



PUBLIC REPORT OF THE

CHIEF CIVILIAN DIRECTOR

Regarding the injury to an adult male on July
31, 2013 by an officer of the Vancouver
Police Department.

IIO 2013-000039

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. As the Chief Civilian Director of the IIO (CCD), I am required to review all investigations upon their conclusion, in order to determine whether I “consider 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 I conclude that an officer may have committed an offence, I am required to report the matter to Crown Counsel. If I do not make a report to Crown Counsel, I am permitted by s.38.121 of the *Police Act* to publicly report the reasoning underlying my decision.

In my public report, I may include a summary of circumstances that led to the IIO asserting jurisdiction; a description of the resources that the IIO deployed; a statement indicating that the IIO, after concluding the investigation, has reported the matter to Crown Counsel; or a summary of the results of the investigation if the matter has not been reported to Crown.

This is a public report related to the investigation into the injury of an adult male that occurred on July 31, 2013, in the city of Vancouver. The affected person sustained serious injuries after being shot in the hand with a rubber bullet by a member of the Emergency Response Team (ERT) of the Vancouver Police Department (VPD).

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

In my public report, I am 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, I am required, if practicable, to notify the person to whom the information relates, and further, notify and consider any comments provided by the Information and Privacy Commissioner (s.38.121(5) of the *Police Act*).

In this case, I have considered the advice provided by the Information and Privacy Commissioner. In this report, I will not be using the name of the affected person or of any other person involved in this matter.

The affected person was 34 years old at the time of the incident.

NOTIFICATION AND JURISDICTION DECISION

The affected person sustained a fractured knuckle that required substantial medical intervention in the form of a hard hand cast that was applied to his entire hand. The IIO

asserted jurisdiction as the affected person's injury occurred as a result of a police action and it appeared to meet the statutory definition of "serious harm". "Serious harm" is defined in the *Police Act* as including any injury that may "substantially impair the mobility of the body as a whole or the function of any limb..."

INVESTIGATIVE EVIDENCE CONSIDERED

The affected person, civilian witnesses and witness officers were interviewed. The subject officer (SO) submitted to a voluntary interview with IIO investigators. Additional information was obtained by reviewing police radio transmissions and a 911 call.

911 Call and Police Radio Transmissions

At 2:07 p.m. on July 31, 2013, an employee of a shelter called the VPD to request that the affected person be transported pursuant to a certification under the *Mental Health Act*. It was noted that he had a past history of verbal aggression and physical outbursts.

At 2:46 p.m., the caller asked police dispatch for an estimated time of arrival for officers. The employee was advised that the police were very busy at that time and that the next available officer would attend to the call.

At 3:02 p.m., Emergency Health Services (EHS) advised police dispatch that they would be waiting for police assistance prior to attending to the affected person.

At 3:18 p.m., police dispatch was advised that the affected person was taking his clothes off and spraying corrosive material on himself. Staff stated that they were unable to calm him and they were worried about the safety of other residents.

At 3:20 p.m., multiple police officers were dispatched to attend to the call.

At 3:25 p.m., officers were reported to be on scene.

At 3:29 p.m., the affected person was in possession of a knife.

At 3:32 p.m., the affected person was not complying with verbal commands of attending officers.

At 3:34 p.m., Emergency Response Team (ERT) officers reported arriving at the scene.

At 3:50 p.m., the affected person was out of his room, "half-naked" and had picked up a knife.

At 3:57-58 p.m., the affected person was attempting to throw a bike out of the window and was throwing clothes and sheets out of the window.

At 4:15 p.m., officers were prepared to breach the door to the affected person's room if he attempted to harm himself.

At 4:19 p.m., the affected person had attempted to set toilet paper on fire and had set a sheet on fire.

At 4:32 p.m., the affected person was contained by ERT officers armed with lethal and less lethal equipment and shields.

At 4:39 p.m., the affected person was "not making much sense" talking to a police negotiator and was "smashing things with his cane."

At 4:43 p.m., it was reported that the affected person had thrown a mattress into the hallway and then returned to his room.

At 4:53 p.m., the affected person's screaming was "elevating" and he was hitting the wall with a "cane pipe."

At 5:05 p.m., the affected person's behavior was "progressing" and it was noted that "if he passes that line, less lethal will be used."

At 5:09 p.m., the affected person was taking off all his clothes again.

By 5:12 p.m., the "Arwen" (a "less lethal" shotgun that fires rubber bullets) had been deployed.

By 5:31 p.m., the affected person had surrendered.

Civilian Witnesses

Civilian Witness 1 (CW1) stated that he was the manager of the facility where the affected person received services. The affected person had been using their services for approximately 10 years and was well known to him and his staff. He stated that the affected person had been to the facility on July 29, 2013, seeking accommodation and that he was provided with a room on July 31, 2013. CW1 stated he had placed a call to a mental health team who saw the affected person and completed a mental health assessment.

CW1 advised that after a doctor had certified the affected person for involuntary treatment under the *Mental Health Act*, CW1 went to see the affected person in his room. He stated that he observed the affected person smoking something with a chemical-like smell, and that he called police. He did not witness the police interaction with the affected person.

Civilian Witness 2 (CW2) was a resident of the facility. He stated that on July 31, 2013, the affected person asked for and was given an old aluminum cane that had been in CW2's possession. At approximately 4:30 p.m., the affected person called him over to his room asking for a knife or blade to cut up some "crack."

CW2 stated that he handed the affected person a knife and stepped back out of the room as he did not feel comfortable being close to him. He described the knife as gray and black with a three inch blade.

CW2 stated that when stepping out of the affected person's room, he saw a member of the staff and a police officer waving him over to the stairwell. CW2 told them what had occurred and that he had left his knife with the affected person. He did not witness the police interaction with the affected person.

Affected Person

The affected person was interviewed by IIO investigators on August 2, 2013. He confirmed that on the day of the incident, officers told him that they were there to detain him under the *Mental Health Act*.

The affected person was unsure who had sent the police and felt that they were going to kidnap him. When asked about the injury to his hand, he described that he was showing the police his identification in the hallway and that's when they shot him twice with a "rubber bullet gun". The affected person stated that he was not carrying any weapons during the incident.

The affected person confirmed that he threw furniture around and made noise in an effort to defend himself from the police. At the time the police shot him with the rubber bullet gun, however, the affected person stated that he was around 15 feet away from the officers, showing them his identification.

When asked about a knife, the affected person advised that someone had brought him a knife, and that person used the knife to cut a small piece of crack cocaine. The affected person denied having the knife in his possession.

Subject Officer

The SO agreed to a voluntary interview with IIO investigators on September 24, 2013.

He acknowledged working as part of the ERT that responded to the incident involving the affected person. He understood from radio broadcasts that the affected person had stolen a knife and a cane, and was apprehendable under the *Mental Health Act*.

The SO stated that when he arrived at the location, he took an "Arwen" (less lethal) shotgun from his vehicle and went to the second floor to meet the rest of the ERT officers. When he entered the building, he could hear banging and screaming from the affected person. The ERT officers set up containment approximately 40 feet from the affected person's suite.

The SO was assigned as “the first line of defense” for the ERT. It was agreed that the Arwen would be deployed if the affected person came down the hallway in a confrontational manner; if he had a weapon; or if he came within 20 feet of the ERT officers.

According to the SO, the decision to deploy the Arwen if the affected person came within 20 feet of the officers was based on the following concerns:

- 1) If the affected person were more than 20 feet from the arresting officers, he would have too much of an opportunity to retreat back into his room, even after a deployment, which was otherwise intended to provide other officers with the opportunity to make an arrest;
- 2) If the affected person were allowed to come too close to the officers, the possibility of a hands-on fight would increase, which would be potentially uncontrolled and dangerous.

The SO noted that the affected person was not engaging with the negotiators. He stated that the affected person was banging things around and carrying personal items into the hallway, repeatedly coming in and out of his room in various stages of undress.

The SO stated that at one point, the affected person advanced on the officers using a mattress as a shield. After getting to within 25 feet of the officers, he threw the mattress into another room and retreated back to his room. At some point, the SO believed he saw a small knife mostly concealed in the affected person’s hand.

The SO stated that when the affected person advanced on the officers a second time, he came within 20 feet of them. The SO fired two rubber bullets from the Arwen device at the affected person.

The first shot was aimed at the hip/pelvis area, and although the affected person stopped advancing on the officers, the SO stated that it had no other apparent impact on him. The SO then fired a second rubber bullet at the same moment that the affected person spun around to return to his room. The second rubber bullet struck the affected person in the buttocks. The affected person then ran into his room, and the officers chose not to follow him.

The SO stated that the affected person later surrendered and was taken into custody with no additional use of force.

Witness Officers

Witness Officer 1 (WO1) stated that he was the first ERT supervisor to arrive in response to the call for assistance from patrol officers. He arrived at the shelter shortly before 4:00 p.m., and went to the second floor of the building. WO1 stated that his focus was to ensure that proper containment was being maintained and the surrounding suites were evacuated.

WO1 was advised that the affected person had grabbed a cane and was using it to smash walls. He was also told that the affected person had a lighter and was trying to set fire to a pile of clothing. In response to that information, WO1 developed a plan to breach and enter the affected person's suite.

At 5:07 p.m., WO1 was outside the hallway speaking with the on-scene Commander when he heard two consecutive Arwen rounds being fired. He ran to the hall and saw ERT members advancing towards the affected person. He then saw the affected person run back towards his suite. Sometime thereafter, the affected person surrendered and was taken into custody without further use of force.

Witness Officer 2 (WO2) stated that he was a member of the ERT that responded to the call. His first job was to ensure that there was containment by uniformed patrol officers. After he was briefed on the immediate action plan, he was assigned to provide "lethal cover" for the SO, who was armed with a less lethal Arwen device.

WO2 described the affected person's behavior as agitated and unpredictable. He stated that the affected person initially made comments that he was going to surrender, and then came down the corridor and placed a yellow "Caution Floor is Slippery" sign down on the floor, about 20 to 25 feet from the ERT officers. WO2 stated that the affected person returned to his room and came out with a mattress which he held out in front of him in an apparent attempt to protect himself from the officers. He stated that the affected person produced an aluminum cane and was banging the walls with it.

WO2 recalled seeing objects in the affected person's hands. He believed that the affected person dropped them at the end of the hallway before approaching the officers. WO2 could not recall if he shouted anything toward the affected person prior to the Arwen being fired, but he heard "Get down!" being called by someone else. WO2 stated the affected person did not comply with the demand and was continuing to approach the ERT officers in an aggressive manner.

WO2 stated that the Arwen was deployed and although the affected person was hit by the rounds, it did not have the desired effect of putting him down. Although the ERT members attempted to detain the affected person, he ran back to his room. Approximately 20 minutes later, the affected person came out of the room and surrendered to officers. He was handcuffed and taken into custody without any further use of force.

Witness Officer 3 (WO3) stated that he was a member of the ERT that responded to the call involving the affected person. He and WO1 were the first ERT officers on scene. He recalled receiving information that the affected person was armed with a knife and a cane. He stated that after he and other ERT officers evacuated the other suites on the floor, they set up containment in the hallway using an inverted triangle. WO3 was behind and in between the SO and WO2. After about an hour, the affected person came out of his room brandishing a "metal" cane. He began hitting the walls and the hallway handrail with the cane. At the time of

the deployment of the Arwen device, he could not see what was in the affected person's hands. WO3 stated that the affected person came forward "with purpose," and that he was ignoring multiple commands that WO3 was shouting to him.

WO3 saw the SO fire two rounds from the Arwen device, both of which struck the affected person. WO3 noted that the affected person had blood on his left hand and a mark on his left hip where the rounds had struck. Over the next 20 to 30 minutes, the affected person calmed down and eventually came out of his room and surrendered himself to police.

Witness Officer 4 (WO4) was also a member of the ERT that was deployed to the call. When he arrived at the scene, he assisted in evacuating the other residents and took a position behind and to the side of three members of the ERT who were positioned in an inverted triangle. WO4 stated that when the affected person came out immediately prior to the deployment of the Arwen device, he appeared visibly upset, sweating, agitated and aggressive. The affected person was throwing and smashing items around and verbally challenging the officers. WO4 stated that the affected person came out from his room naked and walked pointedly towards the officers. WO4 witnessed the SO fire two Arwen rounds that hit the affected person in his left hand and his left hip area. The affected person paused for a moment and when officers moved in to arrest him, he went back to his room. About 30 minutes later, the affected person surrendered himself and was handcuffed.

Witness Officer 5 (WO5) was assigned as the primary negotiator with the affected person. According to a negotiator's report, prepared by another officer, it was difficult for WO5 to establish a meaningful conversation with the affected person. The report indicated that the affected person exited his room a number of times, in an agitated state, smashing a metal cane against the wall and yelling at police.

The report further indicated that at one point, the affected person walked purposefully towards negotiators and ERT officers at the end of the hallway, and the Arwen device was deployed on him. Subsequent to the deployment of the Arwen device, a second negotiator was able to convince the affected person to peacefully surrender.

Scene Canvass

IIO investigators canvassed the scene and determined that no video of the incident was available.

ISSUES

The general issue after any IIO investigation is whether or not there is evidence that a police officer may have committed an offence under any enactment. Culpability for an officer's use of force is governed by the following *Criminal Code* provisions:

1. 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).
2. 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)).

ANALYSIS

The evidence indicates that the affected person acted aggressively towards officers who had the responsibility of taking him into custody on a lawfully-issued mental health hold.

The affected person said that he was merely showing the officers his identification when they shot him. Photographs after the incident show several pieces of his identification strewn along the hallway. The affected person denied having a weapon and police were unable to locate a knife (as described by CW2) after the officers took him into custody.

The only other people present when the SO shot the affected person were police officers. All gave recorded statements in person to IIO investigators. The police officers also provided their notes and reports. The police statements were generally consistent, but included some differing details typical of independent recollections. For example, one witness officer recalled seeing objects in the affected person’s hands, but believed the affected person put them down before approaching the officers. The SO recalled seeing some kind of object in the affected person’s hands, but did not mention seeing him put them down.

Independent evidence corroborates significant parts of the officers’ narratives. For example, the doctor confirmed the affected person’s hostile and disordered state that day. A civilian witness confirmed that the affected person had a cane, and that he advised staff that the affected person had a knife. Photographs showed a cane and damage to the building consistent with what the officers described. The affected person himself agreed that he threw furniture around and made noise in an effort to defend himself from the police efforts to apprehend him.

The question here is whether, given the totality of the circumstances, it was unnecessary or unreasonable for the SO to shoot the affected person with rubber bullets in order to stop him from approaching the officers.

Section 25(1) of the *Criminal Code* authorizes police officers to use “as much force as necessary” for the purpose of doing anything they are authorized by law to do. The *Mental Health Act* authorized the officers to apprehend the affected person by reason of what they saw and learned of his mental health.

However, in these situations, section 26 of the *Criminal Code* holds everyone, including police, criminally responsible for using excessive force.

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 are not held to a standard of perfection and are not required to measure with nicety the force that they use. A legally acceptable use of force is one which is not gratuitous, and which is delivered in a measured fashion.

Whether or not the affected person actually possessed a knife at that point, evidence independent of the officers establishes that the SO had reason to fear that he did. Whether or not the affected person approached the officers for the purpose of showing his identification, his irrational and violent behaviour before that point gave the SO reason to fear further violence.

The presence of the Arwen device was a clear attempt by ERT members to avoid using lethal force or force that would cause serious or permanent injury to the affected person while attempting to take him into custody. Police officers have many different use of force options available to them and they have discretion to determine which tool is the most reasonable to use depending on the totality of the circumstances. I cannot conclude, based on the evidence available to me, that the decision to use the Arwen device was anything other than a legally acceptable use of force.

CONCLUSION and DECISION

The available evidence does not support the conclusion that the SO may have committed an offence against the affected person. Therefore, the IIO will not refer this case to Crown Counsel for consideration of possible criminal charges.

Prepared for Public Release this 19th day of November, 2013

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Independent Investigations Office of BC