



# MEDIA STATEMENT

## CRIMINAL JUSTICE BRANCH

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February 11, 2011

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**Victoria** – The Criminal Justice Branch has decided that no charges will be laid against a member of the Victoria Police Department for kicking two individuals who were being taken into custody during a disturbance in downtown Victoria on March 21, 2010.

After a detailed charge assessment process the Branch concluded that in the case of each individual the actions of the officer involved a legally permissible use of force to facilitate the handcuffing of the suspect. The available evidence supports the conclusion that the officer in question was using force lawfully in order to gain control in an unsafe and unstable situation.

A '[Clear Statement](#)' explaining this decision in greater detail is attached to this Media Statement.

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## **MEDIA STATEMENT 11-2**

### **CLEAR STATEMENT**

Just after midnight on March 21, 2010 three regular members of the Victoria Police Department along with two reserve members were part of the Late Night Task Force patrolling the downtown area of Victoria on foot. The responsibility of the police officers was to deal with such things as public drunkenness and disturbances outside of licensed premises. The Late Night Task Force was established by the Victoria Police Department in response to general public disorder, including disturbances and violence, which had become a problem in the downtown core area in the late evening and early morning hours.

As the officers walked towards the intersection of Johnston and Wharf Streets, they noticed a multi-person fight underway outside a bar on Johnston Street. A male was on the ground, apparently unconscious and was being kicked or stomped in the head by another male. The police attempted to control the crowd and restore order. In doing so, the police eventually placed six males in custody. Two of these males were kicked by one of the arresting officers ("Officer A") during the process of placing them in custody. A video taken of this portion of the event was posted to the internet, was broadcast and received widespread publicity.

In a statement to the press following the incident, Victoria Police Chief Jamie Graham stated "the images are disturbing and the reaction on an emotional level is one of shock." Chief Graham directed an investigation into the conduct of "Officer A" in kicking the two individuals. The investigation was carried out by members of the Vancouver Police Department, and the resulting investigative report was forwarded to the Criminal Justice Branch for a charge assessment review.

In reaching its decision on the matter the Criminal Justice Branch considered the video recording of the arrest of the two individuals, the evidence of the police officers on the scene, the evidence of numerous civilian witnesses, the report of a "Use of Force" expert, the *Criminal Code* provisions relating to the use of force by police officers, and previous case law involving allegations of excessive force by police officers. The civilian witnesses included some individuals directly involved in the disturbance, some bystanders and some passers-by. No individual statement or piece of evidence was determinative of the outcome of the Branch analysis.

The initial review of the file was conducted by Deputy Regional Crown Counsel in Vancouver Region and the result of that review was provided to the Director of Legal Operations. The Director of Legal Operations then directed that a further review of the file be conducted by Deputy Regional Crown Counsel in Fraser Region. Both reviews concluded that the officer in question should not face any charges as a result of his conduct. The Director of Legal Operations has considered both of these reviews, as well as the investigative report and video evidence, and concurs that no charges should be laid against the officer.

## **POLICE ARRIVAL AT THE INCIDENT**

Shortly after midnight on March 21, 2010 five members of the Victoria Police Department "Late Night Task Force" came upon a fight involving seven to ten participants taking place outside a downtown bar on Johnston Street near the intersection with Wharf Street. Police witnessed one individual on the ground, apparently unconscious, with a second individual stomping on or kicking his head. Other males were fighting in the vicinity.

"Officer A" thought initially that police were dealing with an assault causing bodily harm that might turn into a homicide. Another of the attending officers described the situation as "very dynamic, uncontrolled and unsafe" and was concerned that he was witnessing a beating homicide.

The police officers attending were of the view that they needed to quickly gain control of the situation by stopping the fighting and preventing any of the crowd of onlookers from becoming involved. The officers also believed that they needed to bring the situation under control to allow paramedics to attend to treat the unconscious man.

While one civilian witness described the scene as "not volatile" and another civilian described one group of males who became involved in the fight as "rowdy," others described the events using terms such as "pretty violent," "serious," "pretty serious;" "unbelievable," "pretty intense," a "big brawl;" a scene of "chaos", "pretty hectic;" a "war zone," "tumultuous," and a "scary, stressful situation."

To bring the situation under control two officers ran into the crowd, which consisted of the seven to ten fighters and approximately thirty to forty onlookers standing in the immediate vicinity. One of these officers deployed a pepper spray, some of which inadvertently struck the second officer in the left eye. The pepper spray caused the person kicking or stomping to stop his attack on the unconscious male.

"Officer A" arrested or assisted in the arrest of four individuals. While the degree of force used in two of these arrests is not in question, his kicking of the other two individuals ("Civilian A" and "Civilian B") during the process of their arrests became the subject of investigation.

## **THE LAW AND ITS APPLICATION TO THE FACTS**

Section 25 of the *Criminal Code* provides certain legal protections to police officers acting in enforcement of the law. The *Criminal Code* sets out the justification in section 25 which, in part, provides that:

*“(1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law*

*(b) as a peace officer or public officer,*

*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 26 of the *Criminal Code* places limits on what is the legitimate use of force. If an officer uses too much force, he or she is criminally responsible for the excess:

*“26. Every one who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess.”*

The Supreme Court of Canada has recently held that while, at times, the police may have to resort to force in order to complete an arrest or prevent an offender from escaping police custody, the allowable degree of force to be used remains limited by the principles of proportionality, necessity and reasonableness. Courts must guard against the illegitimate use of power by the police against members of society, given its grave consequences.

Other court decisions have established that what is reasonable, necessary, and proportional will depend on the totality of the circumstances. This is assessed from the point of view of the officer because the officer’s training, experience and the orders of the day given to him are all part of what goes into the answer to the question of what constitutes reasonable grounds. This approach also requires a court to take into account the characteristically dynamic nature of police interactions with citizens. The officer’s decision must be made quickly in volatile and rapidly changing situations. The officer must make his or her decision based on available information which is often less than exact or complete.

The courts will not hold police to a standard of perfection, and the police are not required to measure with nicety the force they use. What is reasonable, proportionate, and necessary is a use of force which is not gratuitous. A justified use of force is one delivered in a measured fashion. It is a use of force taken neither from revenge, anger or malice but one characterized as an application of situational force designed to dissolve a potential risk to the officer’s personal safety or achieve some other legitimate purpose.

### **“Civilian A”**

The available evidence is capable of establishing that “Officer A” kicked “Civilian A” twice as police were attempting to take him into custody. While this was an intentional application of force without consent, the available evidence provides a lawful justification for the officer’s actions. There is evidence to establish that “Officer A” had reasonable

grounds to conclude that his fellow officers were lawfully arresting "Civilian A". There is also evidence to establish that the officer's use of force in assisting them was not excessive.

Apart from the officers involved, a number of witnesses say that "Civilian A" resisted the police. "Officer A" kicked him twice in the buttock area. This was a situational use of force designed to achieve one goal, the handcuffing of the individual. Once he produced his hands, there was no need for additional force and none was applied. The application of further force might be expected if the officer's conduct was gratuitous or actuated by malice, anger or the desire to punish the individual. While the use of kicking as an instrument of force calls for close scrutiny, a court is likely to find that this was a measured use of force to achieve a legitimate purpose, and therefore justifiable.

### **"Civilian B"**

The available evidence is capable of establishing that "Officer A" kicked "Civilian B" once and struck him with his knee twice as police were attempting to take him into custody. This also was an intentional application of force without consent, but again there is evidence to provide a lawful justification for this use of force.

It is likely that a Court would conclude that "Officer A" had reasonable grounds to detain or arrest "Civilian B" for assault, having seen him fighting and near the location of the unconscious individual. It was also not unreasonable in all the circumstances for the officer to infer that "Civilian B" had been a combatant and could cause further problems if he were not subdued. While "Civilian B" initially was complying with "Officer A's" instructions to get on the ground, when a second officer intervened "Civilian B" reacted by crawling away and would not produce his hands for handcuffing.

In all the circumstances, it was not unreasonable for "Officer A" to increase the intensity of his intervention and resort to the use of force. Once again, the blows were designed to subdue the individual and achieve the goal of handcuffing him. When the individual produced his hands the level of force was reduced and he was handcuffed, the entire transaction having taken no more than 25 seconds. In relation to this arrest a court is also likely to find that this was a measured use of force to achieve a legitimate purpose, and therefore justifiable.

### **SUMMARY**

The officers involved in this incident were outnumbered and one was to some degree debilitated by pepper spray. The officers had a reasonable basis to be concerned for their safety and that of others. The officers also had a duty to restore the peace and to prevent the commission of offences. "Officer A" concluded that it was necessary to place the combatants in custody as quickly as possible to prevent the recurrence of fights and control the possibility that bystanders would intervene. He also wished to ensure the scene was safe so emergency health officials could enter and treat the injured party.

While many witnesses viewed the officer's conduct as heavy handed, many also confirmed that the two individuals who were kicked were resisting the police efforts to handcuff them. Police training and policy permits the use of hard physical control techniques such as punches, kicks, elbows and knees in order to control a subject who has become, or who the officer reasonably believes is going to become, actively resistant, where lower force options have failed or were inappropriate and unreasonable to be used by the officer.

"Officer A" arrested two other individuals without resorting to the use of force. This reinforces the conclusion that his use of kicks against "Civilian A" and "Civilian B" was a measured, goal-oriented response directed at achieving a quick restraint in a chaotic, unsafe situation, as opposed to a gratuitous, excessive and unlawful application of force.

The available video evidence captures some 57 seconds of an overall incident that witnesses estimate lasted anywhere from five to twenty minutes. It shows a portion after the police had moved in and broken up the fighting and, while significant, it must be considered in the context of the circumstances as a whole.

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.