



MEDIA STATEMENT

CRIMINAL JUSTICE BRANCH

October 16, 2014

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No Charges Approved in Kelowna Police Pursuit Case

Victoria – The Criminal Justice Branch (CJB) of the Ministry of Justice today announced that no charges will be laid against three members of the Royal Canadian Mounted Police involved in a police pursuit in Kelowna on December 6, 2013 in which a male pedestrian sustained serious injuries when he was struck by the vehicle being pursued. The matter was investigated by the Independent Investigations Office (IIO) and a Report to Crown Counsel (RTCC) was submitted to CJB by Richard Rosenthal, Chief Civilian Director of the IIO.

Following an investigation, where the Chief Civilian Director of the IIO determines that an officer may have committed an offence, the IIO submits an RTCC to CJB. The Chief Civilian Director does not make a recommendation on whether charges should be approved or what charges CJB should consider.

CJB has concluded that there is no substantial likelihood of conviction for any driving offences under either the *Criminal Code* or provincial *Motor Vehicle Act* against the three members of the R.C.M.P. who were the subject of the investigation.

A Clear Statement explaining the decision in greater detail is attached to this Media Statement. In order to maintain confidence in the integrity of the criminal justice system, a Clear Statement of the reasons for not prosecuting is made public by the Branch in cases where the IIO has forwarded an investigative report and CJB does not approve charges.

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Clear Statement

Summary of Charge Assessment

Following a comprehensive review of an investigative report from the Independent Investigations Office (IIO), the Criminal Justice Branch (CJB) has concluded that no police officers will be charged in connection with an incident on December 6, 2013 involving a police pursuit by members of the Kelowna RCMP. The incident ended when the vehicle being pursued struck and seriously injured a pedestrian.

The IIO investigation focussed on the driving behaviour of three of the RCMP members who were operating police vehicles involved in the pursuit. After reviewing the evidence that would reasonably be available to the prosecution for use in court, the Branch has concluded that there is not a substantial likelihood of conviction for either a *Criminal Code* offence or an offence under the British Columbia *Motor Vehicle Act* against any of these officers.

Investigative reports are submitted by the IIO to the CJB when the Chief Civilian Director of the IIO determines that an officer may have committed an offence. The Chief Civilian Director does not make a recommendation on whether charges should be approved or what charges CJB should consider. In this case, the investigative report was submitted in relation to an officer who commenced the pursuit in question; a second officer who participated during the pursuit; and a third officer who positioned a police vehicle and blocked the roadway at the location where the pedestrian was struck and the pursuit ended.

The conduct of the driver of the pursued vehicle was investigated by the Kelowna RCMP. A charge assessment based on that investigation was conducted by Crown counsel and a number of charges were approved against that individual. Those charges remain before the Court, and in order to protect the fairness of those proceedings, limited information about the alleged circumstances of this incident will be released by the CJB at this time.

Charge Assessment and the Criminal Standard of Proof

The CJB applies a two part test to determine whether charges should be approved and a prosecution initiated:

1. There must be a substantial likelihood of conviction based on the evidence gathered by the investigating agency; and
2. A prosecution must be required in the public interest.

Under CJB policy, a substantial likelihood of conviction exists where Crown counsel is satisfied there is a strong, solid case of substance to present to the court. To reach this conclusion, Crown counsel will consider whether the evidence gathered by the investigating agency is likely to be admissible in court; the weight that would likely be given to the admissible evidence by a judge or a jury; and the likelihood that viable, not speculative defences will succeed.

In making a decision whether to approve charges, Crown counsel must assess the evidence gathered by investigators in light of the required legal elements of any offences that may have been committed. Crown counsel must also remain aware of the presumption of innocence, the prosecution's burden of proof beyond a reasonable doubt and the fact that under Canadian criminal law, a reasonable doubt can arise from the evidence, the absence of evidence, inconsistencies in the evidence or the credibility or reliability of one or more of the witnesses. A person accused of an offence does not have to prove that he or she did not commit the offence. Rather, the Crown bears the burden of proof from beginning to end.

This charge assessment was conducted by a senior Crown counsel who has no prior or current contact with the officers who were subject to investigation by the IIO, and who does not work in the same region as these officers. The evidence that Crown counsel took into account included:

1. Statements from civilian witnesses and police officers;
2. Police officers' notes;
3. Collision analyst's report;
4. Maps, photos and videos;
5. GPS Data from involved police vehicles;
6. Medical and hospital records; and
7. Investigators' notes.

Relevant Law

In conducting the charge assessment, Crown counsel considered the offences of Dangerous Operation of a Motor Vehicle Causing Bodily Harm, contrary to section 249(3) of the *Criminal Code*, and Driving without Due Care and Attention, contrary to section 149(a) of the provincial *Motor Vehicle Act (MVA)*.

To obtain a conviction for Dangerous Operation of a Motor Vehicle, the Crown must prove that a vehicle was operated in a dangerous manner and that it amounted to a marked departure from the standard of care that a reasonable person would observe in all of the circumstances.

Assessing the required mental element for this *Criminal Code* offence involves full consideration of two questions:

1. In light of all of the relevant evidence, would a reasonable person have foreseen the risk and taken steps to avoid it if possible?
2. Was the failure to foresee the risk and take steps to avoid it, if possible, a marked departure from the standard of care expected of a reasonable person in the circumstances of the accused?

Driving without Due Care and Attention, under the *MVA*, is proved when the Crown can establish on the evidence that the accused was not paying appropriate or sufficient attention to his or her driving in all of the circumstances. Proof of momentary inattention or carelessness is sufficient to support a conviction for this offence.

Police officers are protected from liability for *MVA* violations when they engage in a pursuit or blockade; however, they are required to activate their emergency lights and siren and comply with the other relevant provisions of the *MVA* and its regulations.

The RCMP also has its own pursuit and blockade policies. The relevant provisions of the *MVA*, its regulations, and the RCMP policies are lengthy and involved. All relevant points were considered by Crown counsel in the analysis of this case.

Summary of the Alleged Circumstances

On December 6, 2013, members of the Kelowna RCMP were operating a check stop for impaired driving. At approximately 12:26 a.m. a vehicle approached and initially stopped at the check stop. The roadblock was set up in an area of mixed-use zoning, with big-box stores, hotels and residential housing, bordering on an exclusively residential area to the east and north-east, commercial to the west and north-west, and parkland to the south.

According to police witnesses, after initially stopping the vehicle, the suspect driver then drove forward towards a police officer who yelled at the driver to stop. The vehicle continued to drive past this officer, nearly striking him, and forcing him to move out of the way. He rapped on the window with his flashlight as the vehicle drove past him, but the vehicle continued on, squeezed between a marked police car and another vehicle and then sped away.

The senior officer at the check stop broadcast over the police radio that they “had just had a guy run.” Two police vehicles, including one driven by this senior officer began to pursue the vehicle. Both police vehicles had their emergency lights activated.

The two police vehicles caught up with the pursued vehicle and there was contact between the pursued vehicle and each of the two police vehicles. It is not entirely clear from the available evidence who initiated each of these side-by-side collisions. After the collisions, the suspect driver carried on, as the police vehicles continued to pursue it; however, from this point on the vehicle driven by the senior officer no longer played a significant role in the remainder of the pursuit.

The second officer initially involved in the pursuit subsequently broadcast over the radio that he was calling the pursuit off.

A supervising officer, who was at the detachment office, also broadcast over the radio that the cars should “stand down” and let the dog unit handle the pursuit. However, it seems that this latter broadcast was not heard over the radio by all officers, due to radio problems. Many officers who were involved in the pursuit stated that they did not hear the broadcast terminating the pursuit.

Additional police vehicles began to pursue the fleeing vehicle. Ultimately, the first police vehicle behind the fleeing vehicle was some distance back and the officer driving it lost sight of the vehicle that was being pursued.

Another officer meanwhile stopped his police vehicle at an intersection ahead of the fleeing vehicle, partially blocking the road that it was travelling on. His police vehicle had its emergency lights activated.

The pursued vehicle approached this intersection and then swerved off the road, missing the police vehicle, but striking a pedestrian, who was seriously injured. The vehicle hit a fire hydrant and came to a halt. The total pursuit lasted about 7 minutes.

The officers who were subject to the IIO investigation consisted of: the senior officer at the roadblock, who was one of the two officers who initiated the pursuit; the officer who was in the lead police vehicle pursuing the suspect at the time the pedestrian was struck; and the officer who placed his vehicle in the intersection in front of the suspect.

Circumstances Relevant to the Officers Subject to Investigation

As noted, it is not entirely clear from the available evidence who initiated the side-by-side collisions which occurred between police and the suspect vehicle in the early stages of the pursuit.

The vehicle driven by the senior officer at the roadblock reached high speeds, at different times during the pursuit; however, the speed of his vehicle in and of itself does not appear to bear any factual relation to the eventual collision with the pedestrian, as he had dropped back in the pursuit by that time. Almost all other officers involved in the various stages of the pursuit, in more than eight other vehicles, reached similarly high speeds at different points in the pursuit. The roads were dry, bare, it was late at night, and traffic appears to have been minimal. The high speeds the officer travelled at occurred on relatively major roads in a commercial area or

on Highway 97 and were comparable to the speeds travelled by most other police cruisers involved in the incident.

This officer appears to have slowed at intersections where he did not have the right of way, and as he rounded corners. The specific driving the officer engaged in that could potentially be described as dangerous is a period of side-by-side driving with the pursued vehicle, the initial collision with that vehicle, and the high speeds at which the police vehicle travelled. There is no other evidence of driving that could constitute dangerous driving at law on the part of this officer, although as senior officer in the initial stages, this individual played a role in initiating and supervising the pursuit.

The second officer subject to the IIO investigation became the primary pursuit vehicle after a portion of pursuit along Highway 97, and just after the suspect vehicle exited the highway and travelled through a residential area, where the collision with the pedestrian eventually occurred. Like the other police vehicles involved, this officer at times reached speeds of over 100 km/hr in a 50 km/hr zone.

The GPS data on the location of the second officer's vehicle, together with the timing of radio transmissions, and the officer's statement, all provide evidence that the officer was not immediately behind the suspect vehicle during the portion of the pursuit preceding the collision with the pedestrian.

Given the configuration of the roads travelled, the evidence is not capable of establishing that the officer was close enough to the suspect vehicle when it struck the pedestrian, that the police vehicle would have been visible to the suspect vehicle in its rear-view mirror, or conversely that the suspect vehicle would have been visible to the officer. The evidence of this officer is that the officer lost sight of the vehicle and did not see it again until after the collision had occurred.

The second officer also appears to have slowed at intersections where the police vehicle did not have the right of way, and as it rounded corners. Other than the high speed at which the police vehicle travelled at times, there is no evidence of any other driving that could constitute dangerous driving in and of itself. The police vehicle did not travel particularly fast near the conclusion of the pursuit.

Traffic appears to have been minimal during the portion of the pursuit involving this officer, and the evidence does not establish that the speed the vehicle was travelling put anyone at risk as a direct result of the officer's driving. The officer maintained control of the vehicle. The high speeds occurred largely on straightaways and again, were consistent with the speeds travelled by almost every other police cruiser involved in the incident.

The third officer, who stopped a police vehicle ahead of the fleeing vehicle, partially blocking the road that it was travelling on, did so after arriving at the location by way of an intersecting road. This officer's driving included paralleling or attempting to parallel the pursued vehicle, then turning the police vehicle on to an intersecting road and ultimately positioning it in the middle of the intersection.

The evidence does not clearly establish how much time elapsed between this officer stopping in the intersection and the arrival of the suspect vehicle, nor does it establish when the driver of the suspect vehicle and the officer were first in a position to see each others' vehicles. The evidence does not establish how much time the driver of the suspect vehicle had to react to the police vehicle and stop, or how much time the officer had to react to the approaching suspect vehicle. It appears the window was likely a period of some 8 seconds.

Expert evidence from an accident reconstruction analysis indicates that the suspect vehicle was travelling at a speed of 60 km/hr when the pedestrian was struck. It also indicates that the

suspect vehicle braked after, but not before, it struck the pedestrian, who was a few meters away from the police vehicle, on the grass off the side of the road. The pedestrian was to the left of the suspect vehicle as it travelled towards the police vehicle. According to the available evidence, the suspect vehicle swerved around the front of the police vehicle up onto the curb and grass area along the sidewalk, hitting the pedestrian head on as it did so.

There were two passengers in the pursued vehicle; however, neither provided evidence that is of any assistance in describing what took place. One passenger has reported remembering nothing of the incident. A second passenger has reported that she had her head down and felt them hit something.

Given certain aspects of his evidence, Crown counsel has concluded that little weight can be given to the potential evidence of the individual believed to have been driving the pursued vehicle.

Conclusions

In completing the charge assessment Crown counsel has taken into account that under the RCMP's pursuit policy, the pursuit should have been terminated and likely should not have been initiated in the first place, as it began solely as a result of the a failure to stop for police.

Crown counsel has concluded, however, that even if a decision to engage in a pursuit is mistaken or not in accordance with RCMP policy, this does not necessarily deprive a police officer of the protections that would otherwise be available for engaging in risky driving during a properly justified pursuit. Nor does it necessarily establish that an officer's driving was dangerous within the meaning of the *Criminal Code*. Although internal policies applicable to police officers are relevant to the overall analysis, non-compliance with some aspect of a policy is not determinative of criminal or regulatory liability. It is but a factor for consideration in the charge assessment.

The First Officer

Crown counsel has concluded that there is not a substantial likelihood of conviction for any driving related offence in the case of the officer who initiated the pursuit. As a result, no charges have been approved in relation to this officer.

The officer pursued a vehicle that fled a roadblock and nearly struck a fellow officer, then sped up to catch that vehicle. The officer disengaged from the pursuit once the officer's vehicle and the pursued vehicle had collided. The CJB cannot prove the officer initiated this contact between vehicles. When the officer's driving as a whole is assessed, the CJB has concluded it cannot prove a marked departure from the standard of care that would be undertaken by a reasonable police officer in the circumstances.

The Second Officer

Crown counsel has also concluded that there is not a substantial likelihood of conviction for any driving related offence in the case of the officer who was the lead car in the pursuit at the time of the collision with the pedestrian. As a result, no charges have been approved in relation to this officer.

The roads were dry, the officer's emergency lights were activated and the high speeds occurred along straightaways, with slowing at corners and intersections. The officer was a significant distance behind the pursued vehicle when it struck the pedestrian.

Crown counsel has concluded that although the driving took place in a pursuit that was apparently initiated contrary to RCMP policy, this is not sufficient, on its own, to elevate the officer's driving to the level required to prove criminal conduct.

The Third Officer

Crown counsel has further concluded that there is not a substantial likelihood of conviction for any driving related offences in relation to the officer who blocked the roadway in advance of the pursued vehicle. As a result, no charges have been approved in relation to this officer.

The available evidence supports a conclusion that by placing the police vehicle in the intersection at the time, and in the manner that took place, the officer was likely trying to block the road so that the pursued vehicle would be forced to stop.

The CJB has concluded that the available evidence is not capable of establishing that the officer placed the vehicle in such a manner that the pursued driver did not have time to stop safely, or was forced off the road with the resultant collision with a pedestrian.

Driving Without Due Care and Attention

Crown counsel has concluded that the available evidence does not establish that any of the officers drove Without Due Care and Attention, contrary to the *MVA*. According to the available evidence, the officers made specifically measured decisions about their driving, in an effort to apprehend the driver of the pursued vehicle. They did not display an absence of thought, nor did they fail to pay appropriate or sufficient attention to their driving in all of the circumstances. The evidence furthermore does not establish any momentary inattention or carelessness. As a result, no charges have been approved against the three officers under the *MVA*.