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25-13

**BC Prosecution Service announces no charges approved
in non-fatal shooting by Metro Vancouver Transit Police officer**

Victoria – The BC Prosecution Service (BCPS) announced today that no charges have been approved against an officer from the Metro Vancouver Transit Police (MVTP) involved in a non-fatal shooting on November 28, 2022.

The Independent Investigations Office (IIO) conducted an 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 #2022-313).

In this case, the BCPS has concluded that the available evidence does not meet the BCPS's charge assessment standard. There is no substantial likelihood of conviction for any criminal 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 when 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 or follow [@bcprosecution](https://twitter.com/bcprosecution).

Clear Statement

Overview

On November 28, 2022, around 10:15 p.m., a couple called 911 to report that they had been accosted by a “deranged” male carrying a knife in Gastown (the Affected Person or AP) and that they had seen him punch another person. Other callers reported that this same person had attacked people outside a bar on Abbott Street and was last seen walking down the street with a broken pool cue, being pursued by a bar staff member holding the rest of the pool cue.

Two members of the Metro Vancouver Transit Police (MVTP), the Subject Officer (SO) and their partner (WO1), heard over their dispatch radio that the Vancouver Police Department (VPD) dispatch indicating that the AP was walking westbound on West Cordova Street brandishing a weapon, believed to be a knife (later determined to be the pool cue). The SO and WO1 attended at the scene to assist the VPD.

Two VPD members were already present, Witness Officer 2 (WO2) and Witness Officer 3 (WO3). The VPD officers directed the AP to drop his weapon, but he did not comply. WO2 shot five rounds with their beanbag gun at the AP. These rounds had no apparent effect on the AP’s behavior. Another VPD officer, Witness Officer 4 (WO4), then drove their police vehicle in between the AP and the police officers to create a barrier. The AP was struck by the police car at low speed, causing him to briefly stumble. He regained his footing and continued to advance towards the officers, still brandishing the weapon.

WO2 attempted another unsuccessful shot at the AP with their beanbag gun and, around the same time, WO1 deployed their taser, which was ineffective. The SO discharged seven rounds from their firearm. The bullets struck the AP, causing him to fall to the ground. The AP was given medical attention by police while they awaited the arrival of paramedics. The ambulance arrived and transported the AP to hospital where he was treated for serious injuries.

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 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 SO.

Charge assessment

The charge assessment guidelines 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 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.

Charges considered

The IIO referred a file to Crown Counsel in relation to the SO. Crown Counsel considered the charges of aggravated assault and assault with a weapon.

Timeframe for assessment

The IIO first submitted this file for charge assessment on August 13, 2024.

Relevant law

Aggravated assault

To prove an assault, the Crown must prove a person intentionally applied, threatened, or attempted to apply force, with or without a weapon, 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.

Assault with a weapon

To prove the offence of assault with a weapon, the Crown must prove a person intentionally applied, threatened, or attempted to apply force, with a weapon, to another person without their consent.

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.” The defence is limited by section 25(3), which provides that an officer will not be justified in using force likely or intended to cause death or grievous bodily harm unless the person believes on reasonable grounds that it is necessary for the self-preservation of the person or the preservation of any one under that person’s protection from 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.” 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.

When a court considers a defence under section 25, the Court must determine whether it was objectively reasonable for the officer to believe that the force used was necessary to protect themselves or another person from an attack in which grievous bodily harm or death could occur. The force used must, from an objective standard, be both necessary and proportionate. This assessment “takes into account the particular circumstances and human frailties” of the officer. In applying the standard, the Supreme Court of Canada has said 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 necessity, reasonableness, and proportionality.

In a prosecution, the onus is on the Crown to prove that the legal defences provided under the *Criminal Code* to police officers acting in the course of their duties are not made out.

Summary of evidence

On November 28, 2022, at approximately 10:15 p.m., a 911 call was received from a couple who were walking in an alley near West Cordova Street and Abbott Street in Vancouver, a short distance from the Gastown steam clock. The couple reported that they had been accosted by a “deranged guy” in Gastown (AP). They also reported that they had seen the AP punch another

individual and that he was carrying a knife. They provided a detailed description of the AP, his location, and direction of travel.

About ten minutes before this interaction, CCTV video shows the AP walking on West Cordova with a small flag in his hands. Civilian witnesses reported the AP was stabbing "another homeless person" with a sharp pole, about 20 cm (or 8") long, attached to a small flag.

Other witnesses called 911 reporting that the AP had attacked people outside a bar on Abbott Street in Gastown, and that a staff member had grabbed a pool cue and followed the AP out of the bar. Another male, who was also following the AP, grabbed the pool cue from the staff member and pursued the AP. This male swung the pool cue towards the AP and hit his left arm. The pool cue broke, and the male fell backwards. The male backed away with part of the broken pool cue in his hands. The AP then picked up the other half of the broken pool cue. The male got up, followed the AP and challenged him with the broken pool cue. The AP walked backwards while holding up the other end of the cue.

Two members of the Metro Vancouver Transit Police (MVTP), the SO and WO1, were in the area when they heard a call over the radio from Vancouver Police Department (VPD) dispatch indicating that a male was walking westbound on West Cordova Street brandishing a weapon (believed to be a knife). They had also heard the earlier reports regarding the "stabbing" with a sharp object. The MVTP officers initiated their lights and siren and went to assist the VPD.

Video evidence confirms that when the SO and WO1 arrived on scene, the AP was holding a large weapon in his hand. The two VPD officers who were already on scene, WO2 and WO3, described the weapon as a "sword" or a "spear like object" (and was later identified as the broken pool cue). CCTV in the area confirms there were numerous pedestrians in the vicinity.

WO2 retrieved their less-lethal beanbag gun, and began following the AP who was walking backwards, facing the officers, with his weapon displayed. The SO and WO1 were just in front of WO2 with their weapons drawn: WO1 with a conducted energy weapon (commonly referred to as a taser), and the SO, as lethal overwatch, with their firearm. The officers shouted commands at the AP to drop his weapon. WO3, as lethal overwatch for WO2, followed a short distance behind with their firearm drawn. The AP did not comply with the police commands and continued to brandish his weapon.

WO2 shot five rounds at the AP with their beanbag gun. These rounds had no apparent effect on the AP's behavior. Another VPD officer, WO4, then drove their police vehicle at a low rate of speed in an attempt to create a barrier between the AP and the police officers, and potentially, to knock him over and disarm him. WO4 stated that the AP posed a serious risk of death or grievous bodily harm to both the officers as well as the civilian pedestrian population nearby.

The video evidence confirms that immediately after being struck by the police car at low speed, the AP got back up and continued to advance towards the officers, still brandishing the weapon.

The SO was in the lead, followed closely by WO1, with WO2 following several behind, and WO3 behind them. As the AP approached these police officers, WO2 attempted another shot at the AP with their beanbag gun. This shot failed because the gun was not loaded. Around the same time, WO1 deployed their taser and, almost simultaneously, the SO discharged seven rounds from their firearm. Likely due to his clothing, the taser probes did not make contact with the AP's skin and were therefore ineffective. The bullets from the SO's firearm made contact and caused the AP to fall to the ground.

The AP was given medical attention by police while awaiting the arrival of paramedics. The ambulance arrived and transported the AP to hospital. Medical records confirmed the AP was struck by multiple bullets, which caused serious injuries, including wounds to his right chest cavity, right abdomen, both thighs, right pelvis, right forearm, and a finger on his left hand.

The AP did not provide a formal statement to the IIO despite multiple attempts both immediately after the incident and later. The AP told IIO investigators that he was holding a pool cue when the police arrived and "that's probably the reason I got shot." He also told IIO investigators that he heard police say of their radios that he had a sword.

Analysis

The SO's act of discharging their police-issued firearm at the AP was deliberate and was done with the intent to at least wound the AP. The elements of the offences of assault with a weapon and aggravated assault are established. The only live issue in this case regarding the proposed counts is the application of the section 25 defence.

With respect to the charges considered, the SO would not be criminally responsible if the force used was legally justified in the circumstances. In applying the section 25 defence, a trier of fact must conclude:

- the officer was required or authorized by law to perform an action in the course of their duties
- the officer acted on reasonable grounds in performing that action
- the force used by the officer in their performance of that duty was objectively necessary, reasonable, and proportionate (i.e., the force used was not excessive)

Regarding the first and second factors, the evidence at a trial would show that the SO and the WOs were clearly acting in the course of their police duties. The evidence would support that, throughout the response, the officers had reasonable grounds to believe the AP was

randomly attacking people on the street, that he was armed with a sharp object, and that he may have stabbed someone. On the available evidence, a trier of fact would likely conclude that reasonable grounds existed for the officers to believe the AP posed an imminent risk to anyone the AP might encounter and that, in their response, the officers needed to be prepared with use of force options that were appropriate to respond to that imminent risk. The trier of fact would also likely conclude that the officers were required to act quickly to detain the AP to prevent further assaults.

The central question in this case is whether the SO's act of deploying seven shots from their police-issued firearm at the AP was objectively necessary, reasonable, and proportionate in the circumstances. When, as here, an officer uses force that is intended or likely to cause death or grievous bodily harm, section 25 of the *Criminal Code* requires the trier of fact to determine whether it was objectively reasonable for the officer to believe that the force used was necessary to protect themselves or another person from an attack that could cause serious bodily harm or death. The trier of fact must assess whether the force used in response to that threat was, from an objective standard, both necessary and proportionate. If resort to this high level of force was not necessary to address this risk, it is an excessive use of force that cannot benefit from section 25 protections.

On the available evidence a court would likely conclude that the SO's perception that the AP posed a risk of death or grievous bodily harm was both subjectively and objectively reasonable. At a trial, the available evidence would amply support a defence under section 25 of the *Criminal Code*.

All officers present before the SO discharged their firearm state that police efforts to arrest the AP using multiple less-lethal use of force options had been unsuccessful. This included:

- clear and repeated police commands to the AP to drop his weapon
- five shots from WO2's less-lethal beanbag gun that successfully struck the AP
- WO4's attempt to disarm the AP by striking him at low speed with their police vehicle
- WO2's failed attempt to re-deploy their beanbag gun
- WO1's deployment of their taser

The witness evidence about police efforts to arrest the AP using less-lethal force options is corroborated by the video evidence. The video evidence shows that after being struck by five beanbag rounds and, even after being hit by WO4's vehicle, the AP was unphased and continued to converge towards police still brandishing his weapon. Relying on their personal

observation of these facts, each of these witness officers was consistent that when the SO shot their firearm the AP presented a risk of death or grievous bodily harm.

The available evidence does not permit the Crown to challenge the reasonableness of the stated perception of the witness officers present with the SO throughout the incident. The evidence each officer provided is consistent with the CCTV video. It is also consistent with the evidence from the AP who told investigators that just before he was shot, he was holding a weapon (the broken pool cue), and that this was “probably the reason I got shot”. He also told investigators that he heard police at the scene say on their radios that he had a sword.

In light of the evidence about the threat the AP posed to the officers and the public, the available evidence cannot disprove that the SO’s decision to deploy their firearm against the AP to address that threat was unreasonable, unnecessary, or disproportionate.

The available evidence cannot establish that the SO fired any shots after the threat posed by the AP was neutralized or his subject behaviour changed such that the SO should have concluded he no longer posed a risk of grievous bodily harm or death. Specifically, the video does not show any muzzle fire after the AP was on the ground and no witness suggested otherwise.

These facts, considered together with the information then available to police that the AP had already assaulted at least one person and was now armed with a sharp object, provide an ample basis on which a trier of fact would likely conclude that, at the time of their lethal deployments, there was an objectively reasonable basis for the SO to believe that the AP then posed a risk of grievous bodily harm or death and that, flowing from this, the available evidence did not establish, to the criminal standard, that the SO’s decision to use lethal force was unnecessary, unreasonable, or disproportionate in the circumstances.

Considering all of the available evidence, there is no substantial likelihood of conviction in relation to any of the proposed charges.

Conclusion

No charges have been approved in relation to the SO’s involvement in this incident.