



MEDIA STATEMENT

CRIMINAL JUSTICE BRANCH

April 10, 2017

17-08

No Charges Approved following arrest by Smithers RCMP Officers

Victoria – The Criminal Justice Branch (CJB), Ministry of Justice, announced today that no charges have been approved against two members of the Smithers RCMP involved in an arrest of an individual on August 14, 2015. In the course of the arrest, the suspect became combative and had to be physically restrained. During this process the suspect suffered a lacerated kidney and spleen. The incident was investigated by the Independent Investigations Office (IIO), which subsequently submitted a Report to Crown Counsel (RCC) for review by the CJB.

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

In this case, the CJB has concluded that the available evidence does not meet the CJB's charge assessment standard. The CJB would not be able to prove, beyond a reasonable doubt, that either of the officers committed a criminal offence or used excessive force in the administration or enforcement of the law. No charges have been approved. A Clear Statement explaining the decision in more detail is attached to this Media Statement.

In order to maintain confidence in the integrity of the criminal justice system, a Clear Statement explaining the reasons for not approving charges is made public by the CJB in cases where the IIO has investigated the conduct of police officers and forwarded a report for charge assessment.

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Clear Statement

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Summary of Decision

At approximately 8:30 p.m. on August 14, 2015, two officers of the Smithers RCMP detachment responded to a 911 complaint of a suspect causing a disturbance outside the home of the complainant. The complainant advised the police that the suspect was “stalking” her, banging and kicking her door, was intoxicated, and that she was too scared to answer the door. The officers learned that based on events from earlier that day, the suspect was arrestable for assault and was possibly in breach of his probation conditions. The suspect was known to one of the officers as having a history of being violent through previous interactions with police.

The officers arrived to find the suspect standing outside the door to the complainant’s basement apartment. The accused was placed under arrest for assault and causing a disturbance. During his arrest, the suspect became combative, resulting in a physical altercation between the suspect and the officers. During the altercation, the suspect punched officer A in the face, struck officer B on his arm, and spat at the officers. The officers deployed oleoresin capsicum (“OC” or “pepper”) spray, a Taser, and a baton, in order to gain control of the suspect. Following the altercation, the suspect received medical treatment and was diagnosed with a lacerated kidney and spleen. He was treated non-surgically and released from the hospital on August 19, 2015.

The suspect was later charged with a number of offences, including assault of the two police officers. He pled guilty to one count of assault and one count of mischief and was sentenced to six months jail.

As a result of the injuries to the suspect the IIO conducted an investigation and subsequently submitted a Report to Crown Counsel. Following a thorough review of the available evidence the CJB has concluded that the evidence does not support approving any charges against the police. As a result no charges have been approved.

This Clear Statement contains a summary of the evidence gathered during the IIO investigation, and the applicable legal principles. These are provided to assist in understanding CJB’s decision not to approve charges against the officers involved in the incident. Not all of the relevant evidence, facts, case law, or legal principles are discussed.

The charge assessment was conducted by a Crown Counsel with no prior or current connection with the officers who were subject of the IIO investigation.

Charge Assessment and the Criminal Standard of Proof

The Charge Assessment Guidelines applied by the CJB in reviewing all Reports to Crown Counsel are established in Branch policy and are available online at:

www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/cha-1-charge-assessment-guidelines.pdf

Briefly put, in discharging the charge assessment responsibility, Crown Counsel must fairly, independently, and objectively examine the available evidence in light of the legal elements of any offence that may have been committed in order to determine:

1. whether there is a substantial likelihood of conviction; and, if so,
2. whether a prosecution is required in the public interest.

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. The person accused of a crime does not have to prove that he or she did not commit the crime. Rather, the Crown bears the burden of proof from beginning to end. When assessing the strength of the case the Crown must also consider the likelihood that viable defences will succeed.

The burden of proof applies to issues of credibility. A criminal trial is not a simple credibility contest between witnesses for the Crown and witnesses for the defence. If the accused testifies, he is entitled to be acquitted in any or all of the following circumstances: the trier of fact accepts his evidence; his evidence raises a reasonable doubt; the trier of fact does not know whom to believe; or, even if the trier of fact does not accept the accused's evidence, there remains a reasonable doubt on the totality of the evidence.

Potential Charges

The potential charges against the officers that were considered in this assessment are:

- Assault Causing Bodily Harm contrary to s. 267(b) of the *Criminal Code*.
- Assault with a weapon contrary to s. 267(a) of the *Criminal Code*.

Assault is defined in the *Criminal Code* as the intentional application of force to another person without that person's consent. Bodily harm is harm that is more than "trifling or transient". The weapons at issue in this case are the batons and the oleoresin capsicum (OC) spray.

Relevant Law

Under section 25(1) of the *Criminal Code* a police officer is justified in using force to effect a lawful arrest, provided the officer acts on reasonable and probable grounds and uses only as much force as reasonably necessary in the circumstances.

Section 26 of the *Criminal Code* limits the amount of force that may be used. It provides that an officer is criminally responsible where the force used 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 society, given its grave consequences.

Police do not have 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. They 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.

Circumstances of Police Attendance

On the evening of the incident, the police had received three reports involving the suspect. At approximately 5:20 p.m., a woman called 911 to report that the suspect pushed her grandson

off of a trampoline after she asked the suspect to leave her home because he was drinking. An hour later the same woman called 911 again to report that the suspect was at the neighbour's (complainant's) house and that he had "almost broken her door down." The complainant herself contacted 911 shortly thereafter to advise that the suspect was near a local convenience store on Main Street. RCMP members went to the store to find the suspect but were not successful.

At approximately 8:30 p.m., the first woman called 911 for the third time to report that the suspect was back at the complainant's residence "trying to break in her door." The complainant called 911 as well, stating that she knew the police were looking for the suspect and that he was outside.

Evidence of Suspect

The suspect was interviewed after the incident by the IIO and provided a statement.

The suspect acknowledged drinking alcohol the day of the incident and conceded that he and his cousin had shared a "26'er of vodka" and they were "just getting into" a case of beer. The suspect recalled an incident before the police involvement with a small child whose mom got mad at him "because he was drunk" and he recalled attending at the residence of the complainant, who he described as his girlfriend, and banging on her door. He said she answered the door and then "the next thing you know" two RCMP cars arrived.

The suspect described the police grabbing him and "macing" him almost immediately. He said that he felt a couple of blows from the police and he started swinging back. He said he was thrown down the stairs and tackled on the grass and then the police jumped or "stomped" on his back. He said he was handcuffed but remembered little more until he ended up in the police car where he tried to kick out the window. At that point he says he was sprayed again with "mace".

Evidence of Officers

The officers involved provided independent accounts of the incident that were consistent in all material respects. At approximately 6:00 p.m., the attending officers were told that the suspect had assaulted a young boy earlier that day. The suspect had apparently pushed the young boy off of a trampoline. The officers were advised that the suspect was arrestable for assault if located. At approximately 8:28 p.m., the complainant called the police and advised that the suspect was outside of her residence, trying to get in. She advised that the suspect calls her 100 times a day and is stalking her.

The officers arrived at the complainant's residence at approximately 8:35 p.m. They saw the suspect standing outside the door to the basement suite in a shallow stairwell, wearing only shorts and shoes. Officer B verbally arrested the suspect for assault and causing disturbance. He told the suspect to walk up the stairs. The suspect refused and would not move. He started yelling and swearing at the police. Officer B verbally arrested the suspect for obstruction and told him again to come up the stairs.

The suspect continued swearing at police then moments after, ran up the flight of stairs at Officer B with his fists raised. Officer B started backing up, drew the Taser from its holster and told the suspect to stop or he would be tasered.

The suspect then quickly turned toward Officer A and started to charge at him. Officer B had the Taser pointed at the suspect and was yelling at him to stop as he was under arrest. The suspect continued toward Officer A, who sprayed the suspect with OC Spray (pepper spray). The suspect punched Officer A on the right side of his face near his eye. The suspect then picked up a hand full of rocks with his left hand and threw them at Officer B striking him in the chest. Officer B deployed the Taser without effect. Realizing the deployment was ineffective he reached for his baton. The suspect punched Officer B in the right elbow/triceps area as he was reaching for his baton. Officer A kicked the suspect in the stomach then delivered two strikes

with his baton to the suspect's lower extremities. The suspect continued to attempt to throw more punches at both officers. The suspect was eventually taken to the ground and handcuffed. As the suspect continued to struggle the officers restrained him by kneeling on him and holding him on the ground telling him to stop resisting.

The suspect stopped trying to fight. The officers then helped the suspect to his feet and walked him to the police vehicle and placed him in the back seat on the passenger side.

The suspect immediately started kicking at the rear driver's side door. With each kick the door moved off the frame. Officer A opened the passenger side rear door and told the suspect to stop kicking the door or he would be sprayed again. The suspect swore at Officer A and kicked at the door harder. Officer A sprayed the suspect again which proved more effective this time as the suspect stopped kicking.

Officer A then attempted to read from his charter card to the suspect through a half open passenger window, when the suspect spat at Officer A, narrowly missing his face. Officer A moved back away from the door and rolled up the passenger window.

Officer B contacted Emergency Health Services to meet the officers at the detachment in order to provide medical treatment to the suspect who had complained he was having difficulty breathing and that his face burned from the pepper spray. The suspect was transported to the hospital for further medical treatment, was assessed by a doctor and deemed fit for release. He was then transported back to cells.

Following the incident, Officer B experienced soreness on his right triceps area where the suspect hit him during the altercation. Officer A was diagnosed with a concussion.

Medical evidence

The next day, the suspect complained of stomach pain and was transported back to the hospital. He was ultimately flown to Vancouver General Hospital for further assessment and treatment. According to his medical records, the suspect was diagnosed with a "splenic and left kidney laceration with no active bleeding." A large bruise was observed on the left side of his back. He was treated non-surgically and discharged from the hospital on August 19, 2015, to North Fraser Pre-Trial Centre.

Evidence of Civilian Witnesses

The complainant and a neighbour were interviewed following the incident.

The complainant advised that she first met the suspect approximately two months before. Since then, he would not leave her alone. She told him many times she did not want to go out with him and asked him to stop calling her. She told investigators they were never dating at any point.

The complainant recounted that earlier that day, around 3:30 or 4:00 p.m., the suspect showed up at her house and followed her to the convenience store. He would not leave her alone so she called the police to report his location. A few hours later, he came back to her house and was banging on her door "like scary loud." She called the police again. She advised that she is scared of the suspect when he has been drinking.

The complainant observed the incident from inside the house and confirmed that the suspect rushed at the first officer who attempted to arrest him. She confirmed that the suspect struck one officer in the face, threw rocks at the officers, and was fighting with the officers, resisting their efforts to restrain him. She confirmed the attempt by the suspect to spit in the face of the officer and related that she saw the suspect repeatedly try to kick out the door and window of the police vehicle.

A neighbour who lived across the street from the complainant also described her observations to the investigators. Although her view was partially obstructed she observed that the police “had to fight with [their batons], like they were being attacked. It was a fight.” She further noted that [i]n restraining him [the police] had to fight, they had to actually self-defend themselves.”

Use of force report

In the course of the IIO investigation, a use of force opinion was obtained from a member of the Oceanside RCMP in Parksville, British Columbia. The scope of the opinion was limited to “the reasonableness of the actions of Officer A, specifically to the use of oleoresin capsicum (OC) spray against the suspect inside the police vehicle to determine whether such use of force was appropriate under the circumstances.”

The reviewing officer offered the opinion that it would be reasonable for a police officer given the totality of the situation to use OC spray in this manner to prevent a person from kicking the police door completely open while in transport. Given the violent behaviour of the suspect, more harm would have come to the police officers or the suspect, had the police tried any other form of intervention to stop the suspect’s actions and allow for the police to safely transport him to cells.

The NCO i/c Operational Skills Training Unit, RCMP “E” Division Use of Force Reviewer/ Coordinator, conducted a peer review of the reviewing officer’s report. The NCO agreed with the opinion that the force used by Officer A in dealing with the suspect was reasonable, necessary, and consistent with RCMP policy and training standards.

Application of the Law to the Evidence

Based on the information that the suspect had assaulted a young boy, that he was in breach of his probation conditions, and that he was “stalking” the complainant the officers clearly were in the lawful execution of their duty in arresting the suspect. Accordingly, the officers were authorized under s. 25 of the *Criminal Code* to use as much force as reasonably necessary to achieve that purpose. The only issue is whether the force used was excessive.

Clearly, the suspect did suffer injuries during the altercation, as evidenced by the bruising to his back and diagnosis of a lacerated kidney and spleen. This is some evidence that the degree of force used was significant. Whether the force used was excessive requires a consideration of all the circumstances.

Although the suspect alleges that the officers came up to him and immediately started “macing” him after telling him he was under arrest, the weight of the evidence available suggests the suspect was the aggressor and was combative with the police throughout the incident. The suspect’s evidence is starkly inconsistent with that of the officers and the civilian witnesses.

According to the complainant, when Officer B first interacted with the suspect to tell him he was under arrest, the suspect came “flying up the stairs” at the officer. According to Officer B, the suspect “ran up the flight of stairs with his fists raised.” Officer A’s notes state that the suspect “charged” up the stairs towards Officer B.

The complainant described the suspect as “totally belligerent” and felt that the officers were defending themselves. Even after the use of a Taser and their batons, the suspect continued to fight with the officers – he “wasn’t going down.” This is consistent with the officers’ evidence that the suspect was coming towards them with “fists raised” and was “swinging” at them.

The evidence suggests that the suspect’s injuries were caused while the officers were trying to get control of the suspect in order to handcuff him. The suspect was intoxicated and behaving violently towards the officers throughout the altercation. A trier of fact would likely accept that the force used in the circumstances was both necessary and reasonable to control the suspect in order to effect his arrest.

There is no evidence beyond the severity of the injuries themselves to suggest that any aspect of the officers' use of force against the suspect during the physical altercation was improper, gratuitous or excessive. At trial, the officers' conduct would be found reasonable and necessary in the circumstances, and thereby justified under s. 25 of the *Criminal Code*.

Was Officer A's use of OC spray against the suspect in the police car justified?

The issue remains whether Officer A's use of OC spray against the suspect in the police car was legally justified. Under s. 27 of the *Criminal Code*, everyone is justified in using as much force as is reasonably necessary, (a) to prevent the commission of an offence (i) for which, if it were committed, the person who committed it might be arrested without warrant, or (b) to prevent anything being done that, on reasonable grounds, he believes would, if it were done, be an offence mentioned in paragraph (a). Accordingly Officer A would be entitled to rely on s. 27 of the *Criminal Code* as a justification for using force against the suspect in order to prevent him from committing the offence of mischief in relation to damaging the police vehicle provided the force used was not excessive.

According to the evidence of all witnesses, the suspect was kicking the police cruiser door repeatedly and with significant force and the suspect ultimately pleaded guilty to the offence of mischief. In order to maintain his distance and to avoid being kicked by the suspect, Officer A opted for the use of OC spray to re-direct the suspect's attention from kicking the car towards the discomfort caused by the spray.

The expert opinion evidence supports the view that the use of OC spray to prevent the suspect from committing the offence of mischief was reasonably necessary and proportionate in the circumstances of this case.

The available evidence does not demonstrate that the force used by either officer was disproportionate or excessive in the circumstances. Accordingly, the officers' conduct was legally justified under both s. 25 and s. 27 of the *Code*. This would serve as a complete defence to both officers on a charge of either assault causing bodily harm under s. 267(b) or assault with a weapon under s. 267(a) of the *Code*.

Conclusion

There is no substantial likelihood of conviction with respect to a charge of assault causing bodily harm or assault with a weapon against either of the two attending officers and no charges have been approved.

Material Reviewed

In making the charge assessment decision in this matter the following materials were reviewed:

- Executive summary and detailed narrative;
- Summaries and transcripts of statements of witnesses
- RCMP PRIME report and handwritten notes authored by officers
- Medical records of the suspect;
- Photographs of injuries to the suspect and Officer A;
- Use of force opinion of RCMP and one-page peer review report; and,
- IIO investigator notes and task action reports.