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19-11

BC Prosecution Service announces no charges in Burnaby RCMP non-fatal shooting

Victoria - On May 31, 2019, the BC Prosecution Service (BCPS) announced that no charges were approved against a member of the Burnaby RCMP involved in a non-fatal shooting near the intersection of Canada Way and Edmonds Street in Burnaby on March 1, 2015. The incident occurred when two officers interrupted an armed robbery of a convenience store.

As a consequence of the 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.

In this case, the BCPS concluded on the entirety of the evidence made available to it that the charge assessment standard for initiating a prosecution has not been met and no charges have been approved. A [Clear Statement](#) explaining the decision in greater 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 in cases where the IIO has investigated the conduct of a police officer and forwarded a report for charge assessment.

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Clear Statement

Summary of Decision

On March 1, 2015, at roughly 2:40 am, two Burnaby RCMP officers, the driver (Officer A) and passenger (the Subject Officer) were stopped at traffic lights at the intersection of Edmond St. and Canada Way in a marked police vehicle when they observed a robbery in progress at a convenience store across the intersection to their right. The officers observed two suspects: one appeared to be holding a firearm while the other gathered items from the front counter. Another male, one of the store employees, stood nearby with hands raised.

As the suspects exited the store and ran toward a waiting minivan Officer A drove into the parking area and maneuvered to block the minivan with the police vehicle. One of the suspects entered the driver's side of the minivan while the other fled the area and was not located. As the officers approached with weapons drawn the suspect drove the minivan first into the police vehicle then in the direction of the Subject Officer. As the suspect drove at and then past the Subject Officer the officer fired several rounds at the suspect, two of which struck the suspect. The suspect was located within minutes following a brief police pursuit. He was taken by ambulance to a nearby hospital where he later recovered.

As a result of the injuries to the suspect, the IIO conducted an investigation into the actions of the Subject Officer who fired the shots that struck the suspect during the incident. At the conclusion of the investigation the IIO submitted a Report to Crown Counsel ("RCC"). Following a thorough review of the available evidence the BCPS has concluded that the evidence does not support approving any charges against the officer. The charge assessment was conducted by a senior Crown Counsel with no prior or current connection to the officers who were the subject of the IIO investigation.

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.

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

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. 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 whether there are viable defences or other legal or constitutional impediments to the prosecution that remove any substantial likelihood of conviction.

When making a charge decision, Crown Counsel must assess the evidence gathered by investigators in light of the legal elements of the criminal offence that is said to have been committed. Crown Counsel must also remain aware of the presumption of innocence, the prosecution's burden of proof beyond a reasonable doubt and the fact that under Canadian criminal law, a reasonable doubt can arise from the evidence, the absence of evidence, inconsistencies in the evidence or the credibility or reliability of one or more of the witnesses. The person accused of a crime does not have to prove that they did not commit the crime. Rather, the Crown bears the burden of proof from beginning to end.

The burden of proof on the Crown also applies to issues of credibility. A criminal trial is not a credibility contest between witnesses for the Crown and witnesses for the defence. If the accused testifies, the accused is entitled to be acquitted in any or all of the following circumstances: if the trier of fact accepts the accused's evidence; if the accused's evidence raises a reasonable doubt; if the trier of fact does not know whom to believe; or, even if the trier of fact does not accept the accused's evidence, there remains a reasonable doubt on the totality of the evidence.

Potential Charges

The potential charges considered in this case included attempted murder, careless use of a firearm, discharging a firearm with intent, aggravated assault, and assault with a weapon.

Relevant Law

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 his or her intention.

Careless use of a firearm

The relevant portions of s. 86(1) of the *Criminal Code* make it an offence to, "without lawful excuse", use, carry or handle a firearm "in a careless manner or without reasonable precautions for the safety of other persons".

For a conviction, the Crown must prove a marked departure from the standard of care of a reasonably prudent person in the circumstances. In cases involving the use of a firearm by a police officer acting in the course of their duty, this may require expert opinion evidence to support the standard of care in the circumstances, considering the relevant training and policies of the police agency.

Discharge of a firearm with intent

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. In order 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.

Aggravated assault/assault with a weapon

To prove any assault requires the Crown to prove the accused intended to apply force to a person without that person's consent.

To make out aggravated assault, the force used must cause wounding, maiming, or endangerment of life, and the risk of that result must have been reasonably foreseeable.

There is no issue that the actions of the Subject Officer would satisfy the legal definition for some or all of the offences listed above, unless the officer is entitled to the protection afforded persons enforcing the law that is provided by section 25 of the *Criminal Code* or persons acting in self-defence.

Legal justification

The *Criminal Code* offers legal justification to using force in certain circumstances where that force is used in administering and enforcing the law (s. 25) or in self-defence (s. 34). Both justification provisions require an assessment of the reasonableness of the perception of the threat and the appropriateness of the response (according to the applicable test), in the totality of the circumstances. Where the evidence supports reasonable factual inferences that would justify the impugned use of force, the burden on the Crown cannot be met.

Section 25(1) of the *Criminal Code* provides that a peace officer, acting in the course of their 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 25(4) of the *Criminal Code* limits the justification in relation to "force that is intended or is likely to cause death or grievous bodily" to circumstances where there exist reasonable grounds to believe such force is necessary to protect against death or grievous bodily harm. 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.

Self-defence

Section 34(1) of the *Criminal Code* provides that a person is not guilty of an offence if:

- a. they believe on reasonable grounds that force or a threat of force is being used against them or another person,
- b. the act was 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.

To obtain a conviction, the Crown must prove beyond a reasonable doubt that one or more of the elements of the justification does not apply.

Section 34(2) provides that, in determining whether the act in question was reasonable, the court shall consider the relevant circumstances of the person, the other parties and the act, and other relevant factors, including:

- (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; and
- (g) the nature and proportionality of the person's response to the use or threat of force.

To obtain a conviction the Crown must prove beyond a reasonable doubt that the defence of self-defence does not apply.

Summary of evidence

A number of civilian, police and expert witnesses were interviewed during the course of the investigation. In addition, forensic and video evidence was gathered from the scene and the suspect was interviewed. Although the Subject Officer declined to provide a statement to

investigators, comments made to other officers at the scene allow for conclusions regarding the evidence that could be expected in defence.

Officer A

As the officers waited at the intersection, Officer A observed a clerk in a nearby convenience store with his hands up while two males with balaclava masks and toques stood in the vicinity of the front counter. One of the males appeared to be gathering items near the front counter. It appeared to Officer A that the male near the door was holding a firearm.

As Officer A drove through the intersection the two men walked quickly out of the store and ran to a minivan parked to the north of the store. The police vehicle entered the parking lot and stopped in front of the van at an angle so the officer's front driver's side tire was in front of the front bumper of the minivan.

One of the suspect males opened the driver's side door of the van and got into the driver's seat. The other male, who was never apprehended or identified, turned and ran away from the van and left the area. When the police vehicle stopped, the Subject Officer exited the vehicle and moved toward the minivan pointing their firearm at the vehicle. As Officer A watched, the minivan proceeded to forcefully drive forward into the police vehicle causing minimal damage. At the same time, Officer A exited the vehicle and pointed his weapon at the minivan while shouting commands to the driver to stop and show his hands.

After colliding with the police vehicle, the van reversed. As the van reversed, Officer A observed the Subject Officer step toward the police vehicle. As they reached the front bumper of the police vehicle, the van started to move towards them and ultimately around the front of the police vehicle. The Subject Officer took a few steps back and around the front passenger corner of the police vehicle as the van drove at and past them. They were continuously pointing their firearm at the driver of the van.

Officer A fired one shot at the van as they believed the minivan was going to drive into the Subject Officer. Officer A said the shot happened immediately after the Subject Officer fired once or twice. The minivan drove past the police vehicle, over a parking curb, and over a sidewalk to proceed northwest on Canada Way, in the southeast lanes of travel. As the Subject Officer ran to the sidewalk, Officer A re-entered the police vehicle and drove after the fleeing minivan. Officer A believed the suspect was armed and was going to hurt either Officer A or the Subject Officer. The risk of harm came both from the suspected firearm and the minivan. Officer A believed the Subject Officer was in the minivan's direct line of travel.

The evidence indicates Officer A fired one round into the minivan but the forensic evidence suggests that the bullets that struck the suspect were most likely fired by the Subject Officer.

Immediately after the incident, Officer A checked the Subject Officer to see if they were okay and then followed the minivan. It was located a short distance away. The suspect had fled the vehicle, bleeding heavily, and was located a short distance away with the help of a police service dog.

Civilian evidence

The two clerks at the convenience store gave statements to investigators. Civilian A advised that they were starting their cash-out behind the counter when two men with masks and gloves came in. One stayed at the door and the other came in with a big bag in one hand and a spray canister of what appeared to be bear repellent in the other. He said "give me everything", then "give me cigarettes". Civilian A gave him cigarettes. The suspect then said "give me the cash", then "give me the bus tickets, FareSaver tickets." Both Civilian witnesses complied with the requests made by the suspects. Both observed the suspects exit the store and both observed similar aspects of the confrontation with the police officers including the Subject Officer shooting at the minivan, which one of the clerks described as moving fast.

Police Witnesses

A number of officers attended at the scene of the incident in the immediate aftermath. None of the subsequent attendees observed the shooting incident. These officers established scene security and marked and seized forensic evidence including shell casings, video from the store security system and debris from the vehicles consistent with a minor collision. Some of the officers spoke to the Subject Officer and Officer A. Notes of these conversations, while likely not admissible as evidence, provide insight into the observations and conclusions reached by the Subject Officer and Officer A. These observations include that the officers believed the suspect was armed with a handgun and that the Subject Officer believed the vehicle was driving toward them and they had no available "cover".

The video evidence from the scene is consistent with the evidence of the witnesses present for the incident.

Forensic evidence

Evidence gathered from the scene included shell casings, vehicle debris, and a canister of bear spray. The vehicle debris was consistent with the collision of the vehicles described by the witnesses. Tire marks found at the scene confirmed the minivan exited the parking lot at a northwest diagonal, driving over a steel reinforced concrete wheel stop and over the sidewalk onto Canada Way. Evidence obtained from the minivan included damage consistent with the collision with the police vehicle and seven bullet entrances. Bullet fragments recovered from the van were identified as being from a bullet fired by the Subject Officer.

Evidence of suspect

The suspect provided a statement that was inconsistent with the independent evidence. While the suspect acknowledged leaving the scene against the police commands, he denied driving at the officer and said he only "slightly brushed" the police vehicle before driving away from the store. The route described by the suspect was inconsistent with the physical evidence left when the minivan drove over the parking curb and sidewalk.

Use of force report

An expert in the areas of police training and use of force was asked to review the circumstances of the incident based on the available evidence. The expert concluded that the officers used accepted police tactics in accordance with RCMP training and policy in the areas of risk and threat assessment, incident management and intervention.

Application of law to the evidence

Applying the law respecting the suggested offences to the facts in this case, the Subject Officer could be convicted of the suggested offences unless a lawful justification under section 25 or section 34 of the *Criminal Code* is found to apply. The Subject Officer intentionally fired a gun at the suspect in circumstances where an intent to cause the suspect's death could be readily inferred. Subsection 25(4), however, is engaged in these circumstances.

The Subject Officer was on duty and attempting to arrest the suspect for robbery, an indictable offence for which the suspect could be arrested without warrant pursuant to section 495 of the *Criminal Code*. Once the Subject Officer used force to try to stop the suspect, subsection 25(4) must be considered.

If the Subject Officer reasonably believed that the suspect was about to apply force to them by driving into them, subsection 34(1) could apply to justify the force used by the Subject Officer in defence.

It is likely that section 25 and/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 prove beyond a reasonable doubt that these legal justifications do not apply.

While the Subject Officer did not provide a statement, it is entirely reasonable to assume the Subject Officer would assert a belief that potentially lethal force was necessary for self-preservation after they were in the position where they were outside the police vehicle and the suspect's vehicle was rapidly moving toward them. It is unlikely that a Court would conclude that such a belief in all the circumstances was not objectively reasonable.

As previously mentioned, in assessing the likelihood of conviction of an offence, the Crown must consider whether viable, not speculative, defences may apply on the available evidence.

At the time they began firing their weapon, the Subject Officer was positioned in front of a moving vehicle that may have been accelerating toward them immediately after the driver had rammed the police vehicle that was blocking it. Given the circumstances of the suspect's behaviour (flight from an armed robbery, running from the scene, jumping into a vehicle, failing to respond appropriately to police commands, ramming the police vehicle and driving towards the Subject Officer as he went around the police vehicle) it would have been reasonable for the Subject Officer to believe that it was necessary to use potentially lethal force to protect themselves from death or grievous bodily harm.

Given all of the circumstances and the law, the Crown would not be successful in establishing that any of the shots fired by the Subject Officer were excessive.

Conclusion

It is likely that the legal justifications under sections 25 or 34 of the *Criminal Code* would apply. Therefore, there is no substantial likelihood that the Subject Officer would be convicted of any of the suggested offences and no charges will be approved.