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23-23

## No charges approved following use of force by Abbotsford police officer

**Victoria** – The BC Prosecution Service (BCPS) announced today that no charges have been approved against an Abbotsford Police Department (APD) dog handler in connection with the arrest on March 6, 2021, of an individual who suffered serious dog bite injuries during the arrest.

Because of the 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 #2021-089).

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](http://gov.bc.ca/prosecutionservice) or follow [@bcprosecution](https://twitter.com/bcprosecution) on Twitter.

## Clear Statement

### Overview

On February 25, 2021, at 6:51 am, a complainant reported that his minivan had been stolen outside of his residence in Abbotsford. The complainant provided a description of the stolen vehicle along with the license plate. The complainant had started the vehicle and left it running while he returned to his home. He closed the door of the vehicle but left it unlocked. From within his home, the complainant heard the vehicle door slam shut and saw the vehicle driving away. At the time of the report, police were unable to obtain a description of the driver.

On March 5, 2021, another complainant called and reported that his wife's purse had been stolen from her vehicle while she was checking the community mailbox. The caller described the van used in the theft as older and provided a partial license plate. The description of the van was consistent with that of the stolen minivan. One of the credit cards from the stolen purse was used at a gas station and at a liquor store. Police investigation led to a residence in Abbotsford. At the residence, police located a minivan matching the description of the stolen minivan and the van involved in the purse theft. Police covertly placed a tracking device on the vehicle.

On March 6, 2021, at approximately 2:40 pm, the tracking device indicated to police that the stolen vehicle was moving. The vehicle was located by members of the Crime Reduction Unit (CRU) surveillance team at approximately 3:39 pm in Langley. The surveillance team continued to observe the vehicle and the driver with the assistance of a police helicopter up to and including the point that the driver was arrested. The driver of the minivan will be referred to in this statement as the affected person (AP).

Three officers were directly involved in the arrest. The officer who is the subject of this statement (the Subject Officer or SO) with his police service dog (PSD), was assigned to assist with the investigation and arrest of the AP. Two other officers, witness officer 1 (WO 1) and witness officer 2 (WO 2) also assisted with the arrest.

During the surveillance period, the AP drove the minivan through various parts of Abbotsford. For several hours the AP was observed driving slowly through several parking lots. The SO, who was advised of the tracking results by police radio, believed that the behaviour showed that the AP was looking for an opportunity to commit a criminal offence.

When it appeared to police that the minivan was returning to the area where it was initially located, the two witness officers and the SO with the PSD were positioned in an area nearby. The officers decided that the SO would initiate the arrest of the AP. Both witness officers were in plain clothes, and neither was wearing a protective vest. The SO was in full uniform and had the PSD with him. The police anticipated that the PSD's presence would ensure that the AP complied with police commands.

The police anticipated that the AP would park some distance from the residence and walk from the minivan, passing an identified interception point as he did. The officers concealed themselves in some trees along the anticipated route.

The police assessed the situation as high risk based on the reported purse snatching, the AP's unknown history, the possibility of violence, and the risk of flight. Just prior to arrest, the officers were informed by the helicopter crew that the AP had stepped off the sidewalk and into the bushes adjacent to a neighbour's driveway. This elevated the risk assessment because police were aware that offenders would often hide weapons in outdoor areas near their home.

The helicopter crew broadcast to the arrest team that the AP was approaching the location where they were hidden. The SO stepped out and said "Police, get on the ground". The AP dropped his bags, stepped back, and started turning sideways away from the police. The AP put his hands in the air but did not lie down on the ground. The SO deployed the PSD. The PSD bit the AP, who then went to the ground. The AP rolled onto his stomach and tucked his hands underneath his body. WO 1 instructed the AP to produce his hands. The AP complied and placed his hands on his back. WO 2 and WO 1 applied handcuffs to the AP.

The PSD had bitten the AP on the back of the upper right thigh. WO 2 accompanied the AP to the hospital. The AP received 20 to 25 stitches.

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 refusing to approve charges against the SO. Not all the relevant evidence, facts, case law, nor legal principles are discussed.

The charge assessment was conducted by Crown Counsel with no prior or current connection to the officer.

### **Charge Assessment and the Criminal Standard of Proof**

The charge assessment guidelines that are applied by the BCPS in reviewing all reports submitted by an investigative agency to Crown Counsel are established in policy and are available at:

[www.gov.bc.ca/charge-assessment-guidelines](http://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](http://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 SO in this case were aggravated assault contrary to section 268 of the *Criminal Code* and assault with a weapon contrary to section 267(a) of the *Criminal Code*.

### **Relevant Law**

To prove an assault, the Crown must establish the accused intentionally applies, threatens, or attempts to apply force to another person without that person’s consent. Aggravated assault occurs when the force used wounds, maims, disfigures, or endangers the life of the victim. Assault with a weapon is an assault that occurs when the accused is carrying or using a weapon. Courts have recognized that a police dog can be used as a weapon.

### **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 a reasonable doubt that the justification provisions are not applicable.

In assessing whether a particular application of force by an officer was necessary within the meaning of the *Criminal Code*, the trier of fact must consider 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 take 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).

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.

Despite the deference it affords 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.

### **Statement of SO**

On March 6, 2021, the SO was on duty in full uniform with his PSD. The SO was aware from the radio broadcasts that the driver of the stolen vehicle was involved in a purse snatching. He heard that the vehicle was being driven suspiciously: it was pulling up beside civilians in busy parking lots for no apparent reason. It appeared that the driver was looking for an opportunity to commit some sort of crime. Based on his experience, the SO believed that the driver was looking for a target to rob. The SO was also aware that those committing robberies or driving stolen vehicles to commit offences will often have weapons on them.

The arrest team concealed themselves behind a hedge of trees. The helicopter continuously broadcast the AP’s location and actions. Just before the AP arrived at the location where the officers were hiding, the helicopter occupants advised them that the AP went into the driveway of the adjacent house, where there were bushes, indicating, “he dropped something”. This was a

concern for the SO who believed that the AP could have dropped off, or retrieved, a weapon, thus raising the risk assessment even more. The SO's own policing experience included locating a firearm hidden in similar circumstances.

When the AP was about three metres away, the SO emerged from his hiding spot with the PSD on a short leash. He used loud police commands to instruct the AP to go down to the ground. However, the AP did not immediately comply. Instead, the AP stopped and looked away. It appeared to the SO that the AP was looking around for a way out and sizing up the situation. While the AP dropped the bags that he was holding, he did not respond to the police instructions.

The SO felt that it was not safe to give him more time to comply. The SO was concerned that the AP might flee and with the elevated risk of weapons, the situation would turn into one in which lethal force would be required. The SO thus commanded the PSD to bite the AP.

The PSD took the AP to the ground and the AP produced his hands. WO 1 and WO 2 applied handcuffs, at which point the SO removed the PSD. The officers immediately called an ambulance and provided the AP with first aid. The SO noted that the AP was behaving strangely. He was restless and would quickly alternate between apologetic and confrontational. They found a meth pipe on him and believed the AP to be under the influence of drugs.

The SO felt that the use of the PSD was the least lethal option. The SO agreed that it was a quick deployment but given the elevated risk assessment and because of the AP's act of looking around despite the clear instructions, the SO felt the short time frame was justified.

### **Statements of WO 1 and WO 2**

WO 1 and WO 2 described factors that raised the risk assessment for the arrest, including the reported purse snatching, the AP's unknown history, the possibility of violence, and the risk of flight. WO 2 indicated a concern that the AP would drive dangerously if able to re-enter the van. Both WO 1 and WO 2 described a heightened risk assessment resulting from the AP's action in briefly entering the bushes nearby, which was consistent with stashing a weapon, or retrieving one. At the time that the SO confronted the AP and told him to get on the ground, the bushes were behind the AP, a short distance away.

Once the SO confronted the AP, WO 1 described that the AP dropped his bags, stepped back, and started to turn his body sideways. WO 1 believed based on the AP's body language that the AP was about to flee.

WO 2 described the AP as taking a "bladed stance", turning sideways with his hands up. WO 2 described that the AP did not make any effort to get on the ground as directed.

Both WO 1 and WO 2 observed the SO deploy the PSD, which bit the AP, who then went to the ground. The SO then removed the PSD, and WO 1 and WO 2 applied handcuffs.

### **Video evidence**

The arrest of the AP and deployment of the PSD was recorded on infrared video by police in the helicopter. The video is consistent with the arrest team's account of the events. On the specific issue of the exact nature of the AP's response to the appearance of the SO and the PSD, the quality of the video is not detailed enough to precisely identify the AP's stance. The video does, however, show that the AP was standing and not prone on the ground when the SO deployed the PSD.

### **Statement of the AP**

In a telephone interview the AP stated that on March 6, 2021, he was walking home when police jumped out at him. The officer stated: "I'm police. You're under arrest. Get on the ground." The AP says he immediately went to the ground. The police arrested him and handcuffed him. The AP did not put up a fight and got on the ground without a fuss.

The police were very aggressive with him and jumped on his back without any apparent reason. While on the ground, police said something that sounded like "the dog's gonna bite you now." The AP responded, saying "Well, do I have to run or something for the dog to bite me?" and the police officer responded "Yeah." Suddenly and without explanation, the PSD bit him while he was on the ground and handcuffed. The PSD exhausted itself biting the AP; the handler did not call it off.

The police did not call an ambulance for the AP, an unknown bystander did. When the paramedics arrived, the police said to the paramedics "Hurry up, get him inside before too many people see him". The AP was highly traumatized because of this. He received 37 external and four internal stitches. The wounds became infected and he required surgery.

When it was put to the AP that the surveillance video showed that the bite happened while he was standing, the AP said that it was wrong. He was insistent that the bite occurred while he was face down on the ground and handcuffed. At that point in the interview, he became argumentative with the IIO investigator and hung up. He did not respond to further attempts to contact him.

### **BC Provincial Policing Standards**

Provincial policing standards make it clear that police dogs are intermediate weapons and that their bite can cause serious injury. Bites must be minimized as much as reasonably possible and the use of the dog to bite must be proportional to the risk posed to the handler and to others.

Standards require that police dog handlers give loud verbal warnings prior to ordering their dog to bite "unless such a warning would be impractical or place anyone, including the responding police officers, at risk of bodily harm". The required warning must convey to the subject that the

handler is a police officer with a police dog and that if the subject does not comply, that they may be bitten. However, the standards are silent on what circumstances would render it "impractical" to issue a warning.

## Analysis

The evidence establishes that the arrest in this case involved the intentional application of force to the AP without their permission. This meets the definition of an assault. There is also evidence to establish the essential elements of assault with a weapon and aggravated assault. The SO deployed the PSD to bite the AP and the bite caused significant wounds to the AP.

The real issue is whether the use of force to apprehend the AP was reasonable or excessive within the meaning of the *Criminal Code*. As noted above, the application of section 25 of the *Criminal Code* provides a potential legal justification for the SO to the offence of assault. All depends upon the circumstances in which the force was used and, specifically: the threat which the officer subjectively perceived; the reasonableness of that perception; and the reasonableness of the force the officer used in response.

As noted above, in a potential prosecution of the SO, the Crown would bear the burden of proving that the SO was not legally justified in using force or that he exceeded what was reasonable in the circumstances. The available evidence does not provide a basis to do so. The circumstances that the court would consider in assessing the reasonableness of the officer's response in this case would include:

- There was a reasonable basis to believe that the AP was involved in a purse snatching the previous day, indicating that the AP was prepared to engage in confrontation with others to achieve his goals.
- There was a reasonable basis to believe that the AP had been actively looking for opportunity to commit crimes throughout the day, based on the surveillance observations. The use of a stolen vehicle was consistent under the circumstances with an intent to commit further offences.
- The AP stopped his vehicle and appeared to deposit something in the bushes near the location of arrest. The evidence of the witness officers supports that this action was cause for concern that a weapon had been either stashed in a location close to the arrest or retrieved by the AP before the arrest. The bushes were in the area behind the AP, and accessible if he turned and fled.
- There were other risks that arose if the AP ran away, including a risk that he would enter his nearby residence with the potential for other occupants to become involved, or use the stolen vehicle to drive dangerously.



- The evidence of WO 1 and WO 2 supports the SO's perception that the AP was looking to flee, or sizing up the situation, rather than complying.
- The infrared video taken from the helicopter is not detailed and therefore did not capture the body language observed by the witness officers but does not contradict their accounts.
- The decision to use the PSD was made in difficult and exigent circumstances, including a need to act in a short timeframe.

Based on the totality of the circumstances, there is insufficient evidence to prove that the force used by the SO was unreasonable, disproportionate, or unnecessary. There were factors that made the arrest high-risk, and the available evidence shows a meaningful potential for violence and the involvement of weapons. The SO subjectively believed that the force used was necessary and the available evidence does not prove that his belief was objectively unreasonable.

### **Conclusion**

The Crown would not be able to prove, beyond a reasonable doubt, that the force used in this arrest was unreasonable or disproportionate to the reasonably perceived risk. Accordingly, there is no substantial likelihood of conviction and no charges have been approved.