

THE LAW ENFORCEMENT REVIEW ACT

IN THE MATTER OF:

C. B. W.

Complainant

- and -

CONSTABLE C.R.
CONSTABLE R.H.

Respondents

REASONS FOR DECISION

CHARGES

See Schedules 1(a) (b) and 2 attached

HEARING DATES

November 17, December 3 and 16, 1992

APPEARANCES

For Complainant - G. Tramley
For Respondents - A.R. McGregor, Q.C.
P.R. McKenna

PROVINCIAL COURT JUDGE

A.A. Rich

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Note: For the purposes of distribution, personal information has been removed by the Commissioner.

NOTICE OF ALLEGED DISCIPLINARY DEFAULT AND REFERRAL TO A PROVINCIAL COURT JUDGE UNDER THE LAW ENFORCEMENT REVIEW ACT

DATE OF COMPLAINT: July 17, 1991

FILE NO.: 1676

COMPLAINANT: C.B.W

EXHIBIT NO.	100311.7
FILED BY	H.R.
DATE	7/17/91
ROSE GINGELL GILL	
DIANE GINGELL	

NAME OF RESPONDENT OFFICER: (INCLUDE RANK, NO. AND POLICE FORCE)

Constable C. R. Winnipeg Police Department

TAKE NOTICE that the Law Enforcement Review Commissioner hereby refers the above matter to a Provincial Court Judge for a hearing to determine the merits of the complaint which alleges the commission of certain disciplinary defaults, as defined under Section 29 of The Law Enforcement Review Act, by the above-named respondent officer, namely that the respondent officer did:

1. On or about July 17, 1991 while arresting C. B. W. use unnecessary violence or excessive force against the complainant C.W. in contravention of Section 29(a)(ii) of The Law Enforcement Review Act.
2. On or about July 17, 1991 while arresting C. B. W. use oppressive or abusive conduct or language towards the complainant, in contravention of The Law Enforcement Review Act.

DATED at Winnipeg this 2nd day of November 19 92.

FILED

NOV 4 1992

PROVINCIAL COURT, WPG.

[Signature] L.E.R.A. Commissioner

Note: For the purposes of distribution, personal information has been removed by the Commissioner.

NOTICE OF ALLEGED DISCIPLINARY DEFAULT AND REFERRAL TO A PROVINCIAL COURT JUDGE UNDER THE LAW ENFORCEMENT REVIEW ACT

DATE OF COMPLAINT: July 17, 1991

FILE NO.: 1676

COMPLAINANT: C.B.W.

NAME OF RESPONDENT OFFICER: (INCLUDE RANK, NO. AND POLICE FORCE)

Constable R. H. , , Winnipeg Police Department

EXHIBIT NO. 1 (page 2 of 2)
EXAM OF H.R.
DATE 17 Nov 1991
ROSE GINGELL GILL
DIANE GINGELL

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1. On or about July 17, 1991 while arresting C. B. W. use unnecessary violence or excessive force against the complainant C.W. in contravention of Section 29(a)(ii) of The Law Enforcement Review Act.
2. On or about July 17, 1991 while arresting C. B. W. use oppressive or abusive conduct or language towards the complainant, C.W. in contravention of Section 29(a)(iii) of The Law Enforcement Review Act.

DATED at Winnipeg this 2nd day of November 19 92.

PROVINCIAL COURT, WPG.

[Signature] L.E.R.A. Commissioner

Note: For the purposes of distribution, personal information has been removed by the Commissioner.

NOTICE OF HEARING

DATE OF COMPLAINT: July 17, 1991

FILE NO.: 1676 HEARING FILE NO.:

COMPLAINANT: C.B.W.

EXHIBIT NO.	2
BOARD OF	H. R.
DATE	17 Nov 1991
ROSE GINGELL GILL	
DIANE GINGELL	

NAME(S) OF RESPONDENT OFFICER(S):
(INCLUDE RANK, NO. AND POLICE FORCE)

Constable R. H., Winnipeg Police Department

Constable C. R., Winnipeg Police Department

TAKE NOTICE THAT PURSUANT TO SECTION 23 OF THE AFOREMENTIONED ACT, A HEARING WILL BE HELD AT the St. Boniface Court, 227 Provencher Blvd. IN THE City of Winnipeg COMMENCING ON Tues DAY, THE 17th DAY OF November, 19 92, AT THE HOUR OF 9:30 O'CLOCK IN THE fore NOON.

AND TAKE FURTHER NOTICE THAT THE PURPOSE OF THIS HEARING IS TO DETERMINE WHETHER THE OFFICER(S) INDICATED ABOVE IS/ARE GUILTY OF ALLEGATION(S) OF HAVING COMMITTED DISCIPLINARY DEFAULTS, NAMELY:

1. Use Unnecessary Violence or Excessive Force
2. Use Oppressive or Abusive Conduct or Language

PARTICULARS OF WHICH ARE SET OUT IN A COMPLAINT, FORM 1, REPORTED August 2nd, 1991.

AND TAKE FURTHER NOTICE THAT YOU ARE ENTITLED TO ATTEND THE HEARING AND TO BE REPRESENTED BY COUNSEL OR AN AGENT, AND IF THE OFFICER(S) IS/ARE FOUND TO HAVE COMMITTED DISCIPLINARY DEFAULTS, HE/SHE/THEY WILL BE LIABLE TO THE PENALTIES PROVIDED IN SECTION 30 OF THE AFOREMENTIONED ACT.

AND TAKE FURTHER NOTICE THAT IF YOU DO NOT ATTEND AT THE HEARING, THE HEARING MAY PROCEED IN YOUR ABSENCE AND YOU WILL NOT BE ENTITLED TO ANY FURTHER NOTICE IN THE PROCEEDINGS.

DATED AT Winnipeg, THIS 2nd DAY OF November 19 92.


COMMISSIONER
LAW ENFORCEMENT REVIEW AGENCY

TO: CHIEF OF POLICE
COMPLAINANT
RESPONDENT OFFICER(S)

PROVINCIAL COURT, WPG.

FACTS

The complaint arose as a result of an incident on July 17, 1991. The complainant, the father of a five year old child was exercising his court ordered right of visitation on the day in question. The Court of Queen's Bench order allowed him access to his daughter between the hours of 3:00 and 8:00 o'clock each Wednesday as well as on alternate weekends. It was during the Wednesday access period that this incident occurred.

The complainant decided not to return the child to her mother at the end of the access period at 8:00 p.m. When the mother came to pick up the girl, as required by the terms of the Order, she was greeted by a handwritten sign attached to the door of the complainant's suite which indicated that he was "going fishing and would be back in ten days".

The mother then notified the police and when Constable H. and H. attended her home she informed them that her estranged husband had a history of psychiatric difficulties, chemical dependency, was known to carry a large knife strapped to his leg and could possibly be violent.

The Constables called for back up and two other constables, S. B. and C. R. attended at X ADDRESS where the complainant was living in a suite. Constable H. and H. attempted to gain entrance to the suite and when they were unsuccessful went to the suite of the owner W. B. so he could use his pass key to

- 2 -

attempt to gain entrance. He was unable to do so because the complainant had placed a bar across the door of the suite effectively preventing anyone from entering.

Further efforts to gain entrance were made and then the complainant removed the bar. Officers R. , H. and H. entered the suite. There they found the complainant sitting on a love seat in comparative darkness watching television. His little girl was on a bed beside the love seat. Officer R. saw a large knife to the left of the complainant and he then obtained possession of the knife. In the meantime Officer H. picked up the child handing her over to Mr. B. who took her to the female officer sitting in a car to the rear of the premises.

A scuffle took place between the complainant and the attending policemen. During the course of the scuffle and after falling to the floor, the complainant was handcuffed and removed to the Northend police station. He was later transferred to the Public Safety Building where he was charged, inter alia, with a breach of the Queen's Bench Order.

There is a conflict between the complaint and the police officers as to what happened at the suite. The complainant testified that four police officers including a female police officer were in his suite. Constables H. , R. and H. were consistent in their testimony and their evidence corroborated each other and they each stated that the female officer never entered the suite. I find as a fact that at no time was the female officer in the suite and that the complainant was mistaken when he testified that she was.

There was also a conflict between the complainant and the police as to whether or not he was kicked. In one statement that the complainant gave to the police he said he was kicked once. In another statement he said he was kicked twice. In giving his evidence he insisted that he was kicked twice and that the person who kicked him was Officer H. . The complainant could not identify Officer R and identified Constable H. as the policeman "who took me down".

When he was released from custody on July 18, 1991 the complainant attended at his doctor. The medical report filed as Exhibit 3 indicated a linear abrasion across the right shoulder blade and tenderness in the right bicep area. The x-ray taken at that time revealed a fracture of a seventh right rib. The doctor's report indicated that the injuries were consistent with a physical altercation. The complainant insisted then that the injuries suffered were as a result of the police using unnecessary violence or excessive force against him.

I have noted that there is a serious conflict between the evidence of the complainant and those of the police officers and the landlord W. B. . Wherever there is that conflict I prefer the evidence of the police officers and Mr. B. to that of the complainant.

THE EVIDENCE

The complainant testified on his own behalf. To be very charitable to the complainant, I characterize evidence that he gave as being "confused". When testifying he continually found himself in conflict with statements that he made at various times during the course of the investigation. In giving evidence in chief, he acknowledged that he knowingly breached the existing court order regarding access to his daughter. His explanation to his counsel was that he did so because he "wanted his day in court". His position was that his estranged wife was abusing and neglecting his daughter and therefore he had to have the opportunity of confronting her and could only do this by precipitating this confrontation.

He testified that he had plead guilty to the charge of this breach of the custody order. He acknowledged that during the course of the evening he had had two and a half beers after 8:00 o'clock and had taken his medication, (describing his pills as being needed to "neutralize nerve damage"). He said the combination of the alcohol and the pills left him "light headed". Presumably he was in this condition when the police came to the door.

He acknowledged that he locked and barricaded the door by a steel weight bar and that when he heard someone at the door he presumed that they were the police. He acknowledged further that he did not answer the knock or say anything. In responding to the question as to why he remained silent, he stated that he did not answer the door

because he did not want to give up his daughter. He recounted that after 10 or 15 minutes of banging at the door the banging stopped. Shortly thereafter, he testified that an attempt was made to break down the door but heard no words were spoken. It was then that he decided to unlock the door and to sit on the love seat in front of the T.V. Shortly after, he said, four uniformed constables, three men and one woman came into the suite. He said the female policeman had a flashlight which she shone on his hands from a distance of about two feet. He said that she was off to one side of the love seat and that she did not speak. He also said, initially, that the female police constable picked up his daughter and took the child out of the suite. After awhile, he said, he followed instructions and raised his hands over his head while he was seated on the love seat.

In his direct examination he indicated that the request to him to raise his hands was made three times before he obeyed. When he raised his hands he said he did so with his palms forward. He identified the officer who grabbed him as Constable H. He said the constable reached over the love seat and as a result of the scuffle the love seat tipped over and they both landed on the floor. At this time he said that the female officer was still in the room. When asked to describe how he was grabbed he said "from the back of the neck and pulled backwards". His evidence suggested that when he was flat on the floor one of the police officers was holding him down and his left arm was against his neck and there was a knee in his back.

When asked what officer was on his left he identified Constable H. He attributed to Constable H. the statement "your a smart ass". I gather from his evidence

that Constable H. grabbed him. I also assume from his evidence that the person who grabbed him was also the person who kicked him twice. He said he was starting to pass out and the other officer (not the other one charged, C.R.) bounced him like a basketball. He identified this officer as Constable H. describing him as short, plump, with short hair, five six to five seven inches tall, in his mid-twenties. He said that he looked him square in the face.

When asked by his counsel he indicated that he never struck out at the police, that he had no knife on his person. However he said that there was a knife on the hutch in the living room about eleven feet from where he was sitting.

I noted that during the course of his testimony he was erratic in his responses, fidgeted constantly and seemed to resent being in the position of giving the evidence even when he was responding to his own lawyer's questions.

On cross-examination he acknowledged that he had difficulty in remembering things but that this difficulty was not as a result of is being on prescription medication. He did not recognize Officer R. as being one of the officers with whom he had the altercation and insisted that he was not in the room and if he was he did not see him. He was positive in his identification of Constable H. as being the man who was most offensive to him. He identified Constable H. as being the policeman who put his arms on him. During the course of the cross-examination he made wild allegations about Justices Mullally and Carr and indicated when asked that why he had agreed to the various orders

in family court was because he had been too sick and signed "papers" when he should not have.

With regard to the female police officer he insisted he saw her in the hall next to his wife (who had been subpoenaed to give evidence) on November 17, 1992. He described the female police officer as being about five foot seven inches tall with a "perfect face" and brown hair and when asked, he said that she would be lying if the person who he saw on November 17, 1992 said she wasn't in the suite on the night in question.

When asked about the various differing statements that he had given he said that they were incomplete and therefore they differed from the evidence he gave at this hearing. Toward the end of the cross-examination and after being shown the various statements he changed his evidence and indicated that it was a male officer who took the child downstairs. He said that neither of the individual police officers who were charged (Constables R. and H.) took the child downstairs. When asked by Mr. M. as to what was the truth he said quite sharply that the only person who was telling the truth was him.

He acknowledged to Mr. M. that he made no complaints to the duty sergeant on when he was taken first to the Northend district office and laterally to the Public Safety Building. (The arresting officers, H. and H. also testified that he did not complain to them about being injured in the scuffle.)

Mr. M. continued the cross-examination on December 3, 1992, the second day of the hearing. During this part of the cross-examination, the complainant changed his story once again. At this time he positively identified Constable H. as being the officer who was present and could not identify Constable R. as being one of the policemen in his suite on July 17, 1991.

Following this testimony counsel for the complainant closed his case. Mr. M. then made a motion to dismiss the charges on the grounds that the evidence of the complainant was insufficient to find either of the charged constables guilty. I then heard argument from counsel for the complainant on this motion to dismiss and he acknowledged there was no evidence against Constable R. I then decided there was no evidence that Constable R. used violence or excessive force or any evidence of his abusive conduct or language toward the complainant constable and dismissed the charge as it affected Constable R. I ordered that the hearing with respect to Constable H. to continue.

Called to give evidence was Sergeant B. A. E. from the Internal Investigation Division of the Winnipeg Police Department. He produced a handwritten statement of the complainant and a typewritten version of it. He also described how a photo pack of twenty pictures of policemen was provided, such photographs included the three male police officers, Constables H. , R. and H. . Sergeant E. testified that the complainant identified two other police officers as being parties to the incident who were in fact not present that night. The statements that this witness produced suggested that at the time that the complainant made them he was completely confused.

Throughout he continued to insist that the female policewoman was in the room at the time of the altercation. Sergeant F. also testified that the incident was referred to the director of criminal prosecutions for the City of Winnipeg, Mr. B. M. who determined, after due deliberation, that no charges should be laid against the police officers.

The estranged wife of the complainant was the next witness and she testified as to what occurred that night stating during the course of her direct examination that constables H. and H. attended at her home around 11:00 p.m. on July 17, 1991 and obtained a copy of the custody order. It was during this attendance that she informed these officers of her husband's erratic behaviour, chemical dependency and the fact that he carried a knife. She did so, she said, because she wished to make certain that the officers were fully aware of all of the circumstances. On cross-examination she acknowledged that she never saw her husband carrying a knife but had heard about him doing so from other sources.

The next witness was Constable S. B. Her evidence was that on the evening in question she attended at X ADDRESS with Constable C. R. She said that she remained in the police car while Constable R. went upstairs. She said she was in the car when W. B. brought the child to her. She testified that at no time during the evening did she enter the house and that she was the only female police officer in attendance that night. She indicated that she was not in the suite and never saw the complainant that night. She also said that when C. R. came back to the car they drove the child to the mother's home. She was asked if she carried a flashlight

up to the room that night and denied again that she was ever out of the police car at the rear of the premises and had never been up to the room.

W. B. the owner and landlord of X ADDRESS, was called. He gave evidence as to what happened that night which evidence was subsequently corroborated by Constables H. and H. He testified that he was inside the suite at the time these officers entered and apprehended the complainant. He said that there was no female police in the suite and that it was Officer H. who handed the child to him and that he brought the child down to the female police office who was sitting in a car at the back entrance of X ADDRESS. When asked by Mr. M. if the officers were doing their job he replied that they were as they did not barge into the suite and were very patient. He thought they were very professional. He stated on cross-examination that when he went into the room the complainant was sitting on the love seat with his hands in his lap. He did not see a knife and said that it was one of the officers behind the couch who pulled the complainant over.

The next witness called was Constable H. who acknowledged that he was present at the time of the incident. He testified that the complainant's wife told Constable H. and him that the complainant was mentally unstable, chemically dependent, was known to carry a knife and had a potential for violence. He then described how they contacted the caretaker Mr. B. who came up to the suite with them after they had been unable to gain entrance. He said that he heard the T.V. and assumed that there

were people in the suite. They described how the landlord used his pass key to open the door but as it was barricaded they could not get into the suite.

He indicated that Constable R. was present when they made several efforts to force the door. At approximately 12:00 midnight he heard the bar being removed and then they entered the suite. He saw the complainant was sitting on the couch watching T.V. He saw the child on the bed. He then described how he picked the child up and handed her to Mr. B. When asked he indicated that he could not see the complainant's hands as the back of the couch hid them from view.

The complainant was told that he was under arrest to which the complainant responded "don't mind if I ignore you". He then saw the knife next to the complainant and testified that the complainant was grabbed around the neck from the rear by Constable R. A struggle ensued and they both fell to the floor and that Constable H. stepped in to help handcuff the complainant.

He said he did not touch the complainant. He did not strike or kick him and did not see anyone else strike or kick him. He acknowledged that the complainant and Officer R, fell to the floor with Officer R. on top of the complainant.

On cross-examination Constable H. said that he and Constable H. took extreme care because this was a sensitive family matter and when they were given information by the wife about the complainant that he might be mentally disturbed and had

a knife. He was concerned that harm might come to the child. He said that he was the first of the three police officers into the room. He said he did not become physically involved with the complainant but was present when the altercation took place. He insisted that there was no female officer in the room at any time.

The next witness was Constable C. R. (one of the two officers complained about). He testified that he was a member of the Police Department for some 13 years and had attended on other family incidents similar to this involving children with the possibility of a violent confrontation taking place. He described the precautions that were taken when information reached them that there might be some physical danger to them and to the child. He denied that he kicked the complainant at any time and acknowledged that he struggled with the complainant and fell on the floor on top of the complainant. When asked, he indicated that the complainant did not at any time say to him or anyone in his presence that he had been injured. He said that he and Constable H. handcuffed the complainant and at no time did Constable H. have anything to do with the scuffle.

On cross-examination he reiterated again that he did not use unnecessary or excessive force against the complainant, and that he was not abusive and said that the complainant did not resist. He went on to describe the knife as being a wooden handle kitchen knife that was found beside the complainant when he seized it. He acknowledged on cross-examination that there was no mention of the knife in any of the statements.

Constable H. one of the two officers cited in the complaint was the next and last witness. He corroborated the evidence given by the two police officers as to how and when he arrived on the scene. He indicated that it was he who notified the complainant that he was under arrest and would likely be charged for a breach of a court order for not returning his daughter to her mother. He also indicated he could be charged with abduction and indicated that it was about 1:30 in the morning on the 18th that the complainant was taken away from the premises.

He corroborated that the female police officer was never upstairs. He had the flashlight and he shone it on the complainant. He said that when the door was pushed open he stayed back while the other two officers, R. and H. entered the room. He saw the couch with the complainant on it and off to the left saw the little girl sitting on the bed. He indicated that there was light from the T.V. as well from a small lamp somewhere in the room. He also said he saw the knife on the couch beside the complainant. He indicated that his main concern was the knife that was there when Constable H. picked up the child. He also spoke of the delay of the complainant in raising his hands after he indicated to him that he was under arrest. He then described the hands on struggle and that it was Constable R. who seized the complainant and the two of them toppled to the floor. He said it was a fairly stiff fall with a good bump.

He also described how they managed to turn the complainant over and tie up his hands behind him. When asked, he denied that he or anyone in the room kicked the

complainant. He also confirmed that the complainant had never indicated to any of the arresting officers or the sergeant in the Northend station that he in any way was injured.

He also said that he sat beside the complainant in the rear of the cruiser car during the ride to the Northend station and subsequently downtown and that the complainant never indicated he suffered any injuries. He also stated that in the interview room in the Northend station when asked whether he wanted a lawyer the complainant said he didn't but wanted to clean up.

The evidence of Constable H. was that about fifteen minutes later the complainant requested a lawyer and then called one. The complainant was then taken down to the Public Safety Building. He also mentioned that there was medical staff available at the Public Safety Building and that as far as he was aware the complainant never asked for treatment nor did he indicate to anyone there that he was in any way injured. He also suggested in his evidence that there was no indication whatsoever in the demeanour of the complainant that he was injured in the scuffle. He denied making any derogatory remarks to the complainant and denied that any force other than the normal force needed as the situation required, was used by any of the police officers. He categorically denied that excessive force was used.

In cross-examination he once again reiterated that he did not touch the complainant and his involvement came after it was said that the complainant was under

arrest. He stated again that all he did was go to Constable R. 's assistance and that the altercation and arrest all followed the removal of the knife from the scene.

He also stated that after the complainant was handcuffed he was cooperative although he was somewhat abusive but not markedly so. When asked whether there was a need to arrest the complainant he said there was because the complainant was not complying with orders of the police. He said he didn't stop to evaluate the circumstances as to whether or not an arrest should take place and made a judgment call that there should be an arrest.

Mr. M. concluded his case with the calling of Constable H. and the matter was adjourned to December 16, 1992 so that argument could be prepared by counsel.

I would at this time make a few remarks about the complainant. He was, to say the least, a most difficult person. He was highly emotional throughout the hearing. When his estranged wife was called as a witness he left the hearing room and did not return until after she had completed her evidence. He presented, in my view, a very difficult client to represent and I must commend Mr. Tramley on his patience in dealing with the complainant during the course of the hearing. I do not believe I am remiss in stating that the conduct and actions of the complainant in the hearing room made it difficult to accept him as a credible person much less a credible witness.

ARGUMENT

Mr. Tramley on behalf of the complainant advanced the argument that based on the standard of proof set forth in Section 27(2) of The Law Enforcement Review Act

"The Provincial Judge hearing the matter shall dismiss a complaint in respect of an alleged disciplinary default unless he or she is satisfied on clear and convincing evidence that the respondent has committed disciplinary default."

He emphasized throughout that the complainant suffered a broken rib and argued quite properly, that the assault in his words "a serious one", but not the kind of assault that was evidenced in what he termed the "CROSS" affair. He said that the complainant did not suffer from a simple scrape or bruise and therefore the penalty, if one was to be imposed, should be on the lower end of the scale, not on the upper end as was determined in "CROSS". He said, and I agree, that the incident giving rise to the complaint is not a dismissal incident if it is found that Constable H. is responsible.

His position was that the test to be applied was somewhere between that required in a criminal "beyond a reasonable doubt" and in the civil matter on "the balance probabilities".

His position, as I understand it that the complainant suffered a fractured rib therefore that injury, by itself made it self-evident that the constables involved violated the discipline code as set out in Section 29 of the Act which reads as follows:

"29 A member commits a disciplinary default where he affects the complainant or any other person by means of any of

(i) assisting any person in committing a disciplinary default, or counselling or procuring another person to commit a disciplinary default."

It is noted that the two charges are in relation to Section 29(a)(ii) and (iii). This Argument on behalf of the complainant suggested that the evidence disclosed that Section 29(a)(i) and (iv) were violated by the arresting officers even though the charges were not particularized in the notice of default. I was urged to examine all of the evidence and based my decision on an overview of what I heard. Counsel emphasized the fact that the complainant was not aggressive and did not assume a confrontational stance when the officers entered the suite. Counsel said that he was very quite and was in fact was seated watching television when he testified that the officers "burst into the room".

Mr. Tramley acknowledged that there was a marked difference in the evidence given by the complainant at the hearing and in his statements previously made and even though there was not positive identification (the photo pack) he submitted that the two officers picked out of the pack by the complainant were a good "look-a-like" and therefore the mis-identification was understandable..

As far as the difference in statements were concerned, counsel argued that there was no evidence that the complainant never indicated to the arresting police that he was injured. He submitted that this was not an important fact because the very next day, and when it was first possible for him to do so, he went to see his doctor. The injuries were evident from the examination and therefore counsel ^{ARGUED} ~~argued~~, had to have been incurred when the complainant was apprehended by the police. He said that there was enough evidence

coming from the police to justify finding that Constable H. committed a disciplinary default.

He submitted that the arrest of the complainant was flawed, and therefore the constables were guilty of "false arrest". The suggestion he advanced was that the police officer should not have taken the disclosure by the wife of the complainant of his mental instability and the fact that he (according to rumour) had a knife as gospel and therefore an arrest was not necessary. His argument was that there was nothing in the accused's demeanour to suggest that violence would occur and that all that should have been done by the police at the time of the incident was to obtain the child, give appropriate warnings and cautions without the need to muscle the man to the ground, place him in restraint, convey him to the Northend police station and latterly to the Public Safety Building.

He argued that although the complainant was in breach of a court order it was not a crime in the sense of the word. He referred me to section 495(2) of The Criminal Code with the query as to why the complainant was arrested in the first place. He said that if the complainant was not arrested then perhaps this hearing need not of taken place. He attributed the ultimate injury to the complainant to the fact that the police found it necessary to apprehend the accused and indicated that even though Constable H. was not charged and there was no evidence to support a finding against by Constable R. the overall effect of the police and their entry into the apartment was improper and that the cause of the injuries flowed from the arrest of the complainant therefore, he argued that the police were obviously guilty of using unnecessary violence or excessive force and, during the course of the arrest, used oppressive or abusive conduct or language.

Mr. M. , argued strenuously that the police did not commit a disciplinary default. He said this was not a case where there is any "clear and convincing evidence." In fact, he argued, the evidence of the complainant was anything but clear and convincing. He illustrated the difference between the criminal proof "beyond a reasonable doubt" and the proof necessary under this Act that the evidence under this Act must be "clear and convincing". His position was, that even though the evidence required was not as high a standard as proving guilt under the Criminal Code, the evidence required to make a finding that the police had committed a disciplinary defaulting this case had to be well beyond the civil standard and closer to the reasonable doubt standard.

With respect to the injuries suffered by the complainant also urged me to examine the time gap between the arrest and the eventual discharge of the complainant from the remand centre at the Public Safety Building the next day. His position was that no complaints were made at the time of the arrest as to any injuries suffered by the complainant ~~were made at the time of his arrest~~. There is no evidence he submitted of any *Jack* complaints made by the complainant of injuries during all the time that he was in the custody of the police and it was not until he saw his own doctor the next day, some many hours later did the question of injury arise.

In addition he emphasized the lack of appropriate identification by the complainant of the officers involved. In fact the complainant picked the wrong officers and then continued making that error right up to the date of the hearing when he failed to

identify Constable R. who, (in his own evidence) acknowledged that it was he who put his hands on the complainant.

Mr. M. responded to the position that the arrest was unlawful by pointing out that the police were not charged under this part of Section 29. Mr. M. also argued that the complainant was totally unsure as to the role of the female officer. He had her in the room with a flashlight, he misidentified a spectator at the time of the first hearing as being the female officer present in his room at the time of the altercation.

Mr. M. explained the conduct of the complainant by attributing his inability to recollect the facts accurately because he was on prescription medicine which mixed with the alcohol he consumed that night probably resulted in a misconception as to what happen at the time of the arrest. Mr. M. pointed out that the complainant knew that he was retaining his daughter improperly and contrary to the order. He refused to answer the door. That he delayed opening the door and in fact had barred it thus inviting the kind of reaction that the police had upon entry the room.

Mr. M. argued that everything the complainant did had to result in the police, (once entering the room,) viewing the situation as serious therefore the need for a "hands on arrest". He pointed out to me that there was no evidence of any kicks and if indeed the broken rib was as a result of the arrest or occurred during the arrest it probably occurred when the complainant and Constable R. fell to the floor when the love seat toppled.

Mr. M. pointed out to me that the inconsistency in the evidence of the complainant could lead to no other conclusion that, (based on the need to insure that the evidence was clear and convincing) the charges against Constable H. should be dismissed.

He concluded his argument by asking me to recognize that the complainant had no regrets about retaining the child well beyond the requirements of the Queen's Bench order and thus knew that he was in clear violation of that court process. He pointed out to me that the continuing hostility by the complainant to his estranged wife was exhibited throughout the hearing as he could not bear to be in court when his estranged wife was giving evidence. Mr. M. said that this proceeding before the Law Enforcement Review Act was a clear abuse of the process as the police officer did nothing wrong. He argued that the policeman did exactly what society expected and handled the explosive type of situation properly.

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DECISION

I have reviewed the evidence and the argument in great detail. This matter was the first hearing by a Provincial Judge under the amended act. I have carefully recounted what I consider to be the evidence presented before me and the arguments given during the two and a half days of the proceeding. I have already said how unsatisfied I was with the mode and manner of the giving of the evidence by the complainant. Had this been a criminal trial I would have dismissed the case against Constable H. without hesitation.

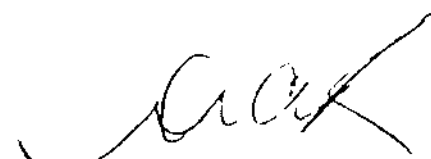
This however is not a criminal proceeding and the fact of the matter is that the complainant suffered a relatively serious injury. That kind of injury should suggest that undue force was used in the arrest.

However I can find no evidence that is "clear and convincing" that Constable H. kicked the complainant or was in any way responsible for the injury suffered by him during the course of his apprehension and arrest. Nor can I find any "clear and convincing evidence" that Constable H. used oppressive or abusive conduct or language and therefore came within the ambit of Section 29 of the Law Enforcement Review Act.

I am not going to state the obvious that the complainant by his own conduct brought the injuries to himself. Certainly he was injured and that this injury was as a result of the apprehension and arrest by the police. However in my view the evidence falls far short of being clear and convincing evidence in every aspect. I cannot find Constable

H. in any way responsible for these injuries and therefore cannot find that he committed a disciplinary default.

Dated: December 22, 1992



PCJ