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24-08

BC Prosecution Service announces 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 an officer with the Vancouver Police Department involved in a non-fatal use of force on May 30, 2022.

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 #2022-129).

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

Clear Statement

Overview

On the morning of May 30, 2022, members of the Vancouver Police Department (VPD) were dispatched to attend at an assisted living facility in Vancouver after reports of a male threatening staff and behaving strangely. The male, referred to here as the affected person (AP), had a large canister of what appeared to be industrial bear spray that he intermittently pointed at the officers.

One of the officers, the subject officer (SO), shot at the AP a total of seven times using a less lethal shotgun (also known as a beanbag gun). The IIO concluded that criminal charges were not warranted in relation to the first six shots. However, moments before the seventh shot was fired, the AP tossed the canister on the ground in front of him. As a result of the incident, the AP suffered broken bones and contusions. The issue in this case is whether the Crown can prove that the seventh shot was not justified under section 25(1) of the *Criminal Code*.

This Clear Statement provides a summary of the evidence gathered during the investigation and the applicable legal principles. These are provided to assist in understanding the BCPS's decision to not approve charges against the SO. 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 the SO.

Charge Assessment

The Charge Assessment Guidelines that are applied by the BCPS in reviewing all Reports to Crown Counsel are established in BCPS policy and are available at:

www.gov.bc.ca/charge-assessment-guidelines

BCPS guidelines for assessing allegations against police 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 charges will be approved and a prosecution initiated. Crown Counsel must independently, objectively, and fairly measure all available evidence to determine:

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 the likelihood that viable, not speculative, defences will succeed.

If the Crown Counsel is satisfied that the evidentiary test is met, Crown Counsel must then determine whether the public interest requires a prosecution. The charge assessment policy sets out a non-exhaustive list of public interest factors to be considered, both for and against a prosecution.

Charges considered

The potential charges considered in this case were assault with a weapon and assault causing bodily harm.

Relevant law

To prove an assault, the Crown must establish a person intentionally applied, threatened, or attempted to apply force to another person, directly or indirectly, without their consent. The required intent is to cause harm to the victim. Assault causing bodily harm requires proof of harm that is more than trifling or transient. The intent required is the intent to assault plus an objective foresight of bodily harm.

Legal defences

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." 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.

The reasonableness of the 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). In these dynamic situations police are not expected to measure the force used precisely 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 principles of proportionality, necessity, and reasonableness.

The primary issue in this case is whether the force used by the SO was necessary, reasonable, and proportionate in the circumstances.

In a prosecution, the onus would be on the Crown to prove beyond a reasonable doubt that the legal defences provided under the *Criminal Code* to police officers acting in the course of their duties did not apply.

Circumstances

The SO was on duty, in uniform, and in a police vehicle with their partner when they were dispatched to the facility at approximately 9:18 am. The SO was advised by dispatch that the AP had been threatening staff with a toy gun, which staff had taken away, and was asking staff if they wanted to die. A description of the AP was provided, and the operator indicated, "he is now making finger guns at people", then walking back to "his RV".

The two officers arrived on scene within minutes after the dispatch. A third officer was driving in a separate vehicle close behind them. The officers located the AP in the parking lot of the facility, standing outside a parked RV. The AP was holding what they perceived to be an industrial canister of bear spray, which he was pointing at the police. The SO retrieved their bean bag gun upon arrival, and the second officer drew their firearm, pointing it at the AP as "lethal overwatch". The third officer did not draw a weapon. The officers stood approximately six-nine metres away from the AP, with one officer to his right, one officer behind and the SO facing him. A fourth officer arrived very shortly after the first three others had approached the AP. The fourth officer positioned themselves a short distance away, at the edge of the parking lot.

The officers began giving verbal commands to the AP to drop the canister and do as instructed. The AP stood and held the canister in his right hand, with his arm extended straight out, pointing the canister at the police while yelling, "zero, one, two", "you're not real", the word "scotch" multiple times, and "one, two, one two, like fuck you, fuck you, I'll kill you".

The SO fired a round from the less lethal shotgun and hit the AP, who fell to the ground and sat cross-legged. The AP dropped the canister and continued to yell nonsensical things. The canister was an arm's length away from the AP. The SO continued to give clear commands to the AP to lay on the ground and "prone out". The AP did not comply and further rounds were deployed. The AP later dropped to his side, picked up the canister again, and pointed it at the officers. During these events the AP continued to yell statements such as, "one, two, fuck you, we're done", "you're not real", and "If you're not here, I'm not here".

Subsequent shots were taken as the AP continued to disregard police instructions. Police witnesses described that the AP's behaviour was unchanged after being hit by the beanbag rounds. The police officers positioned themselves about six-nine metres away from the AP during this initial period, then moved in closer.

A civilian witness, who was inside a building across the street, started recording the interaction with a cell phone camera when the officers were about five metres away from the AP. The recording is 57 seconds long with very faint audio. The video depicts the following:

1. The AP is seated on the ground, holding the canister up, as if pointing at the officers.
2. The AP puts the canister down into his lap area, very briefly extends his hands, then draws his hands in and picks it up again, holding it in his left hand as he's bent over his lap.
3. The AP holds the canister up and waves it around.
4. The AP sits with his head bowed, with the canister in his hand – *shot four fired*.
5. The AP rolls his upper body onto the ground, with the canister still in his hand, then quickly sits up and holds his hands high, with the canister in his left hand – *shot five fired*.
6. The AP points the canister at the three police officers – *shot six fired*.
7. The AP flicks the canister onto the ground in front of him, sitting cross legged. The canister lands about one metre in front of him. He rolls on his side.
8. The AP holds his hands up briefly as the police move into a position about three metres away.
9. The AP sits up, putting his hands out in front of him, and his momentum appears to stretch his arm out toward the canister.
10. The AP sits up, cross legged, with his gaze toward the ground in front of him – *shot seven fired*.
11. The AP appears to say something to the police officers.
12. The three police officers move in to detain the AP.
13. The SO is first in leading with his knee, pushing the AP away from the canister.
14. All three officers pile in, putting weight on the AP, blocking his access to the canister. One of the officers kicks the canister away.

The officers proceeded to handcuff the AP and seize what was later determined to be a small personal-sized fire extinguisher. The evidence supports that during the interaction with the SO, the officers, including the SO, reasonably believed that the AP was armed with a canister bear spray.

Medical records show the AP's injuries included a broken femur, tibia, and patella. He also had contusions on his right flank, the back of his right upper arm, right abdomen, and left hip.

Based on the injuries sustained by the AP, it is a reasonable assumption that at least six of the shots fired made contact with him. EHS observed six beanbag wounds, and hospital records described three broken bones and four contusions. Given the location of the injuries on his hip and lower abdomen, it seems likely that the AP was shot while standing, supporting the evidence of the officer as to the initial events. Injuries to the AP's shins and knee are consistent with him being hit after he was seated. The AP was bandaged by EHS and taken to hospital, where he refused further treatment and then left the hospital. He returned the next day and underwent surgery.

Information obtained later from staff at the facility suggests that the AP had recently moved into the RV. Civilian witnesses described that he was upset that morning as no one would give him a cigarette, and then pointed the toy gun at several people and behaved erratically, yelling at vehicles. The AP advised IIO Investigators that, on the date in question, he had a "minor psychotic episode from crystal meth".

While the video does not capture a clear view of the AP's facial expressions, the evidence supports that his presentation, as observable by the officers, was likely consistent with someone of an altered state of mind.

The AP was charged with threatening a staff member at the facility prior to the arrival of the police, possession of a weapon for a dangerous purpose and assaulting the SO with a weapon. Six months later he died of unrelated causes and the charges were abated.

Police policy

The VPD's *Use of Force* policy, and the provincial policing standards, created pursuant to the *Police Act*, outline that any force used must be necessary, reasonable, and proportionate, and that higher levels of force may only be used in response to higher levels of resistance/threat from the suspect.

Analysis

The IIO has not referred charges in relation to the first six shots. Absent a defence, charges of assault with a weapon and assault causing bodily harm are made out regarding the seventh shot.

The evidence shows that there was an elevated risk to the AP from the use of the less lethal shotgun, but the force used does not support an inference that death or grievous bodily harm was intended by the SO. Therefore, the test to be applied regarding a potential defence for the SO is under section 25(1) of the *Criminal Code*. The factors to be considered include whether:

- the SO was acting in the course of their duties
- the SO, on reasonable grounds, perceived a risk to the officers or others
- the force used by the SO in response to the risk was objectively necessary, reasonable, and proportionate

When, as in this case, the evidence is sufficient to raise an “air of reality” regarding the defence, the Crown must disprove one of these factors beyond a reasonable doubt.

Regarding the first factor, the SO was clearly acting in the course of their duties during their involvement with the AP, and the AP was arrestable for assault and uttering threats.

Regarding the second factor, the SO’s commands and actions are consistent with the belief that the canister contained bear spray. The risk to the officers was reasonably high; they were within range of the purported bear spray, and there was potential that bear spray could incapacitate them. In the circumstances, the SO’s belief there was a risk to the officers or others was reasonable.

Regarding the third factor, the SO’s actions must be considered in the context of earlier events when analyzing whether the final shot was objectively necessary, reasonable, and proportionate. At the time of the seventh shot, the AP had just tossed the canister on the ground in front of him, which might indicate that he was disassociating himself from it. His body was slumped, his eyes were closed, and he was not looking at the officers or the ground. To some degree, these factors suggest that the canister no longer presented a risk.

The purpose of a less lethal shotgun is to gain control of a non-compliant suspect by creating incapacitation, temporary motor dysfunction, mental stunning, balance displacement and distraction. At the time when the seventh shot was taken, there was some evidence to support that the goal of using the less lethal shotgun had been achieved, and the officers should have moved in to apprehend the AP at that point rather than using additional force.

However, the evidence shows that the grounds which justified the first six shots were still in play at the time of the seventh shot. The canister, although not right at hand, was within a few feet of the AP. Given that the police were some three metres away, it was feasible for the AP to have grabbed the canister and sprayed the officers as they moved in towards him. The AP had shown evidence of an altered state of mind and therefore was more likely to behave illogically. The AP had shown a pattern of putting down the canister, slumping over or otherwise appearing resigned, then picking it up to point it at the officers again. The AP’s motion with his right hand as he is sitting up, right before the seventh shot, is consistent with that pattern. The SO had to make an urgent assessment as to whether the AP might grab the canister and spray the officers as they moved in. The decision to fire the seventh shot was made in the context of reacting quickly in a fast-changing situation. Given the factors outlined above, there was an objective basis for that ongoing concern.

Considering all the circumstances, the Crown would be unable to prove beyond a reasonable doubt that the force used was unnecessary, unreasonable, or disproportionate, and therefore that it was unjustified under section 25(1) of the *Criminal Code*. Therefore, there is no substantial likelihood of conviction in relation to the proposed charges.

Conclusion

No charges have been approved in relation to the SO’s involvement in this incident.