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24-22

BC Prosecution Service announces stay of proceedings against Chilliwack RCMP officer

Victoria – The BC Prosecution Service (BCPS) announced today that a stay of proceedings has been directed in relation to charges against Cst. Keven Biagioni of the Chilliwack RCMP detachment who was involved in a non-fatal use of force during an arrest on January 12, 2021.

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 Cst. Biagioni may have committed offences and submitted a report to the BCPS (IIO file #2021-012).

On November 3, 2022, a three count Information was sworn against Cst. Biagioni. Charges were laid under the *Criminal Code* pursuant to section 244(1) – discharge firearm with intent, section 268(1) – aggravated assault, and section 86(1) – careless use of a firearm.

A preliminary inquiry concluded in November 2023. The evidence that arose during the preliminary inquiry caused the Crown to seek an expert opinion regarding Cst. Biagioni's use of force. The evidence at the preliminary inquiry and the expert report caused Crown Counsel to re-evaluate whether there was a substantial likelihood of conviction.

The BCPS has concluded that the available evidence no longer meets the charge assessment standard. As a result, a stay of proceedings has been directed regarding the outstanding charges.

A Clear Statement explaining the decision in more detail is attached to this Media Statement.

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Clear Statement

Overview

On January 12, 2021, the Chilliwack RCMP received a call from a woman alleging that she had been assaulted by her husband. Cst. Biagioni attended at the residence and concluded that the husband (the Affected Person or AP) had committed an assault on his wife and that the AP had left the residence in his truck.

The AP's truck was located near the Vedder River and members of the RCMP formulated a plan to apprehend and arrest him. Two RCMP vehicles were maneuvered to block the AP's vehicle. The AP exited the vehicle holding an edged weapon in his hand that was later identified as a 14-inch barbeque skewer. The officers ordered the AP to drop his weapon, and he refused to do so. The AP began moving his feet in a shuffling or rocking motion and moved his upper body. The AP raised his hands while still holding the barbeque skewer. An officer broadcasted "*knife*" over the radio. Cst. Biagioni then discharged his firearm twice, one shot striking the AP in the chest. The AP was arrested and taken into custody. The AP underwent extensive medical treatment and survived the gunshot wound.

On November 3, 2022, a three-count Information was sworn against Cst. Biagioni. On January 23, 2023, Cst. Biagioni pled not guilty to all three counts and elected to be tried in BC Supreme Court with a judge sitting without a jury. Cst. Biagioni requested to have a preliminary inquiry, which took place over five days in October and November 2023.

At the preliminary inquiry, the evidence demonstrated that one of the officers was closer to the AP than had been apparent at the initial charge approval stage. As a result of this evidence the Crown determined that it was necessary to retain a use of force expert to assist with the analysis of the viability of a section 25 *Criminal Code* defence by Cst. Biagioni.

Based on the evidence at the preliminary inquiry and the use of force expert's conclusion that the use of force was reasonable, necessary, and proportionate in the circumstances, Crown Counsel determined that there was no longer a substantial likelihood of conviction and entered a stay of proceedings.

This Clear Statement provides a summary of the evidence gathered during the investigation and the applicable legal principles. These are provided to assist in understanding the BCPS's decision to enter a stay of proceedings against Cst. Biagioni. Not all the relevant evidence, facts, case law, nor legal principles are discussed. All decisions in relation to this file were made by Crown Counsel with no prior or current connection to Cst. Biagioni.

Charge assessment

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

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

BCPS guidelines for assessing allegations against police officers are also established in policy and are available at:

www.gov.bc.ca/allegations-against-peace-officers

The BCPS applies a two-part test to determine whether charges will be approved, and a prosecution initiated. Crown Counsel must independently, objectively, and fairly measure all available evidence to determine:

1. whether there is a substantial likelihood of conviction; and, if so,
2. whether the public interest requires a prosecution.

Under BCPS policy, a substantial likelihood of conviction exists when Crown Counsel is satisfied there is a strong, solid case of substance to present to the court. To reach this conclusion, a prosecutor will consider what evidence is likely to be admissible and available at trial; the objective reliability of the admissible evidence; and the likelihood that viable, not speculative, defences will succeed.

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

Relevant law

Discharge firearm with intent

To prove the offence of discharging a firearm with intent, the Crown must establish that the firearm was discharged with the intent to wound, maim or disfigure, to endanger the life of, or to prevent the arrest or detention of any person.

Aggravated assault

To prove any assault, the Crown must establish the accused intentionally applied, threatened, or attempted to apply force to another person without that person's consent. To prove the offence of aggravated assault, the force used must wound, maim, disfigure, or endanger the life of the victim, and the risk of that result must have been reasonably foreseeable.

Careless use of a firearm

To prove the offence of careless use of a firearm, the Crown must establish the person used the firearm in a careless manner without reasonable precautions for the safety of other persons.

Legal defences

Section 25(1) of the *Criminal Code* provides that a peace officer who acts, in the course of their lawful duties, on "reasonable grounds" is "justified in doing what [they are] required or authorized to do and in using as much force as necessary for that purpose."

This defence is limited by section 25(3) of the *Criminal Code*, which provides that an officer will only be justified in using force likely or intended to cause grievous bodily harm or death when they subjectively and reasonably believe that it is 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."

In assessing whether a particular amount of force used by an officer was necessary within the meaning of the *Criminal Code*, the trier of fact must have regard to the circumstances as they existed at the time the force was used, recognizing that an officer cannot be expected to measure the force used with precision.

The reasonableness of the officer's belief must be assessed on an objective standard, but one that also "takes into account the particular circumstances and human frailties" of the officer. In applying the standard, the Supreme Court of Canada has ruled that, "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*). In these dynamic situations police are not expected to measure the force used precisely and are not required to use the least amount of force that may achieve their objective.

Despite the deference afforded to police officers in the application of force in exigent circumstances, the law still requires that the use of force not be excessive. Police use of force is constrained by principles of proportionality, necessity, and reasonableness.

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

Summary of evidence at charge assessment

In the early hours on January 12, 2021, a woman called 911 and alleged that she had been physically assaulted by her husband (the Affected Person or AP). Cst. Biagioni attended the residence and spoke with the AP's wife. She reported that her husband believed she was having an affair with one of her friends and threatened to kill her. She said he then slapped the side of her face, pinned her down with his knee on her chest, and began choking her. She said he then removed one hand from her throat and used it to cover her mouth and nose. She was having trouble breathing and in response bit his thumb very hard. The bite caused his thumb to bleed sufficiently so that he got up to tend to the injury, enabling her to escape from the residence and call 911. At some point the AP left in his truck and was not present when the police arrived.

The AP's wife reported that her husband had been using crack cocaine and was mentally unstable. Cst. Biagioni photographed the injuries he observed to her right eye, neck, and chest. The AP's wife called the police a second time to report that her husband was sending her text messages threatening to kill her friend and stating that he was going to kill a police officer to force another officer to shoot him (sometimes referred to as "suicide by cop"). This information was broadcast over the police radio for the awareness of all attending officers.

About 90 minutes later the police located the AP sitting in his truck in a parking lot near the Vedder River. The attending officers waited for backup while they put a plan in place. A total of nine police officers were involved in the apprehension and arrest of the AP, arriving at varying times. The plan involved boxing in the AP's truck two police vehicles to contain him at the location and then effect an arrest. All officers at the scene, including Cst. Biagioni, were designated to use lethal force. Cst. Biagioni was wearing his standard RCMP uniform with a duty belt that contained a taser, baton, and pistol. One officer was designated to use less-lethal force (a beanbag gun).

Two officers parked in a "V" formation facing the AP's vehicle, which was backed into a parking spot. One of the police vehicles pinned the AP's vehicle from the front. The AP exited the driver's door holding an item in his hand that was later identified as a 14-inch barbeque skewer. Cst. Biagioni and other officers were directly in front of the AP but protected behind the police vehicles. Another officer, Sgt. Ristau, was positioned with his police service dog (PSD) to the AP's left. The officers ordered the AP to "*Drop the weapon*" two or three times. He responded "*No, that's not going to happen.*" The AP was described as irate and aggressive.

The AP began moving his feet in a shuffling or rocking motion, and then moved his upper body. Cst. Britton, who was in a good position to make observations, described the AP moving his shoulders in a quick, darting, or lunging motion to his left. The AP raised his hands up to chest level (not in response to a police command to do so), while still holding the barbeque skewer. Sgt. Ristau broadcast "*knife*" over the radio.

Cst. Biagioni discharged his firearm twice, one shot striking the AP in the chest. Sgt. Ristau deployed the PSD, which remained on its leash while it took the AP to the ground. The AP was arrested and taken into custody. The AP underwent extensive medical treatment and survived the gunshot wound.

All officers at the scene, except Cst. Biagioni, were interviewed by the IIO investigators, as well as the AP and his wife. The AP acknowledged that he had refused to put down his weapon when ordered to do so by the police. He said that he might have shuffled his feet, and agreed that he had moved his shoulders, but denied making any sudden moves.

The officers on scene were interviewed about the positioning of themselves and other police officers. Cst. Biagioni and some other officers were reasonably close to the AP, about 20 feet, but protected by police vehicles. Sgt. Ristau was in the area to the AP's left with a PSD, but no other cover. There was some evidence to suggest that Sgt. Ristau was closer than other officers at the time the shots were fired. However, there was a disparity in quantifying that distance:

- Sgt. Ristau estimated he was initially 10-15 feet away from the AP, but that he had backed up a bit by the time the shots were fired (he was not asked how much).
- Cpl. Berze estimated the distance between the AP and Sgt. Ristau to be 10-15 feet.
- Cst. Britton told investigators that he did not see anyone in the area to the AP's left, that he was focused on the AP, and that a police vehicle partially blocked his view of that area. He therefore did not believe that the AP posed a risk of grievous bodily harm or death to anyone at the time the shots were fired. Cst. Britton told investigators that he saw Sgt. Ristau only *after* the shots were fired, and that he was 15 feet away from the AP at that time.
- Cpl. Jordan was reasonably close behind Sgt. Ristau and estimated the distance between the AP and Ristau to be 30-40 feet when the shots were fired. He agreed with the suggestion that it could have been 30-50 feet. However, he qualified that the distance was likely limited by the length of the PSD's leash which was perhaps 25 feet and likely under 40 feet.
- The AP told investigators that Sgt. Ristau was 20-25 feet away from him.
- Other officers either did not know where Sgt. Ristau was at the time the shots were fired, or their interviews did not clarify that issue.

The initial charge assessment was based on the Report to Crown Counsel and the witness statements taken by the IIO investigators. This material included evidence that the officers heard over the radio that the AP had just assaulted his wife, had threatened to provoke a "suicide by

cop”, was believed to be suffering from a mental health crisis, and was under the influence of drugs. Based on this information the officers believed that the AP was at risk of killing or causing grievous bodily harm to the officers. This conclusion was reinforced by the fact that when confronted by the officers, the AP was holding an edged weapon in his hand and was gesturing with it. The AP was non-compliant and told the police that he was not going to drop his weapon despite being surrounded by several armed officers and a PSD.

The Crown’s assessment was impacted by the lack of clear evidence that Cst. Biagioni or any other officer was proximate enough to the AP to put them at imminent risk at the time the shots were fired.

Use of force is assessed on a subjective-objective basis. Based on the above evidence, Crown Counsel concluded that a court could find that Cst. Biagioni subjectively believed that shooting the AP was necessary to save himself or his fellow officers from imminent risk of grievous bodily harm or death. However, Crown Counsel concluded it would be unlikely that a court would find it was objectively reasonable for Cst. Biagioni to shoot the AP in order to save himself or his fellow officers from death or grievous bodily harm. Therefore, Crown Counsel was of the view that the charge approval standard was met in relation to three charges, and that the available evidence did not support a defence under section 25 of the *Criminal Code*.

Accordingly, Crown Counsel approved the following charges under the *Criminal Code*:

- section 244(1) – discharge firearm with intent
- section 268(1) – aggravated assault
- section 86(1) – careless use of a firearm

On November 3, 2022, a three-count Information was sworn against Cst. Biagioni. On January 23, 2023, Cst. Biagioni pled not guilty to all three counts and elected to be tried in BC Supreme Court with a judge sitting without a jury. Cst. Biagioni requested to have a preliminary in relation to counts 1 and 2. A five-day preliminary inquiry took place in October-November 2023.

Summary of evidence at the preliminary inquiry

At the commencement of the preliminary inquiry both counsel advised the court that the purpose of the inquiry was to assist both the Crown and the defence in assessing the viability of a section 25 *Criminal Code* defence at trial.

The Crown called eight police officers at the preliminary inquiry who were involved in the search, apprehension, and arrest of the AP. The officers’ evidence was consistent on the following key points:

- The following information regarding the AP was broadcast over the police radio before their attendance at the scene of the arrest:
 - the AP and his wife had been using crack cocaine for the previous 48 hours
 - the AP had slapped his wife in the face and then choked her
 - the AP's wife bit the AP's thumb in order get away
 - the AP's wife ran out of the house and called 911
 - the AP had written text messages stated that he wanted the police to shoot him, that did not want to get locked up in the psych ward, be arrested, and had threatened to attack his wife and others
 - the AP's wife said he was mentally unwell
- The police plan was to box in the AP's truck with two police SUVs, followed by three other police vehicles; least lethal force option (beanbag gun) to be used by one police officer; all other police officers were authorized to use lethal force.
- The AP was standing/pacing, with his arms down, holding an edged weapon later determined to be a 14-inch barbeque skewer in his right hand.
- The AP's manner was taunting and aggressive.
- The AP ignored police commands and stated, "*No, not doing that*".
- The AP raised his hands with the skewer in his right hand just prior to being shot.
- Sgt. Ristau broadcast "*knife*" over the radio.
- Cst. Biagioni was on the left-hand side of his police vehicle looking over the hood of his and the AP's vehicle with the AP directly in front of him about 20 feet away.
- Each police officer said their risk assessment of situation was at the highest level and that they feared for their own safety or the safety of their colleagues at the scene

Sgt. Ristau testified that after the AP got out of his vehicle, the AP looked at Sgt. Ristau, then turned facing the area where Cst. Biagioni was located. Sgt. Ristau saw some movement in the AP's hands, saw something silver on his right side, moving back and forth. He described the AP as moving "aggressively", in line with the driver's side door, with quick movement sideways, back and forth in all directions. As the AP raised his hands up, Sgt. Ristau could see a sharp metal object in the AP's right hand, and called out on the radio, "*knife*". After he heard the shots

fired, he saw the AP hunched over, still holding the silver object. Sgt. Ristau then deployed his PSD and moved in to arrest the AP.

In cross-examination Sgt. Ristau agreed with the suggestion that he started out closer to 10 feet, then backed up but was still within 20 feet when he saw the sharp metal object. He agreed that he was out in the open and had no cover. Sgt. Ristau testified that the AP's movements were aggressive and threatening, and the AP lifting the weapon caused him to fear grievous bodily harm or death.

The officers gave the following testimony regarding the distance between the AP and Sgt. Ristau at the time the shots were fired:

- Sgt. Ristau testified he was 10-20 feet away from the AP (consistent with his statement to the IIO in which he estimated he was 10-15 feet away from the AP, but then backed up an unspecified distance)
- Cpl. Berze agreed with the suggestion in cross-examination that the distance was 10 feet at the time the shots were fired (versus 10-15 feet in his earlier statement)
- Cst. Stewart agreed with the suggestion in cross-examination that it was possible that the AP and Ristau were 10-15 feet apart at the time the shots were fired, although he did not actually see Sgt. Ristau himself (he had not been asked to provide an estimate during the investigation)
- Cst. Britton testified that he did not see Sgt. Ristau until the PSD was released. At the time the PSD was released he estimated the distance was 15 feet (the same distance he had said in his statement)
- Cpl. Jordan testified the distance was 20 feet but agreed in cross-examination that it was possibly closer than this (versus 30-50 feet in his statement)

The AP's testimony at the preliminary inquiry did not contradict that of the officers on any material point except the distance between him and Sgt. Ristau. The AP testified that Sgt. Ristau was 25-30 feet away from him at the time he was shot and did not resile from this under cross-examination. (In his statement to the IIO, the AP had estimated this distance to be 20-25 feet.)

The AP acknowledged that he had assaulted his wife, was under the influence of crack cocaine, armed himself with the skewer, disobeyed police commands to drop the weapon, and was adamant that he was not going to be arrested. There was some discrepancy in the evidence regarding how far the AP had raised his hands before being shot. The AP's testimony was that he had raised his hands above his head.

The presiding judge determined that the evidence presented by the Crown satisfied the minimal requirements for committing Cst. Biagioni for trial; however, in making that finding the court commented that, based on the evidence that had been led, the likelihood of conviction was very slim, and not a realistic possibility.

Expert retained

The preponderance of evidence at the preliminary inquiry supported the conclusion that Sgt. Ristau was less than 20 feet away from the AP at the time the shots were fired (and one officer agreed in cross-examination it could have been as close as 10 feet).

Crown Counsel must continually consider the charge approval standard throughout the prosecution, including any viable defences. Given the evidence as it emerged at the preliminary inquiry regarding the distance between the AP and Sgt. Ristau, Crown Counsel determined that further information was required. Crown Counsel determined that it was necessary to retain a use of force expert to assist with the analysis of the viability of a *Criminal Code* section 25 defence by Cst. Biagioni. After transcripts from the preliminary inquiry were received, in May 2024, the BCPS retained a court-qualified use of force expert with over 30 years' experience in policing in another province. At the end of July 2024, the expert provided their report to Crown Counsel.

Expert evidence

The use of force expert set out in his report that the decision to use lethal force must rest on the totality of the circumstances, which are different in each incident when a person has an edged weapon, such as this one.

In terms of the impact of distance, the expert described a study that demonstrated that someone with a weapon may be able to cover 21 feet in approximately 1.5 seconds with no obstructions. However, the expert cautioned that the impact of this study must be weighed in connection with the variables in a specific case.

The expert explained that police departments across Canada train their officers that in order to use deadly force options there must be an immediate threat of grievous bodily harm or death to another person or persons, and that the assailant's actions cause the officers to reasonably believe that if they do not intercede with an immediate response then another person could be killed or seriously injured. This can be broken down into three elements:

- 1. The person must have a weapon*

The expert readily concluded that the barbeque skewer was an edged weapon that was capable of killing or causing grievous bodily harm.

2. *The officer must reasonably believe the person intends to use the weapon against another person*

In this case, the totality of the circumstances could reasonably be perceived by Cst. Biagioni as intent by the AP to cause grievous bodily harm to Sgt. Ristau.

3. *The person must be able to apply the force of a weapon from their present position against a potential victim*

The expert relied on a conservative estimate of 25 feet between the AP and Sgt. Ristau and concluded that the AP had the ability to use his weapon against Sgt. Ristau and cause grievous bodily harm or death on the specific circumstances of this case.

The expert considered the use of less lethal force (a taser, a PSD, or beanbag gun) and concluded that in the circumstances these less lethal options were not viable options to address the lethal threat from the AP given the proximity of the AP to Sgt. Ristau.

The expert opined that based on the totality of the circumstances the force used by Cst. Biagioni was reasonable, necessary, and proportionate with the AP's behaviour and the level of risk he posed to Cst. Biagioni.

Analysis

The evidence at the preliminary inquiry put Sgt. Ristau closer to the AP than the evidence had been at the initial charge assessment stage. In light of this change in the evidence and the conclusions of the use of force expert, Crown Counsel was required to reassess the viability of the prosecution.

In considering expert evidence, Crown Counsel is not bound by the expert's opinion, but instead must look at the basis for that opinion and make an independent assessment of the totality of the evidence.

Regarding counts one and two, Cst. Biagioni would not be criminally responsible if the force used was legally justified in the circumstances. Section 25 of the *Criminal Code* sets out the factors to be considered regarding this defence:

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

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

Regarding the first factor, Cst. Biagioni was clearly acting in the course of his duties during this incident.

Regarding the second factor, after the preliminary inquiry, the evidence established that Sgt. Ristau was in the open and within 20 feet of the AP when Cst. Biagioni shot him. The AP was not complying with police commands to drop his weapon, had verbally refused to do so, and was raising the weapon up at the moment he was shot. Cst. Biagioni had reasonable grounds to perceive that the AP posed a risk to Sgt. Ristau.

The central question in this case is whether the force used by Cst. Biagioni was objectively necessary, reasonable, and proportionate in the circumstances. In reviewing the IIO investigation, the preliminary inquiry, and the information set out in the expert report, Crown Counsel concluded that the available evidence at trial would support a viable defence under section 25; therefore, there was no longer a substantial likelihood of conviction regarding these counts.

Regarding count 3 (careless use of a firearm), this offence requires proof of conduct showing a marked departure from the standard of care of a reasonable person in the circumstances.

As discussed above, the evidence at the preliminary inquiry suggests Cst. Biagioni’s use of a firearm was appropriate in the circumstances. There was no other evidence at the preliminary inquiry suggesting Cst. Biagioni’s use of a firearm was a marked departure from the standard of care of a reasonable officer in the circumstances.

Crown Counsel therefore concluded that the charge assessment standard was no longer met regarding each of the three counts and directed a stay of proceedings.

Conclusion

The charge approval standard is no longer met; accordingly, a stay of proceedings has been entered.