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No charges approved following incident involving Abbotsford Officer

Victoria – The BC Prosecution Service (BCPS) announced today that no charges have been approved against a member of the Abbotsford Police Department (APD) in connection with their use of a Kinetic Energy Impact Projectile shotgun (KEIP) during the arrest of a suspect with outstanding warrants on March 2, 2020, in Chilliwack. The suspect suffered serious injuries during the arrest.

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 #2020-068).

In this case, the BCPS has concluded that the available evidence does not meet the BCPS 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) on Twitter.

Clear Statement

Summary

On March 2, 2020, members of the APD and the Chilliwack RCMP were engaged in a joint project to locate and arrest repeat offenders with outstanding arrest warrants. The subject officer (SO) was one of four APD officers who joined officers from the Chilliwack RCMP for the project. The SO was armed with a Kinetic Energy Impact Projectile shotgun (KEIP) designed to fire non-lethal bean bag projectiles.

One of the targets of the project was the suspect. All project officers knew the suspect had several outstanding warrants for vehicle thefts and for offences arising from previous successful efforts to evade arrest, most recently involving the dangerous operation of a motor vehicle and assault of a peace officer. Based on his previous actions, the officers believed the suspect posed a danger to police and the public.

On the evening of March 2, 2020, the project team received information that the suspect may be inside an apartment in a four-story apartment building in Chilliwack. The officers involved in the project, including a police service dog (PSD) handler, attended to contain and arrest the suspect. During these efforts, the SO was stationed on the parkade level facing the balconies of the building. Efforts to arrest the suspect took place on the balcony areas of the complex. To assist the officers trying to arrest the suspect, the SO fired his KEIP a total of eight times, striking the suspect three times. The first shot was mistakenly fired in the direction of another officer who appeared on a second story balcony, and whom the SO mistook for the suspect. The next five shots were fired when the suspect was observed repeatedly striking a PSD deployed to assist with arresting the suspect, who had fled to the balcony of an apartment on the fourth floor. The IIO did not recommend charges for this second series of shots.

Two final KEIP rounds were fired moments later when the AP began climbing over the same fourth floor balcony to evade the police. These rounds struck the suspect in the back and stomach. Despite efforts by the police to restrain the suspect, he fell two stories to a balcony on the second floor. The suspect suffered a fractured heel and a broken wrist from the fall. There is no evidence that the impacts on the suspect by the KEIP shots contributed to the fall.

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 not to approve charges against the officer involved in the incident. Not all the relevant evidence, facts, case law, or 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 charges that were considered against the subject officer in this case were:

- Careless use of a firearm contrary to section 86(1)
- Reckless discharge of a firearm contrary to section 244.2(1)
- Assault with a weapon contrary to section 267(b)
- Aggravated assault contrary to section 268
- Criminal negligence causing bodily harm contrary to section 221

Relevant Law

Careless use of a firearm/reckless discharge of a firearm

The relevant portions of section 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”. Section 244.2 of the *Criminal Code* makes it an offence to discharge a firearm while being reckless as to the life or safety of another person.

Assault with a weapon/Aggravated Assault

To prove an assault with a weapon, the Crown must establish the suspect intentionally applies, threatens, or attempts to apply force to another person without that person’s consent while carrying or using a weapon. Aggravated assault occurs when the force used wounds, maims, disfigures, or endangers the life of the victim.

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. Bodily harm is harm that is more than merely transient or trifling in nature.

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 these 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 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).

Notwithstanding the deference afforded to police officers in the exercise of force in exigent circumstances, the use of force must not be excessive. The degree of force that a police officer may use is constrained by the principles of proportionality, necessity, and reasonableness.

The issue is whether the force used by the SO was necessary, reasonable, and proportionate in the circumstances. In applying section 25, courts have made it clear that based on the exigencies of the circumstances, police are oftentimes required to take control of situations as quickly as possible to prevent an escalation or to ensure the safety of the subject, police, or members of the public. 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.

Outline of Evidence

Expert Evidence

Expert evidence with respect to the KEIP indicates that:

- The KEIP is a shotgun that launches non-lethal projectiles. These projectiles are designed to not penetrate the skin/body.
- The KEIP is an intermediate weapon capable of delivering force equal to or higher than a strike with a police baton. The KEIP can be used on subjects whose behaviours range from actively resisting to potentially causing grievous bodily harm.
- The KEIP can only deploy non-lethal projectiles. These projectiles can only attain velocities between 85-91 meters/second (280-300 feet/second). This is far less than the velocity generated by a conventional firearm.
- KEIPs should be used to de-escalate dangerous or potentially dangerous situations; to control, detain, or arrest a non-complaint subject, or to protect officers or others from harm.
- In selecting the target location, police are trained to consider the need to stop the suspect's behaviour versus the potential for injury from striking vulnerable parts of the body.

- Common injuries from the KEIP are similar to injuries caused by baton strikes. They include contusions, abrasions, lacerations, and fractures. Injuries when delivered to vital organs can be serious or fatal.
- Intentional discharges of KEIPs to deadly force locations (i.e., the head or vital organs) are typically reserved for situations when lethal force is required.

Statements of Police Witnesses

On the evening of March 2, 2020, the project team received information that the suspect may be inside an apartment (unit 110) on the second floor of a four-story residential building. There is an open parkade on the west side. The west facing apartments have balconies enclosed by a low, solid wall. Some of the team entered the building while others patrolled outside.

At approximately 22:15 hours, an officer in the hallway outside unit 110 saw the suspect exit and then re-enter the unit upon seeing the officer. Another officer in the parkade area observed the suspect come out onto the balcony of unit 110 above him and then move towards the balcony of unit 104. This officer heard the suspect knock on the window of unit 104 and then heard breaking glass. The suspect then reappeared on the balcony of unit 104 and began climbing over the railing. The officer approached the suspect with his firearm drawn and advised the suspect he was under arrest. The suspect threatened the officer stating "I'll fuckin' kill you ... I'll shoot you with my gun". The suspect then retreated into unit 104 through the broken window.

The occupant of unit 104 advised an officer that there was an intruder in the unit. The officer found no one inside the unit, so he climbed out the broken bedroom window onto the patio to see if the intruder was there. He shone his flashlight and announced that he was a police officer. As he crawled through the window a single shot was fired from the KEIP. The shot came very close to striking him and hit the wall above his head. He immediately yelled "blue, blue" to indicate he was a police officer.

Two other officers, including the dog handler and her PSD, followed a trail of blood to unit 306 on the fourth floor where they were let in by the occupant. The blood was likely the suspect's, from cuts from the broken window in unit 104. The occupant advised that the suspect had broken into unit 306 and was on the balcony. The officers observed the suspect in a corner of the balcony. One officer announced that they were police and that he was under arrest. The dog handler told the suspect that she was sending the PSD. Both officers observed the suspect striking the PSD with an unknown object several times. Realizing the dog was being injured, its handler pulled the dog back inside. At the same time the officers heard several loud bangs.

The SO fired five rounds from the KEIP at the suspect while the suspect was assaulting the PSD. Investigation revealed that one of these rounds struck the suspect in the face and resulted in a broken nose. The IIO did not recommend any charges in respect of this series of shots.

Immediately after the PSD was pulled back, the suspect climbed onto the solid wood balcony railing. Out of concern for the suspect's safety, one of the officers went onto the balcony and grabbed the suspect while the suspect was straddling the railing. The officer tried to break the suspect's forward momentum, and pull the suspect back onto the balcony, but was not successful, and the suspect was able to get his second leg over the railing. The suspect then swung an object at the officer's face. As this was happening, the officer heard loud bangs. He recalled hearing at least one loud bang after the suspect was hanging on the exterior of the balcony. At this point he ducked down and, using the solid balcony railing, tried to protect himself from whatever projectile it might have been.

During the struggle two other officers arrived onto the balcony of unit 306 to assist. By this time, the suspect was already half-way over the balcony railing. One of these officers described hearing shots when she was on the balcony. She heard one shot as she was getting out to the balcony and one as she struggled with the suspect. She yelled "stop shooting."

All officers described difficulty restraining the suspect due to his loose-fitting clothing and a large amount of blood on his person. Ultimately the officers were unable to maintain a hold of the suspect and the suspect fell two floors, landing on the larger balcony of unit 106 below.

Subject Officer's Statement

In a written statement, the SO stated that after joining the other officers in the parkade area, he heard more glass breaking on a balcony and believed the suspect was trying to gain access to a suite through a window. He moved towards that area and saw a dark figure that he believed to be the suspect appear on the balcony. He ordered the figure to stop and show their hands. The figure was non-compliant and continued to move towards the edge of the balcony. He fired a single shot targeting the subject's right arm. The round did not make contact and he heard "blue, blue" and realized the figure was a police officer.

After the first shot he heard more breaking glass and believed the suspect was breaking into more units. He scanned the balconies with the flashlight on his KEIP and saw the suspect standing at the end of balcony 306. He saw the suspect swinging a flashlight down toward something and believed he was actively assaulting someone. While this was happening, he fired his KEIP five times targeting the area of the suspect's upper back and shoulders. None of the shots appeared to have any effect on the suspect.

As he reloaded, he saw the suspect start to climb over the balcony. He believed that the suspect might be trying to access another suite. He delivered one shot targeting the suspect's back as he was climbing over the railing. He then delivered a final shot targeting the suspect's left leg on the railing as his right leg lifted over the edge. This round appeared to make contact. After this the suspect began to swing his body as though he was trying to reach the balcony below him. He then let go of the railing and fell to the first floor. The SO stated that both shots were fired before he saw police on the balcony.

Statements from the suspect

The suspect provided three statements about this incident. In each of his three statements he minimized his role in the incident and misrepresented the actions he was taking to evade arrest. Examples in his statements included omitting his death threats to police, his efforts to prevent police from bringing him back onto the balcony, and any reference to his previous flight from police. He also misrepresented his interaction with the PSD claiming he only struck the PSD two times with minimal force, that when he struck the dog with the flashlight, he did not realize that it was a PSD and that while he hit the dog, he did not realize that police were there to arrest him. He also claimed that it was his intention to turn himself into police the next day.

The suspect acknowledged suffering memory loss and admits his ability to recall events is "not good" and is likely impacted by his use of fentanyl on the day.

The suspect stated he was struck three times while on the balcony outside unit 306, once in the face while he was attacking the PSD and twice more in the body as he was on the balcony railing. The first shot hit him either before, or as, the first police officer grabbed him. The second as he hung from the solid wood balcony railing. The last two impacts were in quick succession. He did not suggest the impacts caused him to fall from the railing, rather he says he fell because the officer lost grip on his backpack and jacket.

The injuries related to the KEIP shots were a broken nose, bruising to the suspect's lower back and a complaint of stomach pain which the suspect attributed to a projectile impact.

Analysis

Initial KEIP shot at unit 104

The recommended charges relating to the first shot include careless use of a firearm, reckless discharge of a firearm, assault with a weapon, and aggravated assault. These potential charges are only tenable if the officer was not justified in the use of force.

Based on the suspect's behavior and the public safety concerns that existed in the circumstances, and the need to safely effect the arrest of the suspect, a single KEIP shot aimed at the right arm of

a person the officer believed to be the suspect, but who turned out to be an officer, is reasonable and justified by section 25(1).

KEIP shots fired at unit 306

In respect of the final two shots, the IIO recommended charges of careless use, assault with a weapon, aggravated assault, reckless discharge, and criminal negligence causing bodily harm.

The first of the shots was likely fired while the suspect was straddling the balcony and prior to, or as, the officers arrived to arrest him. KEIP rounds fired at the suspect, aimed at non-lethal parts of his body, as he climbed over the balcony would likely be justified by section 25(1). A belief that a shot fired at this time might stop the suspect from climbing over the balcony railing, therefore enabling his arrest and ensuring that he did not break into another apartment, or fall, is reasonable.

The SO states he fired the first of the last two rounds as the suspect climbed the balcony, and the final shot as he was climbing over the balcony, and before he saw police were on the balcony.

The evidence establishes the last two rounds were fired in quick succession. The suspect says the second shot occurred "immediately" after the first. The description of the shots provided by the other police witnesses is consistent with them occurring without any significant gaps.

There is credible evidence that the second shot was fired just as the suspect transitioned from straddling to hanging over the external wall. The final shot appears to have occurred before the SO was, or reasonably should have been, aware that the suspect was hanging with both legs over the balcony. On this scenario, the final shot remains justified for the same reason as the first and would also be justified by section 25.

The Crown is not able to disprove the availability of the justification provisions for the final shot. Accordingly, there is not a substantial likelihood of conviction for any of the recommended charges.

The same analysis which supports the application of the justification provisions to these offences would also apply to the suggested charges of criminal negligence and aggravated assault. The justification provisions would provide a complete defence to the proposed charge. Even if they did not, the provable injuries related to the impact of the KEIP projectiles are not serious enough to establish the offence of aggravated assault and there is no evidence to connect the injuries suffered in the fall with the impact of the KEIP projectiles.

Conclusion

No charges are approved.