



**PUBLIC REPORT OF THE
CHIEF CIVILIAN DIRECTOR**

Regarding serious injuries suffered by a male
while being taken into custody by officers of the
Vancouver Police Department on 2016 December 19

Chief Civilian Director:

Albert Phipps

Legal Counsel:

Clint Sadlemyer, Q.C.

IIO File Number:

2016-232

Date of Decision:

2017 OCTOBER 13

INTRODUCTION

The Independent Investigations Office (IIO) is responsible for conducting investigations into all officer-related incidents which result in death or “*serious harm*” (as defined in Part 11 of the *Police Act*) within the province of British Columbia. The Chief Civilian Director (CCD) of the IIO is required to review all investigations upon their conclusion, in order to determine whether he considers “*that an officer may have committed an offence under any enactment, including an enactment of Canada or another province*” (see s.38.11 of *the Police Act*). If the CCD concludes that an officer may have committed an offence, he is required to report the matter to Crown counsel. If the CCD does not make a report to Crown counsel, he is permitted by s.38.121 of the *Police Act* to publicly report the reasoning underlying his decision.

In this public report, the CCD includes a summary of circumstances that led to the IIO investigating and a summary of the findings of the investigation.

This is a public report related to an investigation involving a male who sustained serious injuries while he was being taken into custody by the Vancouver Police Department. On 2016 December 19, police received a 911 call about a male carrying a weapon near a downtown Vancouver SkyTrain station. A further report suggested the male had boarded the train and was travelling east. Officers responded and met the train at the 29th Avenue Station. During the course of their interaction with affected person, he was shot by an officer. He was subsequently taken into custody, first aid was administered and the male survived.

Pursuant to s.38.11 of *the Police Act*, RSBC 1996 Chapter 367, the CCD has reviewed the concluded investigation. The CCD does not consider that any officer may have committed an offence under any enactment and will not be making a report to Crown Counsel.

In this public report, the CCD is only permitted to disclose personal information about an officer, an affected person, a witness, or any other person who may have been involved

if the public interest in disclosure outweighs the privacy interests of the person. Prior to disclosing any personal information, the CCD is required, if practicable, to notify the person to whom the information relates, and further, to notify and consider any comments provided by the Information and Privacy Commissioner (s.38.121(5) of the *Police Act*). The CCD has considered the advice provided by the Information and Privacy Commissioner. In this report, the CCD will not be using the name of the affected person or the name of any other person involved in this matter.

IIO Notification

The Independent Investigations Office (IIO) was notified of this incident by the Vancouver Police Department (VPD) at 09:06 hours on 2016 December 19. The IIO commenced its investigation as the affected person's injuries appeared to fall within the definition of "serious harm" as defined in the *Police Act*.

The incident began when VPD received a call regarding a male with a weapon near the Stadium SkyTrain station. A further report indicated he had boarded the train and was travelling east carrying a machete.



The overall length of the machete carried by the affected person is approximately 46 cm or 18 inches long

Two members of the South Coast British Columbia Transportation Authority Police Service (SCBCTAPS or Transit Police, TP) met the train the affected person was on at

the 29th Avenue Station. The officers boarded the train and directed the affected person to “drop the knife,” and offered their assistance, but he did not comply.

Passengers were evacuated from the train and the officers disembarked. After approximately two and a half minutes the train doors were closed and the affected person was contained.

Three VPD officers attended the station. Two of the VPD officers went to secure the east end of the platform while an officer, who is the subject officer (SO) in this investigation, stayed with the Transit Police officers near the stairs leading up to the west end of the station.

Approximately two minutes later, the affected person kicked out a window and got out of the SkyTrain car. He moved towards the three remaining officers, who in turn moved from the platform and up the stairs toward the west entrance. The affected person followed them. He was carrying the machete. The officers directed him to drop the weapon and pointed their firearms at him. The affected person followed them up the stairs and through the opened fare-gates as the officers backed away.

The SO stopped backing away from the affected person near the top of a set of stairs that led down to the street where SkyTrain passengers had been evacuated. The affected person continued to approach with the machete and the SO fired once at him. The affected person fell to the floor. He pushed the machete away from himself and was taken into custody. First-aid was rendered and the affected person survived.

Issue

The issue to be considered in this case is whether the subject officer (SO) may have used excessive force when he shot the affected person. Had he done so, he may have committed aggravated assault, assault with a weapon and/or assault causing bodily harm.

Timeline

The events below occurred in Vancouver, B.C. on 2016 December 19. Snow had fallen overnight and it was drizzling that morning. Photos are captures from SkyTrain CCTV.

TIME	EVENT INFORMATION
08:17:20	911 call about windows being hit near the stadium.
08:20:50	The affected person boarded the SkyTrain at the Stadium Station.
08:26:37	The affected person stepped out of and re-boarded train at the Commercial/Broadway Station.
08:30:13	The SkyTrain carrying the affected person stopped at the 29 th Avenue Station.
08:30:17	Transit Police Officer 1 (TP1) and Transit Police Officer 2 (TP2) boarded the train.
08:34:37	TP1 and TP2 got off the train. The affected person remained on board.
08:36:26	Dispatch update – less lethal requested.
08:36:56	SkyTrain doors closed.
08:41:15	Witness Officer 2 (WO2) and the SO arrived on the platform at the 29 th Avenue SkyTrain station.
08:42:55	The SO requested for immediate less lethal.
08:43:22	The affected person kicked out a window and climbed out of the SkyTrain car.
08:43:36	The affected person got off the train and began to climb the stairs.
08:44:13	The affected person walked past the fare gates.
08:44:15	The SO walked backwards outside the main entrance and TP2 followed behind and then threw a yellow caution cone in the affected person's way.
08:44:19	The SO shot the affected person, who then fell to the floor.
08:44:38	While still on the ground, the affected person threw the machete away from himself and TP1 kicked it down the accessibility ramp.

THE AFFECTED PERSON

The affected person was shot once by police and sustained one gunshot wound consisting of an entry to his upper abdomen and an exit to the back. He underwent emergency surgery and survived. He has declined to provide the IIO with a statement.

EVIDENCE CONSIDERED

During the course of this investigation, IIO investigators interviewed dozens of witnesses and completed 78 investigative tasks including the review of many hours of CCTV. While all witness interviews were reviewed in the preparation of this decision, not every witness is mentioned below. Our investigation revealed that none of the officers present when the affected person was shot were equipped with what are called less lethal use of force options, which include Conducted Energy Weapons (Taser) and bean bag shotguns.

An IIO Investigator took measurements at the scene and used still images captured from CCTV of the incident. It was determined the subject officer was approximately 394 centimetres or 12 feet 11 inches away from the affected person when he fired his pistol.

CIVILIAN WITNESSES

Civilian Witness 1 (CW1)

CW1 was at the front desk of an apartment building located in downtown Vancouver. At approximately 0815 hours, a male [the affected person] entered the lobby. CW1 asked the affected person to leave and when that failed, CW1 called 911. The affected person then left the building and struck the window of the front door with what CW1 described

as an axe or machete. The affected person walked in the direction of a nearby SkyTrain station.

The affected person can be seen on SkyTrain CCTV entering the station, walking on the platform and at approximately 0821 hours, he can be seen boarding an eastbound train. The video shows he carried a bag in his left hand and the machete in his right hand.

Civilian Witness 2 (CW2)

CW2 boarded the same train at a previous station, noticed the affected person a few minutes later as the train approached the Commercial/Broadway Station. The affected person was in the same car as CW2. The affected person held a machete in his right hand and was reading a book.

CW2 saw a SkyTrain attendant board the train at the Commercial/Broadway Station. The attendant spoke with the affected person who got up and stepped off the train briefly. As the attendant walked away the affected got back on the train, returned to his seat and said loudly to no one in particular that, "*I will fucking kill you.*" CW2 subsequently moved to another car at the next stop.

Civilian Witness 3 (CW3)

CW3 is a SkyTrain employee and was at the Commercial/Broadway Station. An unidentified passenger got off the eastbound train and told him, "*there is a man holding a machete on the train.*" CW1 looked into the car and saw the affected person holding a book in his left hand, reading. The machete was in his right hand across his lap. The other passengers did not seem concerned; however, he asked the affected person if he would, "*...mind putting that away for me.*"

The affected person stood up, advanced towards CW3 and made an aggressive motion with the machete. CW3 moved quickly away to the other side of the platform and radioed the Transit Police. The affected person stepped off the train momentarily, re-boarded, and sat down. The doors closed approximately five seconds later at 08:26:46 hours and the train departed eastbound.

Civilian Witness 4 (CW4)

CW4 also boarded the same train at an earlier station than the affected person but was in a different car. It was only when the train was stopped at the 29th Avenue Station that he noticed someone was preventing the door on the train from closing. He looked outside and saw a SkyTrain staff member shouting something to the effect of, “*get off the train, get off the train. Guns are drawn*”.

Two plainclothes Transit Police officers had their guns drawn and pointed down, and were shouting at the affected person to get off the train. The officers were also directing everyone to move away.

CW4 went to the west entrance of the station and saw two VPD officers arrive. They told a Transit Police officer to get everyone out of the station. The two VPD officers went down the stairs.

CW4 heard a banging noise and shouting came from the platform area below. He saw two of the officers backing up the stairs with their guns drawn and people moved further away from the station and down the accessibility ramp. The two officers yelled at the affected person to stop. He continued walking with the machete and was, “...*flailing with it*” towards the officers who were walking backwards and almost out of the SkyTrain Station. The two officers had their guns pointed at the affected person and told him to, “*put it down, drop it...get down*” and one of the officers shot him as he was in the ticket booths area.

Another officer kicked the machete away from him and down the accessibility ramp.

Civilian Witness 5 (CW5)

CW5 is an employee working on the SkyTrain. At the Nanaimo Station he boarded the train car the affected person was in. He saw the male, “*clenching a machete-like weapon*” in his right hand, holding a bible in his left and he was, “...*talking to himself.*”

CW5 watched the affected person as he was concerned about the machete. The affected person was not “...*waving it...[and]...did not threaten any passengers.*” There were approximately ten passengers, none of whom seemed overly concerned.

When they arrived at the 29th Avenue Station, he stepped out and saw two plainclothes police officers walking straight towards him. He pointed out the affected person to the officers.

The officers stepped inside the car, drew and pointed their firearms at the affected person and shouted for him to, “*Drop it,*” but he did not drop the machete.

The officers cleared that car of everyone except the affected person. CW5 assisted in evacuating the rest of the train. Once it was cleared, the SkyTrain Control Center closed the train doors. The affected person was the only one left on the train. Police directed CW5 to move the passengers further away from the incident, which he did by getting people up the stairs to the ticket area.

CW5 heard banging and was directed to get the passengers out of the station and down the accessibility ramp to the street. The police were shouting at the affected person to “*Stop*” and “*Don’t come up.*” Shortly after, there was a bang and the machete was,

“...kicked out the entrance, down the wheelchair access.” CW5 stood guard over the machete.

OFFICERS

The IIO uses the term witness officers and subject officers to distinguish between officers who witnessed the incident as opposed to officers who are the subject of the IIO investigation over their direct involvement, which may have caused the serious harm or death. The Transit Police (TP) officers involved in this file are also witness officers.

Transit Police Witness 1 (TP1) and Transit Police Witness 2 (TP2)

TP1 and TP2 of the South Coast British Columbia Transportation Authority Police Service (SCBCTAPS or Transit Police, TP) were on the platform of the 29th Avenue Station when the train carrying the affected person arrived shortly after 0830 hours. They entered the train car and saw the affected person seated with the machete on his lap and right leg, muttering and gritting his teeth.

The officers identified themselves as police and directed the male to put the machete down. TP1 heard the affected person say, *“Fuck you, fuck this. Don’t you know who you’re talking to? I’m Jesus, I’m the King. You will address me as the King.”*

TP2 tried to engage the affected person in conversation and asked what they could do for him and explained they were there to help him. He also asked him to drop the machete but the affected person appeared to be talking to somebody else that wasn’t on the train. He also became angrier and raised the machete and started pointing it at the officers.

The affected person stood up and walked towards them with the machete in his hand. He challenged the officers and was, "...waving the machete, kinda lunging at us" (per TP1). The affected person told the officers, "*I don't have to listen to you*" (per TP2).

The officers disembarked shortly after everyone, except the affected person, had been evacuated. Two and a half minutes elapsed, and the train doors were closed at 08:36:56 hours, containing the affected person within the car. The officers called for more officers to attend, and more specifically for officers with less lethal weapons. In addition, Emergency Health Services was also asked to attend.

The affected person began hitting the window and tried to pry the car door open. TP2 told him they wanted to talk to him, without result.

Witness Officer 1 (WO1) and Witness Officer 2 (WO2)

WO1 and WO2 arrived at the platform along with the subject officer (SO). WO1 and WO2 went to cover the east end of the platform.

TP1, TP2 and the SO waited at the bottom of the stairs leading to the west entrance of the station. The affected person struck the window several times with the machete and at 08:43:21 hours, he kicked out a window and climbed out of the train car. As the affected person walked towards them, the three officers began to retreat up the stairway to the west end of the station. He still carried the machete and did not comply with the officers' calls to drop it.

When they reached the top of the stairs, TP2 and the SO looked back and pointed their firearms toward the affected person as he continued up the stairs towards them. The affected person ignored repeated directions to stop and to drop the machete. After pausing momentarily on the landing at the mid-point of the stairs, he continued his climb.

As the affected person reached the top of the stairs, TP2 and the SO began to walk backwards through the open fare gates and out of the fare paid zone.

The affected person continued to yell and brandish the machete. The officers continued to back away as he continued to move from the top of the stairs toward the fare gates. TP1 was able to move out of the affected person's sight, which allowed him to get behind the affected person as he left the fare paid zone.

TP2 and the SO directed the affected person to "*stay back*" and to "*drop the knife*." They continued backing away. The affected person was closing the distance and would not drop the machete. As the SO walked backwards and out the main entrance, TP2 threw a yellow caution cone in the affected person's path.

The affected person continued to move towards TP2 and the SO. TP2 momentarily moved between the affected person and the SO. The SO backed up to where the snow was piled near the edge by the top of the stairs and stopped.

Immediately after TP2 crossed between the SO and the affected person, the SO fired one shot and the affected person fell to the floor. TP2 kicked away the book the affected person had been carrying. The affected person pushed the machete away from himself. TP1 ran over and kicked the machete down the accessibility ramp.

WO1 handcuffed the affected person and placed him in a recovery position at 8:45:21 hours.

Witness Officer 3 (WO3)

WO3 entered the west entrance where the affected person lay handcuffed and in a semi recovery position. She took up the role of reassuring the affected person by talking to him and to try and calm him down. Due to the weather conditions that day, it took EHS

approximately 15 minutes to arrive and she remained with him the entire time. When EHS did arrive, the affected person was placed on a stretcher and was transported to Vancouver General Hospital.

SUBJECT OFFICER

Pursuant to the Charter of Rights and Freedoms, the subject officer (SO) declined a request for a voluntary statement and also refused the disclosure of his notes to the IIO. His firearm was seized on 2016 December 19. A round count established that one bullet was fired from the SO's firearm. The firearm was tested and was determined to be functional. A single expended bullet casing that was seized from the scene was tested and determined to have been fired from his firearm.

LAW

The protection police officers are afforded when the use of force is required in the course of their duties is governed by the following provisions set out in the *Criminal Code of Canada*:

Protection of persons acting under authority

25 (1) Everyone who is required or authorized by law to do anything in the administration or enforcement of the law

- (a)** as a private person,
- (b)** as a peace officer or public officer,
- (c)** in aid of a peace officer or public officer, or
- (d)** by virtue of his office,

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

Idem

(2) Where a person is required or authorized by law to execute a process or to carry out a sentence, that person or any person who assists him is, if that person acts in good faith, justified in executing the process or in carrying out the sentence notwithstanding that the process or sentence is defective or that it was issued or imposed without jurisdiction or in excess of jurisdiction.

When not protected

(3) Subject to subsections (4) and (5), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless the person believes on reasonable grounds that it is necessary for the self-preservation of the person or the preservation of any one under that person's protection from death or grievous bodily harm.

When protected

(4) A peace officer, and every person lawfully assisting the peace officer, is justified in using force that is intended or is likely to cause death or grievous bodily harm to a person to be arrested, if

(a) the peace officer is proceeding lawfully to arrest, with or without warrant, the person to be arrested;

(b) the offence for which the person is to be arrested is one for which that person may be arrested without warrant;

(c) the person to be arrested takes flight to avoid arrest;

- (d) the peace officer or other person using the force 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
- (e) the flight cannot be prevented by reasonable means in a less violent manner.

The *Code* is, however, clear that the use of excessive force is not permitted and that a police officer will be held criminally responsible for any use of force that is excessive.

Excessive force

26 Every one 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.

As with any other person, police officers may also be legally justified when they use force in defence of themselves or another person.

Defence — use or threat of force

34 (1) A person is not guilty of an offence if

- (a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
- (b) the act that constitutes the offence is 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.

Factors

(2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:

- (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;
- (g)** the nature and proportionality of the person's response to the use or threat of force; and
- (h)** whether the act committed was in response to a use or threat of force that the person knew was lawful.

No defence

(3) Subsection (1) does not apply if the force is used or threatened by another person for the purpose of doing something that they are required or authorized by law to do in the administration or enforcement of the law, unless the person

who commits the act that constitutes the offence believes on reasonable grounds that the other person is acting unlawfully.

Offences that a police officer who has used excessive force could be found culpable for include:

Assault with a weapon or causing bodily harm

267 Every one who, in committing an assault,

- (a)** carries, uses or threatens to use a weapon or an imitation thereof, or
- (b)** causes bodily harm to the complainant,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

Aggravated assault

268 (1) Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.

In an evaluation of the reasonableness of an officer's use of force, the following application of the law is required:

The Supreme Court of Canada in *R. v. Nasogaluak*, 2010 SCC 6 held that:

[32] ... police officers do not have an unlimited power to inflict harm on a person in the course of their duties. While, at times, the police may have to resort to force in order to complete an arrest or prevent an offender from escaping police custody, the allowable degree of force to be used remains constrained by the

principles of proportionality, necessity and reasonableness. Courts must guard against the illegitimate use of power by the police against members of our society, given its grave consequences.

However, the Court went on to say that:

[35] Police actions should not be judged against a standard of perfection. It must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances. As Anderson J.A. explained in R. v. Bottrell (1981), 1981 CanLII 339 (BC CA), 60 C.C.C. (2d) 211 (B.C.C.A.):

In determining whether the amount of force used by the officer was necessary the jury must have regard to the circumstances as they existed at the time the force was used. They should have been directed that the appellant could not be expected to measure the force used with exactitude. [p. 218]

R. v. Kandola, 1993 CanLII 774 our Court of Appeal cited *Brown v. United States* (1921), 256 U.S. 335, where at p. 343, Holmes, J., noted:

Detached reflection cannot be demanded in the presence of an uplifted knife.

The caveat on the use of force set out above in s. 25(3) that applies where the force used is intended or is likely to cause death or grievous bodily harm requires that there must be a reasonable belief by that officer that the force is necessary for the self-preservation of their self or the preservation of any one under their protection from death or grievous bodily harm. The allowable degree of force to be used remains constrained by the principles of 'proportionality, necessity and reasonableness' (*Nasogaluak*).

ANALYSIS

There were many witnesses that provided statements and information during the course of this investigation and all witness statements were reviewed in the preparation of this decision.

The affected person was said by witness after witness to have been carrying a machete. He is seen on CCTV to be carrying the machete at the Stadium, Commercial and 29th Avenue SkyTrain stations. When he was asked to put it away by the attendant at the Commercial Station, he brandished it at the attendant and then resumed his trip.

At the 29th Avenue Station, the affected person challenged the officers that got on the train and offered to help. He was said to have been, “...*waving the machete, kinda lunging at us.*”

By brandishing the machete at the police when he was approached by the Transit Police officers at the 29th Avenue Station, the affected person both carried and threatened to use a weapon contrary s.267 of the *Code* and thereby made himself immediately subject to a lawful arrest without a warrant.

This case has the benefit of video of much of the event.

This case also has the benefit of the full cooperation of the officers from the VPD and the Transit Police.

There is an abundance of evidence that the affected person declined to or simply could not understand the gravity of his situation, such that he could not follow the directions of the SO and other officers present to drop or otherwise surrender the machete.

The SO and other officers backed away and gave the affected person space. They retreated up the stairs and out of the station. Within the station, the affected person was contained; however, once he was at the street level and the general public was at risk,

the officers could not retreat further and risk exposing that public to the level of danger that he represented.

Looking at the SO specifically, he had backed up to the top of a set of stairs. There was snow and ice. The SO could not continue his retreat without risking placing himself or the public in a more uncertain situation. As a police officer, he was under a positive duty to protect the public. The affected person could not be permitted to continue ignoring the police call for him to stop or drop the machete. He could also not be permitted to continue walking toward the police officer and towards where the passengers had been evacuated.

In all the circumstances of this case, the question is whether the degree of force used by the SO can be seen to have been constrained by the principles of proportionality, necessity and reasonableness.

The affected person refused assistance, he refused to stop, and he refused to put the machete down. His verbal utterances were incomprehensible.

The SO faced a man that kept coming towards him carrying a machete. The machete obviously could be used as a weapon that clearly could be used to inflict serious harm or death.

Canada's highest court has recognised that when facing an attacker, no-one could be expected to measure the force used with exactitude and further that detached reflection cannot be demanded in the presence of an uplifted knife.

The SO and others had requested less lethal use of force options; however, because of the bad weather those options had not yet arrived and were not available when they were needed. Had the affected person not broken out of the SkyTrain car, he may have been subjected to a lesser level of force but those options were not present when they might have been used.

A review of all the evidence collected during this investigation shows that when the SO shot the affected person, it would be reasonable for him to believe that the potentially lethal force he invoked was necessary for his self-preservation or the protection of others as is required to justify that force in accordance with s. 25(3) of the Criminal Code of Canada. Additionally, on a plain reading, the self-defence provisions set out above in s. 34 would be applicable.

Decision of the Chief Civilian Director

Based on all of the evidence collected during the course of this IIO investigation and the law as it applies, I do not consider that any police officer may have committed an offence under any enactment and therefore the matter will not be referred to Crown Counsel for consideration of charges.

Clint Sadlemyer, Q.C.
Legal Counsel

2017 October 13
Date of Decision

Albert Phipps,
Chief Civilian Director

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