

FINAL REPORT: IIU concludes investigation into RCMP officer-involved shooting in Moncton, New Brunswick

On December 7, 2019, the Royal Canadian Mounted Police (RCMP) “J” division, New Brunswick (NB), contacted the Independent Investigation Unit (IIU) and asked it to conduct an investigation into an officer involved shooting that occurred earlier that day in Moncton.

New Brunswick does not have specific legislation, nor an established provincial independent unit, to investigate serious incidents involving police. It was their desire to have an investigation of this incident conducted by an independent body, so a request was made for an extra-provincial agency to assume conduct of the investigation. In these circumstances, IIU agreed to assume jurisdiction for this matter.

The notification, provided to IIU (edited for clarity), read in part:

“On 2019-12-07, members of the Codiack RCMP responded to two separate reports of robberies and a theft in the Mountain Road area of Moncton, NB.

Codiack RCMP located the suspect vehicle. As the members attempted to arrest the driver, the suspect resisted and drove into several vehicles in the parking lot, including three RCMP vehicles. The suspect proceeded to drive the car towards police officers which resulted in a member of the RCMP discharging his firearm toward the suspect.

The suspect fled the scene but was later arrested and was taken to the hospital for treatment of a minor, non-life threatening gunshot injury. The suspect was later taken into police custody.

There were no other injuries as a result of this incident.

On 2019-12-07, the suspect (later identified as the “affected person” (AP)) was charged with 'prohibited driving' and was remanded into custody. AP is scheduled to appear in Moncton Provincial Court on December 10 at 13:30, where several other charges will be laid.”

According to this notification, AP sustained a gunshot wound, was medically treated and subsequently taken into custody. A team of IIU investigators was assigned to this investigation and were deployed to Moncton, New Brunswick.

IIU advised RCMP that it would conduct this investigation in accordance with IIU’s existing policies, processes and procedures, which have been in place since the unit became operational in June 2015. As stated earlier, as there is no legislation in New Brunswick similar to the Police

Services Act (PSA), Part 7 that exists in Manitoba, the designation and consequent obligations of subject and witness officers could not be lawfully made or enforced.

However, it should be noted that the RCMP cooperation with IIU requests was excellent. All RCMP members, whether potential witness or subject officers, attended voluntarily for interviews. All requests by IIU investigators for agency information were complied with in their entirety. This allowed IIU investigators to conduct their investigation in a timely and thorough manner.

The civilian director identified the police officer who discharged his service pistol as the “subject officer”¹ (SO). Additionally, 15 police officers were initially identified as potential “witness officers.” However, following review of notes and reports provided to IIU, investigators determined that four “witness officers” (WO1- WO4) would be subject to interviews. IIU investigators also interviewed AP and two civilian witnesses (CW1- CW2).

Had this matter occurred in Manitoba, it would have been considered a mandatory investigation, as it involved a police officer discharging a firearm and causing an injury to someone. The focus of this report will be on the circumstances leading up to, and at the time of, the discharge of a firearm by SO.

Information obtained by IIU investigators included:

- officer narratives
- video and audio recordings
- officer notes and photographs
- Forensic Identification Service reports
- drone aerial photographs
- subject officer training records
- pursuit report
- police dog service report
- medical report relating to AP
- officer training records

Facts and Circumstances

Affected Person:

AP states he fell asleep in his car, parked in a parking lot of a bar in Moncton. AP admitted to consuming a vodka drink and four or five other alcohol drinks, and “did” a line of cocaine earlier in the evening while at another bar. AP believed he was parked in the parking lot for an hour to an hour and a half. According to AP, he awoke to the sensation of someone twisting his arm, telling him repeatedly to get out of the car and to get down on the ground. AP states that he saw two or three people attempting to remove him from the car. AP stated that he did not hear anyone announce “police” or “RCMP”.

¹ As New Brunswick does not have provincial legislation similar to Manitoba’s Police Services Act, Part 7 (PSA), for the purposes of this report, reference will be made to the status of the various police officers involved in this incident in the manner as if they were designated pursuant to the PSA.

According to AP, he believed he was being robbed. AP stated that he put the vehicle in drive and drove forward quickly. AP stated that his car windows were fogged and he could not see out the passenger, driver or front window. AP stated that he struck two white cars that were parked in front of him. At this point, AP stated that he realized these were police vehicles, but he did not see any police officer in front of his vehicle.

AP states that he put his car in reverse and then "... *shortly after* ...," his passenger window blew out and his right arm went numb. AP stated that he was being shot at, drove off and was striking the police vehicles again. AP stated that he feared for his safety. AP states that police vehicles, with emergency lights activated, followed him. AP stated that he recalls the driver's window being smashed out, when police used a baton or knife on it. AP's injury consisted of gunshot wounds to his right arm.

AP provided IIU investigators with a signed consent for the release of his medical records. The medical records show that AP was treated in hospital for a single gunshot wound to his right arm. AP was described as agitated and combative with medical staff in the hospital. He was treated for his injuries, but was not admitted to hospital.

Civilian Witnesses

CW1 is a bartender at the bar where AP's vehicle was parked. CW1 stated that she observed a suspicious vehicle in the parking lot and called the RCMP to report it. At closing time, CW1 left the bar and was in the company of two others. CW1 states that she saw into the suspect vehicle and observed a male who appeared to be having a seizure or was on "meth" and was moving around in the car. CW1 was concerned over the male's well-being and called the RCMP, first from her vehicle when she left the bar, and again from her home.

CW2 worked at a group home that was located across from the bar's parking lot. According to CW2, a dog started barking around 3:30 a.m. CW2 stated that he looked out the home's front window. CW2 stated that he observed three marked police vehicles in the parking lot with their emergency lights on. CW2 stated that he also saw someone run across the parking lot towards the bar, but was not sure who was running and could not describe that person. CW2 saw a car drive out of the parking lot, turn right and drive towards Mountain Avenue, but he could not describe the vehicle. CW2 states that three police vehicles then pursued the car.

Witness Officers

WO1 was conducting a traffic stop and heard a call of a suspicious vehicle at the bar that matched the description of a vehicle involved in an armed robbery call earlier in the night. WO1 was directed by a supervisor to attend the call at the bar.

WO1 attended the location off High Street to prevent the driver/occupant of the suspicious vehicle from running away on foot. WO1 heard, over the police radio, someone say, "*he's running.*" WO1 left this position and drove to the Maple Street entrance of the parking lot. WO1 attempted to block the suspect driver but he struck her vehicle with his. The suspect driver backed up after hitting WO1's vehicle. WO1 states observing another police officer make a "*chopping motion*" at the suspect's driver window and heard glass smash. The suspect driver then drove away, sideswiping WO1's vehicle. WO1 did not see or hear any shooting.

WO2 was working the night shift when a call was received regarding a suspicious vehicle behind the bar. According to WO2, there had been an earlier call to police regarding an armed robbery that involved a vehicle matching the description of the suspect vehicle, a black Volkswagen hatchback.

WO2 made his way to the bar. On arrival, WO2 observed another police cruiser blocking the front of the suspect vehicle. WO2 also observed WO4's unmarked van stopped on the driver's side of the suspect vehicle. WO2 stated that he parked near the unmarked van. WO2 observed a male inside the suspect vehicle.

When WO2 exited his police cruiser, he observed the suspect vehicle trying to drive between the two police cruisers. The suspect vehicle then drove towards Maple Street, so WO2 returned to his vehicle. WO2 then heard a loud noise. WO2 did not immediately recognize the noise as a gunshot, but when he heard over the police radio, "...shots fired," he realized it was a gunshot. WO2 did not know who fired the shot or where the other police officers were when the shot was fired.

WO2 was watching the suspect vehicle and did not recall seeing any police officers on foot in the parking lot. WO2 followed the vehicle out of the parking lot. WO2 believes the suspect vehicle struck a police cruiser on Maple Street and a pursuit began.

WO3 stated that there was an initial call to the RCMP at approximately 3:30 a.m. regarding a suspicious vehicle with one male occupant (possibly on something), parked in the bar's parking lot. WO3 was the lead investigator of a robbery investigation, in which a vehicle matching the suspect vehicle's description, had been involved. WO3 also stated that a third call had been received concerning a vehicle matching the description of the suspect vehicle that was involved in another armed robbery.

WO3 left the RCMP detachment and followed WO2. When WO3 arrived at the parking lot, WO2 turned to the right. WO3 states that he saw two other police vehicles in the parking lot. WO3 states that he recognized WO4 in one of those vehicles. WO3 pulled his vehicle beside the passenger side of another police vehicle, which he now knows was SO's vehicle. WO3 turned his spotlight on and pointed it at the suspect vehicle. WO3 then exited his vehicle and heard the sound of tires spinning.

Then, according to WO3, the suspect vehicle started to drive away. The suspect vehicle smashed into SO's police vehicle and then drove in his direction. WO3 stated that he heard a gunshot and the sound of glass breaking. According to WO3, the suspect vehicle smashed into SO's police vehicle at least twice. At one point, WO3 thought the suspect vehicle had been driving directly at him.

WO3 had his service pistol drawn but he did not have time to react. After hearing the sound of the gunshot, WO3 then stated that he heard the male driver of the suspect vehicle start to yell. WO3 ran behind the suspect vehicle as it drove toward Maple Street and then took cover behind a hydro pole because the suspect vehicle was driving erratically. WO3 is not certain whether it was SO or WO4 that radioed "...shots fired" and "...more members." When the gunshot was heard, WO3 was not certain of the position of the suspect vehicle. WO3 heard "a boom" when the suspect vehicle collided with the police vehicle and then heard a gunshot and the sound of glass breaking. WO3 recalls seeing WO4 in front of the unmarked van. WO3 did not see where

SO was standing but he does believe that the gunshot came from the passenger side of the suspect vehicle.

WO4 was a senior officer on the night of the incident. Throughout that night, WO4 stated that there were three calls about the suspect vehicle. Two of those calls concerned robberies (one with a knife and the other concerned a theft of gas and drive off). Based on the information that was received, WO4 recognized the suspect vehicle as belonging to AP.

WO4 has had previous dealings with AP. WO4 decided to make patrols to AP's known addresses in an attempt to locate the vehicle. While WO4 was on the road, a fourth call was received about the suspect vehicle, with a report that the driver was passed out and parked at the bar's parking lot. On arrival at the parking lot, WO4 located the suspect vehicle at the back of the parking lot, where there was also a tractor and a dumpster present. The suspect vehicle was backed in and parked, hidden from the rest of the parking lot. WO4 could see AP inside of the suspect vehicle. WO4 stated that the suspect vehicle's windows were not fogged.

WO4 blocked the suspect vehicle with his unmarked van. WO4 was expecting WO1 to arrive and complete the containment. However, WO1 went a different way and was not behind him. WO1 ended up in a different area and not in the parking lot.

WO4 then attended to the suspect vehicle, found AP passed out in the driver's seat, and the vehicle was running. WO4 opened the driver's door and identified himself as the police. WO4 stated he was wearing his full police uniform. WO4 told AP that he was under arrest and he was to get out of the car. As soon as AP woke up, he began to scream. WO4 grabbed AP's shoulder and tried to pull him from the vehicle. According to WO4, AP appeared stronger than usual, causing WO4 to believe AP was on a substance.

WO4 stated that AP was able to put the vehicle into drive and he "...floored it." WO4 states that SO arrived by this time, while AP had rammed both the unmarked van and another marked police vehicle (the one that SO had parked in front of AP). WO2 and WO3 also arrived in the vicinity.

WO3 was positioned in front of AP's vehicle and SO was on its passenger side. SO had drawn his baton and was trying to get into the passenger side of the vehicle. WO4 stated that as AP was driving towards police officers, a sound of a gunshot was heard. He did not see who had shot it. Shortly after the shot was heard, AP was able to squeeze his vehicle between the police vehicles and sped off towards Maple Street, ramming another police car that had also arrived on scene.

WO4 believes he was at the front or passenger side of his van when he heard the gunshot, WO4 did not see any muzzle flash. WO4 did not know at that time who had fired a shot.

Subject Officer

In Manitoba, pursuant to the provisions of the PSA, a designated subject officer cannot be compelled to provide his or her notes regarding an incident, nor participate in any interview with IIU investigators.

In this matter, those provisions were not in force in New Brunswick. SO could have declined to attend an in-person interview if he wished, but chose to voluntarily participate in an in-depth interview with IIU investigators. IIU investigators did provide SO with the standard caution in

advance of the interview.² SO had previously provided IIU investigators with a sworn affidavit and his notes regarding his involvement in this matter.

SO stated that when he arrived at the scene, WO4 was already fighting with the driver of the suspect vehicle. SO was getting out of his police car and was planning to go to the passenger side of the suspect vehicle, when the driver put the vehicle in drive, made a hard left turn and struck WO4's van. The driver then backed up.

SO drew his firearm, as he feared death or grievous bodily harm to WO4. WO4 had moved toward the front driver's side of his van. The driver went forward again, ramming WO4's vehicle and trying to push the van out of the way. SO stated that the driver backed up his vehicle once again, and aligned it with a gap between the van and his police car. At this point, SO stated WO3 arrived and parked his police car somewhere behind SO's police vehicle.

WO3 was coming to assist, when the driver went for the gap between the police vehicles, where WO3 was now standing. SO pointed his firearm at the driver, but could not take the shot as WO4 was in the line of fire. The driver continued to drive and passed in front of SO. When SO realized that WO4 was out of the line of fire and near the front of his van (no longer "...*blue on blue*³"), SO stated that he fired one round through the passenger window. SO stated that he did not take a second shot, as he did not want to chance a ricochet striking WO3.

The driver made it through the gap and headed towards Maple Street, running straight into WO1's police car. SO ran up to the suspect vehicle and tried to get the driver, but was unable, and the pursuit began. SO had self identified as the police officer that had fired a shot. A round count was conducted on SO to check the number of rounds in his magazine. One round was missing. SO last qualified with his RCMP firearm during the summer of 2019.

Video Evidence

The video obtained from the RCMP contained eight video clips of the bar parking lot:

1. Shows AP's vehicle entering the parking lot from Maple Street at 4:01 a.m., driving through the parking lot and backing into the spot where it is located when police arrive. No one is observed to leave this vehicle. Another vehicle is observed in the parking lot with lights on.
2. A taxicab arrives, but there is no contact with AP.
3. The taxicab is seen leaving, but there is still no contact with AP.
4. A vehicle, observed as originally parked in the parking lot, leaves, though no one is seen getting into the vehicle.
5. Two women and one male depart the bar and one woman locks the door (believed to be CW1). The three appear to look at AP in his vehicle, but have no other contact with him.
6. The three people get into two vehicles.

² The standard caution involves informing SO of his right to counsel and that he is the subject to the ongoing investigation, that he need not say anything, but anything he does say will be taken down and may be used as evidence against him at a later proceeding.

³ A term used by police to describe an unsafe situation where there is risk of striking a fellow officer if a police officer discharges his firearm.

7. The two vehicles depart the parking lot by Maple Street and by Mountain Street.
8. WO4 arrives in his unmarked van and approaches AP's vehicle then goes off camera. SO then arrives, and as he stops his police car, AP's vehicle is moving forward. AP's vehicle strikes SO's marked police vehicle, as both WO2 and WO3 arrive in their separate marked police vehicles. AP backs his vehicle up and pulls forward again, as police officers approach. WO3 is observed with his firearm drawn and is on the passenger side of SO's police vehicle. SO is at the passenger side of AP's vehicle. WO4 is observed near the front of his van. WO2 remains in his vehicle and is coming to a stop. Smoke is seen near SO (the moment when he discharged his firearm). AP forces his way between police vehicles. Both the van and SO's police vehicles are seen rocking. AP drives toward Maple Street, fishtailing in the middle of the parking lot. When AP arrives at Maple Street, he collides with WO1's marked police vehicle. AP backs up as SO approaches the driver's side. AP drives away down Maple Street towards Mountain Avenue. Officers are running back to their police vehicles and leave the parking lot.

Radio Communications

These communications encompass the initial call of a suspicious vehicle, an officer advising that the suspect vehicle matches a vehicle in a robbery matter from earlier in the evening, an officer arriving and asking for "...more members" and "...shots fired," then to the pursuit, concluding with scene control and logistics.

Pursuit Report

A Pursuit Report was also provided by the RCMP and was reviewed by IIU investigators. The report indicated that the subsequent pursuit (after AP left the bar parking lot) lasted for approximately three minutes. It was six kilometres in length and speeds reached 180 KPH. At the time of the pursuit, there was no vehicular traffic or pedestrian traffic in the area. The route of the pursuit was a multi-lane paved residential area and the road surface was dry at the time. The pursuit ended when AP lost control of his vehicle while turning from Berry Mills Road onto Horsman Road (a residential area of Moncton) and ended up stuck in a ditch.

Conclusion

Issues and Conclusion

This investigation must consider whether the actions of SO to fire upon AP was justified at law. In this incident, police responded to a call for service concerning a suspicious vehicle, parked in a parking lot and matching the description of a vehicle that may have been involved in a series of robberies from earlier that night.

On arrival, police officers, attended to the suspect vehicle. One officer had direct contact with AP, who was sleeping in the vehicle. As the police officer attempted to remove AP from the vehicle, AP put the vehicle in motion and attempted to flee from the area. AP struck several police vehicles as he attempted to leave. Several police officers were out of their respective vehicles and on foot, standing near AP's moving vehicle. SO stated that from his perspective, the lives and safety of other police officers were in jeopardy. SO discharged his service revolver one time and hitting AP. AP continued to drive away and a pursuit was initiated. AP was subsequently apprehended, treated for his injury and detained in custody.

Applicable Law:

Sections 25 (1), (3), (4) and Section 26 of the Criminal Code of Canada are applicable to this analysis:

25 (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

- (a) as a private person,*
- (b) as a peace officer or public officer,*
- (c) in aid of a peace officer or public officer, or*
- (d) by virtue of his office, is,*

if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

(3) Subject to subsections (4) and (5), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely 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.

(4) A peace officer, and every person lawfully assisting the peace officer, is justified in using force that is intended or is likely to cause death or grievous bodily harm to a person to be arrested, if

- (a) the peace officer is proceeding lawfully to arrest, with or without warrant, the person to be arrested;*
- (b) the offence for which the person is to be arrested is one for which that person may be arrested without warrant;*
- (c) the person to be arrested takes flight to avoid arrest;*
- (d) the peace officer or other person using the force believes on reasonable grounds that the force is necessary for the purpose of protecting the peace officer, the person lawfully assisting the peace officer or any other person from imminent or future death or grievous bodily harm; and*
- (e) the flight cannot be prevented by reasonable means in a less violent manner.*

26. Every one 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 addition, police officers are entitled to rely on the self-defence provisions of the Criminal Code under section 34:

34. (1) A person is not guilty of an offence if

- (a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;*

(b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and

(c) the act committed is reasonable in the circumstances.

Effectively, the question is whether the decision of SO to discharge his firearm at AP was reasonable and necessary for the self preservation of that police officer or the preservation of any one under his protection from death or grievous bodily harm in the given circumstances. Reasonableness of a police officer's use of force must be assessed in regards to all of the circumstances, as they existed at the time the force was used, particularly when it is considered in light of the dangerous and demanding work engaged in by police and the expectation that they react quickly to all emergencies and exigencies.

Where lethal force is used (intended or likely to cause death or grievous bodily harm), there must be a reasonable belief by the subject officers that the use of lethal force was necessary for their own self-preservation or the preservation of any one under their protection from death or grievous bodily harm. The allowable degree of force to be used remains constrained by the principles of 'proportionality, necessity and reasonableness' (see *R. v. Nasogaluak*, [2010] 1 S.C.R. 206).

In that decision, the Supreme Court noted, at para. 35:

“Police actions should not be judged against a standard of perfection. It must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances.”

Also, see *R. v. Power* 476 Sask. R. 91 (CA), where at para. 35, the court notes:

“On the basis of the foregoing, a determination of whether force is reasonable in all the circumstances involves consideration of three factors. First, a court must focus on an accused's subjective perception of the degree of violence of the assault or the threatened assault against him or her. Second, a court must assess whether the accused's belief is reasonable on the basis of the situation as he or she perceives it. Third, the accused's response of force must be no more than necessary in the circumstances. This needs to be assessed using an objective test only, i.e. was the force reasonable given the nature and quality of the threat, the force used in response to it, and the characteristics of the parties involved in terms of size, strength, gender, age and other immutable characteristics.”

In this matter, AP was suspected of involvement in a series of robberies and may have been on drugs at the time police had physical contact with him in the parking lot. When police attempted to detain him, he resisted arrest and drove away from them. AP was bent on escaping from the parking lot. He rammed police vehicles several times to aid in his escape. Police officers were on foot on the parking lot and two of them were in the direct line of AP's moving vehicle. If AP struck either or both of the police officers, the potential for grievous bodily harm was high.

Therefore, was it reasonable, in these circumstances, for SO to fire at AP to prevent the injury or death of himself or any other police officer in the vicinity?

The next step is to determine whether the evidence from the various police officers and witnesses is credible. When determining issues of credibility, one must look to the evidence itself, and consider whether it is internally consistent, consider whether it is consistent with evidence given by others, consider whether it makes sense on common sense principles, and consider whether it is consistent with the available objective evidence.

In this case, and in the circumstances that existed, all evidence made sense, was consistent with statements given by numerous officers and with statements by witnesses. Minor variations in the recollections of various witnesses are not unusual or unexpected. When considered as a whole, I am satisfied that this finding of consistency is appropriate in these circumstances. There is further corroborative evidence in support when the video surveillance evidence is considered.

More importantly, the eyewitness evidence and statements are consistent in that:

1. AP was driving his car trying to extricate himself.
2. AP was smashing police cars.
3. Police officers were on foot, exposed, vulnerable and in the path of AP's vehicle.
4. SO was the only police officer to discharge a firearm.

This objective evidence materially corroborates the evidence of all the witnesses, including SO. I am satisfied that the evidence gathered from all sources provides sufficient support for the sole conclusion that the decision by SO to shoot AP was necessary to prevent the injury or death other police officers in the vicinity.

In this investigation, the IIU mandate was to determine whether consequences should flow from the actions of SO, in light of all the circumstances and information known to him at that time. Following a detailed review of this investigation, it is my view that the use of lethal force by SO was reasonable, necessary, justified and unavoidable.

In conclusion, there are no grounds to justify any charges against the subject officer.

The IIU investigation is complete and this file is closed.

Final report prepared by:

Zane Tessler, civilian director
Independent Investigation Unit
April 22, 2020

Ref 2019-077