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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 September 20, 2020, of an individual who suffered serious 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 #2020-232).

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.

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Clear Statement

Summary of decision

At about 2:30 am on September 20, 2020, a civilian in a residential neighbourhood in Vancouver contacted the VPD to report a suspicious male under a car parked on the street. Several VPD officers responded to the call. The police found an individual, hereafter referred to as the affected person (AP), under a car attempting to remove a catalytic converter. The Subject Officer (SO) was on duty with his police service dog (PSD) and took charge of the AP's arrest. The SO directed the officers to create a containment perimeter, and then announced to the AP that he was under arrest.

The AP then came out from under the vehicle and fled on a bicycle. The SO deployed his PSD and a brief chase ensued. The dog followed the AP around a corner with the officers in close pursuit. The PSD was able to stop the AP and the bicycle by biting the AP in the calf. The AP fell off the bicycle and began punching the PSD in the head. The PSD's paws were injured by the bicycle spokes at some point during this take-down.

The SO and a second officer caught up to the AP while he was striking the PSD. The second officer described having to punch the AP in the ribs to distract him from punching the dog and to get him to comply with police demands. During the arrest the AP suffered a fractured jaw, cheek, and orbital bone, in addition to broken ribs consistent with the rib-punches described by the second officer. He also suffered a leg laceration and bite wound from the dog bite. Paramedics arrived on scene and treated the AP's injuries before he was taken by ambulance to the hospital for further treatment.

The IIO did not recommend charges based on the use of the PSD or the rib fractures inflicted by the second officer but did recommend charges relating to the blow or blows to the AP's face that caused the facial injuries. The evidence indicates that any blow to the AP's face must have been delivered by the SO.

This Clear Statement provides a more detailed summary of the evidence gathered during the investigation and the applicable legal principles. These are provided to assist in understanding the BCPS's decision refusing to approve charges against the officer involved in the incident. Not all the relevant evidence, facts, case law, nor legal principles are discussed.

The charge assessment was conducted by Crown Counsel with no prior or current connection to any of the officers who were involved in the incident.

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

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 criminal 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.

Potential Charges

The potential charges that were considered against the subject officers in this case were assault contrary to section 266 of the *Criminal Code*, 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 AP intentionally applies, threatens, or attempts to apply force to another person without that person’s consent. Assault with a weapon is an assault that occurs when a AP is carrying or using a weapon and assault causing bodily

harm requires proof of harm that interferes with the health or comfort of a person and 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 defence 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."

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

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 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).

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.

The issue is whether the force used by the SO was necessary, reasonable, and proportionate in the circumstances. In applying section 25, courts have made it clear that based on the exigencies of the circumstances, police are oftentimes required to take control of situations as quickly as possible to prevent an escalation or to ensure the safety of the subject, police, or members of the public. 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.

Outline of evidence

The evidence indicates that only the SO, the second officer, and the AP were present during the portion of the arrest when the facial injuries would have occurred. By the time other officers arrived on the scene the AP was already bleeding from the face. Statements were obtained from the other officers, the AP, a paramedic, and a civilian who videotaped some of the events with a cell phone. The SO did not provide a statement, but he is not required by law to provide one.

Police evidence

The second officer was interviewed and claimed he did not recall any of the SO's actions during the arrest. The second officer caught up to the AP just as the AP fell off the bike. The second officer saw the AP repeatedly punching the PSD in the head with a closed fist. The second officer approached, yelling "stop punching the police dog, put your hands behind your back." He tried to grab the AP's arm to stop him from punching the dog. When neither of those were effective, he punched the AP "a couple of times" in the back to "cause a distraction" from the AP's focus on punching the police dog. Although this officer provided specific details about the AP's actions, describing him as "flailing around trying to escape" throughout the arrest and as "active resistant," "assaultive" and "non-compliant" he said he could not recall if the SO struck the injured party, or recall anything else about the SO's involvement in the arrest.

Other officers arrived on scene as the AP was being restrained. One officer assisted the second officer with placing the AP in handcuffs. None of the other officers who attended observed the SO striking the AP in the face or at all.

Statement of AP

In his statement to the investigators the AP described how the dog bit his leg and that this caused him to fall over: "When that dog got a hold of my leg it brought me almost to a dead stop and that's why I fell over because I lost my momentum." He asserted that the dog bit him on the left calf, and that he fell to the right. Then he was "on the ground...I'm entangled in my bike...and all my attention was on, of course, the dog biting my leg."

The AP did not mention punching the dog and said he had no memory of his arrest from the dog bite forward; he describes that he "went black". In his statement he initially says that when he "woke up" the ambulance was already there. Later, when asked about the first thing he remembers after blacking out, he describes his mouth being full of blood, on the ground with police all around him, and says he had to tell the police a couple of times that he needed an ambulance.

During the period immediately after he regained consciousness, the AP described one of the officers, whom he assumed was the dog handler, saying "That wasn't necessary". "You messed up my dog's paws. Now I have to take him to the vet. That's why you got the flashlight".

Hospital records disclose that the AP reported having consumed both alcohol and crystal methamphetamine on the night in question. The AP suffered several injuries, the dog bite, and lacerations to his left calf, rib fractures to his lower ribs, and facial fractures to his jaw, hard palate, and the orbital bone on his right side.

Statement of paramedic

One of the paramedics who attended told investigators that a police officer informed her that he "punched the patient in the jaw, so she would find some injuries by the jaw." Based on the circumstances of the arrest and the description of the officer provided by the paramedic it is reasonable to assume that this officer was the SO. This statement by the SO does not disclose the number of punches he delivered to the AP's face.

Video recording

A civilian who lives nearby the arrest location was alerted to the arrest when he heard a scream. He did not observe the take-down itself, but did video record the officers speaking to the AP while he was on the ground after the arrest. In the video, an officer can be heard to say, "You should have stopped right away. Then my dog got his legs caught in your bike. Then you were hitting my dog when it bit you. So be a man. What's your last name?"

The reference to "my dog" suggests that this statement is spoken by the SO. The SO also fits the description of the person who can be seen leaning over the AP when these words are spoken. When this video-recorded statement is made, the SO is one of five or six officers who are standing in circle around the AP, who is still on the ground. He is leaning over the AP and is holding a 15 cm flashlight in his left hand.

Analysis

Assault/assault causing bodily harm

The specific assault charges recommended by the IIO are related to the blow or blows that resulted in the facial injuries suffered by the AP. The evidence establishes that the arrest in this case involved the intentional application of force to the AP without their permission. That is the definition of an assault. In addition, the injuries suffered by the AP satisfy the legal definition for "bodily harm".

There is evidence to show that the SO punched the AP in the face during the course of the arrest. The statement to the paramedic attributed to the SO supports this conclusion. The real issue on charge assessment is whether the use of force to apprehend the AP was reasonable or excessive within the meaning of the *Criminal Code*. As noted above the application of section 25 of the *Criminal Code* provides a potential justification or defence to this offence.

Although the injuries are significant the Crown cannot prove how the injuries were caused. Nor is there evidence of the number of blows which might have caused the injuries. While several blows might have been struck it is possible that the injuries were caused by a single forceful punch to the face. Aside from the extent of the injuries, there are no eyewitnesses to say how many blows were struck. The AP is unable to add any information and the SO's admission to the paramedic is silent on this point. It is important to emphasize that neither the law, nor police standards or training, deem any particular manner or mode of applying force to be excessive or unlawful. 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 objective reasonableness of the force the officer used in response.

The law does not require that an officer use the minimum possible force necessary in order to qualify for the protection afforded by the legal justification provisions of the *Criminal Code*, only that the force used was within a reasonable range of force options. The law does not require an officer to judge necessary force with exactitude. Given the dynamic and confused nature of the situation, considerable latitude is likely to be given officers exercising judgment as to whether the force used was objectively excessive.

The evidence of the officers indicates that the AP was actively resisting arrest. The second officer specifies that this included the AP repeatedly punching the PSD in the head with a closed fist, "a whole bunch of times", in a "fury", in a manner which was "not calculated" and which caused the dog to "recoil" from the blows. This raises an air of reality to the defence of legal justification: that reasonable force was necessary to protect the PSD and effect the arrest.

As there is an air of reality to a section 25 defence, 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 available evidence does not provide a basis to do so. While repeated blows to the head of the AP might be found to be unreasonable under the circumstances, one punch likely would not. Being unable to prove whether the AP's injuries were caused by one or more than one punch, the Crown cannot prove that the SO's actions were an unreasonable response to the AP's punching the PSD or the AP's actively resisting arrest. Accordingly, there is no substantial likelihood of conviction on a charge of assault or assault causing bodily harm.

Assault with a weapon

If the SO used a flashlight to strike the AP in the face, this might well be found to have exceeded what was reasonable in the circumstances and therefore be legally unjustifiable. The only direct evidence that the SO used the flashlight as a weapon comes from the AP's recounting of a statement, apparently made by the SO ("you messed up my dog's paws...that's why you got the flashlight"). Despite the AP's obvious frailties as a potential witness, this statement is corroborated to some extent by the bystander video. That video captures an officer making a

similar statement without reference to the flashlight but made while the speaker is actually holding a flashlight. It was taken at a time when other officers were already present, therefore after the injuries were inflicted. It is possible the AP either misunderstood, misremembered, or contrived the portion of the statement about the flashlight. It is also possible that the statement was made as recounted by the AP but before the arrival of the other officers and the taking of the video, and then repeated in less objectionable form in the presence of the other officers. As indicated above, none of the other officers on scene could (or would) provide any evidence about the actions of the SO. Given that gap, the lack of any physical evidence that could prove the number or nature of the blow or blows delivered, and the AP's frailties as a witness, his statement is not enough to prove that the SO used a flashlight as a weapon to assault the AP.

Conclusion

The Crown would not be able to prove, beyond a reasonable doubt, that the force used in this arrest was unreasonable nor that a weapon was used. Accordingly, there is no substantial likelihood of conviction and no charges have been approved.