IN THE MATTER OF: *The Law Enforcement Review Act*, Complaint #2005/3.

AND IN THE MATTER OF: A hearing pursuant to Section 17 of *The Law Enforcement Review Act*, R.S.M. 1987, c. L75.

BETWEEN:	)	
	)	
R.M.	)	Lyle Smordin
Complainant,	)	Counsel for the Complainant
	)	
- and -	)	
	)	
Sergeant C.B. and Constable J.N.	)	William Haight
Respondents.	)	Counsel for the Respondents
	)	
	)	Hearing date: May 28 & 29, 2007
	)	Decision given: October 12, 2007

NOTE: These proceedings are subject to an order under section 25 of *The Law Enforcement Review Act* that no person shall cause the Respondents' names to be published in a newspaper or other periodical publication, or broadcast on radio or television.

CARLSON, P.J.

I. INTRODUCTION

[1] *The Law Enforcement Review Act, CCSM. c.L75* (the "*Act*") provides a process by which citizens may have complaints about police officers' conduct heard and determined. Police officers perform a public function, and as such, they must be accountable to the public for their conduct. This accountability must be balanced against the need for police officers to be able to effectively do their jobs, in the interests of protection of the public and the administration of justice. To achieve this balance, the *Act* specifies police actions, which, if proved to a requisite standard, amount to "disciplinary defaults", for which specified disciplinary action is mandated.

[2] Complaint No. 2005/3 (the "Complaint") was filed pursuant to the *Act* by R.M. (the "Complainant") on January 11, 2005 against two members of the Winnipeg Police Service, Sergeant C.B. and Constable J.N. (the "Respondents").

[3] The Complaint came before this Court for a hearing on the merits as a result of a referral (Document 4 in Exhibit 1 in this proceeding) dated May 31, 2006, made by the Commissioner of The Law Enforcement Review Agency pursuant to section 17(1) of the *Act*.

[4] The Complaint arises from a search conducted by the Respondents of the Complainant's residence, a suite located at 205-160 Osborne Street, in Winnipeg, on January 7, 2005. The suite is located in the Osborne Village Inn, an establishment at which the Complainant worked and lived. Police had a search warrant for suite 307 of the Osborne Village Inn, in connection with a drug investigation, and had information that suite 205 might be linked with the drug activity and/or the occupant of suite 307. Other officers executed the search warrant in suite 307, and conducted a search of suite 305 (an adjoining room in which drugs were found) while the Respondents carried out a search of suite 205.

[5] Nothing illegal was found in suite 205 by the Respondents. It was admitted by the Respondents that the information they acted on with respect to suite 205 was mistaken.

[6] The Complaint alleges that the Respondents, on or about January 7, 2005, "abused their authority by using oppressive or abusive conduct or language, contrary to section 29(a)(iii) of *The Law Enforcement Review Act.*"

[7] The Complainant says that the oppressive or abusive conduct of the Respondents was:

(i) the conducting of an unlawful search of his suite;
(ii) the conducting of an unlawful search of his personal papers located in his suite; and
(iii) even if the searches were lawful, the conducting of a search that was excessive.

II. THE BURDEN AND STANDARD OF PROOF

[8] The burden of proof in these proceedings is on the Complainant. The Complainant must prove that the Respondents committed a disciplinary default.

[9] The standard of proof is set out in section 27(2) of the *Act*, as follows:

> "The provincial court 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 the disciplinary default."

[10] A number of cases of this Court have considered what is meant by "clear and convincing evidence". Giesbrecht P.J. reviewed judicial consideration of this standard and concluded:

> "…that a complainant under the Act must satisfy a relatively high standard of proof…the standard is higher than mere proof on a balance of probabilities. While proof beyond a reasonable doubt is not required, I must be convinced by clear and compelling evidence …to be convinced means more than merely to be persuaded." (see *R.J.M. v. Sgt. P. and Cst.T.* dated November 24, 2004).

[11] There is inherent logic in the "clear and convincing" standard of proof, given the objectives of the *Act*. The consequences of a finding of disciplinary default can have very serious consequences for a police officer's career. The standard reflects accountability to the public, while ensuring officers are not effectively prevented from properly carrying out their duties.

[12] The burden and standard of proof apply to the facts, not to application of the law. Once the burden and standard of proof have been applied to the evidence and to assessments of credibility to make factual findings, then the issue as to whether what the respondents did or did not do constitutes a disciplinary default is a matter of law.

III. THE ISSUES TO BE DECIDED

[13] The Complainant contends the search done by the Respondents of his suite was unlawful because the Complainant did not give the Respondents informed consent to enter and search the suite. He says that the search violated section 8 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") and thereby constituted an abuse of the Respondents' authority contrary to section 29(a)(iii) of the *Act* (abusive or oppressive conduct). The Complainant says the search of his personal papers was done without consent and is unlawful and a breach of section 8 of the *Charter*, and is a disciplinary default. The Complainant further says that even if the search of the papers was not unlawful, the search was an abuse of the Respondents' authority contrary to section 29(a)(iii) of the Act on the basis that the search was excessive.

[14] The ultimate issue to be decided is whether the Respondents' searches of the Complainant's suite and/or the Complainant's papers constitute disciplinary defaults by the Respondents, within the meaning of the *Act.*

[15] In order to decide that ultimate issue, the following questions must be examined and answered:

1. Was the search of the Complainant's suite unlawful?

2. Was the search of the Complainant's papers in the suite unlawful?

3. Was the search of the papers excessive?

4. Was the search of the suite and/or the search of the papers "oppressive or abusive" conduct?

5. Was the search of the suite and/or the search of the papers an abuse by the Respondents of their authority so as to constitute the commission of a disciplinary default?

IV. THE FACTS

[16] A decision as to what, in fact, happened in suite 205 of the Osborne Village Inn on January 7, 2005, is required before the law can be applied. Material facts are disputed. Accordingly, a review of the evidence, assessments of credibility and a determination of the facts, applying the clear and convincing standard of proof, is necessary.

(a) The Evidence

[17] At the hearing, the Complainant testified and both Respondents testified. There were no other witnesses.

[18] The following documents were entered as exhibits at the hearing (by consent):

- Exhibit 1: Respondents' Book of Documents, which includes:

  (1) Handwritten complaint of Complainant dated January 10, 2005;

  (2) Typewritten complaint of Complainant dated January 11, 2005;

  (3) Letter from Commissioner Wright to Chief Judge Wyant dated June 15, 2006;

  (4) Notice of alleged disciplinary default and referral to Provincial Court Judge dated May 31, 2006;

(5) Handwritten notes of Sgt. B. dated 05 01 07;

(6) Narrative report of Sgt. B; and

(7) Search Warrant issued January 7, 2005, issued by Losset, J.

- Exhibit 2: A sketch prepared by the Complainant of his suite at 205-160 Osborne, in Winnipeg.
- Exhibits 3 and 4: Two black and white photographs of interior of suite 205-160 Osborne, in Winnipeg.
- Exhibits 5 and 6: Two black and white photographs of interior of suite 204-160 Osborne, in Winnipeg.

[19] There are some consistencies in the evidence of all three witnesses as to the facts. There are also a number of differences.

[20] Material differences include whether or not the Respondents identified themselves as police officers to the Complainant prior to entering the suite, where the officers were standing when they were told to come into the suite by the Complainant and what the Respondents specifically told the Complainant about a search warrant prior to being told to come into the suite by the Complainant. The two versions of events cannot be reconciled on these important points.

[21] Accordingly, assessments of credibility are essential. The version of the facts that is ultimately accepted will be the foundation against which are measured the legal arguments about whether there was an unlawful search, and if so, whether such search constituted a disciplinary default.

The Complainant's Version of the Facts Given at the Hearing

[22] The Complainant is a law abiding citizen. He has had no involvement with police prior to this incident, nor since.

[23] The Complainant works as a night auditor at the Osborne Village Inn in Winnipeg. He lives in Suite 205 at the Osborne Village Inn. He has had this job, and lived in this suite, continuously from April, 2001 to present (and in fact had also worked there from l986 until 1995).

[24] The Complainant testified that the following occurred on January 7, 2005.

[25] On January 7, 2005 at around noon, the Complainant was in his suite when he heard three loud bangs. He thought the noise was made by workmen who were fixing the elevator shaft, which is located next to his suite. Shortly after that there was a loud knocking on the door to his suite. He opened the door. A man (whom he identified at the hearing as Sergeant B.) came "flying" through the door into his suite, and he (the Complainant) stepped back. He thought the man was a workman working on the elevator shaft. The man was into the hallway of his suite at least as far as the bathroom door (which is to the immediate right of the entrance) when the man spoke. The man said "Hi Ron, we have a search warrant. We have information you're holding narcotics".

[26] The Complainant swore at Sergeant. B. and told Sergeant B. that he could go ahead and look around and that he wouldn't find anything.

[27] The Complainant had not noticed the other man at the door right away. When he looked over the shoulder of the man who had come into his suite, he saw the other man behind him (whom he identified at the hearing as Constable N.). He noticed the other man was wearing a "police jacket", and that was how he realized they were police officers. The men did not identify themselves as police officers and did not show him badges or any identification.

[28] The Complainant asked the Respondents "Where's the search warrant?" to which Sergeant B. responded "It's upstairs. You already said we could come in".

[29] The Complainant sat down and watched television while Sergeant B. did the searching. Constable N. stood in the open doorway while Sergeant B. did the searching. Sergeant B. picked up an empty margarine container and looked inside and looked inside a shoebox. Sergeant B. then sat on the Complainant's bed and started looking through some papers on the table beside his bed. These papers contained income tax information and credit card statements. The Complainant sarcastically said "You won't find any drugs reading my stuff". Sergeant B. kept reading the papers. The Complainant asked for their badge numbers.

[30] Sergeant B. reached up to the ceiling and pushed up a ceiling tile. Constable N. then came down the hallway of the suite, and picked up a briefcase and a shoebox. As the Respondents were leaving the suite, the Complainant again asked for badge numbers and names. One of the Respondents gave him their badge numbers but not their names, and said "That's all you get".

[31] Sergeant B.'s cell phone rang. Constable N. said "Thanks for your cooperation". The Complainant said "I'll see you later boys".

[32] The Complainant said the Respondents were in his suite for 15 to 30 minutes. He said he did not feel he could leave because one of the Respondents was blocking the door and was bigger than he is.

[33] The Complainant identified the Respondents, Sergeant B. and Constable N. in court as the police officers who had been in his suite on January 7, 2005.

Differences in Complainant's Versions of Events

[34] There are some differences between the Complainant's version of what happened given at the hearing and the versions set out in his written statements. The Complainant candidly acknowledged these differences.

[35] The Complainant provided an initial handwritten complaint to the Law Enforcement Review Agency ("LERA") on January 10, 2005. The LERA representative found the handwriting to be somewhat illegible, although the LERA representative was willing to accept it. The Complainant, wanting to ensure his complaint was clear, took back the original handwritten complaint and wrote out another version, dated January 10, 2005 which he took to a typing service to have typed (Document 1, Exhibit 1). The typed version, dated January 11, 2005, was filed with LERA (Document 2, Exhibit 1). The initial handwritten complaint was not filed in these proceedings.

[36] The handwritten and typed statements of the Complainant given to LERA set out the same facts as given in the Complainant's oral testimony, with the following exceptions:

1. In the second handwritten version (Document 1, Exhibit 1), the Complainant says that when he answered the door, there were two men who appeared to be "maintenance men". In the typed version dated January 11, 2005 (Document 2, Exhibit 1), he says that when he answered the door, there were "two men in civilian clothes". In his oral evidence at trial, he said that the man who came "flying through the door" was wearing a maroon jacket and jeans, and that he didn't notice the other man right away, but then noticed that the other man was wearing a police jacket.

2. In his oral evidence, the Complainant said the man who we now know to be Constable N. stayed in the doorway to the suite until he (the Complainant) asked for names and badge numbers (when he says Sergeant B. was still sitting on his bed, looking through his papers), at

which time Constable N. came down the hallway into the suite and searched some items. However in both the second handwritten version of his complaint (Document 1, Exhibit 1) and in the typed version of his complaint (Document 2, Exhibit 1), he says that when Sergeant B. finished looking at his personal papers he got up and joined his partner "puttering around" the room - Constable N. was already in the suite.

3. In his oral evidence, the Complainant said that the Respondents were in his suite for 15 to 30 minutes. In both the second handwritten complaint (Document 1, Exhibit 1) and the typed complaint (Document 2, Exhibit 1), he said the Respondents were there for 30 to 45 minutes. On cross examination, the Complainant said that he was sure it was not 45 minutes, that it could have been 15 to 30 minutes, and that it definitely was not 5 minutes.

Respondents' Version of Events

[37] The evidence of each of the Respondents as to what transpired from the time they attended at the door of the Complainant's suite until the completion of the search is consistent with the evidence of the other.

[38] Constable N. testified that on January 7, 2005, he had been testifying in court. Upon completion of his court commitments, he called his partner, Constable L., to find out where his partner was. He was advised by his partner that he should attend the Osborne Village Inn, as extra officers were required to execute a search warrant and related drug investigations. Constable N. testified that he attended at the Osborne Village Inn. At that time, he was wearing dress pants, a blue dress shirt and a tie. He left the suit jacket he had worn for court in his car before going into the Osborne Village Inn.

[39] Sergeant B. testified that he was in charge of the search warrant execution and related investigations at the Osborne Village Inn on January 7, 2005. He advised that a search warrant had been obtained for suite 307 based on information that drug activity was present there. Although suite 205 was not included in the search warrant, part of the information used to obtain the warrant for 307 was that there was a possibility another room was being used for the storage or preparation of drugs and that it may be room 205. Sergeant B. briefed the officers who were to conduct the search warrant. Sergeant B. arrived at the Osborne Village Inn and spoke to the desk clerk. Other officers went to execute the search warrant in 307. Sergeant B. asked the desk clerk about the occupant of room 205 and was told that suite was occupied by the night auditor. The manager accompanied Sergeant B.

and Constable N. (who had by then arrived, and been asked by Sergeant B. to accompany him) to suite 205.

[40] Both Respondents testified to the following.

[41] Sergeant B. was wearing a blue police "raid" jacket. The jacket had the police crest on the chest and yellow letters across the back saying "POLICE". Both confirmed Constable N. was wearing dress pants, blue shirt and tie.

[42] Sergeant B. knocked at the door of suite 205. A male answered. Sergeant B. advised the male they were police officers and showed his police badge. Sergeant B. told the male they had a search warrant for the third floor for narcotics and that they had information that his room may be linked to drug activity. Constable N. was standing to the right of Sergeant B. and the desk clerk was standing to the right of Constable N. Constable N. was wearing his police badge and his sidearm on his belt, both of which were visible.

[43] Both Respondents confirmed that Sergeant B. stated the search warrant was for the third floor and that the male's response was to swear at Sergeant B. and to say "Come in and look around. You won't find anything." Both Respondents confirmed that until the male said this and told them to come into the suite and look around, they were both still standing outside the door to the suite, in the hallway, at the threshold of the suite. Both officers testified that they felt the male, by his comment, had allowed them into the suite, and they then entered to do the search.

[44] The Respondents testified that the advice they were police officers was given, Sergeant B.'s badge was shown and Sergeant B.'s advice about the search warrant was given, all while they were still outside the suite.

[45] Sergeant B. entered the suite first. Constable N. entered behind him. The Complainant walked in ahead of them and sat in a chair, watched television, and watched them. The Respondents did a cursory search for drugs, paraphernalia or any documentation that might link the room to the individual in suite 307.

[46] Sergeant B. sat on the bed and looked through papers on the table by the bed. He recalled there being some investment certificates. He testified that he was looking to see if there were any papers to link the room with the individual in suite 307, or any "score sheets" which may have indicated drug activity. The Complainant made a sarcastic comment to him that he would not find drugs looking through the papers.

[47] At no time was the invitation to search the suite withdrawn.

[48] Nothing illegal was found in suite 205.

[49] The Respondents did not raise their voices to the Complainant or used inappropriate language. They did not touch the Complainant. The search was quick, non intrusive and nothing was damaged. The search took 5 minutes. No drugs or related items were found in 205. Sergeant B. apologized to the Complainant as they were leaving and gave him their badge numbers. Constable N. thanked the Complainant for his cooperation.

[50] Significant quantities of drugs were found in suite 307, and also in the adjoining room, suite 305.

[51] Sergeant B. acknowledged that the information received regarding suite 205 was a mistake.

[52] Sergeant B. advised that what happened with respect to room 205 was a misunderstanding. He did not feel the Respondents' conduct was in any way oppressive. He apologized to the Complainant at the end of the search, during the mediation process after the Complaint was filed, and during the hearing.

[53] Sergeant B. advised that he always introduces himself as a police officer, always shows his badge and does not enter premises until invited to do so (if there is no warrant for the specific premises). That is what he is trained to do and he recalls doing it in this instance. He specifically said that the reason he stays outside a door until invited in (if no warrant) is so that he does not end up in court defending the lawfulness of a search.

[54] Constable N. had no notes about the incident. Sergeant B. did have notes. There are entries relating to the search of suites 307 and 305. There is an entry in those notes that Sergeant B. entered the Osborne Village Inn at 12:06 p.m. on January 7, 2005, that he questioned the desk clerk about room 205, that the manager allowed entry, and that the occupant is named (the last name is accurate but the first name is slightly incorrect). There is a note "not involved with 307" and a note that Sergeant B. attended to suite 307 at 12:30. He said that he spent quite a bit of time with the desk clerk downstairs before going to 205.

Material Points that are Consistent as between the Evidence of the Complainant and the Respondents

[55] All witnesses agree that the following occurred:

1. When the Complainant answered the door and was told that there was a search warrant, he swore at Sergeant B. and said words to the effect of "Come in and look around, you won't find anything".

2. Sergeant B. told the Complainant that there was a search warrant.

3. The Complainant sat down and watched television while the search was done.

4. The search was "cursory" – in other words, not very extensive or intense.

5. The search included Sergeant B. looking through some personal papers of the Complainant.

6. While Sergeant B. was searching the papers, the Complainant made a sarcastic comment that "You won't find any drugs reading my stuff".

7. There was no damage done to the suite.

8. At no time did the Respondents touch the Complainant.

9. The Respondents did not raise their voice to the Complainant nor did they say anything offensive to him.

10. The Complainant was angry. He said himself he "went ballistic" and lost his temper.

11. The Respondents gave their badge numbers to the Complainant at the end of the search.

Material Differences in Evidence

[56] There are a number of important points on which the evidence of the Complainant and the Respondents differ.

(i) <u>At What Point the Respondents Entered the Suite</u>

- The Complainant says that when he opened the door, Sgt. B. came "flying through the door" before anything was said.

- Both Respondents say that Sergeant B. remained outside the suite at the threshold until the Complainant told them to come in and look around.

(ii) Entrance into the Suite

- The Complainant says that he backed up when Sergeant B. came in.

- The Respondents say that the Complainant turned around and walked down the hallway and they followed him into the suite.

(iii) What was said about the Search Warrant

- The Complainant says that after the Respondents entered the suite, Sergeant B. said "Hi Ron. We have a search warrant. We have information you are holding narcotics". According to the Complainant, once the Respondents were inside his suite, the Complainant asked them where the search warrant was and says that Sergeant B. responded that "It's upstairs, you already said we could come in". In short, the Complainant's evidence is that the Respondents said they had a search warrant, but did not say that they had a warrant for a suite on the third floor. The Complainant thought Sergeant B. meant they had a search warrant specifically for his suite, suite 205. The Complainant says it was based on their advice that they had a search warrant (which he assumed was for his suite) that he told them to come in.

- The Respondents say that after knocking, the door being opened by the Complainant and Sergeant B. identifying them as police officers and showing his badge, Sergeant B. told the Complainant that they had a search warrant for the third floor and that they had information that his suite may be linked to drug activity. The Respondents say it was based on that information that the Complainant told them to come in and look around.

(iv) What the Respondents were Wearing

- The Complainant says that Sergeant B. was wearing a maroon jacket and blue jeans, and that Constable N. was wearing a police jacket. He said in his first statement that he thought they were maintenance men. In the other statement he says they were wearing civilian clothes.

- Both Respondents say that Sergeant B. was wearing the police "raid" jacket (dark blue with the Winnipeg Police Service crest on the front and "POLICE" in yellow letters on the back). Sergeant B. says he does not own a maroon jacket. Both Respondents say that Constable N. was wearing dress pants, a blue shirt and tie.

(v) Identifying Selves as Police Officers

- The Complainant says that there was no identification given by Sergeant B. that he was a police officer before he entered the suite. He says he was not shown a badge. He says that he realized they were police officers when he looked over Sergeant B.'s shoulder and saw Constable N. wearing a police jacket (both officers say that it was Sergeant B. who was wearing the police jacket).

- Both Respondents say that Sergeant B. identified them as police officers and showed the Complainant his badge before they were invited in. Constable N. says he was wearing his badge and sidearm on this belt and they were visible.

(vi) Length of the Search

- The Complainant said in his statement that the search lasted 30 to 45 minutes. During his evidence he said it took 15 to 30 minutes – when asked on cross examination if it really took that long, he said it could have. The Complainant described the search as a "cover your ass" search (not very thorough). His suite is small.

- Both Respondents said they spent about 5 minutes in the Complainant's suite doing a cursory search. They said it was pretty obvious right away that there were no drugs there.

(vii) Location of Constable N. during the Search

- The Complainant says in oral evidence that Constable N. stayed in the hallway and came into the suite during the search. In his statements he says Constable N. was in the suite during the search. Both Respondents say they were both in the suite during the whole search.

(b) Assessments of Credibility

[57] The respective versions of the Respondents and of the Complainant as to what was said when the Complainant opened the door to his suite about the search warrant, where Sergeant B. was standing when he said it, and what was said about the Respondents' identification as police officers, are different. Findings on these facts are critical to a decision as to whether the searches were lawful. In making a decision on these three points, I must have regard to the overall credibility of the witnesses.

[58] There are a number of factors that may be considered in assessing credibility. The most important is whether a witness's evidence is consistent with other evidence or with other facts that are proved. Even if evidence on a particular point is not a crucial fact in the case, if that witness's version is corroborated or is consistent with other evidence on the same point, that bolsters his credibility overall.

[59] Judge Giesbrecht in *R.J.M.* summarized factors that may be considered to assess credibility of a witness, to include:

> "...demeanour of the witness while giving evidence; whether the witness was under the influence of drugs or alcohol at the time of the events that are being described; whether the actions of the witness are consistent with his or her evidence; the ability of the witness to recall details and make accurate observations; the time that has passed since the event; whether the witness has a motive to adjust or slant her evidence; whether the witness has an interest in the proceedings or is truly independent; whether there are internal inconsistencies in the evidence of the witness; and whether there is support for the witness's evidence or whether it is inconsistent with other evidence in the case."

[60] For the Complainant, the events of January 11, 2005 were a once in a lifetime event. It is reasonable to assume that the events made a significant impression on him. He was clearly outraged and offended by the suggestion that he would have anything to do with drugs. He candidly admits he was upset and angry. His own evidence contains a number of inconsistencies on important points. He admits these inconsistencies. His evidence as between his two written statements varies in terms of his descriptions of the Respondents when he first opened the door and as to whether or not Constable N. entered the suite during the

search. His oral evidence differed significantly from his written statements in terms of the length of the search - saying in the written statements, 30 to 45 minutes and in oral evidence, saying 15 to 30 minutes. He admitted the search was cursory and given the size of his suite, and the fact of the drug investigation going on the floor above, it is simply hard to believe the officers spent even 15 to 30 minutes in his suite.

[61] The Complainant's counsel says that because these events were "once in a lifetime" for the Complainant and were so shocking to him and that he wrote them down very shortly afterwards, his version should be preferred over those of the Respondents who had very little in their notes about suite 205 (and nothing about the search itself).

[62] Indeed one version of events was written by the Complainant shortly after the event. That first version was not produced at the hearing. This was followed by another handwritten version a couple of days later followed by a typed version, which contains some significant differences in recollection. Then another version of events was given at the hearing with other significant differences. I have set out these inconsistencies above. That there are such inconsistencies in the various versions given by the Complainant means I am not persuaded that just because the events were unique for the Complainant and/or because he wrote the events down shortly after they happened, his version should be preferred to that of the Respondents'.

[63] The Complainant’s counsel argued that the Complainant has nothing to gain from this proceeding, such that there is no reason for him to invent or embellish his allegations. The “nothing to gain” factor is not an appropriate consideration when the burden of proof is on the individual claiming he has nothing to gain. The reason is simple. To say that a Complainant has nothing to gain by proceedings and therefore should necessarily be believed, in essence, has the profound effect of shifting the burden of proof to the Respondents. That cannot be the case, as it would be contrary to what is required by the *Act*. I do not consider any motive or lack of motive of the Complainant as a factor in my decision.

[64] In my view, both Respondents gave their evidence in a straightforward way. They did not overstate matters and quite candidly admitted that the information upon which they had acted with respect to suite 205 was a mistake. They were both sympathetic to the Complainant's upset at having his suite searched. The particulars of their evidence were consistent with each other and were consistent with some of what the Complainant said.

[65] The inconsistencies in the Complainant's own versions of his evidence are troubling and no satisfactory explanation is given for the inconsistencies. Given the onus and the standard of proof that the Complainant has to meet, I certainly cannot find that there is clear and compelling evidence that the incident happened the way the Complainant said it did. Where there are differences in the evidence as to what happened, I accept the evidence of the Respondents.

(c) Findings of Fact

[66] Based on the evidence stated above and the findings of credibility I have made, I find the following:

(a) That the Respondents stayed outside the suite until the Complainant told them to come in and look around;

(b) That Sergeant B. told the Complainant they were police officers while the Respondents were still outside the suite;

(c) That Sergeant B. told the Complainant that they had a search warrant for the third floor and had information that the Complainant's suite may be connected, while the Respondents were still outside the suite;

(d) That the Complainant told the Respondents to come in and look around and the Respondents then entered the suite; and

(e) That the search of the suite was cursory and took approximately 5 minutes.

V. POSITIONS OF THE PARTIES

The Complainant

[67] The Complainant says that even if the Respondents did not enter the suite until they were invited to do so, the search of the suite was unlawful because he did not give an informed consent to search the suite.

[68] The Complainant says that the Respondents' search of his personal papers was unlawful because he did not give any consent at all to search those.

[69] The Complainant says that the search of his personal papers was, in any event, excessive.

[70] The Complainant says the unlawful and/or excessive nature of the searches constituted abusive and/or oppressive conduct by the Respondents, which amounted to abuse of their authority, and, as such, disciplinary defaults under the *Act*.

The Respondents

[71] The Respondents deny that the search of the suite and/or of the papers was unlawful and/or excessive.

[72] The Respondents say that even if the search of the suite and/or of the papers was unlawful and/or excessive, their conduct during the searches was neither abusive nor oppressive.

[73] The Respondents say that even if their conduct is found to have been unlawful and abusive or oppressive, their conduct did not amount to an abuse of their authority. If their conduct was not an abuse of authority, it cannot constitute a disciplinary default under section 29(a) of the Act.

VI. ANALYSIS - DETERMINATION OF ISSUES

1. Was the Search of the Complainant's Suite Unlawful?

[74] Section 8 of the *Charter* guarantees everyone the right to be secure against unreasonable search and seizure.

[75] There was no warrant to search suite 205. When a search is done without a warrant it is presumed *prima facie* to be an unreasonable search (*Hunter v. Southam Inc*. (1984), 14 C.C.C. (3d) 97 (S.C.C.)).

[76] For a search to be reasonable, there are three elements that must be present:

1. It must be authorized by law;
2. The law itself must be reasonable; and
3. The manner in which the search was carried out must be reasonable.

(*Collins v. The Queen* (1987), 33 C.C.C. (3d) 1 (S.C.C.))

[77] At common law, an individual may waive his privacy rights under the charter and consent to the police conducting a search where the police are not otherwise authorized to do so.

[78] In such a case, the consent must be an informed consent. In *R. v. Borden,* [1994] 3 S.C.R. 145, Iacobucci J. for the majority, held that for a consent to be effective "the person purporting to consent must be possessed of the requisite informational foundation" for a true relinquishment of the right to be secure from an unreasonable search or seizure.

[79] For there to be informed consent, there must be more than just acquiescence or compliance with a police request. This is because most civilians, when requested to do somehing by the police, will not know that they have a right to refuse. For there to be given true consent to a search, an individual must know that he has the right to refuse the police request to search. (*R. v. Wills* (1992), 70 C.C.C. (3d) 529 (Ont. C.A.). While there is not a positive duty on the police to inform about a right to refuse a search, a failure to so inform an individual may well result in a finding that " … an apparent consent will be found to be no consent at all…" (*R. v. Lewis* (1998), 122 C.C.C. (3d) 481 (Ont. C.A.), paragraph 12).

[80] A finding of no true and informed consent to search may result in a finding of a section 8 *Charter* breach, such that any evidence gathered in the course of the search may be inadmissible at a criminal trial of the individual.

[81] In this case, the Respondents told the Complainant specifically that they had a warrant for another suite and that they had information he might have drugs in his suite. The Complainant was well aware of the purpose for which the Respondents wanted to search his suite when he told them to come in and look around. He knew they were looking for drugs and, with that knowledge, he told them to come in and look around.

[82] However, there is no evidence that either of the Respondents told the Complainant that he had the right to refuse to allow them inside his suite or to search the suite. The evidence of the Respondents (which I accept) is that they told him about the search warrant and that they had information his suite was connected, and that it was on that basis the Complainant swore at the Respondents but told them to come in and look around. The Respondents do not dispute that they did not specifically tell the Complainant he had the right to refuse the search.

[83] I am satisfied that there was no true consent to the general search of the suite. The search of the suite was not authorized on the basis of consent. As such, it was not reasonable, and thus, not lawful.

2. <u>Was the Search of the Complainant's Papers Unlawful?</u>

[84] The Complainant says that he did not give the Respondents consent to search the papers on his nightstand that Sergeant B. looked through.

[85] Even though the Complainant told the Respondents to come into the suite and look around, he did not invite Sergeant B. to look through the personal papers on his nightstand.

[86] The documents in issue were on the nightstand by the bed. Sergeant B. sat down on the bed and looked through the papers. The Complainant said to him words to the effect "You are not going to find any drugs looking at my papers". When Sergeant B. did not stop looking at the papers, the Complainant said "Hey".

[87] I agree with the Complainant that there were no words said by him that constituted a consent to conduct a search of the papers. There is certainly no evidence that either of the Respondents told the Complainant that he could refuse to have them search the papers.

[88] I am satisfied that there was no informed consent to the search of the Complainant's papers. The search, as such, was not reasonable and therefore, not lawful.

3. Was the Search Excessive?

[89] The Complainant says that the search was excessive and therefore, abusive and oppressive.

[90] Even though I have already found the searches to be unlawful, for lack of informed consent, I will address the argument of the Complainant that the search was excessive. A decision on this point is important to the ultimate decision as to whether the conduct of Sergeant B. and Constable N. was an abuse of authority.

[91] The Complainant says that the "excessive" aspect of the search was Sergeant B. looking at his personal papers which were located on the nightstand by his bed. The papers were apparently credit card statements and/or investment statements.

[92] "Excessive" is defined in Black's Law Dictionary as "greater than what is usual or proper. A general term for what goes beyond just measure or amount".

[93] Sergeant B. testified that the reason he looked through the papers was to see if the papers included what are commonly known as "score sheets" in drug investigations, and/or if the papers included any references to the individuals that were being targeted in the drug investigation. He stated it was not enough to take a

quick look at them and then, realizing they were investment information and credit card statements, to put them down. He said it was necessary to look through all the papers to see if there were score sheets or other drug contact information tucked in with the papers. The evidence is that this review of the papers took only a few minutes. There is no suggestion that Sergeant B. copied down any information from the papers, interrogated the Complainant about them or in any way damaged or mixed up the papers.

[94] Sergeant B. had a stated legitimate reason to look through the papers, did so within a short time and in doing so, was in no way disrespectful to the Complainant.

[95] I find that the searching of the Complainant's papers in the manner done by Sergeant B. cannot be characterized as excessive.

4. Were the Searches of the Suite and/or the Papers "Oppressive" or "Abusive"?

[96] Respondents' counsel provided definitions of "oppression" and "abusive" from Black's Law Dictionary.

"Oppression" is defined as follows:

> "The misdemeanor committed by a public officer, who under color of his office, wrongfully inflicts upon any person any bodily harm, imprisonment, or other injury. An act of cruelty, severity, unlawful exaction, or excessive use of authority. An act of subjecting to cruel and unjust hardship; an act of domination."

"Abusive" means:

> "Tending to deceive; practicing abuse; prone to ill-treat by coarse, insulting words or harmful acts. Using ill treatment; injurious, improper, hurtful, offensive, reproachful."

[97] There is no evidence that the Respondents acted in any manner other than a professional one during the search. There is no evidence that they acted or said any words that were cruel, severe, improper, hurtful or offensive. Sergeant B. stated that he did not use any language that he "…would not use at a tea party" and the Complainant did not suggest that the Respondents used any offensive language. They did not do any damage to the suite or its contents. The search was short in duration. They did not touch the Complainant. Upon leaving, they provided the Complainant with their badge numbers, apologized for the intrusion and thanked the Complainant for his cooperation.

[98] The evidence suggests the Respondents were courteous and professional throughout their contact with the Complainant.

[99] There is no basis to find that the conduct of the Respondents was abusive.

[100] I have found that the general search of the suite and the search of the papers were unlawful due to there being no informed consent obtained before the search. The searches, as being "unlawful exaction" of duty, must fall within the definition of "oppressive" conduct.

4. <u>Was the search of the suite and/or the search of the papers an abuse by the Respondents of their authority so as to constitute the commission of a disciplinary default?</u>

[101] I have found the searches to be technically unlawful and therefore "oppressive" conduct.

[102] Does this oppressive conduct by the Respondents necessarily constitute an abuse of their authority?

[103] Whether conduct found to constitute "oppressive" conduct, is in fact an "abuse of authority" within section 29 of the *Act* depends on the facts of a particular case. The mere fact that the searches in this case were technically unlawful, and thereby oppressive, does not necessarily mean that they were abuses of authority by the Respondents.

[104] I agree with the comments of Judge Joyal (as he then was) in *A.C. v. Constable G.S.* (LERA Complaint #6100), February 20, 2007 that, reading the *Act* in context and having regard to its purpose, one may conclude that an "abuse of authority" connotes police conduct that is exploitative. Judge Joyal states, at paragraph 52:

> "The exploitative potential flows from an officer's position of authority which permits the impugned conduct to have an inappropriately and unjustifiably controlling, intimidating or inhibiting effect on a given complainant in the context of a particular fact situation. Police conduct which can be properly found as an "abuse of authority" is that exploitative conduct which, even after an examination of the factual context of a given case, cannot be viewed as consistent with a reasonable police officer's good faith intention to lawfully perform his duties and uphold the public trust".

[105] Even the fact that the searches done may have amounted to a breach of *Charter* rights does not necessarily mean they were an "abuse of authority" within section 29 of the *Act.* Other decisions of this court have held that even Charter

breaches are not necessarily disciplinary defaults under the *Act* (decision of Judge Chartier (as he then was) in *J.W.P. v. Cst. R.L.* (November 15, 2004); decision of Judge Swail in *F.D., and Cst. E.D. and Cst. M.C.* of December 12, 2005). Even Judge Smith, who found conduct she concluded was a breach of a section 10 *Charter* right to be a disciplinary default under the *Act* in *W.H. v. Det. Sgt. R.H. et al* (August 18, 2006) states that "…a Charter breach, in itself, does not automatically constitute a disciplinary default". Rather, Judge Smith says, disregard for fundamental rights guaranteed by the *Charter* can constitute an abuse of authority in certain circumstances and she suggests conduct constituting *Charter* breaches should be carefully scrutinized, in the circumstances of a particular case, to determine whether, in that case, a disciplinary default has been committed.

[106] It is important that every police action that does or might constitute a breach of a *Charter* right and/or might fall within one of the enumerated grounds under section 29(a) of the *Act*, not be automatically deemed to be an abuse of authority. To do so will disturb the balance that must exist between the police being accountable to the public for their conduct and being able to do their jobs effectively in order to protect the public. Judge Swail, in *F.D. v. Constable E.D. and Constable M.C.*, December 12, 2005, paragraphs 83 to 85, accepts comments in the January 26, 1994 decision of *Rampersaud v. Ford*, Board of Inquiry (Ontario Police Services Act) of January 26, 1994, referring to the fact police officers would operate under a "disciplinary chill" if police were subject to disciplinary proceedings every time it was found that an officer had committed a breach of an accused's *Charter* rights.

[107] In order to decide if the conduct of the Respondents in this case, in conducting the general search of the Complainant's suite and the search of his personal papers within the suite, amounts to "abuse of authority", it is necessary to look at the facts of this case. I consider the following facts:

(i) the treatment by the Respondents of the Complainant;
(ii) whether their conduct can be seen as consistent with a reasonable police officer's good faith intention to lawfully perform his duties;
(iii) the extent and specifics of the search itself; and
(iv) how the Respondents' conduct affected the Complainant.

[108] In terms of treatment, I have already found that the Respondents acted courteously and professionally toward the Complainant. They did not disturb or

damage his possessions and they did not touch him. The language they used toward the Respondent was professional and polite.

[109] There is no doubt that the Respondents were acting in good faith with a view to performing a lawful search. According to their evidence (which I accepted), they were careful not to enter the premises until invited to do so by the Complainant and until after they had told him about the search warrant and the basis on which they wanted to search his suite. They identified themselves as police officers and showed identification. Their evidence was that they were careful to make sure they had taken all these steps specifically so that they did not have to end up in court on a challenge to the search. Although the consent they obtained from the Complainant to do the search was not sufficient consent for the search to withstand a *Charter* challenge, the Respondents did obtain some invitation from the Complainant to enter his suite. This was not a situation in which the Respondents entered the suite over objections by the Complainant. They did not force their way in to his suite. They were clearly making best efforts, in good faith, to ensure the search was lawful. The one thing that made the search unlawful (not telling the Complainant that he could refuse to have them search) does not change the fact that they were acting in good faith in pursuit of a lawful search.

[110] I have already found that the search was not "excessive". It was cursory, short, and non-intrusive. The Respondents did not go beyond what was necessary in order to meet the objectives of the search.

[111] In terms of how the Respondents' conduct affected the Complainant, the evidence suggests that the Complainant was angry, but not intimidated. Once the police told him they wanted to search his suite because they believed he had drugs there, his response was to use profanity toward them and then to invite them in to look around. While they were searching, he sat and watched television. When one of the Respondents was searching through his papers, he initiated a sarcastic comment saying words to the effect of "you won't find any drugs looking through my papers". At the end of the search, the Complainant said "I'll see you later boys". This conduct does not seem consistent with someone who is intimidated by the police.

[112] The Respondents failed to obtain informed consent for the searches from the Complainant. This was an error which could have had significant legal consequences for exclusion of evidence, had this been a situation in which charges resulted from such a search (which of course was not the case here).

[113] However, taking into account the Respondents' actual conduct in performing the searches, their treatment of the Complainant, the legitimate pursuit of their duty in a professional and respectful manner, the nature of the search itself and the Complainant's interaction with the Respondents, I conclude that the Respondents' conduct was not exploitative and did not amount to an abuse of authority.

[114] Conduct that does not amount to an abuse of authority cannot constitute a disciplinary default under section 29(a) of the *Act*.

VII. CONCLUSION

[115] One may understand that the Complainant felt insulted by the insinuation that he had some connection with drugs and that he was upset and angry about the fact his suite was searched by police. No drugs were found and the police admit that the information they had that led them to the suite was mistaken.

[116] Indeed, the Respondents made an error in not advising the Complainant he could refuse to have them conduct the searches.

[117] However, for the reasons given above, that error did not constitute an "abuse of authority" within section 29(a) of the *Act.*

[118] Neither of the Respondents in this matter have committed a disciplinary default in any respect as alleged by the Complainant. Accordingly, the Complaint in this matter is dismissed.

[119] It is further ordered that the ban on publication of the Respondents names shall continue.

DATED at the City of Winnipeg, in Manitoba, this 12th day of October, 2007.

"ORIGINAL SIGNED BY"

C. CARLSON, P.J.