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BC Prosecution Service releases Clear Statement following IIO investigation into Police Dog Handler

Victoria - On January 4, 2018, the BC Prosecution Service (BCPS) announced that no charges were approved against a Vancouver Police Department officer who deployed his police service dog (PSD) during the arrest of a suspect in Vancouver on March 16, 2016. The incident was investigated by the Independent Investigations Office ("IIO").

Following an investigation, where the Chief Civilian Director of the IIO determines that an officer may have committed an offence, the IIO submits a report to the BCPS. The Chief Civilian Director does not make a recommendation on whether charges should be approved.

In order to maintain confidence in the integrity of the criminal justice system, a Clear Statement explaining the reasons for not approving charges is made public in cases where the IIO has investigated the conduct of a police officer and forwarded a report for charge assessment.

In this case, the BCPS did not release a Clear Statement explaining the reasons for not approving charges at the time the decision was announced because a related proceeding was before the Courts. As those proceedings have now ended, the BCPS is today releasing a Clear Statement attached to this Media Statement.

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Clear Statement

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Summary of Decision

On March 16, 2016 at approximately 9:00 pm, a Vancouver Police Department (VPD) dog handler (the "Subject Officer"), along with other VPD officers, boxed in a vehicle driven by a suspect who had earlier fled from a traffic stop and had been the subject of 911 calls that evening for erratic and threatening behaviour. After the suspect reversed his boxed-in vehicle and failed to comply with commands to get out of the car, the Subject Officer deployed a police service dog ("PSD") as the suspect was sitting in his vehicle. The PSD engaged the suspect and maintained its hold on the suspect's arm after the suspect got out of the car and began punching the dog. The suspect continued to struggle violently. Once the suspect was brought under control on the ground by several officers, the PSD released the suspect. The PSD caused significant injuries to the suspect's left arm which required two surgeries.

As a result of the injuries to the suspect, the IIO conducted an investigation into the actions of the officers who dealt with the suspect during the incident. At the conclusion of the investigation the IIO submitted a Report to Crown Counsel. Following a thorough review of the available evidence the BCPS has concluded that the evidence does not support approving any charges against the officers. As a result no charges have been approved.

This Clear Statement contains a summary of the evidence gathered during the IIO investigation, and the applicable legal principles. These are provided to assist in understanding the BCPS's decision not to approve charges against the officer involved in the incident. Not all of the relevant evidence, facts, case law, or legal principles are discussed.

The charge assessment was conducted by a Crown Counsel with no prior or current connection to the officers who were the subject of the IIO investigation.

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:

<https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/cha-1.pdf>

The BCPS applies a two-part test to determine whether criminal charges will be approved and a

prosecution initiated:

- a) there must be a substantial likelihood of conviction based on the evidence gathered by the investigating agency; and
- b) a prosecution must be required in the public interest.

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 whether the evidence gathered by the investigating agency is likely to be admissible in court; the objective reliability of the admissible evidence; and the likelihood that viable, not speculative, defences will succeed.

Potential charges

The potential charges that were considered in this case were assault causing bodily harm, contrary to s. 267(b) of the *Criminal Code* and assault with a weapon contrary to s. 267(a) of the *Criminal Code*.

Relevant Law

Causing Bodily Harm

Assault is defined in the *Criminal Code* as the intentional application of force to another person without the person's consent. Bodily harm is harm that is more than "trifling" or transient".

Pursuant to s. 267 of the *Criminal Code*, everyone who commits an assault causing bodily harm is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years or an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

Assault with a Weapon

Pursuant to s. 267 of the *Criminal Code*, everyone who commits an assault with a weapon is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years or an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

Courts have concluded that directing a dog to attack another person may constitute assault with a weapon.

Legal Justification

Section 25(1) of the *Criminal Code* provides that a peace officer, acting in the course of his lawful duties and who acts on "reasonable grounds" is "justified in doing what he is 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."

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 accused". In applying the standard of reasonableness, "a certain amount of latitude is permitted to police officers who are under a duty to act and must often react in difficult and exigent circumstances".

Notwithstanding the deference afforded to police officers in the exercise of force in exigent circumstances, the law still requires that the use of force not be excessive. Case law interpreting these sections recognizes that police officers may need to resort to force in order to execute their duties but also that courts must guard against the illegitimate use of power by the police against members of our society, given its grave consequences. The degree of force that a police officer may use is constrained by the principles of proportionality, necessity, and reasonableness.

Summary of the evidence

Eight VPD officers were involved in the suspect's arrest. Their reports and statements were generally consistent in their descriptions of the sequence of events and in the suspect's conduct.

The Subject Officer was on duty in an unmarked SUV with a PSD. The Subject Officer reported that, while driving in Southeast Vancouver at approximately 8:36 pm, he observed a grey Toyota Echo travelling at a high rate of speed weaving in and out of traffic. The Echo then went into oncoming lanes to overtake two vehicles. The Subject Officer completed a U-turn, pulled up behind the Echo, activated emergency lights and gave a short burst of the siren. The Echo pulled over to the side of the road. The Subject Officer reported that he intended to issue the driver a violation ticket for speeding and passing on the left.

As the Subject Officer opened the police vehicle's door, the Echo accelerated and made a U-turn, fleeing in the opposite direction. The Subject Officer saw the driver. The Subject Officer completed a U-turn and followed the vehicle for several blocks with emergency lights and siren activated. The Subject Officer then lost sight of the vehicle and broadcasted over the police radio that the driver of the Echo was arrestable for "obstruction" and "fail to stop". As the Subject Officer was following the vehicle, another officer [Officer A] advised that he had just responded to a 911 caller who had reported shortly after 8 pm that a driver of the same vehicle was threatening, swearing and acting erratic towards the caller on a nearby street. The 911 caller believed the driver was intoxicated.

Using a police database, the Subject Officer obtained the name and photograph of the registered owner of the Echo. The Subject Officer identified the registered owner as the driver he had attempted to stop.

Meanwhile, another civilian called 911 to report that he had witnessed a male driving a grey Toyota Echo take off from police and that the same man had approached him earlier that evening in a suspicious manner.

At approximately 8:58 p.m., Officer A located the Echo and followed it for a short distance and stopped. Officer A determined the suspect was likely returning to his home and used the police radio to instruct other officers to "box and pin" the suspect's vehicle to ensure that once stopped, the vehicle could not move. Officer A told the other officers to ensure that the suspect was arrested before he got back into his home.

Officer A saw the suspect drive past him and turn towards his residence, and then saw the Subject Officer travelling in the same direction with emergency lights activated.

Two other VPD officers [Officers B & C] were in another police vehicle which was travelling in the opposite direction on the same street. Eventually that vehicle came nose-to-nose with the Echo and the Subject Officer's vehicle drove up behind the Echo to attempt the box-and-pin

manoeuvre so that the suspect could not drive forward or reverse to escape. As soon as the vehicle stopped, Officer B activated their vehicle's emergency lights.

Officers B and C saw the suspect reach over and grab a white substance from a plastic bag and swallow it quickly. The suspect appeared frantic, startled and afraid. Based on their experience, both officers believed the suspect was consuming or hiding drugs. The Subject Officer and Officers B and C approached the Echo. The Subject Officer approached the driver's side door with the PSD and shouted commands at the suspect. The suspect tried to reverse the Echo after it had been blocked by the police vehicles.

The Subject Officer shouted "Vancouver Police, get out of the car", then opened the driver's door and gave the PSD the command to apprehend the suspect. The PSD bit the suspect's left forearm. The suspect exited the vehicle and stood up. The suspect delivered several hard punches to the head of the PSD, which was on its hind legs and maintaining its grip on the suspect's arm. The Subject Officer yelled at the suspect to stop fighting and get onto the ground. At that point other officers became involved, trying to take the suspect to the ground. The suspect continued punching the dog and attempted to overpower everyone there. Eventually, the suspect was brought to the ground, but he continued to flail against the officers who delivered multiple stunning blows to bring him under control. When the suspect stopped moving around and fighting, the PSD released the suspect and other officers who had arrived on scene handcuffed him and advised him he was under arrest.

Evidence of the suspect

The suspect reported that he was driving home when he saw a vehicle driving towards him so he pulled over to the side of the road to allow the vehicle to pass. He said the vehicle remained stationary in the centre of the road with its headlights on. The suspect did not notice any emergency lights flashing. The suspect said that a person who he did not recognize as a police officer approached his door and yelled "get out of the vehicle." The suspect parked the car and opened his door to see what was going on. As he opened the door, the suspect saw the person who had yelled had a dog on a leash. Before he could get out of the vehicle, the dog latched onto his left arm. The Suspect asked the man to tell the dog to let go and tried pushing the dog off. The Suspect said he remained in the vehicle with the dog chewing at his arm for 30 seconds to a minute and a half, and did not get out of the vehicle until the dog released his arm. The Suspect said that he was placed under arrest by one officer, who pushed him to the ground after he was handcuffed. He said one of the officers yelled "spit it out" but he denied consuming anything that would have caused the officer to ask him to spit. He denied consuming any drugs or having any interaction with the police that evening prior to his arrest.

An ambulance arrived soon after, and the suspect was transported to hospital where he had two surgeries to repair significant injuries to his arm over the next month.

Although the suspect denied consuming drugs or alcohol, a blood sample taken at approximately 10:45 p.m. on March 16, 2016 revealed a blood-alcohol content of approximately 143 milligrams of alcohol per 100 milliliters of blood.

Other civilians were interviewed by IIO investigators, but none observed the suspect's arrest.

Application of the law to the evidence

There is no doubt that the officers were in the lawful execution of their duty in arresting the suspect that evening: A male matching his description had generated reports from concerned citizens with respect to his behaviour, and the Subject Officer had observed the suspect commit traffic violations and a criminal offence when he fled. The only question is whether the use of force by the Subject Officer in deploying the PSD was excessive.

The primary evidence suggesting that excessive force may have been used comes from the suspect himself, however, his evidence suffers from a number of frailties which undermine its ultimate reliability. The suspect's denial of having any previous contact with the police that evening is contradicted by both the subject officer and a civilian witness who contacted 911 to report the suspect. Notwithstanding his assertion that he did not drink alcohol that night, the analysis of a blood sample taken at the hospital showed a level of alcohol consistent with impairment. Finally, his description of the sequence of events following the vehicle stop is contradicted by all eight police officers and their radio transmissions in which events were described as they unfolded.

Based on the balance of the available evidence, the Subject Officer was dealing with an unpredictable individual who appeared determined not to comply with police direction and to avoid arrest. He had already fled from police in his vehicle during the earlier traffic stop attempt and had taken steps to try to flee again by reversing his vehicle. The suspect was reportedly driving while impaired, and the Subject Officer had reasonable grounds to believe that the suspect had just consumed drugs based on Officer B's broadcasted observations. Officer A had instructed the officers to ensure that the suspect did not flee from his vehicle and gain access to his residence. From a public safety perspective, the use of the PSD to apprehend the suspect, based on the Subject Officer's opinion that he was attempting to flee was reasonable and necessary in the circumstances. There were reasonable grounds for the suspect's immediate apprehension and reasonable grounds for the Subject Officer to believe that no lesser use of force would have been appropriate or effective. The harm caused by the PSD was proportionate

to the harm the suspect could have caused to the officers, himself and the public had he been given the opportunity to flee again.

Conclusion

In all of the circumstances, the Crown could not prove beyond a reasonable doubt that the Subject Officer's deployment of the PSD was excessive and thereby criminal. Accordingly, there is no substantial likelihood of conviction and no charges have been approved.

Materials Reviewed

The following materials were reviewed in this assessment:

- IIO executive summary and detailed narrative
- Civilian and Police Witnesses' Statements (Summaries and Transcripts)
- Police officers and IIO Investigators Notes and Reports
- VPD Report to Crown Counsel and PRIME report into the investigation of the suspect
- Photographs of the suspect depicting his clothing and injuries
- Medical Records of the suspect
- VPD Policy and training documents on the use of police dogs and the box-and-pin technique