IN THE MATTER OF AN INVESTIGATION INVOLVING BPS DEPLOYMENT OF A LESS-LETHAL FIREARM ON NOVEMBER 5, 2021

FINAL REPORT OF THE CIVILIAN DIRECTOR

OF THE INDEPENDENT INVESTIGATION UNIT

IIU File Number:	2021-0057
Final decision made by:	Zane Tessler, Civilian Director
Final report prepared by:	Roxanne M. Gagné, Civilian Director
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Introduction

On November 5, 2021, the Brandon Police Service (BPS) notified the Independent Investigation Unit of Manitoba (IIU) of an incident.

The written notification disclosed the following information:

"Today, November 5, 2021, at approx. 4:20 p.m., we received a 3rd party report from an employee at Wendy's, 905 – 18th St., of one male armed with a knife chasing another. The suspect and victim were last seen eastbound on Park Avenue, turning north on 16th St.

Members attended to the area and first encountered the victim, who was uncooperative, in the area of 15th and VanHorne Ave. WO1 observed the victim looking back over his shoulder – south down 15th St, while walking quickly towards WO4, who made the initial contact with the victim. This prompted WO1 to look in the same direction and he saw a single male walking away from the area. A witness, driving in a vehicle, flagged WO1 down and stated "That's him" and confirmed that it was the suspect armed with a knife. WO1 attended to the second male, and saw he was holding a knife in his right hand. He issued the Police challenge and yelled at him to drop the knife. The male suspect, later identified as the affected person (AP), who was waving the knife in the air, yelled "It's not illegal" and other comments, took a step towards WO1, and refused to drop the weapon. AP turned and walked away from WO1, who called for LTL force option. Uninvolved civilians were in the area. WO3 and SO had also attended to the area, and AP continued to yell nonsensically and raise the knife overhead .

SO announced "Bean bag" and deployed one bean bag round, striking AP in the right back, below the scapula. Proximate to the impact, AP dropped the knife and went to his knees but refused to prone. Three members went "hands-on" and struggled to get AP restrained and handcuffed. AP was transported to BRHC for medical assessment. Medical staff cleared him after assessing the impact site, and his overall condition for lodging, and expressed no concerns. We attempted to photograph the impact site, but AP was uncooperative and refused. The site was seen by WO1, who described it as akin to a paintball welt.

The shotgun used for the deployment, the expended casing, and the munition were seized on scene by WO2 and have been submitted into Property. The scene was photographed by WO2 as well. AP is held in custody, currently in BPS cells, and facing charges per s. 88 CC, s.129(a) CC, and, possibly 264.1(1)(a) CC."

As this matter concerned an injury resulting from the use of a firearm, it is deemed a serious injury as defined under the IIU regulations. The IIU assumed responsibility for this investigation in accordance with Section 66(4) of *The Police Services Act* (PSA). IIU investigators were assigned to this investigation.

IIU investigators obtained the following information from BPS, among other items:

- BPS Daily Incident Report from November 5, 2021
- BPS Assigned Duties Sheet
- CAD printout regarding call for service
- Adult Court Brief for AP
- Narrative Report of WO1
- PROS Occurrence Summary for BPS file 20211666983
- Notes of Constables WO1, WO2, WO3
- Receipts for Property seized in investigation (x3)
- Undertaking for AP
- Use of Force report authored by SO
- Photos of injuries suffered by AP
- Police vehicle video of incident
- Cell phone video of the incident taken by CW1
- Police radio recordings from incident
- Photographs obtained of scene by WO2

The civilian director designated one subject officer (SO) and four witness officers (WO1-4).

Facts and Circumstances

Scene Examination

IIU investigators were not on scene immediately after the incident. WO2, a BPS supervisor, arrived at the scene several minutes after the incident occurred. He took photographs of the area and seized the firearm used in the incident.

Canvass

On November 8, 2021, IIU investigators attended the area of the incident but were unable to locate any videos.

Affected Person

On November 8, 2021, IIU investigators obtained an interview of AP. He stated that he was walking in Brandon when he believed he got shot in the back with a .22-calibre bullet by a male whom he did not recognize, who began to walk away. AP tried to stop the male, yelling at him, but the person kept moving away from him. AP then discontinued and started to walk away, acknowledging that he was carrying a pocket knife on his person at the time. A police vehicle, with its emergency lights activated, arrived at his location and an officer got out, pointed a Taser at him and instructed him to drop the knife. At this time AP said he was holding his pocket knife

in his hand and his arm was fully extended, but he was not complying with the officer's instructions because the knife was legal and he was not doing anything wrong.

AP stated that three other police vehicles arrived, and one officer had a shotgun in his possession. He said he was shot in the back with a bean bag round and then taken to hospital where he was treated for his injury.

AP added that it was his right to walk the streets and his right to carry a knife, and he was shot for no good reason, stating instead that the police officers present should have had a conversation with him. He also said he may have suffered broken ribs in the incident.

Civilian Witnesses

CW1

On February 3, 2022, IIU investigators obtained a statement from CW1. He stated that he was at a residence on 15th Street in Brandon on November 5, 2021, between noon and 3 p.m. when he heard unintelligible screaming coming from outside. CW1 stepped outside and observed two police officers following a male who was walking down the east side of 15th Street. The officers were in uniform, had their guns drawn and were yelling at the male to drop the knife.

CW1 said one officer was on the road and one was on the sidewalk, on the same side of the road as the male, who was holding something in his right hand and was holding it up in the air. He could not clearly see the item in the male's hand, but believed it to be a knife based upon commands of the police. The male responded to police commands by saying something about the knife not being illegal, or that he was allowed to have it.

The officers continued to yell at the male to drop the knife as he walked south, and CW1 estimated that officers told the male to drop the knife six times or more. The male got to the corner of 15th Street and College Avenue and turned left onto College, at which time more police cruisers showed up. The male was then shot with something, the police rushed to him and CW1 could not see anything after that. He said he did not see any long arms being carried by police, only pistols, and the interaction between police and the male lasted under a minute.

CW1 stated he recorded the incident on his cell phone and shared it with a number of people, including CW3.

CW2

On February 3, 2022, IIU investigators obtained a statement from CW2. He stated that he had been in his house on 15th Street in Brandon around 4:00 p.m. on November 5, 2021, when he noticed his sister's ex-boyfriend recording something outside with his cell phone. He went to the

window of the home and saw a guy carrying an object in his hand on the sidewalk across the street. The male was holding it in his right hand and his hand was in the air. He observed four or five police officers who were yelling at the male. He could not understand what they were saying, and he did not think the officers had their guns drawn.

The male was walking on the sidewalk across the street from his home and moved south to College Avenue and turned left. CW2 observed an officer at the intersection of 15th and College carrying a black rifle that he presumed was a bean bag gun. CW2 did not see or hear that officer deploy his weapon, but did see the male go down to the ground.

CW3

On February 3, 2022, IIU investigators obtained a statement from CW3. She stated that she heard screaming coming from outside her home on 15th Street on November 5, 2021. She could not understand what was being said. From her window, she saw two police officers and a male. The police were yelling at the male. CW3 said she did not remember seeing anything in his hands. She thought she heard one shot. CW3 told investigators she came into possession of video footage of the incident that was captured by CW1, and she forwarded the video to a BPS officer.

CW4

IIU investigators spoke with CW4, who had called 911. CW4, the manager of Wendy's Restaurant in Brandon, said he had been asked to call authorities by an employee, who had in turn spoken with a civilian, who reported that there was a male chasing another male with a knife. No statement was taken from CW4 due to his lack of direct knowledge of the incident.

CW5

On November 12, 2021, IIU investigators obtained a statement from CW5. She stated that she was parked in a friend's driveway on College Avenue in Brandon when she saw a male walking and a police officer approach him. The officer had his gun drawn and was telling the male, "*Drop it,*" but the person did not comply and began to walk away with one of his hands stuck up in the air. She could not see anything in that hand.

Another police officer arrived with his gun drawn, and both officers were telling the male to stop, but he did not comply. She then heard a pop and the male went down to the ground behind her vehicle. CW5 stated she could not see what else happened as the incident transpired in her blind spot of the vehicle she was in.

CW5 said she observed a police officer holding an orange rifle, and described the male subject as defiant and walking as if he was not going to listen to anyone.

CW6

On November 8, 2021, IIU investigators obtained an interview of CW6. He stated that he was driving north on 18th Street in Brandon near the Wendy's restaurant when he noticed a male

subject holding a knife in his right hand. The male subject was yelling threats to another man about 100 metres in front of him. He heard the male with the knife yell, "*You can't walk fast enough. You are going to die. I'm going to kill you*," while waving a large knife that appeared to have a four to six-inch blade.

CW6 began to follow the male with the knife and called police, remaining on the line with them until a lone BPS officer arrived. At that time, the male was on 15th Street walking south and CW6 pointed him out to the officer, who then drove his police vehicle towards the AP. CW6 stated the male still had the knife in his hand, and the police officer exited his vehicle, drew his sidearm and commanded the person to drop the knife several times. The male replied, "*It's legal*," and did not comply with the commands given to him. Another police officer arrived, drove towards the male and got out of his police vehicle. At that point, CW6's line of sight was blocked and he left the scene.

CW7

On November 15, 2021, IIU investigators obtained a statement from CW7. She stated that she was seated in her friend's vehicle on College Avenue. She observed a male walking north on 15th Street, when a police car pulled up and an officer got out with his gun drawn. CW7 was unable to hear what the officer said to the male, and the male raised his arm at the officer and shook his hand in a threatening manner, resulting in the officer taking a few steps back. She could not see anything in the male's hands, but believed he was holding something, based upon the officer's reaction to him.

Another officer showed up on 15th Street, at which point the male subject began to walk south away from the two police officers. As he walked away, CW7 could see his left arm was raised. She then saw a third officer arrive with a shotgun. The male kept walking, turned onto College Avenue and walked behind the vehicle CW7 was seated inside.

CW7 could hear muffled voices, then she heard a pop and someone yell "*Drop it!*" She looked behind the vehicle and noted that the male subject was down on his knees. Police officers forced him down onto the ground, handcuffed him and escorted him to a nearby police vehicle.

Witness Officers

WO1

On January 11, 2022, IIU investigators obtained a statement from WO1. He advised that he received a call about a man chasing another man with a knife near the Wendy's restaurant in Brandon at approximately 4:20 p.m. on November 5, 2021. He arrived in the area of the call and noticed a male walking quickly towards WO4's police vehicle, and observed another male

walking southbound on 15th Street towards College Avenue on the east sidewalk. As he turned to follow the latter male, a man driving a van pulled over and waved him down. The driver told WO1 that the male walking south on 15th Street was the man police were looking for. WO1 confirmed with the driver that the pedestrian on the sidewalk was the one with the knife.

WO1 then approached the male walking on the east sidewalk in his marked police vehicle, at which point he could see something in the man's right hand that he believed to be a knife. The officer got out of his police vehicle and commanded the male to drop the knife, to which he responded by yelling, "*It's not illegal*," and took a couple of steps toward WO1. The officer said he backed up, drew his sidearm and continued to command the male to drop the knife. The male did not comply and continued to yell something about the knife not being illegal. At that point, WO1 believed the male was on some sort of substance, given his behaviour, or that the male had mental health issues. The officer said he radioed that the male was not listening and asked if anyone had a less-lethal shotgun available.

WO4 then arrived on scene and the male turned around and started to walk away. WO1 said he and WO4 followed with their guns drawn, commanding him to drop the knife and that he was under arrest. SO arrived in another police vehicle and got out with a less-lethal shotgun. SO yelled "*Bean bag*," and then deployed the less-lethal shotgun once, striking the male in the back.

According to WO1, the male did not fall right away; rather, he turned around with the knife in his hand towards the three officers. He was again instructed to drop the knife and this time he complied, dropping it next to him and went down to the ground. Officers moved in and handcuffed him. During this time, WO3 arrived on scene and identified the male subject as AP. WO1 arrested AP and then he was taken to the Brandon Regional Health Centre for an examination. While at the hospital, WO1 did not recall AP complaining of a rib injury.

WO2

On January 17, 2022, IIU investigators obtained a statement from WO2. He stated that he was not on scene when the less-lethal round was fired at AP, but arrived approximately seven minutes after the discharge to find SO holding the shotgun that fired the round. WO2 had a conversation with SO, in which SO acknowledged firing one less-lethal round into the back of AP. WO2 photographed the area and seized the shotgun of SO.

WO3

On January 11, 2022, IIU investigators obtained an interview of WO3. He advised that he was at the BPS office dealing with an unrelated matter when he heard the dispatch for a call involving a male chasing another male with a knife. WO3 left to attend the scene. While en route, he overheard on the police radio that a person was located with a knife. The person was not listening, and he heard the officer ask for any officers with a less-lethal firearm to attend. WO3 arrived at the scene and observed a male subject turning the corner on the sidewalk of 15th Street

onto College Avenue, followed by WO1, WO4 and SO. The first two officers were holding their sidearms and pointing them at the male, while SO was holding a less-lethal firearm. WO3 could not hear commands being given by the officers at that time, nor did he see a knife in the hands of the male subject when he first arrived.

As WO3 came to a stop, he heard a single shot. He got out of his police vehicle and could hear the three officers telling the male to drop the knife. The male went down on one knee and tossed what appeared to be a folding knife onto the sidewalk from his left hand, at which time WO4 pulled the male away from where it was lying. WO3 then assisted the officers in putting handcuffs on the male. WO3 escorted the male (AP) to the Brandon Regional Health Centre for an examination prior to being taken to BPS headquarters. WO3 said AP did not complain of rib pain at any time during the medical assessment process.

WO4

On January 11, 2022, IIU investigators obtained an interview of WO4. He stated that he received a call for service involving a male chasing another male with a knife near the Wendy's restaurant in Brandon. He attended the area and spoke with a male who said someone had been chasing him and was trying to stab him. The male did not want to be involved and left the area, indicating that the suspect was in the area where WO1 was with his police vehicle.

At approximately the same time, WO4 heard over the police radio that WO1 had located the suspect on 15th Street, that he had a knife and was not listening to commands. WO4 drove to WO1's location, and as he approached, he could see WO1 had his sidearm out and was pointing it at a male subject on the sidewalk. WO4 said he could hear the officer yelling, but he could not understand what he was saying as he drove up. The male had his arms up and appeared to have a knife in his right hand. The knife was dark with a shiny point, and the male was yelling, "*This is legal*," while holding the knife up in the air. WO1 called out on the police radio looking for a less-lethal shotgun to attend the scene, and SO responded that he had one and was on the way.

WO4 got out of his police vehicle, drew his sidearm and commanded the male to drop the knife. WO1 was also telling the male to drop the knife, but he was not complying with the commands given to him. The male then turned away and started to walk towards College Avenue, yelling things that WO4 could not understand. Both officers followed the male, continuing to give commands to drop the knife, but he still did not comply.

At that point, SO arrived on scene in his police vehicle and a less-lethal shotgun. SO called out "*Bean bag*" twice and then discharged one shot into the back of the AP. Following the shot, the male turned around, still holding the knife. After a moment, the male dropped the knife beside him and went down to his knees. WO4 moved in and pulled the male away from the knife on the ground and began to struggle with him in an effort to get him into handcuffs. WO4 stated that the

male kept fighting and would not surrender his hands. Therefore, WO4 delivered a punch to the man's face, after which the male gave up his hands and was handcuffed.

Subject Officer

SO declined an interview and provided IIU investigators with a copy of his notebook via his legal counsel.

"I observed WO1 and WO4 who had their sidearms pointing down at the suspect male and were verbally telling the suspect to stop and drop the knife.

The male had his right hand up in the air in a fist as he walking away from WO1 and WO4.

I exit my vehicle and removed my less lethal bean bag gun from its holster in PC 201. I then drew my weapon down on the suspect who made visual contact with me. I announced Police and verbally commanded the male to stop. He did not stop and proceeded to walk east on College Ave in the 1400 block. I continued to call out and tell him to stop to which he refuses. At this point and from the time I arrived on scene the male had in his right hand, which he was holding above his shoulder, a pocket knife that was open.

Suspect male refuses to comply with verbal commands from police and at 1626 I verbally announced "bean bag" and deployed a round at the suspect."

Summary of Other Evidence

Policies

IIU investigators obtained BPS policies. The policies provide for an understanding of the continuous risk assessment required of a subject's actions resulting in proportionate responses, decisions, actions by attending officers.

Medical

IIU investigators obtained medical information pertaining to AP's visit at the Brandon Regional Health Centre on November 5, 2021. The records contained the following notations:

Pt seen for clearance with BPS. Shot x1 in back (r upper) with non-lethal projectile by BPS.

Pt alert, standing upright, appearing hostile, being held by BPS. Refused to make eye contact with writer. Pt refused to answer any questions but was seen talking/yelling at/to BPS prior … Upper back – one approximate 4-5 cm diam round area erythema [redness]*/new ecchymosis* [bruising], *no other injury noted.*

On February 2, 2022, investigators spoke personally with AP, who stated he suffered no other injuries as a result of the bean bag round deployment and sought no other medical attention for the injury he suffered during the incident.

Applicable Law

Sections 25 and 26 of the Criminal Code of Canada state:

25 *(1) Everyone 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.*

The allowable degree of force to be used remains constrained by the principles of *proportionality, necessity and reasonableness* (please see *R. v. Nasogaluak, [2010] 1 S.C.R. 206*).

In the *Nasogaluak* 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."

Conclusion

A police officer is authorized to use force to defend or protect himself or others from the use or threat of force by another person, provided it is reasonable in all of the circumstances. If the force used is in excess of what is necessary or reasonable in the circumstances, such force is not justified and the acts may constitute an assault under the Criminal Code of Canada. Civilian Director Zane Tessler assigned to the matter at the time, gave due consideration to this matter and did a thorough review of all the evidence and material facts obtained in this investigation. He considered:

- BPS officers were dispatched to a call for service regarding a male who was chasing another male with a knife.
- Upon arrival at the scene, AP was observed to be holding a knife in one of his hands but refused to drop it when commanded repeatedly to do so by police.
- SO arrived on scene with a less-lethal shotgun which he deployed once in the back of AP.
- AP suffered a welt on his back; however, there was no medical evidence of broken ribs as suggested by the AP.
- The AP was displaying the knife willingly, and he was no longer in danger regarding the initial incident which caused him to pull the knife.
- The AP was provided ample opportunity to cease and desist.
- Police tried all intervention methods culminating in the less lethal deployment.
- Officers could not allow AP to continue to walk around and endanger the public.
- The police were left with no option but to deploy less a lethal force.
- SO used only force that was necessary in the circumstances.

Given the totality of the circumstances, the civilian director determined that the SO's actions were justified, and therefore no charges will be laid against the subject officer. This investigation is now completed and this matter is now closed.