial has not, however, gained full acceptance in Canadian human rights law, where tribunals continue to expect proof of disability in the form of medical evidence in cases where the claim rests on disability itself, rather than a “perception” of disability. In some cases tribunals have taken the position that all disability is physiological or physical in some form, and when someone is claiming disability (as opposed to a perception of disability), they must provide medical evidence to substantiate

¹²⁹⁷ *Charter of Human Rights and Freedoms*, CQLR c C-12, s 10.

¹²⁹⁸ *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City)*, 2000 SCC 27, para 79-81.

it.¹²⁹⁹ For example, in *Ma v. Dr. Ianin G. M. Cleator and another*,¹³⁰⁰ the British Columbia Human Rights

Tribunal stated:

[247] In summary, the concept of disability, for human rights purposes, has generally been held to involve a physiological state that is involuntary and has a degree of severity, permanence and/or persistence. Generally, the disability impairs a person's ability to carry out the normal functions of life to some degree and poses an impediment to a person's participation in the economic or other areas of life which the *Code* seeks to protect against. It is a case-by-case analysis. This line of reasoning continues to be followed by the Tribunal: *Morris v. British Columbia Railway Co.*, 2003 BCHRT 14 [46 C.H.R.R. D/162], para. 214; *Boyce v. New Westminster (City)*, [1994] B.C.C.H.R.D. No. 33 (QL) [1994 CanLII 18445 (BC HRT), 24 C.H.R.R. D/441], para. 50; *Wheatley v. Emergency and Health Services Comm. (No. 3)*, 2009 BCHRT 106 [66 C.H.R.R. D/413]; *Foster, supra*.

[...]

[255] I agree with the respondents that the issue of why there is no medical documentation confirming Ms. Ma's mental disability requires an answer. None was provided. Ms. Ma does not give a name to her mental disability beyond references to stress and general comments about trouble sleeping and loss of appetite. The burden is on the complainant to establish, on a balance of probabilities, that he or she has a disability.

[...]

[257] In circumstances like this, where there is only limited and vague evidence about a mental disability, a complainant would be well-served to provide medical evidence. In this complaint, in the absence of medical evidence supporting Ms. Ma's claim, I am not persuaded that Ms. Ma had a mental disability under the *Code*.¹³⁰¹

As this quote makes clear, medical evidence is considered the standard means of proving mental disability and lack of such evidence can cause a claim to fail. Furthermore, descriptions of personal experiences of distress or unwellness generally do not suffice, blocking claims by those who reject medical labels, or at least making them more challenging to prove.

¹²⁹⁹ Some examples of this reasoning include: *Bhushan v Fraserside Community Resources and another*, 2017 BCHRT 140 (CanLII) paras 15-16; *Grover v CUPE Local 2011 (Saanich) and another*, 2020 BCHRT 205 (CanLII) para 14; *Bahador v M&S Holdings and another*, 2018 BCHRT 78 (CanLII) para 14; *Wiggs v Pemberton Holmes and another*, 2017 BCHRT 98 (CanLII), para 24; *Leonhardt v Manitoba*, 2018 MBHR 3 (CanLII).

¹³⁰⁰ 2014 BCHRT 180 (CanLII).

¹³⁰¹ *Ma v. Dr. Ianin G. M. Cleator and another*, 2014 BCHRT 180 (CanLII) at paras 247, 255, 257.

The problem of medicalizing disability is most potent in the context of “mental health conditions” since some people who have been labelled as “having a mental illness” or “addiction” reject diagnostic labels imposed on them by medical personnel. The human rights system provides little guidance on how someone might prove a disability in a non-medical context and as outlined above, human rights legislation often implies that disability should be substantiated with medical evidence. Requiring medical evidence of disability inevitably means limiting access to claimants who may have adverse or conflictual relationships with the mental health system, a phenomenon which is not uncommon in police use of force interactions pertaining to mental health apprehensions since force in these contexts is only necessary if an individual refuses to be taken to hospital.

Improving access to the human rights systems for those who experience mental health disability could potentially be achieved through better recognition of non-medical evidence of disability (e.g. evidence of participation in hearing voices groups or other peer support) and perhaps guidance provided by human rights commissions on how to demonstrate disability in the absence of medical documentation. However, it is unclear whether the legal system is willing to embrace a stronger social model of disability that does not allow medical experts to play a gate-keeping function.

8.6 Discrimination in Police Exercises of Discretion to Employ Force: Considering Use of Force Models and “Threat Cues”

One of the greatest challenges inherent in bringing discrimination claims against police in response to use of force or other actions or omissions that disproportionately harm persons who experience mental health disability is the nature of police discretion and the lack of transparency in police operational policies, training, and information-keeping concerning use of force.¹³⁰² This lack of

¹³⁰² See, for example, Scot Wortley et al., *Police Use of Force in Canada: A Review of Data, Expert Opinion, and the International Research Literature*, (Canadian Criminal Justice Association 2021) online: < <https://www.ccja-acjp.ca/pub/en/wp-content/uploads/sites/8/2021/08/Full-Report-PUF.pdf> > for a discussion of the lack of public availability of use of force policies among Canadian police services.

transparency renders the influences on use of force decision-making during arrest largely opaque. Proving successful individual or systemic discrimination claims is challenging in contexts where there may be little or no available information about why an officer employed the decision to use force. One type of evidence that can be used to frame a discrimination claim is evidence that an official failed to follow applicable laws or policies, assisting courts and tribunals to make an inference that this failure was the result of bias. Another possible means of challenging use of force decision-making as discriminatory is to argue that police acted according to discriminatory use of force policies or standards.

In Canada, police use of force is typically communicated to courts and tribunals using the National Use of Force Framework ("NUFF") (or an iteration thereof) which was developed by the Canadian Association of Chiefs of Police in 2000 and has been adopted as the use of force model in police services across the country. The NUFF has been adapted by different police services to respond to their particular use of force training and policies. For example, it forms the basis of the RCMP's Incident Management/Intervention Model (IMIM).¹³⁰³ The creation of the NUFF involved a group of 65 use of force experts who were tasked with developing a model of use of force that could be used and adapted by Canadian police forces.¹³⁰⁴ Although this model is routinely used to explain use of force decision-making in Canadian legal proceedings, it is always qualified as not being a "policy" or "law".¹³⁰⁵

Both the IMIM and NUFF structure their depiction of officer risk assessment similarly. The IMIM bases risk assessment on four sets of inputs that influence the "choice of intervention options"¹³⁰⁶

¹³⁰³ Royal Canadian Mounted Police, "Incident Management/Intervention Model, online: <<https://www.rcmp-grc.gc.ca/en/incident-management-intervention-model-imim>>.

¹³⁰⁴ See Chris Butler, "The Use of Force Model and its Application to Operational Law Enforcement – Where have we been and where are we going?" (Canadian Association of Chiefs of Police, 2009) online: <<http://www.cacole.ca/resource%20library/conferences/2009%20Conference/Chris%20Butler.pdf>>.

¹³⁰⁵ For example, the Royal Canadian Mounted Police's description of the IM/IM on their website states: "The IMIM is not policy or law. It shouldn't be considered a model to justify use of a police intervention." Royal Canadian Mounted Police, "Incident Management/Intervention Model, online: <<https://www.rcmp-grc.gc.ca/en/incident-management-intervention-model-imim>>.

¹³⁰⁶ Royal Canadian Mounted Police, "Incident Management Intervention Model", provided to the author in response to Access to Information request #A201607856 at p. 5 (request p. 73).

available to an officer: "situational factors"; "subject behaviours"; "officer's perception"; and "tactical considerations", which are not mutually exclusive, but which may describe the same information in some cases.¹³⁰⁷ Recent adaptations of the model have come to include "de-escalation" or "crisis intervention."

For example, in April 2021 the IMIM was updated to:

[P]lace more emphasis on communication and crisis intervention and de-escalation. Crisis Intervention and De-escalation now surrounds the graphic, emphasizing de-escalation as the preferred result of any interaction. Crisis Intervention and De-escalation provides police with tools that can often be used instead of physical intervention options.¹³⁰⁸

The NUFF model is traditionally depicted as a set of colourful concentric rings that are meant to depict a correlation between levels of force, ranging from "officer presence" to "lethal force" and subject resistance ranging from "cooperative" to "grievous bodily harm or death" (i.e. the officer perceives the subject as displaying a risk of grievous bodily harm or death, as required by section 25(3) of the Criminal Code to justify potentially lethal force). Other rings represent other factors to be considered by the officer, including "tactical considerations and repositioning," and "crisis intervention and de-escalation" which are available throughout encounters; "intermediate weapons" which become available at the stage of "active resistance" and "lethal force" which lines up with "grievous bodily harm or death."¹³⁰⁹

This model contains lists of relevant factors that may inform use of force, which are quite expansive. Indeed, the large number of factors said to influence use of force decision-making, the lack of any meaningful restrictions in the model for when different levels of force can be used beyond a broad association between subjective impressions of the level of resistance demonstrated by a subject makes this model fairly useless for the provision of evidence that discrimination may have occurred due to a lack

¹³⁰⁷ Royal Canadian Mounted Police, "Incident Management Intervention Model", provided to the author in response to Access to Information request #A201607856 at p. 3-5 (request p. 73).

¹³⁰⁸ Royal Canadian Mounted Police, "Incident Management/Intervention Model," online: <<https://www.rcmp-grc.gc.ca/en/incident-management-intervention-model-imim>>.

¹³⁰⁹ *Ibid.*

of conformity with policy. For example, in *Maynard v. Toronto Police Services Board*,¹³¹⁰ Rawle Maynard, a Black man, alleged he had been discriminated against in the provision of policing services on the grounds of race, colour, ethnic origin and age when police stopped him in his vehicle and pointed several firearms at him, forcibly searched him and placed him in the back of a cruiser, when investigating a “gun call” involving a Black suspect driving a “black sports car.”¹³¹¹ Mr. Maynard was released shortly after this occurred as new information made clear that he was not the subject of the call. Mr. Maynard’s claim was ultimately successful with respect to one of the police officers involved (Ryan Baker) and the Toronto Police Services Board, leading to an award of \$40,000 for the violation of his rights under the Ontario Human Rights Code. However, the portion of his claim arguing that the use of force was discriminatory was ultimately unsuccessful. The Tribunal expressed:

In some cases, the act of deviating from established policy can support an inference that a person’s conduct is motivated by racial bias. I did not find it possible, in this case, to come to such a conclusion given the complexity of the use of force model, the endless list of factors that an officer might consider in the ongoing process of assessing a dangerous situation and the inherent subjectivity involved in applying the model.¹³¹²

Vague use of force policies, while structured to be adaptable to the wide range of situations in which police may be required to use force, also serve a protective function for policing agencies, insulating use of force decision-making from scrutiny. As was discussed in chapter 6, the same can be said for the use of concepts like “de-escalation” in policing, where it has been used to describe active use of force through less lethal weapons (like deploying a taser instead of a gun), allowing the term to be attached to a wide range of conduct. Given the vagueness of contemporary use of force models, proving direct bias like, such as arguing that police used force against the claimant because of a discriminatory

¹³¹⁰ 2012 HRT0 1220 (CanLII)

¹³¹¹ *Maynard v Toronto Police Services Board*, 2012 HRT0 1220 (CanLII) at para 6.

¹³¹² *Ibid* at para 143.

belief about the inherent dangerousness of people who experience mental health disability by providing evidence of a failure to follow use of force policies, is unlikely to be a successful strategy.

Unlike image-based use of force “models” such as the NUFF, written use of force policies are rarely accessible in their entirety to the public, and those that are tend to be so general that they cannot anchor claims of discrimination (or any misconduct). However, it cannot be said that police do not receive training that shapes their use of force. While information about the specifics of police training is generally not available, some information about how police are trained to justify use of force, and therefore how use of force decisions are made, can be obtained.

One example of accessible use of force training that could be discriminatory is the use of “threat cues,” which are contained in both RCMP training and within the National Use of Force Framework and which appear from caselaw to be a part of police use of force training in some police services in Canada. The RCMP’s IMIM provides a descriptive “model”¹³¹³ and training tool with mandatory annual certification for all officers to assist members of the force to understand police use of force, including particularly the legal articulation of their decisions to use force in a courtroom setting. The model explicitly acknowledges that “risk assessment” and “risk management” are core aspects of police use of force interventions, situating the assessment and management of risk within the six underlying principles applicable to all use of force intervention. These include:

1. The primary duty of a peace officer is to preserve and protect life.
2. The primary objective of any intervention is public safety.
3. Peace officer safety is essential to public safety.

¹³¹³ Several Royal Canadian Mounted Police documents contain notices that “The IMIM is not policy or law, and should not be used as justification on its own.” (see “Incident Management Intervention Model Policy”, c. 17.1 in Royal Canadian Mounted Police, *Operational Manual*, v 2.1, (Ottawa: Royal Canadian Mounted Police, 2014). Obtained by the author pursuant to a request for records (#A201607856) pursuant to the *Access to Information Act* at 92-93.

4. The IMIM is consistent with federal statutes and common law authorities and in no way replaces or augments the law.

5. The intervention must be applied in the context of a careful *assessment of risk*, taking into account the likelihood and extent of loss of life, injury, and damage to property as a result of the intervention.

6. *Risk assessment* is a continuous process and *risk management* must evolve as situations change.¹³¹⁴ [*emphasis added*]

"Threat cues" are commonly described as a "situational factor" within the IMIM/NUFF, along with "environment" (e.g. lighting, weather, location, hazards, etc.); "number of subjects" (relative to the number of officers present); "perceived subjects' abilities" (e.g. "willingness to resist", "emotional state", "intoxication" or "under the influence"; size and strength); "knowledge of the subject" (from police databases or prior involvement); and "time and distance" (referring to the perceived severity, how fast one must act, and whether time/distance can be created between officer and subject).¹³¹⁵

The IMIM model provides training to officers on "threat cues" which are described as behavioural signals that may indicate a subject is preparing to engage in violent resistance. The IMIM states:

Threat Cues

A subject may provide cues to his or her intentions. The following list includes physical behaviours displayed by a subject that have been known to precede an attack on an officer.

- ignoring the officer
- repetitious questioning
- aggressive verbalization
- emotional venting
- refusing to comply with lawful request
- ceasing all movement

¹³¹⁴ See "Incident Management Intervention Model Policy", c. 17.1 in Royal Canadian Mounted Police, *Operational Manual*, v 2.1, (Ottawa: Royal Canadian Mounted Police, 2014). Obtained by the author pursuant to a request for records pursuant to the *Access to Information Act*, RSC 1985, c A-1.

¹³¹⁵ Royal Canadian Mounted Police, "Incident Management Intervention Model", provided to the author in response to Access to Information request #A201607856 at p. 6 (request p. 77).

- invasion of personal space
- adopting an aggressive stance
- furtive glances
- hiding¹³¹⁶

What is notable about the descriptions in this list is that they are said to include behaviours displayed by subjects prior to attacks on officers, suggesting it is descriptive data drawn from historical encounters between police and subjects. While this list is described as "cues," a similar list of "potential attack signs" are described in the National Use of Force Framework. The National Use of Force Framework list states:

6. Potential Attack Signs

It is important for officers to understand that a subject may give clues as to his or her intentions. For example, a subject may exhibit a number of physical signs, either intentionally or unintentionally, that may give an officer insight into impending behaviour. Some of these signs include:

- Ignoring the officer
- Repetitious questioning
- Aggressive verbalization
- Emotional venting
- Refusing to comply with lawful request
- Ceasing all movement
- Invasion of personal space
- Aggressive stance or posturing
- Hiding or fleeing (fear - paranoia)
- Target glancing
- Wringing or rubbing of hands

¹³¹⁶ Royal Canadian Mounted Police, "Incident Management Intervention Model", provided to the author in response to Access to Information request #A201607856 at p. 3-6 (request p. 77).

- Perspiration incongruent with the situation
- Tensing or tightening of facial muscles
- Pupil dilation"¹³¹⁷

Where threat cues (or potential attack signs) show up in descriptions of police officer testimony in case law, descriptions of this training suggests that they are “behaviours which a police officer may interpret as a sign of impending or imminent harm”¹³¹⁸ which may cause an officer to be “expecting violent behaviour... at any time.”¹³¹⁹ For example, in *R v Pompeo*,¹³²⁰ Judge Wood described the testimony of an RCMP officer who was charged with aggravated assault following a shooting of an unarmed man:

He testified that police officers are trained to recognize certain behaviours and body language as threat cues. Threat cues include such things as the subject getting out of the car that has just been stopped, hands in and about the waist and pocket areas, a thousand yard stare and reaching toward pockets where people secrete weapons. When those threat cues combine, as it was put to him they did in this case, an officer’s training will tell him the subject must be searching for a weapon and the totality is starting to become clear that this is an attack upon the officer.¹³²¹

Case law also suggests “potential attack signs” are part of the use of force training curriculum in some police services. For example, in *R v Tran*,¹³²² Justice Vaillancourt writes:

Acting-Sergeant Pratecante testified that all officers of the Ottawa Police Service receive mandatory use of force training using the Use of Force Model. The training model discusses the six conditions that can characterize a situation, including: the environment, the number of subjects, the perceived subject’s abilities, knowledge of the subject, time and distance, and *potential attack signs*.¹³²³

¹³¹⁷ See Chris Butler, "The Use of Force Model and its Application to Operational Law Enforcement – Where have we been and where are we going?" (Canadian Association of Chiefs of Police, 2009) online: <<http://www.cacole.ca/resource%20library/conferences/2009%20Conference/Chris%20Butler.pdf>> at 15.

¹³¹⁸ *R v Grainger*, 2007 BCPC 113 (CanLII) at para 28.

¹³¹⁹ *Ibid* at para 28.

¹³²⁰ 2013 BCPC 30 (CanLII).

¹³²¹ *R v Pompeo*, 2013 BCPC 30 (CanLII) at para 122.

¹³²² 2013 ONCJ 558 (CanLII).

¹³²³ *R v Tran*, 2013 ONCJ 558 (CanLII) at para 150.

Considering the factors listed above, there are some obvious potential connections between human behaviours that have been associated with mental health conditions and “threat cues.” For example, “pupil dilation” is a biological reaction to some forms of substance use and may be associated with “substance use disorders.”¹³²⁴ “Tensing or tightening of facial muscles” may be confused with tardive dyskinesia. As Hanna Bergman et al., describe:

Tardive dyskinesia is an involuntary movement that causes the face, mouth, tongue, and jaw to convulse, spasm, and grimace. It is caused by long-term use or high doses of antipsychotic drugs, is difficult to treat, and can be incurable.¹³²⁵

Repetitious questioning may be the result of challenges with focus or memory causing someone to require repeat answers to a question. Concentration, attention and memory challenges have been associated with many psychiatric labels. For example, the Centre for Addiction and Mental Health suggests that “cognitive symptoms, such as difficulties with attention, concentration and memory”¹³²⁶ are associated with psychosis and “trouble concentrating, remembering” is associated with depression.¹³²⁷ Several threat cues are signs of fear (e.g. hiding, fleeing, wringing or rubbing of hands, ceasing all movement, perspiration incongruent with the situation) that may be linked to mental health disability through “paranoia” or other psychiatric labels associated with fear responses such as “anxiety disorders” or “post-traumatic stress disorder.” Indeed, the case of R.C.,¹³²⁸ discussed in chapter 4, provides an example of how symptoms of a health crisis can be conflated with indicators of criminal violence. R.C., an Indigenous man experiencing disorientation and crisis due to low blood sugar and diabetes, was subject

¹³²⁴ See Deepika Dhingra, Savleen Kaur & Jagat Ram, “Illicit Drugs: Effects on Eye,” (2019) 150:3 Indian Journal of Medical Research 228.

¹³²⁵ See Hanna Bergman et al., “Antipsychotic reduction and/or cessation and antipsychotics as specific treatments for tardive dyskinesia,” (2018) 2 Cochrane Database Systemic Reviews, DOI: 10.1002/14651858.CD000459.pub3, p. 2.

¹³²⁶ Centre for Addiction and Mental Health, “Psychosis,” Online: <<https://www.camh.ca/en/health-info/mental-illness-and-addiction-index/psychosis>>.

¹³²⁷ Centre for Addiction and Mental Health, “Depression,” Online: < <https://www.camh.ca/en/health-info/mental-illness-and-addiction-index/depression>>.

¹³²⁸ Re R.C., Manitoba, DoD: October 26, 2006.

to violent force and hogtying by members of the public and later police who failed to recognize that his erratic behaviour was caused by a medical emergency.

However, bringing a discrimination claim based on the employment of “threat cues” in use of force decision-making would be challenging in many cases because there may be no source of information about the “articulation of force” (i.e. the phrase used for the legal justification the police officer provides in their use of force report) that is available to a subject of force. In these contexts a complainant would have no way to know whether “threat cues” informed the police officer’s use of force. Where a discrimination claim in respect of use of force is commenced, the complainant would be able to seek disclosure of the use of force report that could include “threat cues” in the officer’s description of why they used force, though if this became a successful litigation strategy one can imagine that such cues may be omitted from use of force reports to limit liability. It is also possible that threat cues could be raised in other proceedings, like, for example, criminal proceedings in which use of force is challenged as being unreasonable. Additionally, following serious use of force incidents there may be an investigation by a special investigations unit that could shed light on police decision-making, although this is unlikely to draw to light these “cues” since officers who are the subject of an SIU investigation are not compelled to provide a statement. Alternatively, inquests (in cases of fatalities) or other legal proceedings may shed light on use of force decision-making.

Considering threat cues from the perspective of the human rights test for discrimination, where a subject of force has a mental health diagnosis (e.g. a diagnosed psychotic condition) they will meet the requirement to fall within a protected ground under human rights statutes (or the Charter). Where an officer relies on a threat cue caused by or associated with that “disability” (e.g. the individual takes psychiatric medication causing tardive dyskinesia which is interpreted by police as the threat cue of “tensing or tightening of facial muscles”) in their decision to apply force, the disability becomes a “factor” in the harm suffered (the act of force itself and any injury or other adverse effects resulting). Significantly,

police decision-making need not rely exclusively on the threat cue associated with disability to meet the requirements for the test for discrimination, so police officers are not insulated from findings of discrimination merely because other factors not associated with the complainant's disability may have informed their use of force.¹³²⁹

Once a *prima facie* case of discrimination is made out, the police would have an opportunity to argue that the threat cues relied on were *bona fide* requirements and consequently the police actions taken did not amount to discrimination pursuant to the *Meiorin/Grismer* test.¹³³⁰ However, for success such an argument would require proof that the standard produced by "threat cues" (i.e. not displaying behaviours supposedly indicative of threats) were adopted for a purpose or goal that is rationally connected to the function being performed (i.e. protection of public safety or some related function), that they were adopted in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal (i.e. maintaining public safety or officer safety), and that they are reasonably necessary to accomplish the purpose or goal, in the sense that it is not possible to accommodate the claimant without undue hardship. Proving this would require evidence of the necessity of these policies for protecting officers or the public and the burden to prove this rests with the police (or government or other body representing them) on a balance of probabilities.

Proving that "threat cues" are *bona fide* factors in the context of use of force would be challenging without evidence that they are actually predictive of violent risk and without evidence concerning their propensity to produce false positives. Neither the IMIM nor the NUFF list are weighted in

¹³²⁹ See *Persaud v. Toronto District School Board*, 2009 HRTO 1728, at para 181.

¹³³⁰ *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, 1999 CanLII 652 (SCC), [1999] 3 SCR 3 [*Meiorin*]; *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 [*Grismer*].

any way to show how suggestive of an attack any particular "cue" or "sign" is supposed to be, and there is no mention of the potential for false positives, which is to say the likelihood that these signs might be displayed in the lead up to non-violent encounters. While the description in the IMIM suggests that the behaviours listed are merely some factors which have been observed prior to previous attacks, their description as "cues" and factors in "risk assessment" suggests that they are taken to be predictive factors of violence. Furthermore, as a search of case law reveals, they are treated as predictive factors that police must pay attention to in order to recognize the risk of violence before it occurs. "Threat cues" are referenced in several cases in legal databases by police officers testifying about their use of force, including recent cases, suggesting they continue to be taught, or at least employed.¹³³¹

It is also unclear where these factors that are incorporated in Canadian use of force policies originated from. Were they reported by officers with no prompting and then recognized through the review of use of force reports? Were they identified as potential signs based on a theory and then contained in a question on use of force reports? Are they based on domestic evidence or are we relying on data from other countries (like the United States) which might have significant differences with respect to violent interactions with police? Are they sourced from published peer-reviewed studies or are they based on anecdotal field accounts of police officers?

Furthermore, the use of ambiguous body language and behavioural descriptions by police in contexts of discrimination are not confined to disability; these practices can also be understood as

¹³³¹ See, for example, *Santucci v Hamilton Police Service*, 2015 HRTO 1254 (CanLII), which involved an unsuccessful claim concerning mental health disability discrimination, including use of force. The "threat cue" in this case was "tensing up."; *R v Danjou*, 2020 BCSC 1819 (CanLII), in which it was described that an officer interpreted a "very cold thousand-yard stare" as a threat cue; *R v Cochrane*, 2016 ABQB 535, in which "pacing" and "assuming a bladed stance" were described as threat cues.; *R v Wilcox*, 2015 ABPC 147 (CanLII), in which a "closed fist" was a threat cue; *R v Bui*, 2014 SKPC 213 (CanLII), in which a lot of movement at a traffic stop was described as a threat cue; *R v Cameron*, 2008 BCPC 231 (CanLII), in which walking towards an officer who is walking away, reaching towards their pepperspray, turning around, and "not following the commands to go down on both knees" were described as threat cues.

potential “manifestations”¹³³² of racial profiling. David Tanovich provides a long list of behavioural indicators (e.g. “hand or body movements,”¹³³³ “apparent nervousness”¹³³⁴, “‘elongated stare’ or failing to make eye contact”¹³³⁵) that have been described in Canadian case law as providing a basis for police to conduct investigative detentions of racialized people, highlighting how behavioural indicators can also be used in common contexts in which racial profiling occurs. Indeed, the problem with police training and actions premised on readings of behavioural indicators a subject displays is that these indicators are ambiguous and can easily be interpreted in the light of ableist or racist beliefs, or deployed as a pretext for discriminatory police actions.

There is some evidence that these behavioural indicators can cause characteristics associated with impairment to be interpreted as resistance, justifying use of force, albeit within a coroner’s inquest case that pertains to cognitive as opposed to mental health disability. *Re C.M.*,¹³³⁶ in Ontario, is an example of a case where traits associated with an invisible disability were misread by police as resistance leading to force. C.M. was a 45-year-old man who died in a use of force interaction with police. In that case, police officers received a call about a man named “Raymond” who they believed was in breach of a recognizance and had recently fled a residential property. When driving in the area they saw a man who seemed to fit the description of the weight and height of “Raymond” and they called out his name but he continued to walk. They turned on their lights, and drove up to the man and tried to speak with him but he walked away faster, and eventually changed directions. The officers got out of their vehicle and yelled at the man to stop but he did not respond. The officers eventually grabbed the man, who resisted, and they tripped him and brought him to the pavement face first, and applied pressure on his back with

¹³³² David Tanovich, “Applying the Racial Profiling Correspondence Test,” (2017) 64 Criminal Law Quarterly 359 at 362.

¹³³³ *Ibid* at 366.

¹³³⁴ *Ibid* at 366.

¹³³⁵ *Ibid* at 366.

¹³³⁶ *Re C.M.*, Ontario, Date of Death: February 27, 2011.

knees, handcuffing him in prone. The man went into medical distress when restrained and ultimately died, with the coroner finding it was an “accident.”¹³³⁷ The man who died was not, in fact “Raymond.” Rather, the coroner’s report describes him as “a developmentally-delayed man” who was “non-verbal and there was some question as to whether he had a hearing impairment.”¹³³⁸ C.M. had been out for a walk with his mother, but he was ahead of her, and she had arrived on the scene once the use of force confrontation was taking place. The officers involved testified that throughout the entire incident they believed they were arresting Raymond.¹³³⁹ In other words, they interpreted C.M.’s behaviour of not replying to them and moving away from them as resistance, when in fact he was not able to verbally respond. Indeed, “fleeing”, “refusing to comply with a lawful command,” and “ignoring the officer” are all threat cues.

Threat cues can also, quite apart from contexts of disability, be signs of general human distress that could be triggered by police behaviour. For example in *Maynard*, the complainant recounted that when, as a young Black man, he was pulled over in his vehicle and police had a firearm pointed at him he was in a state of fear that led him to freeze, or to use the language of threat cues, to “cease all movement,”:

While his hands were in the air Mr. Maynard reached his left hand over to his right hand and shut off his cell phone. Mr. Maynard was terrified that he would be shot and described himself as devastated, frozen, like he was having an out of body experience.

Mr. Maynard testified that Officer Baker was yelling at him to turn around, walk backward toward the sound of Officer Baker’s voice and get on his knees. Mr. Maynard testified that in that moment he was unable to follow the commands that Officer Baker was “blurting out”. Mr. Maynard testified that when he froze, Officer Baker yelled at him “do you want to get shot? Do you want to get shot?”¹³⁴⁰

¹³³⁷ Note: The cause of death was listed as: “cardiac arrhythmia precipitated by struggle and restraint in the context of multiple medical conditions, including catecholaminergic polymorphic ventricular tachycardia.” Re C.M., Ontario, Date of Death: February 27, 2011, at 1.

¹³³⁸ Re C.M., Ontario, Date of Death: February 27, 2011 at 3.

¹³³⁹ *Ibid* at 5.

¹³⁴⁰ *Maynard v Toronto Police Services Board*, 2012 HRT0 1220 (CanLII) at paras 29-30.

Behavioural indicators of fear are especially problematic “threat cues” because they may characterize someone experiencing a mental health crisis, as well as anyone who may be fearful of police, or simply fearful of violence when confronted with police aggression, as dangerous. Populations that are over-policed or disproportionately subject to police violence, like Black or Indigenous people, socio-economically marginalized individuals, and those with perceived mental health impairments may rightly fear that they will be subject to unjustified police violence, causing them to display fear when interacting with police. It is also, arguably, not surprising that people may freeze when weapons are pointed at them, since movement is also commonly interpreted as a risk to police,¹³⁴¹ and those caught in such situations may, even if they are not reacting from shock, fear that police will think they are reaching for a weapon if they move in the wrong way.

As Correctional Investigator Ivan Zinger has noted with respect to human rights concerns vis a vis risk assessment tools in criminal justice, "it's important that these tools are not only predictive of risk but also applied in an ethical manner."¹³⁴² Where a behaviour is mis-characterized as a threat due to a failure of policing theories to adequately consider and account for a disability-related explanation, persons with these conditions may be subject to force more frequently than others based on a false belief that they are dangerous. Indeed, the belief that persons who experience mental health disability are dangerous is a well-recognized negative stereotype that is reinforced by theories that fail to adequately consider and account for human behavioural differences related to disability. This stereotype has been acknowledged by Canadian courts.¹³⁴³

¹³⁴¹ For example, see *Re M.J.W., British Columbia*, Date of Death: January 10, 2010, in which an unarmed man was shot by police after being seen shoving his hands in his pockets and retrieving a black object (cell phone); *Re P.S., Québec*, Date of Death: February 6, 2011, where an unarmed man moved his hands to waist level moving his coat and a police officer shot him, claiming he believed he was searching for something.

¹³⁴² Ivan Zinger, "Actuarial Risk Assessment and Human Rights: A Commentary" (2004) 46:5 *Canadian Journal of Criminology & Public Policy* 607.

¹³⁴³ See *R v Swain*, 1991 CanLII 104 (SCC), [1991] 1 SCR 933 at p 994; *Winko v British Columbia (Forensic Psychiatric Institute)*, 1999 CanLII 694 (SCC), [1999] 2 SCR 625 at para 35.

Practically, containing behaviours associated with mental health disability within threat cues may cause police officers to resort to their use of force training rather than mental health training when confronting a subject. As Geoffrey Alpert has noted, police training in risk analysis for use of force is generally more extensive than training on the accommodation of mental health disability.¹³⁴⁴ Consequently, where risk assessment training helps shape an officer's understanding of subject behaviour by packaging behaviours associated with mental health disability as threats, this can impact officer behaviour and escalate a situation in the direction of force.

As T. Douglas et al. point out with respect to risk assessment in criminal justice, risk assessment necessarily involves trade-offs in accuracy favouring either false positives or false negatives, meaning that depending on what variables are considered we will either incorrectly over-predict risk or incorrectly underpredict it.¹³⁴⁵ When factors predictive of risk are also correlated with the perceived characteristics of marginalized groups in society, this trade-off becomes more significant, since the burden of over-assessed risk may fall on a minority group for the alleged benefit to the majority of the population, raising concerns about discrimination. Other risk assessment tools in the criminal justice have been subject to Charter scrutiny in the past. For example, in *Ewert v Canada*,¹³⁴⁶ Justice Wagner of the Supreme Court of Canada, writing for the majority, discussed the issue of discrimination in the context of population-based risk assessment tools in the correctional system. In *Ewert*, the appellant was a Métis man who was a federal inmate in Canada and was subjected to risk assessment tools employed by the Correctional Service Canada to create a security classification for inmates that determines what type of institution they will live in, along with other circumstances of their incarceration. Mr. Ewert challenged the risk assessment tools on the grounds that CSC's failure to validate these tools with respect to Indigenous

¹³⁴⁴ See Geoffrey Alpert, "Police Use of Force and Suspect with Mental Illness: A Methodological Conundrum" (2015) 14:2 American Society of Criminology 277 at 281.

¹³⁴⁵ T. Douglas et al., "Risk assessment tools in criminal justice and forensic psychiatry" (2017) 42 European Psychiatry 134.

¹³⁴⁶ [2018] 2 SCR 165, 2018 SCC 30.

offenders violated his section 7 and 15(1) Charter rights, and s. 24(1) of the *Corrections and Conditional Release Act*, S.C. 1992 c 20. Section 24(1) of the Act provides that "the Service shall take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up to date and complete as possible." The majority held that CSC's failure to validate the tools for Indigenous offenders did not violate Mr. Ewert's section 7 rights or his section 15(1) rights. They did, however decide that the CSC had failed to comply with s. 24(1) of the CCRA.

In reaching the decision with respect to section 15(1) of the Charter, Justice Wagner stated:

"In my view, Mr. Ewert has not established the infringement of his s. 15 rights that he alleged. As I explained above, the evidence before the trial judge established *a risk that the impugned tools are less accurate* when applied to Indigenous inmates than when they are applied to non-Indigenous inmates. However, the trial judge did not find, and indeed could not have done so on the evidence before him, that the impugned tools do in fact overestimate the risk posed by Indigenous inmates or lead to harsher conditions of incarceration or to the denial of rehabilitative opportunities because of such an overestimation."¹³⁴⁷ [emphasis added]

This case is one of many examples where adverse effects discrimination claims have failed due to a lack of sufficient evidence proving harm caused by the impugned law or policy.¹³⁴⁸ Adelina Iftene points out that this outcome is particularly shocking because the "overwhelming volume of historical and recent reports cited as evidence of discrimination practices speak for themselves."¹³⁴⁹ She also notes that the Correctional Service of Canada should bear the onus of proving their tools are not discriminatory given that they control the information necessary to assess it,¹³⁵⁰ and indeed such a justification might have been required if the court had acknowledged a *prima facie* case of discrimination had been made out and

¹³⁴⁷ *Ewert v Canada*, 2018 SCC 30, [2018] 2 SCR 165 at para 79.

¹³⁴⁸ See also *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30, [2015] 2 SCR 548; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc.* (Bombardier Aerospace Training Center), 2015 SCC 39, [2015] 2 SCR 789.

¹³⁴⁹ Adelina Iftene, "Who Is Worthy of Constitutional Protection? A Commentary on *Ewert v Canada*" (June 25, 2018) CanLII Comment, <<https://canliiconnects.org/en/commentaries/62360>>.

¹³⁵⁰ *Ibid.*

proceeded to determine whether the policy was nevertheless justified as a *bona fide* requirement, with the burden of proof shifted to the government.

The failure in *Ewert* on the section 15 claim raises questions about whether attempts to challenge potentially discriminatory police policies would be destined for failure given the similar lack of transparency in Canadian policing. Where government institutions control information and access to study a topic like use of force, marshalling sufficient evidence to persuade a court to make an inference of *prima facie* discrimination may be challenging. However, there is reason to believe that placing positive obligations on state agencies to study the impact of use of force policies on protected groups (including those with disabilities) and disclose the results publicly may be necessary if the aim is to force change in these bodies. In *Ewert*, the claim was ultimately successful in finding a breach of section 24(1) of the *Corrections and Conditional Release Act*, SC 1992 c 20 which provides:

24 (1) The Service shall take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up to date and complete as possible.

Providing statutory requirements for police agencies to proactively validate their use of force policies to address potential discrimination could assist in addressing the concern that police use of force training indirectly discriminates against persons who experience mental health disability and other protected groups. For example, as chapter 6 describes, “excited delirium” cases raise the prospect that ordinary use of force and restraint tactics employed by police may place those who use substances or those who experience psychosis at risk of death. Some Canadian cases have acknowledged a proactive duty to accommodate disability, requiring institutions to ensure the policies and standards they rely on are as inclusive as possible.¹³⁵¹ For example, in *Grismer*¹³⁵², the Supreme Court of Canada acknowledged

¹³⁵¹ See *Grismer; Council of Canadians with Disabilities v VIA Rail Canada Inc.*, 2007 SCC 15 (CanLII), [2007] 1 SCR 650.

¹³⁵² *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868, 1999 CanLII 646 (SCC) [“Grismer”] at para 19.

the importance of proactively altering government standards to accommodate impacted groups, rather than treating accommodation as a supplement, allowing for the maintenance of the discriminatory standards.¹³⁵³ Policing policies, including those pertaining to use of force, should be proactively evaluated with respect to whether they accommodate persons who experience mental health disability to ensure discriminatory policies are not continued.

For example, as discussed in chapters 5 and 6, there is some evidence suggesting individuals who use cocaine and those who experience psychosis are more likely to die in CEW-proximate or “excited delirium” sudden deaths. Given this information police services should proactively acknowledge that they must determine whether CEWs and use of force techniques involved in “excited delirium” deaths may be more dangerous for those who experience mental health disability than for others. Relying on tests of use of force techniques on healthy volunteer officers is not sufficient to meet the obligation to accommodate mental health disability in policing.

Legislated requirements to test the safety of use of force and restraint practices for persons who experience mental health disability could assist in the removal of practices that are especially lethal for this population. However, requirements for Canadian policing agencies to proactively address potential discrimination in use of force policies would be insufficient to address the discriminatory impact of police use of force in Canada, in light of concerns around over-policing of particular communities. It would at best reduce the likelihood that police training and policies cause discriminatory decisions to use force.

8.7 Failure to Accommodate Mental Health Disability in Police Interventions

As chapter 7 considers, there are several modifications to traditional policing approaches that have been suggested in coroner and fatality inquiry reports as preferable for addressing persons in crisis

¹³⁵³ *Ibid* at para 19.

and those who experience mental health disability. Examples include deploying mobile crisis teams, involving mental health professionals in police responses or employing de-escalation or crisis intervention techniques. These modifications to traditional policing practices, as mentioned in chapter 1 are not in all cases supported by clear evidence of efficacy in preventing use of force. However, to the extent that particular alternatives to traditional police approaches may be supported by evidence of efficacy to reduce force, they could be forms of accommodation of disability.

Human rights claims pertaining to the accommodation of disability may be helpful for providing a wider frame through which to view police interactions than section 25 statutory justification analyses allow for. As discussed above, traditional analyses focused on the statutory defences for justification of force often fail to consider alternative approaches to the one police actually took in a misguided effort to avoid “hindsight bias.” In contrast, human rights law requires a careful consideration of alternatives when determining if respondents have met the duty to accommodate.

The duty to accommodate disability is provided in all human rights statutes in Canada and is also provided within the *Convention on the Rights of Persons with Disabilities*.¹³⁵⁴ In the context of service provision it has been addressed by the Supreme Court of Canada in *Council of Canadians with Disabilities v VIA Rail Canada Inc*,¹³⁵⁵ in which Justice Abella explained:

[110] To redress discriminatory exclusions, human rights law favours approaches that encourage, rather than fetter, independence and access. This means an approach that, to the extent structurally, economically and otherwise reasonably possible, seeks to minimize or eliminate the disadvantages created by disabilities. It is a concept known as reasonable accommodation.

...

¹³⁵⁴ For example, article 4(e) the UNCRPD provides that States Parties undertake “To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise” and “discrimination” is defined in article 2 as including “denial of reasonable accommodation”. Additionally, article 5(3) provides: “In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.” See *Convention on the Rights of Persons with Disabilities*, December 13, 2006, 46 ILM 433, UN Doc A/RES/61/106 [“UNCRPD”].

¹³⁵⁵ [2007] 1 SCR 650, 2007 SCC 15 [*Via Rail*].

[121] The concept of reasonable accommodation recognizes the right of persons with disabilities to the same access as those without disabilities, and imposes a duty on others to do whatever is reasonably possible to accommodate this right. The discriminatory barrier must be removed unless there is a *bona fide* justification for its retention, which is proven by establishing that accommodation imposes undue hardship on the service provider: *Commission scolaire régionale de Chambly v. Bergevin*, 1994 CanLII 102 (SCC), [1994] 2 S.C.R. 525 (“*Chambly*”), at p. 546.¹³⁵⁶

The context of police use of force incidents and police interactions leading to fatalities is fundamentally different from the contexts of disability accommodation that have predominantly informed Canadian law on disability discrimination and accommodation. The majority of disability discrimination cases litigated in Canada occur in the context of employment, and where accommodation claims are made concerning service provision, they often relate to services with which an individual has a long-term connection or ongoing relationship, such as the provision of schooling, public transportation, healthcare, or social benefits. In contrast, use of force incidents involving police are often extremely brief occurrences with severe potential consequences and they occur in highly conflictual circumstances, even where discrimination does not play a role. Accommodation in service provision of this nature is challenging in the context of mental health disability, for several reasons, including that accommodation is generally understood to require proactive disclosure of disability and the need for accommodation by the individual seeking it, with few exceptions, and legal descriptions of the accommodation process have largely been shaped by contexts of repeated or at least temporally extended interactions between an employer and employee or service provider and recipient. Consequently, much of the judicial guidance on the accommodation process is unhelpful or inapplicable to the context of police use of force.

Human rights tribunals and courts have acknowledged a duty to accommodate disability in the context of police interventions or arrests in some cases.¹³⁵⁷ Claims of discrimination pertaining to a failure

¹³⁵⁶ *Ibid* at paras 110 and 121.

¹³⁵⁷ See, for example, *Howell v. York Regional Police*, 2013 HRT0 1095; *Childs v. The Regional Municipality of Peel Police Services Board*, 2014 HRT0 1829.

to accommodate disability require at the outset that the claimant proves *prima facie* discrimination since accommodation is not required in the absence of discrimination.¹³⁵⁸ In claims pertaining to a failure to accommodate disability, the discrimination claimed will be the treatment received by the subject of the police intervention which failed to take into account their disability-related needs and resulted in harm (use of force, injury, etc.).

The plaintiff must demonstrate that the duty to accommodate is triggered. This takes place where police become aware that the individual they are interacting with has a disability that may require accommodation or where accommodation is directly requested. It may be challenging to claim discrimination on the ground of mental health disability with respect to police use of force because mental health disability is not associated with a visible physical impairment or assistive devices, so it may not be immediately apparent to police in many cases. Generally, a service provider is only required to accommodate disability if they are aware that an individual has a disability. However, courts and tribunals have been willing to find that a proactive duty to inquire about disability or to directly accommodate a disability exists where an individual is unable to disclose their need but is “clearly unwell or perceived to have a disability.”¹³⁵⁹

Practically, police may become aware of a potential need for accommodation through routine assessments of those they interact with as being “emotionally disturbed persons” (EDP), which is police jargon for someone displaying what officers perceive to be a mental health issue. In *J.M. v Toronto Police Services Board*,¹³⁶⁰ a discrimination claim on the grounds of perceived mental health disability, the Ontario Human Rights Tribunal considered an argument that assessments by police that a person is an

¹³⁵⁸ See *Childs v. The Regional Municipality of Peel Police Services Board*, 2014 HRT0 1829 (CanLII) at para 42.

¹³⁵⁹ See *Krieger v Toronto Police Services Board*, 2010 HRT0 1361 (CanLII) at para 133 quoting Ontario Human Rights Commission, *Policy on preventing discrimination based on mental health disabilities and addictions*, (Toronto: Ontario Human Rights Commission, 2014) at s 13.6.1.

¹³⁶⁰ 2017 HRT0 1087 (CanLII).

“emotionally disturbed person” (EDP) could be discriminatory. Adjudicator Jennifer Scott highlighted the importance of making such assessments for the accommodation of mental health disability:

[I]t is not discriminatory for the police to assess people as EDP. Identifying someone as EDP is determining whether the person is in a state of crisis or has a mental health disability. Without this assessment, the police will not know whether members of the public require accommodation in the provision of services. Knowing someone has a mental health issue is critical to ensuring that they are provided with the necessary supports by the police. This is important not only for the safety of officers (as many witnesses for the respondent testified), but also for the safety of the individual who is requesting police services, as well as for members of the public.¹³⁶¹

Notations like “EDP” within police notes or databases can be indicators that police were aware of or ought to have been aware of mental health disability and the potential need for accommodations. Furthermore, in some cases information retained in police databases about the mental health status of an individual may be sufficient to trigger a duty to accommodate where police are aware of this information when responding to a call.¹³⁶² The duty to accommodate may also be triggered where information provided by the caller alerts police to the presence of mental health disability.

Accommodation of disability is generally described as having both a procedural and substantive aspect. For example, in *Adga Group Consultants Inc. v. Lane*,¹³⁶³ Justice Ferrier explained, in the context of an employment disability claim that

The procedural duty to accommodate involves obtaining all relevant information about the employee's disability, at least where it is readily available. It could include information about the employee's current medical condition, prognosis for recovery, ability to perform job duties and capabilities for alternate work. The term undue hardship requires respondents in human rights cases to seriously consider how complainants could be accommodated. A failure to give any thought or consideration to the issue of accommodation, including what, if any, steps could be taken constitutes a failure to satisfy the "procedural" duty to accommodate [... case citations omitted].¹³⁶⁴

¹³⁶¹ *Ibid* at para 62.

¹³⁶² For example, in *Commission des droits de la personne et des droits de la jeunesse (Miller et autres) c. Ville de Montréal (Service de police de la Ville de Montréal) (SPVM)*, 2019 QCTDP 31 (CanLII) police were aware that the complainant had a mental health disability due to notations on his police record.

¹³⁶³ 2008 CanLII 39605 (ON SCDC) [*Adga*].

¹³⁶⁴ *Ibid* at para 107.

In the context of policing, the procedural duty to accommodate disability would include gathering any available information, for example from police databases or if the context allows from others present at the site of the intervention or elsewhere, to determine the nature of the disability (if it is not immediately apparent) along with consideration of whether there are means to accommodate, such as alternative intervention techniques, crisis response teams or other programs specifically designed to address mental health crises. The substantive duty to accommodate disability was also defined in *Adga* as requiring the employer (or in this case, service provider) to show that it could not have accommodated the employee's (or in this case service recipient's) disability short of undue hardship.¹³⁶⁵ Where the defendant police agency can prove that accommodations for mental health disability would amount to undue hardship this provides a defence to a claim of discrimination based on a failure to accommodate. "Undue hardship" is said to be a flexible standard and may include many factors, depending on the particular circumstances of the claim, but frequent factors considered include the costs of the proposed accommodation and any impact it may have on health and safety.¹³⁶⁶ Ensuring police-based programs to accommodate disability are available may be argued to be prohibitively expensive in some cases as measures like de-escalation and crisis intervention training require additional training hours and measures like mobile crisis units require additional police to staff them. Policing itself is generally one of the greatest expenditures of municipalities in Canada,¹³⁶⁷ and policing in Canada costs roughly 15.7 billion dollars in 2018/2019 and has been rising since the 1990s.¹³⁶⁸ However, the largesse of current police

¹³⁶⁵ *Ibid* at para 113.

¹³⁶⁶ See, for example, *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, 1999 CanLII 646 (SCC).

¹³⁶⁷ See Tom Cardoso & Molly Hayes, "Canadian cities' police spending ranges from one-10th to nearly a third of total budgets, Globe analysis finds," (August 16, 2020) *Globe & Mail*, online: < <https://www.theglobeandmail.com/canada/article-canadian-cities-police-spending-ranges-from-one-10th-to-nearly-a/>>.

¹³⁶⁸ See Patricia Conor, Sophie Carrière, Suzanne Amey, Sharon Marcellus and Julie Sauvé, Canadian Centre for Justice and Community Safety Statistics, "Police resources in Canada, 2019," (Ottawa: Statistics Canada, 2020) online: < <https://www150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00015-eng.htm>>.

budgets may make such accommodations seem more reasonable, even where they require significant expenditures. Significantly, alternatives to police responses, such as civilian crisis response teams would very likely be significantly cost-saving given that average police salaries are very high,¹³⁶⁹ making financial arguments against these forms of accommodation much less persuasive.

The impact that public safety arguments might have on “undue hardship” has been acknowledged and addressed in some Canadian human rights claims. For example, accommodation of disability in the context of police use of force arose in *Miller*,¹³⁷⁰ a Québec human rights claim under s 10 of the *Quebec Charter of Rights and Freedoms*¹³⁷¹ which alleged discrimination by police on the grounds of race, colour, social condition and handicap (mental health disability), towards a Black man of Jamaican origin. Mr. Miller who was known to police as someone with a mental health disability because of information recorded in police databases, including a history of mental health act apprehensions and criminal activity for which the complainant was found not criminally responsible by reason of mental disorder. In *Miller*, the Human Rights Tribunal explained that the Commission alleged that the police intervention

was not adapted to take into account Mr. Miller's mental health problems, he was the victim of a distinction or exclusion based on his handicap in the exercise of his right to have access to a service ordinarily offered to the public, in violation of sections 10 and 12 of the [Québec] Charter. According to the Commission, by failing to take into account Mr. Miller's known mental health problems and intervening with him in the way that they do with all persons who do not have mental health problems, the SPVM police officers interfered with his right to substantive equality by subjecting Mr. Miller to the use of unjustified force and abusive and premature treatment.¹³⁷²

Mr. Miller’s claim was ultimately dismissed due to unreasonable delay, but the Tribunal des droits de la personne du Québec addressed the law pertaining to the duty to accommodate in the context of police

¹³⁶⁹ The average police salary and wages in 2018/2019 was \$118,000 per officer, which accounts for 81% of police operating expenditures. See *ibid.*

¹³⁷⁰ 2019 QCTDP 31 (CanLII).

¹³⁷¹ CQLR c C-12.

¹³⁷² *Commission des droits de la personne et des droits de la jeunesse (Miller et autres) c. Ville de Montréal (Service de police de la Ville de Montréal) (SPVM)*, 2019 QCTDP 31 (CanLII) at para 22.

use of force and acknowledged that de-escalation techniques could constitute a form of accommodation.

They explained:

[W]hen the City of Montreal provides police services, the [Québec] Charter requires it to do so without causing prejudice to any person because of his or her personal characteristics that are prohibited grounds of discrimination. Police officers therefore have the duty to accommodate persons with disabilities, unless there are justifiable grounds for not doing so, which may be established by proving that the accommodation would cause them undue hardship. The duty to accommodate must be assessed taking into account all the unique features of the context of the intervention.

Diffusing [*sic*] conflicts using de-escalation techniques and the least amount of force necessary in the circumstances can constitute accommodation measures that police officers may implement when intervening with persons with mental health problems.¹³⁷³

In *Miller* the Commission argued, among other allegations of discrimination (including racial and mental health profiling), that a third party known to Mr. Miller or UPS-Justice, a mobile crisis team, should have been deployed to accommodate Mr. Miller's disability.¹³⁷⁴ However, the police argued that such deployment would have been inappropriate given that Mr. Miller was in an agitated state (albeit unarmed).¹³⁷⁵ The police argument against these accommodations demonstrates how mobile crisis or non-police crisis response alternatives can be rendered useless for the purpose of de-escalation where subject agitation (arguably one of the pre-conditions required for de-escalation) is considered sufficient to prevent their deployment.

The tribunal in *Miller* noted that, in the context of a police intervention, "[t]he duty to accommodate is not absolute [...] and must be assessed based on all the unique characteristics of the intervention, in particular the urgency of the situation and the actual risk of dangerousness of the individual."¹³⁷⁶

¹³⁷³ *Ibid* at para 26.

¹³⁷⁴ *Ibid* at para 143.

¹³⁷⁵ *Ibid* at para 147.

¹³⁷⁶ *Ibid* at para 221.

Consideration of the “urgency” and “risk of dangerousness” in a situation is likely to be a serious hurdle to mental health accommodation in the context of use of force interactions because in order to use force, as discussed above, police must demonstrate its necessity through a description of the risk of injury or death. There is some evidence that human rights tribunals may provide leniency to police in light of the dynamic circumstances of arrest, similar to what was described in the context of tort and criminal cases above. For example, in a recent and unsuccessful discrimination claim based on creed, *Stanley v. Toronto Police Services Board*,¹³⁷⁷ the complainant alleged that the police discriminated against her in the course of arrest. The police learned the applicant was Muslim following her arrest when she was placed in a police car without her hijab, nor modest clothing. The Ontario Human Rights Tribunal acknowledged that there was a delay in accommodating the applicant, who had made her need for appropriate attire known to police, but the delay was found to be reasonable because of the dynamic nature of the scene and the tribunal’s recognition that accommodations need not be “perfect”.¹³⁷⁸ In *Stanley*, the tribunal expressed:

[83] I find that the personal respondent could not accommodate the applicant short of undue hardship during her arrest and before she was secured in the back of the police car. In coming to that conclusion, I have considered a number of factors: the arrest of the applicant was a dynamic arrest, a hostile crowd had gathered and additional police units had been called, the crowd was verbally aggressive towards police, the personal respondent did not know what had occurred before his arrival and the applicant was uncooperative throughout her arrest and efforts made to secure her into the car.

[...]

[85] I also find that the personal respondent could not have accommodated the applicant’s creed and gender-based needs short of undue hardship when he left her secured in the back of the police car unaccompanied for approximately 3 minutes. The personal respondent had to assess the situation and had no information about whether the scene was safe. This was his first chance to find out what occurred with the initial arrest and to give his supervising officer the key to the vehicle that the applicant’s son was driving. The latter issue was crucial to the conduct of the investigation. The personal respondent took approximately 3 minutes to speak with the

¹³⁷⁷ 2018 HRTO 803 (CanLII).

¹³⁷⁸ *Stanley v Toronto Police Services Board*, 2018 HRTO 803 (CanLII) at paras 82-84; 89.

officers on the scene and hand the key to Sergeant Rooney. The personal respondent was performing his duties as a police officer at a scene that remained unsafe.¹³⁷⁹

This passage makes clear that in human rights contexts, action on accommodation may be considered reasonably delayed when police are facing concerns about safety or dynamic situations. However, it is worth noting that in the context of *Stanley*, the required accommodation did not relate directly to use of force or the safety and dynamism of the scene. The same logic ought not to be applied in contexts where the accommodation requested or required would be a form of de-escalation, mental health response, or other alternative intervention targeted at preventing police violence against persons who experience mental health disability. These types of accommodations are specifically designed to address dynamic, unsecure situations and to reduce the use of force so it would not be appropriate to refuse to implement them before a scene were secure or safety was assured. To make safety and a secure scene a pre-condition to implementing accommodation measures meant to de-escalate or accommodate disability to prevent violent conflict would be a misinterpretation of the duty to accommodate, since these measures are (arguably) designed to reduce risk.¹³⁸⁰

Safety risk when considering accommodation to the point of undue hardship has been raised in several cases. In *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*¹³⁸¹ Justice Wilson, for the majority explained in the context of accommodations “[w]here safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations.”¹³⁸²

In *Dhillon v British Columbia (Ministry of Transportation and Highways)*,¹³⁸³ the British Columbia Human Rights Tribunal provides an example of risk analysis in determining undue hardship. That case

¹³⁷⁹ *Ibid* at paras 83, 85.

¹³⁸⁰ To the extent that police-based accommodations do not actually reduce the risk of violence in police encounters with persons who experience mental health disability, there is a strong argument to be made that we should then stop funding and providing them.

¹³⁸¹ *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 SCR 489.

¹³⁸² *Ibid* at 521.

¹³⁸³ 1999 CanLII 35196 (BC HRT).

concerned whether Sikh men who wear a turban and ride motorcycles should be exempted from the requirement to wear a helmet. The decision explains:

The first step in determining the magnitude of risk is an assessment of the "baseline risk", that is, the accepted level of risk that is currently tolerated by the respondent and by society in general. The baseline risk in this case is the risk associated with the current scheme of motorcycle licensing regulated by the respondent or, put another way, the risk for motorcyclists who wear safety helmets. As discussed in *Woolverton*, magnitude of risk is analyzed both in terms of the seriousness of the risk and the likelihood that injury will occur. The second step in determining magnitude of risk is an assessment of the increase to the baseline risk or the "marginal risk" posed by allowing Sikhs who wear turbans to ride motorcycles without helmets. The ultimate question then becomes whether accommodation of this marginal risk constitutes an undue hardship."¹³⁸⁴

Thus, when considering police interventions, the risk posed by proposed accommodations need to be assessed in relation to the general risk posed in such situations and if there is in fact evidence demonstrating that these alternative responses reduce risk (which one would hope there is if police services are spending resources on them), the risk should not preclude accommodation. Similarly, if non-police (civilian) responses can be demonstrated to reduce risk relative to police responses, risk should not preclude these accommodations.

In *Dhillon*, the tribunal found that while the magnitude of risk in fact grew (fairly substantially) through the accommodation, it did not meet the point of "undue hardship", in large part because the risk in that case was borne by the accommodated individual alone.¹³⁸⁵ However, one of the challenges of accommodation in police interactions is that risk in these cases is generally not borne by the individual seeking accommodation alone, but also by police officers and in some circumstances third-parties or members of the public. Thus, policing agencies, and civilian crisis responders may need to study the impact of accommodations relative to public and officer (or civilian responder) safety. If using de-

¹³⁸⁴ *Ibid* at para 19.

¹³⁸⁵ *Ibid* at para 47.

escalation tactics in fact increases risks to the public, officers or other responders, this risk may outweigh a decrease in risk to the subject of force in some cases.

At present, it is unclear to what extent police agencies could prove that proposed policing accommodations would increase safety risk using studies of these approaches, or how a tribunal or court would respond to arguments that exigent circumstances prevented accommodation in a given case. This field of legal argument could, if police are shown considerable deference in their risk assessments, prove as ineffective at achieving accountability as traditional forms of legal redress pertaining to use of force. However, at a minimum, discrimination claims pertaining to accommodation would help to reveal to what extent police agencies have tested and validated their own techniques and programs that are ostensibly designed to better address those in crisis. If their policies and programs don't decrease risk, this would strengthen arguments for the development of non-police alternatives that might better reduce risk. Importantly, the burden of proof with respect to undue hardship rests with the respondent, which in contexts of use of force would be the police agencies themselves.

However, attempts to "accommodate" mental health disability in the context of police responses are unlikely to eliminate discrimination in use of force and may be counter-productive to attempts to achieve broader systemic change to the extent that they reinforce police as appropriate responders to mental health crises. On the other hand, civilian crisis response teams and other alternatives to police may be considered viable accommodation strategies and arguments could be made that failure to deploy these resources in lieu of police is discriminatory in some contexts.

Ultimately, accommodation of mental health disability in the context of arrest or apprehension raises many questions not yet answered by courts or tribunals. There is some cause to be skeptical that these actions will achieve better success than traditional tort litigation or criminal prosecution at holding police accountable for unnecessary use of force, but they may shed light on the evidence (or lack thereof)

behind police-based accommodations or provide support for the development of alternative civilian responses to crisis.

8.8 The Potential for Human Rights Law to Inform and Influence the Reform or Replacement of Policing

As discussed in chapter 7, many of the recommendations made in coroner and medical examiner reports, which mirror many of the wider discussions in academic literature on reform, have not been proven to effectively reduce use of force and are consequently of dubious value in addressing systemic over-representation of persons who experience mental health disability among those injured or killed by police.

Similarly, with respect to police violence against Black and Indigenous people, Robyn Maynard has described the ineffectiveness of police reforms to reduce use of force against racialized groups as well. She writes:

“At the municipal level, police forces have implemented “diversity” and “sensitivity” trainings, expanded the recruitment of female and “visible minority” officers, expanded police foot and bicycle patrols, hired community liaison officers and expanded spaces for police-community dialogue. At the provincial level, one response to ongoing community protest has been the creation of civilian oversight mechanisms like Ontario’s Special Investigations Unit (SIU) and Quebec’s Bureau des enquêtes indépendantes (BEI), tasked with conducting “independent” investigations when the police use lethal force.

From the perspective of protecting Black life, all of these reforms have been abject failures, even as they have succeeded in perpetuating the illusion of legitimacy of benevolence for law enforcement agencies. The local reforms and increases in funding for law enforcement agencies across the country have occurred alongside an increase in the number of deaths at the hands of police, which have nearly doubled over the past 20 years (Nicholson and Marcoux, 2018), impacting Black and Indigenous communities most substantially, with broad impacts on Black peoples, especially Black drug users and sex workers, Black homeless and mad peoples.”¹³⁸⁶

¹³⁸⁶ Robyn Maynard, “Police Abolition / Black Revolt” (2020) 41 *Topia* 73. Citing Jacques Marcoux & Katie Nicholson & Jacques Marcoux, “Most Canadians Killed in Police Encounters since 2000 Had Mental Health or Substance Abuse Issues.” CBC News (4 April 2018) online: <<https://www.cbc.ca/news/investigates/most-canadians-killed-in-police-encounterssince-2000-had-mental-health-or-substance-abuse-issues-1.4602916>>.

Many activists and scholars have begun to promote a shift away from policing as a means of addressing the many negative impacts policing can have on racialized people and those who experience mental health disability.¹³⁸⁷ Repeated failures of police reform have led to a move away from attempts to change policing to better accommodate the needs of impacted populations. As Robyn Maynard writes:

“The current moment refuses inclusion, refuses “equality” within the status quo and all of its attendant violences. Instead, this upswing of revolt demands nothing short of a new world.

Perhaps the most visibly transformative demand has been the renewed surge of energy to defund—and abolish—the police.”¹³⁸⁸

With respect to whether human rights legal actions can help to further attempts to fundamentally change or replace policing there is reason to be pessimistic. On one hand, Leslie A. Pal and F.L. Morton argue that Canada has seen law reform as a result of unsuccessful but high-profile discrimination cases, albeit not in the context of policing. They provide the example of *Bliss v Attorney General*, in which the defeat of a discrimination claim under the *Canadian Bill of Rights*, helped foment feminist and civil rights organizations to take political action resulting in stronger protections against discrimination in section 15 of the Charter.¹³⁸⁹ However, human rights law has little power to promote wide systemic change necessary to reduce police violence against persons who experience mental health disability because the human rights system is designed to support only minor reforms in the form of public interest remedies. The incrementalism and conservatism of the status quo that is built into human rights law is apparent in the “undue hardship” limit on reasonable accommodation. In *Hydro-Québec v.*

¹³⁸⁷ See, for example, Shiri Pasternak, Kevin Walby and Abby Stadnyk, eds, *Disarm, Defund, Dismantle: Police Abolition in Canada*, (Toronto: Between the Lines, 2022).

¹³⁸⁸ Robyn Maynard, “Police Abolition / Black Revolt” (2020) 41 *Topia* 70 at 71.

¹³⁸⁹ Leslie A. Pal & F.L. Morton, “*Bliss v Attorney General of Canada*: From Legal Defeat to Political Victory,” (1986) 24:1 *Osgoode Hall LJ* 141.

2000 (SCFP-FTQ)¹³⁹⁰ Justice Deschamps explained:

The test [for undue hardship] is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions *in a fundamental way*, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.¹³⁹¹ [emphasis added]

In other words, human rights law does not place obligations on organizations to fundamentally reconfigure their way of working, which is arguably what is required to address the broad systemic problems leading to discriminatory use of force. More fundamental potential reforms contained in earlier chapters, such as the possibility of removing firearms from police, would be less likely to be supported as accommodations due to their far-reaching impact on the institution of policing itself.

The nature of the liberal human rights systems as fundamentally supportive of the institutions of the state and its inability or limited ability to assist in more significant change to benefit marginalized groups has been recognized by many theorists concerned with addressing ableism.¹³⁹² Furthermore, while the human rights system may be more accessible than traditional legal avenues of redress for individuals seeking accountability from police, it still remains largely inaccessible to those most impacted by policing and the criminal and mental health systems, who should be the people empowered to drive change to the system. For example, in a now somewhat dated study of human rights decisions in four Canadian provinces over the course of 14 years, Judith Mosoff found very few cases of "people with severe disabilities," which she defines according to those having psychiatric diagnostic labels such as schizophrenia and bipolar, as complainants in reported human rights cases, when compared to "mild

¹³⁹⁰ 2008 SCC 43, [2008] 2 SCR 561. [*Hydro-Québec*]

¹³⁹¹ *Ibid* at para 16.

¹³⁹² See, for example, Liat Ben-Moshe, *Decarcerating Disability: Deinstitutionalization and Prison Abolition*, (Minneapolis: University of Minnesota Press, 2020); Mark Sherry, *The Promise of Human Rights for Disabled People and the Reality of Neoliberalism*, (Routledge, 2014).

depression, anxiety or panic disorder.”¹³⁹³ She also notes there were no claims brought by those in psychiatric hospitals or residential facilities.¹³⁹⁴ While a more recent study on the nature of disability claims is not available, structural barriers faced by claimants, such as socio-economic precarity, health challenges preventing time and energy to craft a claim, housing insecurity and stigma likely still limit the number of claims brought by those facing the greatest obstacles. The inaccessibility of the human rights system (or any other legal system) to persons who experience psychosis (a group significantly over-represented among some police-involved deaths) or those who may experience forms of confinement or segregation by virtue of disability is a real concern if human rights law is to play any role in prompting change because the system and the changes it produces are likely to reflect the views of the more privileged people who can access it, while ignoring the needs of the most marginalized and harmed groups. Mosoff explains:

Underrepresentation of people with severe disabilities is clearly not a reflection of their greater social inclusion. It is a result of segregation and exclusion, the very wrong that the human rights system purports to address. Statistics indicate that as the severity of a disability increases, restrictions also increase in a variety of life's activities, including participation in the labour force, leisure activity and long-distance travel. However, the cases which reach human rights tribunals are restricted to experiences that people with severe disabilities are less likely to have.¹³⁹⁵

While human rights actions are unlikely to assist in spurring significant structural reforms, it is worth noting that human rights claims for disability accommodation could assist in promoting non-police crisis response services and other policing alternatives. In Canada, alternatives to policing for crisis response are being developed, and some have existed as grassroots community projects for many years. Examples of such groups that seek to fulfill crisis response roles in lieu of police are foot patrols established in some Canadian cities to respond to the needs of Indigenous communities and other

¹³⁹³ Judith Mosoff, "Is the Human Rights Paradigm Able to Include Disability: Who's In Who Wins - What - Why" (2000) 26:1 Queen's LJ 225 at 263.

¹³⁹⁴ *Ibid* at 263-264.

¹³⁹⁵ *Ibid* at 264.

marginalized groups. Some, like Thunder Bay's Wiindo Debwe Mosewin, do not collaborate with police in their crisis response,¹³⁹⁶ whereas others, like Winnipeg's Bear Clan Patrol work collaboratively with local police services.¹³⁹⁷

Some Canadian cities are also working to develop official government-funded non-police crisis response services. For example, Toronto announced that it would develop and fund non-police crisis response teams for mental health apprehensions, and for an Indigenous-led response for Indigenous residents of Toronto.¹³⁹⁸ The news release notes: "[t]he pilots will create multidisciplinary teams of crisis workers with training in mental health and crisis intervention, de-escalation, situational awareness and field training, prior to the pilots' launch."¹³⁹⁹ Calgary has provided both new funding and reallocated some police funding to social programs aimed at assisting those in crisis.¹⁴⁰⁰ Where accommodations sought are the dispatch of policing alternatives, human rights claims could play some role in reinforcing these systems and promoting a transition away from police responses.

However, developing effective alternative crisis response approaches requires careful consideration of the nature of the civil mental health system because this system itself contains many structures of coercion and confinement typically associated with the criminal justice system. Liat Ben-Moshe has advocated for "conceptualizing incarceration as including institutionalization in a wide variety

¹³⁹⁶ See Jolene Banning, "Bear Clan no more: Why a Thunder Bay safety patrol has turned away from its founding principles of co-operating with police," *Globe & Mail*, (November 7, 2019), online: <<https://www.theglobeandmail.com/canada/article-bear-clan-no-more-why-a-thunder-bay-safety-patrol-has-turned-away/>>.

¹³⁹⁷ "We Are Bear Clan Patrol," Bear Clan Patrol website, online: <<https://bearclanpatrol.org/>>.

¹³⁹⁸ City of Toronto, "City Council unanimously approves community safety and crisis response pilots," News Release, online: <<https://www.toronto.ca/news/city-council-unanimously-approves-community-safety-and-crisis-response-pilots/>>; Sylvia Thomson, "We've Got To Do Better," (June 29, 2021) *CBC News*, online: <<https://www.cbc.ca/news/canada/toronto/toronto-policing-alternative-pilot-1.6083164>>.

¹³⁹⁹ City of Toronto, "City Council unanimously approves community safety and crisis response pilots," News Release, online: <<https://www.toronto.ca/news/city-council-unanimously-approves-community-safety-and-crisis-response-pilots/>>.

¹⁴⁰⁰ City of Calgary, "Funding announced to improve crisis response systems and community supports" (June 3, 2021) News Release, online: <<https://newsroom.calgary.ca/funding-announced-to-improve--crisis-response-systems-and-community-supports/>>.

of enclosed settings, including prisons, jails, detention centers, institutions for the intellectually disabled, treatment centers, and psychiatric hospitals.”¹⁴⁰¹ Ben-Moshe is clear that considering psychiatric hospitals and other institutions for the disabled as sites of confinement does not mean that they are the same as prisons. She notes significant differences in the procedural rights afforded to those in the criminal justice system compared to the psychiatric system and in underlying ideologies of these systems, where psychiatry is assumed to be in the best interests of the patient and criminal justice often focuses on punishment, rather than rehabilitation.¹⁴⁰² However, failures to acknowledge and respond to the present and historic maltreatment and violence against persons who experience mental health disability in Canadian civil mental health structures when seeking to reform or abolish police, may end in the reproduction of the problems that have led to police violence against this population in the first place.

When evaluating mental health system alternatives to policing and criminal justice structures, the human rights concept of inclusion, which is found in both international and domestic law, may be helpful. The UNCRPD, contains several sections acknowledging the importance of the “inclusion” of disabled people within society, including article 3 which lays out the principles underlying the UNCRPD, including “[f]ull and effective participation and inclusion [of disabled people] in society”¹⁴⁰³

Canadian courts have acknowledged this country’s history of the exclusion of persons who experience mental health disability. For example, in *R v Swain*, Chief Justice Lamer wrote:

The mentally ill have historically been the subjects of abuse, neglect and discrimination in our society. The stigma of mental illness can be very damaging. The intervener, C.D.R.C., describes the historical treatment of the mentally ill as follows:

¹⁴⁰¹ Liat Ben-Moshe, “Disabling Incarceration: Connecting Disability to Divergent Confinements in the USA” (2013) 39:3 Critical Sociology 385 at 387.

¹⁴⁰² *Ibid*, p. 388.

¹⁴⁰³ *Convention on the Rights of Persons with Disabilities*, December 13, 2006, 46 ILM 433, UN Doc A/RES/61/106 [“UNCRPD”] at Art. 3.

For centuries, persons with a mental disability have been systematically isolated, segregated from the mainstream of society, devalued, ridiculed, and excluded from participation in ordinary social and political processes.

The above description is, in my view, unfortunately accurate and appears to stem from an irrational fear of the mentally ill in our society.¹⁴⁰⁴

However, despite acknowledging concerns about exclusion of those with disabilities, Canadian courts have often failed to promote full inclusion of those with disabilities. For example, the Supreme Court has refused to acknowledge a presumption of inclusion within mainstream educational institutions for children with disabilities, allowing for segregated education.¹⁴⁰⁵

At present police officers play a fundamental gatekeeping role in Canadian society, determining through the use of coercive powers of arrest, apprehension, and use of force, who can and cannot participate in society, who will or will not be monitored, surveilled, questioned and detained, and who will be subject to criminalization, imprisonment, violence, and in some cases death. In other words, they are uniquely empowered to physically and psychologically exclude people in varied ways through their roles in enforcing criminal law and the provincial mental health acts.

If policing is to be fundamentally changed or replaced the systems being built to address mental health crises need to be evaluated in light of their inclusiveness, both procedurally in terms of whom is involved in creating these alternatives and substantively in terms of how they operate to ensure inclusion in society and the community.¹⁴⁰⁶ Systems that promote coercion, violence and surveillance are inherently exclusionary.

¹⁴⁰⁴ *R v Swain*, 1991 CanLII 104 (SCC), [1991] 1 SCR 933.

¹⁴⁰⁵ See *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28 (CanLII), [2000] 1 SCR 703 at para 73, referencing *Eaton v Brant County Board of Education*, 1997 CanLII 366 (SCC), [1997] 1 SCR 241.

¹⁴⁰⁶ The use of “procedural” and “substantive” aspects of inclusion is drawn from Elizabeth Sheehy’s work on the application of social inclusion theory in the field of criminal justice. See Elizabeth Sheehy, “Advancing Social Inclusion: The Implications for Criminal Law and Policy” (2004) *Canadian Journal of Criminology and Criminal Justice* 46:1 73 at 76.

Practically, with respect to attempts to fundamentally reform or replace police, this means involving persons who experience mental health disability, along with other groups disproportionately harmed by policing such as Black and Indigenous people, incarcerated and criminalized people, and socio-economically marginalized people among those creating new policies and processes. With respect to mental health disability, it is important to emphasize that such inclusion must include those with lived experience and organizations run by them.

Substantively, when creating systems to respond to crises and disorder in the community, attention must be paid to whether they perpetuate and reinforce forms of coercion, segregation or violence, including not only those within the criminal justice system, but those within civil mental health systems as well.

8.9 Conclusion

Traditional avenues of legal redress for unjustified police use of force in Canada, including criminal prosecution, tort actions, and section 7 and 12 Charter claims may provide some compensation or accountability to victims or their surviving families. However, use of force case law is very deferential to police when assessing the appropriateness of force and both civil litigation or criminal prosecution are unlikely to lead to systemic changes in policing, or in how society addresses mental health crises. Courts could make legal justification for police use of force more exacting by ensuring that attempts to avoid hindsight bias or take into account exigency do not dissuade them from asking necessary questions about police planning and approaches in mental health interventions. Court should clarify the exigency in policing must be proven by police if it is to be relied on justify otherwise flawed use of force decision-making and it would be helpful to Parliament to consider prescribing particular factors to be considered when deciding if force is justified, such as the availability of alternative approaches or de-escalation options.

Equality and discrimination law provides an important focus on the accommodation of disability and recognition of the potential for discriminatory impacts caused by standard policing techniques and practices. While human rights law may provide opportunities to directly challenge failures of policing to adequately address the over-representation of persons who experience mental health disability among those who are injured or die in police interactions, there are significant barriers to achieving legal success in such cases. At present, legal uncertainty or limits on post-humous Charter and human rights claims create a significant barrier to employing discrimination law to address police-involved deaths of persons who experience mental health disability. Clarifying the law to ensure discrimination claims can always be brought by the estate of someone claiming discrimination resulting in death is important to ensuring legal recourse for police-involved deaths of persons who experience mental health disability. Furthermore, clarification of how to prove mental health disability absent medical evidence would help make human rights actions more accessible.

Despite many barriers faced by litigants, discrimination law may helpfully provide an avenue for compelling police services to study and demonstrate the safety of police practices, including use of force techniques, for people who experience mental health disability. Furthermore, should civilian crisis responses prove safe and effective, non-police responses may be considered accommodations for disability in the context of crisis response. While legal action could serve to draw these issues to public attention, litigation should not be necessary. Police services and civilian crisis responders should acknowledge that they have a proactive duty to accommodate disability that can only be met by studying the safety and efficacy of policies and practices employed to address mental health crises to ensure they are not discriminatory.

Conclusion

Given the lack of reliable national data on police-involved deaths in Canada, this thesis has sought to shine light on the many ways that people die in police interactions and consider what can be done to prevent the disproportionate number police-involved fatalities that involve persons who experience mental health disability. Information necessary to determine what particular ways people who experience mental health disability die during police contacts was compiled and organized through a typology of police-involved deaths and injuries drawn from the empirical sample of coroner and medical examiner reports studied and a review of literature. This typology provided a structure to think about how to prevent and achieve accountability for particular forms of police-involved death.

National data collection in Canada through formal and informal access to information requests was undertaken in all Canadian provinces and territories to collect coroner and medical examiner reports that serve as official narratives of these deaths. This information was carefully checked through a media search of domestic newspapers and follow-up requests were sent to compile as accurate a list as possible of inquest and inquiry reports produced in the January 1, 2004 to December 31, 2014 time period. The data collected includes 433 unique cases of police-involved deaths subject to medical examiner or coroner processes contained in 425 reports. It reveals a bird's eye view of the types of deaths that occur in police interactions in Canada, some information about the background and circumstances of the deceased and a narrative describing these deaths. In many cases the reports collected also provide recommendations aimed at preventing future deaths.

The data collected reveals that only some types of police-involved deaths disproportionately befall people who experience mental health disability. Such deaths include police shootings; CEW-proximate deaths; deaths labelled "excited delirium", "restraint asphyxia" or "positional asphyxia" or "sudden in custody deaths"; suicide and self-inflicted injury; overdose and substance-use related; deaths

associated with failure to provide medical assistance; and projectile-related deaths. Other types, such as motor vehicle pursuit or accident deaths; foot pursuit or fleeing deaths, natural or accidental deaths; non-weapon use of force deaths; police dog related deaths; non-weapon use of force deaths and exposure deaths, showed no such over-representation. This data is helpful because it identifies types of deaths that require the attention of law and policy-makers aiming to reduce the disproportionate fatalities of people who experience mental health disability in police interactions through reforms. Furthermore, evidence of a disproportionate negative effect of laws, policies or practices on protected groups, such as those with disabilities, can signal the possible discrimination. Seeking to address discriminatory structures, practices or policies associated with types of deaths involving an over-representation of persons who experience mental health disability could prove an effective means of addressing these inequities.

In addition to providing further evidence of over-representation of those who experience mental health disability among police-involved deaths, the 433 cases for which reports were collected, when analyzed as a group, reveal how official narratives of police-involved deaths have framed the problem and proposed solutions. These narratives provide insight into how coroner and medical examiner proceedings have understood what causes and contributes to the deaths of persons who experience mental health disability in police interactions. The thematic analysis of these narratives revealed a tendency of coroner and medical examiner systems across the country to ignore race and indigeneity among other important demographic factors of the deceased when describing police-involved deaths. It was argued that this white-washing of official narratives about police-involved fatalities serves to obscure the impact of racism and colonialism, and their interaction with ableism, as relevant considerations in understanding how these deaths happened and producing recommendations to prevent future deaths. This failure is significant in light of the many studies discussed in the literature review and thematic analysis that point to a significant over-representation of Indigenous and Black people among those killed by police.

Beyond the broad patterns of over-representation of persons who experience mental health disability among the cases of fatalities collected, a more detailed analysis of some police shootings and CEW-related fatalities was conducted. Police shootings and CEW-proximate death cases are types of police-involved death that disproportionately involve persons who experience mental health disability and which involve use of force by police. In addressing the disproportionate impact that shootings have on persons who experience mental health disability, the issue of weapons held by the deceased was identified as a topic that was both commonly discussed in coroner and medical examiner reports, and which has implications for how we seek to reduce deaths. It was noted that persons who are perceived to have a mental health impairment were frequently armed with “sharp objects” during fatal encounters with police, and some police practices, such as the “21-foot rule,” encourage use of firearms in sharp object encounters. Furthermore, given that many persons perceived to have mental health impairments were armed in police encounters, more research is needed to determine if people arm themselves in response to police or if police are generally called in response to arms. The fact that weapons and especially sharp objects are common in police shootings suggests that attempts to reduce fatalities of people who experience mental health disability, such as alternative non-police responses to mental health crisis, may be ineffective if they are only deployed in weaponless contexts. Furthermore, tactics for addressing the risks posed by sharp objects may be important in addressing these fatalities. A notable omission from recommendations on the topic of police shootings was the role that police weapons play and whether restrictions should be placed upon them, whereas there was some focus on restricting gun access and ownership among those perceived to experience mental health disability.

With respect to conducted energy weapon proximate deaths, it was noted that much uncertainty exists concerning the nature of these deaths and narratives in coroner and medical examiner reports were often influenced by experts associated with the industry producing them. While they are seen as safer alternatives to firearms, safety concerns with respect to persons who experience mental health

disabilities or substance users need to be better evaluated to ensure that they do not lead to a greater risk of death for those with disabilities.

“Excited delirium,” sudden in custody deaths and restraint or positional asphyxia deaths, which were often discussed together, were shown to predominantly, and in the case of excited delirium almost exclusively, happen to those who use substances and/or were experiencing psychosis at the time of their deaths. The fact that relatively young people with these conditions are dying in contexts of police use of force and restraint needs to be addressed in a manner that recognizes the possibility that police interventions themselves may contribute to these deaths. Narratives about these deaths tended to medicalize them and ignore violence and restraint as a cause of death, assuming that immediate physical intervention by police was necessary to medically assist those found in this state. However, these deaths raise questions about the safety of police restraint and force techniques of those who experience psychosis or those who use substances that need to be addressed.

Lastly, the empirical analysis considered patterns found in recommendations put forward to address police involved deaths of persons who experience mental health disability, drawing from the 258 cases in the mental health set. Recommendations frequently suggested additional police training in recognition of mental health conditions and responses to them, including particular response techniques like crisis intervention or de-escalation training. However, often details were lacking about what type of mental health, de-escalation or crisis intervention training was intended – an ambiguity that is of concern given that as discussed in the literature review the use of these terms like de-escalation and crisis intervention are subject to widely varying definitions. With respect to mental health training, some reports noted that some police mental health training teaches that this population may be particularly dangerous to police. This highlights why not all mental health training would be likely to reduce stigma or encourage improved responses. Teaching about mental health in the context of risk and use of force could lead to greater use of force against this population, playing into stereotypes about dangerousness.

Given the lack of Canadian data demonstrating particular types of mental health training, crisis intervention training or de-escalation techniques are effective at reducing use of force, increasing police training on these topics may increase expenditures without contributing to a reduction in injuries or fatalities.

Another recommendation found in several coroner and medical examiner reports was the provision or expansion of mobile crisis units or other forms of police responses involving mental health professionals. The challenge with such recommendations is that often mobile crisis units are not engaged where weapons are involved or in volatile situations. As the data on police shootings described in chapter 5 makes clear, since the majority of police shootings of those perceived to have a mental health disability occur in contexts involving weapons (especially sharp objects) these services are unlikely to result in a significant reduction in this type of fatality. Furthermore, given that little evidence links mobile crisis units to a reduction of use of force against persons who experience mental health disability in Canada, the significant proliferation of these systems and reliance on them to improve responses is speculative.

Some recommendations reviewed also suggested improved data collection on mental health by police or increased data sharing between the police and the mental health system. These recommendations suggested an implicit belief that additional information on mental health diagnoses would alter police behaviour in a manner that is protective of persons who experience mental health disability. However, no explanation was provided as to why more personal health information would be helpful to reduce police-involved fatalities. The history of the inappropriate sharing of mental health data by police in Canada, and the stigma associated with this data militates against sharing it without clear evidence of how it will be protective to people being tracked in this way. These recommendations also pointed to the reality that police are, through legislative and policy choice, implicated in mental health service delivery in Canada in a manner that should be subject to greater scrutiny.

Lastly, recommendations suggested an increase in voluntary mental health and social service provision in some cases, and an increase in surveillance and coercive or forced service provision in others. The most common form of such recommendations suggested increased access to medical services for mental health, although some recommendations also suggested improved access to other services, like housing. Such recommendations may be helpful in the prevention of crises caused by a lack of supports or resources. However, other recommendations suggested a more punitive and coercive outlook, suggesting systems to ensure compliance by psychiatrized people with medical treatment, including surveillance and control systems in the community, easier access to involuntary hospitalization and stronger security measures for preventing escape from psychiatric hospitalization. Some recommendations went even further, suggesting forced treatment for mental health or substance use issues. Such recommendations characterize the deceased's mental health as the problem of police-involved deaths that needs to be solved through medical intervention. By relying on structures of force and coercion these recommendations are likely to increase police interventions in the lives of psychiatrized people, since ultimately mandatory systems must be enforced. Increasing coercion increases police involvement in mental health and is likely to increase the potential for police-involved deaths, rather than decrease it.

As a whole, recommendations produced in most of the coroner and medical examiner reports reviewed provided little helpful guidance on systemic reforms to policing to ensure protection of those who experience mental health disability. Indeed, piecemeal reforms are very unlikely to resolve the serious problem of police violence against disabled people. The nature of these recommendations do, however, arguably shine some light on why the problem of police-involved deaths of persons who experience mental health disability has not been successfully resolved and fatalities have not been reduced despite years of public consideration of this issue. By focusing on the "problem" of the individual

in crisis, society fails to adequately address the many ways that the institution of policing perpetuates injury and deaths of people who experience mental health disability.

Finally, this thesis explored some of the deficits in legal accountability for police-involved injuries and deaths of persons who experience mental health disability in Canada and suggested the discrimination claims could play a limited role in promoting change and accountability. While actions in tort and section 7 and 12 Charter claims have tended to be more common legal means of addressing police use of force, along with the rare occasions when police are prosecuted for using force, it was suggested that current judicial interpretations of the statutory justifications for use of force tend to be lenient and permissive towards police. Current interpretations of “hindsight bias” and “exigency” should be clarified to ensure that they do not prevent consideration of why alternative approaches to mental health crises were not employed, and do not shield police from liability in contexts of police-produced exigency.

With respect to discrimination claims as an alternative approach to legal accountability for police-involved injuries and deaths of persons who experience mental health disability, it was noted that there are legal restrictions on standing for estates to bring discrimination claims in some contexts. Furthermore, those who experience mental health disability face many barriers to employing the human rights system or section 15 litigation to achieve accountability, such as the lower damages awarded relative to tort actions, the medicalization of disability in human rights law, and the challenges of proving discrimination in light of the opacity of police discretion. While there is reason to believe that some contemporary police use of force practices, such as the use of “threat cues” or failures to accommodate mental health disability through alternative responses may be discriminatory, litigants face considerable barriers to success.

With respect to the use of discrimination law to assist in reform efforts, the nature the law makes it ill equipped to promote broad systemic reforms such as those likely needed to remedy the problem of police-involved injuries and deaths of persons who experience mental health disability. For example, the “undue hardship” limit on accommodation does not require fundamental changes to be undertaken.

However, discrimination law could play some role in drawing problems of police-involved injuries and deaths to the attention of the public and may help to promote alternative crisis responses. Additionally, the principle of inclusion contained in domestic and international human rights law provides some direction for future reform or replacement of police.

Ultimately, the research conducted suggests that the disproportionate police-involved injuries and deaths of persons who experience mental health disability in Canada is a problem of considerable complexity. There are both a wide variety of different types of police-involved death and injury that show an over-representation of persons who experience mental health disability among their victims, and a lack of viable recommendations to achieve fundamental change needed to protect this population. Furthermore, legal recourse has rarely been successful at providing accountability for victims and has failed to produce systemic change to date. Addressing the problem of discrimination in policing ultimately means contending with cultural and systemic realities of contemporary policing that will be difficult to change if society is focused on small changes to policy or practice, rather than structural issues like the nature of mental health and criminal law as coercive and at times violent systems, the over-reliance on armed responses to social problems, and the culture and para-military structure of policing. While the current study has highlighted some of the ways that policing can be ableist, many other reports and studies have demonstrated that Canadian police services are systemically racist and sexist.¹⁴⁰⁷ There is

¹⁴⁰⁷ See e.g. Hon. Frank Iacobucci, *Police Encounters with People in Crisis* (Toronto: Toronto Police Service, 2014); Hon. Michael Tulloch, *Report of the Independent Police Oversight Review* (Toronto: Government of Ontario, 2017), online (pdf): www.siu.on.ca/pdfs/report_of_the_independent_police_oversight_review.pdf; Ontario Human Rights Commission, *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black*

also little evidence that police services are capable of implementing reforms needed to address discriminatory police-involved injuries and deaths. Indeed the issue of police-involved deaths has attracted considerable attention in the years since the reports studied herein were published yet the Tracking (In)justice database recently published suggests the numbers of police use of force deaths in Canada has continued to rise over time.¹⁴⁰⁸ This suggests the problem of police violence has not been solved after many decades of coroner and medical examiner recommendations.

While this paints a bleak picture of the potential for change, as mentioned in chapter 8, many scholars and commentators have shifted from calls for reform towards calls to defund or abolish police. Police abolition aims to ultimately remove police from society either wholly or in large part, by detasking the police and developing social systems capable of addressing any issues currently handled by police (or the criminal justice/penal systems more broadly). The intractability of the problems discussed in this thesis and the many reports detailing profound discrimination in Canadian policing¹⁴⁰⁹ suggest that abolition may be necessary.

Abolition of police is likely to take time as alternative systems must be developed, implemented and studied to ensure they are more effective and less discriminatory than the policing systems they aim to replace. However, in the interim this thesis provided many suggestions of less far-reaching reforms

Persons by the Toronto Police Service (Toronto: Ontario Human Rights Commission, 2018), online: < <http://ohrc.on.ca/en/public-interest-inquiry-racial-profiling-and-discrimination-toronto-police-service/collective-impact-interim-report-inquiry-racial-profiling-and-racial-discrimination-black>>; Gerry McNeilly, *Broken Trust: Indigenous People and the Thunder Bay Police Service*, (Toronto: Office of the Independent Police Review Director, 2018); Hon. Michel Bastarache, *Broken Lives, Broken Dreams: The Devastating Effects of Sexual Harassment on Women in the RCMP: Final Report on the Implementation of the Merlo Davidson Settlement Agreement*, (Ottawa: Merlo Davidson Settlement Independent Assessor, 2020); Hon. Pamela Kirkpatrick, *Final Report on Tiller/Copland/Roach RCMP Class Action*, (Ottawa: Office of the Assessor, Tiller/Copland/Roach RCMP Class Action, 2022).

¹⁴⁰⁸ Data and Justice Criminology Lab, Institute of Criminology and Criminal Justice, Carleton University, et al., “Police-involved Deaths are on the Rise, as are Racial Disparities in Canada” (Tracking (In)Justice: A Living Data Set Tracking Canadian Police-Involved Deaths, 2023), online: < <https://trackinginjustice.ca/analysis-increase-in-deaths-and-racial-disparities/>>.

¹⁴⁰⁹ See *supra* note 1407.

that may assist us to change course and address or at least better understand the problem of discriminatory police violence. These suggestions can be considered in four groups:

1. collecting and disseminating better data to understand the current systemic failures and to inform future changes;
2. proactively researching and publishing research on the safety and efficacy of police use of force practices;
3. changing how we think about the “problem” of police-involved injuries and deaths of persons who experience mental health disability to focus on the need for systemic changes; and
4. reforming law and policy to prevent future injuries or deaths and ensure better legal accountability for those harmed.

While such reforms will likely be insufficient on their own to produce meaningful change in policing, they can help to provide the information and mindset necessary for change and to reduce the harms of policing for those injured or the families of those killed in anticipation of greater structural change. Importantly, these are not reforms that further entrench policing by, for example, enlarging police budgets or workforces, or increasing police powers. These proposed reforms will be outlined below.

Better Data Collection and Dissemination

As chapters 1 and 4-6 make clear, there continue to be significant gaps in Canadian data collection on police violence and failures to provide transparency for data currently collected. To improve domestic understanding of police-involved injuries and deaths of persons who experience mental health disability, reliable national and provincial/territorial data, collected by the federal government, provinces and territories, of the annual number of the various forms of police-involved deaths and injuries that

occur should be published. This data should include demographic information relevant to the protected grounds under human rights and section 15 of the Charter, including especially mental health disability and race, with appropriate protections to avoid misuse of this data and to protect the identity of subjects. This allows for informed public discussion on the harms of policing and provides information necessary to evaluate whether attempts to reduce police-involved injuries and deaths are successful.

Additionally, as discussed throughout this thesis, in many cases police policies and practices concerning use of force and de-escalation are not available to the public and gaining information about policing requires the cumbersome use of access to information requests, that can be expensive and often fail to produce results. Police services should be required to proactively publish their policies and practices in a transparent way to ensure they are accountable to the public and to keep the public informed about evolving norms in policing.

Proactively Researching and Publishing Studies on the Safety and Efficacy of Police Use of Force Practices

Throughout this thesis, issues have been identified that require additional research to determine whether and what changes are needed to avoid police-involved injuries and deaths. Examples of such research would include studying:

- 1) The occurrence of subjects armed with sharp objects in mental health crisis situations to determine if individuals arm themselves in response to police presence or whether and to what extent sharp objects are a common concern in mental health crisis situations.
- 2) Whether better safety equipment for police or civilian responders is necessary to specifically address risks posed by sharp objects.

- 3) Whether removing firearms from police, or restricting them such as providing them only to specialized armed units required for responses to criminal activity involving firearms would improve safety for the general population, marginalized groups, and police themselves.
- 4) Whether CEWs are safe for groups over-represented in CEW-proximate deaths, including those who use cocaine or other substances and persons who experience mental health disability.
- 5) Whether standard police use of force practices, such as putting people in prone, using body weight on individual when detained, use of pepper spray, CEWs, and other weapons, and types of police hits and holds are safe for persons who experience psychosis, and those who use substances (especially cocaine).
- 6) What role police use of force has in “excited delirium” deaths.
- 7) Whether and to what extent current police crisis intervention and de-escalation practices and systems (incl. mobile crisis units) reduce police-involved injuries and deaths.
- 8) Whether civilian crisis response systems may be more effective in reducing injuries and deaths of persons who experience mental health disability.

Changing How We Think About the “Problem”

As chapters 4-7 suggest, coroners and medical examiners narratives have tended to individualize and medicalize police-involved deaths of persons who experience mental health disability, and recommendations produced in these processes have tended to focus on changing how society deals with persons who experience mental health disability, rather than suggesting systemic changes to address police violence. This focus on the individual is further reflected in the legal system, which can provide remedies for individuals impacted by police, but is limited, even in the human rights system, in the extent to which it can push for fundamental systemic change. The current way of thinking about the problem of

police-involved injuries and deaths of persons who experience mental health disability has failed to produce meaningful results, and in fact Canada has continued to see an increase in some forms of deaths, such as shootings, since the data informing this thesis was collected.¹⁴¹⁰

Rather than focusing on reforming individuals who experience mental health disability, through coercion, surveillance, forced treatment, etc., society needs to take a careful look at the institution of policing and its practices that disproportionately harm disabled and racialized people. This means evaluating current systems and practices to understand how they produce harm and evaluating the possibilities for changing the system. As discussed in chapter 8, this could include seeking alternatives to policing, such as civilian crisis responses. In evaluating these proposed changes, consideration should be given to the principle of inclusion and ensuring that those most impacted have meaningful participation in generating solutions.

Reforming Law and Policy to Prevent Future Deaths and Injuries and Provide Better Accountability

There are many avenues for reforming law and policy to either prevent future police-involved injuries and deaths or improve accountability in this regard. Examples of changes to police policies suggested, include:

- Discontinuing use of the 21-foot rule or other variations on this rule suggesting use of fatal force is necessary and justified when within a specific distance of a subject armed with a sharp object.
- Discontinuing the use of the concept of “suicide by cop” in police training and communications in recognition of the role police discretion plays in these homicides.

¹⁴¹⁰ See: Kelly Geraldine Malone, “Experts call for change as number of police shootings in Canada increases annually” *CBC News* (December 27, 2022), online: < <https://www.cbc.ca/news/canada/edmonton/experts-call-for-change-as-number-of-police-shootings-in-canada-increases-annually-1.6698288>>.

- Requiring police agencies to proactively study the safety and efficacy of use of force practices and weapons with respect to persons who experience mental health disability and publish the results of such studies.

With respect to legal accountability of police, several clarifications of the law were suggested to make existing forms of accountability more effective, including:

- 1) Clarifying the rule against “hindsight bias” in statutory justifications for use of force to ensure judges appreciate the importance of evaluating use of force in light of available alternatives, including approaches that may have prevented confrontation.
- 2) Clarifying the role of “exigency” in statutory justifications for use of force to ensure leniency in police decision-making is not allowed in contexts of police-produced exigency.
- 3) Clarifying the “necessity” in use of force justification requires both that the intervention itself was necessary, and that the force used was necessary.
- 4) Clarifying how human rights complainants can prove mental health disability without psychiatric evidence.
- 5) Ensuring estates are always permitted standing to continue or commence discrimination and other rights claims where rights violation led to the death.
- 6) Removing or expanding caps on damages awarded in human rights systems to ensure these legal avenues are viable for serious and fatal forms of discrimination.

Ultimately, the problem of police-involved injuries and deaths of persons who experience mental health disability will not be solved easily or without careful consideration of the complex systems that lead to them. State violence against persons who experience mental health disability requires scrutiny of how the civil mental health system and criminal justice system interact in ways that place this population

at risk. Failures in social supports and discrimination in policing and police oversight structures, such as coroner and medical examiner systems also play a role in the production of this problem. However, while simple solutions cannot be found for complex problems, there is cause to be optimistic. By better understanding the problem, seeking better data and transparency to illuminate a way forward, and building stronger structures of accountability to address harm and spur change, the lives and rights of persons who experience mental health disability may be better protected in the future.

Bibliography

Legislation

Access to Information Act, RSC, 1985, c A-1.

Act respecting the determination of the causes and circumstances of death, CQLR c R-02.

Alberta Human Rights Act, RSA 2000, c A-255.

Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

Canadian Human Rights Act, RSC 1985, c H-6.

Charter of Human Rights and Freedoms, CQLR c C-12.

Civil Code of Québec, SQ 1991, c 64.

Civil Code of Québec, CCQ-1991.

Community Treatment Order Regulation, Alta Reg 337/2009.

Constitution Act, 1867, 30 & 31 Vict, c 3.

Constitution Act, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

Convention on the Rights of Persons with Disabilities, 3 December 2006, UNTS 2515 (entered into force 3 May 2008).

Coroner Act, RSO 1990, c C37.

Coroners Act, SBC 2007 c 15.

Criminal Code, RSC 1985 c C-46.

Emergency Vehicle Driving Regulation, BC Reg 133/98.

Equipment and Use of Force, RRO 1990, Reg 926.

Equipment and Use of Force, O Reg 391/19.

Estate Administration Act, RSBC 1996, c 122.

Family Law Act, RSO 1990 c F3.

Fatality Inquiries Act, RSA 2000, c F-9.

Fatality Investigations Act, SNS 2001, c 31.

Freedom of Information and Protection of Privacy, SNS 1993 c 5.

Human Rights Act, SNU 2003, c 12.

Human Rights Act, SNWT 2002 c 18.

Human Rights Act, RSY 2002, c 116.

Human Rights Act, RSPEI 1988, c H-12.

Human Rights Act, RSNS 1989, c 214.

Human Rights Act, RSNB 2011, c 171.

Human Rights Act, 2010, SNL 2010, c H-131.

Human Rights Code, 2018, SS 2018, c S-242.

Human Rights Code, RSBC 1996, c 210.

Human Rights Code, RSO 1990, c H19.

Involuntary Psychiatric Treatment Act, SNS 2005, c 42.

Mental Health Act, RSO 1990, c M7.

Mental Health Act, RSNB, 1973, c M-10.

Mental Health Act, RSA, 2000, c M-13.

Mental Health Act, RSBC 1996, c 228.

Mental Health Services Act, SS 1984-85-86, c M-131.

Mental Healthcare and Treatment Act, SNL 2006, c M-91.

Personal Health Information Protection Act, 2004, SO 2004, c 3.

Police Act, RSBC 1996 c 367.

Police Services Act, RSO 1990, c P15.

Special Investigations Unit Act, 2019, SO 2019, c 1, Sch 5.

Statistics Act, RSC 1985, c S-19 (entered into force 12 December 2017).

Survival of Actions Act, RSY 2002, c 212.

Survival of Actions Act, RSNL 1990, c S-32.

Survival of Actions Act, RSPEI 1988, c S-11.

Survival of Actions Act, RSNS 1989, c 453.

Survival of Actions Act, RSNB 2011, c 227.

Survival of Actions Act, RSA 2000, c S-27.

Suspect Apprehension Pursuits, O Reg 266/10.

The Coroners Act, 1999, SS 1999, c C-3801.

The Coroners Regulations, RRS c C-38 Reg 1.

The Human Rights Code, CCSM, c H175.

The Saskatchewan Human Rights Code, 2018, SS 2018, c S-242.

The Survival of Actions Act, SS 1990-91, c S-661.

The Trustee Act, RSO, 1990, c T23.

The Trustee Act, RSM 1987, CCSM c T160.

Training Regulations, PEI Reg EC143/10.

Trustee Act, RSNWT(Nu) 1988, c T08.

Trustee Act, RSNWT 1988, c T08.

Winnipeg Police Service Special Constables Additional Powers Regulation, Man Reg 167/2010.

Caselaw

Abbott v Toronto Police Services Board, 2009 HRT0 1909 (CanLII).

Adams v Fremont, 80 Cal.Rptr.2d 196 (1998) 68 Cal.App.4th 243.

Adga Group Consultants Inc v Lane, 2008 CanLII 39605 (ON SCDC).

Aiken v Ottawa Police Services Board, 2013 HRT0 901 (CanLII).

Aiken v Ottawa Police Services Board, 2019 HRT0 934.

Allarie v Victoria (City), 1994 CanLII 16709 (BC SC), [1995] 1 WWR 655.

AM v Durham Regional Police Service, 2015 HRT0 792 (CanLII).

Andrews v Grand & Toy Alberta Ltd, 1978 CanLII 1 (SCC), [1978] 2 SCR 229.

Andrews v Law Society of British Columbia, 1989 CanLII 2 (SCC), [1989] 1 SCR 143.

Arnold v Teno, 1978 CanLII 2 (SCC), [1978] 2 SCR 287.

Augustus v Gosset, 1996 SCC 173 (CanLII), [1996] 3 SCR 268.

Bahador v M & S Holdings and another, 2018 BCHRT 78 (CanLII).

Barton v Loft Community Centre, 2009 HRT0 647 (CanLII).

Bergmann v Neumeier, 2013 CanLII 48827 (AB LERB).

Berntt v Vancouver (City of), 1999 BCCA 345 (CanLII).

Bettel et al v Yim, 1978 CanLII 1580 (ON SC).

Bhushan v Fraserside Community Resources and another, 2017 BCHRT 140 (CanLII).

Black Action Defence Committee v Huxter, 1992 CanLII 7695 (ON SC).

Blackjack v Yukon (Chief Coroner), 2016 YKSC 53.

Bolianatz v Edmonton Police Service, 2002 ABQB 284 (CanLII).

Boyd v San Francisco (City and County of), 576 F (3d) 938 (9th Cir 2009).

Braithwaite v Ontario (Attorney General), 2006 HRTO 15 (CanLII).

Briggs v Durham Regional Police Services, 2015 HRTO 1712 (CanLII).

British Columbia (Public Service Employee Relations Commission) v BCGSEU, 1999 CanLII 652 (SCC), [1999] 3 SCR 3.

British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights), 1999 SCC 646, [1999] 3 SCR 868.

British Columbia v Gregoire, 2005 BCCA 585 (CanLII).

Brockie v Brillinger (No 2), 2002 CanLII 63866 (ON SCDC).

Brown v Regional Municipality of Durham Police Service Board, 1998 CanLII 7198 (ON CA).

Burbank et al v Bolton et al, 2005 BCSC 1506 (CanLII).

Burbank et al v Bolton et al, 2007 BCCA 215 (CanLII).

Buttar v Halton Regional Police Services Board, 2013 HRTO 1578 (CanLII).

Camaso Estate v Saanich (District), 2013 BCCA 6 (CanLII).

Campbell v Vancouver Police Board (No 4), 2019 BCHRT 275 (CanLII).

Canada (Attorney General) v Central Cartage Co (CA), 1990 CanLII 8009 (FCA).

Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45 (CanLII), [2012] 2 SCR 524.

Canada (Attorney General) v Hislop, 2007 SCR 10 (SCC), [2007] 1 SCR 429.

Carpenter v Limit Night Club, 1999 BCHRT 50 (CanLII).

Carter v Canada (Attorney General), 2015 SCC 5 (CanLII), [2015] 1 SCR 331.

Central Alberta Dairy Pool v Alberta (Human Rights Commission), 1990 CanLII 76 (SCC), [1990] 2 SCR 489.

Centrale des syndicats du Québec v Quebec (Attorney General), 2018 SCC 18, [2018] 1 SCR 522.

Chartier v Greaves, [2001] OJ No 634, 2001 CarswellOnt 563.

Childs v The Regional Municipality of Peel Police Services Board, 2014 HRTO 1829 (CanLII).

Chopra v T Eaton Co Ltd, 1999 ABQB 201 (CanLII).

Christianson v Office of the Independent Police Review Director, 2014 HRTO 1445.

Chugh Estate v AVENS – A Community for Seniors, 2020 CanLII 19007 (NT HRAP).

CN v Canada (Canadian Human Rights Commission), 1987 CanLII 109 (SCC), [1987] 1 SCR 1114.

Commission des droits de la personne et des droits de la jeunesse (Bazelais) c Ville de Montréal (Service de police de la Ville de Montréal) (SPVM), 2022 QCTDP 6 (CanLII).

Commission des droits de la personne et des droits de la jeunesse (Miller et autres) c Ville de Montréal (Service de police de la Ville de Montréal) (SPVM), 2019 QCTDP 31 (CanLII).

Commission scolaire régionale de Chambly v Bergevin, 1994 CanLII 102 (SCC), [1994] 2 SCR 525.

Complainant v City of New Westminster Police Service, 2011 BCHRT 313 (CanLII).

Council of Canadians with Disabilities v VIA Rail Canada Inc, 2007 SCC 15 (CanLII), [2007] 1 SCR 650.

Crampton v Walton, 2005 ABCA 81 (CanLII).

Dawson v Vancouver Police Board (No 2), 2015 BCHRT 54 (CanLII).

Dedman v The Queen, 1985 CanLII 41 (SCC), [1985] 2 SCR 2.

Dennis v Ministry of Health and others, 2020 BCHRT 176 (CanLII).

Densmore (Re), 2005 CanLII 77787 (NS PRB).

Dhillon v British Columbia (Ministry of Transportation and Highways), 1999 CanLII 35196 (BC HRT).

Doern v Phillips Estate, 1994 CanLII 1869 (BC SC).

Doern v Phillips Estate, 1997 CanLII 2433 (BC CA).

Doucet-Boudreau v Nova Scotia (Minister of Education), 2003 SCC 62 (CanLII), [2003] 3 SCR 3.

Dubé v Montreal (City), (1912) 7 DLR 87, 42 Que SC 533 (Que CA) (QL).

Eaton v Brant County Board of Education, 1997 CanLII 366 (SCC), [1997] 1 SCR 241.

Edmonton Journal v Alberta (Attorney General), 1989 CanLII 20 (SCC), [1989] 2 SCR 1326.

Eldridge v British Columbia (Attorney General), 1997 CanLII 624 (SCC), [1997] 3 SCR 624.

Elmardy v Toronto Police Services Board, 2017 ONSC 2074 (CanLII).

Emmal and Vancouver Police Board and another, 2007 BCHRT 315.

Estate of Majencio Camaso, deceased, et al v Corporation of the District of Saanich, et al, 2013 CanLII 40334 (SCC).

Ewert v Canada, 2018 SCC 165, [2018] 2 SCR 165.

Fleming v Ontario, 2019 SCC 45, [2019] 3 SCR 519.

Fleming v Reid, 1991 CanLII 2728 (ON CA), 4 OR (3d) 74.

Foley v Abbotsford Police Department, 2020 BCHRT 137 (CanLII).

Forestell v Regional Health Authority B, 2014 NBCA 40.

Forrester v Peel (Regional Municipality) Police Services Board et al, 2006 HRT0 13 (CanLII).

Fortey (Guardian ad Litem) v Canada (Attorney General), 1999 BCCA 314 (CanLII).

Fraser v Canada (Attorney General), 2020 SCC 28 (CanLII).

Funk v Clapp, (1986) BCLR 68 DLR (4th) 229, 35 BCLR (2d) 222 (BCCA).

Gamache c R, 2015 QCCS 5175 (CanLII).

Garofalo v Cavalier Hair Stylists Shop Inc, 2013 HRTO 170 (CanLII).

Giacomelli Estate v Canada (Attorney General), 2008 ONCA 346 (CanLII).

Granovsky v Canada (Minister of Employment and Immigration), 2000 SCC 28, [2000] 1 SCR 703.

Grant v Winnipeg Regional Health Authority et al, 2015 MBCA 44.

Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component, 2009 SCC 31 (CanLII), [2009] 2 SCR 295.

Green v Lawrence, (1998), 163 DLR (4th) 115 (Man CA).

Grover v CUPE Local 2011 (Saanich) and another, 2020 BCHRT 205.

Harris v Murdoch and others, 2005 BCHRT 189 (CanLII).

Horsley v MacLaren, 1971 CanLII (SCC), [1972] SCR 441.

Howell v York Regional Police, 2013 HRTO 1095 (CanLII).

Hydro-Québec v Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, 2008 SCC 43 (CanLII), [2008] 2 SCR 561.

Iler obo others v Corporation of Delta and others (No 2), 2015 BCHRT (CanLII).

JKB v Regional Municipality of Peel Police Services Board, 2019 HRTO 1274.

JM v Toronto Police Services Board, 2017 HRTO 1087.

Johnson v Halifax (Regional Municipality) Police Service, 2005 NSCA 70 (CanLII).

Johnson v Halifax Regional Police Service, 2003 CanLII 89397 (NS HRC).

Kahkewistahaw First Nation v Taypotat, 2015 SCC 30 (CanLII), [2015] 2 SCR 548.

Klyne v Rae, 2002 SKQB 139 (CanLII).

Krieger v Toronto Police Services Board, 2010 HRTO 1361 (CanLII).

Kweon v Roy, 2016 BCSC 2305 (CanLII).

Laferrière c Québec (Ville de), 2010 QCCS 4167 (CanLII).

Law v Canada (Minister of Employment and Immigration), 1999 CanLII 675 (SCC), [1999] 1 SCR 497.

Leonhardt v Manitoba, 2018 MBHR 3 (CanLII).

Levesque v Zanibbi, 1992 CarswellOnt 2832.

Lipcsei v Central Saanich (District of), 1994 CanLII 368 (BC SC).

Little Sisters Book and Art Emporium v Canada (Minister of Justice), 2000 SCC 69, [2000] 2 SCR 1120.

Livingston v Rawyards Coal Co (1880), 5 App Cas 25 at 39 (HL (Sc)) (Lord Blackburn).

Logeman v Rossa et al, 2006 BCSC 692 (CanLII).

Lovado v BC Ministry of Public Safety and Solicitor General (No 2), 2020 BCHRT 25 (CanLII).

Lynch v Hashemian, 2006 SKCA 126 (CanLII).

Ma v Dr Ianin G M Cleator and another, 2014 BCHRT 180 (CanLII).

Malette v Shulman, 1990 CanLII 6868 (ON CA), 67 DLR (4th) 321.

Mason (Re), 1998 CanLII 18229 (NS PRB).

Maynard v Toronto Police Services Board, 2012 HRTO 1220 (CanLII).

MB v Oak Bay Police Department, 2007 BCHRT 289 (CanLII).

Mcdougall (Re), 2016 MBPC 77 (CanLII).

McKay v Toronto Police Services Board, 2011 HRTO 499 (CanLII).

McKitty v Hayani, 2019 ONCA 805 (CanLII).

McLean v Seisel, 2004 CanLII 9418 (ON CA).

Meadus v The Royal Newfoundland Constabulary Public Complaints Commission, 2013 CanLII 13365 (NL SC).

Moore v British Columbia (Education), 2012 SCC 61 (CanLII), [2012] 3 SCR 360.

Morrison v Ontario Speed Skating Association, 2010 HRTO 1058 (CanLII).

Mousseau v Southern Health / Santé Sud, 2019 MBHR 8 (CanLII).

Nault v Tremblay, 1995 CanLII 1378 (BC SC) (BC SC).

New Brunswick (Human Rights Commission) v Potash Corporation of Saskatchewan Inc, 2008 SCC 45, [2008] 2 SCR 604.

Nichols v Henniges Automotive, 2010 HRTO 915 (CanLII).

Non-Marine Underwriters, Lloyd's of London v Scalera, 2000 SCC 24, [2000] 1 SCR 551.

Norberg v Wynrib, 1992 CanLII 65 (SCC), [1992] 2 SCR 226.

OCB et al v The City of Winnipeg, 2019 MBQB 84 (CanLII).

Oleson v Wagmatcook First Nation, 2020 CHRT 29 (CanLII).

Park Avenue Flooring Inc v EllisDon Construction Services Inc, 2016 ABCA 327 (CanLII).

Parsons v Woodfine, 2009 CanLII 33053 (ON SC).

Persaud v Toronto District School Board, 2009 HRTO 1728 (CanLII).

Pike v RCMP, 2008 BCPC 426 (CanLII).

Quartey v Peel Regional Police Services Board, 2012 ONSC 260 (CanLII).

Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux, 2018 SCC 17 (CanLII), [2018] 1 SCR 464.

Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center), 2015 SCC 39 (CanLII), [2015] 2 SCR 789.

Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City), 2000 SCC 27, [2001] 1 SCR 665.

R c Gilbert, 2021 QCCQ 620 (CanLII).

R v Asante-Mensah, 2003 SCC 38 (CanLII), [2003] 2 SCR 3.

R v Badria, 2017 ONSC 5389 (CanLII).

R v Beaudry, 2007 SCC 5, [2007] 1 SCR 190.

R v Bengy, 2015 ONCA 397 (CanLII).

R v Bottrell, 1981 CanLII 339 (BC CA).

R v Bui, 2014 SKPC 213 (CanLII).

R v Cameron, 2008 BCPC 231 (CanLII).

R v Campbell, 2012 ABQB 466 (CanLII).

R v Cheddie, [2006] OJ No 1585 (SCJ);

R v Cinous, 2002 SCC 29 (CanLII).

R v Cochrane, 2016 ABQB 535 (CanLII).

R v Cornell, 2010 SCC 31 (CanLII), [2010] 2 SCR 142.

R v Danjou, 2020 BCSC 1819 (CanLII).

R v Davis, 2013 SCC 4 (CanLII), [2014] 1 SCR 78.

R v Davis, 2013 ABCA 15 (CanLII).

R v Dempsey, 2018 7536 (18 April 2018) (NZDC).

R v Desjourdy, 2013 ONCJ 170.

R v Doering, 2019 ONSC 6360 (CanLII).

R v Douglas, 2020 SKQB 57 (CanLII).

R v Evans, 2015 BCCA (CanLII).

R v Forcillo, 2018 ONCA 402 (CanLII).

R v Fryingpan, [2005] AJ No 102, 2005 ABPC 28 (Crim Div).

R v Gladue, [1993] AJ No 1045, 23 WCB (2d) 342 (Prov Ct, Crim Div).

R v Grainger, 2007 BCPC 113 (CanLII).

R v Hannaford, 2020 ONSC 1388.

R v Jackson, 2011 ONCJ 228 (CanLII).

R v Jarrett, 2021 ONCA 758 (CanLII).
R v Kapp, 2008 SCC 41 (CanLII), [2008] 2 SCR 483.
R v Kim, 2017 ONSC 5034 (CanLII).
R v MacDonald, 2014 SCC 3 (CanLII), [2014] 1 SCR 37.
R v MacLeod, 2016 NSPC 84 (CanLII).
R v Mann, 2004 SCC 59.
R v Markowska, [2004] OJ No 5153, 2004 ONCJ 332.
R v Maskell, 2011 ABPC 176 (CanLII).
R v McKinnon, 2011 ONSC 3160 (CanLII).
R v Merrick, [2007] OJ No 2266, 2007 CarswellOnt 3855 (CJ).
R v Millington, 2015 BCSC 515 (CanLII).
R v Millington, 2016 BCCA 293 (CanLII).
R v Millington, 2017 SCC 533 (CanLII).
R v Moffitt, 1984 CarswellNWT 23, [1984] NWTR 313.
R v Mohamad, 2018 ONCA 966 (CanLII).
R v Morgentaler, 1988 CanLII 90 (SCC), [1988] 1 SCR 30.
R v Munson, 2001 SKQB 530 (CanLII).
R v Murphy, 2001 CanLII 358 (SK PC).
R v Nasogaluak, 2010 SCC 6, [2010] 1 SCR 206.
R v Paice, 2005 SCC 22, [2005] 1 SCR 339.
R v Phoummasak, 2013 BCPC 391 (CanLII).
R v Pompeo, 2013 BCPC 30 (CanLII).
R v Power, 2016 SKCA 29 (CanLII).
R v Robinson, 2015 BCSC 433 (CanLII).
R v Robinson, 2017 BCCA 6 (CanLII).
R v Robinson, 2017 SCC 382 (CanLII).
R v Rockwood, 2007 NLCA 68 (CanLII).
R v Rogers, [2008] OJ No 23 (SC).
R v Rumsey, 1984 CanLII 2942 (FC).
R v Sharma, 2022 SCC 39 (CanLII).

R v Spannier, [1996] BCJ No 2525, 33 WCB (2d) 145 (SC).

R v Stenning, 1970 CanLII 12 (SCC), [1970] SCR 631.

R v Swain, 1991 CanLII 104 (SCC), [1991] 1 SCR 933.

R v Tang, 2011 ONCJ 525 (CanLII).

R v Tran, 2013 ONCJ 558 (CanLII).

R v Upjohn, 2018 ONSC 947 (CanLII), ONSC 1059.

R v Wilcox, 2015 ABPC 147 (CanLII).

R v Wiscombe, [2003] BCJ No 2858, 2003 BCPC 418.

R v Wiscombe and Tenenbein, 2003 BCPC 418 (CanLII).

R v Young, 2014 ONCJ 171 (CanLII).

R v Yum, 2001 ABCA 80 (WL).

R v Zheng, 2011 ABPC 19 (CanLII).

Radek v Henderson Development (Canada) and Securiguard Services (No 3), 2005 BCHRT 302 (CanLII).

Radke v MS et al, 2005 BCSC 1355 (CanLII).

Radke v MS (Litigation guardian of), 2007 BCCA 216 (CanLII).

Regina v Dietrich, 1978 CanLII 2290 (BC SC).

Regina v Walcott, 2008 CanLII 11374 (ON SC).

Reibl v Hughes, 1980 SCC 23 (CanLII), [1980] 2 SCR 880.

Review Report 15-093 (Re), 2015 NUIPC (CanLII).

RG v Toronto Police Services Board, 2019 HRT0 1457 (CanLII).

Robert Kenneth Power v Her Majesty the Queen, 2016 CanLII 53912 (SCC).

Robinette v Barnes, 854 F.2d 909 (1998).

Rollins v Niagara Regional Police Service et al, 2016 ONSC 7735 (CanLII).

Rots v Toronto Police Services Board, 2020 HRT0 398 (CanLII).

Rumsey v The Queen, [1984] FCJ No 529, 27 ACWS (2d) (QL).

Ruth Gregoire on behalf of her son James Victor Goodwin, deceased v Her Majesty the Queen in right of the Province of British Columbia and British Columbia Human Rights Tribunal, 2006 CanLII 11838 (SCC).

Santucci v Hamilton Police Service, 2015 HRT0 1254 (CanLII).

Sasse v Ontario (Solicitor General), 2020 HRT0 209 (CanLII).

Selkirk et al v Trillium Gift of Life Network et al, 2021 ONSC 2355 (CanLII).

Silverfox v Chief Coroner, 2012 YKSC 74 (CanLII).

Silverfox v Chief Coroner, 2013 YKCA 11 (CanLII).

Sipes v West Vancouver Police Department (No 2), 2010 BCHRT (CanLII).

Sparks v Vancouver Coastal Health Authority and Vancouver Police Department, 2006 BCHRT 575 (CanLII).

Stanley v Toronto Police Services Board, 2018 HRTO 803 (CanLII).

Steele v Edmonton (Police Service), 2015 ABLERB 28 (CanLII).

Stevenson v Canadian National Railway Company, 2001 CanLII (CHRT).

Stewart v Elk Valley Coal Corp, 2017 SCC 30 (CanLII).

Swansburg v Smith, 1994 CanLII 1770 (BC SC).

Taylor v PC Kok, 2016 ONSC 5839 (CanLII).

Tensuan v Vancouver Police Board and others, 2007 BCHRT 280.

Thornton v School Dist No 57 (Prince George) et al, 1978 CanLII 12 (SCC), [1978] 2 SCR 267.

Turner v Canada (Attorney General), 2012 FCA 159.

University of British Columbia v Berg, 1993 CanLII 89 (SCC), [1993] 2 SCR 353.

Vancouver (City) v Ward, 2010 SCC 27.

Viner v Hudson Bay Co, 2013 CanLII 148580 (NS HRC).

Vriend v Alberta, 1998 SCC 816, [1998] 1 SCR 493.

Webster v Wasylyshen, 2007 ABCA 23 (CanLII).

Wiggs v Pemberton Holmes and another, 2017 BCHRT 98 (CanLII).

William v City of Vancouver and another, 2010 BCHRT 248 (CanLII).

Winko v British Columbia (Forensic Psychiatric Institute), 1999 CanLII 694 (SCC), [1999] 2 SCR 625.

Withler v Canada (Attorney General), 2011 SCC 12 (CanLII), [2011] 1 SCR 396.

Books and Articles

A Akwe, Joyce, "Pulmonary Effects of Cocaine Use" (2017) 4:2 Journal of Lung, Pulmonary & Respiratory Research 54, DOI: <10.15406/jlpr.2017.04.00121>.

Allison, Rebecca, "UK's first 'suicide by cop' ruling", *The Guardian* (10 May 2003), online: <www.theguardian.com/uk/2003/may/10/ukcrime.ukguns>.

Alpert, G P & L A Fridell, *Police Vehicles and Firearms: Instruments of Deadly Force* (Prospect Heights, IL: Waveland Press, 1992).

- Alpert, Geoffrey P, "Police Use of Force and the Suspect with Mental Illness: A Methodological Conundrum" (2015) 14 *Criminology & Pub Pol'y* 277.
- Alpert, Geoffrey P & Patrick R Anderson, "The most deadly force: Police pursuits" (1986) 3:1 *Justice Quarterly* 1, DOI: <10.1080/07418828600088761>.
- American Psychiatric Association, "Bipolar I Disorder Diagnostic Criteria" in *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, 5th ed (Washington, DC: American Psychiatric Publishing, 2013).
- — —, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, 5th ed (Washington, DC: American Psychiatric Publishing, 2013).
- — —, "Schizophrenia Spectrum and Other Psychotic Disorders" in *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, 5th ed (Washington, DC: American Psychiatric Publishing, 2013).
- Amnesty International, Press Release, "UK: Public should resist drum-beat of calls for all police to carry a Taser" (12 December 2001), online: <www.amnesty.org.uk/press-releases/uk-public-should-resist-drum-beat-calls-all-police-carry-taser>.
- Anaïs, Seantel Ara Blythe, "Making Up Excited Delirium" (2014) 39:1 *The Canadian Journal of Sociology* 45.
- Annable, Kristin & Vera-Lynn Kubinec, "Criminal consequences for police officers are rare when a civilian dies", *CBC News* (6 April 2018), online: <www.cbc.ca/news/canada/manitoba/deadly-force-police-criminal-charges-1.4607134>.
- Antonowicz, Daniel & John Winterdyk, "A Review of Deaths in Custody in Three Canadian Provinces" (2014) 56:1 *Canadian Journal of Criminology and Criminal Justice* 85.
- Arsenault-Lapierre, Geneviève, Caroline Kim & Gustavo Turecki, "Psychiatric diagnoses in 3275 suicides: a meta-analysis" (2004) 4:1 *BMC Psychiatry* 37, DOI: <10.1186/1471-244X-4-37>.
- Australian Institute of Criminology, "Police Custody and Custody-Related Operations" (last visited 15 September 2022), online: <www.crimstats.aic.gov.au/NDICP/2_police-custody/#numberAge>.
- Autié, A et al, "Douleur et schizophrénie: mythe et réalité" (2009) 35:4 *L'Encéphale* 297.
- Azadani, Peyman N et al, "Funding source and author affiliation in TASER research are strongly associated with a conclusion of device safety" (2011) 162:3 *American Heart Journal* 533.
- Bailey, Cassandra A et al, "Conducted-Energy Device (Taser) Usage in Subjects with Mental Illness" (2016) 44:2 *Journal of the American Academy of Psychiatry and the Law Online* 213.
- Banerjee, Sidhartha, "Montrealer taken on starlight tour by police settles for \$25,000", *CityNews Toronto* (21 August 2018), online: <toronto.citynews.ca/2018/08/21/montrealer-taken-on-starlight-tour-by-police-settles-for-25000/>.
- Banning, Jolene, "Bear Clan no more: Why a Thunder Bay safety patrol has turned away from its founding principles of co-operating with police", *The Globe and Mail* (7 November 2019), online: <www.theglobeandmail.com/canada/article-bear-clan-no-more-why-a-thunder-bay-safety-patrol-has-turned-away/>.
- Barber, Katherine, *Canadian Oxford Dictionary*, 2nd ed (Oxford University Press, 2004).

- Barnes, Colin, "A working social model? Disability, work and disability politics in the 21st century" (2000) 20:4 Critical Social Policy 441, DOI: <10.1177/026101830002000402>.
- Beatty, J, J Stopyra & W Bozeman, "Injury Patterns of Less Lethal Kinetic Impact Projectiles Used by Law Enforcement Officers" (2016) 68:4 Annals of Emergency Medicine S126.
- Beaudry, Jonas-Sebastien, "The Vanishing Body of Disability Law: Power and the Making of the Impaired Subject" (2018) 31 Can J Fam L 7.
- Becknell, Conan, G Larry Mays & Dennis M Giever, "Policy restrictiveness and police pursuits" (1999) 22:1 Policing: An International Journal of Police Strategies & Management 93, DOI: <10.1108/13639519910256901>.
- Becour, Bertrand, "Conducted Electrical Weapons or Stun Guns: A Review of 46 Cases Examined in Casualty" (2013) 34:2 American Journal of Forensic Medicine and Pathology 142.
- Bell, Derrick A, "Brown v. Board of Education and the Interest-Convergence Dilemma" (1980) 93:3 Harvard Law Review 518, DOI: <10.2307/1340546>.
- Bell, Luther, "On a form of disease resembling some advanced stages of mania and fever, but so contradistinguished from any ordinary observed or described combination of symptoms as to render it probable that it may be overlooked and hitherto unrecorded malady" (1849) 6:2 Am J Insanity 97.
- Benedict, James et al, "Deaths involving Tasers", *Reuters*, online: <www.reuters.com/investigates/special-report/usa-taser-tracker/>.
- Benedikt Fischer et al, "Illicit drug use and harms, and related interventions and policy in Canada: A narrative review of select key indicators and developments since 2000" 27 International Journal of Drug Policy 23.
- Ben-Moshe, Liat, *Decarcerating Disability: Deinstitutionalization and Prison Abolition* (Minneapolis: University of Minnesota Press, 2020).
- — —, "Disabling Incarceration: Connecting Disability to Divergent Confinements in the USA" (2013) 39:3 Critical Sociology 385, DOI: <10.1177/0896920511430864>.
- Beresford, Peter, "What Have Madness and Psychiatric System Survivors Got to Do with Disability and Disability Studies?" (2000) 15:1 Disability & Society 167, DOI: <10.1080/09687590025838>.
- Bergman, Hanna et al, "Antipsychotic reduction and/or cessation and antipsychotics as specific treatments for tardive dyskinesia" (2018) 2 Cochrane Database of Systematic Reviews, DOI: <10.1002/14651858.CD000459.pub3>.
- Berryman, Jeffrey Bruce, *The Law of Equitable Remedies*, 2nd ed (Toronto: Irwin Law, 2013).
- Bertomen, Lindsey, "What the 21-foot rule is ... and what it is not: in an encounter in the danger zone, the best you can hope for is a tie" (2016) 43:12 Law Enforcement Technology.
- Best, D et al, "Drug deaths in police custody: is dual diagnosis a significant factor?" (2004) 11:4 J Clin Forensic Med 173, DOI: <10.1016/j.jcfm.2003.12.006>.
- Best, David, Anna Quigley & Alan Bailey, "Police shooting as a method of self-harming: A review of the evidence for 'suicide by cop' in England and Wales between 1998 and 2001" (2004) 32:4 International Journal of the Sociology of Law 349, DOI: <10.1016/j.ijsl.2004.09.002>.

Blanc-Louvry, Isabelle Le et al, "A brain penetration after Taser injury: Controversies regarding Taser gun safety" (2012) 221:1 Forensic Science International e7, DOI: <10.1016/j.forsciint.2012.03.027>.

Boivin, Rémi & Maude Lagacé, "Police Use-of-Force Situations in Canada: Analyzing the Force or Resistance Ratio Using a Trichotomous Dependent Variable" (2016) 19:2 Police Quarterly 180, DOI: <10.1177/1098611115613953>.

Bolan, Kim, "Delta police officer charged with murder after 2012 Starlight Casino standoff", *Vancouver Sun* (18 March 2015), online: <vancouver.sun.com/news/metro/delta-police-officer-charged-with-murder-after-2012-starlight-casino-standoff>.

Boudjikian, Raffy, "RCMP reviewing police-chase policies amid dozens of collisions every year", *CBC News* (15 October 2019), online: <www.cbc.ca/news/canada/edmonton/rcmp-police-cruiser-pursuit-ramming-collisions-policy-1.5311890>.

Boyd, Susan & Donald MacPherson, "Community Engagement-The Harms of Drug Prohibition: Ongoing Resistance in Vancouver's Downtown Eastside" (2018) 200 The British Columbian Quarterly 87.

Brådvik, Louise, "Suicide Risk and Mental Disorders" (2018) 15:9 International Journal of Environmental Research and Public Health 2028, DOI: <10.3390/ijerph15092028>.

Brandl, Steven G & Meghan S Stroshine, "Toward an Understanding of the Physical Hazards of Police Work" (2003) 6:2 Police Quarterly 172, DOI: <10.1177/1098611103006002003>.

Braun, Virginia & Victoria Clarke, "Thematic Analysis" in Harris M Cooper & American Psychological Association, eds, *APA Handbook of Research Methods in Psychology*, 2nd ed (Washington, DC: American Psychological Association, 2012).

— — —, "Using thematic analysis in psychology" (2006) 3:2 Qualitative Research in Psychology 77, DOI: <10.1191/1478088706qp0630a>.

Braun, Virginia, Victoria Clarke, & Paul Weate, "Using Thematic Analysis in Sport and Exercise Research" in Brett M Smith & Andrew C Sparkes, eds, *Routledge Handbook of Qualitative Research in Sport and Exercise* (New York: Routledge, 2018).

Braun, Virginia, Victoria Clarke & Nicola Rance, "How to use thematic analysis with research data" in Andreas Vossler & Naomi Moller, eds, *The Counselling and Psychotherapy Research Handbook* (London: SAGE Publications, 2015).

Brown, Beth, "Nunavut RCMP should not assume unconscious Inuit are intoxicated: inquest", *Nunatsiaq News* (1 August 2017), online: <nunatsiaq.com/stories/article/65674nunavut_rcmp_should_not_assume_unconscious_inuit_are_intoxicated_inque/>.

Byard, Roger W, "Ongoing issues with the diagnosis of excited delirium" (2018) 14:2 Forensic Science, Medicine and Pathology 149.

Calvo, Franz et al, "Diagnoses, Syndromes, and Diseases: A Knowledge Representation Problem" (2003) 2003 AMIA Annu Symp Proc 802.

Campbell, Fiona A Kumari, "Exploring internalized ableism using critical race theory" (2008) 23:2 Disability & Society 151, DOI: <10.1080/09687590701841190>.

Campbell, Meagan, "New light on Saskatoon's 'starlight tours'", *Macleans* (8 April 2016), online: <www.macleans.ca/news/canada/new-light-on-saskatoons-starlight-tours/>.

Cardoso, Tom & Molly Hayes, "Canadian cities' police spending ranges from one-10th to nearly a third of total budgets, Globe analysis finds", *The Globe and Mail* (16 August 2020), online: <www.theglobeandmail.com/canada/article-canadian-cities-police-spending-ranges-from-one-10th-to-nearly-a/>.

Carmichael, Jason T & Stephanie L Kent, "The Use of Lethal Force by Canadian Police Officers: Assessing the Influence of Female Police Officers and Minority Threat Explanations on Police Shootings Across Large Cities" (2015) 40:4 *Am J Crim Just* 703, DOI: <10.1007/s12103-014-9283-1>.

Ceyssens, Paul, *Legal Aspects of Policing*, vol 1 (Scarborough, ON: Carswell, 1997) (loose leaf update 29 - July 2016).

Chan, Theodore C et al, "Weight force during prone restraint and respiratory function" (2004) 25:3 *The American journal of forensic medicine and pathology* 185.

Chan, Wendy & Dorothy E Chunn, *Racialization, Crime, and Criminal Justice in Canada* (Toronto: University of Toronto Press, 2014).

Charles, W H R, *Understanding Charter Damages: The Judicial Evolution of a Charter Remedy* (Toronto: Irwin Law, 2016).

Cherney, James L, "The Rhetoric of Ableism" (2011) 31:3 *Disability Studies Quarterly*, DOI: <10.18061/dsq.v31i3.1665>.

Cho, Sumi, Kimberlé Crenshaw & Leslie McCall, "Intersectionality: Theorizing Power, Empowering Theory" (2013) 38:4 *Journal of Women in Culture and Society* 785.

Clermont, Yvan, *Firearm-related crime in Canada* (Statistics Canada, 2019), online(pdf): <sencanada.ca/content/sen/committee/421/SECD/Briefs/Stats_Can_Presentation_ppt_e.pdf>.

Colbert, Douglas L, "Prosecuting Baltimore Police Officers" (2016) 16 *U Md LJ Race, Religion, Gender & Class* 185.

Coleman, Terry G & Dorothy H Cotton, "Reducing Risk and Improving Outcomes of Police Interactions with People with Mental Illness" (2010) 10:1–2 *Journal of Police Crisis Negotiations* 39, DOI: <10.1080/15332581003756950>.

Comack, Elizabeth, "No Dumping: Indigenouness and the Racialized Police Transport of the Urban Homeless" in *Indigenous Homelessness: Perspectives from Canada, Australia, and New Zealand* (Winnipeg: University of Manitoba Press, 2016).

———, *Racialized Policing: Aboriginal People's Encounters with the Police* (Halifax: Fernwood Publishing, 2012), online: <fernwoodpublishing.ca/book/racialized-policing>.

Compton, Michael T et al, "The Police-Based Crisis Intervention Team (CIT) Model: II. Effects on Level of Force and Resolution, Referral, and Arrest" (2014) 65:4 *Psychiatric Services* 523, DOI: <10.1176/appi.ps.201300108>.

———, "Use of Force Preferences and Perceived Effectiveness of Actions Among Crisis Intervention Team (CIT) Police Officers and Non-CIT Officers in an Escalating Psychiatric Crisis Involving a Subject With Schizophrenia" (2011) 37:4 *Schizophrenia Bulletin* 737, DOI: <10.1093/schbul/sbp146>.

Corbin, Juliet M & Anselm Strauss, "Grounded theory research: Procedures, canons, and evaluative criteria" (1990) 13:1 Qual Sociol 3, DOI: <10.1007/BF00988593>.

Corbin, Juliet M & Anselm L Strauss, "Strategies for Qualitative Data Analysis" in *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory*, 3rd ed (Thousand Oaks: SAGE, 2008).

Corker, Mairian, "Differences, Conflations and Foundations: The limits to 'accurate' theoretical representation of disabled people's experience?" (1999) 14:5 Disability & Society 627, DOI: <10.1080/09687599925984>.

Crabtree, Benjamin & William Miller, "A template approach to text analysis: Developing and using codebooks" in Benjamin Crabtree & William Miller, eds, *Doing Qualitative Research* (Newbury: SAGE, 2009).

Crank, John P, "Suicide by Cop: Inducing Officers to Shoot" (2007) 30:1 Policing: An International Journal of Police Strategies & Management 158, DOI: <10.1108/13639510710725686>.

Crenshaw, Kimberlé Williams, "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law" in *Law and Social Movements* (Routledge, 2006).

Crenshaw, Kimberley, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) 1:8 University of Chicago Legal Forum 139.

Cruzado, Lizardo et al, "Severe Burns and Amputation of Both Arms in the First Psychotic Episode of a Schizophrenic Patient" (2015) Case Reports in Psychiatry article ID 405713, DOI: <10.1155/2015/405713>.

Cyr, Kevin, "Police Use of Force: Assessing Necessity and Proportionality" (2015) 53 Alta L Rev 663.

Dale, Sannisha & Kimberley Merren, "The Legacy of Slavery in Thoughts, Emotions, and Behaviors: Using Cognitive Behavioral Therapy to Frame the Impact of Slavery on African Americans" in Morgan M Medlock et al, eds, *Racism and Psychiatry: Contemporary Issues and Interventions* (Cham: Humana Press, 2019).

Daniel Antonowicz & John Winterdyk, "A Review of Deaths in Custody in Three Canadian Provinces" 56:1 Canadian Journal of Criminology & Criminal Justice 85.

Davidson, Lara, "Crisis Intervention Team" (2009), online(pdf): *Canadian Mental Health Association* <cmha.bc.ca/wp-content/uploads/2016/07/CIT-summary.pdf>.

DeBard, Mark et al, *White paper report on excited delirium syndrome* (American College of Emergency Medicine, 2009).

DeGue, Sarah, Katherine Fowler & Cynthia Calkins, "Deaths Due to Use of Lethal Force by Law Enforcement" (2016) 51 American Journal of Preventive Medicine S173, DOI: <10.1016/j.amepre.2016.08.027>.

Denzin, Norman K, *The Research Act: A Theoretical Introduction to Sociological Methods* (Chicago: Aldine, 1970).

Devlin, Richard F, "Jurisprudence for Judges: Why Legal Theory Matters for Social Context Education" (2001) 27 Queen's LJ 161.

Devlin, Richard & Dianne Pothier, "Introduction: Toward a Critical Theory of Dis-citizenship" in Dianne Pothier & Richard Devlin, eds, *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* Law and Society (Vancouver: UBC Press, 2006).

Dewey, Lauren et al, "Suicide by Cop: Clinical Risks and Subtypes" (2013) 17:4 Archives of Suicide Research 448, DOI: <10.1080/13811118.2013.801810>.

Dhand, Ruby, "Access to Justice for Ethno-Racial Psychiatric Consumer/Survivors in Ontario" (2011) 29 Windsor Yearbook of Access to Justice 127, DOI: <10.22329/wyaj.v29i0.4483>.

Dhillon, Sunny, "B.C. police officer who fatally shot man outside casino says he feared for his life", *The Globe and Mail* (11 February 2016), online: <www.theglobeandmail.com/news/british-columbia/officer-who-shot-man-outside-bc-casino-says-suspect-pointed-gun/article28735561/>.

Dhingra, Deepika, Savleen Kaur & Jagat Ram, "Illicit drugs: Effects on eye" (2019) 150:3 Indian J Med Res 228, DOI: <10.4103/ijmr.IJMR_1210_17>.

DiMaio, Theresa G & Vincent J M DiMaio MD, *Excited Delirium Syndrome: Cause of Death and Prevention* (Boca Raton: CRC Press, 2005), DOI: <10.1201/9780203483473>.

Douglas, T et al, "Risk assessment tools in criminal justice and forensic psychiatry: The need for better data" (2017) 42 European Psychiatry 134, DOI: <10.1016/j.eurpsy.2016.12.009>.

Drescher, Jack, "Queer Diagnoses: Parallels and Contrasts in the History of Homosexuality, Gender Variance, and the Diagnostic and Statistical Manual" (2010) 39:2 Arch Sex Behav 427, DOI: <10.1007/s10508-009-9531-5>.

Dupont, Randolph & Sam Cochran, "Police response to mental health emergencies—Barriers to change" (2000) 28 Journal of the American Academy of Psychiatry and the Law 338.

Dworkin, Robert H, "Pain Insensitivity in Schizophrenia: A Neglected Phenomenon and Some Implications" (1994) 20:2 Schizophrenia Bulletin 235, DOI: <10.1093/schbul/20.2.235>.

Dymond, Abi, "'Taser, Taser'! Exploring factors associated with police use of Taser in England and Wales" (2018) 30:4 Policing and Society 396, DOI: <10.1080/10439463.2018.1551392>.

Eberts, Mary & Kim Stanton, "The Disappearance of the Four Equality Rights and Systemic Discrimination from Canadian Equality Jurisprudence - ProQuest" (2018) 38:1 National Journal of Constitutional Law 89.

Editorial Board, "Opinion: Almost 1,000 were killed by police last year. Here's what to do about it.", *Washington Post* (19 January 2018), online: <www.washingtonpost.com/opinions/almost-1000-were-killed-by-police-last-year-heres-what-to-do-about-it/2018/01/08/198fb0a0-f4be-11e7-a9e3-ab18ce41436a_story.html>.

Eisler, Peter et al, "Shock Tactics: A 911 call, a Taser shot and the toll of stun guns", *Reuters* (22 August 2017), online: <www.reuters.com/investigates/special-report/usa-taser-911/>.

Engel, David M & Frank W Munger, "Rights, Rememberance, and the Reconciliation of Difference" (1996) 30:1 Law & Society Review 7.

Engel, George L, "The Clinical Application of the Biopsychosocial Model" (1981) 6:2 The Journal of Medicine and Philosophy: A Forum for Bioethics and Philosophy of Medicine 1, DOI: <10.1093/jmp/6.2.101>.

———, “The Need for a New Medical Model: A Challenge for Biomedicine” (1977) 196:4286 *Science* 129.

Engels, Gwenda & Erik Scherder, “Clinical Pain in Schizophrenia: A Forgotten Area” in Gisèle Pickering & Stephen Gibson, eds, *Pain, Emotion and Cognition: A Complex Nexus* (Cham: Springer International Publishing, 2015), DOI: <10.1007/978-3-319-12033-1_14>.

Epp, Charles R, *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State* (Chicago: University of Chicago Press, 2010).

Fahim, Christine, Valbona Semovski & Jodi Younger, “The Hamilton Mobile Crisis Rapid Response Team: A First-Responder Mental Health Service” (2016) 67:8 *Psychiatric Services* 929, DOI: <10.1176/appi.ps.670802>.

Faraday, Fay, “One Step Forward, Two Steps Back? Substantive Equality, Systemic Discrimination and Pay Equity at the Supreme Court of Canada” (2019) 94:12 *Supreme Court Law Review* 301, DOI: <10.2139/ssrn.3475621>.

Fereday, Jennifer & Eimear Muir-Cochrane, “Demonstrating Rigor Using Thematic Analysis: A Hybrid Approach of Inductive and Deductive Coding and Theme Development” (2006) 5:1 *International Journal of Qualitative Methods* 80, DOI: <10.1177/160940690600500107>.

Fernando, Suman, “Racialisation of the Schizophrenia Diagnosis” in Bruce M Z Cohen, ed, *Routledge International Handbook of Critical Mental Health* (London: Routledge, 2017).

Fernando, Tarini & Roger W Byard, “Positional asphyxia without active restraint following an assault” (2013) 58:6 *Journal of forensic sciences* 1633.

Fischer, Benedikt et al, “Illicit drug use and harms, and related interventions and policy in Canada: A narrative review of select key indicators and developments since 2000” (2016) 27 *International Journal of Drug Policy* 23, DOI: <10.1016/j.drugpo.2015.08.007>.

Fishbain, David A & Charles V Wetli, “Cocaine intoxication, delirium, and death in a body packer” (1981) 10:10 *Annals of Emergency Medicine* 531, DOI: <10.1016/S0196-0644(81)80010-8>.

Fiske, Jo-Anne & Annette J Browne, “Aboriginal citizen, discredited medical subject: Paradoxical constructions of Aboriginal women’s subjectivity in Canadian health care policies” (2006) 39:1 *Policy Sci* 91, DOI: <10.1007/s11077-006-9013-8>.

Flynn, Timothy P & Robert J Homant, “Suicide by Police in Section 1983 Suits: Relevance of Police Tactics” (1999) 77 *U Det Mercy L Rev* 555.

Follett, Kayla M et al, “Barriers to Calling 9-1-1 during Overdose Emergencies in a Canadian Context” (2014) 15:1 *Critical Social Work* 18, DOI: <10.22329/csw.v15i1.5905>.

Forchuk, Cheryl et al, “Psychiatric Crisis Services in Three Communities” (2010) 29:S5 *Canadian Journal of Community Mental Health* 73, DOI: <10.7870/cjcmh-2010-0035>.

Freeman, Alan D, “Truth and Mystification in Legal Scholarship” (1980) 90 *Yale LJ* 1229.

French, Sally & John Swain, “There But For Fortune” in John Swain & Sally French, eds, *Disability on Equal Terms* (London: SAGE, 2008).

Frideli, Lorie A, "Improving Use-of-Force Policy, Policy Enforcement, and Training" in Joshua A Ederheimer & Lorie A Frideli, eds, *Exploring the Challenges of Use of Force* (Washington: Police Executive Research Forum, 2009).

Gaetz, Stephen et al, *Homelessness Canada in the State of 2016* (Toronto: Canadian Observatory on Homelessness Press, 2016), online: <homelesshub.ca/sites/default/files/SOHC16_final_20Oct2016.pdf>.

Galletly, Cherrie Ann, "Premature death in schizophrenia: bridging the gap" (2017) 4:4 *The Lancet Psychiatry* 263, DOI: <10.1016/S2215-0366(17)30079-2>.

Geberth, Vernon, "Suicide-by-Cop: Inviting Death From the Hands of a Police Officer" (1993) 47:7 *Centre for Suicide Prevention* 105.

Gill, James R, "The syndrome of excited delirium" (2014) 10 *Forensic Sci Med Pathol* 223, DOI: <10.1007/s12024-014-9530-2>.

Gillborn, David, "Intersectionality, Critical Race Theory, and the Primacy of Racism: Race, Class, Gender, and Disability in Education" (2015) 21:3 *Qualitative Inquiry* 277, DOI: <10.1177/1077800414557827>.

Glatter, Kathy & Steven B Karch, "Positional asphyxia: inadequate oxygen, or inadequate theory?" (2004) 141:2–3 *Forensic Science International* 201.

Glauser, Wendy, "Why some doctors want to defund the police" (2020) 192:48 *Canadian Medical Association Journal* E1644, DOI: <10.1503/cmaj.1095905>.

Goddard, Murray J, "Personal Accounts: On Being Possibly Sane in Possibly Insane Places" (2011) 62:8 *PS* 831, DOI: <10.1176/ps.62.8.pss6208_0831>.

Gonin, Philippe et al, "Excited Delirium: A Systematic Review" (2018) 25:5 *Academic Emergency Medicine* 552, DOI: <10.1111/acem.13330>.

Goodley, Dan, "Disentangling Critical Disability Studies" in Anne Waldschmidt, Hanjo Berressem & Moritz Ingwersen, eds, *Culture – Theory – Disability: Encounters between Disability Studies and Cultural Studies* (Bielefeld: Transcript-Verlag, 2017), DOI: <10.14361/9783839425336>.

Gordon, Robert W, "Unfreezing Legal Reality: Critical Approaches to Law" (1987) 15 *Fla St U L Rev* 195.

Gordon, Todd, "The Political Economy of Law-and-Order Policies: Policing, Class Struggle, and Neoliberal Restructuring" (2005) 75:1 *Studies in Political Economy* 53, DOI: <10.1080/19187033.2005.11675129>.

Graduate Institute of Geneva, "Global Firearms Holdings" (last visited 15 September 2022), online: *Small Arms Survey* <www.smallarmssurvey.org/database/global-firearms-holdings>.

Grange, Jeff T, Richard Kozak & Jaime Gonzalez, "Penetrating injury from a less-lethal bean bag gun" (2002) 52:3 *Journal of Trauma and Acute Care Surgery* 576.

Green, Joyce, "From Stonechild to Social Cohesion: Anti-Racist Challenges for Saskatchewan" (2006) 39:3 *Canadian Journal of Political Science* 507, DOI: <10.1017/S0008423906060215>.

Guest, Greg, Kathleen MacQueen & Emily Namey, *Applied Thematic Analysis* (Thousand Oaks: SAGE Publications, 2012), DOI: <10.4135/9781483384436>.

Haar, Rohini J et al, "Health impacts of chemical irritants used for crowd control: a systematic review of the injuries and deaths caused by tear gas and pepper spray" (2017) 17:1 *BMC public health* 1.

Habel, Laurel A et al, "ADHD Medications and Risk of Serious Cardiovascular Events in Young and Middle-aged Adults" (2011) 306:24 JAMA 2673, DOI: <10.1001/jama.2011.1830>.

Hackett, Christina, David Feeny & Emile Tompa, "Canada's residential school system: measuring the intergenerational impact of familial attendance on health and mental health outcomes" (2016) 70:11 J Epidemiol Community Health 1096, DOI: <10.1136/jech-2016-207380>.

Hall, Christine et al, "Restraint in police use of force events: examining sudden in custody death for prone and not-prone positions" (2015) 31 J Forensic Leg Med 29, DOI: <10.1016/j.jflm.2014.12.007>.

Hall, Christine Alison et al, "Frequency of signs of excited delirium syndrome in subjects undergoing police use of force: Descriptive evaluation of a prospective, consecutive cohort" (2013) 20:2 Journal of Forensic and Legal Medicine 102, DOI: <10.1016/j.jflm.2012.05.008>.

Hall, Christine Alison & Chris Butler, *National Study on Neck Restraint in Policing* (Canadian Police Research Centre, 2007).

Harruff, R C et al, "Firearm suicides during confrontations with police" (1994) 39:2 J Forensic Sci 402.

Hasler, Francis, "Developments in the Disabled People's Movement" in John Swain et al, eds, *Disabling Barriers - Enabling Environments* (London: SAGE, 1993).

Hendy, Ross, "Routinely armed and unarmed police: What can the Scandinavian experience teach us?" (2014) 8:2 Policing: A Journal of Policy and Practice 183.

Hennekens, Charles H et al, "Schizophrenia and increased risks of cardiovascular disease" (2005) 150:6 American Heart Journal 1115, DOI: <10.1016/j.ahj.2005.02.007>.

Herzog, S, "Public perceptions of the seriousness of victim-precipitated homicides: An empirical analysis of the consensus model of the law on homicide in Israel" (2005) 33:3 International Journal of the Sociology of Law 169, DOI: <10.1016/j.ijsl.2005.07.001>.

Ho, Jeffrey D et al, "Impact of conducted electrical weapons in a mentally ill population: a brief report" (2007) 25:7 The American Journal of Emergency Medicine 780, DOI: <10.1016/j.ajem.2007.02.030>.

Hoffmann, Gabi & Paul Mazerolle, "Police pursuits in Queensland: research, review and reform" (2005) 28:3 Policing: An International Journal of Police Strategies & Management 530, DOI: <10.1108/13639510510614591>.

Holmes, Oliver Wendell, "Privilege, Malice, and Intent" (1894) 8:1 Harvard Law Review 1, DOI: <10.2307/1322381>.

Homant, Robert J & Daniel B Kennedy, "Suicide by police: a proposed typology of law enforcement officer-assisted suicide" (2000) 23:3 Policing: An International Journal of Police Strategies & Management 339, DOI: <10.1108/13639510010343029>.

Homant, Robert, DB Kennedy & R Thomas Hupp, "Real and perceived danger in police officer assisted suicide" (2000) 28 Journal of Criminal Justice 43, DOI: <10.1016/S0047-2352(99)00031-8>.

Horwitz, Morton J, "The Rise of Legal Formalism" (1975) 19:4 The American Journal of Legal History 251, DOI: <10.2307/845052>.

Hosking, David L, *Critical Disability Theory* (Lancaster University, UK, 2008), online: <www.lancaster.ac.uk/fass/events/disabilityconference_archive/2008/papers/hosking2008.pdf>.

Hubbard, Tasha, dir, "Two Worlds Colliding" (2004), online(video):
<www.nfb.ca/film/two_worlds_colliding/>.

Hutson, H Range et al, "A Review of Police Pursuit Fatalities in the United States From 1982–2004" (2007) 11:3 Prehospital Emergency Care 278, DOI: <10.1080/10903120701385414>.

— — —, "Suicide by Cop" (1998) 32:6 Annals of Emergency Medicine 665, DOI: <10.1016/S0196-0644(98)70064-2>.

Iftene, Adelina, "Who is worthy of constitutional protection? A Commentary on Ewert v Canada" (last visited 22 September 2022), online(blog): *CanLII Connects* <canliiconnects.org/en/commentaries/62360>.

Irwin Cohen & Len Garis, *Determinants of Injury and Death in Canadian Police Officers* (Langley: University of the Fraser Valley, 2018), online: <cjr.ufv.ca/wp-content/uploads/2018/09/Determinants-of-Injury-and-Death-in-Police-Officers-August-2018.pdf>.

Jacobsen, Geesche, "Police pursue 'suicide by cop' angle in teen shooting death", *Sydney Morning Herald* (13 December 2008), online: <www.smh.com.au/national/police-pursue-suicide-by-cop-angle-in-teen-shooting-death-20081213-gdt6g1.html>.

Jauchem, James R, "Deaths in custody: Are some due to electronic control devices (including TASER® devices) or excited delirium?" (2010) 17:1 Journal of Forensic and Legal Medicine 1, DOI: <10.1016/j.jflm.2008.05.011>.

— — —, "Exposures to conducted electrical weapons (including TASER® devices): how many and for how long are acceptable?" (2015) 60 Journal of Forensic Sciences S116.

Joannou, Ashley, "Inquests are a slog for affected families", *Yukon News* (17 January 2014), online: <www.yukon-news.com/news/inquests-are-a-slog-for-affected-families/>.

Jones, Melinda, "Inclusion, Social Inclusion and Participation" in Marcia H Rioux et al, eds, *Critical Perspectives on Human Rights and Disability Law* (Leiden: Martinus Nijhoff Publishers, 2011).

Jordan, Alejandra, Nancy R Panza & Charles Dempsey, "Suicide by Cop: A New Perspective on an Old Phenomenon" (2020) 23:1 Police Quarterly 82, DOI: <10.1177/1098611119873332>.

Kaiser, H Archibald, "Canadian Mental Health Law: The Slow Process of Redirecting the Ship of State" (2009) 17 Health Law Journal 139.

Kaminski, Robert, "Police Foot Pursuits and Officer Safety" (2007) 7:3 Law Enforcement Executive Forum 59.

Kaminski, Robert J et al, "A Quantum of Force: The Consequences of Counting Routine Conducted Energy Weapon Punctures as Injuries" (2015) 32:4 Justice Quarterly 598, DOI: <10.1080/07418825.2013.788729>.

Kaminski, Robert J, Clete Digiovanni & Raymond Downs, "The Use of Force between the Police and Persons with Impaired Judgment" (2004) 7:3 Police Quarterly 311, DOI: <10.1177/1098611103253456>.

Kanter, Arlene S, "The Law: What's Disability Studies Got to Do With It or an Introduction to Disability Legal Studies" (2010) 42 Colum Hum Rts L Rev 403, online: *Colum Hum Rts L Rev* <<https://heinonline.org/HOL/Page?handle=hein.journals/colhr42&id=407&div=&collection=>>>.

Kari, Shannon, "A timeline of police charged with murder or manslaughter in Canada", *The Globe and Mail* (25 January 2016), online: <<https://www.theglobeandmail.com/news/toronto/a-timeline-of-police-charged-with-murder-or-manslaughter-in-canada/article28374533/>>.

Kelsall, Diane & Matthew J Bowes, "No standards: medicolegal investigation of deaths" (2016) 188:3 Canadian Medical Association Journal 169, DOI: <10.1503/cmaj.160041>.

Kennedy, Duncan, "Toward an historical understanding of legal consciousness: The case of classical legal thought in America, 1850-1940" (1980) 3:3 Research in Law and Sociology 3.

Kerr, Thomas, Will Small & Evan Wood, "The public health and social impacts of drug market enforcement: A review of the evidence" (2005) 16:4 International Journal of Drug Policy 210, DOI: <10.1016/j.drugpo.2005.04.005>.

Kesic, Dragana & Stuart Thomas, "Attempted suspect-provoked shootings in Victoria: prevalence and characteristics" (2017) 40:4 Policing: An International Journal of Police Strategies & Management 704, DOI: <10.1108/PIJPSM-04-2016-0050>.

Kesic, Dragana, Stuart DM Thomas & James RP Ogloff, "Mental Illness Among Police Fatalities in Victoria 1982–2007: Case Linkage Study" (2010) 44:5 Aust N Z J Psychiatry 463, DOI: <10.3109/00048670903493355>.

Kesic, Dragana, Stuart DM Thomas & James RP Ogloff, "Analysis of Fatal Police Shootings: Time, Space, and Suicide by Police (2012) 39:8 Criminal Justice & Behaviour 1107.

Ketteler, Laura & Mary Dodge, "Improving Police Interactions With the Mentally Ill: Crisis Intervention Team (CIT) Training" in Rosemary L Gido & Lanette P Dalley, eds, *Women's Mental Health Issues Across the Criminal Justice System* (Upper Saddle River: Pearson Prentice Hall, 2009).

Kim, Peter, "17 years of police violence in Canada" (28 March 2019), online(blog): *Pivot Legal Society* <www.pivotlegal.org/17_years_of_police_violence_in_canada>.

Kim, Sung Tae & Taehwan Park, "Acute and Chronic Effects of Cocaine on Cardiovascular Health" (2019) 20:3 International Journal of Molecular Sciences 584, DOI: <10.3390/ijms20030584>.

King, William & Thomas Dunn, "Dumping: Police-Initiated Transjurisdictional Transport of Troublesome Persons" (2004) 7:3 Police Quarterly 339, DOI: <10.1177/1098611102250586>.

Kingshott, Brian F, "Suicide by Proxy: Revisiting the Problem of Suicide by Cop" (2009) 9:2 Journal of Police Crisis Negotiations 105, DOI: <10.1080/15332580902865110>.

Kirst, Maritt et al, "Examining implementation of mobile, police-mental health crisis intervention teams in a large urban center" (2015) 24:6 Journal of Mental Health 369.

Kisely, Stephen et al, "A Controlled Before-and-after Evaluation of a Mobile Crisis Partnership between Mental Health and Police Services in Nova Scotia" (2010) 55:10 The Canadian Journal of Psychiatry 662, DOI: <10.1177/070674371005501005>.

Knutsson, Johannes & Jon Strype, "Police Use of Firearms in Norway and Sweden: The Significance of Gun Availability" (2003) 13:4 Policing and Society 429, DOI: <10.1080/1043946032000105381>.

Koshan, Jennifer, "'Arbitrary Disadvantage': A Slip of the Pen or Something More?" (18 June 2014), online(blog): *ABlawg* <ablawg.ca/2014/06/18/arbitrary-disadvantage-a-slip-of-the-pen-or-something-more/>.

Koshan, Jennifer & Jonnette Watson Hamilton, "The Continual Reinvention of Section 15 of the Charter" (2013) 64 UNBLJ 19.

Koziarski, Jacek, Christopher O'Connor & Tyler Frederick, "Policing mental health: The composition and perceived challenges of Co-response Teams and Crisis Intervention Teams in the Canadian context" (2021) 22:1 Police Practice and Research 977, DOI: <10.1080/15614263.2020.1786689>.

Kroll, M W et al, "Benefits, risks, and myths of TASER® handheld electrical weapons" (2019) 3:7 Human Factors and Mechanical Engineering for Defense and Safety, DOI: <10.1007/s41314-019-0021-9>.

Kroll, Mark W et al, "Fatal traumatic brain injury with electrical weapon falls" (2016) 43 Journal of Forensic and Legal Medicine 12.

Kroll, Mark W, Mollie B Ritter & Howard E Williams, "Fatal and non-fatal burn injuries with electrical weapons and explosive fumes" (2017) 50 Journal of Forensic and Legal Medicine 6.

Kunz, S N, N Grove & F Fischer, "Acute pathophysiological influences of conducted electrical weapons in humans: A review of current literature" (2012) 221:1 Forensic Science International 1, DOI: <10.1016/j.forsciint.2012.02.014>.

Lakkireddy, Dhanunjaya et al, "Effects of Cocaine Intoxication on the Threshold for Stun Gun Induction of Ventricular Fibrillation" (2006) 48:4 Journal of the American College of Cardiology 805, DOI: <10.1016/j.jacc.2006.03.055>.

Lancaster, Andrew, "Evidence for joint police and mental health responses for people in mental health crisis" (2016) 19:10 Mental Health Practice 20.

Landeen, Janet et al, "Delineating the Population Served by a Mobile Crisis Team: Organizing Diversity" (2004) 49:1 The Canadian Journal of Psychiatry 45, DOI: <10.1177/070674370404900107>.

Lawrence, Sonia, "Harsh, Perhaps Even Misguided: Developments in Law, 2002" (2003) 20 The Supreme Court Law Review 93.

Lawson, Anna & Mark Priestley, "The Social Model of Disability: Questions for Law and Legal Scholarship?" in Peter Blanck & Eilíonóir Flynn, eds, *Routledge Handbook of Disability Law and Human Rights* (London: Routledge, 2016).

Leiter, Brian, "Legal Formalism and Legal Realism: What's the Issue?" (2010) 16:2 Legal Theory 111, DOI: <10.1017/S1352325210000121>.

Leonard, Charles E et al, "Antipsychotics and the Risks of Sudden Cardiac Death and All-Cause Death: Cohort Studies in Medicaid and Dually-Eligible Medicaid-Medicare Beneficiaries of Five States" (2013) Suppl 10:6 J Clin Exp Cardiol 1, DOI: <10.4172/2155-9880.S10-006>.

Levesque, Anne, "Gaming the [Human Rights] System?: A Critical Look at Discrimination Complaints Involving Government Services" (2020) 9 Can J Hum Rts 35.

Levine, Kate, "Who Should't Prosecute the Police" (2015) 101 Iowa L Rev 1447.

Lewis, Bradley, "A Mad Fight: Psychiatry and Disability Activism" in Lennard J Davis, ed, *The Disability Studies Reader*, 4th ed (New York: Routledge, 2013).

Lincoln, Yvonna Sessions & Egon G Guba, *Naturalistic Inquiry* (Beverly Hills: Sage, 1989).

Linder, Lauren M, Clint A Ross & Kyle A Weant, "Ketamine for the Acute Management of Excited Delirium and Agitation in the Prehospital Setting" (2017) 38:1 Pharmacotherapy 139.

Lindsay, Mark & David Lester, "Suicide During Confrontations with Police" in *Suicide by Cop: Committing Suicide by Provoking Police to Shoot You* (New York: Routledge, 2004).

Lippert, Randy K, Kevin Walby & Blair Wilkinson, "Spins, stalls, and shutdowns: Pitfalls of qualitative policing and security research" (2016) 17:1 Forum: Qualitative Social Research 1.

Lord, Vivian, "Law Enforcement-Assisted Suicide" (2000) 27:3 Criminal Justice and Behavior 401, DOI: <10.1177/0093854800027003007>.

———, "Police Responses in Officer-Involved Violent Deaths: Comparison of Suicide by Cop and Non-Suicide by Cop Incidents" (2014) 17:1 Police Quarterly 79, DOI: <10.1177/1098611114522040>.

MacAlister, David, "The Ontario Special Investigation Unit: Securing Independence and Impartiality" in David MacAlister & Robert Holmes, eds, *Police-involved Deaths: The Need for Reform* (Vancouver: BC Civil Liberties Association, 2012).

MacAlister, David & Robert Holmes, "Deaths in Police Custody: Towards a Typology" in *Police-involved deaths: the need for reform* (Vancouver, BC: BC Civil Liberties Association, 2012), online(pdf): <epe.lac-bac.gc.ca/100/200/300/bc_civil_liberties_assoc/police_involved_deaths_reform/2012-BCCLA-Report-Police-Involved-Deaths1.pdf>.

MacBeth, John P et al, *Solicitor General's Special Committee on Police Pursuits: Report* (Toronto: Queen's Printer for Ontario, 1985).

MacDonald, John M, Robert J Kaminski & Michael R Smith, "The Effect of Less-Lethal Weapons on Injuries in Police Use-of-Force Events" (2009) 99:12 Am J Public Health 2268, DOI: <10.2105/AJPH.2009.159616>.

MacDonnell, Vanessa, "Assessing the Impact of the Ancillary Powers Doctrine on Three Decades of Charter Jurisprudence" (2012) 58 Supreme Court Law Review 225.

MacKinnon, Catou, "Quebec's police watchdog flooded with complaints from Indigenous people about police misconduct", *CBC News* (15 January 2019), online: <www.cbc.ca/news/canada/montreal/bei-indigenous-complaints-1.4978180>.

Maines, Rachel P, *The Technology of Orgasm: "Hysteria," the Vibrator, and Women's Sexual Satisfaction* (Baltimore: JHU Press, 1999).

Malhotra, Ravi, "The United Nations Convention on the Rights of Persons with Disabilities in Canadian and American Jurisprudence" (2015) 32 Windsor Yearbook of Access to Justice 1.

Mandel, Michele, "Taxpayers on hook for outcome of Yatim civil lawsuits", *Toronto Sun* (26 January 2016), online: <torontosun.com/2016/01/26/taxpayers-on-hook-for-outcome-of-yatim-civil-lawsuits>.

Marcoux, Jacques, "Deadly Force: How CBC analyzed details of hundreds of fatal encounters between Canadians, police", *CBC News* (4 April 2018), online: <www.cbc.ca/news/canada/manitoba/iteam/deadly-force-cbc-analysis-1.4603696>.

Marcoux, Jacques & Katie Nicholson, "Deadly Force: Fatal Encounters with Police in Canada: 2000-2017", *CBC News*, online: <newsinteractives.cbc.ca/longform-custom/deadly-force>.

Martin, Sheilah, "Balancing Individual Rights to Equality and Social Goals" (2001) 80 Can B Rev 299.

- Martinelli, Ron, "Revisiting the '21-foot rule'" (2014) 18 Police: The Law Enforcement Magazine.
- May, Katie, "Legal fee burden shuts families out of inquests: lawyer", *Winnipeg Free Press* (14 August 2016), online: <www.winnipegfreepress.com/breakingnews/2016/08/14/legal-fee-burden-shuts-families-out-of-inquests-lawyer>.
- Maynard, Robyn, "Police Abolition/Black Revolt" (2020) 41 TOPIA: Canadian Journal of Cultural Studies 70, DOI: <10.3138/topia-009>.
- — —, *Policing Black Lives: State Violence in Canada from Slavery to the Present* (Halifax: Fernwood Publishing, 2017).
- McColl, Mary Ann et al, "People with Disabilities and the Charter: Disability rights at the Supreme Court of Canada under the Charter of Rights and Freedoms" (2016) 5:1 Canadian Journal of Disability Studies 183.
- McKenzie, Kwame & Kamaldeep Bhui, "Institutional racism in mental health care" (2007) 334:7595 British Medical Journal 649, DOI: <10.1136/bmj.39163.395972.80>.
- McLeod, Louise C, Stuart D M Thomas & Dragana Kesic, "The frequency and nature of resolution of potential police provoked shooting encounters" (2014) 37:4 Int J Law Psychiatry 383, DOI: <10.1016/j.ijlp.2014.02.009>.
- Meade, Peter C, "Police and domestic dog bite injuries: What are the differences? What are the implications about police dog use?" (2006) 37:11 Injury Extra 395, DOI: <10.1016/j.injury.2006.05.007>.
- Meng, Yunliang, "Racially biased policing and neighborhood characteristics: A Case Study in Toronto, Canada" (2014) Cybergeog: European Journal of Geography, DOI: <10.4000/cybergeog.26165>.
- Messina, Zachary, Angela Hays Shapshak & Rebecca Mills, "Anoxic Encephalopathy" in *StatPearls* (Treasure Island, FL: StatPearls, 2022).
- Mfoafo-M'Carthy, Magnus, "Community treatment orders and the experiences of ethnic minority individuals diagnosed with serious mental illness in the Canadian mental health system" (2014) 13:69 International Journal for Equity in Health 1, DOI: <10.1186/s12939-014-0069-3>.
- Michaud, Alain, "Restraint related deaths and excited delirium syndrome in Ontario (2004–2011)" (2016) 41 Journal of forensic and legal medicine 30.
- Michel, Linda, *Le rapport du coroner du Québec : Un discours complexe de déresponsabilisation policière sur les décès causés par le SPVM*. (PhD Thesis, University of Ottawa, 2017) [unpublished].
- Millar, Paul & Akwasi Owusu-Bempah, "Whitewashing Criminal Justice in Canada: Preventing Research through Data Suppression" (2011) 26:3 Canadian Journal of Law and Society 653, DOI: <10.3138/cjls.26.3.653>.
- Miller, Ted R et al, "Perils of police action: a cautionary tale from US data sets" (2017) 23:1 Injury Prevention 27, DOI: <10.1136/injuryprev-2016-042023>.
- Mills, China, "The psychiatrization of poverty: Rethinking the mental health–poverty nexus" (2015) 9:5 Social and Personality Psychology Compass 213.
- Minich, Julie Avril, "Enabling Whom? Critical Disability Studies Now" (2016) 5:1 Lateral, DOI: <10.25158/L5.1.9>.

Minichino, Amedeo et al, "Pain-processing abnormalities in bipolar I disorder, bipolar II disorder, and schizophrenia: A novel trait marker for psychosis proneness and functional outcome?" (2016) 18:7 *Bipolar Disorders* 591, DOI: <10.1111/bdi.12439>.

Mirchandani, H G et al, "Cocaine-induced agitated delirium, forceful struggle, and minor head injury. A further definition of sudden death during restraint" (1994) 15:2 *Am J Forensic Med Pathol* 95, DOI: <10.1097/00000433-199406000-00002>.

Mohandie, Kris & J Reid Meloy, "Hostage and Barricade Incidents Within an Officer-Involved Shooting Sample: Suicide by Cop, Intervention Efficacy, and Descriptive Characteristics" (2010) 10:1–2 *Journal of Police Crisis Negotiations* 101, DOI: <10.1080/15332581003799737>.

Mohandie, Kris, J Reid Meloy & Peter I Collins, "Suicide by cop among officer-involved shooting cases" (2009) 54:2 *Journal of Forensic Sciences* 456, DOI: <10.1111/j.1556-4029.2008.00981.x>.

Mor, Sagit, "Between Charity, Welfare, and Warfare: A Disability Legal Studies Analysis of Privilege and Neglect in Israeli Disability Policy" (2006) 18 *Yale JL & Human* 63.

Morabito, Eugene V & William G Doerner, "Police Use of Less-Lethal Force: Oleoresin Capsicum (OC) Spray" (1997) *Policing: An International Journal of Police Strategies & Management* 688.

Morabito, Melissa S et al, "Crisis Intervention Teams and People With Mental Illness: Exploring the Factors That Influence the Use of Force" (2012) 58:1 *Crime & Delinquency* 57, DOI: <10.1177/0011128710372456>.

Morabito, Melissa Schaefer & Kelly M Socia, "Is Dangerousness a Myth? Injuries and Police Encounters with People with Mental Illnesses" (2015) 14:2 *Criminology & Public Policy* 253, DOI: <10.1111/1745-9133.12127>.

Morrison, Audrey & David Sadler, "Death of a Psychiatric Patient during Physical Restraint. Excited Delirium — A Case Report" (2001) 41:1 *Med Sci Law* 46, DOI: <10.1177/002580240104100109>.

Mosoff, Judith, "Is the Human Rights Paradigm Able to Include Disability: Who's In - Who Wins - What - Why" (2000) 26 *Queen's LJ* 225.

Nabbali, Essya M, "A" Mad" Critique of the Social Model of Disability." (2009) 9:4 *International Journal of Diversity in Organisations, Communities & Nations*.

Neitzel, Amber R & James R Gill, "Death Certification of 'Suicide by Cop'" (2011) 56:6 *Journal of Forensic Sciences* 1657, DOI: <10.1111/j.1556-4029.2011.01891.x>.

Nelson, Camille A, "Racializing Disability, Disabling Race: Policing Race and Mental Status" (2010) 15 *Berkeley Journal of Criminal Law* 1.

Nelson, Sarah E & Kathi Wilson, "The Mental Health of Indigenous Peoples in Canada: A Critical Review of Research" (2017) 176 *Social Science & Medicine* 93, DOI: <10.1016/j.socscimed.2017.01.021>.

Nicholson, Katie, "More than 20 Canadians shot dead by police since 2000 were unarmed", *CBC News* (7 April 2018), online: <www.cbc.ca/news/investigates/more-than-20-canadians-shot-dead-by-police-since-2000-were-unarmed-1.4605021>.

Nicholson, Katie & Jacques Marcoux, "What an examination of every Canadian police-involved fatality since 2000 tells us", *CBC News* (4 April 2018), online: <www.cbc.ca/news/investigates/most-canadians-killed-in-police-encounters-since-2000-had-mental-health-or-substance-abuse-issues-1.4602916>.

- Nunnally, Sophie, "Involuntary Hospitalization and Treatment: Themes and Controversies" in Colleen M Flood & Jennifer A Chandler, eds, *Law and Mind: Mental Health Law and Policy in Canada* (Toronto: LexisNexis Canada, 2016).
- O'Brien, Anthony J et al, "Use of Tasers on people with mental illness: A New Zealand database study" (2011) 34:1 *International Journal of Law and Psychiatry* 39, DOI: <10.1016/j.ijlp.2010.11.006>.
- O'Halloran, Ronald L & Larry V Lewman, "Restraint asphyxiation in excited delirium" (1993) 14:4 *American Journal of Forensic Medicine and Pathology* 289.
- Oliva, Janet R, Rhiannon Morgan & Michael T Compton, "A Practical Overview of De-Escalation Skills in Law Enforcement: Helping Individuals in Crisis While Reducing Police Liability and Injury" (2010) 10:1–2 *Journal of Police Crisis Negotiations* 15, DOI: <10.1080/15332581003785421>.
- Oliver, Michael, *The Politics of Disablement: A Sociological Approach* (London: Palgrave Macmillan, 1990).
- Oliver, Michael & Colin Barnes, *The New Politics of Disablement* (Bloomsbury Publishing, 2012).
- Oliver, Mike, "The social model of disability: thirty years on" (2013) 28:7 *Disability & Society* 1024, DOI: <10.1080/09687599.2013.818773>.
- Osborne, Philip H, *The Law of Torts*, 6th ed (Toronto: Irwin Law, 2020).
- Pal, Leslie A & F L Morton, "Bliss v. Attorney General of Canada: From Legal Defeat to Political Victory" (1986) 24 *Osgoode Hall L J* 141.
- Palmater, Pamela, "Shining Light on the Dark Places: Addressing Police Racism and Sexualized Violence against Indigenous Women and Girls in the National Inquiry" (2016) 28:2 *Canadian Journal of Women and the Law* 253, DOI: <10.3138/cjwl.28.2.253>.
- Panwala, Asit S, "The Failure of Local and Federal Prosecutors to Curb Police Brutality" (2002) 30 *Fordham Urban Law Review* 639.
- Parent, Richard, *Aspects of police use of deadly force in North America: The phenomenon of victim-precipitated homicide* (PhD Thesis, Simon Fraser University, 2004) [unpublished].
- — —, "Suicide by Cop in North America: Victim-Precipitated Homicide" in Donald Sheehan & Janet Warren, eds, *Suicide and Law Enforcement* (Washington, DC: Federal Bureau of Investigation, 2001).
- Parent, Richard B & Simon Verdun-Jones, "Victim-precipitated homicide: police use of deadly force in British Columbia" (1998) 21:3 *Policing: An International Journal of Police Strategies & Management* 432, DOI: <10.1108/13639519810228741>.
- Parent, Rick & Catherine Parent, "Canada and the USA: Community Violence and the Police Use of Deadly Force in Bordering Nations" in James F Albrecht & Garth den Heyer, eds, *Understanding and Preventing Community Violence: Global Criminological and Sociological Perspectives* (Cham: Springer International Publishing, 2022), DOI: <10.1007/978-3-031-05075-6_9>.
- Pasternak, Shiri, Kevin Walby & Abby Stadnyk, eds, *Disarm, Defund, Dismantle: Police Abolition in Canada* (Toronto: Between the Lines, 2022).
- Patton, Christina L & William J Fremouw, "Examining 'suicide by cop': A critical review of the literature" (2016) 27 *Aggression and Violent Behavior* 107, DOI: <10.1016/j.avb.2016.03.003>.

Payne-James, John, "Restraint Techniques, Injuries, and Death: Baton" in J Payne-James & Roger W Byard, eds, *Encyclopedia of Forensic and Legal Medicine* (Amsterdam: Elsevier, 2005).

Peters, Yvonne, *Twenty Years of Litigating for Disability Equality Rights: Has it Made a Difference? : an Assessment by the Council of Canadians With Disabilities* (Toronto: 20th Anniversary Committee of the Equality Clause, 2004), online: <www.ccdonline.ca/en/humanrights/promoting/20years>.

Peterson, Jillian & James Densley, "Is Crisis Intervention Team (CIT) training evidence-based practice? A systematic review" (2018) 41:5 Journal of Crime and Justice 521, DOI: <10.1080/0735648X.2018.1484303>.

Phillips, Katharine et al, "Cocaine Cardiotoxicity: Review of the Pathophysiology, Pathology, and Treatment Options" (2009) 9:3 American Journal of Cardiovascular Drugs 177, DOI: <10.1007/BF03256574>.

Pieters, Selwyn, "Access to Justice for Community Users: A Litigator's Perspective" (2021) CanLII Docs 1516.

Pilgrim, David & Floris Tomasini, "On being unreasonable in modern society: are mental health problems special?" (2012) 27:5 Disability & Society 631, DOI: <10.1080/09687599.2012.669108>.

Pippin, John J, "Taser research in pigs not helpful" (2007) 49:6 Journal of the American College of Cardiology 731.

Pirsig, Robert M, *Zen and the Art of Motorcycle Maintenance: An Inquiry Into Values* (New York: Harper Collins, 1974).

Plush, Theodore et al, "Cocaine-Induced Agitated Delirium: A Case Report and Review" (2015) 30:1 J Intensive Care Med 49, DOI: <10.1177/0885066613507420>.

Pollanen, Michael S et al, "Unexpected death related to restraint for excited delirium: a retrospective study of deaths in police custody and in the community" (1998) 158:12 Canadian Medical Association Journal 1603.

Pothier, Dianne & Richard Devlin, *Critical Disability Theory: Essays in Philosophy* (Vancouver: UBC Press, 2006).

Puddister, Kate & Danielle McNabb, "When the Police Break the Law: The Investigation, Prosecution and Sentencing of Ontario Police Officers" (2021) 36:3 Canadian Journal of Law and Society / La Revue Canadienne Droit et Société 381, DOI: <10.1017/cls.2021.3>.

Pynn, Larry, "Police pursuits claimed 77 lives over a decade in Canada, study finds", *CBC News* (23 April 2022), online: <www.cbc.ca/news/politics/police-pursuits-report-1.6415811>.

Quattlebaum, Megan & Tom Tyler, "Beyond the Law: An Agenda for Policing Reform" (2020) 100 BU L Rev 1017.

Queally, James, "Video emerges in St. Louis fatal police shooting", *Los Angeles Times* (20 August 2014), online: <www.latimes.com/nation/nationnow/la-na-nn-stl-police-shooting-video-20140820-story.html>.

Raghavan, Malathi, "Fatal dog attacks in Canada, 1990-2007" (2008) 49:6 Canadian Veterinary Journal 577.

- Rando, Jessica et al, "Intranasal naloxone administration by police first responders is associated with decreased opioid overdose deaths" (2015) 33:9 Am J Emerg Med 1201, DOI: <10.1016/j.ajem.2015.05.022>.
- Ransley, Janet, Jessica Anderson & Tim Prenzler, "Civil Litigation Against Police in Australia: Exploring Its Extent, Nature and Implications for Accountability" (2007) 40:2 Australian & New Zealand Journal of Criminology 143, DOI: <10.1375/acri.40.2.143>.
- Ray, Wayne A et al, "Atypical Antipsychotic Drugs and the Risk of Sudden Cardiac Death" (2009) 360:3 New England Journal of Medicine 225, DOI: <10.1056/NEJMoa0806994>.
- Razack, Sherene, *Dying from Improvement: Inquests and Inquiries into Indigenous Deaths in Custody* (Toronto: University of Toronto Press, 2015).
- , "'It Happened More Than Once': Freezing Deaths in Saskatchewan" (2014) 26:1 Canadian Journal of Women and the Law 51, DOI: <10.3138/cjwl.26.1.51>.
- Razack, Sherene H, "Timely Deaths: Medicalizing the Deaths of Aboriginal People in Police Custody" (2011) 9:2 Law, Culture & the Humanities 352, DOI: <10.1177/1743872111407022>.
- Read, Dr John, "Does 'Schizophrenia' Exist? Reliability and Validity" in Dr John Read et al, eds, *Models of Madness: Psychological, Social and Biological Approaches to Psychosis* (London: Routledge, 2013).
- Reaume, Geoffrey, "Understanding critical disability studies" (2014) 186:16 Canadian Medical Association Journal 1248, DOI: <10.1503/cmaj.141236>.
- Reay, Donald T et al, "Effects of positional restraint on oxygen saturation and heart rate following exercise" (1988) 9:1 Am J Forensic Med Pathol 16.
- , "Positional asphyxia during law enforcement transport." (1992) 13:2 The American journal of forensic medicine and pathology 90.
- Reay, Donald T & John W Eisele, "Death from law enforcement neck holds" (1982) 3:3 The American Journal of Forensic Medicine and Pathology 253.
- Remsberg, Chuck, "Is The 21-Foot Rule Still Valid When Dealing With An Edged Weapon? (Part 1)", *Force Science News* (22 April 2005), online: <www.forcescience.com/2005/04/is-the-21-foot-rule-still-valid-when-dealing-with-an-edged-weapon-part-1/>.
- Rich, Ben & James M Brophy, "Estimating the Risk of Cardiac Mortality After Exposure to Conducted Energy Weapons" (2015) 31:12 Canadian Journal of Cardiology 1439, DOI: <10.1016/j.cjca.2015.02.006>.
- Rickgarn, Ralph, "Victim-Precipitated Homicide: Incident and Aftermath" in Donald C Sheehan & Janet I Warren, eds, *Suicide and Law Enforcement* (Washington, DC: U.S. Dept. of Justice: Federal Bureau of Investigation, 2001).
- Ritchie, Andrea J, *Invisible No More: Police Violence Against Black Women and Women of Color* (Boston: Beacon Press, 2017).
- Rivara, FP & CD Mack, "Motor vehicle crash deaths related to police pursuits in the United States" (2004) 10 Injury Prevention 93.
- Roach, Kent, "Principled Remedial Discretion Under the Charter" (2008) 25:2 SCLR 101.

- Robert Menzies, Brenda A LeFrançois & Geoffrey Reaume, "Introducing Mad Studies" in Brenda A LeFrançois, Robert Menzies & Geoffrey Reaume, eds, *Mad Matters: A Critical Reader in Canadian Mad Studies* (Toronto: Canadian Scholars' Press, 2013).
- Robison, Debra & Shelby Hunt, "Sudden In-Custody Death Syndrome" (2005) 27:1 Topics in Emergency Medicine 36.
- Rogers, Michael S, Dale E McNeil & Renée L Binder, "Effectiveness of Police Crisis Intervention Training Programs" (2019) 47:4 Journal of the American Academy of Psychiatry and the Law 414.
- Roh, Sunghoon & Matthew Robinson, "A Geographic Approach to Racial Profiling: The Microanalysis and Macroanalysis of Racial Disparity in Traffic Stops" (2009) 12:2 Police Quarterly 137, DOI: <10.1177/1098611109332422>.
- Ruiz, Jim & Chad Miller, "An Exploratory Study of Pennsylvania Police Officers' Perceptions of Dangerousness and Their Ability to Manage Persons with Mental Illness" (2004) 7:3 Police Quarterly 359, DOI: <10.1177/1098611103258957>.
- Rukavina, Steve, "Two Montreal police officers charged with dumping homeless man near Ontario border", *CBC News* (23 May 2018), online: <www.cbc.ca/news/canada/montreal/two-montreal-police-officers-charged-with-dumping-homeless-man-near-ontario-border-1.4674669>.
- Runions, Bradley, "Less-lethal weapons in peace operations: Broadening the spectrum of response" (1996) 25:1 Peacekeeping & International Relations 8.
- Ryder, Bruce, "The Strange Double Life of Canadian Equality Rights" (2013) 63 Supreme Court Law Review 261.
- Saks, Elyn R, *The Center Cannot Hold: My Journey Through Madness* (New York: Hachette Books, 2007).
- Savaser, Davut & Theodore C Chan, "Positional and restraint asphyxia" in Darrell Ross & Gary Vilke, eds, *Guidelines for Investigating Officer-Involved Shootings, Arrest-Related Deaths, and Deaths in Custody* (New York: Routledge, 2017).
- Scaggs, Thomas R et al, "Prehospital Ketamine is a Safe and Effective Treatment for Excited Delirium in a Community Hospital Based EMS System" (2016) 31:5 Prehospital and Disaster Medicine 563, DOI: <10.1017/S1049023X16000662>.
- Schillmeier, Michael, *Rethinking Disability: Bodies, Senses, and Things* (London: Routledge, 2010).
- Schwartz, Bryan G, Shereif Rezkalla & Robert A Kloner, "Cardiovascular Effects of Cocaine" (2010) 122:24 Circulation 2558, DOI: <10.1161/CIRCULATIONAHA.110.940569>.
- Sekhon, Nirej, "Police and the Limit of Law" (2019) 119:6 Columbia Law Review 1711.
- Seputis, Jasmin, "James Forcillo jury didn't hear suicide by cop theory at his murder trial", *CBC News* (19 January 2016), online: <www.cbc.ca/news/canada/toronto/james-forcillo-jury-didn-t-hear-suicide-by-cop-theory-at-his-murder-trial-1.3410688>.
- Shakespeare, Tom, *Disability Rights and Wrongs* (London: Routledge, 2006).
- Sheehy, Elizabeth, "Advancing Social Inclusion: The Implications for Criminal Law and Policy" (2004) 46:1 Canadian Journal of Criminology and Criminal Justice 73, DOI: <10.3138/cjccj.46.1.73>.

Sherry, Mark, Michael Gill & Cathy J Schlund-Vials, "The Promise of Human Rights for Disabled People and the Reality of Neoliberalism" in *Disability, Human Rights and the Limits of Humanitarianism* (Routledge, 2014).

Shuttleworth, Russell & Helen Meekosha, "What's so 'critical' about critical disability studies" (2009) 15:1 Australian Journal of Human Rights 47.

Singh, Inayat, "2020 already a particularly deadly year for people killed in police encounters", *CBC News* (23 July 2020), online: <newsinteractives.cbc.ca/fatalpoliceencounters/>.

Skinner, R et al, "Suicide and self-inflicted injury hospitalizations in Canada (1979 to 2014/15)" (2016) 36:11 Health Promot Chronic Dis Prev Can, DOI: <10.24095/hpcdp.36.11.02>.

Skolnik, Terry, "Racial Profiling and the Perils of Ancillary Police Powers" (2021) 99 Can B Rev 429.

Snel, Marnix & Janaína De Moraes, *Doing a systematic literature review in legal scholarship* (The Hague: Eleven International Publishing, 2018).

Steadman, Henry J & David Morrisette, "Police Responses to Persons With Mental Illness: Going Beyond CIT Training" (2016) 67:10 Psychiatric Services 1054, DOI: <10.1176/appi.ps.201600348>.

Steffee, C H et al, "Oleoresin capsicum (pepper) spray and 'in-custody deaths'" (1995) 16:3 American Journal of Forensic Medicine and Pathology 185, DOI: <10.1097/00000433-199509000-00001>.

Stratton, Samuel J, Christopher Rogers & Karen Green, "Sudden death in individuals in hobble restraints during paramedic transport" (1995) 25:5 Annals of emergency medicine 710.

Stribopoulos, James, "The Limits of Judicially Created Police Powers: Investigative Detention after Mann" (2007) 52 Crim LQ 299.

Strike, Carol & Tara Marie Watson, "Losing the uphill battle? Emergent harm reduction interventions and barriers during the opioid overdose crisis in Canada" (2019) 71 International Journal of Drug Policy 178, DOI: <10.1016/j.drugpo.2019.02.005>.

Strömmer, Ellen MF et al, "The role of restraint in fatal excited delirium: a research synthesis and pooled analysis" (2020) 16:4 Forensic Science, Medicine and Pathology 680.

Strote, Jared, "Excited delirium as a potentially dangerous diagnosis" (2014) 31:3 Emergency Medicine Journal 256.

— — —, "Safety of prone positioning still in doubt." (2015) 36 Journal of Forensic and Legal Medicine 108.

Strote, Jared & H Range Hutson, "Taser Use in Restraint-Related Deaths" (2006) 10:4 Prehospital Emergency Care 447, DOI: <10.1080/10903120600884863>.

Stuart, Bruce, "Police Use of Conducted Energy Weapons in Canada" (2009) 9:3 Law Enforcement Executive Forum 51.

Subramaniam, Sheela & Seble Markonnen, "Racial and Mental Health Profiling in Ontario: Exploring the Links" (2017) 14 Canadian Diversity 25, online: *Canadian Diversity* <www.ohrc.on.ca/sites/default/files/Racial%20Profiling%20and%20Human%20Rights_Canadian%20Diversity.pdf>.

Swain, John & Sally French, "Towards an Affirmation Model of Disability" (2000) 15:4 Disability & Society 569, DOI: <10.1080/09687590050058189>.

Szasz, Thomas, *Law, Liberty and Psychiatry: An Inquiry into the Social Uses of Mental Health Practices* (New York: MacMillan, 1963).

Takeuchi, Asia, Terence L Ahern & Sean O Henderson, "Excited Delirium" (2011) 12:1 West J Emerg Med 77.

Tamanaha, Brian Z, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton: Princeton University Press, 2009).

Tanovich, David M, "Applying the Racial Profiling Correspondence Test" (2017) 64 Crim LQ 359.

———, "E-Racing Racial Profiling" (2003) 41:4 Alta L Rev 905.

Tchou, Patrick, "CEW Effects with Illegal Stimulant Intoxication" in Jeffrey D Ho & Mark W Kroll, eds, *TASER® Conducted Electrical Weapons: Physiology, Pathology, and Law* (Boston, MA: Springer US, 2009), DOI: <10.1007/978-0-387-85475-5_18>.

Terrill, William & Eugene A Paoline III, "Conducted Energy Devices (CEDs) and Citizen Injuries: The Shocking Empirical Reality" (2012) 29:2 Justice Quarterly 153, DOI: <10.1080/07418825.2010.549834>.

Thakur, Sanjay et al, "Non-lethal? Penetrating chest injury due to beanbag bullet" (2013) 2013 British Medical Journal Case Reports, DOI: <10.1136/bcr-2012-008482>.

Thomas, Carol, *Female Forms: Experiencing and Understanding Disability* (Buckingham: Open University Press, 1999).

———, "How is disability understood? An examination of sociological approaches" (2004) 19:6 Disability & Society 569, DOI: <10.1080/0968759042000252506>.

———, "Rescuing a social relational understanding of disability" (2004) 6:1 Scandinavian Journal of Disability Research 22, DOI: <10.1080/15017410409512637>.

Thompson, Trevor et al, "Analgesic Effects of Alcohol: A Systematic Review and Meta-Analysis of Controlled Experimental Studies in Healthy Participants" (2017) 18:5 The Journal of Pain 499, DOI: <10.1016/j.jpain.2016.11.009>.

Thomson, Sylvia, "'We've got to do better': Toronto readies to launch non-police crisis response pilot", *CBC News* (29 June 2021), online: <www.cbc.ca/news/canada/toronto/toronto-policing-alternative-pilot-1.6083164>.

Toprak, Sadik et al, "The pathology of lethal exposure to the Riot Control Agents: Towards a forensics-based methodology for determining misuse" (2015) 29 Journal of Forensic and Legal Medicine 36.

Torres, Patrick A et al, "Rhabdomyolysis: Pathogenesis, Diagnosis, and Treatment" (2015) 15:1 Ochsner Journal 58.

Truscott, Amanda, "A Knee in the Neck of Excited Delirium" (2008) 178:6 Canadian Medical Association Journal 669, DOI: <10.1503/cmaj.080210>.

Tueller, Dennis, "How close is too close" (1983) SWAT Magazine 1.

Unger, Roberto Mangabeira, "The Critical Legal Studies Movement" (1983) 96:3 Harvard Law Review 561, DOI: <10.2307/1341032>.

Urban-Kowalczyk, Małgorzata, Justyna Pigońska & Janusz Śmigielski, "Pain perception in schizophrenia: influence of neuropeptides, cognitive disorders, and negative symptoms" (2015) 11 *Neuropsychiatr Dis Treat* 2023, DOI: <10.2147/NDT.S87666>.

Vanhala, Lisa, *Making Rights a Reality?: Disability Rights Activists and Legal Mobilization* (Cambridge: Cambridge University Press, 2011).

— — —, "Twenty-Five Years of Disability Equality? Interpreting Disability Rights in the Supreme Court of Canada" (2010) 39:1 *Common Law World Review* 27, DOI: <10.1350/clwr.2010.39.1.0194>.

Vashishtha, Devesh, Maria Luisa Mittal & Daniel Werb, "The North American opioid epidemic: current challenges and a call for treatment as prevention" (2017) 14:1 *Harm Reduction Journal* 7, DOI: <10.1186/s12954-017-0135-4>.

Vassilev, Ivaylo & David Pilgrim, "Risk, trust and the myth of mental health services" (2009) 16:3 *Journal of Mental Health* 347, DOI: <10.1080/09638230701299178>.

Vehmas, Simo & Nick Watson, "Moral wrongs, disadvantages, and disability: a critique of critical disability studies" (2014) 29:4 *Disability & Society* 638, DOI: <10.1080/09687599.2013.831751>.

Vilke, Gary M et al, "Does weight force during physical restraint cause respiratory compromise" (2005) 12:5 *Academy of Emergency Medicine Supplement Emerg Med* 16.

— — —, "Excited Delirium Syndrome (ExDS): Defining Based on a Review of the Literature" (2012) 43:5 *The Journal of Emergency Medicine* 897, DOI: <10.1016/j.jemermed.2011.02.017>.

Vilke, Gary M & Theodore C Chan, "Less lethal technology: medical issues" (2007) 30:3 *Policing: An International Journal of Police Strategies & Management* 341.

Wahl, Peter, Nicolas Schreyer & Bertrand Yersin, "Injury pattern of the Flash-Ball®, a less-lethal weapon used for law enforcement: report of two cases and review of the literature" (2006) 31:3 *The Journal of emergency medicine* 325.

Walby, Kevin & Alex Luscombe, "Criteria for quality in qualitative research and use of freedom of information requests in the social sciences" (2017) 17:5 *Qualitative Research* 537.

Warren, Jonathan M, "Hidden in Plain View: Juries and the Implicit Credibility given to Police Testimony" (2018) 11 *DePaul J Soc Just* 1.

Watson, Amy C, Michael T Compton & Jeffrey N Draine, "The crisis intervention team (CIT) model: An evidence-based policing practice?" (2017) 35:5–6 *Behavioral Sciences & the Law* 431, DOI: <10.1002/bsl.2304>.

Watson, Amy C, Patrick W Corrigan & Victor Ottati, "Police Officers' Attitudes Toward and Decisions About Persons With Mental Illness" (2004) 55:1 *Psychiatric Services* 49, DOI: <10.1176/appi.ps.55.1.49>.

Watson, Amy C & Anjali J Fulambarker, "The Crisis Intervention Team Model of Police Response to Mental Health Crises" (2012) 8:2 *Best Practices in Mental Health* 71.

Wecht, Cyril H et al, *Investigation and Prevention of Officer-Involved Deaths*, 1st ed (Boca Raton, FL: CRC Press, 2010).

Werb, Dan et al, "Effect of drug law enforcement on drug market violence: a systematic review" (2011) 22:2 *Int J Drug Policy* 87, DOI: <10.1016/j.drugpo.2011.02.002>.

- Wesley, Keith, "Excited Delirium Strikes without Warning" (2011) *Journal of Emergency Medical Services*.
- Wetli, Charles V & David A Fishbain, "Cocaine-induced psychosis and sudden death in recreational cocaine users" (1985) 30:3 *Journal of Forensic Science* 873.
- Wetli, Charles V, Deborah Mash & Steven B Karch, "Cocaine-associated agitated delirium and the neuroleptic malignant syndrome" (1996) 14:4 *The American Journal of Emergency Medicine* 425, DOI: <10.1016/S0735-6757(96)90066-2>.
- White, Aaron, "Edged Weapons Response" (2013) *Blue Line*, online: *Blue Line* <www.blueline.ca/edged_weapons_response-2799/>.
- White, Michael D et al, "Federal Civil Litigation as an Instrument of Police Reform: A Natural Experiment Exploring the Effects of the Floyd Ruling on Stop-and-Frisk Activities in New York City" (2016) 14 *Ohio St J Crim L* 9.
- White, Michael D, Victor Mora & Carlena Orosco, "Exploring Variation in Police Perceptions of De-Escalation: Do Officer Characteristics Matter?" (2021) 15:2 *Policing: A Journal of Policy and Practice* 727, DOI: <10.1093/police/paz062>.
- White, Michael D & Justin Ready, "The TASER as a Less Lethal Force Alternative: Findings on Use and Effectiveness in a Large Metropolitan Police Agency" (2007) 10:2 *Police Quarterly* 170, DOI: <10.1177/1098611106288915>.
- White, Stephen, Letter from Stephen White to Guy Bujold (30 November 2017), online(pdf): <www.crc-cetp.gc.ca/pdf/VictorD-CommissionerResponse-en.PDF>.
- Williams, Howard, *TASERS and Arrest-Related Deaths* (El Paso: LFB Scholarly Publishing, 2015).
- Williams, Howard E, Scott W Bowman & Jordan Taylor Jung, "The Limitations of Government Databases for Analyzing Fatal Officer-Involved Shootings in the United States" (2019) 30:2 *Criminal Justice Policy Review* 201, DOI: <10.1177/0887403416650927>.
- Williams, Patricia J, *The Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1991).
- Williams, Robert, Edith Samuel & Richard Ferrell, "Excited delirium: Consideration of selected medical and psychiatric issues" (2009) *Neuropsychiatric Disease and Treatment* 61, DOI: <10.2147/NDT.S2883>.
- Wobeser, Wendy et al, "Causes of death among people in custody in Ontario, 1990–1999" (2002) 167:10 *Canadian Medical Association Journal* 1109.
- Wolfgang, Marvin E, "Suicide by means of victim-precipitated homicide" (1959) 20 *Journal of Clinical & Experimental Psychopathology* 335.
- Wong, Sabrina T et al, "The diagnosis of depression and its treatment in Canadian primary care practices: an epidemiological study" (2014) 2:4 *Canadian Medical Association Open Access Journal* E337.
- Wu, Chi-Shin, Yu-Ting Tsai & Hui-Ju Tsai, "Antipsychotic Drugs and the Risk of Ventricular Arrhythmia and/or Sudden Cardiac Death: A Nation-wide Case-Crossover Study" (2015) 4:2 *Journal of the American Heart Association* e001568, DOI: <10.1161/JAHA.114.001568>.
- Wurtzel, Elizabeth, *Prozac Nation* (New York: Penguin, 1994).
- Yeung, M F & W Y Tang, "Clinicopathological effects of pepper (oleoresin capsicum) spray" (2015) 21:6 *Hong Kong Medical Journal* 542–52.

Zaami, Mariama, "'I Fit the Description': Experiences of Social and Spatial Exclusion among Ghanaian Immigrant Youth in the Jane and Finch Neighbourhood of Toronto" (2015) 47:3 *Canadian Ethnic Studies* 69, DOI: <10.1353/ces.2015.0032>.

Zaychenko, Vladimir A & Simon N Verdun-Jones, "Police Use of Conducted Energy Weapons: A Review of the Canadian Jurisprudence" (2011) 49 *Alta L Rev* 149.

Zhu, Jingjing et al, "Antipsychotic drugs and sudden cardiac death: A literature review of the challenges in the prediction, management, and future steps" (2019) 281 *Psychiatry Research* 112598, DOI: <10.1016/j.psychres.2019.112598>.

Zinger, Ivan, "Actuarial Risk Assessment and Human Rights: A Commentary" (2004) 46:5 *Canadian Journal of Criminology and Criminal Justice* 607, DOI: <10.3138/cjccj.46.5.607>.

Zipes, Douglas P, "Sudden Cardiac Arrest and Death Following Application of Shocks From a TASER Electronic Control Device" (2012) 125:20 *Circulation* 2417, DOI: <10.1161/CIRCULATIONAHA.112.097584>.

Websites

"À propos" (last visited 20 September 2022), online: *Coalition contre la répression et les abus policiers* <lacrap.org/a-propos>.

"About" (17 March 2022), online: *ARWEN Less Lethal* <arwenlesslethal.com/about/>.

"Authorised Firearms Officer (AFO)" (last visited 20 September 2022), online: *College of Policing* <profdev.college.police.uk/professional-profile/authorised-firearms-officer-afo/>.

"Bear Clan Patrol Inc." (last visited 22 September 2022), online: *Bear Clan* <<https://bearclanpatrol.org/>>.

ASFC, "Canadian Motor Vehicle Traffic Collision Statistics: 2020" (1 February 2022), online: *Transport Canada* <tc.canada.ca/en/road-transportation/statistics-data/canadian-motor-vehicle-traffic-collision-statistics-2020>.

"Case Study: CAHOOTS" (last visited 20 September 2022), online: *Vera Institute of Justice* <www.vera.org/behavioral-health-crisis-alternatives/cahoots>.

"Causes: Coronary heart disease" (3 October 2018), online: *NHS* <www.nhs.uk/conditions/coronary-heart-disease/causes/>.

"Central Forms Repository" (last visited 17 September 2022), online: *Government of Ontario* <www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/FormDetail?OpenForm&ACT=RDR&TAB=PROFILE&SRCH=&ENV=WWE&TIT=Use+of+Force+Report&NO=008-0270E>.

City of Toronto, Press Release, "City Council unanimously approves community safety and crisis response pilots" (2 February 2021), online: <www.toronto.ca/news/city-council-unanimously-approves-community-safety-and-crisis-response-pilots/>.

"Cleveland Police death bite dog 'was out of control'", *BBC News* (21 September 2018), online: <www.bbc.com/news/uk-england-tees-45605943>.

City of Calgary, Press Release, “Funding announced to improve crisis response systems and community supports” (3 June 2021), online: <newsroom.calgary.ca/funding-announced-to-improve--crisis-response-systems-and-community-supports/>.

CMHA Peel Dufferin, Press Release, “Peel Regional Police launches the Mobile Crisis Rapid Response Team (MCRRT)” (last visited 20 September 2022), online: <cmhapeeldufferin.ca/news/peel-regional-police-launches-the-mobile-crisis-rapid-response-team-mcrrt/>.

Guiding principles on use of force (Washington, D.C.: Police Executive Research Forum, 2016), online(pdf): <www.policeforum.org/assets/30%20guiding%20principles.pdf>.

“Health Care Options – Crisis Outreach and Support Team (COAST) – Peel” (22 October 2021), online: <web.archive.org/web/20211022060623/https://www.ontario.ca/locations/health/locationDetails.php?location=29426534&lang=en>.

“Health state descriptions for Canadians: Section A - Affective disorders” (30 January 2012), online: *Statistics Canada* <www150.statcan.gc.ca/n1/pub/82-619-m/2012004/sections/sectiona-eng.htm>.

“ICD-10 Version:2016” (last visited 11 September 2022), online: *World Health Organization* <<https://icd.who.int/browse10/2016/en>>.

“Incident Management / Intervention Model” (3 October 2017), online: *Royal Canadian Mounted Police* <www.rcmp-grc.gc.ca/en/incident-management-intervention-model-imim>.

International Classification of Diseases, 10th ed (Geneva: World Health Organization, 2010).

“International Covenant on Civil and Political Rights” (last visited 23 September 2022), online: *OHCHR* <<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>>.

“Laying Charges” (last visited 21 September 2022), online: *Province of British Columbia* <www2.gov.bc.ca/gov/content/justice/criminal-justice/bcs-criminal-justice-system/understanding-criminal-justice/how-works/laying-charges>.

“Less lethal intervention options” (last visited 15 September 2022), online: *Royal Canadian Mounted Police* <www.rcmp-grc.gc.ca/en/conducted-energy-weapon-cew>.

“Mobile Crisis Intervention Team (MCIT)” (last visited 20 September 2022), online: *Toronto Police Service* <www.tps.ca/organizational-chart/communities-neighbourhoods-command/field-services/community-partnerships-engagement-unit/mobile-crisis-intervention-team-mcit/>.

“Myers Park shooting: David Cerven was unarmed when police fired”, *NZ Herald* (16 September 2015), online: <www.nzherald.co.nz/nz/myers-park-shooting-david-cerven-was-unarmed-when-police-fired/GUF32JPOHBKBTNXVT2LUPZFTA/>.

“Ontario demographics” (2019), online: *Government of Ontario* <www.ontario.ca/page/ontario-demographics>.

“Police and public safety” (11 April 2022), online: *Office of the Privacy Commissioner of Canada* <www.priv.gc.ca/en/privacy-topics/surveillance/police-and-public-safety>.

“Police Record Checks” (last visited 21 September 2022), online: *Canadian Mental Health Association – Ontario* <ontario.cmha.ca/documents/police-record-checks>.

“Population estimates - Office for National Statistics” (last visited 15 September 2022), online: *Office of National Statistics*
<www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates>.

“Preventing and responding to an overdose and naloxone” (6 July 2022), online: *Ottawa Public Health*
<www.ottawapublichealth.ca/en/public-health-topics/signs-of-overdose.aspx>.

“Recent Publications” (last visited 20 September 2022), online: *Serious Incident Response Team*
<sirt.novascotia.ca/publications>.

“SAY HER NAME” (last visited 12 September 2022), online: *African American Policy Forum*
<<https://www.aapf.org/sayhername>>.

“Subject Behaviour / Officer Response Database (SBOR)” (22 May 2009), online: *Royal Canadian Mounted Police* <www.rcmp-grc.gc.ca/en/privacy-impact-assessment-subject-behaviour-officer-response-database-sbor>.

“Suicide Prevention” (last visited 20 September 2022), online: *Mental Health Commission of Canada*
<www.mentalhealthcommission.ca/English/what-we-do/suicide-prevention>.

“Tachycardia: What is it?” (1 July 2019), online: *Harvard Health*
<www.health.harvard.edu/a_to_z/tachycardia-a-to-z>.

“Toronto police cleared in death of Otto Vass”, *The Globe and Mail* (5 November 2003), online:
<www.theglobeandmail.com/news/national/toronto-police-cleared-in-death-of-otto-vass/article22618259/>.

Databases & Tables

Jacques Marcoux & Katie Nicholson, “Deadly force: Fatal encounters with police in Canada: 2000-2017”, *CBC News* (5 April 2018), online: <<https://newsinteractives.cbc.ca/longform-custom/deadly-force>>.

Statistics Canada, Aboriginal Peoples Highlight Tables, 2006 Census (Ottawa: Statistics Canada, 2008), online: <www12.statcan.gc.ca/census-recensement/2006/dp-pd/hlt/97-558/pages/page.cfm?Lang=E&Geo=PR&Code=01&Table=1&Data=Count&Sex=1&Age=1&StartRec=1&Sort=2&Display=Page>.

Statistics Canada, Canadian Vital Statistics - Death database (CVSD) (Ottawa: Statistics Canada, 2022), online: <www23.statcan.gc.ca/imdb/p2SV.pl?Function=getSurvey&SDDS=3233>.

Statistics Canada, “Deaths, by cause, Chapter XX: External causes of morbidity and mortality (V01 to Y89)” (last visited 11 September 2022), online:
<<https://www150.statcan.gc.ca/t1/tbl1/en/cv.action?pid=1310015601#timeframe>>.

Statistics Canada, Table 13-10-0096-03 Perceived mental health, by age group (Ottawa: Statistics Canada, 2017), DOI: <10.25318/1310009601-eng>.

Statistics Canada, Table 13-10-0156-01 Deaths, by cause, Chapter XX: External causes of morbidity and mortality (V01 to Y89) (Ottawa: Statistics Canada, 2022), DOI: <10.25318/1310015601-eng>.

Statistics Canada, Table 13-10-0465-01 Mental health indicators (Ottawa: Statistics Canada, 2013), online: <www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1310046501>.

Statistics Canada, Table 13-10-0619-01 Mental health characteristics: Perceived need for mental health care (Ottawa: Statistics Canada, 2019), online: <www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1310061901>.

Statistics Canada, Table 14-10-0106-01 Employment and unemployment rate, annual, population centres and rural areas, inactive (Ottawa: Statistics Canada, 2021), DOI: <10.25318/1410010601-eng>.

Statistics Canada, Table 35-10-0076-01 Police personnel and selected crime statistics (Ottawa: Statistics Canada, 2022), online: <www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510007601>.

Statistics Canada, Table 35-10-0170-01 Number and percentage of homicide victims, by type of firearm used to commit the homicide (Ottawa: Statistics Canada, 2022), online: <www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510017001>.

Statistics Canada, Table 89-503-X Table 2 Aboriginal female population, by province or territory, Canada, 2006 (Ottawa: Statistics Canada, 2015), online: <www150.statcan.gc.ca/n1/pub/89-503-x/2010001/article/11442/tbl/tbl002-eng.htm>.

Statistics Canada, Uniform Crime Reporting Survey (UCR) (Ottawa: Statistics Canada, 2022), online: <www23.statcan.gc.ca/imdb/p2SV.pl?Function=getSurvey&SDDS=3302>.

“The Counted: people killed by police in the United States” (last visited 20 September 2022), online: *The Guardian* <www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database>.

Indices

Mental Illness & Addiction Index (Centre for Addiction and Mental Health), online: *Mental Illness & Addiction Index* <<https://www.camh.ca/en/health-info/mental-illness-and-addiction-index/>>.

Reports

A Collective Impact: Interim Report on the Inquiry Into Racial Profiling and Racial Discrimination of Black Persons by Toronto Police Service (Ontario Human Rights Commission, 2018), online: <ohrc.on.ca/en/public-interest-inquiry-racial-profiling-and-discrimination-toronto-police-service/collective-impact-interim-report-inquiry-racial-profiling-and-racial-discrimination-black>.

A Measured Approach to Conducted Energy Weapons (Toronto: Canadian Civil Liberties Association, 2010).

A National Use of Force Framework (2000), online(pdf): Canadian Association of Chiefs of Police <www.cacp.ca/cacp-use-of-force-advisory-committee-activities.html?asst_id=199>.

Abella, Rosalie D, Report of the Commission on Equality in Employment, (Ottawa: Minister of Supply and Services Canada, 1984), online: <publications.gc.ca/site/eng/471737/publication.html>.

Allan Consulting Group, Police, Ambulance and Clinical Early Response (PACER) evaluation: Final report, (Melbourne: Victoria Department of Health, 2012), online(pdf):

<content.health.vic.gov.au/sites/default/files/migrated/files/collections/research-and-reports/p/pacer_eval_18april2012_finalfinal---pdf.pdf>.

Annual Report 2013-2014 (Victoria: Independent Investigation Office of BC, 2014), online(pdf): <iiobc.ca/app/uploads/sites/472/2019/02/IIO_Annual_Report_2013_141.pdf>.

Annual Report 2014-2015 (Victoria: Independent Investigation Office of BC, 2015), online(pdf): <iiobc.ca/app/uploads/sites/472/2019/02/IIO_Annual_Report_2014_15.pdf>.

Annual Report 2015-2016 (Victoria: Independent Investigation Office of BC, 2016), online(pdf): <iiobc.ca/app/uploads/sites/472/2019/02/IIO-2015-2016-Annual-Report-Interactive.pdf>.

Annual Report 2016-2017 (Victoria: Independent Investigation Office of BC, 2017), online(pdf): <iiobc.ca/app/uploads/sites/472/2019/02/IIO-2016-2017-Annual-Report-Final.pdf>.

Annual Report 2017-2018 (Victoria: Independent Investigation Office of BC, 2018), online(pdf): <https://iiobc.ca/app/uploads/sites/472/2019/05/17-18-Annual-Report_Web-Version.pdf>.

Annual Report 2018 (Toronto: Special Investigations Unit), online(pdf): <www.siu.on.ca/pdfs/ar_2018_pdf.pdf>.

Annual Report 2018/2019 (Victoria: Office of the Police Complaints Commissioner, 2019).

Annual Report 2020-2021 (Surrey: Independent Investigation Office of BC, 2021), online: <iiobc.ca/app/uploads/sites/472/2021/07/IIO-Annual-Report_2020_2021.pdf>.

Armed Response Team trial (New Zealand Police, 2020), online: <www.police.govt.nz/can-you-help-us/armed-response-team-trial>.

Arriagada, Paula, Statistics Canada, First Nations, Métis and Inuit Women, (Ottawa: Statistics Canada, 2016), online: <www150.statcan.gc.ca/n1/pub/89-503-x/2015001/article/14313-eng.htm>.

Baess, Edward, Integrated Mobile Crisis Response Team: Review of Pairing Police with Mental Health Services, (Victoria: Victoria City Police Department and Vancouver Island Health Authority, 2005), online(pdf): <citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.583.1431&rep=rep1&type=pdf>.

Bain, Ron G, Examination of Less-Lethal Force Options, Including the Possible Expansion of Conducted Energy Weapons (CEWs)", (Toronto: Toronto Police Services Board, 2017), online(pdf): <www.oacp.ca/en/committee/cscp/public/OACP%20Report%20-%20Examination%20of%20Less-Lethal%20Force%20Options%20and%20Expansion%20of%20CEWs_Oct%2018%202017.pdf>.

Bastarache, Hon. Michel, Broken Lives, Broken Dreams: The Devastating Effects of Sexual Harassment on Women in the RCMP: Final Report on the Implementation of the Merlo Davidson Settlement Agreement, (Ottawa: Merlo Davidson Settlement Independent Assessor, 2020).

Braidwood, T R, Restoring public confidence: restricting the use of conducted energy weapons, (Victoria: Braidwood Commission on Conducted Energy Weapon Use, 2009).

— — —, Why? The Robert Dziekanski Tragedy, (Vancouver: Braidwood Commission on the Death of Robert Dziekanski, 2010), online(pdf): <www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/inquiries/braidwoodphase2report.pdf>.

Breakdown of ASIRT Files by Category (Edmonton: Alberta Serious Incident Response Team, 2019), online: <solgps.alberta.ca/asirt/Statistics/Pages/breakdown.aspx>.

Brink, J et al, A Study of How People with Mental Illness Perceive and Interact with the Police, (Calgary: Mental Health Commission of Canada, 2011), online(pdf): <www.mentalhealthcommission.ca/wp-content/uploads/drupal/Law_How_People_with_Mental_Illness_Perceive_Interact_Police_Study_ENG_1_0_1.pdf>.

Brown, Jeremy, Comments on the Use of Capsaicin Spray, (Ottawa: Royal Canadian Mounted Police), online(pdf): <www.publicsafety.gc.ca/lbrr/archives/cnmcs-plcng/cn26707-eng.pdf>.

Butler, Chris, The Use of Force Model and its Application to Operational Law Enforcement – Where have we been and where are we going?, (Canadian Association of Chiefs of Police, 2009).

Canada, A Report on Mental Illnesses in Canada (Ottawa: Health Canada, 2002), online(pdf): <www.phac-aspc.gc.ca/publicat/miic-mmacc/pdf/men_ill_e.pdf>.

Cavoukian, Ann, Crossing the Line: The Indiscriminate Disclosure of Attempted Suicide Information to U.S. Border Officials via CPIC: A Special Investigation Report, (Toronto: Information and Privacy Commissioner, 2014), online(pdf): <www.ipc.on.ca/wp-content/uploads/Resources/indiscriminate_disclosure.pdf>.

Cohen, Dr Irwin M & Len Garis, Determinants of Injury and Death in Canadian Police Officers, (Langley: University of the Fraser Valley, 2018), online(pdf): Centre for Public Safety and Criminal Justice Research <cjr.ufv.ca/wp-content/uploads/2018/09/Determinants-of-Injury-and-Death-in-Police-Officers-August-2018.pdf>.

Cole, David P & Margaret Gittens, Report of the Commission on Systemic Racism in the Ontario Criminal Justice System, (Toronto: Commission on Systemic Racism in the Ontario Criminal Justice System, 1995).

Coroner's Inquest Family Reimbursement Program Guidelines (Toronto: Government of Canada, 2017), online(pdf): <web.archive.org/web/20181224095723/https://www.mcscs.jus.gov.on.ca/sites/default/files/content/mcscs/docs/CIFRP%20Guidelines.pdf>.

Corporate Risk Management Annual Report, 2020 (Toronto: Toronto Police Service, 2020).

Correctional Service Canada, Annual Report on Deaths in Custody 2014/25 (Ottawa: Correctional Service Canada, 2016), online: <www.csc-scc.gc.ca/research/092/005008-3008-eng.pdf>.

Davies, William H, Alone and Cold: the Davies Commission Inquiry into the Death of Frank Paul (Vancouver, BC: Davies Commission Inquiry into the Death of Frank Paul, 2009), online(pdf): <www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/inquiries/daviescommission-finalreport.pdf>.

Data and Justice Criminology Lab, Institute of Criminology and Criminal Justice, Carleton University; The Centre for Research & Innovation for Black Survivors of Homicide Victims (The CRIB), at the Factor-Inwentash Faculty of Social Work, University of Toronto; Canadian Civil Liberties Association; Ethics and Technology Lab, Queen's University, "Police-involved Deaths are on the Rise, as are Racial Disparities in Canada" (Tracking (In)Justice: A Living Data Set Tracking Canadian Police-Involved Deaths, 2023).

Deaths During or Following Police Contact: Statistics for England and Wales 2017-2018 (London: Independent Office for Police Conduct, 2018).

Deaths During or Following Police Contact: Statistics for England and Wales 2018/2019 (London: Independent Office for Police Conduct, 2019), online(pdf):

<www.policeconduct.gov.uk/sites/default/files/Documents/statistics/deaths_during_following_police_contact_201819.pdf>.

Deaths During or Following Police Contact: Statistics for England and Wales: Time Series Tables 2004/2005 to 2017/2018 (London: Independent Office for Police Conduct, 2018), online(pdf): <www.policeconduct.gov.uk/sites/default/files/Documents/statistics/deaths_during_following_police_contact_201819.pdf>.

Dubé, Paul, A Matter of Life and Death, (Toronto: Ontario Ombudsman, 2016), online: <www.ombudsman.on.ca/resources/reports-and-case-summaries/reports-on-investigations/2016/a-matter-of-life-and-death>.

Dunn, Sara, Statistics Canada, Police officers murdered in the line of duty, 1961 to 2009, (Ottawa: Statistics Canada, 2010), online: <www150.statcan.gc.ca/n1/pub/85-002-x/2010003/article/11354-eng.htm>.

Engel, Robin S, Hannah D McManus & Tamara D Herold, The Deafening Demand for De-escalation Training: A Systematic Review and Call for Evidence in Police Use of Force Reform, (International Association of Chiefs of Police, 2018).

Hoffman, Ron & Laurel Putman, Not Just Another Call... Police Response to People with Mental Illnesses in Ontario, (London: Centre for Addiction and Mental Health, 2004), online(pdf): <www.forcescience.com/wp-content/uploads/2011/11/Not_Just_Another_Call.pdf>.

Hubbs, Ken, Impact munitions use: Types, targets, effects, (US Department of Justice, Office of Justice Programs, National Institute of Justice, 2004).

Iacobucci, Hon Frank, Police Encounters with People in Crisis, (Toronto: Toronto Police Service, 2014).

IPCC review of Taser complaints and incidents, 2004-2013 (London: Independent Police Complaints Commission, 2014), online(pdf): <webarchive.nationalarchives.gov.uk/ukgwa/20170914112800mp_/http://www.ipcc.gov.uk/sites/default/files/Documents/guidelines_reports/Taser_report_final_2014.pdf>.

Johnston, Joel, The Use of Impact Weapons By Police Officers in British Columbia, (Commission of Inquiry into Policing in British Columbia, 1993).

Joint Statement from Canadian Civilian Oversight Agencies on Release of Names (2015), online(pdf): Independent Investigations Office of BC <iiobc.ca/app/uploads/sites/472/2019/02/Joint_Statement_Release_of_Names_2015.pdf>.

Karp, Aaron, Estimating Global Law Enforcement Firearms Numbers, (Canberra: Australian Department of Foreign Affairs and Trade, 2018), online(pdf): <www.smallarmssurvey.org/sites/default/files/resources/SAS-BP-Law-Enforcement-Firearms-Numbers.pdf>.

Kiedrowski, John et al, A Discussion of the Collection and Analysis of Data on the Use of Force in Encounters between the Police and Members of the Public, (Ottawa: Public Safety Canada, 2014).

Kirkpatrick, Hon. Pamela, Final Report on Tiller/Copland/Roach RCMP Class Action, (Ottawa: Office of the Assessor, Tiller/Copland/Roach RCMP Class Action, 2022).

Lamanna, Denise et al, Toronto Mobile Crisis Intervention Team (MCIT): Outcome Evaluation Report, (Toronto: Centre for Research on Inner City Health and St. Michael's Hospital, 2015), online: <research.unityhealth.to/wp-content/uploads/2016/12/MCIT-outcome-evaluation-Final-report.pdf>.

Linden, Sidney, The Ipperwash Inquiry - Final Report, (Toronto: Ipperwash Commission of Inquiry, 2007), online: <<https://wayback.archive-it.org/16312/20211208091140/https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/report/index.html>>.

Lyneham, Matthew & Alana Hewitt-Rau, Motor-vehicle pursuit related fatalities in Australia, 2000-11, (Canberra: Australian Institute of Criminology, 2013), online(pdf): <www.aic.gov.au/publications/tandi/tandi452>.

Manitoba, 2018-2019 Annual Report (Independent Investigations Unit, 2019), online(pdf): <www.iiumanitoba.ca/pdf/iiu_2018_2019_annual_report.pdf>.

Martino, Joseph, SIU Director's Report - Case # 20-OFD-075, (Special Investigations Unit, 2020), online: <www.siu.on.ca/en/directors_report_details.php?drid=1010>.

McGuinness, Gordon, Bite and Hold Review Report: Bark and Hold vs Bite and Hold, (Vancouver: Vancouver Police Department), online: <vancouver.ca/police/assets/pdf/media/2012/bite%20and%20hold%20review%20report.p>.

McNeilly, Gerry, Broken Trust: Indigenous People and the Thunder Bay Police Service, (Toronto: Office of the Independent Police Review Director, 2018).

Michael Tulloch, Report of the Independent Police Oversight Review, (Toronto: Government of Ontario, 2017), online: <www.siu.on.ca/pdfs/report_of_the_independent_police_oversight_review.pdf>.

Moreau, Sylvie, Statistics Canada, Canadian Coroner and Medical Examiner Database: Annual Report 2006 to 2008, Catalogue no. 82-214-X (Ottawa: Statistics Canada, 2012), online(pdf): <www150.statcan.gc.ca/n1/en/pub/82-214-x/82-214-x2012001-eng.pdf?st=2W6SpU9g>.

National Police Services: Building a Sustainable Future (Ottawa: Royal Canadian Mounted Police, 2012), online: <www.rcmp-grc.gc.ca/en/national-police-services-building-a-sustainable-future>.

Ontario, Annual Report 2020-2021 (Toronto: Special Investigation Unit, 2021), online: <www.siu.on.ca/pdfs/2020-21_siu_annual_report_final_july_28_2021_-_clean.pdf>.

Operational Manual, Independent Investigation Office of BC, Independent Investigation Office of BC (Ottawa: Royal Canadian Mounted Police, 2014).

Pearson, Caryn, Teresa Janz & Jennifer Ali, Statistics Canada, Mental and substance use disorders in Canada, Catalogue no. 82-624-X (Ottawa: Statistics Canada, 2015), online: <www150.statcan.gc.ca/n1/pub/82-624-x/2013001/article/11855-eng.htm>.

Plecas, Darryl et al, Understanding and Reducing RCMP Motor Vehicle Collisions, (Langley: BC Centre for Social Responsibility, 2011), online: University of the Fraser Valley <www.ufv.ca/media/assets/criminal-justice-research/Police-Motor-Vehicle-Crash-Report.pdf>.

Police pursuits and public safety: a report (Ottawa: RCMP Public Complaints Commission, 1999), online(pdf): <www.publicsafety.gc.ca/lbrr/archives/hv%208080.p9%20r69%201999-eng.pdf>.

Police shootings of people with a mental illness (Canberra: Australian Institute of Criminology, 2013), online: <www.aic.gov.au/publications/rip/rip34>.

Police use of firearms statistics, England and Wales: April 2018 to March 2019 (London: Home Office, 2019), online(pdf): GOVUK <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/820556/police-use-firearms-statistics-england-and-wales-april-2018-to-march-2019-hosb1319.pdf>.

Policy on preventing discrimination based on mental health disabilities and addictions (Toronto: Ontario Human Rights Commission, 2014).

Provincial Policing Standards (British Columbia), online(pdf): <www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/police/standards/1-2-2-intermediate-weapons-b.pdf>.

Puder, Gil, Neck Restraints as a Use of Force, (Vancouver: Policing in B.C. Commission of Inquiry, 1993).

Rapport annuel 2017-2018 (Bureau des enquêtes indépendantes, 2018), online: <www.bei.gouv.qc.ca/fileadmin/documents/publications/BEI_Rapport_annuel_2017-18_WEB.pdf>.

Rapport annuel 2018-2019 (Bureau des enquêtes indépendantes, 2019), online(pdf): <https://www.bei.gouv.qc.ca/fileadmin/documents/publications/BEI_Rapport_annuel_2018-2019.pdf>.

RCMP Use of Conducted Energy Weapons (Ottawa: Commission for Public Complaints Against the Royal Canadian Mounted Police, 2008), online(pdf): <www.crc-cetp.gc.ca/pdf/FinalCEWReport_e.pdf>.

Re Brian Lloyd Sinclair (Winnipeg: Provincial Court of Manitoba, 2014), online(pdf): <www.manitobacourts.mb.ca/site/assets/files/1051/brian_sinclair_inquest_-_dec_14.pdf>.

Re Joyce Echaquan (Montréal: Bureau du coroner Québec, 2021), online(pdf): <www.coroner.gouv.qc.ca/fileadmin/Enquetes_publiques/2020-EP00275-9.pdf>.

Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls (National Inquiry into the Missing and Murdered Indigenous Women, 2019) (Chair: Marion Buller), online: <www.mmiwg-ffada.ca/final-report/>.

Report of the Ontario Human Rights Commission on police use of force and mental health (Toronto: Ontario Human Rights Commission, 2014), online: <www.ohrc.on.ca/en/report-ontario-human-rights-commission-police-use-force-and-mental-health>.

Report of the Panel of Mental Health and Medical Experts Review of Excited Delirium (Dartmouth, NS: Government of Nova Scotia, 2009) (Chair: S Kutcher).

Saunders, Mark, Annual Report 2016: Use of Conducted Energy Weapons, (Toronto: Toronto Police Services Board Report, 2017), online: <www.tpsb.ca/component/jdownloads/send/42-2017/557-march-23?option=com_jdownloads>.

Selman, Luauna, Office of the Police Complaint Commissioner, 2018/2019 – 1st And 2nd Quarter Statistical Report, (Victoria: Office of the Police Complaint Commissioner, 2018), online(pdf): <opcc.bc.ca/wp-content/uploads/2019/02/2018-2019-1st-and-2nd-Quarter-Stats-April-1-to-Sep-30-updated.pdf>.

— — —, Office of the Police Complaint Commissioner, 2018/2019 – 3rd Quarter Statistical Report, (Victoria: Office of the Police Complaint Commissioner, 2018), online(pdf): <opcc.bc.ca/wp-content/uploads/2019/02/2018-2019-3rd-Quarter-Stats-Sep-30-to-Dec-31.pdf>.

— — —, Office of the Police Complaint Commissioner, 2018/2019 – 4th Quarter Statistical Report, (Victoria: Office of the Police Complaint Commissioner, 2019), online(pdf): <opcc.bc.ca/wp-content/uploads/2019/08/4th-Quarter-Statistical-Report-2018-2019.pdf>.

Semple, Tori & Craig Bennell, Injuries and Deaths Proximate to Oleoresin Capsicum Spray Deployment: A Literature Review, (Ottawa: Correctional Service Canada, 2018), online: <www.publicsafety.gc.ca/cnt/rsrscs/lbrr/ctlg/dtIs-en.aspx?d=PS&i=97679710>.

Shining a light on mental health in Black communities (Mental Health Commission of Canada, 2021), online: <mentalhealthcommission.ca/resource/shining-a-light-on-mental-health-in-black-communities/>.

Skolnik, Terry & Vanessa MacDonnell, Policing Arbitrariness: Fleming v. Ontario and the Ancillary Powers Doctrine, (Rochester, NY: Social Science Research Network, 2020), DOI: <10.2139/ssrn.3679329>.

Smetanin, Paul et al, The life and economic impact of major mental illnesses in Canada, (Ottawa: Mental Health Commission of Canada, 2011).

Statement on the Medical Implications of Use of the TASER X2 Conducted Energy Device System (Scientific Advisory Committee on the Medical Implications of Less-Lethal Weapons, 2016) (Chair: RJ Flower), online(pdf): <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/595242/Medical_Statement_on_the_TASER_X2_system.pdf>.

Statistics Canada, Police resources in Canada, 2019 (Ottawa: Statistics Canada, 2020), online: <www150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00015-eng.htm>.

Submission to the Government of Canada on Police Abuse of Indigenous Women in Saskatchewan and Failures to Protect Indigenous Women from Violence (Human Rights Watch, 2017), online: <www.hrw.org/news/2017/06/19/submission-government-canada-police-abuse-indigenous-women-saskatchewan-and>.

The Expert Panel on the Medical and Physiological Impacts of Conducted Energy Weapons, The Health Effects of Conducted Energy Weapons, (Ottawa, ON: Council of Canadian Academies, 2013) (Chair: Stephen T Goudge), online: <cahs-acss.ca/wp-content/uploads/2015/07/CofCA_13-151_CEW_Book_E_New-Font_WEB_v21.pdf>.

The First Year In Review: 2012-2013 Annual Report (Halifax: Serious Incident Response Team, 2012).

The Health Effects of Conducted Energy Weapons (Ottawa: Council of Canadian Academies, The Expert Panel on the Medical and Physiological Impacts of Conducted Energy Weapons, 2013).

Those who take us away: Abusive policing and failures in protection of Indigenous women and girls in Northern British Columbia, Canada (New York: Human Rights Watch, 2013), online: <www.hrw.org/report/2013/02/13/those-who-take-us-away/abusive-policing-and-failures-protection-indigenous-women>.

Trust Confidence Integrity Independence, Annual Report 2013-2014 (Halifax: Serious Incident Response Team, 2017).

Trust Confidence Integrity Independence, Annual Report 2014-2015 (Halifax: Serious Incident Response Team, 2017).

Trust Confidence Integrity Independence, Annual Report 2015-2016 (Halifax: Serious Incident Response Team, 2017).

Trust Confidence Integrity Independence, Annual Report 2016-2017 (Halifax: Serious Incident Response Team, 2017).

Under suspicion: Issues raised by Indigenous peoples (Toronto: Ontario Human Rights Commission, 2017), online: <www.ohrc.on.ca/en/under-suspicion-issues-raised-indigenous-peoples>.

Wahbi, Rafik Nader, Sterling Johnson & Leo Beletsky, From Crisis Response to Harm Prevention: The Role of Integrated Service Facilities, (Rochester, NY: Social Science Research Network, 2020).

Wortley, Scot et al, Police Use of Force in Canada: A Review of Data, Expert Opinion, and the International Research Literature, (Ottawa: Canadian Criminal Justice Association, 2021), online: <www.ccja-acjp.ca/pub/en/wp-content/uploads/sites/8/2021/08/Full-Report-PUF.pdf>.

Wright, David, Report of the Commission of Inquiry into matters relating to the death of Neil Stonechild, (Regina: Publications Saskatchewan, 2004), online(pdf): <www.publications.gov.sk.ca/freelaw/Publications_Centre/Justice/Stonechild/Stonechild.pdf>.