



# MEDIA STATEMENT

## CRIMINAL JUSTICE BRANCH

November 19, 2014

14-26

### No Charges Approved in Fernie Police Pursuit

**Victoria** – The Criminal Justice Branch (CJB), Ministry of Justice, announced today that no charges will be laid against two members of the Royal Canadian Mounted Police who were involved in a police pursuit between Fernie and Sparwood on January 26, 2014. The occupants of another vehicle suffered injuries when it was struck by the vehicle that had been pursued by police. 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 after reviewing the entirety of the RTCC that there is no substantial likelihood of conviction for any driving offences under either the *Criminal Code* or provincial *Motor Vehicle Act* against the two members of the RCMP. The CJB has also concluded that the available evidence does not establish that the force used by the officers in the course of arresting the suspect driver was excessive in all the circumstances.

A Clear Statement explaining the charge assessment 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 CJB in cases where the IIO has forwarded an investigative report and CJB does not approve a charge.

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<http://www.ag.gov.bc.ca/prosecution-service/> and

[www.justicebc.ca/en/cjis/index.html](http://www.justicebc.ca/en/cjis/index.html)

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***Courageous, Fair and Efficient – A Prosecution Service that has the Confidence of the Public.***

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### **Summary of Charge Assessment**

After thoroughly reviewing 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 January 26, 2014 involving a police pursuit by members of the Fernie RCMP. The incident ended after the vehicle that had been pursued by police struck another vehicle from behind. One occupant of that vehicle suffered significant injuries, while a second occupant experienced less serious injuries.

CJB's charge assessment in the case considered the driving behaviour of two RCMP members who were operating police vehicles involved in the pursuit, as well as the use of force by those same officers in the course of arresting the suspect driver.

The conduct of the driver of the pursued vehicle was investigated by the Fernie RCMP. A number of charges were approved against that individual by Crown Counsel. The driver subsequently pleaded guilty in March 2014 to two charges of Impaired Driving Causing Bodily Harm, a charge of Flight from a Peace Officer, and a charge of Dangerous Operation of a Motor Vehicle, and received a jail sentence and driving prohibition.

It should be noted that whether the driver of a pursued vehicle has been charged or convicted of offences related to an incident does not determine whether the police officers subject to investigation will be charged. It is just one aspect of the circumstances considered by CJB.

In the circumstances of the case, CJB focussed on potential *Criminal Code* offences against the officers of Dangerous Operation of a Motor Vehicle and Assault. CJB also considered the offence of Excessive Speeding contrary to the British Columbia *Motor Vehicle Act* (MVA). Crown Counsel has concluded there is not a substantial likelihood of conviction for any assault or motor vehicle related *Criminal Code* offences, nor for any offences under the MVA.

The charge assessment was conducted by a senior prosecutor in another area of the province, who has no prior or current connection with the officers subject to investigation.

### **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, and the prosecution's burden of proof beyond a reasonable doubt. 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.

## **Relevant Law**

### **Failing to Comply with Motor Vehicle Act Provisions**

The rules with respect to the right of officers driving police vehicles to disregard traffic laws are detailed and comprehensive. 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. In particular, to engage in a pursuit a peace officer must have reasonable grounds to believe the occupants of the pursued vehicle have committed, are committing, or will commit an offence; and that the seriousness of the offence and the need for immediate apprehension outweigh the risk created to public safety by the pursuit.

In certain circumstances, an officer may disregard traffic laws without using emergency lights and siren, if the officer has reasonable grounds to believe that the risk to the public in using the equipment outweighs the risk of harm if the equipment is not used.

The RCMP has its own pursuit and blockade policies. All relevant statutes, policies and guidelines were considered by Crown Counsel in the analysis of this case.

### **Dangerous Operation of a Motor Vehicle**

To establish an offence of Dangerous Operation of a Motor Vehicle, the manner of driving must be objectively dangerous and the manner in which the vehicle was operated by the driver must be a marked departure from the standard of care that would be expected from a reasonably prudent driver in all the circumstances.

### **Use of Force by Peace Officers**

A general protection for peace officers who use force is found in section 25 of the *Criminal Code*, which provides that a peace officer, who acts on reasonable grounds, is justified in doing what the officer is required or authorized to do and in using as much force as necessary for that purpose. Section 26 of the *Code* provides that an officer who is authorized by law to use force is criminally responsible for a use of force which is excessive.

Case law interpreting these sections has recognized that police officers may need to resort to force in order to execute their duties, but the Supreme Court of Canada has held that courts must guard against the illegitimate use of power by the police against members of our society, given its grave consequences.

Police do not have an unlimited power to inflict harm on a person. The allowable degree of force remains constrained by the principles of proportionality, necessity, and reasonableness. What is proportionate, necessary and reasonable within the meaning of the law will depend on the totality of the circumstances and is assessed from the point of view of the officer, recognizing the characteristically dynamic nature of police interactions with citizens. Police may be required to act quickly in volatile and rapidly changing situations.

Police are not held to a standard of perfection and are not required to precisely measure the amount of force that they use. Police are not required to use only the least amount of force which might successfully achieve their objective. A legally acceptable use of force is one which is not gratuitous, and which is delivered in a measured fashion.

## **Summary of the Alleged Circumstances**

### **Police Pursuit**

On January 26, 2014, at 0015 a.m. the RCMP received a complaint of an allegedly impaired driver attempting to run over persons standing outside a bar in downtown Fernie.

According to the available evidence, investigators were later told that an individual was asked to leave the bar because of his behaviour. As he was leaving, he became involved in a scuffle with some men outside the establishment. A short time later he returned in a Ford SUV (the SUV), revving his engine and driving close to the people on the street. He went around the block several times and reportedly was driving at a high rate of speed, swerving the vehicle and appeared to be trying to strike persons with it. Two persons were reportedly struck by the SUV but were not injured. Police were called by bar staff and a police vehicle attended the area.

The first officer attending the scene, who was driving a marked police vehicle, observed the SUV travelling towards him. He attempted to block it by stopping in front of the SUV, however, it sped around him and then made a turn without signalling. The officer activated his emergency lights, turned and followed. The officer saw the SUV proceed to Highway 3, having rapidly accelerated and swerved into the oncoming lane as another police vehicle approached on an intersecting street. This second police officer pulled in behind the police vehicle driven by the first responding officer.

The lead officer turned onto the highway and attempted to close the distance to determine if the SUV would stop for police. The speed limit through the Fernie town site on Highway 3 is 60 km/h. The lead officer observed no vehicle or pedestrian traffic present. GPS data from the two police vehicles indicates they reached top speeds of approximately 146 and 154 km/h, in the initial stages of the pursuit on Highway 3 through Fernie, although these speeds were only very briefly maintained. This portion of Highway 3 has two eastbound lanes and two westbound lanes with shoulders on the side. The road was bare and dry at the time.

A third officer was in a marked police vehicle stopped at an intersection with Highway 3, slightly less than 2 kilometers from the initial police encounter. This officer observed the SUV quickly approaching with the two police vehicles following, and reports that there was quite a gap between the SUV and police.

After the SUV passed, this officer activated his emergency equipment and pulled out onto the highway. He was quickly passed by the original two police vehicles, and very soon abandoned the chase as he felt he had no chance of catching the vehicles.

As the lead officer passed the intersection where the third police vehicle had been located the officer turned on his siren and wail function to accompany the emergency lights. The officer made a radio transmission declaring a pursuit as he was catching up to the SUV.

The pursuit proceeded into a section of Highway 3 which narrowed to two lanes. As the pursuit proceeded the officer observed the SUV pass the two vehicles ahead at a speed in excess of 160 km/h. The officer concluded at this point that it was obvious that the SUV was not going to pull over and a pursuit was a hazard to public safety. The officer could no longer track the rear lights of the SUV. As a result, the officer turned off the emergency lights and siren and announced he was calling off the pursuit but continuing to follow the SUV. The declared pursuit lasted less than a kilometer and for about 30 seconds, at which point the officer's vehicle had travelled about 3 kilometers from the point of first contact.

The evidence of the second officer is that he lost sight of the SUV just outside of town. Following the lead officer's direction, he turned off his emergency equipment but continued down Highway 3 at a high rate of speed.

Just outside Fernie, Highway 3 narrows to two lanes with a wide shoulder. It is generally flat and straight. Road conditions were bare and dry. The speed limit outside of Fernie increases to 80 km/h and then to 100 km/h.

The two officers passed the two vehicles which the SUV had passed, and then continued to follow at speeds averaging from 130 to 155 km/h for the next eight kilometers.

Approximately 8 kilometers from town the SUV attempted to pass another vehicle travelling in the same direction and side-swiped it. The driver who was side-swiped estimated that the SUV was travelling at 180 km/h, and he also described it as swerving. He states that some 15 to 20 seconds later the two police vehicles passed him at a speed of between 120 and 130 km/h.

At 00:34 a.m., eight minutes after the initial encounter and approximately 16 kilometers from the point of initial contact, the two officers came upon the scene of a collision. The SUV had rear ended another car which had ended upside down in the south ditch. The SUV was approximately 100 metres further down the road with roll-over damage.

### **Arrest of the Suspect**

The lead officer in the pursuit found the suspect in the driver's position in the SUV wearing a seatbelt. The vehicle was still running and the airbags had deployed. The driver had no visible injuries and he stated he was not injured. The officer observed symptoms consistent with alcohol consumption. The driver was placed under arrest and, as the officer was concerned that he might attempt to fight or flee, he ordered him to get on the ground.

With the assistance of the other officer, the arms of the suspect were handcuffed behind his back. As it appeared the suspect would be cooperative, the second officer went back to assist the others involved in the collision.

The suspect then complained of difficulty breathing, although the officer who was dealing with him states it was obvious that the suspect was having no difficulty breathing. The suspect suddenly became hostile and belligerent and attempted to roll over and fight with the officer. The officer attempted to keep him on his stomach. As the suspect began to writhe violently and fight the officer deployed his OC spray to the suspect's face without significant effect. He then used his radio to call for the second officer who attended. The two officers had difficulty restraining the suspect, and repeatedly ordered him to stop fighting. The suspect was again OC sprayed with little effect. He continued to fight and kick police and it was only after one officer struck him 4 to 6 times on the left side of his head that he responded that he would stop, and subsequently went limp.

After he had been placed in a police vehicle a paramedic attended and examined the suspect, who did not complain of any injury.

Later in police cells he again became hostile and belligerent. He was taken for a medical assessment several hours later, however the report indicates nothing arising from this assessment.

When released the next day police noted the suspect had some bruising to his left ear and a small amount of blood on his left nostril. The suspect was photographed while at the Sparwood detachment and there were no apparent injuries to his face.

When interviewed by IIO investigators the suspect told them he was upset by the way he was treated by the RCMP officers. He stated that as he drove on the highway, the officer followed him within 3 or 4 car lengths. He looked back at the police vehicles and that is when he side-swiped a car. He states that the officer's vehicle was behind him the entire way with its emergency lights on.

He told investigators that after the collision the officer dragged him from the vehicle, handcuffed him and was '*pretty belligerent*'. He states that the officer pepper sprayed him and '*beat my head into the pavement*'. He states that the whole left side of his head was black and blue for at least two weeks while he was in police cells. He denied being drunk or using drugs, but he did acknowledge that he may have had a few drinks.

On March 26, 2014 the suspect pleaded guilty to two counts of Impaired Driving Causing Bodily Harm, Flight from Peace Officer and Dangerous Driving. He received an 18 month jail term less time spent on remand, and a three year driving prohibition.

### **Application of the Law to the Circumstances in this Case**

The officers' driving in this case can be divided into three parts: the initial chase; the declared pursuit; and following the vehicle at high speed.

The first responding officer was aware that the alleged driving by the suspect was extremely dangerous. The reported actions would constitute a serious offence and establish that the suspect posed a high risk to the public. In light of this, and on the available evidence, Crown Counsel has determined that the first steps taken in attempting to block the SUV were reasonable.

When the SUV initially took off at high speed, it was reasonable for both officers to attempt to catch up to it. From what the officers knew at that point, it would reasonably place the public at greater risk if they did not attempt to close the distance and pull the offending vehicle over, particularly because it was entering the main highway which would likely have more traffic. It is significant that the officers noted that there was no traffic or pedestrians until they came upon the two vehicles travelling in the same direction on the highway, after having left town.

The lead officer caught up to the SUV less than two kilometers from the start of the chase and at this point he turned on his siren and declared a 'pursuit'. These actions complied with the applicable regulations and guidelines. At this stage, it was reasonable for the officer to make an attempt to pull over the suspect vehicle since he had closed the distance. The danger to the public was mounting and an attempt to apprehend the suspect was arguably required.

The declared pursuit lasted about 30 seconds and was called off when it was clear that the suspect would not pull over. Crown Counsel has concluded that the police actions up to this point were reasonable and justified.

The final segment of driving was following the suspect at high speed on Highway 3 without emergency equipment activated. Whether the officers' speed was justified requires an assessment of all the surrounding circumstances.

Crown Counsel considered a number of factors to be particularly relevant:

- The suspect's driving was extremely dangerous and a significant risk to the public.
- At the time of the events in question road conditions were good and traffic was light.
- The portion of Highway 3 involved outside of Fernie is relatively straight.
- Other than the vehicles passed just outside Fernie, the only vehicles present on the Highway were the two that the suspect vehicle struck.

- The officers had lost visual contact with the offending vehicle. While under the applicable regulations this is deemed to increase the risk, it must also be noted that since the suspect could not see the officers, their driving could not reasonably have influenced him.
- The officers specifically called off the pursuit and turned off their emergency equipment.
- The speed of the officers' vehicles did not match that of the suspect and generally declined over the course of following the suspect vehicle.

Considering all of the circumstances Crown Counsel concluded that it could not be proven the officers were exceeding their legal authority to drive in the manner described during the time they continued to follow the suspect after suspension of the declared pursuit. At all stages, the officers considered the appropriate factors and made decisions on pursuit and following the offending vehicle which were appropriate given the risk. In light of this there is not a substantial likelihood of proving beyond a reasonable doubt that the officers were guilty of the MVA offence of Excessive Speeding.

The officers ignored controlled intersections and exceeded the speed limit. It is apparent that vehicles were operated in such a manner that they posed some risk to the public. As noted, however, the Crown would be unable to prove that the officers were driving without lawful authority. Taking into account the circumstances and road conditions described above, as well as that the officers involved were trained in high speed driving and the absence of any evidence that their driving actually endangered any vehicle or person directly, the Crown has concluded there is not a substantial likelihood they would be convicted of offences involving allegations Dangerous Driving, contrary to the *Criminal Code*. Peace officers must occasionally engage in risky driving to protect the public, however, risk alone does not necessarily equate to dangerous driving. The available evidence does not establish a marked departure from the standard of a reasonably prudent peace officer facing the same circumstances.

The Crown took into consideration the fact that the suspect's account of the pursuit and arrest is cursory, truncated and in contradiction with the physical evidence and the statements of other witnesses. His description of the event did not acknowledge that he drove at high rates of speed for about 8 minutes over a distance of 16 kilometers, instead implying a much shorter period where the incident unfolded rapidly.

His statement that the police vehicles were closely following him, and that his looking back caused him to side-swipe one vehicle which directly led to the collision with next, is in direct contradiction with the physical evidence of the collisions and the statements of all other persons involved.

The suspect also reportedly exhibited signs of intoxication at the time of the incident. Although in his statement to the IIO he disputed being drunk or on drugs, he acknowledged that he may have had a few drinks. After the incident, however, he pleaded guilty to impaired driving offences. The consumption of alcohol affects the reliability of his recollection and his ability to accurately recount the events.

Crown Counsel has also concluded that a court would be likely to place little weight on the allegations of the suspect with respect to the use of force against him. The evidence of the officers involved is consistent with each other; as well as with all the other witnesses and the available physical evidence.

The arrest of the suspect was justified and appropriate, and the officers only resorted to using force when he began to resist the arrest. Initially, the officers tried to hold the suspect on the ground and repeatedly instructed him to stop resisting. The use of force was only escalated when the suspect would not comply and the officers were beginning to lose control. On the available evidence it cannot be proven that the officers used more force than was necessary to

effect a lawful arrest. As an excessive or unlawful use of force cannot be established, there is no substantial likelihood of proving a criminal assault beyond a reasonable doubt.

As a result of the preceding analysis, no charges have been approved against the officers who were the subject of the IIO investigation.

**Materials Reviewed by Crown Counsel**

- Executive Summary and Detailed Narrative.
- Summaries and transcripts of witness statements.
- Police officer's notes, Prime reports and ``will says``.
- RCMP Report and Narrative for relevant files.
- GPS mapping and speed data for the police vehicles.
- Photographs, maps and satellite imagery.
- Guidelines for Pursuit issued by the Police Services Division, Ministry of Justice.