

November 14, 2018

18-22

No charges approved in allegation of theft by Abbotsford Police officer

Victoria – The BC Prosecution Service (BCPS) announced today that no charges have been approved following an allegation of theft of money by a police officer during a search of an Abbotsford residence pursuant to a search warrant.

On November 23, 2017, Abbotsford Police Department Drug Enforcement Unit officers executed search warrants at a residence in relation to a drug trafficking investigation. While searching the residence, officers located cash, weapons, drugs and drug paraphernalia. As a result of the search an individual was charged with eight offences including possession of narcotics or drugs for the purpose of trafficking contrary to the *Controlled Drugs and Substances Act*. During the prosecution of those offences the defence alleged that one of the investigating officers had taken money found at the scene of the search and the theft had been captured by a home video recording device.

At the request of the Abbotsford Police Department the allegations were investigated by the Combined Forces Special Enforcement Unit (CFSEU) to avoid the appearance of any improper influence in the administration of justice. At the conclusion of the investigation CFSEU submitted a Report to Crown Counsel (RCC) recommending charges of theft under \$5000 contrary to s.334 of the *Criminal Code*.

In this case, the BCPS has concluded that the available evidence does not meet the BCPS's charge assessment standard and 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, the BCPS issues Clear Statements explaining the reasons for not approving charges against police officers, where the potential effect of their conduct could negatively impact public confidence in the administration of justice.

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Clear Statement

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Summary of decision

On November 23, 2017, Abbotsford Police Department Drug Enforcement Unit officers executed search warrants at a residence in relation to a drug trafficking investigation. While searching the residence, officers seized cash, weapons, drugs, and drug paraphernalia. An individual (the "accused") was charged with eight offences including offences of possession of narcotics or drugs for the purpose of trafficking contrary to the *Controlled Drugs and Substances Act*. Those offences were prosecuted to a recent conclusion by the Public Prosecution Service of Canada.

On April 23, 2018, during the accused's trial, counsel for the accused sought to challenge the admissibility of evidence, alleging that police had conducted the search in a manner that breached the accused's rights under the *Canadian Charter of Rights and Freedoms*. In support of this contention, the accused produced a video clip which suggested that, during the search, a police officer (the "subject officer") had placed some money into his sock or pant leg. The subject officer was confronted with this evidence. He responded that he had been joking and that he put the money back.

As a result of the defence producing the video, an investigation was requested by Abbotsford Police. The matter was referred to CFSEU, who submitted a RCC. Following a thorough review of the available evidence the BCPS has concluded that the evidence is insufficient to support approving any charges against the officer. As a result no charges have been approved.

This Clear Statement contains a summary of the evidence gathered during the CFSEU 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.

The charge assessment was conducted by a senior Crown Counsel with no prior or current connection to the officer who was the subject of the investigation.

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

In determining whether a prosecution will be initiated, Crown Counsel must independently,

objectively, and fairly measure all the 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.

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 whether the evidence gathered by the investigating agency is likely to be admissible and available in court; 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.

Potential Charges

The charges proposed by CFSEU were theft under \$5000 contrary to s. 334 of the *Criminal Code*. The BCPS also considered the offence of breach of trust by a public officer contrary to s. 122 of the *Criminal Code*.

Relevant law

To establish the commission of the offence of theft, the Crown must prove each of the following essential elements:

1. that the accused took property that belonged to another
2. that the accused had no legal right to the property
3. that the accused took the property fraudulently and without colour of right
4. that when he took the property he meant to deprive, at least temporarily the lawful owner of the property.

To establish the offence of breach of trust, the Crown must prove the following essential elements:

1. that the accused was an official
2. that the accused committed breach of trust (fraud)
3. that the fraud was in connection to the accused's official duties and
4. that the accused intended to commit the breach of trust in connection with his official duties.

Fraud is a dishonest deprivation. It involves the use of deceit, falsehood, or any other means that ordinary persons would consider dishonest to obtain money or anything of value. There is a breach of trust if an accused could be shown to have done something contrary to a duty imposed upon him by law, by regulation, by his contract of employment or a direction given for the performance of his duties. Underlying the breach of trust in this case is the requirement that the evidence establishes that officer committed a theft (or fraud) in the execution of the search warrant at the home.

Summary of evidence

During the investigation, CFSEU took possession of video evidence that had been presented at the trial of the accused. CFSEU investigators conducted an interview with the accused in which they canvassed the existence of additional evidence including video evidence. The accused alleged that various property was missing, including cash and other property in addition to that said to have been seized.

The video evidence was provided to the Court by counsel for the accused. It depicts a person who is identified as the subject officer counting money. There is visible in this video a stack of bills including a two dollar U.S. bill. In the video the subject officer is counting money and places a second U.S. bill, in this instance a one dollar bill on the same stack. This is significant, as neither of those bills was recorded in the Exhibit Flow Chart in which police itemized what they seized during the search.

A third video clip was presented to CFSEU. In this video the subject officer walks up to the dresser, retrieves a number of items, believed by CFSEU to be cash bills. He places those items in his hand, bends over, looks left and then stands up and has nothing in his hands. He is inspecting another item at the point that the video cuts out.

CFSEU investigators attempted to obtain the complete set of video recordings that were apparently made by the accused's home recording system. They were unable to do so. In addition to the video evidence provided to the Court by the accused's counsel, CFSEU obtained video evidence from the accused's nominee. A family member of the accused stated that he placed all of the videos on his computer, but later found that some of the videos were erased or deleted.

The video evidence provided to CFSEU clearly depicts that some of the property that the subject officer appears to have been handling is later unaccounted for. Specifically the U.S. \$1 bill and a \$2 bill are not included in the cash noted either in the subject officer's notebook or in the Exhibit Flow Chart. The video appears to depict the subject officer at one point taking what is likely money, bending down out of sight of the camera and coming back up with nothing in his hands.

The apparent disappearance of specific bills along with an absence of a plausible explanation from the subject officer makes it possible that he took the money.

When the subject officer was confronted with this evidence by the accused's counsel in Court, he explained that his actions were a joke. However, there is nothing in the video that would indicate that his actions were done in a funny or light-hearted way.

In considering the evidence contained in the partial video clips provided on behalf of the accused, the following can be said:

1. That the subject officer took part in the search of the residence;
2. That while searching the room described by police as the accused's bedroom, he located a sum of cash;
3. That the cash located included U.S. currency with a one dollar and a two dollar bill;
4. That the U.S. one and two dollar bills were not referred to in the subject officer's notes, nor were those bills seized by the Exhibit officer or photographed by the police officer tasked with photographing the scene and
5. That the actions of the subject officer during the search depict him having something in his hand at one point, following which he bends down and re-emerges with nothing in his hands.

Evidence of Accused

The accused was interviewed during the CFSEU investigation. He advised that he had a broken safe which contained \$2000-\$3000 of loose change (one and two dollar coins) and a sum of American cash that included denominations of 50, 20, 10, five, and one dollar bills. There were more than ten one dollar bills. He also had a clear Tupperware container containing rolled coins amounting to about \$1000. Also reported as missing were vintage Canadian bills amounting to less than \$1000. Jewelry was also missing from a dresser.

Evidence of family members

Two family members of the accused were also interviewed. The family member who provided the video clips to CFSEU stated that he watched those clips depicting the same view of the accused's room and noted that another family member (the "second family member") and two other individuals were also in the residence on November 23. He advised police that he watched video showing the second family member taking property that did not belong to him from the accused's bedroom. This is part of the video evidence that could not be recovered.

The second family member, when interviewed, denied taken any property.

Evidence of other officers

The two officers who participated in the search with the subject officer were also interviewed. They confirmed having a recollection of the subject officer joking about having money in his sock. The first officer had not indicated this in his testimony during the accused's trial, however he recalled it later and reported it to police. Both officers thought that the money the subject officer was joking about was U.S. currency, with one indicating that it was a \$1 bill of some sort (not Canadian).

Evidence Gaps

CFSEU investigators in this case have advised that despite their efforts to retrieve all of the video evidence, it was not possible. As a result of the passage of time or technical issues caused by the manner in which the evidence was downloaded, or selective exclusions from the complete video files, the entire relevant sequence of video was not available for analysis. There is evidence that there was video in addition to that which the police were able to retrieve and that some of that evidence was relevant to the determination of this matter. It is a significant concern in conducting this assessment that potentially exculpatory evidence relating to the subject officer's actions is not available. This exclusion was not related to the actions of the police, but rather to the manner and possible motivations of the persons who produced the video to CFSEU.

Analysis

The actions of the subject officer are concerning. One inference that could be drawn is that he committed theft of an U.S. one and two dollar bill. There is no way of establishing more than that. Those denominations of currency are visible in the video clip of the search of the accused's bedroom provided to police by the accused but as neither the notes of the subject officer nor the Exhibit Flow Chart make any reference to cash in those denominations being seized from the residence.

The challenge for the prosecution is that the subject officer, while admitting moving the money, also testified that he returned it. To approve a charge based on the theft, the Crown would have to be able to prove beyond a reasonable doubt that the subject officer did not return the money. This is not possible in light of the following;

- 1) The video evidence is incomplete. As noted above the gaps do not permit the Crown to establish a complete picture of the offence.
- 2) The approach to documenting the seizure of items at the scene leaves open the possibility that the money was returned either before the search was complete and not properly accounted for or returned after the search and taken by a third party.

- 3) There is evidence that others were present and may have taken the returned cash. Evidence from a family member that three persons returned to the room after police searched it and were observed after the fact on video taking other objects from the room raises the possibility that the money was taken by one of the three.

The actions of the entire Abbotsford Search team on November 23, 2017 occurred at a time when the Abbotsford Police Department did not have a specific policy in place regarding the seizure of cash. The search was conducted in a fashion that was less than ideal, with incomplete documentation of items located and seized, and a lack of photographic evidence that would confirm specifically what was located and seized.

Conclusion

In order for the Crown to be satisfied that the charge approval standard is met, the first step is to determine whether there is a substantial likelihood of a conviction. A substantial likelihood of conviction exists if Crown Counsel is satisfied that there is a strong and solid case of substance to present to the court.

In summary, there are activities depicted in the video evidence provided to Crown Counsel that raise concern about the subject officer's participation in the search of the accused's residence. While it is possible to draw some inferences pointing towards guilt from the subject officer's suspicious activities, on the whole of the evidence there are other, plausible inferences, consistent with innocence, that cannot be refuted. These reasonable inferences consistent with innocence are sufficient to raise a reasonable doubt as to the guilt of the subject officer.

Accordingly the evidence falls markedly short of a solid case of substance that would be capable of supporting a prosecution and no charges have been approved.