1.3 The Opportunities and Challenges of Litigating Death-in-Custody Cases in Canada: Criminal and Civil.
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Learning Objectives
At the end of the presentations, participants will be able to

1. State and describe the two forms of legal recourse available against law enforcement officers in death-in-custody cases in Canada.
2. State and describe the strategic challenges and considerations litigators face in either form of litigation.
3. Discuss the policy issues of accountability and liability for deaths in custody.

Abstract
When a person dies in police custody in Canada, the law offers two forms of recourse against the police, each with its own challenges and considerations for the litigator. This talk will examine these two avenues of litigation under Canadian law.

The first is criminal law: police and corrections officers, like ordinary people, are subject to criminal liability for their actions, including liability for assault, criminal negligence, and murder. However, criminal cases for deaths in custody differ from other prosecutions in many important regards. First, in Ontario, the death is investigated, not only by local police forces, but also by the Special Investigations Unit, a civilian-led agency with the power to lay charges against police, operating at arm's length from Crown. Cases will then be prosecuted by a specialized team of prosecutors at the office of the Attorney General and adjudicated by judges brought in from outside the accused officer's local jurisdiction. In court, death-in-custody cases will often revolve around Criminal Code provisions relating to the use of force, namely self defence, (s. 34) and the right of law enforcement personnel to use reasonable force (s. 25). Criminal charges and convictions in connection with deaths in custody are relatively rare occurrences in Canada.
The second means of legal recourse is civil litigation: the deceased’s family or another interested party may launch a wrongful death suit against the police or another public body. Civil plaintiffs face a much lower burden of proof than criminal prosecutors and have an opportunity to recover for monetary and non-monetary losses. In such civil suits, as with criminal prosecutions, the defendants’ status as law enforcement personnel affords some legal protection: in most provinces, the Police Act shields officers from individual liability for good faith actions within the scope of their duties. Accordingly, plaintiffs typically have an easier time recovering from municipalities and police boards than holding individual officers responsible by civil suit.

This talk will use specific examples to examine the challenges that criminal and civil litigators and their clients face in Canadian death-in-custody cases.