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23-20

BC Prosecution Service announces no charges in Kelowna non-fatal shooting

Victoria – The BC Prosecution Service (BCPS) announced that no charges have been approved against an RCMP BC Highway Patrol member involved in a non-fatal shooting that occurred in a residential area of Kelowna on December 22, 2019. The incident occurred in the course of the investigation of suspected *Motor Vehicle Act* infractions.

As a consequence of the gunshot 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 (IIO file 2019-231).

In this case, the BCPS has concluded that the available evidence does not meet the BCPS's charge assessment standard. Based on the available evidence, the BCPS is not able to prove, beyond 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 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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To learn more about BC's criminal justice system, visit the British Columbia Prosecution Service website at: gov.bc.ca/prosecutionservice or follow [@bcprosecution](https://twitter.com/bcprosecution) on Twitter.

Clear Statement

Factual Overview

On the evening of December 21st, 2019, the officer who is the subject of the investigation (the Subject Officer or SO) was on duty and driving a marked police SUV. He was carrying his service pistol. He was assigned to conduct speed and traffic enforcement along Highway 97 in Kelowna, British Columbia. The roads were wet, the temperature was approximately 2 degrees, and there was a low mist in the air.

The events that evening were captured, in part, on a Watchguard video system, installed in the front window area of the police SUV. Speeds were captured by a GPS in the SUV.

Shortly after midnight, the SO was proceeding eastbound on Highway 97 and observed a gray pick-up truck travelling westbound. The truck appeared to be speeding and one of its headlights was burnt out. At approximately 12:05 am, the SO conducted a U-turn and activated the emergency lights on his SUV, turned on his siren and increased his speed to 133.6 km/h. The SO caught up to the truck, coming close enough to observe the license plate and notify dispatch. The SO was travelling 167 km/h at that time. Highway 97 has three lanes heading westbound in this area and is lined with strip malls and businesses. There were a few cars on the road, each of which pulled over due to the SO's lights and sirens.

The truck continued along Highway 97 and turned right on Spall Road. The SO reduced his speed to 42.3 km/h and followed. The speed limit along Spall Road is initially 50 km/h, and then becomes 60 km/h. Spall Road has two lanes heading in each direction and is commercial in the area adjacent to Highway 97, with some homes and several traffic lights as one proceeds north. Traffic in the area was light.

At 12:06 am, the dispatcher advised the SO that the truck's license plate was inactive. The SO's speed increased to 150.3 km/h and was then immediately reduced to 73 km/h. Throughout, the SO was close behind the truck. At 12:07 am, the SO advised dispatch he believed the truck was stopping as it slowed and pulled into the left hand lane and then turned left onto Highland Drive. There were no oncoming cars, and the turn appears safe on the video.

The SO continued to follow closely down Highland Drive. The SO's supervisor told him to cease his pursuit of the vehicle. The SO acknowledged and slowed his vehicle, shutting off his lights and siren. He did not stop entirely, however, and continued following behind the truck, which made a slight right turn and continued along Highland Drive. Dispatch asked the SO: "Confirm emergency equipment is turned off, not pursuing?" The SO responded: "Yeah, I've stopped, we're at a dead end here." At that time, his vehicle was continuing to follow at a distance behind

the truck at about 55 km/h. In this area, Highland Drive is a residential street with one lane in each direction. No moving vehicles or pedestrians are seen in the video.

The truck turned into a cul-de-sac at the end of Highland Drive. The SO re-activated his police lights and placed his vehicle facing into the exit lane, as the truck proceeded to turn counterclockwise, so it was facing out of the cul-de-sac. The two vehicles were facing each other in the left-hand lane from the SO's perspective, with a single free exit lane to the right of the SO's vehicle. The cul-de-sac is a small circle, with no median, and contained a parked van.

Two occupants were in the front seat of the truck, later identified as the Affected Person (AP) and the passenger. The SO exited his vehicle and can be seen in the Watchguard video, walking swiftly to his right at the front of his SUV with his firearm drawn and pointed at the truck.

As the SO crossed into view of the Watchguard video, the truck's tires started to turn to its left toward the SO. The SO yelled, "Stop right there" twice, as he crossed in front of the SUV and into the right-hand exit lane. While he was walking, the truck rolled forward. It then accelerated out of the cul-de-sac through the exit lane as the SO continued walking swiftly to his right, in the path of the truck.

As the truck drove out of the cul-de-sac, the SO fired two shots in quick succession. The truck did not hit the Subject Officer and drove away. At approximately 12:08 am, the SO stated, over the radio, "10-4, shots fired, he tried to run me over."

The truck was located within several hours after the AP attended at a local hospital emergency room with a gunshot wound. The AP told hospital staff that he had been shot while being robbed and did not want the police to be called. The AP underwent surgery and a bullet was located in his upper right arm.

The truck was found parked near an alleyway behind a business complex. There was a hole through the pillar of the driver's side door. The tempered glass in the driver's door and on the rear passenger side door was fragmented and mostly missing. There was blood visible on the front driver's side seat and fragmented glass inside.

The AP was later arrested for assault with a weapon and flight from police. He had a bullet lodged in his right arm. Subsequently, he was charged with flight from police, dangerous operation of a conveyance, and assaulting a peace officer with a weapon.

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 *Criminal Code of Canada* charges considered against the officer in this case were dangerous driving during the pursuit (section 320.13), assault with a weapon/causing bodily harm

(section 267), aggravated assault (section 268), discharge of a firearm with intent (section 244), attempted murder (section 239), and criminal negligence causing bodily harm (section 221).

Relevant Law

Dangerous driving

Determining whether driving is dangerous to a criminal standard requires proof that the person's driving was objectively dangerous to the public in all the circumstances. These circumstances have been taken to include the nature, condition, and use of the place at which the vehicle is being operated and the amount of traffic present.

The requisite mental state can be inferred by a driving pattern that constitutes a marked departure from what would be expected of a reasonably prudent person in the circumstances.

Assault with a weapon/causing bodily harm, Aggravated Assault

To prove an assault with a weapon, the Crown must establish the suspect intentionally applied, threatened, or attempted to apply force to another person without that person's consent while carrying or using a weapon. Bodily harm is harm that is more than merely transient or trifling in nature. Aggravated assault occurs when the force used wounds, maims, disfigures, or endangers the life of the victim.

Discharge of a firearm with intent/reckless discharge of a firearm

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. 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.

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.

Criminal negligence causing bodily harm

Offences involving criminally negligent behavior require the Crown to prove that the accused engaged in behavior that shows wanton or reckless disregard for the safety of others and caused bodily harm as a result. Wanton or reckless disregard is proven if the Crown shows that

the offender displayed a marked and substantial departure from the standard of care of a reasonable person in the circumstances.

If a police officer, in executing their duty, creates a situation where they are required to use force, this may constitute a marked and substantial departure from the standard of care of a reasonable police officer. If it does, the offence of criminal negligence may be made out.

However, establishing the standard of care of a police officer in any particular situation can be complex and fact dependent. That standard may be informed by established police policies and practices, by the legal standards set in the *Criminal Code*, and, in some cases, by resort to expert evidence. In some cases, the impugned police conduct is non-technical and within the experience of an ordinary person, or it is so egregious that it obviously falls short of the standard of care.

With the exception of the driving and criminal negligence offences, there is no issue that the actions of the SO could satisfy the legal definition for some or all of the offences listed above, unless the officer is entitled to the protection afforded to persons enforcing the law under section 25 of the *Criminal Code* or is acting in self-defence.

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 of the *Criminal Code* are not applicable.

In assessing whether a particular application 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 take 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). 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.

Despite the deference afforded to police officers in the application of force in exigent circumstances, the law still requires that the use of force not be excessive. Police use of force 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:

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

The legal onus rests on the Crown to prove beyond a reasonable doubt that the defence of self-defence does not apply.

Policy re: Police pursuit

The *Emergency Vehicle Driving Regulations*, which govern police emergency driving, and incorporate the *BC Policing Standards for Police Pursuits* provide that:

- "*pursuits may only be initiated for offences where the driver or passenger has committed, or is about to commit, an indictable offence and immediate apprehension is required to prevent imminent harm to a person. Motor Vehicle Act offences do not justify a pursuit.*"

The *National RCMP OM 5.4 Emergency Vehicle Operations (Pursuits)* says, in part, that a pursuit must be terminated when the risk to life becomes too great, and that a member who is directed to terminate a pursuit must pull over and stop their vehicle.

Summary of evidence

Statement of AP

The AP was interviewed and stated that he did not pull over when the officer was following him, as he was not doing anything wrong, and he did not know if it was a "real cop". He left the cul-de-sac because he didn't "feel safe". He stated that the first shot shattered the driver's side window and rear passenger window, the second shot passed through the front of his jacket, missing his ribcage, and lodged in his right arm. During his interview with IIO investigators, he described that he heard, but did not see, the SO say "hey", about a meter away from the driver's side of his vehicle and then two shots.

He indicated that the SUV's lights were very bright. Later in his interview, he described that he heard two "bangs", wondered "what's going on here?", then "safely" drove around the SUV, and "before I was just coming around the cop" heard a third bang and felt pain in his arm ("a lightening bolt flash"). At other points in his statement, the AP repeated that he heard three "bangs" and two "bangs". He did not clarify which was correct. He described that, after being shot, he drove away and attended the emergency room.

Statement of passenger

The passenger provided an account of events that conforms with the video evidence. She confirmed that she was the owner of the truck. She said the AP did not stop because there was no insurance on the truck. She described that the AP drove the truck into the cul-de-sac on Highland Drive, the police vehicle pulled up in front of the truck, the officer jumped out and yelled "stop right there" and ran over shooting, the shot coming in the driver's side window. She described hearing two shots. When the shots issued, the SO was positioned about 2.5 meters away from the truck, across from the police vehicle's passenger side door. The truck was either stopped at the back of the cul-de-sac, or just starting to drive forward. She drew a diagram which suggested that the truck started its trajectory out of the cul-de-sac pointing directly at the SO's position. She described that, as the truck left the cul-de-sac, the officer was "not far away...probably just out of the way."

Statement by Subject Officer

In response to a request from the IIO, counsel for the SO provided a voluntary statement of the SO. The SO stated:

- His rationale for attempting to stop the truck was that "it was travelling at 21 km/h over the posted speed limit of 60 km/h with a burnt out headlight in foggy conditions."

- He believed that the truck was going to stop at Spall Road, as it slowed drastically. At that point he was close enough to read the license plate. When the truck began accelerating, he believed it was "now evading police".
- He believed that the risk to the public was low based on there being little traffic on Spall Road and no traffic or pedestrians on Highland Drive.
- He was directed to terminate the pursuit and was doing so when he saw a road sign indicating the truck had entered a dead-end street. He believed, based on experience, that the occupants would likely flee on foot. He believed that he might also block the truck to prevent any further danger to the public or to himself from the driver.
- When he stopped at the entrance to the cul-de-sac, he thought the occupants were about to leave the truck and flee on foot.
- He saw the vehicle roll back slightly, which, he believed, meant it was being put in park on an incline. He then got out of his SUV and took his eyes off the truck to do so, as the ground was slippery.
- The SO said that he drew his weapon as he moved toward the front of his SUV and intended to make his way to the door of the truck. He drew his service pistol in the event the suspect "used the truck as a weapon."
- The driver put the truck in drive and was starting to move toward him when he was in between his SUV and the truck, with his firearm pointed at the truck, yelling, "stop right there, stop right there."
- He had momentum going to his right and felt he could not retreat to his left without losing his footing in the slippery conditions. He kept moving to avoid being pinned between the vehicles, and, as he did so, the driver of the truck turned his front wheels in the Subject Officer's direction and accelerated hard toward him. At this point, he was a few feet from the passenger side of his SUV. He feared he was going to be run over and fired two shots to stop the imminent threat.
- At the time he fired, he was about two meters from the passenger side of his SUV, and about six meters from the truck. He saw the first shot hit the windshield, and the second hit the drivers side window of the truck.
- After the shots were fired, the truck changed its direction slightly and continued back up Highland Drive.

- The truck avoided hitting him by a few feet, as he continued to move to his right. He believed he could have reached out and touched the truck's rear-view mirror.
- He did not think he could get out of the way of the truck, even at a full sprint, if it had not changed its trajectory.
- He thought that shooting at the driver would stop him by incapacitation or make him steer away.

Analysis

Dangerous driving

The SO's driving on Highway 97 was consistent with closing the distance to pull over the vehicle driven by the AP and was not the subject of charges proposed by the IIO. The SO's driving along Spall Road, and along Highland Drive before he slowed down is properly characterized as a pursuit, which breached the *Emergency Vehicle Driving Regulations* and internal RCMP policies. That is not, however, determinative of whether the driving was dangerous to other users of the highway.

Courts have concluded that excessive speed can make out the test for dangerous driving where the speed is "so wildly beyond any safe standard that it is appropriately branded as criminal." The SO's speed on Spall Road started under the speed limit at 42.3 km/h, increased to 150.3 km/h very briefly, and then was reduced to 72 km/h over the course of about 40 seconds. The road conditions were misty and wet, traffic was light. He was using lights and sirens and other vehicles can be seen to get out of the way. He passed through two green lights. The SO's speed on Highland Drive started at about 67 km/h and slowed to 24 km/h.

In the context of a relatively brief police pursuit, the SO's speeding on Spall Road and Highland Drive does not meet the standard for dangerous driving. The evidence indicates that the officer drove with lights and siren engaged appropriately, did not disregard traffic signals, and although he exceeded the speed limit, the speeds were not "wildly beyond any safe standard". Although regulations and police policy do not authorize pursuit for the suspected offences, the manner of the pursuit in this case does not establish a driving pattern that is dangerous to the criminal standard, given the short duration of the pursuit, the speeds involved, the otherwise safe manner of driving and absence of risk to other drivers present at the time.

Offences related to the shooting

Applying the law to the facts in this case, there is no doubt that the SO intentionally fired a gun at the suspect, which was likely to cause grievous bodily harm or death.

At the time of these events, the SO was on duty and employed as a peace officer. He took steps to stop the AP in the context of an ongoing investigation. In doing so, he was acting within his authority as a police officer. Once the SO used force against the suspect, section 25(3) must be considered.

To determine whether the SO's use of force was reasonable, necessary, and proportionate, the court must consider the use of force in context. The context is provided by the video and the witness statements and is consistent with the statement of the SO.

The video evidence shows that the front tires of the truck began turning toward the right-hand exit lane as the SO was in front of his vehicle. The headlights of the truck appeared to track him as he walked swiftly to his right over the course of less than a second. The truck was moving as he walked across the front of the SUV but accelerated after he moved into the right-hand exit lane. The SO did not pause or plant himself in the path of the truck but continued to move swiftly out of it, as if in response to events.

Given that the truck appeared to track his movements, then accelerated toward him, there was a basis for a reasonable belief that the truck presented an evolving and increasing threat to the SO. The evidence supports that it would have been reasonable for him to infer that the driver of the truck was going to hit him.

That inference is supported by the passenger's evidence that the truck began moving out of the cul-de-sac pointing straight at the SO. As the truck left the cul-de-sac, the passenger stated the SO was "just out of the way."

Notably, the SO's reasons for firing would likely form part of the Crown's case, as he can be clearly heard to allege, "he tried to run me over" immediately after the events.

Given the speed of events, the evidence is sufficient to raise a reasonable doubt that the SO believed he was at risk of grievous bodily harm or death from the AP's vehicle when he fired two shots, and that the force used was necessary for his self preservation. It is likely that a court would conclude that such a belief in all the circumstances was objectively reasonable.

It is likely that either section 25 or section 34 would apply to provide a full justification to charges involving the intentional use of force in these circumstances. Given the available evidence, it is unlikely that the Crown would be able to meet its legal onus of proving beyond a reasonable doubt that these legal justifications do not apply.

Criminal negligence causing bodily harm

The available evidence is insufficient to prove to the criminal standard that this officer's actions were a marked and substantial departure from the standard of care. The officer's initial decision to initiate a pursuit fell outside of policy. However, the entire sequence of events and his actions and tactical decisions up to and including the shooting, encompass matters that fall outside the knowledge and experience of an ordinary person. They were not so egregious that they obviously constituted a marked and substantial departure from the standard of care of a reasonable police officer. Because the Crown is unable to prove beyond reasonable doubt that the SO's use force was unnecessary, the offence of criminal negligence causing bodily harm cannot be made out.

Conclusion

The charge approval standard is not met and no charge is approved.