

**IN THE MATTER OF A PUBLIC HEARING pursuant
to Section 137(1) of *The Police Act* into an Allegation of
Abuse of Authority against Constable Christopher Bowser #90
and Constable Brendan Robinson #396 of the Victoria
Police Department**

NOTICE OF ADJUDICATOR'S DECISION

- TO: Constable Christopher Bowser #90 (Member)
Victoria Police Department**
- AND TO: Constable Brendan Robinson #396 (Member)
Victoria Police Department**
- AND TO: Chief Constable Jones (External Discipline Authority)
New Westminster Police Service**
- AND TO: Michael Tammen (Public Hearing Counsel)**
- AND TO: Dennis T.R. Murray, Q.C. (Counsel for Constable Bowser)**
- AND TO: David G. Butcher, Q.C. (Counsel for Constable Robinson)**
- AND TO: John S. Heaney (Counsel for Stan T. Lowe, Police Complaint
Commissioner)**
- AND TO: Richard Neary (Counsel for Tyler Archer)**

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A. LIST OF WITNESSES

1. Cst. Jessica McLeod – (Victoria Police Department)
2. Nick Richards – (B.C.A.S)
3. Joel Hibbard
4. Grace McCrimmon
5. Tyrone Trotter
6. Michael Morellato
7. Daniel Harlow
8. Deborah Excelby (B.C.A.S.)
9. Cst. Lane Douglas Hunt - (Victoria Police Department)
10. Cst. Dylan Bruce - (Victoria Police Department)
11. Daniel Irwin
12. Carl Arnett
13. Cst. Mandeep Gill - (Victoria Police Department)
14. Cst. Shannon Mayo - (Victoria Police Department)
15. Reserve Cst. Anil Apa – (Cent. S.P.D.)
16. Cst. Darren Hall (Vancouver Police Dept., Expert, Use of Force)
17. Tyler Archer
18. Orville Nickel (Expert – Use of Force)
19. Michael Baron
20. James Cameron (Skype from Paris, France)
21. Colton Borthwick
22. Cst. Chistopher Bowser - (Victoria Police Department)
23. Cst. Brendan Robinson - (Victoria Police Department)
24. John McKay (Expert, Use of Force)

C. INTRODUCTION

1. In May 2009, the City of Victoria established the Downtown Late Night Task Force to address a number of problems plaguing the City's downtown core at night. These were:

- excessive intoxication
- vandalism/breaking windows
- fighting/aggressive or anti-social behaviour
- street crowding after bars close
- excessive noise
- drinking and driving

2. On Enforcement, the Report states:

Enforcement:

Enforcement is a cornerstone of any effective program to manage late night disorder. Historically, police departments have responded to downtown late night weekend enforcement needs by deploying more officers to deal with the crowds and consequent issues, generally on an overtime or call-out basis. With the shift to community policing in the 1990's, police departments have balanced their role of enforcer with that of community collaborator or facilitator. Some cities have formed dedicated evening late night police details to deal with the unique demands of hospitality zones during the intense Thursday through Saturday period. The focus is on closing time crowds, traffic and pedestrian safety, underage drinking and intoxication and its impacts on businesses, residents, and other patrons. Resources and budgets to manage and maintain this work are limited, suggesting a greater need for police and business collaboration and sharing of resources.

According to Responsible Hospitality Institute, this trend will expand policing roles and require a more coordinated and customer service minded approach. The purpose is still to reduce risk to the public and this will involve traditional law enforcement techniques, prevention, problem-solving, collaboration and community engagement.

The coordination of police enforcement with other enforcement functions performed by municipal bylaw, fire and liquor authorities is an example of how this approach can play out in a community.

3. At page 30 of the Report, there is a heading:

B) Other Ideas Examined But not Adopted

The Task Force considered several other stakeholder suggestions, but elected not to include them in their recommendations as the evidence does not substantiate their effectiveness.

Among these were:

Tough police approach as opposed to a welcoming philosophy;
Experience in other jurisdictions suggests that a friendlier and less threatening approach is more effective in gaining cooperation and compliance and sending a positive message about the late night experience.

4. The Victoria Police Department responded with an Operations Plan (Ex.8) for a Late Night Task Force which states as its objective:

Four police officers will be assigned to the downtown entertainment district on Thursday, Friday and Saturday nights. Officers will work five-hour shifts between 2230 and 0330 and will patrol the entertainment zone on foot, with regular stops at the three taxi stands.

The policing style will be one that emphasizes welcoming patrons to the downtown, doesn't take a "heavy" approach, but clearly will address any issues that arise and take enforcement action where appropriate. Uniformed members will deploy on foot in full police uniform with issue yellow jackets. Meet in the atrium ready to go at 2230 hours.

Focus should include but not be limited to the following issues:

- Overcrowding in licensed establishments and/or restaurants operating late at night
- compliance with the LCLA in the downtown core
- disturbances outside licensed premises
- nuisance type offences (urinating in public, obstructing traffic, etc.)
- public drunkenness
- assistance to By-Law Officers and Commissionaires at all 3 newly established taxi stands

ENFORCEMENT

All members should have a low tolerance approach for these duties. Keep in mind that a welcoming charisma from police needs to be established early in the night well before the end of the night.

5. On March 21, 2010, members of the Late Night Task Force were:

A/Sgt. Chris Bowser
Cst. Brendan Robinson
Cst. Shannon Mayo
R/Cst. Anil Apa
Cst. Jessica McLeod

6. I will borrow from the Submission of Mr. Butcher to profile each member:

A/Sgt. Chris Bowser has a degree in biology and psychology from the University of Victoria. He joined the Oak Bay Police in 1995, and transferred to the Victoria Police in 2000. He is 6'3" to 6'4" tall, and weights 210 lbs. He was 38 years old with 17 years policing experience at the time of the incident. Like all of the other officers, the Late Night Task Force was an overtime shift for him. He had been trained in the National Use of Force Continuum at the J.I.B.C. He had received annual Use of Force updates at Oak Bay, and twice yearly updates in Victoria. He was responsible for all of the officers working that night.

Cst. Brendan Robinson was, on March 21, 2010, a Probationary Officer with the Victoria Police Department and a Second Class Constable at the time of his appearance at the Public Hearing. His one year probationary period ended on July 6, 2010. In 2006, he was a Volunteer Auxiliary Constable with the Sidney, North Saanich RCMP and remained in that capacity for 2 years until joining the Victoria Police Department in September, 2008. He trained at the Justice Institute in New Westminster and graduated in 2009. At the time of the events in issue he was 24 years of age, 6'4" tall and weighed 225 lbs.

Cst. Shannon Mayo, on the date of her appearance at the Public Hearing, was a Probationary Constable with the Victoria Police Department. On the date of the events in issue, she was a Reserve Constable with the Department and being trained at the Justice Institute New Westminster.

Cst. Jessica McLeod had been a regular member of the Victoria Police Department since November 2006, and had been working in patrol since July 2007. On the night in question, she had two years and eight months experience (Tr. June 25/12, Day 1, p. 16). She was Cst. Robinson's regular partner on their regular patrol shift duties for about 18 months. She had never seen him use any force that she considered inappropriate, excessive or unjustified. (Tr. June 25/12, Day 120) In her evidence, Cst. McLeod stated that while working with Cst. Bowser she had never seen him treat someone with disrespect or inappropriately. (Tr. June 25/12, Day 1, p.137)

Cst. Anil Apa, on the date of his appearance at the Public Hearing, was a Recruit Constable with the Central Saanich Police Department and was to commence full time as a Probationary Constable on July 21, 2012. On the date of the events in issue, he was a Reserve Constable with the Victoria Police Department. Cst. Apa is 5'8" tall and of average build.

7. The first set of Admissions of Fact dated June 25, 2012 (Ex.4), set the stage for the decision to call a Public Hearing:

- “1. On March 21, 2010, shortly after midnight, members of the Victoria Police Department who were conducting foot patrol as part of a Late Night Task Force witnessed a fight or brawl in progress outside a bar called The Social Club. The Social Club is located at 560 Johnson Street, in Victoria, British Columbia.
2. Several members of the Victoria Police Department, including the Respondent members Bowser and Robinson, attended the scene and interceded in the altercation. They took several people into custody. One or more members deployed pepper spray in the area.
3. One of the people taken into custody by police was Tyler Archer.
4. Exhibit “3” in these proceedings is video footage which depicts the Respondent members taking Tyler Archer into custody. The video was captured using a memory card by Michael Morellato, who will be a witness in these proceedings.
5. At all material times, both Cst. Bowser and Cst. Robinson were employed as members of the Victoria Police Department and on duty.”

8. The video, referred to in Item 4 above, was posted on *YouTube*.

9. On March 1st, the Police Complaint Commissioner issued a Notice of Public Hearing which reviews all the proceedings in this matter that transpired following the publication of the video. The Notice is marked as Ex. 1 and is a lengthy document. I will record here paragraphs 1, 2, 3, 4, 5, 14 and 15 as follows:

1. On March 24, 2010, the Office of the Police Complaint Commissioner received information from Victoria Police Department Professional Standards Section outlining allegations of professional misconduct by Constable Christopher Bowser (#90) and on a later date by Constable Brendan Robinson (#396). It was brought to my attention that a portion of this incident was audio-video recorded and posted on *Youtube*. On March 25, 2010, I issued an Order for Investigation, pursuant to section 55(3) of the former *Police Act*;
2. On April 14, 2010, Chief Constable Jamie Graham requested the Calgary Police Service Investigate this matter externally. On this same date, Chief Constable Graham delegated his legal authority as Discipline Authority, pursuant to section 134(1)(b) of the *Police Act* to former Deputy Chief Dave Jones of the New Westminster Police Service;
3. On May 4, 2010, Mr. Richard Neary, legal counsel for both of the subjects of the complaint, Mr. Archer and Mr. Kang, submitted a formal complaint form to the Office of the Police Complaint Commissioner on their behalf;
4. Mr. Neary is also representing Mr. Archer and Mr. Kang as Claimants in a civil action against Constable Bowser and Constable Robinson;
5. A criminal investigation was conducted by Vancouver Police Department where Crown Counsel did not elect to pursue charges. Both Mr. Archer and Mr. Kang participated in an interview in relation to the criminal investigation. For the purpose of the *Police Act* investigation, Mr. Archer and Mr. Kang were contacted either personally or through their lawyer, Richard Neary, for further interview. Both complainants declined the opportunity for further interview and the investigator was advised by Mr. Neary that his clients would not be making any further statement relating to this matter. As a result, their statement from the criminal investigation was adopted for the *Police Act* investigation.
14. Following a discipline proceeding into this matter, on November 28, 2011, Chief Constable Jones as the Discipline Authority, found that the allegations of Abuse of Authority contrary to section 77(3)(a)(ii) of the *Police Act* had not been proven for Constable Bowser or for Constable Robinson with respect to their conduct against Mr. Archer;
15. Having reviewed the investigation and discipline proceedings into this matter to date, pursuant to section 138(1)(c)(i) and section 138(1)(d) of the *Police Act*, I have determined that a

public hearing into this matter is required as I consider there is a reasonable basis to believe that the Discipline Authority's finding in this matter is incorrect and that it is also necessary in the public interest. In terms of the public interest, I have considered factors including but not limited to the following:

- (a) The complaint is serious in nature as the alleged misconduct involves a significant breach of trust;
- (b) There is reasonable prospect that a public hearing will assist in determining the truth; and
- (c) A public hearing is necessary to preserve public confidence in the police complaint process.

10. For reasons stated in para. 15 above, the Police Complaint Commissioner alleged as follows:

That Constable Bowser and Constable Robinson committed the following disciplinary default pursuant to section 77 of the *Police Act*:

- (a) **Abuse of Authority: contrary to section 77 of the *Police Act*, subject members committed the disciplinary default of abuse of authority, in the performance of duties, intentionally or recklessly used unnecessary force on Mr. Tyler Archer.**

11. Prior to the commencement of the Public Hearing on June 25, 2012, a series of Pre-Hearing Case Management Conferences were held on March 1, April 19, May 7, May 18, May 22 and May 25, 2012. I also granted an Order providing for limited participant status in the Public Hearing to Mr. Archer and Mr. Kang as follows:

...that Mr. Archer and Mr. Kang will have limited participant status in the hearing, such participation to consist of the following:

1. The right to be represented by counsel during their testimony, such right to include full participation by counsel during the testimonial portion of their evidence;
2. The right to have counsel instructed on their behalf, cross-examine the Respondent members, Constable Bowser and Constable Robinson;
3. The right to make final submissions at the conclusion of the evidentiary portion of the hearing;
4. The right to cross-examine Constable Darren Hall, with the order of cross-examination as among counsel for the Respondent members Mr. Neary's cross-examination will not exceed 60 minutes;

5. The right, in addition to disclosure material already received from the Office of the Police Complaint Commissioner, to access to and production of any further material which becomes part of the evidentiary record in this proceeding.

12. This Order was amended orally and with Consent, in the course of the proceedings, with the calling of John McKay, an expert in the use of force by Constables Bowser and Robinson.

13. Also, on May 7, 2012, I heard an Application by Mr. Neary, to suspend the Public Hearing, scheduled to commence on June 20, 2012, until the Civil Claims, filed by Messrs. Kang and Archer, were settled. I dismissed the Application with reasons on May 17, 2012.

14. The Public Hearing commenced on June 25, 2012, and heard from 24 witnesses, over 17 days of testimony. 34 Exhibits were entered into evidence. Also on this date, I issued Warrants for Harpinder Singh Kang, Michael Baron and Ryan Friesen. The witnesses can be grouped as follows:

- 8 Police Officers (Regular, Probationary, Reserve)
- 3 Ambulance Personnel
- 3 Experts on Use of Force
- 10 Bystanders/Combatants/Other

15. A second set of Admissions, dated July 18, was entered on that date as Ex. 20 and provides as follows:

1. The Social Club had committed the following contraventions of its Liquor Licence, and received the following suspensions:

December 1, 2007 – Overcrowding beyond permitted occupant load:
5 day licence suspension

March 7, 2010 – Overcrowding beyond permitted occupant load:
7 day licence suspension

Previous contraventions had been noted with no prior enforcement action taken.

2. In this matter, both officers were lawfully engaged in their duties within a challenging and potentially dangerous environment. They were seeking to end a brawl amongst several males, where at least one individual appeared injured and unconscious on the ground. There were numerous bystanders in this area, and a legitimate concern that matters could potentially escalate. The officers were required to act quickly to bring about order and control to the situation.
3. The conduct of Constable Chris Bowser was subject to a criminal investigation by the Vancouver Police Department. The fruits of that investigation, including: civilian statements of Carl Arnett, Mike Baron, James Cameron, Cayce Fedberg,

Ryan Friesen, Daniel Harlow, Tara Henderson, Joel Hibbard, Daniel Irwin, Grace McCrimmon, Robert McFarland, Michael Morellato, Ombodhi St. John, Tyler Archer, Harpinder Kang, Deb Excelby, Nick Richards, Tyrone Trotter; police statements of Csts. McLeod, Bowser, and Robinson, and Csts. Apa and Mayo;

911 call, and radio broadcasts; and the YouTube video were forwarded to Crown Counsel for charge approval. The material was reviewed by the Deputy Regional Crown Counsels for Vancouver and Fraser Regions, and the Director of Legal Operations for the Criminal Justice Branch. The Crown concluded that no charges should be laid. In the summary of the reasons for that decision released in public Media Statement 11-2, the Crown explained, in part:

The officers involved in this incident were outnumbered and one was to some degree debilitated by pepper spray...The officers also had a duty to restore the peace and to prevent the commission of offences.

...

The visual images on the video showing the application of force are emotionally disturbing, however in all the circumstances of the incident there is evidence that the officer was using force lawfully in order to gain control in an unstable and unsafe situation.

4. Casey Truesdale-Jackson declined to provide any statement to the police.
5. Ryan Friesen was interviewed by the police on April 22, 2010. He told them:

At about 12 midnight on March 20th, 2010, he arrived in a cab at the Social Club with his friends Carl Arnett, James Cameron, and Daniel Irwin.

He saw two people yelling at each other. There were a group of people in pub crawl shirts. Some of the other guys friends were in there too. It was becoming like a brawl almost.

There was a big guy who looked like a football player. He was pushing people away from the fight. He was taking the side of the pub crawl guy in the fight. He was ready to fight people too. Then the black guy hit him in the face and he fell down.

The pub crawl guys started to win the fight. This one guy was in trouble. He started to lose and was getting hurt. Then a black guy came out of nowhere and punched a couple of pub crawl guys. He knocked them out.

The original guy who was fighting started stomping a couple of times on the knocked-out guy's head. The black guy ran away.

The guy doing the stomping was wearing a black hoodie.

D. THE BURDEN OF PROOF

16. On October 23, 2012, I was informed that Counsel for Cst. Robinson, Mr. Butcher, wished to raise the issue of the applicable burden of proof.

17. On October 30 and November 5, oral submissions were heard from all counsel, including Mr. Heaney, who appeared on behalf of the Police Complaint Commissioner. These were followed by written submissions. The argument raised by Mr. Butcher (and supported by Mr. Murray, counsel for Cst. Bowser), was that the burden of proof on Mr. Tammen, Public Hearing Counsel, was higher because the allegation of misconduct involved police officers. They argued that the burden of proof should be an "intermediate" burden, higher than in a civil case, i.e. on the balance of probabilities but lower than in a criminal case, i.e. proof beyond a reasonable doubt.

18. It is not necessary for me to review the many decisions which contributed to the confusion over the notion of a third or "intermediate", burden of proof in Canadian jurisprudence. These decisions were reviewed in the Supreme Court of Canada in the case of *F.H. v McDougall*, [2008] 34 SCR. 41, 2008 SCC 53, in which, in a unanimous decision the Court held that:

"There is only one standard of proof in a civil case and that is on a balance of probabilities."

19. I wish to refer to the following authorities:

A. B.C. Police Discipline Cases

1. PH-08-01 *Reasons for Decision of Adjudicator Robert Bruce Hutchison January 28, 2009*;
2. *Reasons for Decision of Discipline Authority, Ian H. Pittfield in the Matter of Constable Wendy Bowyer*:

20. At page 8, para. 25 of his Decision, Discipline Authority Pitfield states as follows:

“Until such time as the British Columbia Court of Appeal determines otherwise, I am of the view that the standard to be applied in a *Police Act* discipline proceeding is that of proof on the balance of probabilities, in the assessment of which the trier of fact must examine the quality of the evidence with care to ensure that it is clear, convincing, and cogent. As I see it, the words “clear”, “convincing” and “cogent” constitute an admonition to the trier of fact to assess the evidence with care and to ensure that it is clear and not ambiguous. Evidence that is convincing is also cogent. The words are synonymous. The assessment of evidence in this manner is something one would expect of a trier of fact in any event...”

B. R.C.M.P. Discipline Cases:

1. *Appeal of an RCMP Adjudication Board Decision*, made pursuant to section 45,15 of the Royal Canadian Mounted Police Act, R.S.C. 1985, c. R-10, as amended between: *Corporal “X” and Appropriate Officer “X” Division*, Royal Canadian Mounted Police, before: Catherine Ebbs, Chair, Feb. 10. 2009.

21. At page 40, para. 100 of her decision, Chair Catherine Ebbs states:

[100] I note that in its decision, the Board rightly stated that the standard of proof to be met in this case was the balance of probabilities. However, it added that “the degree of probability required to discharge the burden of proof on a balance of probabilities is a flexible standard”. The Board’s statement was not unreasonable given that, at the time it made its decision, the law was uncertain on this point. However, in the Supreme Court of Canada’s (“SCC”) decision in *F.H. v McDougall*, 2008 SCC 53, the Court recently clarified the law of the standard of proof in civil cases:

“In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.” (para. 49)

[101] I therefore recommend to the Commissioner of the RCMP that he analyze the Board’s findings on fact on the basis of the SCC’s pronouncement in *McDougall*.

2. *Appeal of an RCMP Adjudication Board decision, made pursuant to Section 45.15 of the Royal Canadian Mounted Police Act R.S.C. 1985, c. R-10, as amended between Constable "X" and Appropriate Officer "X" Division, Royal Canadian Mounted Police, before: Catherine Ebbs, Chair, January 28, 2011.*

22. At page 11, para. 33 and 34 of her decision, Chair Catherine Ebbs States:

"[33] The Board issued an oral decision on December 17-18, 2008 (Transcript of Dec. 17, 2008, pp. 258-261; Dec. 18, pp. 5 – 21). It completed a written decision on or around March 4, 2009.

[34] The Board held that in view of the Appellant's admissions, testimony, and certain exhibits, the acts constituting the alleged misconduct in all five allegations were established on the balance of probabilities. It believed that a reasonable person with knowledge of all relevant circumstances, including the realities of policing generally and the realities of policing in the Force particularly, would find that the purported acts were disgraceful and a discredit to the Force. It found a clear nexus between the transgressions set out in the allegations, and the Force's interests. It noted that this gave the Force sufficient reason to discipline the Appellant."

C. Other Papers and Reports Concerning Police Discipline

23. In her Annual Report 2008 – 2009 to the Honourable Peter Van Loan, P.C., M.P. Minister of Public Safety, at p. 18, Chair Catherine Ebbs writes as follows:

"Standard of Proof Required in RCMP Discipline Hearings:

In D-108, the ERC highlighted a recent Supreme Court of Canada decision, *F.H. McDougall*, 2008 SCC 53, which clarified that there is only one standard of proof in civil cases – the balance of probabilities – and that this standard does not vary with the seriousness of the allegations or the potential consequences to the member. The ERC noted this principle and recommended that the RCMP Commissioner review the Level I decision with this standard in mind."

24. RCMP Code of Conduct Cases in British Columbia - A Five Year Review: 2005-2009 At page 1 of the Review, para. 4, the following appears:

"Importantly, substantiating a contravention under the Code of Conduct requires a decision based on the

“balance of probabilities”. This standard, being a civil law burden of proof rather a criminal law burden of proof, is met if the likelihood that the proposition is true is more likely than it being not true. Effectively, the standard is met if it is determined that there is a greater than 50% probability that the proposition is true.”

3. *Let's Be Clear About "Clear and Convincing"*, a paper concerning the standard of proof in police discipline cases presented at the CACOLE Annual Conference, Halifax, N.S. October 12, 2007, by David Goetz, Senior Counsel, MPCC, Military Police Complaints Commission, Ottawa.

4. *Let's Be Clear About "Clear and Convincing" A Postscript*, CACOLE Annual Conference, Ottawa, Ontario, June 8, 2009, by David Goetz, Senior Counsel, MPCC. (Note: David Goetz' First Paper preceded F.H. McDougall. His Second Paper, as the title indicates, is a Postscript)

25. A Public Hearing pursuant to Section 137(1) of the *Police Act*, R.S.B.C., 1996, c. 267, is a civil proceeding to which the common law applies. In the absence of a statutory provision specifying a burden of proof, the common law applies. The leading case in Canada, at this time, on burden of proof, is: *F.H.v McDougall*.

E. THE VIDEO AS EVIDENCE

26. Witness Michael Morellato, his wife and two friends were walking northbound on Wharf Street when they noticed a “ruckus”, i.e. police officers breaking up a fight adjacent to The Social Club at 560 Johnson Street. Morellato was attracted to and concerned with the force being used by the police in gaining control of an individual (Kang) who was down on the paved roadway adjacent to The Social Club. Morellato had his camera with him, a Canon G11, handheld and he had it on video mode. He described it further as a high-end compact camera. Morellato filmed the events he observed, continuously, in colour and with audio for approximately 56 seconds focusing on the use of force being used by the police on two individuals who he later learned were Kang and Archer.

27. Before I make any observations and findings based on my viewing of the video (Ex. #3), I will address concerns (or limitations) on the video evidence which have been expressed by Mr. Butcher in his written submissions of November 2, 2012 and by expert witness Cst. Darren Hall. Mr. Butcher summarizes the limitations as follows at para. 66, p. 21 of his Submission:

“To summarize these are some of the many limitations with Mr. Morellato’s

video:

- a) it does not capture the whole chronological sequence of events
- b) it's angle captures only 45-90 degrees of the "pie" when it is recording;
- c) it does not depict the arresting of Archer from the perspective of any of the participants.

28. Cst. Hall, at l. 1 - 6, p. 185, Tr. July 9 states:

"Video shows only one perspective. And it's important to understand that it is generally speaking not from the perspective of an officer making a decision, which is really what we should be looking at as to make an assessment as to the validity of their actions."

29. I do not disagree with the limitations of the video evidence as expressed by Mr. Butcher.

30. In respect of Cst. Hall's statement, I cannot disagree that what a camera captures of an event is not what an officer sees through their own eyes and on which they base their perception of circumstances in deciding to use force.

31. Video evidence has its weaknesses and it has its strengths. It is an extraordinary situation, as in this case, for a fact-finder to have the benefit of an audio-visual recording, in colour, taken by an independent witness, whose focus was the use of force being used by police officers, which is the subject of this Public Hearing.

32. In this case the video effectively places me, as the fact-finder, to within 20 – 25 feet of the events which require analysis, just as if I were an eye witness at the scene. I understand, of course, that I only see what the camera captures of those events. With or without the video, a fact-finder must rely on the reliability and credibility of the individual police officer's evidence as to what they see and perceive. Obviously, a camera cannot perform that function.

33. There are scenes in the video where events are obstructed by legs, bodies, and a rock monument and it becomes necessary to rely on other evidence, namely oral testimony, to understand the particular event. Significant evidence has been given of events which were not captured by the video. Those events will be evaluated, obviously, through oral testimony."

34. Although a camera can be used as an investigate tool, it was not so used in this case as there was no investigation underway. I disagree with Cst. Halls' testimony in this regard.

F. HANDCUFFING OF HARPINDER KANG

35. There are no formal allegations of Abuse of Authority against Officers Bowser and Robinson arising from their conduct in handcuffing Kang. I will, in due course, make observations in that regard insofar as they relate to their subsequent dealings with Archer.

36. To set the stage, I will borrow from Mr. Tammen's submissions where he fairly summarizes the Testimony of Cst. McLeod, the first police officer to deal with the combatants:

"Cst. McLeod was walking across the grassy median when she noticed that a fight was breaking out just to the north of The Social Club entrance. She ran across the grass median and was the first officer to reach the scene of the fight. She saw a male on the ground, later identified as Ryan Friesen, and a male wearing a dark hoodie kicking Friesen in the head. She deployed her OC spray in the area as soon as she arrived at which she believed were multiple assaults involving six to eight people.

The group dispersed and an unidentified male came to the aid of Friesen. Her attention was then drawn to two males who were continuing to fight on the sidewalk to the north. She identified those males as Michael Baron and Casey Truesdale-Jackson (from subsequent dealings). She deployed her OC spray to Truesdale-Jackson, and thereafter spent some time assisting him and keeping him out of harm's way.

She did not recall seeing the male in the dark hoodie again. She identified Archer, but said she had no prior dealing with him."

37. Mr. Tammen also fairly summarizes Cst. Robinson's testimony about his arrival at the scene:

"He said he saw 7 – 10 males physically fighting, punching and kicking. He noticed one male actively stomping on another male's head. The first male appeared to be lifeless, and Robinson thought he might be witnessing a homicide. He and Constable McLeod were first on scene. He was about to deploy his pepper spray toward the main aggressor when he was hit in the left side of his face with OC spray deployed by Constable McLeod.

He described the situation as very volatile, like a fire that was smouldering and could flare up again at any moment.

With respect to the main aggressor, the person stomping on Friesen's head, he said it was a large male. He never saw his face, and did not see where he went after he left the area.

He described the effects of the OC spray upon him, particularly to the vision in his left eye, but also the burning sensation and the effect on his breathing and respiratory system.

Robinson's attention was drawn to Kang, who he recognized as one of the 7 – 10 males involved in the initial fight. He said Kang was yelling and swearing, but that he did not recall what Kang was saying. Kang would not leave the area, so Robinson decided to arrest him. He described the inability of both himself and Cst. Apa to gain adequate control of Kang.

38. Witness Grace McKrimmon preceded Morellato, the cameraman, to the confrontation. She was driving northbound, off the Johnson Street bridge and planning to go east on Johnson Street when she saw the police using a level of force which upset her. She parked her car facing north on Wharf Street and was "much less than 30 feet" away from the fighting.

F. (I) The Video Evidence (Kang)

39. The opening scene in the video at .04 seconds, also captured in a still photograph (Ex. 13), shows Cst. Robinson, hatless, down in a squat position, back to the camera and, to his left, Cst. Apa, both trying to control Kang so he can be handcuffed.

40. Kang is lying on the paved road, on his right side, with his knees tucked up as in a fetal position. His lower back is clearly exposed between the top of his belted jeans and the bottom rim of his white shirt or top which he is wearing. Cst. Bowser has not yet appeared. At this time, witness Harlow and a female later identified as Lynette Lim, are in the immediate area, i.e. a pace or two from where Kang is lying.

41. At .03 seconds, the video shows Cst. Bowser approaching with measured strides to where Cst. Robinson and Cst. Apa are struggling with Kang.

42. Cst. Bowser looks down at Kang, places his right hand on Cst. Robinson's left shoulder, his left hand on Cst. Apa's right shoulder (as if to brace himself) and delivers a hard kick with his right foot to Kang's lower back just below the exposed area. The kick is not with the toe of his boot but with the sole and heel – a downward, thrusting, forceful kick as if he were striking a brake pedal on a vehicle.

43. He then delivers a second kick, with the same foot, in quick succession, to the same area of Kang's lower back but with the toe of his boot. This was a hard and forceful kick delivered while he appeared to be bracing himself, as before, with his hands on Cst. Robinson's and Cst. Apa's shoulders.

G. HANDCUFFING OF TYLER ARCHER - The Video Evidence

44. After Cst. Bowser delivers foot strikes to Kang, he is seen at 0.10 secs., to walk in a counter-clockwise direction around Kang (who is still on the ground) and is scanning the scene.

45. At 0.16 secs., Cst. Bowser's attention is drawn to some minor inter-action between witnesses Harlow and Borthwick, who are both standing by, and he then returns, clockwise, to where Borthwick is standing. At 0.20 secs., with backs to the camera, they have a brief conversation.

46. In the course of their conversation, Borthwick is seen gesturing with his left arm in the direction to where (we learn a second or two later) Archer is located.

47. At 0.22 secs., Cst. Bowser is seen to turn his head suddenly, ease Borthwick from obstructing his views, with his hand, to get a better view of Archer, whose conduct is concerning him.

48. At 0.24 secs., Borthwick and Cst. Bowser walk towards Archer. As they approach the curb which borders the grassy area, Cst. Bowser points to the ground where Archer is standing and in a clear loud voice, commands Archer to "get on the ground." At this time, Archer is not seen in the video.

49. At 0.26 secs., the scene shows Archer, Cst. Bowser and Borthwick, just a few feet apart from each other. Again, Cst. Bowser points to the ground where Archer is standing and gives a second clear and loud command to "get on the ground."

50. At this time, Archer is standing still, feet apart, arms forward and down, hands open, back slightly arched and is looking directly at Cst. Bowser and appears to have his mouth open as if he is speaking to Cst. Bowser.

51. On the second command, Archer goes down, leaning on his left arm with his left hand on the grass and his left leg folded under him. He then, at 0.28 secs., rolls onto his buttocks with his right arm supporting him, right hand on the grass and with his left arm and open hand held up, appears to be speaking and gesturing to Cst. Bowser, who appears to be listening to him.

52. Cst. Bowser moves closer to Archer in a stance that suggests that he is about to handcuff Archer.

53. At 0.30 secs., Cst. Robinson is seen charging toward Archer, obviously unseen by Cst. Bowser, and tackles Archer, grabbing him by his clothing on his left side and tries to roll Archer over and down onto his stomach.

54. The struggle by Cst. Robinson to force Archer into a prone position continues, largely obstructed by a rock monument, but Archer is seen, at 0.31 secs., with his black jacket pulled over his head while in a squat position and then forced forward on his knees.

55. At 0.33 secs., Archer is heard to exclaim: "ow", "ow", "ow", as he is being forced into a prone position.

56. At 0.34 secs., Archer is seen on his knees supporting his upper body from falling face down on the grass with his arms. Cst. Robinson is trying to pull Archer's right forearm up for handcuffing and Cst. Bowser is standing beside Archer's head and is heard to say "put your hands behind your back or it's going to go bad for you".

57. At 0.37 secs., Cst. Bowser is seen delivering a hard forceful kick to the left side of Archer's exposed upper torso.

58. At 0.38 secs., Cst. Robinson delivers a knee strike to Archer's left side (abdomen area) with his left knee.

59. At 0.39 secs., Archer goes down on the grass on his left side. At .40 secs., Cst. Bowser pins him at the waist with his left knee while holding his handcuffs in his right hand. At this time, Cst. Robinson is trying to grab hold of Archer's left and right wrists and appears to have them but then loses hold.

60. At 0.41 secs., Archer is heard to exclaim "ow", "ow", "ow".

61. At 0.43 secs., Cst. Bowser knees Archer in the middle of the back with a forceful knee strike. Cst. Robinson is holding Archer's right arm and hand. At 0.45 secs., Cst. Bowser delivers a second forceful knee strike in the middle of Archer's back.

62. At 0.50 secs., Cst. Bowser is heard to say "there you go."

63. The handcuffing is accomplished at 0.49 secs.

H. ANALYSIS AND FINDINGS

(1) Activity at the Scene

64. I fully recognize that when I view the video, it is not in the atmosphere that prevailed when Kang and Archer were being handcuffed. What I see is not exactly tranquillity but I do not see the chaos or the chaotic activity that Cst. Bowser and Cst. Robinson have described.

65. The evidence is clear that when Cst. McLeod deployed her pepper spray at the combatants, they dispersed and the fighting ended.

66. At the time when Cst. Bowser delivered the foot strikes to Kang, there were two persons who were close to the struggle that the officers were having with Kang. They were, as it was later learned, Lynette Lim, Kang's girlfriend and witness Harlow, part owner and manager of the Social Club.

67. According to Ex. 34, Kang's statement to the Vancouver Police investigators states that Lim is a "little Asian girl" and weighed "approximately one hundred pounds." Witness Harlow, as we learned when he testified, knew Cst. Robinson on a first name basis. All other persons were a respectful distance from the handcuffing either standing as the sidewalk, apparently in a line-up or concerned with Friesen who is prostrate on the sidewalk under the watchful eye of Cst. Mayo.

68. No one, including, Cst. Bowser is rushing around. It is a relatively orderly scene.

69. I do not see in the video a threat of interference by any onlooker that would justify the use of foot strikes to enable three police officers, two of whom are 6'3" tall and weighing 225 and 220 lbs. respectively, to handcuff a man who is on the ground and weighs 175 lbs.

70. The video does not show any chaotic activity or any indication of interference or potential inference in the vicinity of the struggle to handcuff Archer. Persons are seen walking along the sidewalk. Cst. McLeod is helping a victim of pepper spray and the scene is relatively orderly.

(2) Tyler Archer as a Threat

71. In his testimony of July 3, Cst. Apa explained his encounter with Archer. Referring to the

Photo Booklet, Ex. 5, he said that he was near the BC Hydro box shown in photo #3 when he saw a male on the ground being stomped on two doors down from the Social Club, near a parking station. Cst. Apa said he ran to the area and encountered the person later indentified to him as Archer.

72. Cst. Apa stated that Archer was just standing in the middle of the road in front of a blue shop. (photo #4)

73. Cst. Apa testified as follows in his exchange with Mr. Tammen:

“Q. And tell us as best you can what he looked like when you first approached him?

A. --he had blood on his face.

A. On the mouth area and the nose area. And he was trying to tell me things, he was saying, oh, they attacked him. And there was quite a bit of blood that he was just splattering, spattering when he was talking. (p. 55, ll. 1- 25)

A. So I just then when I was trying to listen to him, I saw Constable Robinson struggling with this other person on the ground. So at that moment I made a decision. I said, “You just have a seat here on the curb.” I assist him to sit on – by the side of the curb there, and then I ran towards Constable Robinson to help him with the arrest of Mr. Kang.

Q. Are you able to say anything about whether from your perspective, at that time at least, you perceived this fellow later know to you as Tyler Archer to be a threat?

A. Not to myself, no.

Q. I take it when you first had dealings with him he was not handcuffed?

A. No.

A. He was standing up.

Q. Are you able to say anything from you observations then or at any other time on scene about his state of intoxication? (p. 56, ll. 1 – 25)

A. I can't tell. As I said, my interaction with him was very short.

74. And at p. 76, ll. 7 – 17, this exchange with Mr. Tammen:

- Q. Can you say anything else about how he appeared when you first saw him, or have you already told us everything?
- A. I did. As I say, he had blood on his face, and he looked kind of disoriented, like he didn't—yeah, that's all I can really say.
- Q. Okay.
- A. It was very short. Like, I didn't spend not more than, I don't know, five seconds with him. Like I said, I just walked to him, told him to sit on the curb and ran and assisted Constable Robinson.

75. On July 3, Cst. Apa testified as to his encounter with Archer. He was cross-examined by Mr. Murray as follows:

- Q. Now, dealing with the person you described in your words as Mr. Archer, when you dealt with him for those few seconds after you finally got across to the area of the outside the doorway, okay?
Dealing with him in those few seconds you told him sit down?
- A. That's correct.
- Q. And you told him in no uncertain terms not to move; correct?
- A. That's correct.
- Q. And part of the reason you told him that was that same reason you would tell anybody; you wanted people out of the way sitting down, under control. Correct?
- A. That's correct.
- Q. You didn't want people, if you could possibly do it, still Milling around. You wanted to reduce the numbers milling around as much as you possibly could; correct?
- A. Absolutely.
- Q. And that's why you told him to sit down?
- A. That's correct.
- Q. And that's why you told him in no uncertain terms do not move; correct?
- A. That's correct.
- MURRAY: Thank you. Those are my questions.

76. On July 19, 16 days after Mr. Murray cross-examined Cst. Apa, Mr. Tammen cross-examines Cst. Bowser on Cst. Apa's testimony about his encounter with Archer:

- Q. And likewise, you didn't see from the time that Reserve Apa entered the fray slightly ahead of you, you didn't see him until you saw him interacting with Mr. Kang over on the street; correct?
- A. That's correct.
- Q. It's your next visual of Reserve Apa?
- A. That's correct.

- Q. Okay. And so you didn't see, if he did, for instance, have some interaction with Tyler Archer, and ask or direct Archer to sit down on the curb or on the grass, you didn't see that? Right?
- A. I didn't see Reserve Apa have interaction with Mr. Archer, no. I don't know how it would have been possible for him to have interaction with Mr. Archer when Mr. Archer broke away to the west, and by the time I handcuff Mr. Baron, I look over and Reserve Apa is in an altercation with Mr. Kang. I don't know how that would be humanly possible for him to run there to Mr. Archer and not saying you knew at the time, we know now, there are two groups of people, two groups of combatants, the lacrosse team and the pub crawl guys. Baron and Archer aren't on the same side; right?
- A. They are clearly not on the same side. We know that from the proceedings.
- Q. Right, exactly, and I'm not suggesting you knew that the time. I am suggesting you saw two individuals in effect moving off together, leaving the scene, fleeing the scene, but that's not exactly what was happening. All you are seeing is two individuals that are simply moving in the same direction. One of them is Baron, we know what you did with him. The other one we know it's Archer, but all that's going on there, he is moving over, walking over to sit down on the grass, and that's something that an officer, Reserve Apa, has told him to do, go sit over there and that's all that happened?
- A. No, wouldn't have had time for that in my opinion.
- Q. Okay?
- A. The group is there, there is the melee is going on, spray is in the air, and breaking out of that melee is Mr. Baron and Mr. Archer. And they break from that melee and are moving at a brisk pace. Are they at a full-out spring? No. Are they walking? No. They are moving at a brisk pace away from the scene. They are within a distance of each other that I could keep an eye on both of them up to the point where my focus primarily came to Mr. Baron to take him into custody. But in no way, shape or form was Reserve Apa anywhere near Mr. Archer as they broke from the group or would he have had time to have had an interaction with him in the chaos that was occurring. I don't see it. But I can't speak for Reserve Apa's evidence. That's just my perceptions at the time.
- Q. Okay. You do remember his evidence when he testified here?
- A. Yes, I do. And he said he took him and he sat him down and he talked to him. I don't think he could have done that.
- Q. All right. I want to get a sense, though, of this. Let me start with this. In terms of whatever Apa did when he first go there, you don't know because you lost sight of him almost immediately; correct?
- A. That's correct. When they hit that outer crowd before the brawl, before they even get into the brawl as they are into that outer crowd I have lost sight of my officers in that crowd, and they are all going through the crowd to get to the scene.

77. It is significant, in my view, that on July 3 (Day 5) when Cst. Apa gave his evidence

about his encounter with Archer, he was not challenged at that time as to whether he could be mistaken. His cross-examination by Mr. Murray was very brief and focused on whether Archer had remained seated on the curb where Cst. Apa had assisted him in sitting down.

78. It was on July 19 (Day 13) that Cst. Bowser testified and stated:

“But in no way, shape or form was Reserve Apa anywhere near Mr. Archer as they broke from the group or would he have had time to have had an interaction with him in the chaos that was occurring. I don’t see it. But I can’t speak for Reserve Apa’s evidence. That’s just my perceptions at the time.”

79. On July 3, when he testified, Mr. Tammen referred to Cst. Apa to the scene in the video where Archer is standing up and beginning to respond to the commands of Cst. Bowser to “get on the ground”. Cst. Apa described the location where he had assisted Archer to sit down on the curb.

80. I found Cst. Apa to be a credible witness and I accept his evidence as to his encounter with Archer and his observations.

81. I do not accept Cst. Bowser’s evidence that the encounter between Cst. Apa and Archer could not have taken place.

82. I also note that Cst. Apa’s evidences does not support Cst. Bowser’s perception of Archer as a threat.

83. On July 17, witness Borthwick, testified as follows in an exchange with Mr. Tammen:

A. A couple of the big guy’s friends, I don’t know who they were, were fighting with them. It was mainly between the big guy and Tyler. I think the big guy attacked Tyler, and then Tyler was losing. And I think someone jumped in and knocked the big guy out, and that’s when the cops came in.

Q. What happened when the police came onto the scene? What did you see them do or what did you see happen?

A. They all just unleashed the cans and started hosing everybody down with pepper spray. (p. 63, ll. 4-22)

Q. After the police broke up the fight, did you see anybody on the ground?

A. Well, yea, Tyler was hurt. The big kid attacked him; he was on the grass. (p. 64, ll. 18-22)

Q. Did you have any interaction, any dealings at all with any of the police officers once they arrived and they had sort of broken up the

fight?

- A. Yes, I asked one of them to come help Tyler because I thought he was seriously hurt. (p. 65, ll. 21 – 25)
- A. I walked over with the officer and I was kind of just standing there. And I guess the officer probably thought Tyler was trying “to resist”, but I guess he was mistaken. He was hurt. And that’s when he kicked him, I guess. He wasn’t cooperating.
- Q. Okay. You say he kicked him. Can you be more specific about who kicked who?
- A. I don’t know the officer’s name. I have just seen the video.
- Q. He kicked who though?
- A. Tyler.
- Q. What made you think that Tyler was hurt and needed assistance?
- A. Because he was already down. He was holding his rib. And he is important, right? We are in mid-season, ready to go into playoffs. So he’s one of our main guys; we can’t have him injured. I don’t know. I was just trying to be a nice guy helping my buddy out. I told the officer can you ask the paramedics down here to help him out. (p. 66, ll.4-25)
- Q. You told the officer something about Tyler needing help?
- A. Yes.
- Q. And did you indicate to the officer in any way who it was that needed help or who Tyler was?
- A. I pointed at him.
- Q. And do you recall this: Did the officer that you said that to and pointed out Tyler to—did he respond to you in any way, do you remember?
- A. No, but now that I watch the video it looks like he said thanks, because he puts his hand on my back and then walks over there. But, no, he didn’t really say anything. I kind of just back off again. (p. 67, ll. 1-16)
- Q. And we see there, where we have paused it now, the 22 – second mark, you have got your back to the camera. You are pointing to your left, it looks like, and this officer in the yellow jacket it appears you had some discussion with him, and he has got his back to the camera. He is looking or pointing in a slightly different direction. Up until then you could see from the video that you had had some interaction with the officer; correct?
- A. Yes.
- Q. Is that what you were telling us earlier when you tried to tell him something?
- A. I tried to tell him to come over to Archer because Archer was holding his hip, and if you keep playing it, you will see he is holding his hip, holding his ribs. (p. 70, ll. 9-25)

Mr. Tammen pauses the video at .35 secs. and has the following exchange with Borthwick:

- Q. Were you watching what was going on here between these two officers and Tyler Archer as we see it in the frame here?
- A. Yes, the officer thought he was resisting, I guess, and having an issue.

So that's why they kicked him.

- Q. Did it look to you from what you saw like Tyler Archer was resisting?
- A. No, not at all. He was putting his hands up saying, "Listen, I'm good. Just calm down." He was trying to be chill, but I guess he wasn't. (p. 75, ll. 2-12)

84. On the day following Borthwick's testimony on July 17, Cst. Bowser testified. He was examined by Mr. Murray on his perception as to Archer being a threat. At page 59, ll. 1 – 25 the following exchange took place:

And I do hear over the radio, she is calling for PAS. She's called for additional cover units. None are coming, And as that is occurring, now my attention is drawn through my peripheral vision towards Mr. Archer. Mr. Archer begins to advance towards the location I am dealing with Mr. Borthwick. That's my dealings with Mr. Borthwick.

- Q. So what—what did you see of Mr. Archer at that point? What's he doing? What's he saying? What's he...
- A. What I see of Mr. Archer is Mr. Archer was one of the individuals who broke with Mr. Baron from the initial melee in around where Mr. Friesen was laying unconscious. He is one of the primary individuals I wanted to arrest in regards to believing that he was responsible along with Mr. Baron for the unconscious male, Mr. Friesen, laying in the doorway.

For whatever reason, unbeknownst to me at the time, Mr. Archer begins to come back into the fray, and I call it a fray because the scene to me is still not under control. It's still chaotic, and it's still not a place for PAS to be as such yet. He starts to advance, and he is advancing at a quick pace. He has got a look on his face which is typically referred to as the kind of a "thousand-yard stare," which is that stare you get of "I have a purpose, and I am coming." And to me that purpose, given the behaviour that he had demonstrated before, a large-stature man involved in a fight, in the middle of the fight with a man down in a brawl that I would describe as one of the more significant brawls I have witnessed in my career, he is advancing, and he's advancing at a quick pace. His arms are up slightly and swaying, and he is advancing towards us. My thought process at that time is, okay, well, why is he coming back? I have just watched him in an all-out brawl.

It's clear that police are trying to restore order and move people along. My concern was, was he coming to deal with Mr. Borthwick? Was Mr. Borthwick involved in the fight, and

he wanted to settle the score with Mr. Borthwick? Was he coming to assault myself and intercede with police? Was he coming to interfere with the arrest of Mr. Kaug? I didn't know what he was doing, but the intention that I perceived at the time was that he was coming back for no good."

85. Prior to demonstrating in the hearing room the manner in which Cst. Bowser perceived Archer to be advancing, Cst. Bowser stated:

He was advancing with a thousand-yard stare. A thousand-yard stare, Mr. Adjudicator, is -- a thousand-yard stare advancing towards you with a purpose, and when someone is advancing towards you with a purpose, it raises your senses and your sensibility that why is that person coming at me like that? Something's not right. So that was my perception at the time. Someone who is coming and wanting to say, "Officer, I have no problems," they advance like this: "Mr. Officer, I have no problems," if they are not advancing quickly after being in a brawl like that. And that to me is -- that's the basics of officer safety.

86. I find the scenes at 0.28 and 0.30 secs. of the video to be very telling as to whether Archer, at any time, posed a threat.

87. At paras. 51 and 52 I described what I see as follows:

At this time, Archer is standing still, feet apart, arms forward and down, hands open, back slightly arched and is looking directly at Cst. Bowser and appears to have his mouth open as if he is speaking to Cst. Bowser.

On the second command, Archer goes down, leaning on his left arm with his left hand on the grass and his left leg folded under him. He then, at 0.28 secs., rolls onto his buttocks with his right arm supporting him, right hand on the grass and with his left arm and open hand held up, appears to be speaking and gesturing to Cst. Bowser, who appears to be listening to him.

Cst. Bowser moves closer to Archer in a stance that suggests he is about to handcuff Archer.

88. The scene of Archer, sitting on his buttocks; legs bent with his knees up; arms down and out with open hands (as if pleading his case); making eye contact with Cst. Bowser; is, in my view, one of complete submission to Cst. Bowser's authority.

89. Cst. Bowser's back is to the camera but there can be no doubt that Cst. Bowser knows that he has Archer under his complete control and is preparing to clip his handcuffs on Archer

while he is in a sitting position.

90. At this time, there is not the slightest indication of assaultive or aggressive behaviour on the part of Archer toward Cst. Bowser.

91. Cst. Robinson, under the misguided impression that Archer is not cooperating with Cst. Bowser and that Cst. Bowser expects Archer to get down in a prone position, i.e. face down, charges into Archer, grabs him by his clothing on his left side and tries to roll him over and down onto his stomach.

92. There are scenes in the closing seconds of the video where Archer is seen to open and close his hands (as if to form a fist), where it appears that he is pulling his arms away from Cst. Robinson, where he is crawling away from Cst. Robinson. It is suggested that these actions are clues to assaultive behaviour, attempts to resist or flee. I am not persuaded that Archer was, at any time, assaultive in his behaviour to the police officers; resistant to their level of force and trying to flee the scene.

(3) Cst. Bowser's Use of Force on Kang:

93. At paras. 40 - 43 of this Decision, I stated as follows:

Kang is lying on the paved road, on his right side, with his knees tucked up as in a fetal position. His lower back is clearly exposed between the top of his belted jeans and the bottom rim of his white shirt on top which he is wearing. Cst. Bowser has not yet appeared. At this time, witness Harlow and a female later identified as Lynette Lim, are in the immediate area, i.e. a pace or two from where Kang is lying.

At .03 seconds, the video shows Cst. Bowser approaching with measured strides to where Cst. Robinson and Cst. Apa are struggling with Kang.

Cst. Bowser looks down at Kang, places his right hand on Cst. Robinson's left shoulder, his left hand on Cst. Apa's right shoulder (as if to brace himself) and delivers a hard kick with his right foot to Kang's lower back just below the exposed area. The kick is not with the toe of his boot but with the sole and heel – a downward, thrusting, forceful kick as if he were striking a brake pedal on a vehicle.

He then delivers a second kick, with the same foot, in quick succession, to the same area of Kang's lower back but with the toe of his boot. This was a hard and forceful kick delivered while he appeared to be bracing himself, as before, with his hands on Cst. Robinson's and Cst. Apa's

shoulders.

94. I now refer to Cst. Bowser's interview with Detectives Smith and Kelly of the Vancouver Police Department (Ex. 22) where he is asked:

PK: ... just in relation to Mister Kang, paraphrasing here, but you say he clearly doesn't want to be cuffed, in your mind, exactly what does that mean?

CB: What that means is that he's resisting police attempts to cuff him. He's flailing and kicking out his legs, he's pulling his arms away from police as they're trying to, to arrest him. When I come in I give him commands to put his hands behind his back, he doesn't do it.

PK: And where did you strike Mister Kang, your recollection?

CB: The left buttocks.

95. On August 30, 3011, Cst. Bowser attended a Disciplinary Hearing at New Westminster, B.C. Also present were his Counsel, Mr. Murray, Cst. Robinson and his Counsel, Mr. Butcher. Cst. Bowser was sworn and gave the following statement to the Adjudicator:

I turn and look for Brendan and for Cst. Robinson and Cst. McLeod and then I see Cst. Robinson in a fight with Mr. Kang on the ground and they're struggling, trying to get control of Mr. Kang, take control of his legs and arms and he's pulling away and won't heed to the officer's directions. So I move from there, move over towards Mr. Kang, lean in. Brendan is kneeling on his hands and knees trying to get control of the guy and the people are pressing in around him, he's in a vulnerable situation—anyway, he's in a vulnerable situation, he's down on his hands and knees and looks to be suffering from the effects of pepper spray. I move in between them and lean in to Mr. Kang and I yell at him to put his hands behind his back and stop resisting the police. He doesn't comply. He's lying on his right side in a semi-prone position, he states to pull his arms away from Brendan resisting so I give him two strikes with the ball of my foot to his left buttocks region, the intention to cause motor dysfunction and help Brendan get him cuffed.

Exhibit 23: At p. 21, ll. 24 and 25 and at page 22, ll. 1 -21.

96. On October 6, 2010, Cst. Bowser was interviewed by Detectives Ho and S/Sgt. Davies of Calgary Police Services and made the following statement:

So, I walk up, and lean in between Mister or Constable Robinson

and Reserve Apa. Uh Kang is still kicking and flailing his legs, he's stiff, he's still struggling with Brendan, and I lean forward and say, put your hands behind your back, and he doesn't do so and he starts to pull his arm away from Brendan. And I tell him again, put your arms behind your back, and he doesn't do it, and I give him two, un, ball foot strikes to his left glut, or his buttocks.

97. Cst. Bowser gives the following testimony to Mr. Murray at the Public Hearing on July 18th:

So come up in between them. Mr. Kang takes his – looks to be his left arm I believe at the time, and he takes that, and he tries to pull away from Brendan, or sorry, Constable Robinson. He does that. I give him two voice commands to put his hands behind his back, and those voice commands are coupled with a kicking strike with the bottom of my foot to his buttocks or gluteal region. The target selection at the time, the gluteus maximus, is large, fleshy muscle. It's got lots of nerve endings in that, and it provides a good place to provide a stunning motor control function to the lower limbs of the body with pain compliance to roll the individual over into a prone position to gain control. And the two strikes were successful and do exactly that. They roll Mr. Kang over on to his stomach, and Brendan is able to gain control of that arm.

98. I do not see any indication, in the video, that Cst. Bowser “leans forward”, “yells”, or issues any commands to Kang to put his hands or arms behind his back.

99. The evidence of Cst. Apa and Cst. Robinson does not support Cst. Bowser's evidence that he gave commands to Kang.

100. The video does not pick up the sound of Cst. Bowser making any demands.

101. I find that Cst. Bowser did not issue any commands to Kang to put his hands or arms behind his back before he delivered two foot strikes to Kang's lower back, and, therefore, I do not accept Cst. Bowser's evidence on that issue.

(4) Cst. Robinson's Use of Force on Archer

102. At 0.24 and 0.25 seconds of the video, Cst. Robinson is seen squatted down and appears to be completing the handcuffing of Kang along with Cst. Apa.

103. At 0.26 seconds, he hears the first command of Cst. Bowser, who is pointing toward Archer, to “get on the ground”. Cst. Robinson is seen to turn his head, looks in the direction of Cst. Bowser and starts to get up.

104. At this time, Archer is standing still, feet apart, arms forward and down, hands open, back slightly arched and is looking direct at Cst. Bowser and appears to have his mouth open as if he is speaking to Cst. Bowser.

105. On the second command, Archer goes down, leaning on his left arm with his left hand on the grass and his left leg folded under him. He then, at 0.28 secs., rolls onto his buttocks with his right arm supporting him, right hand on the grass and with his left arm and open hand held up, appears to be speaking and gesturing to Cst. Bowser, who appears to be listening to him.

106. At 0.27/0.28 seconds, Cst. Robinson, just enters the video. At this time, Archer is fully on his buttocks, legs bent at the knees, hands on the grass beside him and he appears to be talking to Cst. Bowser.

107. At 0.30 secs., Cst. Robinson is seen charging toward Archer, obviously unseen by Cst. Bowser, and tackles Archer, grabbing him by his clothing on his left side and tries to roll Archer over and down onto his stomach.

108. The struggle by Cst. Robinson to force Archer into a prone position continues, largely obstructed by a rock monument, but Archer is seen, at 0.31 secs., with this black jacket pulled over his head while in a squat position and then forced forward on his knees.

109. At 0.33 secs., Archer is heard to exclaim "ow", "ow", "ow" as he is being forced into a prone position.

110. At 0.34 secs., Archer is seen on his knees supporting his upper body from falling face down on the grass.

111. At 0.38 secs., Cst. Robinson delivers a knee strike to Archer's left side (abdomen area) with his left knee.

112. Mr. Tammen fairly and accurately summarizes Cst. Robinson's evidence on his reasons for intervening in the handcuffing of Archer:

...He was in the process of completing the handcuffing of Kang and he turned toward Archer. He said his perception was that Archer was arguing with Bowser while he was standing, and then Archer sat down. He said sitting down was not his interpretation of what Bowser intended with his command. He said that, based on his experience and also the tone of Bowser's direction, he thought Archer was being told to assume a prone position. He said that in the time he had to decide whether to make physical contact or not with Archer, he interpreted and perceived that Archer was being "passive resistant"

toward Bowser's command he believed that pushing Archer over into a prone position would be a reasonable and effective way of getting control of him (p. 90/91). He could tell that Archer was a large male, and he could see that he had blood on his face. He thought he was probably involved in the brawl somehow and speculated that Archer might have been intoxicated. To some extent, Archer was an unknown quantity. He thought that his use of force in pushing Archer over was both reasonable and within training.

He said that Archer went down initially then popped back up and ended up on his hands and knees. He managed to gain control of his right arm, but Archer ripped it away and began to crawl away from him. At that time, Bowser delivered one foot strike. Robinson then delivered a knee strike, but he believed both strikes had limited effect on Archer. He was able to dig out Archer's right arm once again, then Bowser delivered two more knee strikes, the second of which had a positive effect and permitted them to gain control of Archer.

Robinson described Archer's conduct in pulling his arm away and trying to crawl as actively resistant, perhaps a pre-assaultive cue. He said Archer had his right hand in a closed fist or a clenched fist position at some point in the struggle. (Transcript pp. 101—102).

He said his purpose in delivering the knee strike was to provide a stun so that he could gain control of Archer's arm.

He said that any suggestion there was no need for him to apply force to Archer is made with the luxury of viewing the video in a controlled, safe environment. He stood by the reasonableness of his actions "based on the whole totality of the circumstances involved". He said he would behave in exactly the same fashion in identical circumstances. (Transcript p. 108)

Cst. Robinson was also cross-examined at length. He said that he had no reason that night to think the male who had done the stomping was still on the scene. He was convinced that he got away and was never caught.

He agreed that if a subject still posed a threat to an officer, the officer would not remove his handcuffs. He did not see at the time that Bowser had his handcuffs out before Robinson tackled Archer.

H. (5) ***The Code of Professional Conduct Regulation, B.C., Reg. 205/98***

113. ***The Code of Professional Conduct Regulation, B.C., Reg. 205/98*** was in effect on March 21, 2010. Relevant Sections are as follows:

Disciplinary Defaults:

4(1) In this Code, "disciplinary default" means:

- (a) discreditable conduct,
- (b) neglect of duty,
- (c) deceit;
- (d) improper disclosure of information,
- (e) corrupt practice;
- (f) abuse of authority,
- (g) improper use and care of firearms,
- (h) damage to police property,
- (i) misuse of intoxicating liquor or drugs in a manner prejudicial to duty,
- (j) conduct constituting an offence,
- (k) being a party to a disciplinary default, or
- (l) improper off-duty conduct.

(2) It is a breach of this Code to commit, or to attempt to commit, a disciplinary default referred to in subsection (1).

10. For the purposes of section 4(1)(f), a police officer commits the disciplinary default of abuse of authority if the police officer:

- (a) without good and sufficient cause arrests, detains or searches a person;
- (b) uses unnecessary force on a person,
- (c) while on duty, is discourteous or uncivil or uses profane, abusive or insulting language to a person including, without limitation, language that tends to demean or show disrespect to a person on the basis of that person's race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age or economic and social status, or
- (d) harasses, intimidates or retaliates against a person who makes a report about the conduct of an officer or submits a complaint under Part 9 of the Act.

Mental element of disciplinary default

17. Unless otherwise specified in this Code, a police officer commits a disciplinary default if the police officer intentionally or recklessly committed the act or omission constituting the disciplinary default.

114. Cst. Robinson's use of force in arresting and handcuffing Kang was, in my view, reasonable, proportional and necessary. His conduct was professional.

115. Cst. Robinson committed a series of errors before tackling Archer, i.e. failing to pause and assess; misinterpreting Archer's behaviour as being non-compliant; failing to consider Archer's condition; and failing to give any clear commands. Those errors, as it turns out, have had serious consequences.

116. Cst. Robinson's sole motivation, it seems to me, was to give support to his team leader, Cst. Bowser. In doing so, he seriously misconceived or omitted to consider other important factors.

117. Had his perceptions been valid, Cst. Robinson's use of force including his knee strike, would not have been excessive.

118. I do not believe that it is the intention of the *Police Act* to subject a police officer to disciplinary proceedings when they use unnecessary force based on an honest, but mistaken, perception of an occurrence.

119. I, therefore, find that Cst. Robinson did not abuse his authority as alleged.

120. Any perception that Cst. Bowser held about Archer being a threat because of his "thousand yard stare" and that "he was coming back for no good" should have reasonably been dispelled the instant that Archer got down on the ground, as commanded, rolled onto his buttocks with his right arm supporting him: his right hand on the grass; and with his left arm and open hand held up; and appears to be speaking and gesturing to Cst. Bowser, who appears to be listening to him. This was at 0.28 seconds of the video.

121. From 0.28 seconds to 0.55 secs. when Cst. Bowser is heard to say "there you go", Cst. Bowser knows that Archer would have cooperated with him to be handcuffed had it not been for the unnecessary intervention of Cst. Robinson.


122. Both officers know that Archer was injured and had been pepper-sprayed.

123. Not only did Cst. Bowser not intervene to prevent Cst. Robinson's unnecessary use of force, he escalated the use of such force by delivering foot and knee strikes to vulnerable parts of Archer's body.

124. I find, on the balance of probabilities, that Cst. Bowser used unnecessary force on Tyler Archer and has, thereby abused his authority.

We need a date, Mr. Tammen, to complete this matter.

DATED AT VICTORIA, B.C. THIS ²⁷~~26~~TH DAY OF MARCH, 2013.



THE HON. H. BENJAMIN CASSON, Q.C.

ADJUDICATOR