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23-25

No charges approved following incident involving Port Moody police officer

Victoria – The BC Prosecution Service (BCPS) announced today that no charges have been approved against a member of the Port Moody Police Department who was involved in the arrest of an individual on an outstanding warrant on September 15, 2021, in Port Moody. While attempting to avoid apprehension the individual, hereafter referred to as the affected person (AP), suffered serious injuries.

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 #2021-258).

In this case, the BCPS has concluded that the available evidence does not meet the BCPS's 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.

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

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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

In early September 2021, the officer who was the subject of the IIO investigation (the Subject Officer or SO) was part of a three-person team conducting surveillance at a residence in Port Moody in an attempt to locate and arrest the AP. A warrant had been issued for his arrest after his parole was revoked for breaching the terms of his release.

The team believed that the AP was at the residence, but they did not have the requisite grounds to obtain a specific warrant to enter the dwelling house to effect his arrest. The team decided they would attempt to arrest the AP if they located him leaving or returning to the residence.

Based on the AP's criminal record, the team believed that he would try to avoid arrest. His criminal record included multiple convictions for violent offences, including assaulting a peace officer and resisting arrest. He was considered by police to potentially be armed.

For several days in early September 2021 the team conducted surveillance on the residence and did not see the AP, however, they did observe a car parked in front of the residence that was associated to him.

On September 15, 2021, while on patrol duties, one of the team members drove by the residence and observed that the car was no longer parked in front of the residence. The team believed that the AP may return to the residence and that this would be a good opportunity to execute the arrest warrant, so they reassembled around the residence.

The team agreed that the SO, in plainclothes, would take up an observation position in front of the residence while the other two uniformed officers on the team (witness officers WO1 and WO2), would take back-up positions on side streets. These back-up positions did not offer a direct line of sight to the residence.

The SO did not provide a statement, and there are no reports or notebook entries authored by him in the report provided to Crown Counsel. His radio transmissions and social media messages, along with those of the other team members, are the only evidence of what happened before the SO approached the residence and attempted to arrest the AP.

The SO's radio transmissions show that he observed a male outside the residence who he suspected was the AP. This suspicion was strengthened upon further observations of the male that revealed distinctive tattoos. It appears the male entered the residence thereafter. In subsequent transmissions the SO said the door to the residence was open and the SO heard yelling from inside and was going to approach. The SO then radioed, "I'm at the front door now".

The final radio transmission made by the SO was "step it up", which meant that the SO required immediate assistance. The other team members attended at the residence, where they found the

front door open. They entered and found two males seated in the living room and heard voices upstairs. As WO 1 arrived at the top of the stairs, the SO broadcast over the radio: "He's running out the back".

The AP had jumped from a third-story balcony, landing on an awning off the second floor and then onto the ground. He got up and ran but was quickly apprehended by the WOs. The AP suffered fractures to his left foot, hip joint, and hip socket during the incident.

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 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 connection to any of the officers who were involved in the incident.

Charge Assessment and the Criminal Standard of Proof

The standard of proof in a criminal case requires that the Crown prove each essential element of the offence beyond reasonable doubt.

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.

If Crown Counsel is satisfied that the evidentiary test is met, Crown Counsel must then determine whether the public interest requires a prosecution. In assessing the public interest, Crown Counsel should consider the particular circumstances of each case and the reasonable public safety concerns of the local community. While hard and fast rules cannot be imposed, the Crown Counsel Policy Manual sets out a list of factors Crown Counsel should consider in determining whether a prosecution is required in the public interest.

Potential Charges

The potential charges that were considered against the subject officer in this case were assault, contrary to section 266 of the *Criminal Code*, assault causing bodily harm, contrary to section 267(b) of the *Criminal Code*, assault with a weapon contrary to section 267(a) of the *Criminal Code* and unlawfully causing bodily harm contrary to section 269 of the *Criminal Code*.

Relevant Law

To prove an assault, the Crown must establish the suspect intentionally applied, threatened, or attempted to apply force to another person without that person's consent. Assault causing bodily harm requires proof of harm that interferes with the health or comfort of a person and that is more than merely transient or trifling in nature.

Assault with a weapon requires the use of a weapon in the course of the assault. Unlawfully causing bodily harm requires proof that an accused committed an underlying unlawful offence that was objectively dangerous and that the unlawful act caused bodily harm to another person.

Summary of evidence

Civilian Witnesses

Two civilians were in the living room of the residence when the SO attended that day. Although both spoke to investigators, only one provided a recorded statement via telephone. The witness who gave the recorded statement described the SO coming to the open patio sliding "back door" and attracting his attention. The witness called out to the AP that there was somebody "at your door". He thought the SO identified himself as a police officer.

The witness' description of what occurred next was somewhat disjointed. He described that the AP came downstairs. He described the AP as "hesitant to walk any closer" to the SO. He did not say where the AP was at that point, but it appears from his statement the SO was still outside a door. The witness described that, during the interaction, the police officer entered the residence. He described a struggle, which he said occurred in the living room, between the SO and the AP, who wanted to go upstairs to get his ID. However, an investigator then asked this witness how the AP and SO got from the "front door" [sic] to the upstairs and the witness responded by describing the SO trying to grab the AP and the AP "slithered out of...the grasp" and (went) upstairs. It is unclear from his statement where the interaction started.

The other witness spoke to an investigator briefly on the telephone, but declined to provide a recorded statement. He said he was in the living room when he saw the police officer "flash" his badge at the AP from the area of the front sliding door, and saw the AP run up the stairs, followed by the SO. It is not clear from his brief statement where he was located, where the officer was when he flashed his badge, whether the AP went to the doorstep, or what else, if anything, he observed.

Information about the Layout of the Residence

Available information about the residence shows that it has a painted wood front door, which is out of view from most vantage points in the living room. Photographs taken of the residence show that the stairs to the upper levels of the house were accessible from the living room.

Affected Person

The AP provided a statement to the IIO investigators the day after the incident. He described that he was upstairs, and a friend called him to come downstairs, saying someone was looking for him. He described that there was "some dude standing there", that the person lifted up his shirt and had a gun and a badge, and said, "Come outside right now". He did not think it was a cop because "nobody knew I was there". He described telling the officer that he was going to get his ID and "started back stepping". The AP said that the officer did not say that he was under arrest. He described that, during the course of events, the police officer walked into the house. He described that the SO came toward him at the foot of the stairs, pointing a gun, and tried to grab his hand, so he ran up to the third-floor balcony and jumped off, trying to get away.

The AP's statement was brief. He provided it while in the hospital, still in pain from the incident. The AP did not describe, where the officer was standing when he first saw him "standing there". He did not describe where he was located before he started "back stepping". He was not asked if he attended at any door, or where the doors were located in the residence.

After he jumped off the balcony, the AP described that he bounced off the second-floor roof and then hit the first floor, knocking himself out for a second or so, and then started running in the backyard. He told investigators that he ran for six-nine meters, and then two uniformed officers yelled at him and he stopped, put his hands up, and told them, "I'm done, I'm hurt, I'm not resisting." He was taken to the ground and handcuffed.

Witness Officers

Neither witness officer was present when the SO made initial contact with the AP. One officer described that, after he heard the radio call, "step it up", he entered the house and ran upstairs. He could hear the SO giving the AP commands to stop and that he was under arrest. He heard the SO say something like, "don't do that" and then, "he's running out the back". Both witness officers provided statements that the AP stopped when he saw the police, but do not say that he put his hands up and told them he was not resisting, as alleged by the AP.

Medical Records

The AP was transported to Royal Columbian Hospital as a result of injuries he sustained after jumping from the third-floor balcony. He suffered a fractured hip socket, a fractured hip joint, and a fractured foot. On intake, he told the attending physician that he had used about one-two lines of crystal meth that morning. The physician noted that the AP was "unclear why he ran from the police but (the AP) suspected that it was because he was intoxicated from alcohol and crystal meth and that impaired his judgment."

Analysis

The determinative issue in this case is the location of the AP when the arrest was initially attempted. That issue was identified during the investigation, and it was the focus of charges referred to Crown Counsel.

The police had a warrant to arrest the AP, but they did not have the specific kind of warrant that would allow them to enter a residence to effect the arrest, absent exigent circumstances. If the officer entered the residence to arrest the AP inside without first obtaining the specific warrant that permits entry, the arrest would be unlawful, and the AP would be entitled to resist. Attempts by the SO to overcome this resistance could constitute assaults.

If, however, the arrest was initiated while the AP was outside the residence, or on the threshold, and the AP tried to avoid arrest, the SO would be lawfully entitled to follow the AP into the residence. Police officers have the lawful authority to enter a dwelling house to make an arrest if they are in "hot pursuit". If the arrest was initiated or occurred while the AP was outside the residence, or on the threshold, the SO would be justified in using a reasonable amount of force to

accomplish the arrest. In that case the SO would be legally justified in using force and the assault charges could not be made out.

For the reasons that follow, the evidence does not establish a strong and solid case of substance that the arrest occurred inside the residence and, therefore, that the arrest was unlawful, so no charges have been approved.

Unlawful arrest

The onus is on the Crown to prove the arrest was unlawful. In order to establish that, the Crown must prove the location of the arrest beyond a reasonable doubt. The evidence on this key issue is undeveloped. Specifically, the witnesses did not comment on the following questions:

- What is the layout of the residence?
- How many doors does it have?
- Where is the back sliding patio door referred to by the first civilian witness?
- Where is the front sliding door referred to by the second civilian witness?
- Where was the SO when the AP came down the stairs?
- Where did the AP go after he came down the stairs? Did he attend at the door or threshold? If so, which door?

Although the witness statements raise the clear possibility that the arrest may have occurred inside the residence, significant ambiguities in the statements regarding the location of the initial contact are unresolved. Therefore, the available evidence is insufficient to make out a strong and solid case of substance to support the conclusion that the arrest occurred inside the residence and there is no substantial likelihood of conviction in relation to the proposed charge of assault.

Unlawfully Causing Bodily Harm

Even assuming that the Crown could prove the arrest occurred inside the residence and was therefore unlawful, the SO could only be held responsible for the injuries suffered by the AP in the fall from the window if the actions or reactions of the AP to the unlawful arrest were reasonably foreseeable. A reasonable person would not have foreseen the AP's action as a likely consequence of the attempted arrest, and therefore no charge has been approved for this offence.

Conclusion

The evidence does not meet the charge approval standard to show that the arrest took place inside the residence. Therefore, there is no substantial likelihood of proving the arrest was unlawful. Accordingly, there is no substantial likelihood of conviction, and no charges are approved.