

May 16, 2019

19-09

## **BC Prosecution Service announces no charges in Salmon Arm RCMP non-fatal shooting**

**Victoria** – On May 16, 2018, the BC Prosecution Service (BCPS) announced that no charges were approved against members of the Salmon Arm RCMP involving a non-fatal shooting near Salmon Arm on July 3, 2015. The incident was investigated by the Independent Investigations Office (IIO). Following the investigation, the Chief Civilian Director of the IIO determined that officers may have committed offences and submitted a report to the BCPS.

In this case the BCPS concluded that the available evidence does not meet the charge assessment standard for approval of any charges against the police officers in connection with the incident.

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 in cases where the IIO has investigated the conduct of a police officer and forwarded a report for charge assessment.

In this case, the BCPS did not release a Clear Statement explaining the reasons for not approving charges at the time the decision was announced because a related proceeding was before the Courts. As that proceeding has now ended, the BCPS is today releasing a [Clear Statement](#) attached to this Media Statement.

Media Contact:        Dan McLaughlin  
                              Communications Counsel  
                              [Daniel.McLaughlin@gov.bc.ca](mailto:Daniel.McLaughlin@gov.bc.ca)  
                              250.387.5169

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

## **Clear Statement**

### **Summary of Decision**

On July 3, 2015 at 4:42 pm, Salmon Arm RCMP received a report that a male suspect had robbed a gas station in Sicamous brandishing what appeared to be a firearm. The suspect fled in a vehicle westbound on the Trans-Canada Highway ("Hwy 1"), with one of the owners of the gas station pursuing him on a motorcycle.

Following civilian reports, the RCMP attempted to set up containment using police vehicles near the intersection of Hwy 1 and Bernie Road. As the suspect drove back toward Hwy 1, he maneuvered his vehicle through the loose containment without striking any people or vehicles. As the suspect's vehicle turned off Bernie Road westbound onto Hwy 1, one of the RCMP officers ("Subject Officer 1") fired a single shot at his vehicle, hitting nothing.

The suspect fled westbound. The RCMP later located the vehicle he had been driving at a farm east of Salmon Arm. An officer ("Subject Officer 2") with a Police Service Dog ("PSD") tracked the suspect to a dark storage room in the lower level of a disused barn. The PSD entered the room, followed by Subject Officer 2, who yelled commands to the suspect and to the PSD. At some point, the PSD seized the suspect's thigh. The suspect swung a baseball bat, hitting Subject Officer 2 and Subject Officer 2's firearm. Subject Officer 2 fired several shots, some of which struck the suspect.

The suspect was treated in hospital, and survived his injuries.

As a result of the injuries to the suspect, the IIO conducted an investigation into the actions of the officers who dealt with the suspect during the incident. At the conclusion of the investigation the IIO submitted a Report to Crown Counsel ("RCC"). Following a thorough review of the available evidence the BCPS has concluded that the evidence does not support approving any charges against the officers. The charge assessment was conducted by a Crown Counsel with no prior or current connection to the officers who were the subject of the IIO investigation.

This Clear Statement contains a summary of the evidence gathered during the IIO 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 of the relevant evidence, facts, case law, or legal principles are discussed.

## **Charge Assessment and the Criminal 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](http://www.gov.bc.ca/charge-assessment-guidelines)

The BCPS applies a two-part test to determine whether criminal charges will be approved and a prosecution initiated:

- a. there must be a substantial likelihood of conviction based on the evidence gathered by the investigating agency; and
- b. the public interest requires a prosecution.

Under BCPS policy, a substantial likelihood of conviction exists when Crown Counsel is satisfied there is a strong, solid case of substance to present to the court. To reach this conclusion, a prosecutor will consider what evidence is likely to be admissible and available at 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 conviction.

When making a charge decision, Crown Counsel must assess the evidence gathered by investigators in light of the legal elements of the criminal offence that is said to have been committed. Crown Counsel must also remain aware of the presumption of innocence, the prosecution's burden of proof beyond a reasonable doubt and the fact that under Canadian criminal law, a reasonable doubt can arise from the evidence, the absence of evidence, inconsistencies in the evidence or the credibility or reliability of one or more of the witnesses. The person accused of a crime does not have to prove that they did not commit the crime. Rather, the Crown bears the burden of proof from beginning to end.

The burden of proof on the Crown also applies to issues of credibility. A criminal trial is not a credibility contest between witnesses for the Crown and witnesses for the defence. If the accused testifies, the accused is entitled to be acquitted in any or all of the following circumstances: if the trier of fact accepts the accused's evidence; if the accused's evidence raises a reasonable doubt; if the trier of fact does not know whom to believe; or, even if the trier of fact does not accept the accused's evidence, there remains a reasonable doubt on the totality of the evidence.

## **Potential charges**

The potential charges that were considered in this case were careless use of a firearm contrary to section 86(1) of the *Criminal Code*, attempted murder contrary to section 239 of the *Criminal Code*, aggravated assault contrary to section 268 of the *Criminal Code*, criminal negligence causing bodily harm contrary to section 221 of the *Criminal Code*, and discharging a firearm with intent contrary to section 244 of the *Criminal Code*.

## **Relevant Law**

### **Careless use of a firearm**

The relevant portions of section 86(1) of the *Criminal Code* make it an offence to, "without lawful excuse", use, carry or handle a firearm "in a careless manner or without reasonable precautions for the safety of other persons".

For a conviction, the Crown must prove a marked departure from the standard of care of a reasonably prudent person in the circumstances. In cases involving the use of a firearm by a police officer acting in the course of their duty, this may require expert opinion evidence to establish what is reasonable in the circumstances, considering the relevant training and policies of the police agency.

### **Attempted murder**

For a conviction for attempted murder, the Crown must prove beyond a reasonable doubt that the accused specifically intended to commit murder, and did something for the purpose of carrying out their intention.

### **Aggravated Assault**

To prove any assault requires the Crown to prove the accused intended to apply force to a person without that person's consent.

To make out aggravated assault, the force used must wound, maim or endanger the life of the victim, and the risk of that result must have been reasonably foreseeable.

### **Criminal negligence causing bodily harm**

In order to prove that a police officer has committed criminal negligence causing bodily, the Crown must establish:

- That the officer did or omitted to do something that was their legal duty to do;
- That the officer showed a wanton or reckless disregard for the lives or safety of others; and,
- That the act or/omission caused bodily harm.

Conduct that is reasonable cannot be wanton.

### **Discharge of a firearm with intent**

Section 244 of the *Criminal Code* makes it an offence to discharge a firearm at a person with intent to wound, maim, disfigure, or endanger the life of any person. In order to prove this offence, the Crown must prove that the shot was fired in the direction of the victim (not necessarily directly at the victim) and that the shooter intended to wound, maim, disfigure, or endanger the victim's life.

### **Legal justification**

The *Criminal Code* offers legal justification to using force in certain circumstances where that force is used in administering and enforcing the law (section 25) or in self-defence (section 34). Both justification provisions require an assessment of the reasonableness of the perception of the threat and the appropriateness of the response (according to the applicable test), in the totality of the circumstances. Where the evidence supports reasonable factual inferences that would justify the impugned use of force, the burden on the Crown cannot be met.

### **Administration and enforcement of the law**

Section 25(1) of the *Criminal Code* provides that a peace officer, acting in the course of lawful duties and who acts on "reasonable grounds" is "justified in doing what he [or she] is required or authorized to do and in using as much force as necessary for that purpose." 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."

The Crown bears the onus of proving beyond reasonable doubt that one or more elements of the justification provisions does not apply.

In assessing whether a particular amount of force used by an officer was necessary within the meaning of the *Criminal Code*, the trier of fact must have regard to 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 be assessed on an objective standard but one that also "takes into account the particular circumstances and human frailties of the accused". In applying the standard of reasonableness, "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".

Notwithstanding the deference afforded to police officers in the exercise of force in exigent circumstances, the law still requires that the use of force not be excessive. Case law interpreting these sections recognizes that police officers may need to resort to force in order to execute their duties but also that courts must guard against the illegitimate use of power by the police against members of our society, given its grave consequences. The degree of force that a police officer may use is constrained by the principles of proportionality, necessity, and reasonableness.

### ***Self-defence***

Section 34(1) of the *Criminal Code* provides that a person is not guilty of an offence if:

- a. they believe on reasonable grounds that force or a threat of force is being used against them or another person,
- b. the act said to constitute the offence was committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
- c. the act was reasonable in the circumstances.

Section 34(2) provides that, in determining whether the act in question was reasonable, the court shall consider the relevant circumstances of the person, the other parties and the act, and other relevant factors, including:

- a. the nature of the force or threat;
- b. the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
- c. the person's role in the incident;
- d. whether any party to the incident used or threatened to use a weapon;
- e. the size, age, gender and physical capabilities of the parties to the incident;
- f. the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
- f.1. any history of interaction or communication between the parties to the incident; and
- g. the nature and proportionality of the person's response to the use or threat of force.

To obtain a conviction the Crown must prove beyond a reasonable doubt that the defence of self-defence does not apply.

### Summary of the evidence

The suspect robbed a gas station in Sicamous, brandishing a weapon that was subsequently identified as an airsoft pistol he had painted black. He then fled westbound on Hwy 1, driving a blue Subaru that had been stolen in Saskatchewan bearing Nova Scotia licence plates. One of the owners of the gas station pursued him on a motorcycle.

Several RCMP officers were dispatched, including members of the Emergency Response Team ("ERT") and two dog handlers.

Based on reports from the gas station owner who had pursued the suspect and other civilians, the RCMP believed the suspect was hiding in the area of Bernie Road. Seven police officers arrived and parked their vehicles near the intersection of Hwy 1 and Bernie Road. All vehicles had their emergency lights flashing, and all but one of the officers wore their full uniforms.

One officer ("Officer A") saw the suspect's vehicle driving up Bernie Road towards the intersection with Hwy 1 and broadcast over the radio that the vehicle was coming. Another officer ("Officer B") stepped out into Bernie Road in the path of the vehicle waving his arms and yelling at the suspect to stop. The suspect vehicle slowed and then, when it was approximately 6-9 meters from Officer B, accelerated again toward Officer B. Officer B jumped out of the way of the vehicle to avoid being hit.

The suspect's vehicle then moved as if it was going to turn right onto Hwy 1, but then turned to the left and travelled quickly towards Subject Officer 1, who was standing in front of a police vehicle with a firearm drawn. Subject Officer 1 fired one shot at the suspect's vehicle but it did not strike anything.

In a statement to the IIO several days later, the suspect said he saw approximately five police vehicles with lights and sirens on and six to eight uniformed police officers as he drove up Bernie Road toward Hwy 1. He admitted to having come within five feet of an officer who stepped in front of him, and that he weaved through the police vehicles at approximately 40 km/h, while the police had pistols and a long gun aimed at him. The suspect said one of the officers fired a shot at him from behind him, after he had turned onto Hwy 1.

After turning onto Hwy 1, the suspect was pursued by police vehicles at speeds up to 160 km/hr; however, he was able to lose them. At 5:41 pm, a 911 call came in advising that a vehicle had been left in the driveway of a residence east of Salmon Arm and the driver had fled on foot. Police went to the residence and identified the vehicle as the same Subaru the suspect had been driving earlier.

Two dog handlers attended with police dogs and attempted to track the suspect. A nearby homeowner reported that motion sensor lights had been activated on their property and another neighbour reported that someone had rung their doorbell, but no one was there when the resident looked out.

At 6:34, Subject Officer 2 advised he was in the yard where the doorbell was rung and was going to track away from the residence with the PSD. The PSD tracked the suspect to a derelict barn that had not yet been searched. Subject Officer 2 and the PSD went inside the top floor which was accessible by a wooden ramp from the top of an embankment. Inside, Subject Officer 2 found a bag that appeared to have been freshly dropped and on which the PSD indicated. Another Officer (Officer C) who was with Subject Officer 2 and the PSD briefly searched the bag and seized it. Officer C then looked around the top floor and loft above to confirm the suspect was not hiding there.

Once they left the top floor of the barn, Subject Officer 2 advised Officer C that the suspect was nearby, based on the behaviour of the PSD. PSD went down the bank to the lower level of the barn, followed by Subject Officer 2.

Officer C, who was further behind, heard the PSD "going crazy", and then heard Subject Officer 2 say "see your hands, see your hands" and give a verbal command for the PSD to seize the suspect. Officer C then heard four or five gunshots in succession. Subject Officer 2 continued yelling "see your hands, see your hands" as he backed out of a doorway leading to a small room in the barn.

Officer C moved into the room with a carbine up and saw the suspect on the ground yelling for them to get the dog off him. Officer C could see blood on the ground in front of the suspect. Officer C started yelling "see your hands, give me your hands" but the suspect did not do so. Concerned that he may have a weapon, Officer C pinned the suspect down. The suspect's left arm came up and Officer C and Subject Officer 2 handcuffed it, although more pressure was applied before the suspect raised his right arm to be handcuffed. At that point, the PSD was removed from the suspect.

Subject Officer 2 told Officer C and other officers who arrived at the scene he that he had been hit with a bat and was seen holding onto his arm. Subject Officer 2's pistol was also damaged: its rear sights had been moved 5 mm to the left and a scuff was visible on the slide near the sights. Officer C saw a baseball bat lying to the left of the suspect.

One of the paramedics who attended shortly after described three injuries to the suspect's abdomen, one to his chest and one to his shoulder blade when he was rolled over.

After dealing with the suspect, that paramedic offered first aid to Subject Officer 2. The paramedic noted a bruise, a small laceration, and swelling on Subject Officer 2's elbow. Subject



Officer 2 demonstrated to the paramedic how the suspect had struck him by swinging a baseball bat gripped with both hands from his left side.

In his statements to the IIO and the RCMP, the suspect said that he had been hiding in a dark wooden storage barn room for about 45 minutes to an hour when he heard people moving around in the barn above him. He had a metal baseball bat with him but had stashed his airsoft pistol in the other room of the lower level of the barn. He heard grass moving outside and assumed a police officer was approaching. The suspect then saw a dog's nose poke around the door he was hiding behind, and then a pistol coming past the doorway. The suspect reported bringing down the baseball bat he was holding in a chopping motion with one hand, trying to knock the pistol out of the person's hand. He said the dog bit onto his left leg during his swing. He said he then dropped the bat, and person holding the pistol stepped out from the doorway and shot him seven times from approximately five feet away. The suspect said he did not hear any warning and had his hands up.

Subject Officer 2's pistol, with its 15-round capacity magazine, was seized and found to contain ten rounds of ammunition. Four shell casings and three spent bullets were found at the scene, all of which were fired from Subject Officer 2's pistol.

The suspect was treated in hospital for dog bite wounds to his thigh and bullet wounds to his left chest, lower abdomen and two in his right arm. He also had a fractured left shoulder blade with embedded bullet fragments from an exit wound and damage to his lower spine. It's not clear on the available evidence how many bullets fired by Subject Officer 2 actually hit the suspect.

#### Use of force opinion

A qualified expert in the use of force by police officers reviewed the available evidence and concluded that the actions of both subject officers appeared to be in line with RCMP policy and training, given the risk of death or grievous bodily harm that appeared to arise in both interactions. The conclusions included the following;

With respect to Subject Officer 1, the possibility that the shot may have been fired after or as the suspect's vehicle passed Subject Officer 1 may be attributable to the delay between the perception of risk and reacting to it.

With respect to Subject Officer 2, upon apprehension of threat of death or grievous bodily harm, police officers are trained to shoot until the threat is neutralized. Multiple shots would be in line with RCMP policy and training considering the delay between perception and reaction and the fact that the suspect remained standing throughout the shots.

### **Application of the law to the evidence**

The offences under consideration involve the careless or intended application of force on the suspect. As such, the Crown must prove beyond a reasonable doubt that the use of force was not justified under either section 25 or section 34 of the *Criminal Code*.

#### ***Subject Officer 1***

Given the nature of the call being responded to, Subject Officer 1 was clearly acting in the course of duty in taking a position in support of the attempt to contain the suspect and drawing a pistol.

The circumstances described by officers at the scene in light of the background context support a reasonable perception that Subject Officer 1 faced a threat of force and acted with a defensive purpose.

The question is whether firing a shot was reasonable, necessary and proportionate in the circumstances. Given the immediacy of the threat presented by the suspect's vehicle being driven in an unpredictable manner, the lack of any apparent reasonable alternative use-of-force options available, and the information Subject Officer 1 had about the suspect's potential for violence and recklessness, Subject Officer 1's perception of a threat of grievous bodily harm or death was not demonstrably unreasonable and the Crown cannot prove that the use of lethal force to repel that threat was unreasonable or unnecessary. As a result, there is no likelihood of conviction with respect to any offence against Subject Officer 1.

#### ***Subject Officer 2***

Subject Officer 2 was clearly acting in the execution of duty when tracking the suspect in order to apprehend him. Given the belief that the suspect had used a firearm in a robbery, had evaded police containment and engaged in a high-speed chase, it was reasonable to believe that the suspect would continue to flee and posed a significant threat, both to police and the public. These circumstances exhibit a propensity for significant violence and recklessness and fall within the circumstances in which policing standards support the use of a PSD to apprehend a suspect by dog bite.

Subject Officer 2 was attacked with a metal baseball bat by someone who was believed to be armed with a firearm and who had failed to respond to verbal commands and the use of a PSD. The circumstances support an inference that Subject Officer 2 reasonably perceived a threat and acted with a defensive purpose. In the totality of the circumstances, there is no likelihood that the Crown could prove beyond a reasonable doubt that Subject Officer 2 acted unreasonably, disproportionately or unnecessarily in discharging his pistol at the suspect.

**Conclusion**

In all of the circumstances, the Crown could not prove beyond a reasonable doubt that the actions of either Subject Officer 1 or Subject Officer 2 were excessive and thereby criminal. Accordingly, there is no substantial likelihood of conviction and no charges have been approved.

**Materials Reviewed**

The following materials were reviewed in this assessment:

- IIO Investigative Report
- Civilian and Police Witnesses' Statements (Audio recordings and Transcripts)
- RCMP investigative materials
- Use of force expert opinion and peer review
- Firearms examination reports, including round counts
- Transcripts of police radio calls
- Medical Records of the suspect
- Photographs, scene descriptions, and diagrams
- Transcript of the preliminary inquiry in the suspect's prosecution