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19-20

## No charges approved in non-fatal NWPD police shooting

**Victoria** - The BC Prosecution Service (BCPS) announced that no charges have been approved against a member of the New Westminster Police Department involved in a non-fatal shooting that occurred near the Walmart on 805 Boyd St. on January 15, 2016. The incident occurred in the course of the apprehension and arrest of an armed suspected shoplifter.

As a consequence of the injuries suffered by the suspect, 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 had committed offences and submitted a report to the BCPS.

In this case, the BCPS concluded on the entirety of the evidence made available to it that the charge assessment standard for initiating a prosecution has not been met and no charges have been approved. A [Clear Statement](#) explaining the decision in greater 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 in cases where the IIO has investigated the conduct of a police officer and forwarded a report for charge assessment.

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## Clear Statement

This case involves the use of force by the Subject Officer ("SO") in first discharging the SO's conducted energy weapon ("CEW", also commonly known as a "Taser") against a suspect and then discharging the SO's firearm eight times after the suspect drew and pointed a firearm at the SO.

As a result of injuries to the suspect, the IIO conducted an investigation into the actions of the SO who fired the shots that struck the suspect. 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 SO. The charge assessment was conducted by a senior 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)

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 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.

## **Potential Charges**

### **Aggravated assault/assault with a weapon**

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 cause wounding, maiming, or endangerment of life, and the risk of that result must have been reasonably foreseeable.

### **Attempted murder**

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

### **Careless use of a firearm/ Reckless Discharge 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".

Section 244.2 of the *Criminal Code* makes it an offence to intentionally discharge a firearm while being reckless as to the life or safety of another person.

For a conviction for either offence, 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 support the standard of care in the circumstances, considering the relevant training and policies of the police agency.

## Potential Defences

### 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). Section 25(1) of the *Criminal Code* provides that a peace officer, who acts on "reasonable grounds" in the course of their lawful duties, is "justified in doing what he is required or authorized to do and in using as much force as necessary for that purpose." Section 25(4) of the *Criminal Code* limits the justification in relation to "force that is intended or is likely to cause death or grievous bodily" to circumstances where there are reasonable grounds to believe such force is necessary to protect against death or grievous bodily harm.

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 legal justification provisions require an assessment of the reasonableness of the officer's perception of the threat and the appropriateness of the response, in the totality of the circumstances. There is no requirement for an accused to prove they apply. The Crown bears the onus of proving beyond reasonable doubt that the justification provisions are not applicable. Where the evidence supports reasonable factual inferences that would justify the use of force, the Crown cannot meet its burden of proof.

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 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 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 courts have recognized that, "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 the justification and self defence provisions 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 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 committed is reasonable in the circumstances.

Where there is an "air of reality" to self-defence, to obtain a conviction, the Crown must prove beyond a reasonable doubt that one or more of the elements of the defence does not apply. There is no requirement for an accused to prove the defence applies.

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.

### **Summary of Evidence**

During the course of the investigation, statements were obtained from a number of civilian and police witnesses. These accounts are generally consistent and differ in minor areas only. The suspect, who declined to provide a statement, was prosecuted for offences related to his use of a firearm in this case. The SO gave testimony at the suspect's Preliminary Inquiry. The testimony, though not admissible against the SO, provide insight into the viable defenses which might arise at a trial.

On January 15, 2016, a Loss Prevention Officer (LPO) at the Walmart located at 805 Boyd Street, New Westminster, called 911 to report that an individual she had previously arrested at the store was present contrary to a court order. The LPO also reported that this person was accompanied by an associate (the suspect). After relaying this information, the LPO watched as the first individual was taken into custody outside the store by an officer from the New Westminster Police Department (NWPD). A short time later the LPO observed the suspect on closed circuit television taking two items and heading towards the back of the store.

NWPD dispatch radioed to officers at the scene that a potential theft was in progress. One of the officers who responded to the call was the SO. After arriving on scene, the SO observed a male matching the physical description of the suspect walking in the Walmart store parking lot, and noted he was carrying two boxed items and a cell phone but did not have a store bag.

The SO approached the suspect and engaged in a brief conversation. Although witnesses described the SO as initially calm, the conversation quickly became heated and more agitated. At one point the boxes held by the suspect were sent flying or fell. The suspect was seen by one witness to be angling his body away from the SO in a manner that would conceal his right arm. The SO produced the Taser and, as the suspect turned to flee, discharged the weapon. The suspect ran approximately 15- 20 meters and fell to the ground.

After the suspect fell to the ground he rolled (which may have displaced the Taser probes) and quickly sat up. He then produced a silver-coloured handgun from his right pocket or right side area of his body and pointed it in the direction of the SO, another officer and the civilian witnesses. The SO drew a police-issued firearm and fired two shots at the suspect. The suspect then ran through the parking lot in a northerly direction, towards the nearby river.

The SO, followed by a second officer, pursued the suspect as he ran close to the northern edge of the front parking lot, then turned left, entering the rear parking lot. The suspect passed two parked semi-trucks and turned right onto the grassy area, where he fell and was ultimately apprehended by the pursuing officers. He was found to have suffered gunshot wounds to his left buttock, left patella, soft tissue injury to his right leg, and laceration to his left leg. He has since recovered from the injuries.

Evidence recovered from the scene indicated that the SO had discharged the firearm eight times, twice when the suspect pointed the firearm at the police, once towards the northern edge of the parking lot, and five times in the parking lot near the grassy area.

CCTV video shows that, during the pursuit, the suspect ran away from the SO, looking over his shoulder and raising his right arm, consistent with waving or pointing his firearm. One civilian in the area heard the SO direct the suspect to drop the gun during the pursuit. The CCTV

video was not sufficiently clear to verify if the firearm was in the suspect's right hand at this point. However, it is apparent from all of the evidence that the suspect had been carrying his handgun throughout the pursuit.

When the suspect was approached, lying on the grassy area, he did not immediately comply with directions to discard his handgun, but ultimately threw the handgun a short distance away where it was recovered. On recovery, it had no magazine but had one round in the chamber. A magazine containing ammunition was recovered from the pursuit route. The handgun had not been fired.

The officer's actions were assessed by a use of force expert who concluded that the officer's actions in discharging his firearm were consistent with NWPD policy and training. The expert concluded that:

- faced with a temporarily effective Taser and a person who is getting to his feet and drawing a handgun and apparently pointing it in the direction of the officer, the SO's decision to fire two rounds was appropriate,
- at no time were any by-standers in the direct line of sight of the SO when he fired at the suspect and that the actions of the SO were "generally appropriate under the circumstances", and
- permitting the suspect to escape while still in possession of his handgun would have been neither a reasonable nor a safe response.

The CCTV video supports the expert's findings that there were no by-standers in the direct line of sight of the SO when he fired at the suspect. The rear parking lot, where the last five shots were fired, was adjacent to an automotive and garden centre which was open at the time of these events.

### **Analysis: Use of Taser**

There is recognized judicial authority for police to detain individuals for the purpose of investigating recent or ongoing criminal offences. Such investigative detentions can properly include limited searches for safety purposes, if carried out in a reasonable manner, where the police officer has reasonable grounds to believe that their own safety, or the safety of others, is at risk. In this case there is sufficient evidence to support an inference that the SO had grounds to detain the suspect for investigation.

Once lawfully detained, police are permitted to ask the detained person questions relating to possible safety risks, such as the possession of weapons or needles. While the detained person cannot be compelled to respond, a refusal to respond, or a refusal to un-clench a closed fist or show an officer what is in a person's hand, is a factor that the officer is entitled to consider when deciding on the manner of a search.

In addition police may use reasonable force to effect an investigative detention, where justified. A reasonable conclusion on the evidence in this case is that the SO had lawfully detained the suspect to conduct an investigation. The issue is whether the force used by the SO in deploying the Taser was reasonably justified within the definition in section 25 of the *Criminal Code*.

In this case a court would consider the evidence that the suspect was agitated, the actions of the suspect in shielding or "blading" his body with the effect of concealing the contents of his right hand, and the heated exchange between the SO and the suspect as observed by witnesses. This evidence is sufficient to show an "air of reality" to a section 25 justification, and raise a reasonable doubt that the use of the Taser was justified. The SO's anticipated evidence that the suspect had refused to comply with directions to remove his hand from his pocket supports this conclusion.

As a result, there is not a substantial likelihood of convicting the SO for assault or assault with a weapon relating to the use of the Taser.

### **Analysis: Use of firearm**

The same defence of legal justification applies to the use by the SO of their firearm in pursuit of the suspect. Police officers have a common law duty to act to protect life and safety. Section 25 of the *Criminal Code* recognizes that peace officers may be justified in using force that is intended or likely to cause death or grievous bodily harm to a person where the officer is acting in the course of duty and believes on reasonable grounds that the force is necessary for self-preservation or for the preservation of any one under the officer's protection. Additionally, pursuant to section 25(4), an officer may be justified in using force that is intended or likely to cause death or grievous bodily harm to a person who "takes flight to avoid arrest", where the officer believes, on reasonable grounds that "the force is necessary for the purpose of protecting the peace officer, the person lawfully assisting the peace officer or any other person from imminent or future death or grievous bodily harm; and,...the flight cannot be prevented by reasonable means in a less violent manner."

Section 34 of the *Criminal Code* may also be applicable in that it provides a legal justification for the reasonable use of force in circumstances where self-defence or the defence of others is reasonably believed to be necessary in response to force or a threat of force.

When the suspect drew a concealed handgun and pointed it in the SO's direction, and the direction of civilians nearby, during their agitated interaction in the front Walmart parking lot, the SO had a reasonable basis to believe that the SO and anyone in the immediate vicinity was at risk of grievous bodily harm or death.

The evidence indicates that, during the pursuit, the suspect continued carrying his handgun in his hand, looked over his shoulder and raised his right arm, did not comply with directions to



drop the weapon, and continued to maintain control of the weapon to the point where he ultimately fell in the grassy area before throwing it a short distance away. It is reasonable to infer that the suspect posed a continuing risk of grievous bodily harm or death to the officers and those in the area, including occupants of the nearby stores. The SO had a common law duty to protect those persons.

The suspect was arrestable for firearms offences, he was in the process of fleeing from the SO, there were reasonable grounds to believe that the risk he posed to those in the area included grievous bodily harm or death, and his conduct supported the conclusion that his flight was not preventable by reasonable means in a less violent matter.

On the evidence, the Crown would not be able to prove beyond a reasonable doubt that the legal justifications or the defence of self defence do not apply. Accordingly, charges of attempt murder and aggravated assault have not been approved relating to the discharge of the SO's firearm.

Given the above findings, there is insufficient evidence to show that the SO's conduct was "a marked departure from the standard of care of a reasonable person in the circumstances," to make out the offence of careless use of a firearm or "that he was being reckless as to the life or safety of another person," for an offence of reckless discharging of a firearm. The use of force expert's opinion that the manner in which the SO discharged his firearm throughout this incident was "in accordance with policy and training" supports this finding.

## **Conclusion**

As the Crown would be unable to disprove the legal justifications and defences that arise from the facts of the case, there is no substantial likelihood of a conviction and no charges have been approved.