

December 14, 2017

17-25

No charges Approved in Smithers RCMP in-custody Death

Victoria – The BC Prosecution Service announced today that no charges have been approved against a member of the Smithers RCMP involved in an in-custody fatality. On February 14, 2015 at approximately 11:00 p.m., a suspect was arrested and transported to the Smithers RCMP police detachment. Shortly after arriving at the detachment, the suspect attacked an officer and a physical altercation ensued. In the course of restraining the suspect, another officer held the suspect around his head and neck area. The suspect became unconscious and was taken to the hospital by ambulance. The suspect never regained consciousness. He died in hospital on February 21, 2015.

The Independent Investigations Office (IIO) conducted an investigation into the actions of the officer who held the suspect by the head and submitted a Report to Crown Counsel (RCC) for review by the BC Prosecution Service (BCPS). 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 BCPS. The Chief Civilian Director does not make a recommendation on whether charges should be approved.

In this case, the BCPS has concluded that the available evidence does not meet the BCPS's charge assessment standard. The BCPS would not be able to prove, beyond a reasonable doubt, that the officer 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 BCPS 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**17-25****Summary of Decision**

At approximately 10:34 p.m. on February 14, 2015, the Smithers RCMP received a 911 call from a young female reporting that her father was drunk, suicidal, holding a knife and being "really aggressive." While the caller remained on the line the dispatcher relayed information to the attending officers that the father was suicidal, and that he had just opened his gun safe and was aiming a firearm at his family. The family fled to a neighbour's residence.

When the subject officer arrived at the scene, the suspect was standing in the doorway of his home. After being asked to approach the officer, the suspect walked quickly and aggressively towards the officer with his hand in his pocket. The suspect refused to remove his hand from his pocket and said to the officer "shoot me" several times. The subject officer deployed O.C. (pepper) spray and was able to gain control of the suspect. The suspect was placed in the police car and taken to the local police detachment. The suspect was noted to be agitated and aggressive, at times asking the police to "just shoot me" and enquiring repeatedly who had pepper sprayed him. At the scene the suspect was offered decontamination for the pepper spray, assessed by Emergency Health Services (EHS) personnel, and cleared for transport to the detachment.

At the detachment, the suspect was dealt with by the subject officer and the officer's supervisor. Also present was the guard on duty at the time. Much of the interaction between the parties was captured on the detachment video cameras.

The suspect was initially provided a further opportunity to decontaminate from the pepper spray and was given water and paper towels in one of the cells in the detachment. He remained in an agitated and emotional state becoming more confrontational when taken to the booking area for processing.

As the suspect became more upset, the officers attempted to move the suspect back to the holding cell. In the process, the suspect became uncooperative and aggressive, at one point reaching for the subject officer's firearm. At this point the officers took physical control of the suspect and moved him toward the cell. Shortly before arriving at the cell, the suspect turned and lunged at the supervisor. The subject officer grabbed the suspect by the head and neck area and the suspect was taken to the ground. Initially the suspect was positioned face down with the subject officer beneath and beside the suspect maintaining his hold and the supervisor on the suspect's back attempting to handcuff the suspect. The guard

attempted to control the suspect's legs. After a brief struggle the suspect stopped resisting and went limp. The officers rolled him over and found that he had stopped breathing. They attempted to revive him by performing chest compressions and eventually got the suspect breathing again but he remained unconscious. EHS personnel were summoned and they arrived within minutes to assume care of the suspect. He was transported to hospital for treatment but never regained consciousness. He died approximately a week later.

As a result of the death of the suspect the IIO conducted an investigation into the actions of the officer who first dealt with the suspect and applied the head restraint. At the conclusion of the investigation the IIO submitted a Report to Crown Counsel. Following a thorough review of the available evidence the BCPS has concluded that the evidence does not support approving any charges against this officer. 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 the BCPS's decision not to approve charges against the officer 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 to the officer who was the subject of the IIO investigation.

Charge Assessment and the Criminal Standard of Proof

The Charge Assessment Guidelines that are applied by the BCPS in reviewing all RCCs are established in policy and are available 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

The Criminal Justice Branch applies a two-part test to determine whether criminal charges will be approved and a prosecution initiated:

- a) there must be a substantial likelihood of conviction based on the evidence gathered by the investigating agency; and
- b) a prosecution must be required in the public interest.

Under Branch policy, a substantial likelihood of conviction exists when Crown counsel is satisfied there is a strong, solid case of substance to present to the court. To reach this conclusion, a prosecutor 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 charge assessment, Crown Counsel must review the evidence gathered by investigators in light of the legal elements of any offence 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. The 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.

Potential charges

The potential charges that were considered in this case were manslaughter and criminal negligence causing death contrary to ss. 236 and 220 of the Criminal Code.

Relevant Law

A person commits homicide when, directly or indirectly, by any means, he or she causes the death of human being. Homicide that is not culpable is not a criminal offence. A person commits culpable homicide when he causes the death of a human being in the circumstances set out under s. 222(5) of the Criminal Code. Of relevance to this case are s. 222(5)(a) (causing death by means of an unlawful act), or s. 222(5)(b) (causing death by criminal negligence).

Manslaughter

A person who intends to cause death or intends to cause bodily harm that the person knows is likely to cause death, and is reckless whether death ensues or not, is guilty of murder. A person who causes death by an unlawful act without the intent for murder is guilty of manslaughter.

Criminal negligence

According to s. 219(1) everyone is criminally negligent who in doing anything, or in omitting to do anything that it is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons. Section 220 makes it an offence to cause death by criminal negligence.

Accordingly, in order to prove the offence of criminal negligence causing death against a police officer, the Crown must prove the following:

- i. The officer
 - a. acted, or,
 - b. omitted to act when legally obliged to act;
- ii. The officer showed a wanton or reckless disregard for the lives or safety of others; and,
- iii. The officer's act or omission caused the victim's death.

In the context of an allegation of criminal negligence by a police officer the Crown must show that the accused's conduct represented a marked and substantial departure from the conduct of a reasonably prudent person in the accused officer's circumstances. Conduct that is "reasonable" cannot be "wanton".

Legal Justification

Section 25(1) of the *Criminal Code* provides that a peace officer, who acts on "reasonable grounds", is "justified in doing what he is required or authorized to do and in using as much force as necessary for that purpose." Section 25(3) of the *Criminal Code* provides that a peace officer is not justified in using force that is intended or is likely to cause death or grievous bodily harm unless the officer believes on reasonable grounds that it is necessary for the self-preservation of the officer or the preservation of any one under that officer's protection.

Section 26 of the *Criminal Code* provides that an officer "who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess."

Case law interpreting these sections recognizes that police officers may need to resort to force in order to execute their duties but also that courts must guard against the illegitimate use of power by the police against members of our society, given its grave consequences. The degree of force that a police officer may use is constrained by the principles of proportionality, necessity, and reasonableness.

In assessing whether a particular amount of force used by an officer was necessary within the meaning of the *Code*, the trier of fact must have regard to the circumstances as they existed at the time the force was used, recognizing that an officer cannot be expected to measure the force used with precision.

For the use of lethal force by a peace officer to be justified, the peace officer must have a subjective belief that lethal force is necessary to protect the peace officer or anyone under his protection from death or grievous bodily harm and the police officer's subjective belief must be objectively reasonable. The reasonableness of the peace officer's belief must be assessed on an objective standard but one that also takes into account the particular circumstances and human frailties of the accused. In applying the standard a certain amount of latitude is permitted to police officers who are under a duty to act and must often react in difficult and exigent circumstances. The trier of fact must place himself in the shoes of the police officer and take into account considerations unique to the individual, while independently assessing the officer's conduct through the lens of a reasonable person.

If charged with a criminal offence based on an allegation of excessive force, a police officer does not bear a legal or evidentiary burden to prove that one of the *Criminal Code's* justification provisions apply. Rather, the Crown must prove beyond a reasonable doubt that the relevant justification provision is not applicable. To do so, the Crown need only disprove that one of the required, constituent elements of the provision is not met on the evidence.

Circumstances of arrest and detention

During the course of the investigation statements were obtained from a number of civilian and professional witnesses. These accounts are generally consistent and differ in minor areas only.

On the evening of February 14, 2015, the suspect was reportedly upset about an incident with his son that took place earlier that day. The suspect began arguing with his wife and daughter and made comments which caused them to believe he was suicidal. He yelled at his family and was walking around with his chest "puffed out" like he was "looking for a fight."

The suspect was also intoxicated. His wife described him as "horribly drunk." His daughter stated that she could smell alcohol on him. She told him to calm down and go to bed or she would call the police.

At one point, the suspect retrieved a folding hunting knife and approached his daughter with the knife still closed, causing her to back up into a wall. She recalled he was trying to convince her not to call the police. She described his demeanour at this time as "frantic....hysterical

almost." Though she did not think he would use the knife, she was "freaked out" by the situation and was concerned he wanted to hurt himself. She went to call 911.

Meanwhile, the suspect removed a shotgun from the safe where he stored his hunting rifles. At that point his wife and son fled to their neighbour's house. After calling 911, the daughter followed her mother and brother to the neighbour's house. As she did, she saw the suspect standing in the doorway of their residence with a shotgun in his hands. She hid behind a car until he went back inside. She feared he might shoot her. She then went towards the neighbours' house but did not immediately go inside.

The subject officer was the first to arrive on scene. He remained at his vehicle as the suspect appeared in the door of the house. The officer called the suspect to come towards him. The suspect initially argued with the officer then the suspect approached the officer in an aggressive manner with his left hand in his jacket pocket. The suspect ignored the officer's directions to take his hand from his pocket and the officer drew his sidearm. The suspect was heard to say "shoot me" several times as he approached the officer. As the suspect closed on the officer, the officer sprayed the suspect with OC (pepper) spray.

At that point, the subject officer and another officer took custody of the suspect, handcuffed him and placed him in the police car. He was provided with water and, when he complained of breathing problems, was attended by EHS personnel who had arrived on scene. He continued to present as agitated, belligerent and rude. He was described by the second officer on scene as "amped up". After his condition was assessed by the EHS attendants he was taken from the scene to the local police detachment in the subject officer's police car.

At the detachment, the subject officer's supervisor assisted him in dealing with the suspect. The supervisor was off duty when called to attend and was not in uniform. He was not armed during his dealings with the suspect. A jail guard was also on shift at the detachment that evening. All of the suspect's interactions with the police officers at the detachment were recorded by the detachment surveillance cameras, which do not record audio. The suspect was described as a large powerful individual with thick arms and wrists, who smelled of pepper spray and alcohol. At the detachment, the handcuffs that had been applied were removed and further decontamination was facilitated. The suspect asked repeatedly who had pepper-sprayed him. The subject officer eventually was identified as the officer who used the pepper spray. In response, the suspect pointed his finger at the subject officer and told him he would "take care of him" that he would "teach him a lesson."

When explained the reasons for the arrest, the suspect again became upset and emotional. He was taken from the cell to the booking area where he was seated to await the booking process. Without warning the suspect suddenly stood up, appearing more agitated and confrontational.

As the situation appeared to be escalating, the supervisor decided to move the suspect back to the holding cell. When the suspect resisted the supervisor took the suspect by the wrist and attempted to move the suspect towards the cell area. The suspect stepped forward and reached for the subject officer's handgun. The officers resisted the suspect's efforts and continued to escort him toward the cell area. As they neared the cell area the suspect turned suddenly and faced the supervisor in an aggressive manner. The supervisor described the incident in these terms;

"From the subject's posture and look on his face and eyes it was clear to me that he was about to attack me. I backed up trying in an effort to reposition and give myself time and room to react, however the subject came at me quickly."

The suspect raised his hand toward the supervisor and rushed toward him, forcing him up against the wall. The subject officer and the guard immediately intervened with the subject officer taking hold of the suspect from behind and to the suspect's right. The suspect then turned toward the subject officer and put his hands around the subject officer's neck. The officers managed to unbalance the suspect and took him to the floor. The suspect landed on his knees and pulled the subject officer down to the ground as he fell forward onto his stomach, lying face down. The supervisor straddled his mid-section.

The subject officer at this point was holding the suspect around the head and neck but his arms were partially pinned by the body of the suspect. The guard was attempting to restrain the suspect's legs. The suspect continued to struggle as the supervisor attempted to secure the suspect's arms behind his back with handcuffs. Eventually the suspect stopped struggling and went limp.

The subject officer released his hold and the suspect was moved onto his back. The supervisor noted he appeared red and purple in the face and did not appear to be breathing. The subject officer called EHS while the supervisor attempted to resuscitate the suspect. The EHS personnel arrived within a few minutes and found the suspect unresponsive and in respiratory distress. The suspect was placed on a stretcher and taken to the hospital. En route, the suspect began to breathe on his own.

The suspect was airlifted to Victoria General Hospital the following day but remained in a coma until his death on February 24, 2015.

Autopsy results

The forensic pathologist who conducted an autopsy on the suspect concluded:

"The cause of death is best described as resulting from external pressure to the head/neck, by way of asphyxia (interference with the uptake and/or utilization of oxygen) and/or precipitation of an unseen catastrophic event (such as a fatal cardiac arrhythmia), leading to brain damage."

Use of Force report

Two use of force reports were prepared to assist in analyzing whether the subject's officer's actions in seizing the suspect in the neck and head area were reasonable under the circumstances. One report was from an RCMP expert from a different detachment and a second report was prepared by an expert from the Calgary Police Service. Both experts concluded that the actions of the subject officer were consistent with the applicable policies and with the officer's training in the use of force.

Application of the Law to the Facts

As described above, the suspect was under arrest at the time of the struggle that led to his death and there were reasonable grounds for that arrest. While in the booking area, the suspect became resistive and confrontational. The supervisor, the subject officer, and the jail guard all became involved in attempting to restrain the suspect and regain control over him. It was in the course of this struggle that the subject officer applied pressure to his head or neck area.

Manslaughter

As previously noted, a person who causes death by an unlawful act, without the intent for murder, or by criminal negligence, is guilty of manslaughter. It appears beyond doubt that the subject officer applied force or pressure to the suspect's head or neck and that this was at least a contributing cause of the suspect's death. The autopsy report indicates that external pressure to the suspect's head or neck caused the suspect to asphyxiate, or resulted in "an unseen catastrophic event (such as a fatal cardiac arrhythmia)", leading to brain damage. Though the autopsy suggests the suspect's obesity and enlarged heart may also have contributed to his death, it is not necessary to prove that the subject officer's actions were the sole or even the main cause of death. If the subject officer's actions contributed significantly to the suspect's death, that is sufficient to establish causation.

The real issue is whether in causing the suspect's death the subject officer committed an unlawful act or was criminally negligent.

Unlawful Act

The subject officer's notes suggest that he pulled the suspect's head to get him to the ground, and that he maintained his hold while on the ground "to pin him to the ground" and to prevent him from rolling over to fight with the officers. In the circumstances, the subject officer was legally justified in using at least some force to restrain the suspect. If the force used by the subject officer was a reasonable and proportionate response to the suspect's resistive and confrontational behaviour, then the subject officer's response would not be considered excessive within the meaning of s. 26 of the *Criminal Code*.

The subject officer applied a headlock to restrain the suspect for a period of approximately 82 seconds while the supervisor attempted to handcuff the suspect. The restraint of a subject by the head and neck falls within the "physical control – soft" category of force responses according to established use of force protocols. Handcuffing is also included in this category. Soft techniques are appropriate when it is necessary to control a subject and are considered to have a lower probability of causing injury (as compared to "hard" force responses).

Here, the anticipated evidence of both use of force experts is that the suspect was an assaultive subject from the moment he began making sudden and aggressive approaches at the subject officer. Prior to this, the suspect displayed multiple pre-assaultive cues. At the time he reached for the subject officer's firearm, and then for the supervisor's throat, both experts agree that objectively the suspect could be classified as a lethal threat.

The video indicates that the officers took the suspect to the ground by force. It is clear from the video that the officers had considerable difficulty dealing with the suspect who was larger and more powerfully built than the officers, and who was aggressive, emotional and violent. The fact that the officers had to overpower the suspect and take him to the ground by force demonstrates his continued threat as an assaultive subject. The officers gave verbal commands to the suspect to put his hands behind his back. Due to the size of the suspect's wrists and forearms, the supervisor struggled to handcuff the suspect.

The suspect was significantly larger than both of the officers. He weighed 288 pounds – almost 90 pounds heavier than the supervisor and likely over 100 pounds more than the

subject officer, who was estimated by one of his colleagues to weigh approximately 175-180 pounds.

The 82-second period in which the subject officer restrained the suspect by way of a headlock was within the range of reasonable responses available to him, considering the limited time, space, distance and use of force options available to the subject officer at the time. The subject officer's conduct must be understood in the context of a highly dynamic altercation with an extremely aggressive and powerful individual. Accordingly, the subject officer's use of force would therefore be legally justified under s. 25 of the *Criminal Code*.

As a result, the available evidence does not establish beyond a reasonable doubt that the suspect's death was caused by an unlawful act.

Criminal Negligence

The video of the subject officer's response to the suspect's aggression towards him in the booking area reveals a police officer who is calm and in control. This evidence provides important context for assessing the subject officer's conduct in the cell block. To the extent any pattern is revealed through the evidence of the subject officer's earlier dealings with the suspect that night, the weight of the evidence suggests the subject officer was consistently conducting himself in accordance with his training in all material respects. This is further supported by the opinions of both of the use of force experts.

As events escalated the officer reacted to an increasingly violent situation. The subject officer's conduct must be understood in the context of a highly dynamic altercation with an extremely aggressive and powerful individual. Immediately preceding the altercation, the suspect had attempted to grab the subject officer's firearm. Moments later, the suspect lunged at the supervisor's throat with his arms and hands outstretched. As the subject officer intervened the suspect made a similar attempt at the subject officer.

Conduct that is reasonable cannot be "wanton" and accordingly is not criminally negligent. Both use of force experts confirm that the subject officer's conduct fell well within the range of responses available to a reasonably trained officer in his circumstances. Accordingly, the subject officer's conduct cannot be said to be marked and substantial departure from the conduct of a reasonably prudent person in his circumstances.

The evidence does not establish that the force applied by the subject officer was negligent on a criminal standard of proof.

Conclusion

The evidence does not establish that the subject officer intentionally applied force that he knew or that was likely to cause death or grievous bodily harm. The force applied by the subject officer to control the suspect was otherwise reasonable and proportionate to the level of threat the suspect posed to the officers, and that force was reasonably necessary to control the suspect. At trial, the subject officer would be entitled to rely on s. 25 of the *Criminal Code* as a complete defence.

As the evidence does not establish a substantial likelihood of conviction for any criminal charges no charges have been approved in respect of this incident.

Materials Reviewed

In making the charge assessment decision the following materials were reviewed:

- Executive summary and detailed narrative
- Summaries and transcripts of civilian and police witness statements
- Written statement of the Supervising officer
- IIO and RCMP interview transcripts of the jail guard
- Handwritten notes of the subject officer
- Vetted training record of the subject officer
- IIO investigator notes and reports
- RCMP PRIME reports and officer notes
- Autopsy report of the suspect
- Smithers RCMP cell block video
- Expert use of force opinions from two experts
- RCMP policy and training documents