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23-27

No charges approved following use of force by Vancouver police officer

Victoria – The BC Prosecution Service (BCPS) announced today that no charges have been approved against a member of the Vancouver Police Department (VPD) in connection with the arrest on July 22, 2021, of an individual who suffered facial injuries during the arrest.

Because of the serious nature of the injuries, the incident was investigated by the Independent Investigations Office (IIO). Following the investigation, the Chief Civilian Director of the IIO determined that there were reasonable grounds to believe the officer may have committed offences and submitted a report to the BCPS (IIO file #2021-198).

In this case, the BCPS has concluded that the available evidence does not meet the BCPS charge assessment standard. The BCPS is not able to prove, beyond a reasonable doubt, that the officer committed any offence in relation to the incident. As a result, no charges have been approved. A Clear Statement explaining the decision in more detail is attached to this Media Statement.

In order to maintain confidence in the integrity of the criminal justice system, a Clear Statement explaining the reasons for not approving charges is made public by the BCPS in cases where the IIO has investigated the conduct of police officers and forwarded a report for charge assessment.

The charge assessment was conducted by Crown Counsel with no connection to the officer involved in the incident.

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To learn more about BC's criminal justice system, visit the British Columbia Prosecution Service website at: gov.bc.ca/prosecutionservice or follow [@bcprosecution](https://twitter.com/bcprosecution) on Twitter.

Clear Statement

Summary

On the late evening of July 22, 2021, an individual referred to as the Affected Person (AP), was in the downtown area of Vancouver near Stanley Park. During this time, he used a tree branch to vandalize windows, signs, and vehicles while walking east down Robson Street. On one occasion he swung the branch at people, narrowly missing one male's head. He also struck a vehicle that was parked at a red light at the intersection of Denman and Robson. As a result of his actions, multiple individuals called 911 to report the incidents.

In response to these calls, the officer who is the subject of the investigation (the Subject Officer or SO) and another officer (the Witness Officer or WO) were dispatched to the scene and specifically directed to the CIBC bank branch situated at 1720 Robson Street. Upon their arrival, they discovered the AP inside the ATM vestibule, actively damaging the electronic keypad with the branch. As the officers entered the area, the SO was armed with a kinetic energy impact projectile shotgun (KEIP) designed to fire non-lethal bean bag projectiles, while the WO had his handgun drawn and pointed at the AP as well. Despite being commanded to drop the branch, the AP disregarded their instructions and continued to approach them.

The SO fired three rounds from the KEIP to subdue the AP. However, the AP continued to advance toward the officers and swung the branch at head level, striking the SO on the shoulder, causing the AP to lose his grip on the branch. In response, the two officers retreated outside the door. The AP then raised his hands, prompting the officers to re-enter the area. The SO took the AP to the ground in close contact, while both officers attempted to gain control of his hands. The SO subsequently stood up and utilized the barrel of the KEIP to strike the AP in the head/upper body area, followed by a kick with his right leg to the same region.

At this point, two additional officers, arrived at the scene to help. Together, all officers worked to handcuff the AP. Once the AP was restrained, he spat at the SO and the WO.

Due to the AP's injuries, Emergency Health Services (EHS) were called to the scene. They provided medical assistance and transported the AP to the hospital. Upon examination, it was determined that he had two lacerations near his left eye, which required 10 sutures. Additionally, a laceration on the left temporal region of his head required six staples. Furthermore, he had suffered a fracture in his left hand/forearm where he had been struck by the KEIP projectile, which necessitated a cast.

This Clear Statement provides a summary of the evidence gathered during the investigation and the applicable legal principles. These are provided to assist in understanding the BCPS's decision not to approve charges against the officer involved in the incident. Not all the relevant evidence, facts, case law, or legal principles are discussed.

Charge Assessment and the Standard of Proof

The charge assessment guidelines that are applied by the BCPS in reviewing all RCCs are established in policy and are available at:

www.gov.bc.ca/charge-assessment-guidelines

BCPS guidelines for assessing allegations against Peace Officers are also established in policy and are available at:

www.gov.bc.ca/allegations-against-peace-officers

The BCPS applies a two-part test to determine whether charges will be approved, and a prosecution initiated. Crown Counsel must independently, objectively, and fairly measure all available evidence against a two-part test:

1. whether there is a substantial likelihood of conviction; and, if so,
2. whether the public interest requires a prosecution.

The reference to “likelihood” requires, at a minimum, that a conviction according to law is more likely than an acquittal. In this context, “substantial” refers not only to the probability of conviction but also to the objective strength or solidity of the evidence. A substantial likelihood of conviction exists if Crown Counsel is satisfied there is a strong and solid case of substance to present to the court.

In determining whether this test is satisfied, Crown Counsel must consider what material evidence is likely to be admissible and available at a trial; the objective reliability of the admissible evidence; and whether there are viable defences, or other legal or constitutional impediments to the prosecution, that remove any substantial likelihood of a conviction.

If Crown Counsel is satisfied that the evidentiary test is met, Crown Counsel must then determine whether the public interest requires a prosecution. The charge assessment policy sets out a non-exhaustive list of public interest factors both for and against a prosecution for Crown Counsel to consider.

Potential Charges

The potential charges that were considered against the subject officer in this case were assault causing bodily harm contrary to section 267(b) of the *Criminal Code* and assault with a weapon contrary to section 267(a) of the *Criminal Code*.

Relevant Law

To prove an assault, the Crown must establish the SO intentionally applied, threatened, or attempted to apply force to another person without that person's consent. Assault with a weapon is an assault that occurs when the SO is carrying or using a weapon and assault causing bodily harm requires proof of harm that is more than merely transient or trifling in nature.

Legal Justification

Section 25(1) of the *Criminal Code* provides that a peace officer who acts, in the course of their lawful duties, on "reasonable grounds" is "justified in doing what [they are] required or authorized to do and in using as much force as necessary for that purpose." This is limited by section 25(3) which provides that an officer will only be justified in using force likely or intended to cause grievous bodily harm or death where they subjectively and reasonably believed that it was necessary to protect themselves or another from grievous bodily harm or death.

Section 26 of the *Criminal Code* provides that an officer "who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess."

In assessing whether a particular application of force by an officer was necessary within the meaning of the *Criminal Code*, the trier of fact must consider the circumstances as they existed at the time the force was used, recognizing that an officer cannot be expected to measure the force used with precision.

The reasonableness of the peace officer's belief must take into account the "particular circumstances and human frailties" of the officer. In applying the standard, "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" (*R v Asante-Mensah*, 2003 SCC 38 at para 73). In these dynamic situations police are not expected to measure the force used to a nicety and are not required to use the least amount of force that may achieve their objective.

Despite the deference it affords to police officers in the application of force in exigent circumstances, the law still requires that the use of force not be excessive. Police use of force is constrained by principles of proportionality, necessity, and reasonableness.

The issue is whether the force used by the SO in this case was necessary, reasonable, and proportionate in the circumstances.

The Crown bears the onus of proving beyond reasonable doubt that the justification provisions of the *Criminal Code* are not applicable.

Statement of AP

The AP is a refugee and was unhoused at the time of the incident. He described that he was angry with the government about his immigration status. His income support payments had been stopped, he had no money, and hadn't eaten for some time. He was not under the influence of alcohol or drugs. He says the officers first told him to, "throw the bat", that he indicated he did not intend to hit them but had it over his shoulder. He described that he was "waiting to be arrested" when he was shot with the KEIP, striking him in the wrist and leg.

Evidence of witness officers

In the WO's statement to the IIO, he recounted receiving a dispatch about a male individual wielding a hockey stick and causing damage to business windows in the Robson and Chilco Street area. While the SO and the WO travelled to the site, they were informed that the individual had entered the ATM area of the CIBC branch.

Upon arriving at the bank, the WO and the SO entered, with the SO holding the KEIP and the WO closely following, his pistol unholstered. As they entered, the WO noticed that the AP made eye contact with them. The SO repeatedly commanded the AP to drop the stick, but the AP advanced upon them without responding.

The WO heard three shots from the SO's KEIP, and he observed the AP flinch after the first shot but continued moving forward. The AP approached the SO and the WO closely, raising the stick over his head and swinging it downward toward them. The stick struck the SO on the shoulder and deflected off the doorframe, causing it to be dislodged from AP's hands. Subsequently, the AP stood motionless, seemingly stunned.

The SO then proceeded to bring the AP to the ground, while the WO, concerned about the presence of the stick, grabbed one of the AP's legs and pulled him away from the wall to create space.

In the WO's statement, he described that as the AP approached with the stick, he raised it over his head, holding it like a baseball bat. At this point, the WO feared grievous bodily harm or death and positioned his finger onto the trigger of his duty pistol. However, he did not fire as he did not have a clear shot at the AP with the SO in front of him. The WO told investigators that he did not see any strike or kick by the SO.

The first two officers to enter the vestibule after the SO and the WO each provided statements to the IIO. Neither described seeing any strikes or kicks delivered by any of the other officers, nor did they know how the AP had been injured.

One officer described the AP as "turtling" when she arrived, unwilling to surrender his hands. She noted that the AP actively resisted as she attempted to grab his right arm, and he exhibited

behaviors such as spitting, kicking his legs, and refusing to cooperate. She also noted a black metal signpost in the vestibule as they approached.

The other officer described the AP as resisting by attempting to kick them and yelling throughout the incident.

Civilian Statements

The civilian who had followed the AP towards the CIBC and called 911 to report his behavior provided a statement. He observed the arrival of the two officers when he was approximately 10 to 15 meters away from the CIBC and described the SO firing the KEIP after AP had disregarded his commands. According to the civilian the AP seemed to shrug off the two hits and aggressively lunged towards the officers. The civilian continued to observe as the officers brought the AP to the ground, noting that he believed the AP was still displaying some resistance at that point. The civilian then witnessed the SO stand up and strike AP in the face, using what he believed to be the butt of the rifle. Describing the action, the civilian stated that it didn't appear to be a "cheap shot" or anything of that nature.

Neither of the other two civilian witnesses saw the strike with the gun but both witnesses observed a kick.

Medical Records

The AP suffered two lacerations near his left eye, which required 10 sutures. The investigative theory is that these lacerations were caused by the kick. Additionally, there was a laceration on the left temporal region of his head required six staples. This injury was in a circular c-shape, consistent with the barrel of the KEIP.

Finally, the AP suffered a fracture in his left hand/forearm, which necessitated a cast. This was likely caused by the KEIP projectile.

Analysis

The evidence establishes that the SO in this case intentionally applied force to the AP without their permission and in doing so caused injuries that were more than merely transient or trifling in nature. This meets the definition of an assault causing bodily harm. There is also evidence that the SO used the KEIP as a weapon when assaulting the AP. It was not the discharge of the KEIP that formed the basis for the criminal charge suggested by the IIO, but the SO's use of a significant amount of force in striking the AP with the KEIP and the subsequent kick. These latter applications of force necessitate a thorough analysis to determine if they were excessive in the circumstances.

As previously noted, the application of section 25 of the *Criminal Code* provides a potential legal justification for the SO to the offence of assault. All depends upon the circumstances in which the

force was used and, specifically: the threat which the officer subjectively perceived; the reasonableness of that perception; and the reasonableness of the force the officer used in response.

In a potential prosecution of the SO, the Crown would bear the burden of proving that the SO was not legally justified in using force or that he exceeded what was reasonable in the circumstances. The circumstances that the court would consider in assessing the reasonableness of the officer's response in this case would include the AP's behavior leading up to the police interaction, his response to police commands, and his active resistance during the takedown.

Throughout the interaction with the police the AP displayed dangerous and unpredictable behavior. He attacked civilian bystanders, caused significant property damage, did not comply with police commands, appeared unaffected by multiple rounds from the KEIP, and attacked the police with a large tree branch.

When the AP was brought to the ground and struck by the SO, both officers struggled to gain control of the AP's hands. Given the AP's previous behavior, it would be reasonable to perceive his failure to surrender his hands as an ongoing threat to both the SO and the WO. It was unknown if the AP had other weapons, and there were objects within his reach which could be used as weapons, including the metal signpost observed by one witness and the tree branch. Therefore, at the time the AP was on the ground, some measure of force was necessary to prevent further violence and safely complete the arrest.

When assessing the reasonableness and proportionality of the SO's response to the threat posed by the AP, the brief duration and dynamic nature of the encounter must also be considered. The entire sequence, from the SO's initial confrontation with the AP in the vestibule to the moment the AP is being handcuffed, lasted approximately 20 seconds. Within this very brief period, several events occurred: commands to drop the tree branch were issued, three rounds of the KEIP were fired, the AP advanced to attack the officers, they retreated, the AP struck the SO on the shoulder with the tree branch, the AP lost his grip on the weapon and retreated. The SO then re-entered the bank and took the AP to the ground. The WO and the SO struggled to free AP's hands. The SO stood up and struck the AP with the barrel of his KEIP followed by a kick to the head area. Subsequently, additional officers arrived to assist in gaining control of AP's hands and placing him in handcuffs.

As discussed above, within the context of a legitimate threat occurring in a brief and dynamic situation, some measure of force was necessary to protect the officers and make the arrest.

The Crown would need to prove that the by striking and kicking the AP in these circumstances was excessive and beyond the range of reasonable alternatives. While the force chosen was not the least forceful option available, the strikes were targeted and appeared intended to overcome AP's resistance and his reluctance to surrender his hands.

Conclusion

The available evidence does not provide a basis for proving that the SO's use of force fell outside the protection of the legal justification in section 25 of the *Criminal Code*. The AP exhibited dangerous and unpredictable behavior by attacking the officers. The Crown would not be able to prove, beyond a reasonable doubt, that the force used in this arrest was unreasonable or disproportionate to the reasonably perceived risk. Accordingly, there is no substantial likelihood of conviction and no charges have been approved.