



**PUBLIC REPORT OF THE
CHIEF CIVILIAN DIRECTOR**

**REGARDING SERIOUS INJURIES SUFFERED BY
A MALE WHILE BEING TAKEN INTO CUSTODY BY
THE VANCOUVER POLICE DEPARTMENT
ON 2015 SEPTEMBER 21**

IIO 2015-152

Chief Civilian Director:
Legal Counsel:
IIO File Number:
Date of Decision:

Albert Phipps
Clint Sadlemyer, Q.C.
2015-152
2017 SEPTEMBER

INTRODUCTION

The Independent Investigations Office (IIO) is responsible for conducting investigations into all officer-related incidents which result in death or “*serious harm*” (as defined in Part 11 of the *Police Act*) within the province of British Columbia. The Chief Civilian Director (CCD) of the IIO is required to review all investigations upon their conclusion, in order to determine whether he considers “*that an officer may have committed an offence under any enactment, including an enactment of Canada or another province*” (see s.38.11 of *the Police Act*). If the CCD concludes that an officer may have committed an offence, he is required to report the matter to Crown counsel. If the CCD does not make a report to Crown counsel, he is permitted by s.38.121 of the *Police Act* to publicly report the reasoning underlying his decision.

In this public report, the CCD includes a summary of circumstances that led to the IIO investigating and a summary of the findings of the investigation.

This is a public report related to an investigation involving a male who sustained serious injuries while he was being taken into custody by the Vancouver Police Department. On 2015 September 21, police received a 911 call about a person breaking into a marijuana dispensary. Officers responded and during the course of their interaction, physical force was used to detain and arrest the affected person. He suffered several broken facial bones during the incident.

Pursuant to s.38.11 of *the Police Act*, RSBC 1996 Chapter 367, the CCD has reviewed the concluded investigation. The CCD does not consider that any officer may have committed an offence under any enactment and will not be making a report to Crown Counsel.

In this public report, the CCD is only permitted to disclose personal information about an officer, an affected person, a witness, or any other person who may have been involved if the public interest in disclosure outweighs the privacy interests of the person. Prior to disclosing any personal information, the CCD is required, if practicable, to notify the

person to whom the information relates, and further, to notify and consider any comments provided by the Information and Privacy Commissioner (s.38.121(5) of the *Police Act*). The CCD has considered the advice provided by the Information and Privacy Commissioner. In this report, the CCD will not be using the name of the affected person or the name of any other person involved in this matter.

IIO NOTIFICATION

On 2015 November 12 the Independent Investigations Office (the IIO) was notified of this incident pursuant to s. 177.1 of the *Police Act*, by the Office of the Police Complaints Commissioner (OPCC). The IIO initiated an investigation in accordance with s.38.02(1)(d) of the *Act*.

The incident began on 2015 September 21 at 0337 hours when the Vancouver Police Department (VPD) received a complaint a person was breaking into a marijuana dispensary across the alley from a Vancouver residence. An officer who is the subject of this investigation and another officer (Witness Officer 1) responded. The Subject Officer (SO) waited a short distance to the south up the alley while WO1 covered the northern end. The affected person was seen to come out of the dispensary and ride his bicycle southbound towards the SO. The SO used physical force to detain and arrest him. The affected person suffered broken facial bones.

Notification in this case was delayed because the extent of the man's injuries was not confirmed until after he was released from custody and the duty officer was not informed.

ISSUE

The issue to be considered in this case was whether the SO may have committed the offence of assault causing bodily harm when he used force to detain and arrest the affected person.

EVIDENCE CONSIDERED

Evidence examined in this investigation includes statements made by civilian witnesses, statements made by witness officers, medical evidence, information obtained through neighbourhood canvassing, and 911 dispatch records. Police policy regarding Use of Force was also assessed.

AFFECTED PERSON

The affected person was interviewed by IIO investigators and provided a statement for this investigation. He told the IIO he was riding a bicycle southbound in an alley when he observed four officers run toward him. He said the officers were in front of and to the left of him. He said one officer (the Subject Officer) was in the lead and two other officers were “*right coming behind him.*” He made no further reference to a fourth officer.

The affected person said he was not immediately aware they were police officers but came to that determination after he heard the SO yell “*stop*” and one of the officers behind him shout “*Vancouver Police.*” He said the SO was in plain clothes.

The affected person said the SO was about six metres from him and hidden behind “*tarps and stuff.*” He told the IIO the SO yelled “*stop—you’re under arrest*” and one of

the other officers said “*get on the ground.*” The affected person said he told officers “*You’ve got the wrong guy.*”

The affected person said he stopped and stood with his legs straddling the bicycle frame and his hands holding the handlebar. He said he did not get on the ground because he “*was holding [his] bike up.*” The affected person told the IIO that not getting off the bike and down on to the ground, “*was probably what caused the takedown.*”

The affected person said the SO approached the left side of the bicycle and grabbed both of his arms near the shoulder and rotated counter clockwise to forcefully pull him off the bicycle. He said that as his head went down the SO “*fed me a knee to the face.*” He told the IIO he was struck one time only and no words were exchanged. He said no other officer was involved in the altercation.

The affected person said the alley was dark. He estimated that from the moment he first observed the officers to when he was pulled off the bicycle was about two to three seconds.

The affected person said as he lay face down on the ground he was surrounded and told not to move. He said the officers searched his backpack and he was handcuffed. About five minutes later an officer assisted him up into a seated position. He said he was in a lot of pain and there was “*a lot of blood.*” He said he told the officers he thought his jaw was broken.

The affected person said the SO told him it was “*good to meet you*” and he should “*go back to Victoria*” and “*this is what happens when you mess with the Vancouver Police.*”

The affected person said two paramedics arrived and told the police he did not have a broken jaw and could be arrested but would have to go to the hospital to “*get checked out.*” He said he was taken to the VPD jail in a police wagon and once there was

examined by a nurse who said he needed to go to the hospital. He said he was taken to hospital and treated.

The affected person remained in custody and was charged with and pled guilty to breaking into the dispensary.

OPCC COMPLAINT

The affected person made a handwritten complaint to the Office of the Police Complaint Commissioner. Therein he asserted that he *“...was rushed by officer not in uniform, I was on my bike, so clearly had time to turn around and ride away.”*

CIVILIAN WITNESSES

Civilian Witness 1 (CW1)

CW1 was in a house near the marijuana dispensary. She told the IIO she heard sounds which she believed was like someone was trying to break through a door or wall. Later she heard glass breaking and called 911.

She said she heard some shouting in the lane but could not make out the words. A bit later she saw the police:

“...had the guy sitting on the ground with his hands behind his back, handcuffed...I saw no evidence of police brutality at all. In fact I thought the police were very polite and considerate...they were going through the contents of

his backpack, which included -- because somebody was reading the list to someone else who was writing it down, including stud finders and a volt meter."

Civilian Witness 2 (CW2)

CW2 lives near the dispensary. He told the IIO he could see someone "skulking around" near a boarded-up window on the south side of the dispensary. He said that as he watched, "...I could see him prying and pulling at the window frame."

CW2 said he called 911 and:

"I had turned away for a moment to pick up the phone and actually communicate with the police dispatcher. When I looked back I just saw the tail end of his behind and feet going into the shop. That was through the boarded-up window on the south side of that little square building."

CW2 said he heard the [affected person] crashing around in the shop, even after turning on the lights, and then:

"...he sort of fell out of the window onto the ramp...Picked up his backpack first... then his bicycle. Sort of got onto the bicycle. He was a bit woozy, I think. He just didn't seem to be very coordinated."

CW2 said he thought the affected person was going to get away when he heard a vehicle and shouts and "We've got him." He did not see the affected person being detained or arrested.

CW2 told the IIO he went out to the alley and saw the affected person sitting on the ground handcuffed behind his back. He said a uniformed officer was standing over the affected person and no-one else was near him. He said other officers were going through a backpack.

CW2 said he did not hear the affected person speak at any time and there was no conversation between the affected person and the SO.

Civilian Witness 3 (CW3)

CW3 is a paramedic with the BC Ambulance Service. He told the IIO a request was received from the VPD to provide a patient wellness check and he and his partner attended the scene. He said the affected person was seated and surrounded by six to eight police officers.

CW3 said the affected person was handcuffed. He said he did not seem impaired. He said he saw a bicycle and thought most of the officers “*were wearing undercover stuff.*” CW3 said he asked officers: “What happened?” and was told by one of the officers that the affected person, “*...fell off his bike and we just kind of like want to get him checked-out ... and has a lac [laceration] on his head.*”

CW3 told the IIO he recalls saying out-loud to the officer that the patient did not have a “*lac*” on his head but a bloody nose and there was no comment in response.

CW3 saw a small amount of fresh blood dripping from the affected person’s nose and there was a minimal amount of blood on the affected person’s clothes. He said there was no other injury observed on his head.

CW3 told the IIO that when he asked the affected person what happened he was told by him that, “*I fell off my bike.*” CW3 felt this seemed less than forthcoming however the affected person was cooperative but indicated he did not want to be checked-out or go to the hospital.

CW3 would not speculate how the affected person was injured however he thought it was possible he may have done so by falling off the bicycle.

OFFICERS

The IIO uses the term witness officers and subject officers to distinguish between officers who witnessed the incident as opposed to officers who are the subject of the IIO investigation over their direct involvement, which may have caused the serious harm or death.

WITNESS OFFICER 1 (WO1)

WO1 told the IIO he did not make any notes of the incident. He said he was partnered with the Subject Officer (SO) and both were in plainclothes in an unmarked SUV with the SO driving. He said they heard over the police radio that a break and enter was in progress at a marijuana dispensary. He said dispatch indicated the complainant heard breaking glass and the burglar was believed to be inside the dispensary.

WO1 said as they approached the scene he got out and the SO drove further on. He said he positioned himself to see the north and west sides of the dispensary. He said he radioed to the SO to walk north in the alley to observe the south side of the dispensary.

WO1 said he heard breaking glass and saw a light was on in the dispensary. He next saw a male (the affected person) emerge on a bicycle from the parking lot area west of the building. He said the affected person started riding the bicycle with a wobble and then after four or five cranks on the pedals, straightened-out and accelerated in speed as he moved at a moderate pace southbound in the alley toward where the SO was.

WO1 radioed his observations to the SO, who he said was 100 to 150 feet away. He said that as the affected person went past, the SO came toward and “dragged the male off his bike” and began to take him into custody.

WO1 said the SO “...grabs him in a bear hug and pushes him off the bike, kind of coming over top of the bike. Around, like the upper portion of his body.” He said it was “seconds” from when the affected person emerged until he arrived near the SO.

WO1 said neither officer announced themselves as police or issued verbal commands before the takedown. He said the concern was that if he had shouted at the affected person to, “Stop. Police, he would simply ride harder...it would have simply alert[ed] him and caused him to ride harder...”

WO1 said both he and the SO were taught and have instructed courses including tactics to apprehend suspects when both officer and suspect are on foot. He said:

“The concept of it is to engage in a foot takedown...there is a measure of surprise, because you are not doing conventional police takedown with identification and otherwise. The element of surprise allows you to take a person in custody safer than stepping out in plainclothes and demanding someone to stop, trying to convince them that you are a police officer and providing them an opportunity to reach for weapons, or make their escape or whatever else.”

He also said that:

“...if I was in [the SO’s] position, I would have acted in the same way. I wouldn’t have identified myself, because it just provides an opportunity for [the affected person] to make his escape, and increases risk to the officer that he could get injured. So, I would have stepped out and done exactly that. You tackle him off the bike or dragged him off, and then begun identifying myself as a police officer once I was taking him in custody and giving him commands to show his hands and otherwise.”

WO1 said that once the SO pulled the affected person off the bike, he began giving him commands such as “*give us your hands.*” He said he ran towards the SO to assist him as he did not know whether the affected person may have had a weapon.

WO1 said the affected person was facedown and was wearing a backpack. He said the affected person did not comply with the SO’s direction to “*give us your hands*” and the man had his hands between the ground and his torso. He said while the affected person was not combative, he kept his hands clenched underneath and adjacent to his body.

He said as he arrived to where the SO and the affected person were on the ground he saw the SO deliver a knee strike to the shoulder-head upper portion of the affected person who then immediately became subdued and submitted to being handcuffed. He said no other officers were present at this time.

WO1 said the SO did not deliver a knee strike as he pulled the affected person off the bicycle. He said he did not hear the SO say “*Go back to Victoria ... this is what happens when you mess with the Vancouver Police.*”

SUBJECT OFFICER

The Subject Officer declined to provide the IIO with a voluntary statement which is his right pursuant to the *Charter of Rights and Freedoms*.

MEDICAL EVIDENCE

Medical records indicate the affected person suffered several facial fractures.

LAW

Culpability for an officer's use of force is governed by the following provisions set out in the *Criminal Code of Canada*:

1. A police officer acting as required or authorized by law “*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.*” (section 25(1)).
2. Any police officer who uses force “*is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess.*” (section 26).

In an evaluation of the reasonableness of an officer's use of force, the following application of the law is required:

The Supreme Court of Canada in *R. v. Nasogaluak*, 2010 SCC 6 held that:

[32] ... police officers do not have an unlimited power to inflict harm on a person in the course of their duties. While, at times, the police may have to resort to force in order to complete an arrest or prevent an offender from escaping police custody, the allowable degree of force to be used remains constrained by the principles of proportionality, necessity and reasonableness. Courts must guard against the illegitimate use of power by the police against members of our society, given its grave consequences.

However, the Court went on to say that:

*[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. As Anderson J.A. explained in *R. v. Bottrell* (1981), 1981 CanLII 339 (BC CA), 60 C.C.C. (2d) 211 (B.C.C.A.):*

In determining whether the amount of force used by the officer was necessary the jury must have regard to the circumstances as they existed at the time the force was used. They should have been directed that the appellant could not be expected to measure the force used with exactitude. [p. 218]

The allowable degree of force to be used remains constrained by the principles of 'proportionality, necessity and reasonableness' (*Nasogaluak*).

ANALYSIS

The affected person's complaint to the OPCC is with regard to a blow to his face which he told the IIO occurred as he was being taken off his bicycle by the Subject Officer (SO). The affected person's complaint is that he received a gratuitous knee strike to his face as he was being apprehended. The following analysis is based on his accounts.

The affected person told the IIO that, from the time he first saw the officers until he was pulled off the bicycle, was about two to three seconds. He said the SO was about six metres away and was running at him. He said the SO yelled at him to "stop" and one of the officers behind the SO shouted "*Vancouver Police*." He said he was not immediately aware they were police officers and only came to that determination after he heard the SO yell "stop" and one of the officers behind him shout "*Vancouver Police*."

The affected person also said the SO told him "*stop—you're under arrest*" and that one of the other officers said "*get on the ground*." He said that prior to being pulled off the bicycle he told the officers "*You've got the wrong guy*." He said he stopped the bicycle and was standing stationary.

The affected person told the IIO that he did not comply with police direction to get on the ground. He said “...*I didn't get on the ground because I was – had the bike between my legs*” and that he believed that, “...*was probably what caused the takedown.*”

The SO is duty bound to protect the property of the citizens of Vancouver. Eyewitnesses saw the affected person breaking in and leaving a business premise. This information was relayed to the SO via police radio from his partner WO1. The affected person pled guilty to breaking into the dispensary.

In his complaint to the OPCC the affected person said that he, “...*was rushed by officer not in uniform, I was on my bike, so clearly had time to turn around and ride away.*”

If the affected person so clearly had the time to turn around and ride away in the two to three second time-frame he says the interaction with police occurred, the situation would have been so fast paced and dynamic that the SO would have to have acted quickly and decisively to end the matter. The shouting by the police as described by the affected person would have occupied at least one-half of the time-frame in which he said the events occurred, leaving only moments for the SO to react in a manner that would not compromise his own safety.

The risk that the affected person had a weapon is not improbable. In these circumstances, a blow of sufficient force to stun the affected person while gaining control over him is a reasonable and proportionate measure. The dynamic pace of events and the affected person's admission that he did not get on the ground when he was directed, left no time for the SO, “*to measure the force used with exactitude.*”

The training regime described by WO1 suggests the element of surprise allows for a safer interaction with a suspect being apprehended on foot. The scene is a dark alley. It would be impossible to ascertain whether the affected person possessed a weapon and there could have been a likelihood that he possessed break-in tools that could be used as weapons.

The account by WO1 refers to the training in common he shared with the SO that is at odds with what the affected person said happened. In particular WO 1 describes a knee strike being used to secure compliance where the affected person is said to have presented a very real potential danger by struggling and refusing to show his hands.

The circumstances described by W01 afford the reasonable grounds that justify the SO's use of force as described by WO1. The SO was required and authorized to apprehend and detain the affected person. In so doing he was permitted to use, "*as much force as is necessary for that purpose*".

Where a person's hands cannot be seen and it is unknown whether he has a weapon or other dangerous object and that person is struggling and refusing to cooperate an officer may have to resort to the use of such force as the SO did in this case.

An analysis of each of the competing versions of the events herein does not disclose an excess of force being applied.

The complaint of unprofessionalism by making inappropriate comments is a matter that will be dealt with by the OPCC.

DECISION OF THE CHIEF CIVILIAN DIRECTOR

Based on all of the evidence collected during the course of this IIO investigation and the law as it applies, I do not consider that any police officer may have committed an offence under any enactment and therefore the matter will not be referred to Crown Counsel for consideration of charges.

Clint Sadlemyer, Q.C.
Legal Counsel

2017 September
Date of Decision

Albert Phipps,
Chief Civilian Director

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