

Attachment B

RESTORING PUBLIC CONFIDENCE

Restricting the Use of Conducted Energy Weapons in British Columbia

BRAIDWOOD COMMISSION
ON CONDUCTED ENERGY WEAPON USE

JUNE 2009

RESTORING PUBLIC CONFIDENCE

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BRAIDWOOD COMMISSION on Conducted Energy Weapon Use

BRITISH COLUMBIA

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Recommendation 1

I recommend that officers of provincially regulated law enforcement agencies be authorized to deploy a conducted energy weapon only in relation to enforcement of a federal criminal law.

2. The subject's behaviour

a. *General rule*

What threshold of subject behaviour should be required before an officer is justified in deploying a conducted energy weapon? At present, this weapon is classified in British Columbia as an intermediate weapon, and consequently the National Use of Force Framework permits use in the face of "active resistance." Most provincially regulated law enforcement agencies adopt this subject behaviour threshold.

With respect to the RCMP, its policy includes the conducted energy weapon as an intermediate weapon which, according to the Incident Management/Intervention Model, authorizes use in the face of "active resistance." However, its February 2009 policy amendment adds a further requirement that the subject's behaviour also poses "a threat to officer or public safety."

Although the term "active resistance" implies some form of active engagement with or against the officer, the definitions capture a broader range of conduct that belies any form of "resistance," let alone "active" resistance. They state:

The National Use of Force Framework

Active Resistance—the subject uses non-assaultive physical action to resist, or while resisting an officer's lawful direction. Examples would include pulling away to prevent or escape control, or overt movements such as walking toward, or away from an officer. Running away is another example of active resistance.²⁴⁵

RCMP's Incident Management/Intervention Model

Active Resistance—the person demonstrates resistance to control by the police officer through behaviours such as pulling away, pushing away or running away. This can include a situation where a police officer activates a police vehicle's

²⁴⁵ *Ibid.*, see footnote 58, p. 7.

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emergency equipment and the suspect fails to stop and attempts to evade apprehension by driving evasively.²⁴⁶

Under both these formulations, the focus is on the officer attempting to exercise control or direction over the subject, and on the subject walking toward the officer or pulling away, pushing away, or running away from the officer.

Police officers who made presentations during our public forums uniformly spoke in favour of retaining this subject behaviour threshold. However, in 2008 several public agencies published reports recommending that the threshold be raised from “active resistance” to “assaultive.” They include:

- Commission for Public Complaints Against the RCMP;
- House of Commons Standing Committee on Public Safety and National Security;
- Nova Scotia Advisory Panel to the Minister of Justice;
- Compliance Strategy Group (Kiedrowski Report) to the RCMP; and
- Saskatchewan Ombudsman.²⁴⁷

Both use-of-force frameworks include this “assaultive” level of subject behaviours, which is higher than “active resistance,” but lower than “grievous bodily harm or death” (which justifies the use of lethal force). They state:

National Use of Force Framework

Assaultive—the subject attempts to apply, or applies force to any person; attempts or threatens by an act or gesture, to apply force to another person, if he/she has, or causes that other person to believe upon reasonable grounds that he/she has, present ability to effect his/her purpose. Examples include kicking and punching, but may also include aggressive body language that signals an intent to assault.²⁴⁸

RCMP’s Incident Management/Intervention Model

Assaultive—the person attempts or threatens to apply force to anyone, *e.g.*, punching, kicking, clenching fists with intent to hurt or resists, threats of an

²⁴⁶ *Ibid.*, see footnote 63.

²⁴⁷ See Part 8 for summaries of these and several other reports.

²⁴⁸ *Ibid.*, see footnote 58, pp. 7-8.

assault. In the case of a person operating a vehicle, they attempt to collide with the police vehicle, another vehicle or a pedestrian.²⁴⁹

In my view, several matters must be considered before deciding what threshold of subject behaviour to recommend—the medical risks as we currently understand them, and proportionality, which necessitates a discussion of Canadian values.

i. Medical risks

I reviewed the medical evidence in Part 9. It may be useful to summarize here the main conclusions that I drew from that review:

- An external electrical current can overtake the human body’s internal electrical system, resulting in ventricular capture, which may lead to ventricular tachycardia and, in some cases, ventricular fibrillation.
- There is evidence that the electrical current from a conducted energy weapon is capable of triggering ventricular capture.
- Although the results from animal studies should be approached with caution, it is safe to draw several conclusions from these studies that can be extrapolated to humans:
 - The greatest risk of ventricular fibrillation arises when the weapon’s probes are vectored across the heart; and
 - The risk of ventricular fibrillation increases as the tips of the probes get closer to the wall of the heart.
- There is a short “window” during the heart’s normal beat cycle (the T-wave) when the heart is most vulnerable to an external electrical shock. During this period, current pulses 25 or more times lower than at other times in the heart cycle may induce fibrillation.
- There are some circumstances in which the risk of ventricular fibrillation may increase, including:
 - *Heart disease*—people with cardiovascular disease are at a significantly higher risk of ventricular fibrillation, for several reasons—diseased hearts are much more vulnerable to arrhythmias, scar tissue interrupts the normal flow of electrical currents around the heart, and the shock and intense pain that a subject experiences may cause the heart to beat faster and more forcefully, placing greater strain on the heart wall, which is dangerous for people with

²⁴⁹ *Ibid.*, see footnote 63.

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chronic high blood pressure or for people suffering from congestive heart failure.

- *Thin subjects*—people with an unusually thin chest skin-to-heart distance are at greater risk for ventricular fibrillation.
 - *Subject's response*—even in healthy subjects, the pain, anxiety, and stress associated with conducted energy weapon use will stimulate the heart through an outpouring of the sympathetic nervous system and an outpouring of adrenaline. The heart beats faster, blood pressure increases, and the electrical properties of heart muscle cells are altered, making the heart more prone to developing dangerous arrhythmias.
- The intense muscle contractions resulting from the weapon's electrical current can lead to ventricular fibrillation due to two mechanisms:
 - The contractions may result in the buildup of lactic acid and carbon dioxide in the blood. This lowers the blood pH, thereby increasing acidity, which may lead to acidosis. This affects the electrolyte balance, especially potassium, and the electrical triggering of the heart, making the heart more susceptible to ventricular fibrillation.
 - The contractions can cause muscle damage (rhabdomyolysis), contributing to an increase in potassium levels that may electrically imbalance the heart.

Although ventricular fibrillation is the greatest concern, there are other medical risks associated with use of a conducted energy weapon, including:

- *Ventricular tachycardia*—electrical current can overtake the human body's internal electrical system, resulting in ventricular capture which may lead to ventricular tachycardia and which may also lead to ventricular fibrillation. This can happen at almost any part of the heartbeat cycle and, in the case of prolonged weapon discharge, can capture the heart for the duration of the discharge.
- *Myocardial infarction (heart attack)*—there is evidence that electrical current can cause coronary artery spasm, leading to myocardial infarction. Alternatively, stress and anxiety resulting from the weapon's discharge will inevitably increase the heart rate and result in a greater oxygen demand. Subjects with pre-existing coronary artery disease have a significantly reduced capacity to supply the heart muscle with oxygen-rich blood, which may lead to ischemia or, in severe cases, myocardial infarction.
- *Implanted pacemakers and defibrillators*—these devices deliver their electrical currents directly into the heart by way of metal leads running from

the devices into the heart muscles. Researchers have raised several concerns:

- The wires may conduct the current from the conducted energy weapon directly into the heart, in which case much less current would be required to trigger an arrhythmia.
- The weapon's current might override the device's current.
- The device might interpret the weapon's current as ventricular fibrillation, causing the defibrillator to emit an electrical current inappropriately.
- The weapon's current might damage the implanted device.
- **Blood pressure**—an increase in a subject's heart rate, leading to increased blood pressure, could cause an acute stroke, rupture a pre-existing aneurysm (an abnormal ballooning of the wall of an artery), or rupture the heart wall where coronary heart disease has created scar tissue.
- **Respiratory risks**—discharge of the weapon's probes into the upper torso (especially multiple deployments) could impair the subject's ability to breathe, due to the electrical current's induction of spasm into the intercostal muscles around the rib cage and the thoracic diaphragm. This could lead to acidosis, or to acute respiratory failure, which is immediately life-threatening.
- **Metabolic risks**—rhabdomyolysis (muscle damage that can be brought on by direct electrical damage to muscles) can lead to the release of muscle breakdown products into the bloodstream. If released at levels higher than the kidneys can clear, they can cause acute renal (kidney) failure.

When we examine the risk of ventricular fibrillation, the risks associated with implanted pacemakers or defibrillators, and the risk of respiratory failure, it appears to me that the single most important factor in creating the medical risk, or in exacerbating it, is deployment of the conducted energy weapon in probe mode, with the probes across the chest vectoring the heart. It is the combination of deployment in probe mode (where there is deeper penetration of the device's electrical current into the subject's body because of the greater spread between the probes and the imbedding of the probes up to 9 mm into the chest wall) and positioning of the probes (near the heart wall, intercostal muscles, or diaphragm) that are largely responsible for creating the risks of interference with the heart's normal rhythms or of interference with breathing.

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If it were practical to do so, I would recommend severe restrictions on the probe mode deployment of a conducted energy weapon in a subject's chest area because of the medical risks that have been identified, many of which would not be apparent to the officer on the scene. However, I have concluded that such a restriction would not be workable, for the following reason. Officers are already taught (properly, in my view) not to aim a conducted energy weapon at a subject's head, throat, or genital area (because of the associated medical risks), and to avoid the arms and legs (because of the risk that one or both of the probes will miss the subject, rendering the deployment ineffective). If the chest area were added to that list of prohibited target areas, the only remaining frontal target area would be the lower abdomen, but this is an unrealistically small target area, given the intensity and rapidly changing nature of many police-subject encounters. It would likely mean that officers would have to restrict their use to push-stun mode, or to probe mode on the subject's back.

Having said that, I remain concerned about the medical risks I have discussed. At the very least, recruit training should emphasize the medical risks that have been identified to date, and recruits should be counselled to deploy in probe mode in the chest area only as a last resort.

There are also several "indirect" medical risks associated with the use of conducted energy weapons. Most of these risks flow from:

- the intense pain, stress, and anxiety experienced by the subject—this can lead to ventricular fibrillation in healthy subjects or those with pre-existing heart conditions, to myocardial infarction, or to internal hemorrhaging due to rupture of an artery or the heart wall; or
- the intense muscle contractions caused by the weapon's electrical current—this can lead to ventricular fibrillation due to acidosis or rhabdomyolysis, or to renal failure due to rhabdomyolysis.

As I see it, these medical risks are only indirectly associated with the weapon's deployment. By that, I mean that deployment of the weapon may trigger a physiological response by the subject, which can then lead to a medical complication; or the weapon's electrical current may cause muscle contractions that then lead to other medical consequences. I am satisfied that these risks can be managed through

appropriate rules respecting multiple deployments of weapons, and through different approaches to de-escalating crisis situations involving emotionally disturbed subjects.

ii. Proportionality—An application of Canadian values

Quite apart from the medical risks that I have discussed, it seems to me that deciding what level of subject behaviour justifies deployment of a conducted energy weapon requires a consideration of proportionality. In other words, the use of force should be commensurate to the level of the subject's resistance. In deciding this issue, which is an essentially subjective exercise, I give much weight to what I call Canadian values, which in this context includes matters such as respect for the individual, the public's right to personal safety, and fairness. Until now, it has been left to law enforcement agencies to make their own determination of proportionality and they have, almost without exception, adopted a subject behaviour threshold of "active resistance."

If the definitions of "active resistance" quoted earlier had focused primarily on a subject's active confrontation with an officer, and had then added as a subordinate example running away from an officer, I might have concluded that "active resistance" is a reasonable threshold. However, the definitions do just the opposite—the principal focus of both formulations is pulling away from the officer.

In my view, that type of behaviour is not egregious enough to warrant deployment of a weapon that is designed to inflict intense pain and to totally incapacitate the subject. There are other devices, weapons, and force options available to police officers to adequately deal with these types of behaviours. It would embarrass me as a Canadian to watch a police officer deploy a conducted energy weapon against a subject, even one under investigation for a criminal offence, for merely walking or running away from the officer.

If "active resistance" is too low a threshold, then what level of subject behaviour would be more appropriate, with regard to the medical risks I have discussed and my sense of proportionality as viewed through a "Canadian values" lens? Should I recommend the RCMP's new "active resistance plus a threat to officer or public safety" level, the "assaultive" level found in the two use-of-force models, or perhaps

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even the higher “grievous bodily harm or death” level as suggested by several presenters? Or should I propose a different threshold falling somewhere within this range?

In considering this issue, I am mindful of the two competing values discussed earlier—the need to give the police appropriate tools to do their difficult job and the duty on officers to use the least force necessary in order to manage the risk. When then-Attorney General Ujjal Dosanjh approved use of conducted energy weapons in 1999, he did so on the understanding that they would be deployed sparingly: only in situations where the subject was assaultive or combative; or a threat to themselves, the police, or some third person. Since then, the threshold for use has dropped significantly, from assaultive behaviour to a very loosely drawn definition of active resistance.

In my view, it would be unrealistically restrictive to limit use of conducted energy weapons to “grievous bodily harm or death” situations. As I discussed earlier, officers are justified in using lethal force in such situations so, by definition, they would also be permitted to resort to any other force option as well, including conducted energy weapons.

That brings me to the RCMP’s new “active resistance plus threat” level, and to “assaultive” behaviour, which I will discuss in turn. As I discussed in Part 5, my interpretation of the RCMP’s February 2009 policy amendment is that deployment of a conducted energy weapon is now permitted against a subject who is exhibiting active resistance, but only if the subject’s behaviour poses a threat to officer or public safety. The RCMP’s Incident Management/Intervention Model states that a subject is actively resistant if “the person demonstrates resistance to control by the police officer through behaviours such as pulling away, pushing away or running away.” It is difficult to see how any of these behaviours can pose a threat to officer or public safety, so the new policy must contemplate some more dangerous level of subject behaviour. In the RCMP’s Incident Management/Intervention Model, the next higher level is “assaultive” which, as I will discuss below, applies when “the person attempts

or threatens to apply force to anyone.” However, the new policy is so generally worded that it would appear to catch behaviours that fall below the “assaultive” threshold. For example, it uses the term “threat” without adding any qualifier, such as the Incident Management/Intervention Model’s threat “to apply force.” Similarly, “public safety” is ambiguous. Assuming that it means a threat to the safety of a member of the public, the policy provides no guidance as to what type of threat must be present before deployment is justified. Further, the new policy does not state how serious or imminent the threat must be, and appears to authorize deployment based solely on the officer’s subjective opinion, without also requiring that there are reasonable grounds for doing so. In my view, the threshold for deployment contained in the RCMP’s new policy is too imprecise and, based on my interpretation of it, too low to justify deployment of a conducted energy weapon.

Turning now to a consideration of the “assaultive” level of subject behaviour, “assaultive” is the general range of subject behaviour that I believe constitutes an appropriate threshold. However, I have misgivings about the actual descriptions as found in the two use-of-force models. They state as follows:

National Use of Force Framework²⁵⁰

Assaultive—the subject attempts to apply, or applies force to any person; attempts or threatens by an act or gesture, to apply force to another person, if he/she has, or causes that other person to believe upon reasonable grounds that he/she has, present ability to effect his/her purpose. Examples include kicking and punching, but may also include aggressive body language that signals an intent to assault.

RCMP’s Incident Management/Intervention Model²⁵¹

Assaultive—the person attempts or threatens to apply force to anyone, *e.g.*, punching, kicking, clenching fists with intent to hurt or resists, threats of an assault. In the case of a person operating a vehicle, they attempt to collide with the police vehicle, another vehicle or a pedestrian.

If we “unbundle” the National Use of Force Framework definition, we find that “assaultive” includes four different types of behaviours:

250 *Ibid.*, see footnote 58, pp. 7-8.

251 *Ibid.*, see footnote 63.

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- *Applying force to another person*—this approximates the criminal offence of assault under s. 265(1)(a) of the *Criminal Code*, which states, “A person commits an assault when without the consent of another person, he applies force intentionally to that other person, directly or indirectly.”
- *Attempting to apply force to any person*—this approximates the separate criminal offence of attempted assault, under the combined effect of s. 265(1)(a) and s. 24 of the *Criminal Code*.
- *Attempting or threatening by an act or gesture, to apply force to another person, if he/she has, or causes that other person to believe upon reasonable grounds that he/she has, present ability to effect his/her purpose*—this constitutes the criminal offence of assault under s. 265(1)(b) of the *Criminal Code*.
- *Aggressive body language that signals an intent to assault*—this falls short of the criminal offence of assault, and may also fall short of an attempted assault because s. 24 of the *Criminal Code* distinguishes between attempts and mere preparation, the latter of which is too remote to constitute an attempt.

A similar unbundling of the RCMP’s Incident Management/Intervention Model reveals that its definition of “assaultive” includes the following behaviours:

- *Attempting to apply force to anyone*—this approximates the criminal offence of attempted assault, as discussed above.
- *Threatening to apply force to anyone*—this falls short of the criminal offence of assault under s. 265(1)(b), because it makes no reference to the subject having a present ability to effect his or her purpose.
- *In the operation of a vehicle, attempting to collide with the police vehicle, another vehicle or a pedestrian*—this approximates the criminal offence of assault, by applying force indirectly.
- *Clenching fists with intent to hurt, or threats of an assault*—these likely fall short of the criminal offence of assault or attempted assault.

It will be seen that those who drafted both frameworks were using the *Criminal Code* definition of common assault as the benchmark for “assaultive” behaviour. Common assault is defined as the intentional application of *any* force without consent. It would, for example, include laying a hand on an officer’s arm or patting the officer on the shoulder. However, both frameworks go further. They also justify use of a conducted energy weapon even when there has only been an attempted common assault, which does not require any touching of the officer and, more significantly,

they justify use of a conducted energy weapon when no criminal offence has been committed, such as by using “aggressive body language that signals an intent (but not an attempt) to assault,” or by “threatening to apply force” or by “clenching fists with intent to hurt.” To the same effect, the RCMP’s February 2009 policy amendment (“threat to officer or public safety”) justifies use of a conducted energy weapon in threatening situations, when the subject’s behaviour falls short of even attempted assault.

In my view, importing the *Criminal Code* standard of common assault sets too low a threshold—it authorizes the officer to use far more force than the force that is being used by the subject. Justifying deployment of a conducted energy weapon in the case of an attempted assault, or even behaviour that falls below any criminal conduct, is even less defensible.

I support in principle the approach of couching the subject behaviour threshold in *Criminal Code* terminology, because police officers are familiar with those categorizations, and judicial interpretation over the years gives such terms some certainty of meaning.

Having regard to the medical risks discussed above, and to my sense of proportionality, I believe that a threshold approximating the *Criminal Code* definition of assault causing bodily harm found in s. 267(b) would be appropriate. It requires demonstrably more dangerous behaviour than “assaultive” as defined by both use-of-force models, but adopting a “bodily harm” threshold is not so high as to be unreasonably onerous. “Bodily harm” is defined in s. 2 of the *Criminal Code* as “any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature.”

In my view, the subject behaviour threshold should be met when the subject is causing bodily harm or the officer is satisfied, on reasonable grounds, that the subject’s behaviour will imminently cause bodily harm. There are several aspects of this proposed new threshold that warrant comment:

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- "*is causing*"—it is not enough that the officer is aware that the subject “has caused” bodily harm, even moments ago. There must be a continuing risk.
- "*is satisfied on reasonable grounds*"—it is not enough to leave it up to each officer to decide, on a purely subjective basis, whether he or she will deploy the conducted energy weapon. In my view, that decision should also include an objective component. By that I mean that the officer must personally believe that deployment is necessary (the subjective element), but a disinterested third person who is aware of all the circumstances and is acting reasonably would also reach the same conclusion (the objective element). For the officer’s actions to be justified, both elements must be established.
- "*imminently*"—there must be some immediacy to the threat, and a present ability to cause bodily harm.

Recommendation 2

I recommend that officers of provincially regulated law enforcement agencies be prohibited from deploying a conducted energy weapon unless the subject’s behaviour meets one of the following thresholds:

- the subject is causing bodily harm; or
- the officer is satisfied, on reasonable grounds, that the subject’s behaviour will imminently cause bodily harm.

However, I would not want officers to conclude that, whenever this “causing bodily harm” threshold is met, they are automatically justified in deploying a conducted energy weapon. Both use-of-force models emphasize the need for officers to constantly reassess the situation and to use the least amount of intervention needed to manage the risk.

Recommendation 3

I recommend that, even if the threshold set out in Recommendation 2 is met, an officer be prohibited from deploying a conducted energy weapon unless the officer is satisfied, on reasonable grounds, that:

- no lesser force option has been, or will be, effective in eliminating the risk of bodily harm; and

- de-escalation and/or crisis intervention techniques have not been or will not be effective in eliminating the risk of bodily harm.

There is currently no outright prohibition on deployment of a conducted energy weapon against a subject who is handcuffed or restrained. The policies of most agencies are silent on this issue, while the policies of two other agencies specifically prohibit such use, “unless behaviour cannot be controlled otherwise.” This exception effectively authorizes such deployments, if the officer subjectively considers it necessary. I do not think it would be appropriate to recommend a policy banning deployment in such circumstances, because one can imagine scenarios in which a handcuffed or restrained subject could cause bodily harm, or be imminently capable of doing so. However, I would think that it would be a rare event that an officer would be justified, under my proposed subject behaviour threshold, to deploy a conducted energy weapon against a subject who is handcuffed or otherwise restrained.

iii. Emotionally disturbed people

In Part 9 I discussed at length the challenges that police officers face when confronted with emotionally disturbed people who display extreme behaviours, including violence, imperviousness to pain, superhuman strength and endurance, hyperthermia, sweating, and perceptual disturbances.

The unanimous view of mental health presenters was that the best practice is to de-escalate the agitation, which can best be achieved through the application of recognized crisis intervention techniques. Conversely, the worst possible response is to aggravate or escalate the crisis, such as by deploying a conducted energy weapon and/or using force to physically restrain the subject.²⁵² It is accepted that there may

252 Until recently, RCMP policy stated: “Individuals experiencing excited delirium require medical treatment which first requires that they be restrained. In considering intervention options for excited delirium cases, the use of the [conducted energy weapon] in a probe-mode deployment may be the most effective response to establish control.” However, the February 2009 policy amendments make no reference to “excited delirium.” Rather, “Acutely agitated or delirious persons may be at a high risk of death. If an individual is in an acutely agitated or delirious state, and whenever possible when responding

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be some extreme circumstances, however rare, when crisis intervention techniques will not be effective in de-escalating the crisis. But even then, there are steps that officers can take to mitigate the risk.

Training in crisis intervention is relevant beyond the issue of conducted energy weapon use. Officers are, with increasing regularity, called upon to deal with emotionally disturbed people. The psychiatrists and other mental health professionals who made presentations during our public forums have persuaded me that the week-long crisis intervention training that they talked about should not be tied just to use of conducted energy weapons, but should be an essential part of recruit or in-service training.

Recommendation 4

I recommend that the Ministry of Public Safety and Solicitor General approve a curriculum for crisis intervention training comparable to that recommended by presenters at our public forums, and require:

- that it be incorporated without delay in recruit training for officers of provincially regulated law enforcement agencies; and
- that all currently serving officers of provincially regulated law enforcement agencies satisfactorily complete the training within a time frame established by the ministry.

Recommendation 5

I recommend that officers of provincially regulated law enforcement agencies, when dealing with emotionally disturbed people, be required to use de-escalation and/or crisis intervention techniques before deploying a conducted energy weapon, unless they are satisfied, on reasonable grounds, that such techniques will not be effective in eliminating the risk of bodily harm.

to reports of violent individuals, request the assistance of emergency medical services. If possible bring medical assistance to the scene” (Chapter 17.1, para. 3.1.4.).