



PUBLIC REPORT OF THE
CHIEF CIVILIAN DIRECTOR

Regarding the injury to an adult male on
April 25, 2014, involving an officer employed
by the Nelson Police Department.

IIO 2014-000073

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 (CCD) of the IIO, 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 an investigation into the injury sustained by an adult male that occurred on April 25, 2014, in the city of Nelson. The male affected person sustained serious injuries as a result of jumping off of a bridge while being pursued by police and subsequently being taken into custody.

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, to 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.

Further, as the affected person is before the court and faces jeopardy, a significant amount of information will not be included in the public report.

NOTIFICATION AND JURISDICTION DECISION

On April 25, 2014, officers were pursuing the affected person near the Kootenay Canal Bridge near Nelson. According to the police, this was in response to an “armed robbery” complaint. The affected person left the vehicle he was driving and climbed over the bridge railing. The affected person fell to the area below. When he was located by police, he was taken into custody. Police requested emergency medical assistance.

The affected person suffered fractures to his hip and leg in addition to a large laceration to his head. The Independent Investigations Office (IIO) asserted and sustained jurisdiction after the affected person alleged that his fall and his injuries were the result of police actions. The affected person’s injuries fell within the definition of “serious harm” as defined in the *Police Act*. The *Police Act* definition includes injuries that result in “serious disfigurement,” or “a substantial loss or impairment of mobility of the function of any limb...”

Investigative Evidence Considered

IIO investigators interviewed the affected person and a witness who was in the vehicle with him. Some information obtained through these interviews will not be included in this public report as he remains before the court and faces jeopardy.

IIO investigators took voluntary statements from two subject officers and interviewed a witness officer. In addition, the IIO obtained radio communications and cell phone recordings between an officer and police dispatch. Photographs taken at the scene including those of the vehicles were considered.

Affected Person

The affected person gave a statement to IIO investigators and indicated he was “chased” onto a bridge on the outskirts of Nelson. He stated the police “blocked” him with their vehicles and that he felt trapped and feared for his life. According to the affected person, the officer who was directly behind his vehicle drew his weapon and yelled “I will kill you.” The affected person stated that he got out of his vehicle through the passenger side door and went to the railing “in a panic.” He indicated he was frightened and went over the side after hearing an officer say “I will blow you away.” The affected person stated he thought he would be better off at the bottom of the bridge rather than being shot by the officer.

The affected person stated that he was unconscious for “a little while.” He did not recall officers saying anything as they approached him. He was face down. The officer that “drew” on him jumped on his back, handcuffed him and tried to pick him up by his handcuffs. The affected person stated that he kept yelling at the officer “my leg is broken and I can’t stand on it” and that the officer was screaming “stand up, stand up.”

The affected person stated that the officer let go of the handcuffs and that he fell face first into the boulders and “cracked” his head open more. He stated that the officer tried to pick him up a second time and dropped him again. He stated that he wasn’t able to brace his landing to

stop his head from “bouncing off the rocks again” and that his head was “split open even farther.” He stated that he heard one of the other officers say “back off,” or something similar. He then heard the officers call for the medivac.

Civilian Witness

The civilian witness was interviewed by IIO investigators on April 30, 2014. She acknowledged being in the vehicle when it stopped on the bridge. The affected person opened the passenger door and got out.

According to the civilian witness, she huddled and closed her eyes. She stated that she heard screaming and yelling ‘get down, get down’ and reference to something about ‘guns’ however did not see anything. She did not see the affected person again after he got out of the car.

The civilian witness was asked to clarify what she meant by “stuff about guns.” She responded in writing: (She) heard the police shouting to (the affected person) saying things like ‘put the gun down’ and /or ‘get away from the gun.’

Subject Officers

Subject officer 1 consented to a voluntary interview with IIO investigators on April 30, 2014.

Subject officer 1 reported that he was advised by dispatch of an armed robbery in progress and identified himself as driving the lead vehicle involved in the pursuit. As subject officer 1 approached a sharp right prior to the Taghum Bridge, he lost sight of the affected person’s vehicle.

As he rounded the bend, subject officer 1 observed the affected person’s vehicle stopped at the right curb on the bridge entrance and stopped behind him. Subject officer 1 stated that he observed the affected person exiting the vehicle on the driver’s side.¹ Subject officer 1 observed the affected person turn and walk directly to the bridge railing. Subject officer 1 stated that he then got out of his vehicle and yelled two or three times: “Police, don’t move.” The affected person paid no heed and as soon as he reached the rail, threw the bag over, climbed over the railing and attempted to scale down a tree. Subject officer 1 observed the tree bend and the affected person fell from sight.

Subject officer 1 stated that he looked over the railing but could not see the affected person. He could see a black bag and a black jacket. He went to the opposite railing to see if he could see the affected person. It was at that time that other officers arrived and he directed them to where the affected person fell. Subject officer 1 subsequently followed subject officer 2 down a steep bank towards the river. Witness officer 1 stayed above to hold “cover position.”

¹ Both the affected person and the civilian witness state that the affected person left his vehicle through the passenger side door. Photographs show chipped paint on the rail of the bridge consistent with where the passenger side door would have been opened. As such, it appears that subject officer 1 may have been mistaken on this point.

Subject officer 1 stated that he saw the affected person conscious but lying face down on the rocks with one foot in the river. Subject officer 1 described the affected person as immobile and in pain. Subject officer 1 stated that subject officer 2 approached the affected person first and moved the affected person's arms behind his back to place him in handcuffs. The affected person "expressed grave discomfort" while the officers attempted to assist him off the rocks. They left him where he was and medical and rescue assistance was requested.

Subject officer 1 described the approach toward the affected person:

"(Subject officer 2) immediately began scaling down the bank as myself and (witness officer 1) followed. While doing so I observed a male wearing the same clothing as I observed on the bridge deck lying face down across several large rocks and one foot in the river. (Subject officer 2) and I continued down the bank as (witness officer 1) held his cover position above with the assault rifle on the (affected person). (Subject officers 1 and 2) arrived at the male's location and found him to be conscious however immobile and in a significant amount of pain. Blood was visible on the rocks adjacent to him and he advised members that he sustained an injury to his leg, back and head. (Subject officer 2) placed the (affected person) under arrest and placed him in handcuffs. The male expressed grave discomfort while members attempted to assist him in moving off the rocks, therefore, he was left on same."

When asked if there was any resistance by the affected person to subject officer 2's attempt to place him in handcuffs, subject officer 1 responded: "He was obviously very distracted by the pain he was in, so he did not initially comply with putting his hands behind his back. He was consumed by the pain so (subject officer 2) assisted him with that in, you know, as gentle a manner as possible....by physically pulling his arms, both arms back so that he could facilitate handcuffing."

Subject officer 1 described subject officer 2 as doing a cursory search, but no more due to the affected person's condition and him stating that "he couldn't move". According to subject officer 1, subject officer 2 did initially attempt to relocate the affected person off the rocks "but it was causing too much discomfort even trying to move him so we left him where he was."

On August 13, 2014, subject officer 1 was re-interviewed and specifically presented with the allegations made by the affected person, namely that he was threatened by subject officer 1 which caused the affected person to decide to jump off the bridge.

According to subject officer 1, he drew his firearm only as he left his vehicle and issued the command "Police, don't move," on two occasions as the affected person continued towards the railing. The affected person jumped over the railing onto the tree under his own volition and without any threats having been made by subject officer 1.

When presented with the allegations that an officer had "jumped" on the affected person's back, subject officer 1 stated that when they arrived down at his location, the affected person was face down on the rocks. He denied that there was any "jumping" on the affected person.

Subject officer 1 confirmed that it was subject officer 2 who handcuffed the affected person. He recalled that subject officer 2 made two attempts at moving the affected person by grasping him in the arm area and lifting him up a minimal distance. At that point, the affected person made some sort of loud moaning noise but there was no "screaming." He and subject officer 2 looked at each other and he may have said, "We'll just back off, wait for EHS to arrive and transport him," or something similar.

Subject officer 2 was interviewed by IIO investigators on April 29, 2014, and consented to his information being used by the IIO. He confirmed that he was the passenger in the second police vehicle engaged in the pursuit of the affected person. Witness officer 1 was the driver. Subject officer 2 stated that as they came around a sharp right bend, he could see the affected person's vehicle and the primary pursuit vehicle stopped at the Taghum Bridge. Subject officer 2 could see subject officer 1 looking over the west side of the bridge and indicating that the affected person was under the bridge.

Subject officer 2 stated that he made his way down a steep bank, with his weapon drawn and he could see the affected person on the river edge. He shouted to the affected person to "show" his hands. Subject officer 2 did not know if the affected person was armed.

Subject officer 2 also confirmed that he was the officer who handcuffed the affected person and that subject officer 1 was behind him at the time. When subject officer 2 tried to "pick him up," the affected person made a noise as if in pain. Subject officer 2 noted that the affected person had a cut on his head and that the affected person stated that his leg hurt. Subject officer 2 reported that subject officer 1 suggested that the affected person may have broken his leg. Subject officer 2 subsequently called for medical assistance.

In his interview, subject officer 2 gave an account of first encountering the affected person lying under the bridge and recalled issuing explicit commands to "show me your hands." Subject officer 2 stated that he issued further commands to "show me your hands" and he continued to approach the affected person.

Subject officer 2 stated that knowing he was covered by witness officer 1 and subject officer 1, he put his own gun away and approached the affected person: "(I) grabbed onto his arm, cuffed him, told him he was under arrest, and then I tried to pick him up.....and he started....not moaning, not screaming in pain, but wasn't compliant and obviously there was something that wasn't right.....I thought he was in pain. I can't remember, he grunted, moaned or....he didn't scream out, he just made some indications that it wasn't comfortable for him."

Subject officer 2 recalled: "I tried to pick him up and he was in some pain so I put him back down and I could see that he had a head.....that he had a cut on his head and some blood on the rocks and he said that his leg hurt. I asked him what was wrong, where did he hurt.....and he said that his leg hurt. I think (subject officer 1) said "His leg might be broken."

Subject officer 2 stated he responded by using his cell phone to communicate "That I had one in custody; I needed EHS and NFD (Nelson Fire Dept.)"

On August 13, 2014, subject officer 2 was re-interviewed. When presented with the allegations made by the affected person, subject officer 2 confirmed he did try and pick up the affected person twice. He stated that the affected person only made a groaning noise as he was trying to pick him up. It was at that time that he thought he may have been injured. Subject officer 2 stated that he had not seen the affected person fall. Subject officer 2 denied jumping on the affected person's back. He also stated that when he put the affected person back down, he did not drop him or smash his head on the rocks.

Witness Officer

Witness officer 1 was interviewed by IIO investigators on April 30, 2014, and confirmed he was driving with subject officer 2 as his passenger, while pursuing the affected person.

Witness officer 1 stated that as he came around the corner towards the Taghum Bridge, he saw the affected person's vehicle stopped on the bridge deck and subject officer 1's vehicle stopped directly behind it. Subject officer 2 got out of the vehicle first and witness officer 1 recalled subject officer 1 indicating that the affected person had gone "over the side."

Witness officer 1 moved to the edge of the bridge and could see the affected person on the rocks below. Witness officer 1 provided "lethal over watch" from the bridge while subject officers 1 and 2 made their way down. Witness officer 1 stated that subject officer 2 was the officer who handcuffed the affected person.

When asked about what he saw from the bridge while providing cover, witness officer 1 stated "He was just lying prone and I heard him moaning a little bit. I couldn't hear what he was saying; if he was saying anything....I was too far away."

Observing the affected person being taken into custody, witness officer 1 described "there was no resistance.....actually I can't say if there was or wasn't.....my perception from the top of the bridge down is going to be much different than somebody who has hands on the individual so to say if he actually provided any physical resistance when they attempted to handcuff him, I can't say that....but from my perspective there may have been resistance but it wasn't a struggle and he was handcuffed."

Asked if he saw the officers need to apply force to the affected person or to restrain him, witness officer 1 replied, "No, simply applying the handcuffs."

Communications Audio Recordings

Relevant radio communications were obtained:

- 2:25:05 p.m.: "Spike belt being set up by RCMP on Taghum Bridge
- 2:28:57 p.m.: "Passing the Kootenay Canals (subject officer 1)
- 2:31:01 p.m.: "Vehicle ditched. Male Running" (subject officer 1)
- 2:32:37 p.m.: "Male in custody" Emergency Medical Services requested.

During the course of the pursuit, radio communications were lost between pursuing officers and Nelson police dispatch. Subject officer 2 subsequently contacted dispatch via his cell phone

and was able to provide dispatch with ongoing updates relating to the pursuit, including the location of the affected person's vehicle, speeds and road conditions.

Subject officer 2's cell phone communications with dispatch lasted for six minutes and 36 seconds until the transmission was lost.

At five minutes and 43 seconds into the recording, subject officer 2 advised dispatch that the affected person was out of his vehicle and on the bridge. Thirty seconds after, officers were heard yelling:

- 6:13: "Let me see your hands!"
- 6:14: "Show me your hands!"
- 6:21: "Don't move!"
- 6:27: "Don't move!"
- 6:28: "Don't move!"
- 6:30: "Show me your hands!"
- 6:32: "Put your hands behind your back! Right now!"
- 6:35: "Put your hands behind your back!"
- 6:36: Connection lost.

ISSUES

The general issue in any IIO investigation is whether a person suffered death or "serious harm" as a result of the actions of an officer, and if so, how and why. If I consider that an officer may have committed an offence, then I must forward a report to Crown Counsel. The legal issues to be considered in this case are whether any officer made unnecessary threats, used unnecessary force or acted unreasonably causing subsequent injury to the affected person.

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)).

In addition, the affected person alleged that an officer attempted to move him and during the course of such an attempt, caused him additional injury. In order for such an act to be a criminal violation, it would have to be an act of criminal negligence. Criminal negligence is defined by section 219 of the *Criminal Code*: "Everyone is criminally negligent who (a) in doing anything, or (b) in omitting to do anything that it is in his duty to do, shows a wanton or reckless disregard for the lives or safety of other persons."

ANALYSIS

To constitute criminal assault by a police officer in the course of his duties, it would have to be established that in the context of the totality of the circumstances known to the officer, the force was disproportionate or unnecessary. The Supreme Court of Canada has clearly established that the allowable degree of force remains constrained by the principles of proportionality, necessity and reasonableness. *R. v. Nasogaluak*, [2010] 1 SCR 206 at para. 32. 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.

The affected person alleged that the only reason that he jumped off the bridge (and thereby sustained serious injury) was because subject officer 1 threatened to kill him.

That allegation does not appear to be true. Subject officer 1 stated that he issued the orders “police, don’t move” two or three times; he denied uttering the threats alleged by the affected person. The civilian witness acknowledged only hearing the words “get down, get down” and “things like ‘put the gun down’ and/or ‘get away from the gun.’”

In addition to the fact that the affected person’s allegation was not corroborated by the civilian witness, there are additional inferences that can be made that lead me to conclude that no such threats were made. The affected person engaged in other risky conduct that day, which would suggest his high level of motivation to escape apprehension. In addition, if the subject officer’s purpose was to apprehend the affected person, unconditional threats to kill would hamper that purpose. In fact, such threats to kill would be inconsistent with the orders that the civilian witness heard, namely the officer ordering the affected person to the ground.

The affected person also alleged that subject officer 2 used unnecessary force in dropping him to the ground two times causing him injury above and beyond the injury sustained from the bridge jump.

Subject officer 2 acknowledged two attempts to move the affected person, but stated that they were reasonable attempts to take him into custody before he realized that the affected person’s injuries precluded such a move. Subject officer 2’s statements are generally corroborated by the other officers who denied the affected person’s suggestion that he was handled without due care.

I note that from the time that it was first reported that the affected person exited his vehicle to the time that the call for emergency services was made, a period of one minute and 36 seconds had passed. This period of time also reflected the time it took for subject officer 2 to arrive at the scene (which was after the affected person jumped from the bridge), for him to climb down

a steep embankment and engage with the affected person. According to the cell phone records, it took subject officer 2 approximately 30 seconds to issue commands to the affected person after he arrived at the scene. As such, it appears that a period of less than one minute passed from the time that subject officer 2 began issuing commands to the point where the call for emergency medical services to attend was made.

The affected person may very well have perceived subject officer 2's actions to have been unreasonable. However I have to conclude that subject officer 2's decision to handcuff the affected person was not unreasonable given the significant efforts he had taken to avoid apprehension and given the nature of the alleged offence. Nor can I conclude that subject officer 2's initial efforts to move the affected person were unreasonable or acts taken with wanton or reckless disregard for his safety.

By all accounts, once subject officer 2 realized that the affected person was not in a position to be moved, he stopped and called for emergency medical services within one minute's time. According to the affected person's statement, the officer who was trying to pick him up was yelling: "stand up, stand up." Such statements would not be consistent with an officer who was attempting to inflict pain or injury, but rather an officer who was attempting to move him from the rocks to a more appropriate location. Even if it would have been more prudent for subject officer 2 to leave the affected person where he was, his two failed attempts to move him within such a short period of time would not constitute such an extreme disregard for the affected person's safety that it could be considered that he acted with criminal negligence.

CONCLUSION AND DECISION

Based on the evidence obtained as a result of the investigation, I cannot conclude that any officer may have committed any offence in this case. As such, no further action will be taken by the IIO and I will not be making a Report to Crown Counsel for consideration of possible charges.

CCD Decision Written on February 2, 2015.

Public Report Prepared for Release on February 23, 2015.

Richard Rosenthal
Chief Civilian Director