



September 18, 2019

19-16

Stay of Proceedings Directed in Prosecution of Surrey RCMP officer

Victoria – The BC Prosecution Service (BCPS) announced today that a stay of proceedings has been entered on charges of aggravated assault and assault with a weapon previously approved against Cst. Elizabeth Cucheran of the Surrey RCMP. The charges related to an on duty incident involving the fatal shooting of Hudson Brooks that occurred on July 18, 2015 in the parkade of the District 5 RCMP detachment on 152 Street in Surrey.

The case was investigated by the Independent Investigation Office (IIO) which subsequently submitted a Report to Crown Counsel (RCC). The charges were approved and the prosecution conducted by senior Crown Counsel with no connection to, or working relationship with, Cst. Cucheran.

Following the approval of charges a preliminary inquiry was concluded in BC Provincial Court. As a result of issues that arose during that hearing, the BCPS requested further investigation. Based on a careful review of new material received and consideration of an additional expert report, the BCPS has determined that the available evidence no longer satisfies the charge assessment standard for the continued prosecution of Cst. Cucheran for any criminal offence. As a consequence, a stay of proceedings was directed in the case. The ban on publication ordered at the preliminary inquiry has also been lifted.

In order to maintain confidence in the integrity of the criminal justice system, a Clear Statement explaining the reasons for not approving charges, or for staying approved charges, is made public in cases where the IIO has investigated the conduct of a police officer and forwarded a report for charge assessment. A [clear statement](#) explaining this decision in greater detail is attached to this media statement.

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Clear Statement

Introduction

On December 19, 2017 the BCPS issued a media statement announcing that charges of aggravated assault and assault with a weapon had been approved against Cst. Elizabeth Cucheran of the Surrey RCMP.

The charges arose as a result of the shooting death of 20 year old Hudson Brooks on July 18, 2015 near the District 5 RCMP detachment on 152 Street in Surrey. The death was investigated by the Independent Investigations Office (IIO). A Report to Crown Counsel (RCC) was first submitted to BCPS by the IIO in October 28, 2016. After an initial review, the BCPS requested further information from the IIO. A further expert opinion was obtained by the IIO and was forwarded to the BCPS in March 2017. Further investigation was requested and the RCC was completed in November 2017.

After reviewing the evidence that was available in December 2017, senior Crown Counsel were satisfied that the standard for charge approval under the BCPS Charge Assessment Guidelines (CHA 1) was met. 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

While charges related to the homicide were not approved, charges of aggravated assault and assault with a weapon were approved. The charges proceeded to a preliminary inquiry in November 2018. The inquiry concluded in December 2018 after hearing evidence from 6 civilian witnesses, 7 police officers (two of whom were present at the scene), and three expert witnesses in the areas of toxicology, pathology, and use of force. At the conclusion of the inquiry, Cst. Cucheran was committed to stand trial on both counts.

The evidence that emerged at the inquiry revealed significant shortcomings in the case against Cst. Cucheran. As a result Crown Counsel undertook a comprehensive file review. The review included further consultation with several use of force experts including two retained by the defence.

Under BCPS policy, the charge assessment standard continues to apply throughout the prosecution and Crown Counsel has an obligation to ensure that it continues to be met. Based on its review of this matter, the BCPS recently determined that the available evidence no longer satisfies the charge approval standard for a prosecution of Cst. Cucheran for any criminal offence. Accordingly, the BCPS entered a stay of proceedings.

This decision was based on evidentiary and legal considerations arising out of the evidence at the preliminary inquiry, witness interviews, further information and material received, and an analysis of their impact on the file.

The BCPS recognizes that this case has attracted considerable public attention. The BCPS also appreciates the importance of transparency in maintaining public confidence in the administration of justice, especially in relation to the use of lethal force by police officers. As noted by the Supreme Court of Canada: "No one is above the law. When a member of the community is killed or seriously injured by a police officer, it is not only appropriate to ask whether the police were acting lawfully, it is essential".

Factual Background for the Charge Assessment

This is a summary of the evidence on which the initial charge approval was based. Not every detail is included.

In the early hours of July 18, 2015, 20-year-old Hudson Brooks, having consumed significant quantities of alcohol and cocaine, was acting erratically. Shoeless and wearing only boxer shorts, he was seen wandering down the middle of the streets in the vicinity of the District 5 RCMP detachment on 152 St. in Surrey. He was vandalizing cars and talking to himself loudly, saying "Kill me!", "They're going to kill me!", and "Sorry mom!" Onlookers called 911.

At the time of the initial call, Cst. Cucheran and Officer A were in the detachment, Officer B, a trainee officer, was waiting for Cst. Cucheran in a police vehicle in the station parkade. Officer A immediately went to the detachment parkade and got into his SUV in order to investigate the call.

At 2:43:12 the dispatcher broadcast that the individual was apparently high on drugs. At 2:43:23, Officer A, half-way out of the Parkade, radioed that the suspect was coming directly at him.

Mr. Brooks proceeded to attack Officer A's SUV. Officer A locked his doors, activated his emergency lights and air horn and called for help over the radio. According to Officer A, Mr. Brooks was screaming incoherently, yelling "Kill you! Kill me! Kill you!" When Mr. Brooks was unable to access the interior he started to hammer at the driver's door and window with his arms, hands, elbows, knees, shoulder, and head. Officer A says Mr. Brooks had a vacant look and he thought he was going to smash through the window. Officer A thought he would be "at a complete disadvantage" if Mr. Brooks got in and that he would be "severely injured, if not worse..." Officer A believed Mr. Brooks intended to seriously harm or kill him. He did not, however, see anything in Mr. Brooks' hands. Officer A's evidence was corroborated by a taxi driver who was driving slowly past the parkade who testified at the preliminary inquiry that Mr. Brooks was the most violent, aggressive person he had ever seen. Twenty-two seconds after his

initial radio call, Officer A radioed again saying *"I need help now! I need help now!"* Officer B says Cst. Cucheran passed her just as Officer A sent that broadcast.

The parkade video shows that at 2:43:34 Cst. Cucheran entered the parkade and started running towards the parkade exit. She was in full uniform, with body armour, her service pistol, a CEW (Taser), pepper spray, and an ASP baton.

Officer B got out of her vehicle as Cst. Cucheran ran past her. They both disappeared off camera around the corner at 2:43:39. According to Officer B, she and Cst. Cucheran stopped when they saw Mr. Brooks.

Officer B, like Officer A, characterized Mr. Brooks' behaviour as assaultive and aggressive. She thought he definitely wanted to hurt one of them. She says she did not think that she and Cst. Cucheran could take him on by themselves. She says she did not think Mr. Brooks had anything in his hands but it happened so quickly she could not be certain.

Officer B says she and Cst. Cucheran stopped behind the vehicle but is vague about how far behind they were. Cst. Cucheran was on the driver's side and Officer B was to Cst. Cucheran's right, more directly behind the SUV. She says Cst. Cucheran yelled *"Stop!"* Mr. Brooks charged towards the back of the SUV and initially took a step towards Officer B. At this point she noticed Cst. Cucheran drawing something, either her firearm or her Taser. Mr. Brooks charged Cst. Cucheran and Officer B heard bangs. She estimates that Cst. Cucheran and Mr. Brooks were about two metres apart at this point.

Officer B says Mr. Brooks continued to move towards Cst. Cucheran, who was stepping back, firing as she did. The parkade camera captures Cst. Cucheran retreating backwards and firing as Mr. Brooks pursues her.

Officer B drew her pistol *"just automatically"* because shots had been fired and because she did not know what Cst. Cucheran had seen. Officer B realized she might now be in the line of Cst. Cucheran's fire so she crossed behind Mr. Brooks, moving north towards the ledge of the parkade.

Officer B says that as Cst. Cucheran retreated, she tripped backwards over a ledge forming the perimeter of the parkade. Mr. Brooks fell at her feet and then crawled on top of her.

Cst. Cucheran was trying to pull her leg back and push Mr. Brooks off but seemed stuck.

Cst. Cucheran then fired one or two more shots. Those were the last shots Officer B heard.

At this point, Officer A arrived and told Officer B to *"pull"*. She switched her gun to her left hand, and pulled Cst. Cucheran out from under Mr. Brooks with her right hand. Officer A then pepper-sprayed Mr. Brooks, who fell over onto his left side.

Officer A's description is somewhat different. He says that he was trying to turn off his air horn (which had become stuck) when he saw an RCMP member reflected in his side mirror. He heard pops behind him. He radioed "*Shots fired!*" at 2:43:54 (20 seconds after radioing for help).

Officer A got out of the SUV and observed Cst. Cucheran and Mr. Brooks in the north area of the parkade. He says Mr. Brooks was within centimeters of her and appeared to be grabbing her, trying to throw her around and then he saw her go backwards over the ledge and Mr. Brooks went on top of her. He says Mr. Brooks was still screaming "*I'm going to kill you!*"

Cst. Cucheran fired her pistol twelve times, hitting Mr. Brooks nine times. She hit him four times in the upper left thigh, once in the lower left abdomen and once in the left side of his torso. There are no powder burns on these wounds so it appears likely that these wounds were caused by shots fired as she retreated, while there was still more than two feet between the muzzle of Cst. Cucheran's pistol and Mr. Brooks. The last three wounds do demonstrate scorching and powder burns, so it appears likely that these were fired when Mr. Brooks was very close to or on top of Cst. Cucheran. These shots hit him in the right wrist, the right eye, and the centre of his chest. Cst. Cucheran also shot herself in the outside of her left leg when she was on her back.

Initial Expert Evidence

An expert in the area of RCMP training and the use of force provided an opinion on the actions taken by Cst. Cucheran. The expert's initial opinion was that the actions of Cst. Cucheran against Mr. Brooks did not conform to RCMP policy or training at the time of this incident. She and Officer B put themselves at a disadvantage as they got too close to Mr. Brooks when he turned towards them. Mr. Brooks was demonstrating potential assaultive behaviour towards the officers but he was only wearing boxer shorts and thus there were very few areas where he could conceal a weapon. In these circumstances, Cst. Cucheran's available use-of-force options were: officer presence, communication, and physical control—including hard tactics and intermediate weapons. He notes that her Taser had an effective range of 6.5 m and could be expected to be particularly effective against a naked person. While she might have been at a disadvantage one-on-one against Mr. Brooks, both Officers A and B were on scene, and other officers could be expected to arrive shortly.

Legal context for Charge approval

Aggravated Assault / Assault with a weapon / Manslaughter

To prove any assault requires the Crown to prove the accused intended to apply force, with or without a weapon, 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.

A person who intends to cause death or intends to cause bodily harm that the person knows is likely to cause death, and is reckless whether death ensues or not, is guilty of murder. A person who causes death by an unlawful act without the intent for murder is guilty of manslaughter.

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 to disprove the justification beyond a reasonable doubt 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."

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. 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. 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:

- the nature of the force or threat;
- 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;
- whether any party to the incident used or threatened to use a weapon;
- the size, age, gender and physical capabilities of the parties to the incident; and
- 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 neither the defence of justification nor self-defence would apply.

Analysis by Crown Counsel

Crown Counsel were satisfied that the available evidence would establish that Cst. Cucheran fired the shots that struck and killed Mr. Brooks. This evidence, however, would not be enough to sustain a conviction unless the evidence would also disprove justification or self-defence.

The law is clear that even a mistaken belief in the need to use lethal force offers a complete defence to a charge of assault if it was objectively reasonable in the circumstances of the case.

The Crown concluded that the initial shots Cst. Cucheran fired at Mr. Brooks were not legally justifiable. While there was no doubt she was entitled to use some degree of force to defend herself as Mr. Brooks approached, the Crown was satisfied she was not entitled to resort to lethal force as soon as she did.

While Cst. Cucheran may have had a subjective belief that lethal force was necessary, on the available evidence this belief was not objectively reasonable. Based on the evidence as it stood at the time of charge assessment, it appeared that she would have had time to deploy her Taser instead of shooting Mr. Brooks.

As the events unfolded and Mr. Brooks came into physical contact with her, eventually ending up on top of her, the officer's reasonable alternative options for defending herself disappeared. She was put in the position of justifiably resorting to her firearm to defend herself. Although the initial shots were not legally justifiable, that could not be established for the subsequent shots. The pathology evidence indicates Mr. Brooks' death was caused by a close range shot to his chest, fired when Cst. Cucheran had no reasonable alternative for defending herself. For that reason homicide charges were not approved. Instead charges of assault with a weapon and aggravated assault were approved with respect only to the initial shots fired by Cst. Cucheran.

Preliminary Inquiry

A preliminary inquiry is a hearing held to determine whether there is *any* admissible evidence, whether direct or circumstantial, which, if believed by a properly charged jury acting reasonably would justify a conviction. If the answer to that question is yes, the accused is committed to stand trial on the charges. The threshold for committal is low, well below both the Crown's threshold for charge approval and the standard of proof beyond a reasonable doubt that would apply at a trial.

At the preliminary inquiry, particularly during cross examination, eyewitnesses and expert witnesses gave testimony that differed significantly on key points from evidence provided in previous statements, reports and opinions. As a result, Crown Counsel were obliged to reassess the evidence and the conclusion they had initially drawn with respect to the use of force employed by Cst. Cucheran in the early stages of the incident. The critical changes in the evidence since charge approval were:

1. Evidence brought out in cross examination of eye-witnesses gave a different tenor to their original statements to investigators. Their evidence now provided significant context and objective support for a conclusion that Mr. Brooks posed an imminent risk of grievous bodily harm or death.
2. The Crown's use-of-force expert's opinion was challenged under cross-examination, with the result that the Crown's case has been significantly undermined. Examples of admissions under cross-examination include:
 - The expert conceded that Mr. Brooks was likely suffering from "excited delirium" and that this had significant implications for the use of force options that were available to Cst. Cucheran, specifically with respect to the potential for a successful Taser deployment. In his initial opinion, there had been no indication of the possibility of excited delirium or the fact that this would significantly reduce the likely effectiveness of the Taser;
 - The expert agreed, contrary to his initial opinion, that:
 - Cst. Cucheran did not make a mistake in initially drawing her pistol;
 - Cst. Cucheran's resort to her firearm in the circumstances was not contrary to RCMP training and policy;
 - Cst. Cucheran could reasonably have believed that Officer A had been killed or injured by Mr. Brooks and, as a result, was not available to assist her in defending against Mr. Brooks; and
 - Cst. Cucheran likely would not have had time to re-holster her firearm and draw her Taser or resort to one of her other force options once Mr. Brooks began attacking her.

3. Following the preliminary inquiry, an independent expert provided a report in which he strongly disagreed with the original opinion offered by the Crown expert on a number of key points, most centrally the opinion that Mr. Brooks did not pose a risk of grievous bodily harm or death to Cst. Cucheran. Defence counsel provided the Crown with two opinions from qualified experts that agreed with this contrary opinion.
4. When charges were initially approved, there was no reference in the expert reports to the possibility that Mr. Brooks was in a state of excited delirium or what the implications of this might be for the assessment of the reasonableness of the force used by Cst. Cucheran. When the Crown expert conceded in cross-examination at the preliminary inquiry that Mr. Brooks was almost certainly in such a state, this significantly undermined the basis for the Crown's initial charge approval. The fact of excited delirium significantly raises the risk Mr. Brooks posed to Cst. Cucheran as well as significantly lessening the effectiveness of non-lethal force options. Independent and defence experts have subsequently confirmed this opinion.

"Excited Delirium" or "cocaine psychosis" refers to "a state of extreme mental and physiological excitement, characterized by extreme agitation, hyperthermia, hostility, exceptional strength and endurance without apparent fatigue." Common underlying causes are said to be illicit drug use or mental illness.

Mr. Brooks was displaying many of the symptoms of excited delirium. Moreover, the evidence gathered after the fact establishes that Mr. Brooks had significant quantities of cocaine and alcohol in his system, had (based on eyewitness accounts) possibly also used psilocybin that evening, had attacked several car side mirrors and had wandered for several kilometers across town and through traffic, at times in the middle of a four lane road seemingly oblivious to traffic.

All experts agree that individuals experiencing excited delirium are likely to be unaffected by interventions that rely on pain to effect compliance. While the Taser can incapacitate, it is most effective when the subject is 3-4 metres from the operator. Inside of three metres, the effect of the Taser is a pain response rather than incapacitation. Based on the available evidence the Crown is not able to establish the distance between the Cst. and Mr. Brooks was in excess of three metres when the Taser could have been deployed.

Conclusion

The evidence brought out at the preliminary inquiry significantly weakened the foundations of the Crown theory that the Taser provided a reasonable force option for Cst. Cucheran to use to attempt to incapacitate Mr. Brooks and therefore that it was unreasonable for her to resort her firearm during Mr. Brooks' initial advance.

In light of the expert's testimony at the preliminary inquiry, as supplemented by the opinions of other experts, the Crown is unable to prove that Cst. Cucheran's failure to use the Taser when Mr. Brooks initially attacked her resulted from or reflected any blameworthy conduct on her part. The Crown is now of the view that the evidence strongly establishes that resort to her firearm was entirely reasonable in the circumstances.

After a comprehensive review of the available evidence, the BCPS concluded that the charge assessment standard is no longer met. Accordingly, the Crown directed a stay of proceedings for all charges against Cst. Cucheran.