



MEDIA STATEMENT

CRIMINAL JUSTICE BRANCH

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No Charges Approved in IIO Investigation Into Errington Incident

Victoria – The Criminal Justice Branch (CJB), Ministry of Justice, announced today that no charges have been approved against a member of the Oceanside Royal Canadian Mounted Police (RCMP) detachment for an incident that occurred on November 18, 2012, in which an individual suffered a significant facial injury while being placed under arrest. The matter was investigated by the Independent Investigations Office (IIO).

Where the Chief Civilian Director of the IIO is satisfied that an officer may have committed an offence, the IIO submits a Report to Crown Counsel to the CJB. The Chief Civilian Director does not make a recommendation on whether charges should be approved or what charges CJB should consider. In deciding whether to initiate a prosecution, CJB must assess whether the available evidence provides a substantial likelihood of conviction and, if so, whether a prosecution is required in the public interest. Before entering a conviction for an offence, a judge or jury must be satisfied that the guilt of the accused has been proved beyond a reasonable doubt.

CJB has concluded, on the available evidence, that there is no substantial likelihood the officer who was the subject of the IIO investigation would be convicted of any offences. This decision is explained in greater detail in the attached Clear 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 CJB in cases where the IIO has investigated a police officer and forwarded a Report to Crown Counsel.

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Clear Statement

This Statement contains summaries of the evidence gathered during the IIO investigation, and the applicable legal principles. The summaries are provided to assist the public in understanding the decision of CJB not to approve charges against the officer who the Civilian Director concluded may have committed an offence. They do not detail all of the evidence considered, or discuss all relevant facts, case law or legal principles.

The charge assessment in this matter was conducted by a senior Crown Counsel who is located in a different area of the province than the officer under investigation, and who has no prior or current connection with the officer.

Charge Assessment and the Criminal Standard of Proof

CJB applies a two part test to determine whether criminal charges should be approved and a prosecution initiated. The reviewing prosecutor must examine the available evidence and assess (a) whether there is a substantial likelihood of conviction based on the evidence gathered by the investigating agency; and (b) if so, whether a prosecution is required in the public interest.

Under CJB policy, a substantial likelihood of conviction exists when 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 at a trial; and the likelihood that viable, not speculative, defences will succeed.

In making a charge assessment, a reviewing prosecutor must assess the evidence gathered by investigators in light of the legal elements of the offence that is alleged to 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.

A criminal trial is not a simple credibility contest between witnesses for the Crown and witnesses for the defence. If an accused person testifies and denies an offence, he is entitled to be acquitted in any or all of the following circumstances: if the judge or jury accepts his evidence; if the judge or jury finds that his evidence raises a reasonable doubt; if the judge or jury does not know whom to believe; or, even if the judge or jury does not accept the evidence of the accused, it nonetheless finds that there is a reasonable doubt in favour of an acquittal on the totality of the evidence.

Relevant Law

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 26 of the *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 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.

Circumstances of the Case

On November 18, 2012, shortly after 4 p.m., a member of the Oceanside detachment of the RCMP responded to a complaint of loud music coming from a property in Errington. Upon arrival, the investigating officer noted the loud music and was of the opinion that the male occupant of the suspect property was in a highly intoxicated condition. There was some conversation in the front of the property between the officer and this male, who was the complainant in the IIO investigation. Among other things, during this conversation the male refused to provide identification to the officer.

The male alleges that the officer punched him once in the nose without warning, however, the statement of the officer makes no mention of such a punch. Both agree that the officer told the male that he was under arrest for obstruction. A struggle ensued, with the officer positioned behind the male moving him down the gravel driveway toward a police vehicle parked on the road. The officer involved is substantially larger than the male who was being taken into custody. Both men went to the ground, with the officer behind and on top of the male. The impact caused what was ultimately determined to be a significant injury to the male's nose.

The male states that he was choked into unconsciousness prior to falling to the ground near the end of the driveway. The officer states that he accidentally tripped and fell upon the male.

Three other witnesses were interviewed by the IIO. Two of the witnesses describe the officer moving the male out to the road using a chokehold. One refers to a "choke hold carry", while the other said the male was being "choke hold carried out all the way to the edge of the driveway". One of these witnesses said that she saw the officer drive the male into the ground, apparently falling intentionally on top of him. The officer then put his knee into the male's back, pulled out his handcuffs and handcuffed him. The second witness said that the officer "just let him go" and the male "face-planted to the asphalt." According to this witness, the officer then put his knee into the male's back and handcuffed him. Neither of these witnesses could see the men's legs prior to the injured male's contact with the ground.

A third witness also described the officer having the male in a chokehold and carrying him along the driveway. He states that the officer lunged forward and drove the male to the ground in the middle of the paved roadway, landing directly on top of him. This third witness also states that the officer appeared to tackle and "pile drive" the male into the roadway, but he did not believe the officer tripped in doing so. The injured male, the police officer, and the other two witnesses all described the incident occurring near the end of the gravel driveway, not on the roadway.

Application of the Law to the Facts

There is available evidence that the officer was in the execution his duties as a peace officer when he attended the residence as a result of the noise complaint. Crown Counsel who reviewed the IIO report has concluded that the circumstances which followed the officer's arrival at the scene provided reasonable and probable grounds to arrest the male occupant of the property for the offence of obstructing a peace officer in the execution of his duty, as the male refused to provide the identification that the officer was entitled to request in enforcing the law. Under the *Criminal Code*, the officer was entitled to use as much force as reasonably necessary to place the male under arrest.

Depending on which version of events is accepted, the conduct of the officer was either a reasonable application of force, during the course of which the male who was under arrest fell to the ground with the officer accidentally falling on top of him; or it was an intentional and unjustified application of excessive force in which the officer purposely threw or drove the male into the ground, and intentionally fell on top of him. To sustain a conviction for assault or assault causing bodily harm under the *Criminal Code*, the Crown would have to prove the latter scenario beyond a reasonable doubt.

Having considered all of the evidence, including differences in the descriptions provided by the witnesses, Crown Counsel determined there is no substantial likelihood of proving that the officer intentionally drove the male into the ground, or intentionally fell onto the ground with the male beneath him.

There are reasons to discount the evidence of the injured male and his version of events: he was reportedly intoxicated; by his own admission he was uncooperative with the police officer; and, his claim that the officer punched him in the nose was not substantiated by the three civilian witnesses.

Moreover, the descriptions of the incident as provided by the injured party and the three civilian witnesses are not consistent. Each had different perceptions of how the incident occurred. Two of the civilians were unable to see the feet of the male or the officer prior to the male's contact with the ground. The third witness acknowledged that the officer might say he tripped, but said that it looked to him like a pretty deliberate move to throw the injured male's face to the ground.

Inconsistencies among witness accounts are, to a certain extent, to be expected and standing alone, they would not necessarily result in the witness' evidence being given less weight, or discounted entirely. However, the background and circumstances under which the investigation unfolded in this particular case are unusual and, in Crown Counsel's overall assessment, there is a reasonable likelihood that the irregularities would negatively impact the reliability of the evidence available to the Crown. Within this context, inconsistencies between versions of events take on heightened importance in assessing the probative value of the Crown's case.

As noted, the alleged incident occurred on November 18, 2012. The RCMP reported the incident to the IIO shortly after it occurred. Based on the information provided at that time, the IIO did not assert investigative jurisdiction. The statutory mandate of the IIO is to conduct investigations into officer-related incidents of death or serious harm, in order to determine whether or not an officer may have committed an offence.

The injured male retained civil counsel following the incident. After the RCMP received a Civil Notice of Action relating to personal injuries that were said to have been experienced by the arrested male the RCMP provided additional information on these injuries to the IIO. The subsequent notification to the IIO was made on May 1, 2013

Communication between IIO investigators and civil counsel for the injured male took place over a number of weeks before the IIO investigators were able to access the medical records that were considered necessary to support IIO involvement in the matter. On June 26, 2013, the Chief Civilian Director asserted jurisdiction following a reassessment of the information provided to the IIO.

The injured male made his participation in an interview with IIO investigators contingent on his civil counsel being present during the interview. He also made his participation contingent on his civil counsel being permitted to speak to the three civilian witnesses in private before the IIO investigator interviewed them. The IIO learned that a number of months earlier, civil counsel had already interviewed and taken statements from these three other witnesses.

Civil counsel demanded a private meeting with two of these witnesses immediately before they spoke to the IIO investigators. It is unknown what was discussed during those meetings, or during the prior dealings with civil counsel. The statement of the third witness was obtained only after Crown Counsel asked civil counsel to facilitate the witness's contact with the IIO to provide a statement. All of this occurred after the injured male had already commenced a civil suit against the RCMP.

In these circumstances it is difficult, if not impossible, to rule out the possibility that the evidence provided to the IIO investigators by the injured male and civilian witnesses had been influenced by the existence of the civil suit. This creates a significant concern about the weight that would ultimately be given to the evidence if tendered in court, which would have a direct and significant effect on the Crown's ability to prove the guilt of the officer beyond a reasonable doubt.

The officer provided an innocent explanation for what occurred, attributing the male's injuries to the parties tripping and falling to the ground. In the circumstances as a whole, the officer's version of events is one which is reasonably capable of belief, or, at the very least, sufficient to raise a reasonable doubt. The inconsistencies in the descriptions of the event provided by the injured male and the civilian witnesses, coupled with the possible tainting of their evidence by virtue of a concurrent civil suit and interviews conducted for that purpose, leaves the Crown unable to prove excessive force to the criminal standard.

Given the onus of proof on the prosecution, Crown Counsel has concluded that there is no substantial likelihood the officer would be convicted of any criminal offence. As a result, no charges have been approved.

The charge assessment in this case took into account the following material:

- Report to Crown Counsel Executive Summary and Detailed Narrative
- Statement of officer subject to investigation
- Statement of injured male
- Summaries and Transcripts of Statements of civilian witnesses
- Notes and/or summaries of anticipated evidence of IIO Investigators
- General Occurrence and Task Action Reports
- Medical records of injured male
- Photographs