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CLD MEMORANDUM RESPECTING ALL CHIEFS' MEMO

TO: Richard Stubbings
Assistant Deputy Minister
Public Safety Division
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FROM: Randy Schwartz
Assistant Deputy Attorney General
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DATE: October 11, 2022

SUBJECT: **The Use of Force by Police Officers (sections 25 & 26 of the *Criminal Code*) – A Practical Summary of the Law and Governing Principles**

The following is a practical summary of the legal principles governing the use of force in the lawful exercise of police powers, and related matters of significance to criminal prosecutions. This summary is intended to be used by police services and police colleges in the training of police officers, and by police services boards for the purposes of governance. Police services should ensure that their current policies and procedures are consistent with the advice in this summary, and, if necessary, update them accordingly.

1. **OBLIGATION TO ENSURE USE OF FORCE RESTRICTIONS ARE OBSERVED:** The Crown, the judiciary, police services, and individual police officers are each required to ensure that statutory and common law restrictions

on the use of force are observed and enforced.¹ Unnecessary use of force by police officers contributes to community distrust and undermines public confidence in the administration of justice. This issue is particularly serious for individuals within Indigenous and Black communities in Ontario, as well as other marginalized or racialized communities.²

2. **UNDERSTANDING THE RELEVANCE OF USE OF FORCE IN A CRIMINAL CASE:** It is important to keep in mind that the use of force by police in any criminal case may be relevant to the prosecution in a number of ways.

The use of force by police may be relevant to the prosecutor's assessment of whether there is a reasonable prospect of conviction, or whether it is in the public interest to continue the prosecution. The use of force by police may also be relevant to applications by accused persons alleging excessive force and seeking a remedy under the *Canadian Charter of Rights and Freedoms*. And the use of force by police in a case may be relevant to determining the appropriate sentence imposed by the presiding Judge.

3. **THE USE OF FORCE BY POLICE MUST BE AUTHORIZED BY STATUTE OR THE COMMON LAW:** Police officers may use force in the execution of duty only if permitted by statute or the common law. More particularly, the statutory or common law authority on which an officer relies when using force must apply to the particular duty that the officer is carrying out. Unless an officer possesses such authority in any particular case, the use of force by the officer may be unlawful, and, accordingly, the officer could be liable for assault or for other related offences as applicable in the circumstances.

4. **THE USE OF FORCE BY POLICE IS GOVERNED BY THE PRINCIPLES OF NECESSITY, PROPORTIONALITY, AND REASONABLENESS:** Even when the use of force may be authorized to carry out a particular type of duty, a police officer does not possess an unrestricted right to use force. The lawful use of force by police is constrained by the principles of necessity, proportionality, and reasonableness. That is, an officer will be justified in using force in any particular case only if the harm sought to be prevented could not be prevented by less violent means, and that the injury or harm done by, or which might reasonably be anticipated from the force used, is not disproportionate to the injury or harm it is intended to prevent.

In accordance with those principles, section 25(3) of the *Criminal Code* specifies that an officer is *not* justified in using *lethal* force (that is, force that is intended or is likely to cause death or grievous bodily harm) unless they believe on reasonable grounds that such force is necessary to avoid the death or grievous bodily harm of themselves or a person under their protection.

¹ *R. v. Nasogaluak*, 2010 SCC 6 at para. 32; and *R. v. Davis*, 2013 ABCA 15 at para. 57 (in dissent), reversed 2014 SCC 4

² *R. v. Morris*, 2021 ONCA 680 at paras. 1, 39-43; *R. v. Le*, 2019 SCC 34 at paras. 59, 89-97; *R. v. Theriault and Theriault*, 2021 ONCA 517 at para.143

5. **THE MEANING OF “EXCESSIVE FORCE”:** The use of force by an officer will be excessive if the officer did not have the authority to use force, or otherwise if it violates the principles of proportionality, necessity, and/or reasonableness. Under s. 26 of the *Criminal Code*, a police officer who uses force is “criminally responsible for any excess ...”
6. **THE SCOPE OF AN OFFICER’S DISCRETION IN USING FORCE:** Police officers possess a measure of reasonable discretion in determining whether force is required, and if so, to what degree. The police engage in dangerous work, and, on occasion, must act quickly in emergencies. Assessments regarding the use of force need not be based on a “standard of perfection”, nor calibrated with “jewellers’ scales”. Moreover, an officer is not required to use only the least amount of force which might achieve their objective. However, a use of force which objectively violates the principles of proportionality, necessity, and/or reasonableness, in light of the circumstances known to the officer at the time, may leave the officer liable for excessive force.
7. **THE IMPORTANCE OF DE-ESCALATION AS A TACTICAL OPTION:** “De-escalation” is a term that refers to non-use-of-force tactical options that a police officer may use when confronting a violent or non-compliant individual. (This term is also sometimes used to refer to use-of-force options that have achieved compliance on the part of a subject, but to avoid confusion the term should be restricted to non-use-of-force options: See “National Consensus Policy and Discussion Paper on Use of Force” (2020), International Association of Chiefs of Police et. al.).

De-escalation techniques have the purpose of resolving or stabilizing a volatile situation without the use of force, or with a reduction in the amount of force that would otherwise be needed. De-escalation seeks to slow the dynamics of an encounter, thereby gaining time to allow for the arrival of further resources and tactical options which may further minimize or eliminate any need to use force. De-escalation seeks to pacify the non-compliant individual by means of building a personal rapport with the police officer, and thereby reduce or eliminate the likelihood of violence on the part of the individual.

Whether de-escalation may be effective or even feasible in any particular case will depend on an assessment of the circumstances at hand. Police are trained to assess, plan and act, based on existing circumstances, but also to reassess and adapt as circumstances evolve. Key considerations include, for example, the tactical options immediately available to police; whether further tactical options will be arriving at the scene; and the nature and degree of risk posed by the non-compliant individual. A situation may begin with de-escalation being a reasonable tactical option, but it can reverse in an instant.

In situations where it is feasible, de-escalation may be particularly effective in dealing with individuals who are in a state of crisis or suffering from an apparent mental illness. De-escalation may also be particularly effective when dealing with

members of Indigenous and Black communities, as well as members of other marginalized or racialized communities.

There is no legal duty that requires an officer to employ de-escalation techniques in every case. However, an officer may not use force if there are non-violent tactical options that are reasonably available to the officer, by which the officer's lawful objective would likely be accomplished.³ Accordingly, in a case where an officer used force in circumstances where de-escalation was an objectively reasonable alternative, such use of force may be excessive.

8. OFFICERS MUST ADEQUATELY DOCUMENT CIRCUMSTANCES

SURROUNDING THE USE OF FORCE: In a case where an officer uses force against a person, the Crown Brief must contain sufficient information regarding the incident to permit an assessment of the lawfulness of the officer's use of force, including whether de-escalation was or was not a reasonable tactical option. Each officer who is present at a scene where there is a use of force by police, whether the officer applied force or is a witness, is required to summarize the circumstances of the altercation, based on their observations, in their notebooks and/or other police records. This duty applies whether or not a charge is laid by police in connection with the occurrence.

In any instance where force is used, the following matters should be addressed, as far as possible, from each officer at a scene based on their direct knowledge:

- i) the events/circumstances that led police to engage the person in issue;
- ii) details regarding the use of force, including:
 - a. the type of force that was used;
 - b. the reason that force was used;
 - c. whether the force resulted in an apparent injury, or whether the subject of the force complained of an injury;
 - d. the names of the officers who were present, who used force, and who caused injury (if any);
 - e. the physical attributes of the injured person;
 - f. the conduct and demeanor of the person during the incident;
 - g. the verbal exchanges/communication between the person and

³ See *R. v. Aucoin*, 2012 SCC 66 at para. 39; *R. v. Davis*, above; and *R. v. Baxter* (1975), 27 C.C.C. (2d) 96 (Ont. C.A.) at 113.

police during the incident;

- h. whether reinforcements or other assistance was requested by officers at the scene, including but not limited to EMS personnel and/or specialized response teams;
 - i. whether de-escalation was considered or attempted;
 - j. if de-escalation was not attempted, the reasons for that; and
 - k. other pertinent factors (e.g. time, factors impacting visibility, and location of the incident).
- iii) in cases where there is an apparent injury, or a complaint of injury, the steps that police took, if any, to provide medical assistance; and
 - iv) steps taken by police, if any, to notify their superiors that there had been a use of force that resulted in an apparent injury or a complaint of an injury.

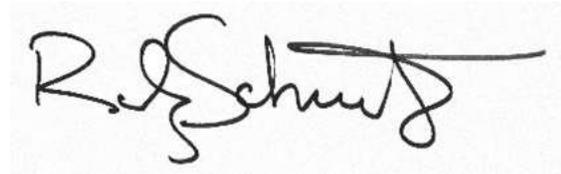
An officer who deliberately fails to adequately record the circumstances surrounding a use of force, or to hide its occurrence, whether the officer themselves used force or was a witness to the incident, may potentially be charged with criminal offences or related administrative offences.

The duty to adequately record the use of force applies in any circumstance where an officer is exercising police powers, irrespective of whether the officer is “on duty” or “off duty”.

9. **POLICE MUST PROVIDE OR OBTAIN MEDICAL ASSISTANCE FOR PERSONS WHO ARE INJURED, AND MUST REPORT SUCH INJURY TO THEIR SUPERIOR:** If in the execution of their duty a police officer applies force which results, or appears to result, in the injury of a person, or if a person in an officer’s custody otherwise appears injured or in physical distress, the officer must provide and/or obtain medical assistance as soon as practicable, and must also promptly report such injury or distress to their superior.
10. **OFFICERS MAY NOT WITHHOLD THEIR NOTES FROM DISCLOSURE:** A police officer who is a witness in a prosecution may not withhold their notes from disclosure for the purpose of protecting themselves from potential criminal or civil liability, subject to one narrow exception; that is, an officer who is the subject officer in an investigation being conducted by the Special Investigations Unit (SIU) is not required to produce their notes to the SIU (although they may do so voluntarily).

I trust this information will assist you. If you need assistance or require clarification, please reach out to the Chief Counsel of the Justice Prosecutions Section in the Crown Law Office – Criminal or contact your local Crown Attorney.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Schwartz", with a long horizontal flourish extending to the right.

Randy Schwartz
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Criminal Law Division
Ministry of the Attorney General