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No charges approved following use of force by Lower Mainland police officers

Victoria – The BC Prosecution Service (BCPS) announced today that no charges have been approved against members of the Lower Mainland Integrated Police Dog Services in connection with the apprehension on May 29, 2021, of an affected person (AP) who suffered serious injuries during the incident.

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 #2021-169).

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 officers 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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Clear Statement

Summary of decision

On May 29, 2021, at 8 pm Abbotsford Police Department plain clothes members were covertly surveilling a woman at a local shopping centre who was recently arrested for being in a stolen car. Shortly thereafter she was seen entering a stolen four-door pickup truck with two male occupants. Abbotsford police followed the vehicle until it entered Surrey where the Surrey Crime Reduction Unit took over.

The stolen vehicle drove to an alleyway in a residential area where one of the males exited the vehicle from the passenger side and was arrested. Police then turned on their emergency lights and the stolen vehicle drove up onto a lawn and accelerated away from police across private properties ultimately coming to a stop when it collided with two parked civilian vehicles. A male and the female jumped out of the stolen vehicle and ran northbound from the accident scene pursued by police officers.

The first subject officer (SO 1) is a member of the Delta Police Department and was on duty with his police service dog (PSD) when he became involved in the efforts to apprehend the suspects in the residential area. He was in the company of another officer referred to here as the Witness Officer (WO). The second subject officer (SO 2) is an RCMP member who also arrived on scene and joined with these officers in foot pursuit of the two suspects. All officers were assigned to the Lower Mainland Integrated Police Dog Service at the time of these events.

The officers followed as the suspect vehicle drove away from the members around a sharp turn and out of sight. During the course of the pursuit officers were advised the male suspect was possibly in possession of a firearm. The officers heard a crash and then observed that two civilian vehicles had been struck by the stolen truck. The officers followed as the female suspect ran northbound up a driveway at the end of a cul-de-sac while the male ran through a yard towards the backyard of the house. The male was wearing all dark clothing with dark sweatpants. The WO yelled "police stop running" and other officers yelled "police stop running" and "police, you are under arrest".

At this point, the female stopped, turned toward the police, and put her hands up. The WO observed a male wearing all dark clothing moving through the front yard of the house, jumping over a hedge and continuing into the back yard. The officer believed this male was the male who exited the suspect vehicle given the brief time delay, proximity to the crash, and description of clothing. As the officers caught up to the male, SO 2 ran at the suspect striking him with his shoulder, pushing him to the ground. As SO 2 moved away from the suspect, SO 1's service dog set upon this person biting him in the lower left leg.

The officers quickly determined that this was not the suspect, and the dog was directed to disengage. The actual suspect was located by the service dog a short distance away in some bushes in a nearby back yard.

The victim, who will be referred to in this statement as the affected person (AP), resided in the cul-de-sac and was unconnected with the events involving the stolen car. He suffered a serious wound as a result of the dog bite and attended at the local hospital where twelve staples were applied to close the wound.

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 officers involved in the incident. 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 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.

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 both for and against a prosecution for Crown Counsel to consider.

Potential Charges

The potential charges that were considered against the subject officers 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* 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 SO intentionally applied, threatened, or attempted to apply force to another person without that person's consent. Assault with a weapon is an assault that occurs when an SO is carrying or using a weapon and assault causing bodily harm requires proof of harm that is more than merely transient or trifling in nature. Courts have recognized that a police service 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."

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). 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.

The issue is whether the force used by the SOs in this case was necessary, reasonable, and proportionate in the circumstances.

The Crown bears the onus of proving beyond reasonable doubt that the justification provisions of the Criminal Code are not applicable.

Outline of evidence

Observations of Witness Officer (WO)

On the night of these events the WO was working with SO 1 as a "ride along". The WO observed SO 2 push the male to the ground which he believed was due to the high-risk nature of the arrest. He then observed the PSD, who was on leash, contact the male's leg. The WO heard the male say, "it's not me" and observed SO1 immediately direct the PSD to disengage. The WO then covered SO 1 as the PSD led police to the actual male suspect who was found hiding in the bush. The WO handcuffed the suspect male and noted that he was wearing black shirt and black sweatpants.

Observations of SO 2

Subject officer SO 2 became aware of a stolen vehicle being followed by Abbotsford Police into Surrey with Air One support. He heard that the driver was possibly in possession of a firearm and was described as a male wearing all black; and the passenger was a female. SO 2 was at the crash scene within seconds and observed a female and male running in a residential cul-de-sac. SO 2 observed the female running up a driveway at the end of the cul-de-sac and a male wearing all black at the front of a residence near the female. SO 2 stated it was a dark night and was very dark where he observed the male. Based on his observations, SO 2 believed the male to be the suspect male and both the female and male were arrestable. SO 2 yelled "police stop you are under arrest". The female stopped but the male went from the front of the residence toward the dark back yard. The male jumped a one-meter hedge and took three to four steps into the back yard as SO 2 approached at a running pace. SO 2 believed the safest way to

apprehend the male due to SO 2's proximity was to knock him to the ground giving the PDS the chance to deploy. Doing this would make it difficult for the male to access a firearm in his possession. SO 2 again yelled "stop police" as he approached the male at a running pace. He got within two meters of the male at which point the male turned around and raised his hands. SO 2 pushed the male to the ground using his shoulder and moved out of the way as the dog handler was approaching from behind. Once it was determined the male was not the suspect and the dog was directed to disengage, SO 2 continued the search with the dog handler. The suspect male was located in a back yard nearby.

Statement of AP

The affected person is an officer with a municipal police force. On the evening in question, he was in his driveway. It was getting dark, and he heard a loud collision and saw a black pickup truck had collided with a tree at the end of his street. He went to get his mobile phone to call 911. When he returned to his driveway, he heard someone yell "run" and he saw a male run down his neighbour's driveway to their back yard and a female running to where the male had run. He then saw a male with a flashlight and heard someone shout "stop". He went up to the hedge to tell the female to stop and then went around the hedge where the male went. He held up his hands and said "stop". He did not see or hear any police lights or sirens. He was now on the grass outside his neighbour's home and saw a group of three or four people running in a pod and a dog – he thought they were the police. They had no reflective markings and were not shouting "police". He held his hand up in a passive position and said, "Hey guys I'm not involved". He watched as the dog was sniffing around his neighbour's grounds. He said the dog was off leash. He turned his head and was then tackled by one of the males and landed two meters from where he was standing, face down on the ground and said, "I'm not involved". The officer then called out to the dog, and he felt a pull on his left leg. Within a few seconds they had gone. He got up and hobbled over to his house. Police called an ambulance and did first aid. He went to the hospital where he had twelve staples applied to the wound on his lower left leg.

Provincial Policing Standards for Police Service Dogs

The Provincial Policing Standards for Police Service Dogs (BCPPS 1.4 – Police Service Dogs), sets out the following relevant principles:

- Police dogs are important policing tools and can be used for a variety of tasks, including searching, locating, and apprehending suspects.
- Police dogs are intermediate weapons and can bite. One of the tasks of police dogs is to apprehend suspects by biting. Police dogs can bite either on command, or automatically in certain situations commensurate with their training, or sometimes even accidentally. The

potential for a dog bite is inherent in every deployment, although not every deployment will result in a bite.

- The use of a dog, as with all other force options, must be proportional to the level of risk posed to the officer, the suspect, and the community as a whole. The need to locate or apprehend someone must always be balanced with the potential for a police dog bite and its likely resulting injury.

The standards prohibit police dog handlers from permitting a police dog to bite a person, and prohibit dog handlers from permitting a police dog to continue to be deployed if it would reasonably be expected that the police dog would bite a person, unless:

- the person is causing bodily harm to an officer, a third party or the police dog;
- the police dog handler is satisfied, on reasonable grounds, that the person's behaviour will imminently cause bodily harm to an officer, a third party, or the police dog; or
- the person is fleeing or hiding and there are reasonable grounds for their immediate apprehension by a police dog bite.

Analysis

There is evidence that the arrest in this case involved the intentional application of force by the SOs to the AP without his permission. This meets the definition of an assault. There is also evidence that the assault caused harm to the AP that was more than trifling or transient and that the police dog was deployed as a weapon to bite the AP.

The police believed the AP was the male who exited the stolen vehicle given the brief time delay, proximity to the crash, and description of clothing. These observations support the reasonable belief that the AP was the male suspect they were attempting to lawfully arrest for driving/being in possession of a stolen vehicle and justified their use of force to effect a lawful arrest. The fact that the AP was not the actual suspect does not change the analysis of the use of force in this case where the evidence provides a reasonable basis for the officer's mistaken belief in the identity of the AP as the suspect.

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. Resolving this issue 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.

In the circumstances of this case, it was reasonable for the SOs to use some level of force to apprehend the AP, whom they reasonably believed was a suspect associated to a stolen vehicle who was fleeing from them. The question is whether the force they used was justified under section 25 of the *Criminal Code*.

As noted above, in a potential prosecution of the SOs, the Crown would bear the burden of proving that the SOs were not legally justified in using force or that they exceeded what was reasonable in the circumstances. The available evidence does not provide a basis to do so.

In this case the court would have to consider that the police were involved in an extended pursuit of multiple suspects associated to a stolen vehicle and at least one of whom was possibly in possession of a firearm. The suspects took aggressive action to avoid arrest including driving over residential property, colliding with parked vehicles, and fleeing on foot from the accident scene, running down a street that ended in a cul-de-sac.

Given the dynamic and high-risk nature of the arrest, under circumstances that included the suspect driving erratically to avoid apprehension, driving into parked cars and the ensuing foot-chase through a residential neighborhood, SO 2's use of his shoulder to knock the apparent suspect to the ground thereby denying the suspect the opportunity to access a potential firearm was not excessive. Given the possible presence of a firearm and the fact that the suspect had not been securely apprehended but simply knocked to the ground, the subsequent deployment of the police dog by SO 1 was also reasonable, as he had grounds to believe that the male suspect would cause bodily harm to SO 2, or to other officers.

Although the AP denied being involved and did not resist arrest the police were still engaged in a dynamic arrest of an individual they reasonably believed had been purposely and aggressively avoiding apprehension for the previous thirty minutes. Until the suspect was securely apprehended and his lack of involvement was confirmed the police were not bound to accept the AP's assertion of non-involvement. The available evidence is insufficient to prove that the officers used more force than was necessary in the circumstances.

Conclusion

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