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24-25

**BC Prosecution Service announces no charges in use of force
by Vernon RCMP officers**

Victoria – The BC Prosecution Service (BCPS) announced today that no charges have been approved against two officers from the Vernon RCMP detachment involved in a non-fatal use of force on June 30, 2021.

Because of the serious nature of the injuries, the incident was investigated by the Independent Investigations Office (IIO). Following the investigation, the Chief Civilian Director of the IIO determined that there were reasonable grounds to believe the officers may have committed offences and submitted a report to the BCPS (IIO file #2021-171).

In this case, the BCPS has concluded that the available evidence does not meet the charge assessment standard. There is no substantial likelihood of conviction in relation to any criminal offences involving the two officers. As a result, no charges have been approved.

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 when the IIO has investigated the conduct of police officers and forwarded a report for charge assessment. A Clear Statement explaining the decision in more detail is attached to this Media Statement.

Media Contact: Ann Seymour
A/Communications Counsel
bcpsmedia@gov.bc.ca
604.364.3376

To learn more about BC's criminal justice system, visit the [British Columbia Prosecution Service website at: gov.bc.ca/prosecutionservice](https://www.gov.bc.ca/prosecutionservice) or follow [@bcprosecution](https://twitter.com/bcprosecution).

Clear Statement

Overview

On June 30, 2021, the Affected Person (AP) encountered members of the Vernon RCMP when he attended at the Vernon Ministry of Children and Family Development (MCFD). Shortly before, the AP's brother had driven to the MCFD office with his two small children for an appointment. The MCFD social workers were aware that the brother was prohibited from driving and could therefore not permit him to drive with his children in the vehicle, so he called the AP to give them a ride home. The police were called regarding the driving offence.

The two subject officers (SO1 and SO2) arrived on scene, interacted with the AP, and ultimately arrested him using force. During his arrest, the AP suffered injuries, including broken ribs, bruising, and abrasions.

This Clear Statement provides a summary of the evidence gathered during the investigation and the applicable legal principles. These are provided to assist in understanding the BCPS's decision not to approve charges against the SOs. Not all the relevant evidence, facts, case law, nor legal principles are discussed. The charge assessment was conducted by Crown Counsel with no prior nor current connection to the SOs.

Charge Assessment

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

www.gov.bc.ca/charge-assessment-guidelines

BCPS guidelines for assessing allegations against police officers are also established in policy and are available at:

www.gov.bc.ca/allegations-against-peace-officers

The BCPS applies a two-part test to determine whether charges will be approved, and a prosecution initiated. Crown Counsel must independently, objectively, and fairly measure all available evidence to determine:

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

Under BCPS 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 what evidence is likely to be admissible and available at trial; the objective reliability of the admissible evidence; and the likelihood that viable, not speculative, defences will succeed.

If Crown Counsel is satisfied that the evidentiary test is met, Crown Counsel must then determine whether the public interest requires a prosecution. The charge assessment policy sets out a non-exhaustive list of public interest factors to be considered, both for and against a prosecution.

Charges considered

The potential charges considered in this case were assault, assault with a weapon, and assault causing bodily harm.

Timeframe for assessment

The IIO first submitted a Report to Crown Counsel in April 2024.

Relevant law

To prove an assault, the Crown must establish a person intentionally applied, threatened, or attempted to apply force to another person, directly or indirectly, without their consent. The required intent is to cause harm to the victim. Assault causing bodily harm requires proof of harm that is more than trifling or transient. The intent required is to assault plus an objective foresight of bodily harm.

Legal defences

Section 25(1) of the *Criminal Code* provides that a peace officer who acts, in the course of their lawful duties, on "reasonable grounds" is "justified in doing what [they are] required or authorized to do and in using as much force as necessary for that purpose."

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."

In assessing whether a particular amount of force used by an officer was necessary within the meaning of the *Criminal 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.

The reasonableness of the 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 officer. In

applying the standard, the Supreme Court of Canada has ruled that, "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" (*R v Asante-Mensah*). In these dynamic situations police are not expected to measure the force used precisely and are not required to use the least amount of force that may achieve their objective.

Despite the deference afforded to police officers in the application of force in exigent circumstances, the law still requires that the use of force not be excessive. Police use of force is constrained by principles of proportionality, necessity, and reasonableness.

In a prosecution, the onus would be on the Crown to prove beyond a reasonable doubt that the legal defences provided under the *Criminal Code* to police officers acting in the course of their duties have not been established.

Summary of evidence

The AP's brother attended the Vernon MCFD office with his two young children. The social workers were concerned that he was a prohibited driver and would not allow him to depart in his truck with the children. A social worker phoned Vernon RCMP to apprise them of the situation and asked for an officer to attend.

A short time later, a witness officer (WO) attended at the MCFD office. The video evidence shows that the WO parked their marked SUV behind and to the left of the man's truck. The WO spoke with the brother and through computer queries confirmed he was the subject of a Canada-wide driving prohibition under the *Criminal Code*. The WO advised him that he would need to wait to be served with paperwork in respect of criminal charges before he could leave. The male advised the WO that he had phoned his brother, the AP, to pick him and his children up.

Soon after, the AP arrived in his SUV. He parked two to three car lengths behind his brother's truck. Shortly after, SO1 arrived in a marked police vehicle and parked parallel to the AP's SUV.

Video evidence shows that SO1 spoke to the AP on the sidewalk and the children were moved into the back of the AP's SUV. Once this was done, the video shows the WO spoke briefly with the AP near the driver's side area of his SUV before returning to their police vehicle. The AP says that the WO asked him if he could wait with his brother and the children in his SUV while the paperwork was completed, and he agreed to do so.

Soon after, SO2 arrived in their marked police vehicle. The video evidence shows SO1 and SO2 briefly interact with the AP while he is sitting in the driver's seat of his SUV. At this time, the WO recalls hearing loud voices and believed it was the AP's brother arguing with SO1 and SO2 about

his driving prohibition. Soon thereafter, the AP's brother left the scene on foot. SO1 then walked over to the WO's vehicle and advised that the AP's brother had left the scene. SO1 went to go look for him while the WO remained in their vehicle completing paperwork.

After SO1 departed, the video shows the AP continuing to sit in his SUV conversing with SO2. During this conversation the video shows two social workers arrive and stand in front of the AP's SUV. The WO briefly joins SO2 before speaking with one of the social workers. While this is occurring, the video shows the AP closing his car door on SO2, striking him in the torso. The door is then opened by SO2, who reaches inside and grabs at the AP. The AP then grabs at something from SO2, resulting in SO2 moving back.

The AP told the IIO investigators that he then turned on his phone and started recording SO2 and that SO2 then took his phone away. The social workers stated that the AP was yelling and swearing at SO2 and that SO2 was calm and collected during this time. The WO heard the AP asking SO2 for his phone back but did not recall seeing a phone. After seeing the AP close his car door on SO2, the WO says they asked the AP to calm down and that they could sort this out. Moments later, the WO observed the AP (from within his SUV) strike SO2 on the chest with his right arm. WO then heard SO2 arrest the AP for assault of a police officer, asked the AP to exit the SUV, and observed the AP refusing to do so.

The social workers observed the AP reach towards the waist area of an officer. One specified they believed the AP was reaching for the officer's gun belt. Another said that the AP threw a punch towards the officer that did not make contact. After viewing this escalation of events, the three social workers quickly removed the children from the AP's SUV.

The video shows that around this time SO1 returned to the area of the driver's door of the SUV. Shortly after this, two additional police officers arrived. As this occurred, the WO opened the AP's passenger door. SO1 pulled out their OC spray and deployed it into the SUV. The video evidence then shows the AP being physically removed by SO1 and SO2 and taken to the ground. The video does not capture what happened once the AP was on the ground.

The AP's evidence is that SO1 deployed OC spray into the vehicle while the children were in the back seat, then reached over him and undid his seatbelt, grabbed him by his shirt and shoulders, and pulled him out of the car and up against rear passenger door. He said he was slammed down onto the pavement and that SO1 stomped on his toe and kicked the back of his right shoulder. He said SO1 jumped on top of him and proceeded to punch him behind the ears and in the back of the head 15 to 20 times before being handcuffed. He described that he was pressed up against the SUV window, he could see the children in the back. He was taken to the police station, where he was given his phone back and released from custody without charges.

The AP says that he never struck or attempted to strike SO2, or any other police officer, and that apart from telling the SOs that he would not get out of his SUV, he did not demonstrate any resistance to being placed under arrest. He stated that throughout the incident he was compliant with the police. The AP claims the video he recorded of SO1 and SO2 was deleted by police. However, the AP declined a request by the IIO investigators to analyze his phone to retrieve any deleted footage. As such, there is no direct evidence confirming that the AP recorded a video or that this video was deleted by SO1 or SO2. No charge recommendation was forwarded by the IIO in relation to this allegation.

The WO, two additional attending police officers, and five social workers with a view of the incident were interviewed regarding the AP's behaviour in the SUV and after he was removed. The video evidence clearly shows that the children had been removed from the car by social workers before the OC spray was deployed. The evidence also suggests the AP was agitated and yelled at SO2 prior to exiting the SUV, and that he was actively resistant to SO2 efforts to remove him from the SUV.

The social workers' evidence is that while the AP was in his SUV, the police officers were calm and attempting to de-escalate the situation. The AP refused to exit the SUV, the situation escalated, and the police then forcibly removed the AP.

The five social workers could not see what happened once the AP was taken to the ground. The WO saw the AP face down struggling and making it difficult to handcuff him, and not obeying commands. The two police officers who arrived as the AP was being removed from his SUV say SO1 took the AP to the ground and then they assisted SO1 and SO2 with handcuffing him. Each said the AP was resisting police efforts to complete the arrest.

Two additional social workers arrived after the AP was on the ground and made observations of the scene as they parked their vehicle and walked into the building. It is unclear exactly how long they observed events, or from what distance or position, but the period of observation was apparently brief. They observed that one officer was on top of the AP and administered at least three closed fist strikes to the AP's head. They did not observe the AP to be fighting with police. These witnesses cannot identify which police officer(s) was responsible for the strikes.

During these events, the AP suffered five broken ribs, abrasions to his right shoulder, upper back, right wrist, right knee, above his right eye, and a cut to his big toe.

The AP told investigators that, at one point, he told the police that he wanted to leave, and they said, "No, you can't go". Unfortunately, the investigation did not reveal when this exchange took place, so it is unclear whether it occurred before or after the AP was arrestable.

Analysis

Detention

A determinative issue in this case is whether the Crown can prove the AP was the subject of an unlawful detention when he closed the car door on SO2's torso or when he punched toward SO2. If the available evidence could establish an unlawful detention, the AP was then entitled to use reasonable force to end that unlawful detention, and therefore was potentially not arrestable for the offence of assaulting a peace officer. If established, this would mean the SOs were not entitled to the protection of a section 25 defence because they would not have been acting in the lawful course of their duties at the time the force was deployed.

At trial, the burden is on the Crown to prove an unlawful detention occurred to the criminal standard (i.e., beyond a reasonable doubt). There is no substantial likelihood of proving an unlawful detention in these circumstances.

Section 9 of the *Canadian Charter of Rights and Freedoms* guarantees the right not to be arbitrarily detained or imprisoned. A detention for the purposes of section 9 refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint imposed by police. Not all citizens delayed or kept waiting by police are detained. Whether there has been a detention for the purposes of section 9 is determined by an objective test: having regard to the entire interaction, would the actions of the police cause a reasonable person in their position to conclude that he or she is not free to go and must comply with the direction of the police.

The available evidence establishes that the AP's brother was arrestable for the *Criminal Code* offence of operating a motor vehicle while prohibited and was properly detained by police in respect of their investigation of this offence. The AP was not the subject of a police investigation and was present at the scene for the sole purpose of driving his brother and the children home. The AP agreed to the WO's request to wait while his brother's paperwork was being completed.

Following the AP's agreement to wait, and while the AP's brother was still present, the WO repositioned their vehicle to restrict the space in front of the AP's SUV. Because SO1's vehicle was blocking the AP's SUV to his left, this meant the AP's SUV was now blocked from driving forward. The video evidence is inconclusive about whether the AP's SUV was blocked at its rear.

Once police became aware that the AP's brother had left, the SOs began making inquiries with the AP (while he was seated in the driver's seat) regarding his brother's whereabouts. The video shows that when the SOs walked away from the AP's driver's door, the AP's SUV lurched forward several feet. The WO then repositioned their vehicle again so that it was angled toward the AP's SUV; however, this movement did not have much practical effect.

In his statement, the AP said he did not recall moving his vehicle at all during the incident. The WO was not asked about the movement of either vehicle. As a result, there is no evidence about why either the AP or the WO moved their vehicles, or the impact, if any, of the WO's actions on the reasonable perception of his detention status.

The AP's actions in closing his driver's door on SO2's torso, or striking toward SO2, constitute an assault and provide grounds for the arrest of the AP. A detention arising from a lawful arrest is not arbitrary.

The AP was not interviewed about this incident for six months. In his statement, the AP was not asked about his perception in respect of his detention status. The evidence he did provide does not establish that, prior to being told he was under arrest, police actions could have caused him to believe he was not allowed to leave. The available evidence does not support the conclusion that the AP was unlawfully detained at the time he closed his driver's door on SO2 or struck toward him; therefore, he was not entitled to use force against the officers. There is no substantial likelihood that the Crown could disprove at a trial that the officers were acting in the course of their duties when they arrested him for assaulting a peace officer.

Reliability of the AP's evidence

Crown Counsel conducting a charge assessment must assess all the material evidence. Crown Counsel are required to assess the objective reliability of the AP's evidence about key aspects of the allegations. In this case, the AP's evidence about the nature of his interactions with the police as shown on the video are demonstrably unreliable, which negatively impacts on the reliability of his evidence about events on the ground, which were not captured on video.

Section 25 defence

The IIO referred charges of assault, assault with a weapon, and assault causing bodily harm in relation to the actions of SO1 and SO2.

SO1 and SO2 were acting in the course of their duties when they arrested the AP and were therefore justified in using force to complete the arrest as long as the force used was reasonable, necessary, and proportionate in the circumstances.

Assault with a weapon

SO1 deployed OC spray into the AP's SUV. This occurred shortly after the AP had grabbed at or struck SO2 and during the time the two subject officers were arresting and attempting to restrain the AP.

The RCMP Incident Management Intervention Model, Vernon/North Okanagan Operational Unit Supplements - Section 1(a) states that "OCS *may be used to arrest a resisting person*". Section 2 states, "*Exercise caution in confined environments...where danger of cross-contamination may occur and affect...innocent bystanders.*"

SO1's use of OC spray to arrest a resisting person aligns with this RCMP policy. The available evidence does not establish a substantial likelihood that the Crown could prove at a trial that SO1's use of OC spray when arresting the AP was an excessive use of force in the circumstances. As such, there is no substantial likelihood of a conviction for the charge of assault with a weapon.

Assault causing bodily harm

SO1 and SO2 physically removed the AP from the SUV, took him to the ground, and arrested him. This would constitute an assault, and the injuries sustained by the AP meet the definition of bodily harm. However, as discussed above, SO1 and SO2 are entitled to rely upon section 25 of the *Criminal Code* as a defence to applying force on the AP.

At the time SO1 and SO2 used force to remove the AP from the SUV, he was physically resisting arrest, in the driver's seat of a running SUV, on a public street.

Both SO1 and SO2 were involved in taking the AP to the ground and restraining him there. The AP's injuries are not inconsistent with injuries that might be incurred by a suspect who was struggling as he was taken out of the SUV and onto the ground. Although the AP was injured as a result of the force used by the police, the available evidence does not establish a substantial likelihood that the Crown could prove at a trial that the degree of force used was more than necessary to take control of the situation as quickly as possible.

The AP told investigators that after he was taken to the ground the officers kicked his shoulder, jumped on top of him, and punched him in the head 15-20 times. The two police officers who arrived during the arrest say they observed the AP resisting the SOs' efforts to complete the arrest. Each stated to investigators that they did not observe the SOs strike the AP. The two social workers who arrived after the AP was on the ground said that the AP was not resisting arrest during their brief observation. These witnesses observed the officers strike the AP at least three times in the head but could not identify which officer delivered the strikes.

The AP's evidence is demonstrably unreliable. The AP's allegations that the police deployed pepper spray into the AP's SUV while the children were present, that he did not strike nor attempt to strike, any police officer, and that he offered no resistance to the police who removed him from the SUV are provably untrue. While his recollection of events may be honest,

these discrepancies negatively impact on the reliability of his evidence about force used after he was on the ground. The preponderance of evidence is that three strikes occurred after the AP was removed from the SUV.

At a trial, the Crown would be required to disprove to the criminal standard that the force used in striking the AP was reasonable, necessary, or proportionate. Police are trained that distraction strikes are a tactic at the lower end of the use of force continuum that may be used to arrest a resisting person. The AP's injury in the head area is limited to an abrasion above his right eye. The evidence does not establish a substantial likelihood that the Crown could prove at a trial that the strikes were contrary to police training.

There is no substantial likelihood of conviction for a charge of assault causing bodily harm for the force used to remove the AP from the SUV and take him to the ground.

The evidence does not establish a substantial likelihood that the Crown could prove at a trial that the strikes delivered by either SO1 or SO2 to restrain, handcuff, and arrest the AP were unreasonable or excessive.

There is no substantial likelihood of a conviction for the charge of assault or assault causing bodily harm with respect to either SO1 or SO2 in arresting the AP.

Conclusion

No charges have been approved in relation to either SO1 or SO2's involvement in this incident.