IN THE MATTER OF: ***The Law Enforcement Review Act.***
Complaint #5328

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

BETWEEN:	)	**Ms R.M.**
	)	**representing herself,**
R.J. M.	)	**with the assistance**
	)	**of her father,**
Complainant,	)	**Mr. R.D.**
-and-	)	
	)	
Sergeant P. **and**	)	**Mr. Josh Weinstein**
Constable T.	)	**for the Respondents**
	)	
Respondents.	)	
	)	**Hearing dates:**
	)	**February 10, 11 &**
	)	**17, 2004**
	)	
	)	**Decision delivered**
	)	**this 24th day of**
	)	**November, 2004**

L. GIESBRECHT P. J.

INTRODUCTION

[1] The respondent officers are members of the Winnipeg City Police Service. On May 9, 2000 they arrested the complainant, R.M., as a suspect in a break-in they were investigating. This arrest occurred in the apartment of a friend with whom Ms M. was staying at the time. Ms M. was taken to the Public Safety Building to be interviewed. She alleges that the two officers committed various disciplinary defaults under *The Law Enforcement Review Act* (the Act or L.E.R.A.) during their encounter with her.

RECORD OF PROCEEDINGS

[2] Ms M. made a complaint about the respondent officers' conduct to the Law Enforcement Review Commissioner (the Commissioner) on July 6, 2000. An investigation was conducted by the Commissioner's office. Pursuant to section 17(1) of the Act, by notice dated the 12th of December 2002, the Commissioner referred the matter to a Provincial Judge for a hearing to determine the merits of the complaint.

[3] Prior to the hearing on the merits, the respondent officers filed a preliminary application seeking a finding that the Commissioner had acted without jurisdiction in referring this matter for a hearing. This application was based on a limitation period in the Act, which requires complaints to be filed not later than 30 days after the date of the alleged disciplinary default. The Act also gives the Commissioner a limited discretion to extend the time for the filing of a complaint, which he exercised in the present case. The respondent officers took the position that the Commissioner ought not to have exercised his discretion in the circumstances of this case. The respondents' application was dismissed with written reasons being provided on February 10, 2004. The hearing on the merits of the complaint proceeded on February 10, 11 and 17, 2004.

NOTICE OF ALLEGED DISCIPLINARY DEFAULT

[4] The notice of alleged disciplinary default and referral to a Provincial Court Judge was filed as Exhibit #1. The date of the alleged disciplinary defaults is set out in the notice as May 5, 2000. This date in the notice is obviously an error, as all the evidence establishes that the encounter between the respondent officers and the complainant occurred on May 9, 2000.

[5] The complaint in this case alleges a number of disciplinary defaults under s. 29 of the Act, namely, that the respondent officers abused their authority in the following manner:

1. By searching the apartment without lawful authority;
2. By using unnecessary violence or excessive force on the complainant;
3. By using oppressive or abusive conduct or language on the complainant; and
4. By being discourteous or uncivil towards the complainant.

THE STANDARD OF PROOF

[6] The burden of proof in these proceedings is on the complainant to prove that the respondent officers committed the alleged disciplinary defaults. What this means is that the respondent officers do not bear any burden to prove that they did not commit any disciplinary defaults.

[7] These are civil proceedings and generally the standard of proof in such proceedings is on a balance of probabilities. Counsel for the respondents submits that the standard of proof as defined in the Act is above and beyond a balance of probabilities. While he admits that the standard is less than proof beyond a reasonable doubt he suggests that it approaches that standard.

[8] The standard of proof under the Act is set out in s. 27(2) as follows:

> "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 the disciplinary default." (Emphasis added.)

[9] The term 'clear and convincing evidence' has not been the subject of the same kind of judicial scrutiny or commentary as have the terms 'beyond a reasonable doubt' and 'on a balance of probabilities' in the criminal and civil context. Nevertheless a number of decisions have considered what is required for proof on clear and convincing evidence.

[10] My colleague Wyant P.J. (as he then was) in his August 14, 2000 unreported L.E.R.A. decision, ***Graham v. Constables G. & B.*** concluded at paragraph 7, that the term 'clear and convincing evidence', "speaks to the quality of the evidence necessary to meet that standard of proof on a balance of probabilities."

[11] He referred to the case of ***Huard v. Romualdi*** (1993), 1 P.L.R. 217 where it was held that clear and convincing proof in proceedings of this kind must be based on cogent evidence because the consequences to a police officer's career flowing from an adverse decision are very serious.

[12] My colleague Chartier P.J. in his October 26, 2000 unreported L.E.R.A. decision ***Anderson v. Constables D. & K.*** held that the standard of

proof under section 27(2) of the Act is a high standard. He stated at page 3 of his decision:

> "The evidence must be clear; it must be free from confusion. It must also be convincing which, when combined with the word 'clear', in my view means that it must be compelling."

[13] My former colleague Enns P.J. in his December 3, 1998 unreported L.E.R.A. decision ***Sutton v. Constable D.*** also discussed the meaning of the term 'clear and convincing evidence'. He held that "the onus of proof is something less than in a criminal case, but something more stringent than a balance of probabilities as in a civil case…" He concluded as follows at paragraph 16:

> "In themselves, the terms are relatively plain, and applying ordinary dictionary definitions, it may be said that the degree of proof must be easy to see or transparent, persuasive of being true, and essentially reliable."

[14] In his June 21, 1996 L.E.R.A. decision in ***Weselake v. K.*** Cohen P.J adopted the interpretation of the term 'clear and convincing evidence' that was approved by the British Columbia Court of Appeal in the case of ***College of Physicians and Surgeons of British Columbia v. J.C.*** (1992), W.W.R. 673. The Court of Appeal in that case accepted the trial judge's comments as to what is meant by clear and convincing evidence. The trial judge indicated that "a high standard of proof is called for going beyond the balance of probabilities and based on clear and convincing evidence" and that the case must be "proven by a fair and reasonable preponderance of credible evidence." The trial judge held that the most helpful term used in various judicial pronouncements on this subject is 'convincing' and that "to be convinced means more than merely to be persuaded."

(It should be noted that in the L.E.R.A. decisions I have referred to above, I have used initials rather than the full names of the officers involved as in each case the officer's name was the subject of a ban on publication.)

[15] Based on this review of the cases I conclude that a complainant under the Act must satisfy a relatively high standard of proof. I agree with respondents' counsel that 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. I agree

with the judge in the B.C. case cited above, that to be convinced means more than merely to be persuaded.

THE EVIDENCE

[16] Four witnesses testified at this hearing. In addition some medical documents were admitted in evidence on behalf of the complainant over the strenuous objection of counsel for the respondents. While there is general agreement as to the surrounding circumstances in terms of date, place and times and to some extent the sequence of events, there are vast differences between the evidence of the respondent officers and the complainant and her witness as to what happened during the respondents' encounter with Ms M. These differences in the evidence for the most part cannot be explained merely as difficulties with recollection due to the passage of time, or as differing perspectives on the same events, or even as a misinterpretation of events. While the passage of time, misunderstandings and differing perspectives may account for some of the differences in the evidence, the fundamental issue in this case is credibility.

[17] The two conflicting versions of events cannot be reconciled in this case. Take, for example, the allegation of abuse of authority by using unnecessary violence or excessive force. Ms M. testified that while she was being interrogated in the interview room at the Public Safety Building she was assaulted by Cst. T. in the presence of Sgt. P. This is not a case where the police officers admit to using some force but argue that it was reasonable in the circumstances. They absolutely deny the use of any force whatsoever. They say that it simply did not happen. Both officers testified that apart from a routine search of the complainant by Cst. T., neither officer had any physical contact with Ms M. in the interview room.

[18] In view of the conflicting nature of the evidence, and the credibility contest that is the central issue in this case, I will review the evidence of all the witnesses in some detail. For the sake of convenience and to provide a backdrop to the evidence of the witnesses, I will commence with a short outline of facts which are not in dispute.

Outline of Facts not in Dispute

[19] The complainant R. M. is a young aboriginal woman who was 19 years of age in May of 2000. At the time of the hearing she was in her

second year of university studying pre-medicine. In the spring of 2000 Ms M. was employed at an escort service and was staying for a while with a co-worker by the name of M. A., in A.'s apartment on Hargrave Street in downtown Winnipeg. At some point the roommates had a disagreement and Ms M. moved out. The disagreement was apparently over one of Ms A's boyfriends. On April 3, 2000 Ms M. entered the apartment using her key and removed her belongings which consisted of clothing, baby toys and perfume. She then called Ms A. at work and told her that she had taken her "stuff" so that when Ms A. came home she would not wonder where these items were.

[20] When Ms A. returned home later that day she found her apartment door unlocked and noted that some of her own belongings, including a stereo, CDs, and jewelry were also missing. She reported the matter to the police on April 3rd, stating that she suspected Ms M. of taking these items. She also indicated that Ms M. should not have had a key to her apartment. Police officers who initially attended the call noted no signs of forced entry to the apartment. Within one to three days this report of a possible theft or break-in was assigned to Sgt. P. for further investigation.

[21] Sgt. P. at that time was a plain clothes constable working out of the downtown detective office of the Winnipeg City Police Service. His partner was Cst. T. P. was the lead investigator in this case. As of the date of this hearing Sgt. P. had been a police officer for 17 years, and Cst. T. had been a police officer for just over 9 years. Cst. T. is aboriginal, having been raised on a reserve in Northern Manitoba.

[22] Sgt. P. spoke to Ms A. either on May 8th or 9th and she provided him with a possible address where Ms M. was staying. On May 9th at about 8:10 p.m. Sgt. P. and Cst. T. attended to that address, an apartment on Hargrave Street. This apartment belonged to Ms J. K., who is a friend of Ms M.'s. Ms K. is a young aboriginal woman who was living in the apartment with her two children. Ms M. had been staying with Ms K. for about a week at that time. The respondent officers attended to that location intending to arrest Ms M. if they located her.

[23] Sgt. P. knocked on the door, identified himself and his partner as police officers and when the door was opened they entered the apartment. Most of the events from this point on are in dispute. It is not disputed that Sgt. P. showed his police identification and advised Ms M. that they were

investigating a break-in which had occurred at M. A.'s apartment on April 3, 2000, and that CDs, jewelry and a stereo had been stolen. He also advised Ms M. that she was a suspect in this offence and that she would have to accompany them to the Public Safety Building. It is not disputed that at some point while the officers were in the apartment Ms M. was handcuffed and Sgt. P. examined a stereo that was located in the kitchen of the suite. This stereo was not the one that had been reported stolen by A.

[24] It is also common ground that at some point while the officers were in the apartment one or two young children came out of a bedroom. The surrounding circumstances as to how this came to happen are disputed. One of these children had red marks about his body. It is not disputed that the officers believed that the child may have been abused, and as a result one of the officers examined the child. It turned out that the child had chicken pox and Ms K. informed the officers of that fact. It is not disputed that Ms K. became irate and started yelling and swearing at the officers. Shortly afterwards the officers left the apartment with Ms M.

[25] It is not disputed that on route to the Public Safety Building Ms M. was advised of her right to counsel and her right to remain silent. She was upset and crying during this time. Upon arrival at the Public Safety Building Ms M. was placed in an interview room. Her handcuffs were removed and she was searched by Cst. T. and a prisoner log sheet was completed. The officers then left her alone in the room. About half an hour later the officers entered the interview room once again and began to interview Ms M. about the offence. This interview was not videotaped. Much of what happened during the interview is in dispute. The interview lasted for about 35 minutes. It is during this period of time that the assault is alleged to have occurred. It is not disputed that Ms M. repeatedly denied any involvement in the offence. She was crying and upset. The interview ended at 9:31 p.m.

[26] Shortly after 10:00 p.m. on May 9th Ms M. was released from custody. She was advised that she was not being charged with any offence pending further investigation. The respondent officers offered her a ride home which she declined. It is not disputed that Ms M. attended to the Health Sciences Centre Emergency Department and was examined by a doctor at about 11:40 p.m. on May 9, 2000. It is not disputed that Ms M. and Ms K. each made notes about what had happened during their dealings with the police officers. These notes were made that same evening. On July 6, 2000 Ms M.

made a complaint to the L.E.R.A. Commissioner respecting the events of May 9th.

The Evidence of R. M.

[27] Ms M. testified that the respondents knocked at the apartment door on the evening of May 9th and identified themselves as Winnipeg Police officers. She asked Ms K. whether she should let them in and Ms K. said yes. Ms M. then opened the door and the police officers came into the apartment. She indicated that they were not really invited in but that they "just came in". At this time the officers were in a small hallway or foyer near the door of the apartment. The officers showed their identification and advised Ms M. that she was under investigation for stealing some property from her ex-roommate M.A. They advised her that a Sharp stereo, some CDs and jewelry had been taken. Ms M. testified that she told the officers that she had nothing to do with taking these items.

[28] The officers noticed a stereo that was on a shelf in the kitchen and one of the officers looked at it. Ms K. told them that it was a Sony not a Sharp stereo. Ms M. agreed that the stereo was visible from the foyer and that the officers were given permission by Ms K. to look at it. She testified, however, that the officers were not given permission by anyone to look elsewhere in the apartment. She testified that after she opened the door to the apartment "they just came in, and started walking around" and "kept looking around." She indicated that after they looked at the stereo, "they were like just kind of like roaming around" the apartment in the living room area. She thought that they were looking to see if any of the stolen property was there. She conceded in cross-examination that the officers did not pick up any other property in the apartment to look at, other than the stereo.

[29] Ms M. testified that while they were in the living room area one of the officers, she believes it was the female officer, opened the bedroom door. While she could not be definite as to which one of the officers opened the door, she was adamant that it was one of them. She indicated that Ms K.'s sons then came out of the bedroom. One of the boys had chicken pox, and the female officer started accusing Ms K. of abusing her children. According to Ms M., the officer asked Ms K. whether she liked hitting her children. One or both of the officers examined the child. They went into the bedroom although not all the way in. Ms M. agreed that when the children came running out of the bedroom Ms K. yelled at the kids to the effect, "Get

the fuck back in your bedroom". Ms M. fairly conceded that hearing a mother speak to a child in this way and seeing red marks on the child might reasonably give cause to someone to be concerned about the child's well-being.

[30] Ms M. expressed the view that the officers were being "intimidating and not very nice." She stated that the officers were rude to Ms K. when they accused her of abusing her children. Ms K. became very upset and told them to get out of the apartment and said that they had no warrant. At this point Ms M. stated that she walked away from the officer, at which time the male officer grabbed her arm and said something to the effect, "You're not running away." She was then handcuffed and told that she was going with them to the Public Safety Building. She said that she was not placed under arrest in the apartment. Ms M. was of the view that the police officers were in the apartment for about 20 minutes.

[31] Ms M. was taken to the police car, and it was there that she say she was arrested and read her rights. While on route to the police station, Ms M. testified that both of the officers were rude and insulting to her. They accused her of being a hooker, and said that her mother was a hooker. They accused her of using drugs. She stated that she was crying and very upset at this time and indicated to them that she was trying to turn her life around. She also told the officers that she was trying to get custody of her daughter. They told her that if she did not tell them where the stolen property was she would be taken to the Remand Centre and she would never see her daughter again.

[32] Ms M. testified that at the police station she was placed in an interview room where she was interrogated by the respondent officers. She stated that the female officer ordered her to sit down, and she then sat down on one side of a metal picnic type bench. The female officer brought a chair into the room and slammed it down on the floor. The officers both accused her of lying and kept asking her where the stuff was. Ms M. stated that she kept telling the officers that she did not take any of the missing property and offered that they could go search her belongings which she was storing at another friend's place. The officers asked her if she had ever pawned any jewelry and she indicated that she had and told them at which pawn shop. This was jewelry that belonged to her. She also told the officers that she used her key to go into A.'s apartment to get her belongings. She stated that

she asked a man that she had just met to help her move her belongings across the street to her friend's place as he had a car. She testified that she did not know who this person was. She fairly conceded that it was quite understandable why the police officers didn't believe her on this point, because anyone might wonder why she would accept a ride from a stranger.

[33] Ms M. stated that the officers kept questioning her and accusing her of lying. The female officer twice pushed her head against the wall with her hand, and was holding her head against the wall asking her if she was lying. The officer then slapped the left side of Ms M.'s head with her hand and also grabbed her wrists and shook her. The complainant testified that she was crying and she told the officers that they can't treat her like this, that they can't hit her. The male office told her that he had not seen anything and that no one would believe her. Ms M. stated that she asked for a lawyer and the male officer told her "If we want we'll get you a fucking lawyer" and "you're under arrest and you have to do what we say." When she said that it was her right, he told her that she had no rights.

[34] Ms M. testified that after some time the officers left her alone in the interview room. When they returned she was told that she was being released and was not being charged with anything. They offered her a ride home. She did not accept the ride, and ran all the way back to the apartment. She indicated that she was very scared. She said that she did not want to go anywhere with the police officers because she was scared of what else they might do to her. She stated that she had read in the newspaper about police officers taking people to the edge of town and leaving them to freeze to death, and this put a big fear into her mind as to what could be done to her. She testified that if something happened to her the police officers would have a good chance of getting away with it as she thought that no one would believe her.

[35] When she got back to the apartment the complainant made notes about what had happened, and then went to the hospital. She testified that she spoke to her father on the phone and he advised her to write things down and to go to the hospital. She stated that she went to the hospital to have her head examined as her head was sore. She had just been assaulted by the police and she thought that being examined by a doctor was the best thing to do. She told both the triage nurse and the doctor that she had been assaulted

by the police. She told the doctor that her head was numb. She testified that the doctor also felt her head and felt the bump on her head.

[36] Within days of this incident, the complainant stated that she left the apartment and went to British Columbia for a period of time.

The Evidence of J. K.

[37] Ms K. testified that on the evening of May 9th there was a knock on the door of her apartment and the persons at the door identified themselves as Winnipeg Police. She and Ms M. were both present at the door when they decided to open it. The officers stated that they were looking for R. M. and that they had some questions for her. Ms M. identified herself to them. Ms K. stated that the officers just came into the apartment at that point. She says that she and Ms M. kind of backed up and the officers came in. She does not believe that she invited them in. She stated that she did not say that they could come in. In cross-examination Ms K. agreed that she may have said "okay" when Ms M. asked her if she should let them in. The reason she did so was so they could talk to Ms M. However, she also testified that, "I did not agree to open the door so they could come in and look around in my apartment and look at my children."

[38] Ms K. indicated that when the officers came into the apartment they went in two directions, that "one officer went one way the other officer went the other way". They started looking through her closets and rifling through her belongings and going into the other rooms. She told them that they can't do that. One of the officers stated "Yes, we can because you invited us." Ms K. disagreed. She testified that in her view "An invitation is saying, hello, come on in, not opening the door and then pushing your way in."

[39] Ms K. expressed the view that it was wrong and unfair of the officers to search her apartment and stated that she felt that her rights were disregarded. She concluded that if the officers had simply come in and had remained in the foyer area while they questioned Ms M. that would have been reasonable and she would not have had a problem with that.

[40] Ms K. testified that the officers were accusing Ms M. of stealing some property, including a stereo. Ms K. said that they repeatedly accused Ms M. of lying, saying that she had taken the stuff. The male officer opened the door to the bedroom where her kids were in bed. At this point her kids came

running out of the room. Ms K. testified that she told the police officer to "shut the fucking door." She indicated that she was addressing this comment to the police officer and not to her kids.

[41] Ms K. testified that the female officer then asked her if she abused her kids. She told the officer that her son had chicken pox. Ms K. indicated that she was already upset because the officers were searching her apartment without her permission. She agreed that she became very angry at this point and that she was swearing and yelling at the officers. She admitted that her behaviour was inappropriate but she felt that the officers had overstepped their boundaries. She thought that it was an ignorant comment to make and that it was completely unprofessional of the officers to accuse her of abusing her kids. She was of the view that this was disrespectful to her and may even have had racist undertones. She expressed the opinion that she would have been treated differently if she was another nationality. She testified that in hindsight she realizes that she could have reacted differently. She indicated that she was younger at the time, and didn't understand the results of her behaviour and didn't think how it would make her look.

[42] Ms K. testified that the male officer looked at the stereo that she had in the kitchen. She indicated that she does not remember the officer asking if he could look at the stereo. She eventually agreed in cross-examination that she was not sure whether she or Ms M. gave permission to the officer to examine the stereo. However, she also indicated that the officers were already looking all over the apartment anyway. The following exchange took place between Ms K. and counsel for the respondents in this regard:

> Q. Okay. Was it not the case that you had actually pointed them in the direction of where the stereo was?
> A. They did not – no, they – I didn't tell them my stereo was in the kitchen. They were walking all over the place already.
> Q. So again –
> A. They were already in the apartment, looking around. Do you get it? They came in, and one went this way, the other went this way. I didn't have time to say, hey, you know. Like I followed one officer, the other officer's opening doors. I said, "Shut the F'ing door." And it was -- it was like kind of a hectic moment there."

[43] Ms K. testified that she did not hear either officer say anything about Ms M. being under arrest. She heard them say that they were taking her to the Public Safety Building for questioning. Ms K. indicated that at one point

Ms M. was walking toward the closet where she kept her belongings. One of the officers grabbed her and said "You're not running away." The officers then handcuffed Ms M. and they left the apartment. Ms K. testified that the officers were in the apartment for about 15 minutes.

[44] Ms K. stated that she was really scared of the officers because they were very aggressive and did not want to take no for an answer. She indicated that Ms M. returned to the apartment about 2 hours later. Ms M. was visibly upset, crying and scared. Her face was red under her eyes from crying. Ms M. told her that the officers were really mean to her and that one of the officers had grabbed her head and hit it against the wall. Ms K. testified that both she and Ms M. wrote down their own perceptions of what had happened with the officers that night. She also called the non-emergency number of the Winnipeg Police Service in order to find out the badge number of the officers. The officer who was on the phone did not provide the information requested and hung up on her. A short time later Ms M. went to the hospital. When she returned from the hospital she began to pack her belongings to leave the apartment as she was afraid that the police would return.

Medical Evidence

[45] A copy of a two-page medical record from the Health Sciences Centre respecting the complainant's attendance there on May 9, 2000 was tendered as an exhibit by the complainant. This record was obtained by the Commissioner during his investigation of the complaint. Respondents' counsel had received a copy of these records some time well prior to the hearing. He raised a number of objections to these records being received in evidence without the makers of the records being available for cross-examination.

[46] The records were ruled to be admissible, in light of section 24(5) of the Act. This section provides that a provincial judge has the discretion to receive and accept evidence whether such evidence would be admissible in a court of law or not. The weight to be attached to this evidence is another issue.

[47] The documents consist of a handwritten Emergency Triage Record, and a form that contains some typed background information about the complainant as well as some handwritten notes apparently made by the

examining doctor. These records contain some hearsay information that would obviously have been provided by the complainant. This includes information that she had been assaulted by a police officer. Some details of the assault are provided. Some of the information apparently written by the examining doctor is indecipherable and unclear including the name of the doctor. One statement in the doctor's comments is "some tenderness to the occiput". It is not clear whether this was information that the doctor observed himself or whether this was information relayed by Ms M..

[48] A further medical report was obtained by Mr. D. on behalf of the complainant on February 10, 2004. Dr. G. provided a handwritten report clarifying details of his examination of Ms M. on May 9, 2000. This report was also filed as an exhibit in these proceedings. That report explains some of the terms used in the original report. The relevant portion of the report reads as follows:

> "O/E refers to 'on examination'. No distress, alert, oriented
> PERLA (pupils equal & reactive to light). EOM's normal.
> Cranial nerve exam normal. Some tenderness to occiput. No cuts. No visible abrasions. Diagnosis: alleged assault."

[49] Mr. D. did an admirable job of tracking down the doctor in a busy city emergency room almost four years after the original examination and in obtaining this further report. However, Dr G. was not called as a witness, and his clarification of his report is not as clear as it could be. It is not clear exactly what "some tenderness to the occiput means." As a result this evidence may be less helpful to the complainant than Dr. G.' viva voce evidence might have been.

The Evidence of Sgt. P.

[50] Sgt. P. testified that in early April 2000 he was assigned to do a follow-up investigation of a possible theft or break-in at M. A.'s apartment. He was aware at the time from the report of the attending officers that Ms M. was an ex-roommate of Ms A.'s and that Ms M. had contacted Ms A. on April 3rd to advise that she had removed the rest of her belongings from the suite. He was also aware from reading the report that Ms M. and Ms A. worked at a social club, which he believed was an escort service. He testified that it was his belief that the majority of the people employed at this club would be prostitutes.

[51] Sgt. P. commenced his investigation in this matter within a day or so of May 9, 2000. He spoke to Ms A. who provided a possible address where Ms M. was staying. Sgt. P. did not indicate what the basis was for Ms A.'s knowledge of Ms M.'s whereabouts. Before attending the address the officer checked Ms M.'s criminal record and determined that she had a youth record, although at the time of the hearing he stated that he could not recall what it was.

[52] Sgt. P. testified that on May 9, 2000 at about 8:10 p.m. he and Cst. T. attended to the address provided by Ms A., intending to arrest Ms M. if they located her. He heard music coming from the apartment and heard people talking. He knocked on the door and said that it was the police. The door was opened by a female who identified herself as R. M. The officers were not in uniform so Sgt. P. presented his police identification to Ms M. At this point Ms M. looked at another female in the suite, who was later identified as J. K., and asked if it was "all right if the police could enter the suite." Ms K. said words to the effect that it was okay for the police to come in and the officers stepped into the foyer/hallway area of the apartment.

[53] Sgt. P. testified that immediately after coming into the apartment, he advised Ms M. what their investigation was about and placed her under arrest. He stated that he would have said something to the effect that they were investigating a break-in which occurred at Ms A.'s suite on the 3rd of April 2000, and that A. was reporting that her CDs, jewelry and a stereo was missing. He would also have told Ms M. that she was a suspect in this matter and would have to attend the Public Safety Building with them. He testified that shortly after he told Ms M. that she was under arrest he would have allowed her to put shoes and a jacket on if that was required. He could not recall if that was done in this case as he did not recall if Ms M. was already prepared to go. After that he stated "we would have handcuffed her" in order to secure her. It was his evidence that Ms M. was handcuffed shortly after they entered the suite although he has no note about this.

[54] In terms of the arrest Sgt. P. testified that Ms M. was advised that she was under arrest for B and E or some similar offence and she indicated at the time that she understood. Sgt. P. stated that he did not have his notebook with him and that he wrote his notes of what occurred at the apartment in the cruiser car and at the police station. At that time he indicated that he would have tried to remember to the best of his ability exactly what was said. He

testified that he would not have made his notes in the apartment as he had not been there before or dealt with these individuals, and thus he would have been very cautious of officer safety. Sgt P. indicated that he did not ask Ms M. about her involvement in the offence before arresting her, and that she did not deny any involvement in the offence while in the apartment. He testified that he did not ask Ms M. at any time whether she would voluntarily accompany them to the police station to tell her side of the story. He indicated that at times this might happen but that most people he deals with won't come willingly.

[55] Sgt. P. indicated that there was music playing in the suite and that there was a child crying. He testified that he and his partner were standing just inside the front door of the apartment. He explained to Ms M. that a ghetto blaster type stereo had been stolen from Ms A. and he asked Ms K. if he could take a look at the stereo that he could see in the kitchen of the apartment. He stated that Ms K. "allowed" him to go look at the stereo. He did not testify as to the exact words used by Ms K. in conveying her consent in this regard.

[56] Sgt. P. testified that he went to the kitchen and looked at the stereo and determined that it was not the one that had been stolen – it was a different brand of stereo. Cst. T. remained in the foyer of the apartment with Ms M. Sgt. P. stated that as he was standing in the kitchen near the stereo, a child ran out of a bedroom that opened off the living room. The child was about 2-3 years of age and was wearing only underwear or a diaper. He observed that there were numerous red marks on the child and that the child was crying quite loudly at that time. Sgt. P. indicated that no one had opened the door to the bedroom before the child came out. In particular he testified that neither he nor Cst. T. had opened that door. When the child came out of the room, Ms K. yelled at the child to "Shut that fucking door." She was looking at the child and pointing to go back into the room. The child went back into the bedroom and shut the door.

[57] Sgt. P. testified that having seen the red marks on the child and hearing what was said by Ms K. he was concerned that the child may have been abused. He went to the bedroom, opened the door and went in to the room to check on the child. He observed that the child had either measles or chicken pox and Ms K. stated, "My child has chicken pox." He indicated that she said this after he was already in the room checking the child. Ms K.

became very upset that he had entered the bedroom. He testified that he tried to explain to her why he felt he had to go into the bedroom to check on the well-being of the child. He expanded on his reasons at the hearing indicating that as a police officer he has seen several children that have been abused and he felt that it was his duty to investigate incidents of that nature. Sgt P. denied that he or his partner ever accused Ms K. of abusing or hitting her children.

[58] Sgt. P. testified that Ms K. continued to be upset and irate. He noted that she was pretty rude, yelling and swearing at them and stating that she couldn't believe that he would do something like that. Prior to that time he indicated that she had been quite calm and normal and easy to talk to. Sgt. P. denied that either he or Cst. T. roamed around the apartment or searched other areas of the apartment as indicated by Ms M. and Ms K. in their evidence.

[59] Sgt. P. testified that at that point he and his partner left the apartment with Ms M. He stated that Ms M. was handcuffed although he could not recall precisely when that had been done. He explained that the reason people under arrest are handcuffed is basically for officer safety and for that person's own safety. This is particularly the case when he is transporting a prisoner in an unmarked police car where there is no shield between the front and back seats. In those circumstances he indicated that almost 100% of people he arrests would be handcuffed. He conceded that not all persons under arrest are handcuffed. He indicated that if he was dealing perhaps with an elderly shoplifter where he believed there to be absolutely no threat to his safety, then he would not handcuff the person. He noted that he did not at the time perceive a threat from Ms M. but because of her younger age there was more potential for her to escape.

[60] Sgt. P. testified that he could not recall any movement by Ms M. in the suite heading towards a closet before she was handcuffed. He indicated that he did not believe that this happened although he could not recall it. He agreed that he would probably have grabbed Ms M.'s arm in order to assist his partner in handcuffing her.

[61] Sgt. P. stated that Ms M. was placed in the rear of the police car at approximately 8:16 p.m. At that time she began crying and when asked why she was crying she stated that she had been doing her best to stay out of trouble. During the short trip to the police station, Sgt. P. indicated that he

formally arrested Ms M. again and read her right to counsel and the police caution. She indicated that she understood and when she was asked if she would like to call a lawyer she stated, "No, I only took my stuff." Sgt. P. denied that either he or his partner called Ms M. or her mother a hooker. He testified that he would not make a comment like that and that he does not make derogatory remarks. He denied that either he or his partner said anything about Ms M. not seeing her child again. He indicated that it was Ms M. who made some comment about this incident affecting her ability to see her child.

[62] At 8:20 p.m. they arrived at the Public Safety Building. Ms M. was viewed by the Sergeant on duty at the time, and was placed in an interview room. Ms M.'s handcuffs were removed, and Cst. T. searched her while Sgt. P. completed the prisoner log form. This was completed at about 8:23 p.m. and then the officers left the room.

[63] During the time they were out of the room they would have updated their notes, taken their guns off and checked reports. They returned to the interview room at 8:56 p.m. and commenced the interview of Ms M. Sgt. P. was the person who conducted the interview, and made notes. Cst. T. was also in the room. Throughout the interview process both officers were present at all times.

[64] Sgt. P. began the interview by obtaining some background information from Ms M. He then asked her what she knew about the incident that they were investigating. She maintained that she had gone to A.'s apartment but that she had only taken her own stuff. Sgt. P. testified that he took down all the questions and answers verbatim in his notebook. He indicated that he confronted Ms M. about her story and suggested to her that she was lying and that she should tell the truth about what really happened. He told her that he had a hard time believing that she had found some guy whose name she didn't know to help her move her stuff in his car when she was just moving it across the street to her friends place. He told her he was tired of her lies. Throughout this time he indicated that he spoke in a normal tone of voice and did not shout or raise his voice. Cst. T. was present but did not participate in the interview.

[65] Sgt. P. testified that the interview ended after 35 minutes at 9:31 p.m. Ms M. throughout maintained that she had not taken any of Ms A.'s property. He and Cst. T. discussed the case and determined that they did

not have enough evidence to charge Ms M. She had given them the name of a pawn shop where she had pawned some of her jewelry and they decided that they would check into that. At 10:00 p.m. Ms M. was told that she would be released without charge pending further investigation. She was offered a ride home, which she declined. She was taken back before the Sergeant on duty and her property was returned to her. At that time she would have been asked how she had been treated and if she had any complaints. She made no complaints and she was released at 10:05 p.m.

[66] Sgt P. indicated that at no time did Ms M. ever tell them that they could search through her belongings at her friend's place. He testified that at no time during the interview did either he or Cst. T. touch Ms M. He specifically denied that Cst. T. assaulted Ms M. He testified that in all the time he has been a police officer he has never witnessed an assault by another officer. He denied that anyone swore at Ms M. or made any derogatory comments to her. He testified that she never requested a lawyer at any time and no one denied her right to a lawyer. He denied all of the abusive conduct and language that Ms M. claims happened during the interview process. He indicated that throughout the interview Ms M. was definitely upset and crying.

[67] Sgt. P. confirmed that he received a call from Ms K. sometime that evening, he could not recall the exact time. He testified that she was very obnoxious on the phone, swearing and yelling at him. He told her that if she wanted to talk to him she should do so in a civil manner. When she continued screaming and swearing at him he hung up.

[68] The following day Sgt P. indicated that he checked with the pawn shop and determined that the items pawned by Ms M. were not the things that had been reported stolen. No further investigation was done and no charges were ever laid against Ms M. respecting this matter.

The Evidence of Cst. T.

[69] Cst. T. testified that Sgt. P. was the lead investigator in this case as this was his file but that as his partner she went with him to the apartment in order to assist. Prior to attending there she had reviewed the file and was generally familiar with the allegations. When they arrived at the apartment, she heard music coming from the apartment and people talking inside. The door was answered by a female who identified herself as R. M. Sgt. P.

showed her his police identification. Ms M. then called out to another female in the apartment asking whether she should let the police in. The second female came to the door and identified herself as J. K. Ms K. said, "Sure come in" as she waved the police inside.

[70] At 8:14 p.m. Sgt. P. gave notice of arrest to Ms M., after explaining that he was investigating a break-in at A.'s residence in April. He told her that she would be attending to the Public Safety Building with the officers. Cst. T. testified that this notice of arrest was given within a minute of entering the apartment. She stated that she and P. were standing in the foyer at the entrance to the apartment at this time. Cst. T. could not recall whether Ms M. made any denials in answer to being told about the allegations.

[71] Sgt. P. then asked if he could look at a stereo that was playing at the time. Ms K. advised that it was in the kitchen and to go take a look. He walked over to the stereo and examined it. Cst. T. indicated that she remained at the door of the apartment with Ms M. She could see the entrance to the kitchen and part of the stereo from where she was standing in the foyer. Both Ms M. and Ms K. were described as being calm at this time.

[72] While P. was checking the stereo, Cst. T. testified that she heard a child or children crying in another room in the apartment. All of a sudden children came running out of a room into the living room. They opened the door themselves. Ms K. yelled at the children to "Shut the fucking door." Cst. T. testified that she observed that one of the children had red marks on his body; she did not see the second child. Cst. T. testified that her partner immediately went into the bedroom to check the child for injuries.

[73] Cst. T. indicated that she was also concerned about the child, and that if P. had not done so she would have checked on the child herself. She testified that if she saw a child abused and did not do anything about it she would not want to live with the idea if later on the child was murdered or died of its injuries. She stated that it was her professional responsibility to check into this and that she could be subject to dismissal if she did not do so.

[74] As Sgt. P. was going into the room to check on the child, Ms K. yelled out that they had chicken pox. She immediately became irate and started yelling. Cst. T. indicated that she tried to explain to Ms K. that the police have a duty to check on the well-being of children. Sgt. P. also tried

to explain to Ms K. why he had to check on the child. Ms K. refused to listen and was yelling and swearing at them. She told the officers to leave the apartment. Cst. T. was asked if she would become irate if someone saw red marks on her child and accused her of child abuse. She advised that she would not, that she would be more concerned about other people getting infected. She indicated that she would then explain what the red marks were if she was asked.

[75] Cst. T. testified that she and Sgt. P. took custody of Ms M. and T. handcuffed her. T. could not recall any time when Ms M. tried to walk away from her in the apartment. She indicated that it was possible but could not recall as she had no note of it. They left the apartment and at about 8:16 p.m. placed Ms M. in the police car. According to Cst. T. they were only in the apartment for about three minutes. Throughout the time she remained in the foyer near the entrance to the apartment. She indicated that her notes about what happened in the apartment were made after she was in the police station prior to the interview.

[76] Once in the car Ms M. began crying. Sgt. P. asked her why she was crying and M. advised that she had not been in trouble for a long time and that she has a daughter that she sees on weekends twice a month. In the police car Sgt. P. read Ms M.'s right to counsel and the police caution. M. indicated she understood and that she did not want to call a lawyer as she only took her own stuff.

[77] Cst. T. testified that she did not say anything to Ms M. in the police car, and that neither she nor her partner made any derogatory comments to her. They arrived at the Public Safety Building and placed Ms M. in an interview room. Her handcuffs were removed and Cst. T. did a pat-down search of Ms M. while P. was completing the prisoner log form. They then left the interview room. Both officers returned to the interview room at 8:56 p.m. Sgt P. and Ms M. sat on a metal picnic bench while Cst. T. sat on a chair which she brought into the room. She denied that she banged the chair down on the floor.

[78] Cst. T. testified that while she was present during the question and answer interview, she did not participate in any other way in the interview. She did not ask any questions. She did not say anything to Ms M. Cst. T. denied that either she or her partner had any physical contact of any sort with Ms M. during the course of the interview. Specifically, she denied

grabbing M.'s wrists, hitting her or pushing her head against the wall. Cst. T. stated that this never happened. She denied that any of the abusive comments or conduct testified to by Ms M. occurred. Cst. T. indicated that Ms M. was crying during the interview and at times put her head down on the table.

[79] Cst. T. testified that Sgt. P. was recording the questions and answers as they were being given. After the interview she reviewed his notes and initialed then verifying that they were accurate. Cst. T. indicated that Ms M. was released without being charged and that was the end of her involvement in this matter.

ANALYSIS

[80] Throughout this analysis of the evidence, I must be mindful of the standard of proof that applies in this case and that the complaint must be dismissed unless I am satisfied on clear and convincing evidence that the respondents committed any or all of the disciplinary defaults. As I have indicated above, the fundamental issue to be determined in this case is the issue of credibility. The two conflicting versions of the events of May 9, 2000 cannot otherwise be reconciled. There is no question that if events occurred as they were described by Ms M. and Ms K., then the respondent officers abused their authority in a number of different ways that are set out in the notice of alleged disciplinary default.

[81] In determining issues of credibility a number of factors may be considered. These include such things as the 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.

[82] Determining issues of credibility can be a very simple or a very complex task depending on the circumstances. In some situations two totally opposite versions of events may be seen as, or may be determined to

be equally credible. It may not always be possible for credibility issues to be resolved. Ultimately triers of fact do not have any exceptional ability to look into the minds or hearts of witnesses to determine if they are telling the truth or not. We must simply rely on the kinds of factors noted above.

[83] There are no truly independent or neutral witnesses in this case. All of the witnesses have an interest in the outcome of these proceedings. All of the witnesses can be said to have a motive to slant their evidence in their favour. Certainly the respondent officers may suffer serious consequences if disciplinary defaults are found to have been committed. The respondents accordingly have a strong motive for denying Ms M.'s allegations. Ms M. and Ms K. also have an interest in the outcome of this complaint. The question was raised by Mr. D. as to what possible reason Ms M. would have to make up these allegations. Counsel for the respondents quite properly countered that there is no obligation on them to establish any motive in a case like this where the onus is on the complainant.

[84] I found Ms M. and Ms K. to be bright, intelligent, articulate, and mature young women. Ms M. is a soft-spoken individual who related her evidence in a calm and even manner. Ms K. is somewhat more outspoken and is someone who obviously feels very strongly about her personal rights. Both women gave their evidence in a straightforward fashion. They were neither evasive nor deceptive in their demeanour when giving evidence. Their evidence was not shaken in any material way during cross-examination.

[85] They were prepared to make concessions where it was reasonable to do so. By way of example, Ms K. was fairly certain that the officer did not ask for permission to look at her stereo. Nevertheless, she was prepared to concede that it was possible that either she or Ms M. may have given such permission. Ms K. also conceded that her own behaviour was inappropriate when she yelled and swore at the officer who checked on her child. She indicated that she was very angry but that she should have dealt with the situation differently. She stated that she was much younger then and didn't think about how her actions would make her look.

[86] Ms K. testified that she felt that she may have been treated differently during this incident because she is aboriginal. She was of the view that it was ignorant, disrespectful and unprofessional of the officers to accuse her of abusing her children. She thought that it was wrong of them to look

around her apartment. She clearly had the perception that she was treated differently than other persons in the same situation would have been treated and felt that it may have some racist undertones. But she fairly stated that not all police officers treat her this way. When she was asked specifically whether the respondent officers treated her this way because she is aboriginal, she was fair in her response. She testified that she was not sure, because she can't think for them or act for them, but in her own mind this was how she felt. Her feelings in this regard appeared quite genuine. At the same time I thought her evidence on this point was very fair when she stated that she could not be sure whether the officers acted the way they did because of her race.

[87] Ms M. was also very fair in her evidence. She stated that in her view it was quite reasonable in the circumstances for the officers to want to check on the condition of the child and she understood why they might have had concerns that the child was being abused. She also indicated that she could understand why the officers did not believe her story about getting a stranger to help her move her belongings out of Ms A.'s apartment.

[88] I formed a general impression of Ms M. and Ms K. as concerned young women who were sincerely trying to be candid and who genuinely believed in the truth of their complaints and believed that they were standing up for their rights. I did not find either of them to be prone to exaggeration or embellishment. While the events occurred almost four years before the hearing, each of them made notes of what occurred on the date of the incident. While they had some difficulty recalling some details due to the passage of time, both of them had a good recollection of the events. Neither of these witnesses was under the influence of drugs or alcohol at the time of the incident.

[89] There is nothing to suggest that these witnesses rehearsed their stories. Certainly there were some differences in their evidence. Perhaps the most significant difference between these two witnesses, is in relation to the comment made by Ms K. when her children came out of the bedroom. Ms K. testified that she was addressing her comment to the officer. Ms M. agreed with the respondents on this point and said that Ms K. was addressing the comment to her children.

[90] Ultimately I found both Ms M. and Ms K. to be credible witnesses. Ms M.'s actions after her encounter with the officers are consistent with her

complaints. She was upset, scared and crying when she returned home. She made notes of the incident. She complained to Ms K. about the officers' conduct. She attended to the hospital to be examined by a doctor. While she did not make an immediate complaint to the LERA Commissioner, the reasons for her delay in doing so are credible and reasonable. Ms K.'s actions are also consistent with her evidence. She too made notes of the incident. She called the police office seeking information about the officers who had arrested Ms M. While there are some differences in their evidence for the most part their evidence is consistent with one another.

[91] Sgt. P. and Cst. T. also were not shaken in their evidence. They strongly maintain that the alleged abuses of authority never happened. They were subjected to fairly lengthy and at times very repetitive and intense cross-examination. For the most part they maintained their composure. In particular I found Sgt. P. to be patient and thoughtful in many of his answers to fairly pointed and sometimes convoluted questions. He remained calm and firm in his responses.

[92] Cst. T. was less so. She was inclined at times to be impatient and somewhat sarcastic in her responses to what she apparently perceived to be impertinent questions. One example of this was when she was asked about making her notes. She indicated that she did not have her notebook with her in the apartment and did not make any notes until she returned to the police station. She indicated that when she is involved in a situation where there is a concern about officer safety it would not be practical to say, "Stop what you are doing for a moment so I can write this down". When asked if she made any notes while in the police car she commented that she couldn't drive and write at the same time. While undoubtedly she was correct in this regard, her responses were in my view sarcastic.

[93] Cst. T. at times also overstated or exaggerated in her evidence. One such situation occurred when she was justifying Sgt. P.'s decision to examine the child after he saw the red marks. She said that if he had not done so she would have examined the child herself. While her concern about her duty to investigate possible cases of child abuse is certainly admirable, when she talked about children possibly dying of their injuries or being murdered if she did not investigate, this was in my view, an overstatement on her part in the context of this case. Let me make it clear that I find no fault with Sgt. P.'s decision to examine the child in these

circumstances, although he might have gone about it somewhat differently and more diplomatically. I also recognize that police officers cannot lightly disregard any evidence of possible child abuse and that it is easy to criticize with the advantage of hindsight. Nevertheless, Cst. T.'s evidence on this point was not particularly compelling.

[94] Cst. T. also testified that if upon observing red marks on her own child someone accused her of abusing that child she would not be irate or upset. This question presumably was asked because Ms K. became so upset when she was questioned about abusing her kids. Cst. T. stated that her concern would be that someone else would be infected if the child had chicken pox. While little turns on this issue, I found that this was an incredible response. I doubt very much that she would be as calm and sanguine as she led us to believe if someone accused her of abusing her own child.

[95] Her counsel in direct examination asked Cst. T. about the interview of Ms M. and whether any kind of "good cop, bad cop scenario" was being used by them during this interrogation. Cst. T. did not respond directly to this question, indicating merely that she was not involved with the Q's and A's or questions and answers. Later when she was asked further about this by me she conceded that this would be a valid interview technique, but indicated that it would not have been used during the interview of Ms M. She testified that she was not aware of such a technique at the time of Ms M.'s interview and that she only learned of it later when she took an interrogation course. I found her evidence in this regard questionable and frankly incredible.

[96] I also question the accuracy of some of the times that Cst. T. testified to, specifically the times of events at the apartment. Cst. T. did not make any notes in the apartment or in the police vehicle. She did not make any notes about this incident until sometime after they arrived at the police station. Yet her evidence is that within a minute of attending at the apartment, at approximately 8:14 p.m. Sgt. P. gave the notice of arrest to Ms M. and that at approximately 8:16 p.m. Ms M. was placed in the police vehicle. At 8:20 p.m. they arrived at the Public Safety Building.

[97] In terms of the times she has recorded in her notes, Cst. T. testified that she makes a mental note of the time when something is happening and then later writes it down from her recollection. Firstly, I find it difficult to

accept that all the events the officers described as happening in the apartment only took three minutes. Secondly, the times themselves seem very specific for someone who did not make notes until sometime later.

[98] There were aspects of Sgt. P.'s evidence that I also found troubling. He testified that in his entire career he has never done anything harmful or unlawful in the execution of his duties. He indicated that he has never made any kind of derogatory comments. Moreover, he testified that he has never witnessed a partner doing anything unlawful or making any derogatory comments nor has he ever witnessed any other officer assaulting someone. I find it difficult to believe that in a seventeen year career a police officer would be so unaware of or sheltered from any kind of potential abuses by fellow officers. In this regard I think he overstated his evidence. I also find it difficult to accept his evidence that he has never made any kind of derogatory remark in the execution of his duties, or that he would never call anyone a hooker. Once again it is my view that this is an exaggeration on his part.

[99] Notwithstanding these troubling aspects of the respondents' evidence I cannot conclude that overall their evidence is incredible. In some areas their evidence was quite compelling. In other areas I prefer the evidence of Ms M. and Ms K.

[100] These conclusions respecting credibility require that I consider more specifically the evidence respecting each one of the alleged disciplinary defaults. For the sake of convenience I again set out the four disciplinary defaults that are the subject of the complaint in this case. It is alleged that the respondent officers abused their authority:

1. By searching the apartment without lawful authority;
2. By using unnecessary violence or excessive force on the complainant;
3. By using oppressive or abusive conduct or language on the complainant; and
4. By being discourteous or uncivil towards the complainant.

THE SEARCH OF THE APARTMENT

[101] The respondents take the position that they were invited into the apartment, and that Ms K. consented to the examination of the stereo which

was in the kitchen. In order to investigate the possibility of child abuse, Sgt. P. entered the bedroom in order to check the red marks he had seen on the child. According to the officers that was the entire extent of the search in the apartment. They both deny that there was any general search of the apartment or that they looked anywhere else. They maintain that in fact Cst. T. never moved from her location in the foyer near the door to the apartment.

[102] The evidence of Ms M. and Ms K. is that as soon as the door was opened and the officers were inside the door they started walking around and looking in various areas of the apartment. They were opening doors to rooms and looking in closets. Ms M. expressed the view that the officers were looking for the stolen property. Ms K. indicated that they were rifling through her belongings and moving her stuff around. As they were walking around they were demanding to know where the stolen property was.

[103] The evidence as to the nature of the invitation into the apartment is equivocal. I am prepared to accept that there was at least an implied invitation into the apartment if not a verbal explicit invitation. Ms M. and Ms K. conceded as much in their evidence. It is what happened after the officers were inside the apartment that is in issue.

[104] With respect to Sgt. P.'s examination of the stereo in the kitchen, the evidence is clear that there was some sort of consent for him to look at the stereo. Ms M. agrees that he had such permission. Ms K. conceded that she or Ms M. may have given permission to look at the stereo although she also says that the officers were already looking around the apartment in any event. While I am not satisfied that the consent to look at the stereo was a real informed consent as that term has been defined in the case law, I am prepared to accept that permission of a kind was obtained by Sgt. P. in this regard. Accordingly, the examination of the stereo, while not based on an informed consent is not an abuse of authority such as to constitute a disciplinary default.

[105] With respect to the examination of the child by Sgt. P., I am of the view that there was an obligation to investigate further once he observed the marks on the child, heard the child crying and heard Ms K. yelling and swearing at the child. There was a reasonable basis for his expressed belief that the child may have been abused. While there might have been better ways of pursuing that investigation which would have been more respectful

of Ms K.'s rights, I am not prepared to conclude that his conduct in this regard was an abuse of his authority. It certainly would have been more courteous and respectful if the officers had asked Ms K. what was wrong with the child before they jumped to conclusions about abuse. This is particularly so in light of the fact that the officers' evidence is that up until this point in time Ms K. had been calm and cooperative.

[106] However, I recognize that a standard of perfection is not demanded of police officers, and that what seems like reasonable behaviour at the time may appear less so with the benefit of hindsight. I agree with respondents' counsel that in evaluating police officers' conduct in the context of these kinds of proceedings that we should not be "dancing at the nitpickers' ball".

[107] As to the issue of who opened the door to the bedroom, leading to the child coming into the living room, both officers indicate that the child himself opened the door, and that they certainly did not. Ms M. and Ms K. are equally adamant that one of the officers opened the bedroom door as part of the overall search of the apartment. Whether or not one of the respondent officers opened the bedroom door at the time the child came into the living room, I am satisfied that the subsequent investigation of the child was not unreasonable in all the circumstances.

[108] My concern is in relation to the alleged general search of the apartment. Ms M. and Ms K., state unequivocally that such a search occurred. The respondent officers deny that there was any general search of the apartment. I prefer and accept the evidence of Ms M. and Ms K. I found their evidence in this regard to be clear and compelling. While it may be a cliché, their evidence on this point had a ring of truth to it that is hard to dismiss. Their description of what happened in the apartment is very similar although the words they used were different. They both describe a scenario where once the officers had their foot in the door, so to speak, they proceeded to roam through the apartment looking around.

[109] Ms K. testified that the officers went in two different directions. She stated that "they were walking all over the place". She became quite incensed when she was cross-examined on this point. Her evidence was particularly compelling when she challenged counsel saying "Do you get it? They came in, and one went this way, the other went this way." She indicated that the officers had an attitude of complete disregard for her rights. She told them that they couldn't do this and according to her

evidence one of the officers said that they could do this because she had invited them in.

[110] Ms M. testified that after she opened the door to the apartment "they just came in, and started walking around", that they "kept looking around." and that "they were like just kind of like roaming around". She said that at one point Ms K. told the officers to leave as they had no warrant.

[111] I believe Ms M. and Ms K. without reservation with respect to the search of the apartment. They corroborate each other in this regard. I find their combined evidence to be clear and convincing. Where their evidence differs from the respondent officers' respecting the search of the apartment I accept their evidence and reject the evidence of the officers. I am satisfied that there was a general search of the apartment by the respondent officers.

Was there any lawful authority for the search of the apartment?

[112] Section 8 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) provides that everyone has the right to be secure against unreasonable search and seizure. That section is designed to be a safeguard against unreasonable state-sponsored intrusions on an individual's privacy. There was no warrant to search in the present case. Where a search is conducted without a warrant it is presumed prima facie to be an unreasonable search: See ***Hunter v. Southam Inc.*** (1984), 14 C.C.C. (3d) 97 (S.C.C.).

[113] There are three requirements that must be met for a search to be reasonable: (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: See ***Collins v. The Queen*** (1987), 33 C.C.C. (3d) 1 (S.C.C.)**.**

Consent

[114] Individuals may waive their privacy rights under the *Charter* and may consent to the police doing what they otherwise would not be authorized to do. At common law the police may conduct a lawful search if there is consent to the search. Where the lawfulness of a search depends on consent there must be an informed and true consent. In this regard the comments of Doherty J.A. speaking for the Court in ***R. v. Wills*** (1992), 70 C.C.C. (3d) 529 (Ont. C.A.) at pages 540 -541 are particularly instructive:

> "Certain underlying values give definition to the concept of consent in the present context. Members of the community are encouraged to co-operate with the police. Co-operative policing will often be less intrusive and more effective than confrontational policing. … Co-operation must, however, be distinguished from mere acquiescence in or compliance with a police request. True co-operation connotes a decision to allow the police to do something which they could not otherwise do. Acquiescence and compliance signal only a failure to object, they do not constitute consent.
>
> The dynamics which operate when a police officer 'requests' the assistance of an individual cannot be ignored. It would be naïve to equate most requests made by a police officer with similar requests made by one private individual to another. The very nature of the policing function and the circumstances which often bring the police in contact with individuals introduce an element of authority, if not compulsion, into a request made by a police officer. This is particularly true where the request is made of someone who is the target of an ongoing investigation…
>
> …**When the police rely on the consent of an individual as their authority for taking something, care must be taken to ensure that the consent was real. Otherwise, consent becomes a euphemism for failure to object or resist, and an inducement to the police to circumvent established limitations on their investigative powers by reliance on uninformed and sometimes situationally compelled acquiescence in or compliance with police requests…**" (Emphasis added)

[115] Doherty J.A. expanded on what is required for a valid consent to a search in ***R. v. Lewis*** (1998), 122 C.C.C. (3d) 481 at paragraph 12. He held that while the police do not have a duty to advise a person of the right to refuse to consent to a search, failure to do so may lead to a violation of s. 8 where the police conduct can only be justified on the basis of an informed consent. He stated that "It is well established that a person cannot give an effective consent to a search unless the person is aware of their right to refuse to consent to that search…" and that if the police do not tell an individual of the right to refuse to consent to a search they "run the very real risk that any apparent consent will be found to be no consent at all…"

[116] Iacobucci J. for the majority in ***R. v. Borden,*** [1994] 3 S.C.R. 145 at paragraph 34 held that in order 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.

[117] In the present case I am satisfied that there was no consent to any general search of the apartment. Ms K. said it best when she said, "I did not agree to open the door so they could come in and look around in my apartment and look at my children." The general search of the apartment in this case was not authorized on the basis of consent.

[118] Moreover, as I indicated previously, there was no true informed consent to the search of the stereo. In this regard according to the evidence of the respondents, Ms M. was already under arrest at the time Sgt. P. was allowed to look at the stereo. She had not been provided with her right to counsel and any consent she might have given would not be valid. I appreciate that the respondent officers testified that it was Ms K. who gave permission to look at the stereo. However, there is no evidence that she was ever told that she had the right to refuse her consent.

Search incidental to arrest

[119] The common law has long recognized that there is a police power to conduct a reasonable warrantless search incidental to a lawful arrest. The existence and scope of this power was confirmed by the Supreme Court of Canada in ***Cloutier v. Langlois*** (1990), 53 C.C.C. (3d) 257**.** That case involved a "frisk" search by police, of a person under arrest on a warrant of committal for unpaid traffic fines. Madam Justice L'Heureux-Dube who delivered the judgment of the Court stated at p. 274:

> "…the common law as recognized and developed in Canada holds that the police have a power to search a lawfully arrested person and to seize anything in his or her possession or immediate surroundings to guarantee the safety of the police and the accused, prevent the prisoner's escape or provide evidence against him."

[120] The Court also firmly established that where the search flows from the fact of a lawful arrest, the search does not require any justification apart from that arrest. An officer conducting a search incidental to a lawful arrest need not have reasonable and probable grounds to believe that the search will yield weapons which could endanger the officer nor that the search will yield evidence of the offence for which the accused was arrested. (At p. 278).

[121] The necessary prerequisite to the lawful exercise of the power to search as an incident to arrest is a lawful valid arrest. If the arrest is not lawful, then the warrantless search that follows cannot be lawful either: See ***R. v. Caslake*** (1997), 121 C.C.C. (3d) 97 (S.C.C.) per Lamer C.J. at paragraph 13. However, even where the arrest is lawful, the warrantless search of a home incident to arrest is generally prohibited subject to exceptional circumstances where the law enforcement interest is so compelling that it overrides the individual's right to privacy within the home: See ***R. v. Golub*** (1997), 117 C.C.C. (3d) 193 (Ont. C.A.) leave to appeal to the S.C.C. refused 128 C.C.C. (3d) vi.

[122] In the present case the arrest occurred within a dwelling house. There were no exceptional or exigent circumstances. Accordingly, the general search of the apartment was not authorized as an incident to the arrest of Ms M.

The arrest of Ms M.

[123] I appreciate that the arrest of Ms M. is not the basis of any alleged disciplinary default by the respondent officers. It is not alleged in the notice of disciplinary default that the arrest was improper in any way. Accordingly, respondent's counsel objected to any questions related to the lawfulness or validity of the arrest. However, as I indicated during the course of the hearing I have some concerns about the arrest, in particular the absence of a warrant for the arrest. I propose to deal with the arrest of Ms M., not with the intention of finding any disciplinary default by the officers, but rather to fulfill the broader public interest purpose that the Act serves. I am of the view that my concerns respecting this arrest need to be expressed so that appropriate changes can be made to police policies respecting arrests in dwelling houses if such changes are needed.

Reasonable and Probable Grounds for the arrest

[124] Mr. D. on behalf of Ms M. asked a great many questions about the grounds for Sgt. P.'s belief that Ms M. was a suspect in the offence they were investigating. It was suggested that further investigation should have been done prior to her arrest. It was suggested that it was discourteous, uncivil and overzealous conduct on the part of the police officers to arrest Ms M. prior to interviewing her. In view of these allegations, for the benefit of the complainant, I propose to deal with the issue of the reasonable and

probable grounds to arrest in this case even though this is not the subject of any alleged disciplinary default.

[125] A police officer's legal authority for effecting an arrest without warrant is set out in s. 495 of the *Criminal Code*, the relevant portions of which provide as follows:

> "495 (1) A peace officer may arrest without warrant
>
> (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;"

[126] In ***R. v. Storrey*** **(**1990), 53 C.C.C. (3d) 316 the Supreme Court of Canada dealt with the standard of reasonable and probable grounds for arrest as follows at p. 324:

> "In summary then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. **Specifically they are not required to establish a *prima facie* case for conviction before making an arrest.**" (Emphasis added)

[127] I am satisfied that the respondent officers had the requisite reasonable and probable grounds to arrest Ms M. According to Sgt P., the offence that they were investigating was a theft or a break-in to Ms A.'s apartment. A break-in to a dwelling house is an indictable offence, for which the police officers could arrest without a warrant pursuant to section 495 of the *Criminal Code*.

[128] The officer's belief that Ms M. was responsible for the theft of the items from Ms A.'s apartment was based on information provided by Ms A. She advised police that Ms M. was a suspect because she was an ex-roommate and M. had called A. on April 3rd indicating that she had been in the apartment to remove the rest of her belongings. When Ms A. returned home that same day her own articles were missing. The door of her apartment was unlocked and there were no signs of forced entry, suggesting that the individual responsible had entered with a key. I am satisfied that based on this information the police had the requisite grounds subjectively

and objectively to believe that Ms M. was responsible for taking the missing items.

[129] It was conceded by Sgt. P. that there was a "little bit of a gray area" as to whether Ms M. had a lawful right to be in Ms A.'s apartment in order to retrieve her own belongings. Thus he testified that it was possible that what he was investigating could be a theft instead of a break-in. He also conceded that this investigation might be a little different from the usual investigation of a break-in to a dwelling house, in view of the prior relationship between M. and A. and a possible colour of right defence to being in the apartment.

[130] In light of these facts, which were known to the police prior to the arrest, prudence might have dictated getting Ms M.'s side of the story prior to arresting her. The fact that the officers chose not to do so does not, however, mean that they did not have reasonable grounds to arrest her, nor does this make their actions unlawful. I am not prepared to second guess Sgt. P. 's decision to arrest Ms M. prior to interviewing her simply because other options were open to him.

The requirement for a warrant pursuant to Section 529.1 of the *Code*

[131] The sanctity of a person's home has long been recognized and protected by the courts. In ***Semayne's Case*** (1604), 5 Co. Rep. 91a at p. 91b, 77 E.R. 194 (K.B.) the following oft repeated phrase first found expression:

> "The house of everyone is to him as his… castle and fortress, as well for his defence against injury and violence, as for his repose…"

[132] More recently it was stated by Cory J. in ***R. v. Silveira*** (1995), 97 C.C.C. (3d) 450 (S.C.C.) at paragraph 140:

> "There is no place on earth where persons can have a greater expectation of privacy than within their 'dwelling house'."

He expanded on this concept at paragraph 148 as follows:

> "It is hard to imagine a more serious infringement of an individual's right to privacy. The home is the one place where persons can expect to talk freely, to dress as they wish and, within the bounds of the law, to live as they wish. The unauthorized presence of agents of the

> state in a home is the ultimate invasion of privacy. It is the denial of one of the fundamental rights of individuals living in a free and democratic society…for centuries it has been recognized that a man's home is his castle. …Despite the historical importance attached to the privacy interest of an individual in his or her home…the police entered the appellant's home without a warrant."

Implied license to approach a residence and knock

[133] The common law held that no one could set foot on another's property without some form of license or permission. However, as noted by Sopinka J. in ***R. v. Evans***, [1996] 1 S.C.R. 8, "the common law has long recognized an implied license for all members of the public, including police, to approach the door of a residence and knock." Thus the occupier of a dwelling is deemed to grant permission to the public to approach the door and knock. This implied invitation waives any privacy interest that individuals would otherwise have in the approach to the door of their residence. However, the scope of such a waiver is not unlimited. The implied license ends at the door of the dwelling. Sopinka J. in ***Evans*** defined the terms of this implied invitation as follows at paragraph 15:

> "In my view, the implied invitation to knock extends no further than is required to permit convenient communication with the occupant of the dwelling. The 'waiver' of privacy rights embodied in the implied invitation extends no further than is required to effect this purpose. As a result, only those activities that are reasonably associated with the purpose of communicating with the occupant are authorized by the 'implied license to knock'."

[134] In ***Evans*** the police approached the residence with the intent to sniff for marijuana when the door was opened. This was held to be an unlawful search. Sopinka J. accepted that one police objective in approaching the house was to communicate with the occupants of the residence. However, he also found that the police hoped to secure evidence against the occupants by attempting to get a whiff of the marijuana, which police believed was being grown in the residence. He concluded at paragraph 16:

> "Clearly, occupiers of a dwelling cannot be presumed to invite the police (or anyone else) to approach their home for the purpose of substantiating a criminal charge against them. Any 'waiver' of privacy rights that can be implied through the 'invitation to knock' simply fails to extend that far. As a result, where the agents of the state approach a dwelling with the

> intention of gathering evidence against the occupant, the police have exceeded any authority that is implied by the invitation to knock."

[135] In my view, these comments could also apply to a situation where the police intend to arrest an occupant in a dwelling house. Where police officers approach a dwelling with the fixed intention of arresting an occupant thereof, the implied license to knock ends at the door of the residence. In these circumstances an invitation to enter the residence does not in my view constitute lawful authority or consent to an arrest made within the dwelling house. A warrant will be required if the police intend to arrest a person in the residence. The situation may be different if the police approach the residence, intending to make an arrest but only if the suspect voluntarily comes out of the residence: See ***R. v. Martin*** [2000] O.J. No. 5736 (Ont. Sup. Ct. of Justice)**.** In that case Campbell J. held at paragraph 25 that an entry warrant is not required where the police lawfully and by invitation go to a dwelling house for the purpose of making an arrest outside the dwelling house.

R. v. Feeney

[136] The rules governing a lawful arrest of an individual in a dwelling house were fundamentally changed by the Supreme Court of Canada in the case of ***R. v. Feeney,*** [1997] 2 S.C.R. 13**.** Sopinka J. wrote the majority judgment. After an extensive review of the common law and pre-*Charter* rules relating to lawful arrests in a dwelling house, he concluded that arrests complying with these rules are no longer lawful in light of the *Charter*. He held that the rules had to be changed in order to comply with *Charter* guarantees of privacy. He noted at paragraph 43 that while the common law always placed a high value on the security and privacy of the home, the "legal status of the privacy of the home was significantly increased in importance with the advent of the *Charter*."

[137] Sopinka J. referred at some length to the majority decision of Dickson C.J.C. in the case of ***R. v. Landry,*** [1986] 1 S.C.R. 145. ***Landry*** at the time was the seminal authority from the Supreme Court of Canada on the issue of lawful arrests within a dwelling house. According to Sopinka J. in the ***Landry*** case and others like it, “the issue boiled down to a balance between aiding the police in their protection of society on the one hand, and the privacy rights of individuals in their dwellings on the other.” (At paragraph 41) He concluded at paragraph 44, that in light of the *Charter*:

> "… in general, the privacy interest outweighs the interest of the police and **warrantless arrests in dwelling-houses are prohibited."** (Emphasis added)

[138] According to ***Feeney***, with some limited exceptions, such as where there is hot pursuit or perhaps where exigent circumstances exist, a warrant is required to make a lawful arrest in a dwelling-house. In response to the ***Feeney*** decision, Parliament enacted Section 529.1 of the *Criminal Code*. Warrants issued under this section have come to be called 'Feeney' warrants. The relevant portions of section 529.1 provide as follows:

> "529.1 A judge or justice may issue a warrant in Form 7.1 authorizing a peace officer to enter a dwelling-house described in the warrant for the purpose of arresting or apprehending a person identified or identifiable by the warrant if the judge or justice is satisfied by information on oath that there are reasonable grounds to believe that the person is or will be present in the dwelling-house and that
>
> (b) grounds exist to arrest the person without warrant under paragraph 495(1)(a) or (b); "

[139] The reason for the general prohibition against warrantless arrests in a dwelling house is for protection of the privacy and security of a person's home. In ***Feeney*** Sopinka J. indicated that in the *Charter* era the emphasis on privacy interests mandates the need for a warrant before "forcibly entering a private dwelling to arrest". Sopinka J. referred by analogy to the provisions of s. 8 of the *Charter* and noted that this section guarantees a broad and general right to be secure from unreasonable search and seizure. He then referred to the requirement set out in ***Hunter*** for there to be prior authorization for a search to be reasonable. He concluded as follows in this regard at paragraph 45:

> "The purpose of the Charter is to **prevent** unreasonable intrusions on privacy, not to sort them out from reasonable intrusions on an *ex post facto* analysis. If **Landry** were to be adopted in the post-Charter era, there would be the anomalous result that prior judicial authorization is required to intrude on an individual's privacy with respect to a search for things, but no authorization is required prior to an intrusion to make an arrest. The result becomes more anomalous when **Cloutier v. Langlois,** supra, is considered. **Cloutier** held that a search incidental to a lawful arrest does not violate s. 8. Putting this proposition together with the proposition that a warrantless arrest in a dwelling house is legal may lead to the conclusion that a warrantless search of a dwelling house is legal so long as it is

> accompanied by a lawful arrest. Such a conclusion is clearly at odds with **Hunter**, which held that warrantless searches are prima facie unreasonable. I conclude that generally a warrant is required to make an arrest in a dwelling house." (Emphasis in the original.)

Manitoba Court of Appeal decisions on Feeney warrants

[140] In ***R. v. Petri,*** [2003] M.J. No. 1 (Man. C.A.) Kroft J.A. for the Court emphasized at paragraph 29 that it is critical that the specific facts of each case be kept in mind when dealing with s. 8 breaches in the context of warrantless arrests in a dwelling house. In that case police officers attended to the residence of the accused in order to investigate a report of erratic driving. Petri answered the door. He was not a suspect or an accused at that point as far as the police were concerned. He was asked if he had been driving the vehicle in question and he replied in the affirmative. He stepped aside and allowed the officers to enter the residence. They observed signs of impairment and arrested him.

[141] Kroft J.A. stated at paragraph 23 that "if the police are present for the lawful purpose of conducting an investigation by communicating with the occupant, they can continue the communication unless and until the occupant makes known that his cooperation has been withdrawn." He concluded at paragraph 28 that "there was no reasonable ground for arrest until after entry had been granted and the investigation had been completed." In these circumstances he held that to impose a requirement for a warrant to be obtained to effect an arrest for the purpose of a breathalyzer simply made no sense. He referred to the decision of the Saskatchewan Court of Appeal in ***R. v. Grotheim,*** [2001] S.J. No. 694 which is to the same effect. In ***Grotheim*** the Court also concluded that the police officer did not attend to the door of the residence for the purpose of making an arrest. His intention was only to talk to the occupants about an accident that he was investigating.

[142] Another relevant case from the Manitoba Court of Appeal dealing with a warrantless arrest in a dwelling house is ***R. v. M.C.G.***, [2001] M.J. No. 482**.** Huband J.A. wrote the majority decision. In that case police officers attended the door of the apartment intending to arrest the accused youth on an outstanding warrant for failing to appear in court. They also wanted to speak to him about some robberies they were investigating. They did not have a Feeney warrant. They knocked on the door and the door was opened by a sister of the accused. While they were speaking to her the

accused attended to the door. The police officers stepped into the front hallway of the residence. There was no clear evidence as to how the officers came to be in the front hallway but Huband J.A. concluded that they did not take undue advantage of the opened door.

[143] The accused was asked if he was willing to accompany the officers to the police station to deal with the outstanding warrant and to talk to them about the robberies. He agreed to do so. Huband J.A. stated that there was no attempt to arrest the accused until after he had agreed to accompany the officers to the police station. At no time did the "officers stray beyond the entrance hall." He concluded, however, at paragraph 13 that the evidence of an informed consent was not compelling. He said:

> "The officers were allowed to cross the threshold and enter the entrance hall of the residence before the nature of their business was fully known."

[144] Huband J.A. also held that the accused was not told that he need not accompany the officers or "that if he refused, prudence would require the police to obtain a different form of warrant before attempting to effect an arrest in the residence." In these circumstances, Huband J.A. concluded that in the absence of clearer evidence of an informed consent, the arrest of the accused in the dwelling house was not lawful. He stated, however, that the *Charter* violation in that case was of a technical nature only in light of all the circumstances. He admitted the statement of the accused notwithstanding the breach. He considered that this was not a serious *Charter* breach, that the police officers acted in good faith and that "they did not overstep what they believed to be a tacit invitation to cross the threshold." (At paragraph 21)

[145] The circumstances in the present case are substantially different from those in ***M.C.G.*** That case, however, seems to stand for the proposition that in the usual case a Feeney warrant will be required to arrest an individual within a dwelling house. An exception to this general rule will be where there is clear evidence of an informed consent by the individual to voluntarily accompany the officers prior to the arrest or where the nature of the police business is fully known before they are granted entry.

[146] Another recent case from the Manitoba Court of Appeal on this subject is ***R. v. Guiboche,*** [2004] M.J. No. 43. The judgment of the Court

was delivered by Freedman J.A. The circumstances in ***Guiboche*** are very different from those in the present case. The accused was implicated in the murder of a woman he had been living with. Police had reasonable and probable grounds to arrest him and intended to do so when they found him. Police attended to the residence of the father of the accused. They had no grounds for believing that the accused would be there, it was simply a possibility that they were investigating. It turned out that the accused was in his father's residence and police arrested him there. The lawfulness of the arrest was challenged, based on the entry by police into the house without a Feeney warrant.

[147] When the police knocked on the door of the house the father of the accused opened the door, and stepped back, at which time the police officer stepped over the threshold into the house without any express words of invitation. This was held to be insufficient to render what followed unlawful. Freedman J.A. stated in this regard at paragraph 56:

> "The benign nature of such a threshold crossing was aptly expressed by Newcombe P.J., in **R. v. Jerao** (27 May, 2001), Winnipeg (Man. Prov. Ct.), wherein he observed that entry to a foyer (at p. 3):
>
> > '…is a common although not universal courtesy extended to callers such as delivery men, canvassers, census takers and indeed, police officers, as here. **By convention, it is understood to grant entry to a foyer, entryway or hallway and no further.** The officers did not encroach beyond that point.'" (Emphasis added)

[148] In the ***Guiboche*** case it was held that after the police stepped over the threshold of the residence, the father of the accused knowingly and willingly facilitated the arrest of the accused in the residence. He directed the police to where the accused was and in effect consented to the police going into the residence to arrest the accused. Freedman J. A. held that the father of the accused was the person who had a reasonable expectation of privacy in the house and that his conduct showed that his consent was an informed consent and was more than mere acquiescence or compliance.

[149] The evidence in ***Guiboche*** was that the accused had lived with the victim for seven or eight years and that he had never lived with his father during that time. Freedman J. A. concluded that the accused was using his father's house merely as a hideout and that he had failed to establish that he had any reasonable expectation of privacy whatsoever in his father's house.

Accordingly his rights under s. 8 of the *Charter* were not engaged let alone infringed. Freedman J.A. distinguished the case of ***R. v. Adams*** (2001), 157 C.C.C. (3d) 220 (Ont. C.A.) which was relied on by the defence. The Ontario Court of Appeal concluded in that case that there is nothing in ***Feeney*** or in s. 529 of the *Code* to suggest that a warrant is not required for an arrest in the dwelling house of a third party. Freedman J.A. held that the consent of the landlord in ***Adams*** was obtained by trickery on the part of the police and this vitiated any consent. Accordingly, that case had no application to the situation in ***Guiboche*****.**

[150] Freedman J.A. held at paragraph 82 that where there is a valid consent to enter the dwelling house by the person(s) with a reasonable expectation of privacy in the house, this will be an exception to the broad general statement set out in ***Feeney*** that a warrant is required for a lawful arrest in a dwelling house. Where there is such clear informed consent no warrant will be necessary.

Application of the law to the present case

[151] The respondent officers did not have a warrant for the arrest of Ms M. when they attended to the apartment. Sgt. P. testified that they went to the apartment with the intention of arresting Ms M. if they located her. This is not a situation where the officers merely intended to communicate with the occupants of the apartment in the course of an investigation. Prior to their attendance to the apartment they had formed the opinion that they had reasonable and probable grounds to arrest Ms M. No further investigation was intended by them prior to the arrest. This is confirmed by the evidence of Sgt. P. who stated that he placed Ms M. under arrest within a few minutes of entering the apartment, immediately after he had informed her of the break-in they were investigating. According to his evidence he did not ask Ms M. to comment on this information prior to placing her under arrest. He did not ask her if she would accompany officers voluntarily to the police station to discuss the allegations. He did not do so as he said that most of the people that he deals with won't come willingly.

[152] The circumstances in the present case are very different from any of the cases referred to above. This is not a case such as ***Petri*** or ***Grotheim*** where the police simply approached the residence in order to communicate with the occupants during an investigation. Here the police knew the

identity of the suspect in the matter they were investigating and had a fixed intention to arrest her. They had reasonable and probable grounds to arrest her before they attended to the door of the apartment. Nor is this a case such as ***Guiboche*** where there was a clear and informed consent to enter the residence for the purpose of effecting an arrest. This is not a case such as ***M.C.G.*** where the accused voluntarily agreed to accompany the police officers before he was placed under arrest.

[153] In order for police officers to be able to obtain a warrant under s. 529.1 of the *Code*, they have to have valid reasonable and probable grounds to arrest the accused under s. 495 of the *Code*, and they must have reasonable grounds to believe that the person is or will be in the dwelling house in question. In the present case there is no detailed evidence of the grounds that the police officers had for believing Ms M. was at the apartment. Sgt. P. testified that he did not know if he would have been able to get a Feeney warrant as he did not know if Ms M. was actually living at the apartment. It was his view that he could only get such a warrant if it was established that this was her actual residence. It is not entirely clear to me whether Sgt. P. was of the opinion that he could only get a Feeney warrant for any residence actually belonging to the suspect as opposed to any other dwelling house where she may be staying with someone else. If he is of this view then this would be an error, as according to the case law a warrant is required for any dwelling house, even if it is not the dwelling house of the suspect.

[154] The evidence is clear that Sgt. P. obtained the specific address of the apartment where Ms M. was staying, from Ms A. either the same day they attended to the apartment or at most the day before. Ms A. advised the officer that she thought that Ms M. was staying at that apartment. Unfortunately, Sgt. P. did not say and he was not asked what the basis was for Ms A.'s knowledge of this address. The officer did not make any note of exactly what Ms A. said in this regard. In view of the fact that Ms A. was Ms M.'s former roommate, that they had been co-workers in the past and that the information was provided within a day of the officers attending the apartment, it seems to me that Ms A.'s information as to where Ms M. was staying would be quite compelling. It would not be difficult to conclude in these circumstances that the police officers could have satisfied a justice that they had reasonable grounds to believe that the person they wanted to arrest would be in the apartment. I am satisfied that this is not something the

officers ever even considered. The fact that Sgt. P. made no note of exactly what Ms A. told him confirms that he did not consider using this information as the basis for obtaining a warrant.

[155] It is clear from the evidence of the officers that getting a Feeney warrant in this case never crossed their mind. I am satisfied that the first time it was even considered by the officers was when they were questioned about it during their evidence at this hearing. My concern in this regard is due in large part to the fact that the evidence of the officers offers me no assurance that they **ever** seriously consider the general need to obtain a warrant before they attend to a residence to arrest someone. It is for this reason that I have dealt with this issue at some length in these reasons. The impression I have from the evidence in this case is that as a matter of policy or otherwise, police officers with the Winnipeg Police Service rarely consider that there is any need to obtain a warrant in order to arrest an individual in a dwelling house. If my impression is accurate, this is a policy and an attitude that needs to change.

[156] My perception of the attitude of the respondent officers to the requirement to obtain a warrant to arrest someone in a dwelling house comes from some of the answers the officers provided at this hearing. Sgt. P. was asked by me why he did not obtain a warrant under s. 529 of the *Code* when he thought he had reasonable and probable grounds to arrest Ms M. and intended to do so. He replied:

> "I mean, I know Feeney warrants have been around for a while, but I've, I've – I mean a lot of times don't have trouble getting permission to enter a suite, and I've never had – very seldom have ever had anybody present a problem to, to that particular type of incident."

[157] Respondent's counsel followed this up in re-examination and the following exchange occurred between him and Sgt. P. in this regard:

> Q. And do your receive any training where there's sort of a blanket statement that says don't go and arrest someone at a home unless you have a Feeney warrant?
> A. No.
> Q. Okay. Is that sort of at the discretion, or is it told to you by someone about whether or not to go get one?
> A. No, it's just – I **mean, it's never been a practice just to go get a Feeney to arrest somebody out of their home.** I mean, if, if I

would have went there and they didn't allow us in, and – at that time I might attempt to get a Feeney.

Q. Okay. So it would not be the case, in sort of a line-up of officers who are all going to arrest people at their homes, that they're lining up for Feeney warrants?
A. No, that's not the normal practice.

(Emphasis added)

[158] In the direct examination of Cst. T. she was asked by her counsel whether at any time before she attended to the apartment with Sgt. P. , she suggested to him that they should get a warrant. She indicated that she had not. She was asked why she had not suggested this and her response was as follows:

> "Well, my understanding is we attend a location and the person gives you permission to enter their place, that's fine. You don't – it's not – a warrant is not required."

She indicated further that if they did not get permission to enter then they would call for assistance for someone to stay there while they went to get a warrant.

[159] All the evidence in this case suggests that obtaining a Feeney warrant is considered by police officers only as a very last resort. It is apparently not the normal practice of the Winnipeg Police Service to obtain such warrants. It is not something that even vaguely crossed the minds of the officers in the present case. I do appreciate that the respondent officers also expressed the view that they might not have been able to get a warrant in the present case in any event because of their uncertainty as to whether Ms M. was actually living at the address they had been given. This is certainly a factor for the police to take into account. However, this is in my view, more of an after the fact rationalization in the present case than it is a factor that was actually considered in any reasoned decision on the part of the officers not to apply for a warrant.

[160] The bottom line is that the issue of whether a warrant could or should be obtained in this case was not contemplated by the officers. My concern, however, is with the general practice that was revealed and the general attitude that was expressed that a warrant will only be sought if permission to enter is not granted. These police officers start with the apparent

assumption that a warrant is not needed as a general rule and that it is only in the exceptional cases where permission is not obtained that any effort may be made to obtain a warrant. This in my view is a backwards way of dealing with this issue. Police officers should start with the proposition that as a general rule a warrant is required, and that it is only as an exception to the general rule that a warrant may not be required.

[161] I agree that consent or permission to enter can provide the police with lawful entitlement to be in a residence. The ***Guiboche*** case is clear on this point. Such consent can be an exception to the general rule that a warrant is required to arrest someone in a dwelling house. However, the nature of such consent must be carefully examined. It is only where the consent is clear and informed that it will be valid and will operate as authority for the police to make a lawful warrantless arrest in a dwelling house. In order for the consent to be an informed consent it seems clear that the person who is giving consent must know what is being consented to. That person must know that the police are seeking entry to the dwelling house for the purpose of effecting an arrest. In the absence of such information being provided by the police any consent to enter cannot validate a warrantless arrest.

[162] In the present case I am satisfied that there was at least implicit consent by Ms M. and Ms K. for the respondent officers to enter the apartment. There may even have been an explicit invitation to come in. Such invitation or permission to enter the apartment at most provided the police officers with the right to enter for the limited purpose of communicating with the women. Such an invitation is understood by convention to be an invitation only into the entranceway or foyer, and no further. Such an invitation to enter the apartment certainly did not mean that either Ms M. or Ms K. was consenting to the entry for the purpose of arresting Ms M. or searching the premises. The police officers did not inform Ms M. or Ms K. that they were there to arrest Ms M. or that they were seeking entry for that purpose. They did not ask if Ms M. would voluntarily accompany them to the police station. It cannot be said that any consent to enter was a valid or informed consent. As such the permission to enter the apartment did not authorize the police to arrest Ms M. in the apartment without a warrant.

[163] It is my view that when police officers are intending to arrest a suspect in a dwelling house they should start from the premise that a warrant

is necessary for a lawful arrest. There is no possible downside to approaching this issue in that fashion. Such a policy will eliminate much of the need for the *ex post facto* analysis which now occurs whenever someone has been arrested without warrant in a dwelling house. Sgt. P. testified that he did not ask Ms M. if she would accompany them voluntarily to the police station because in his experience most of the people he deals with will not agree to attend voluntarily. If that is the case, then all the more reason for obtaining a warrant **before** attending a residence for the purpose of making an arrest.

[164] If a justice does not grant the warrant because there are not reasonable grounds to believe that the person being sought is or will be in the dwelling house, the police still have the option of pursuing consent to the warrantless arrest, presuming that they otherwise have the necessary grounds to arrest without warrant. In such circumstances the good faith of the police officers in attempting to obtain a warrant will be a significant factor for the court to consider when determining an appropriate remedy for any alleged *Charter* violation.

[165] If the police choose to rely on consent for a lawful arrest they must ensure that it is a valid informed consent. It is not sufficient to merely obtain an invitation into the residence when such an invitation is given without full knowledge of the purpose for the police attendance.

[166] I recognize that the duties of police officers are onerous and often complex. The *Charter* has served to complicate their duties. The law dealing with *Charter* rights is constantly evolving and is not always without controversy. Police officers may act in an unjustified manner although their intentions were good. They may not always be aware of or understand the courts' latest interpretation of *Charter* rights. I recognize that this may be frustrating for police officers who are on the front lines of the fight against crime. It is for this reason that police departments must provide appropriate guidance, policies and practices which ensure that *Charter* rights are respected. Such policies should certainly be developed with respect to the issue of so-called Feeney warrants if they do not presently exist. Such a recommendation is well within my mandate in proceedings of this kind having regard to s. 33 of the Act. That section provides that where a provincial judge identifies any organizational or administrative practices of a police department which may have contributed to an alleged disciplinary

default the judge may recommend appropriate changes to the Chief of Police and the municipal authority which governs the department.

Conclusion as to the search of the apartment

[167] A search will be reasonable if it is authorized by law, if the law itself is reasonable and the search was carried out in a reasonable manner. In the present case I have concluded that there was a general search of Ms K.'s apartment by the respondent officers. I am satisfied that such a search was not authorized by law. The search was not consented to by Ms M. or Ms K. The search was not a valid search incident to the arrest of Ms M. Moreover, I am satisfied that the search was not carried out in a reasonable manner. I am satisfied on clear and convincing evidence that the respondent officers abused their authority by searching the apartment without lawful authority. I find that they committed a disciplinary default in this regard within the meaning of s. 29 of the Act.

[168] There is one further matter that was raised during the evidence in this case that I wish to comment on. Ms K. expressed the view during her testimony that perhaps she was treated with disrespect because she is aboriginal. She thought that what happened in the apartment may have had racist undertones. She conceded that she did not know what the officers were thinking or why they acted the way they did, but she felt in her own mind that it was related to her race. She thought that she would have been treated differently if she was not aboriginal. She was particularly upset about what she believed was an accusation by the officers that she had abused her children. Her evidence in this regard appeared to be quite genuine. I am satisfied that her belief was honestly held.

[169] On the other hand, Cst. T. expressed resentment at these comments by Ms K. She testified that she regarded these comments as an insult to herself and her partner. She mentioned that she grew up on a reserve in the north, that she speaks the language there and that as an aboriginal person herself she was insulted that someone would view her as racist. She denied that this was the case. Her evidence in this regard also seemed sincere and honest.

[170] Certainly the fact that someone is a member of a minority group does not inoculate them against racist attitudes. Having said that, there is nothing in the evidence before me in this case which suggests that anything that

happened was as a result of discrimination based on race. I think it is important that I make this clear. By the same token, the mere fact that Ms K. perceived that race may have played a part in her dealings with the police is also important to note. A perception of different treatment by the police because of race, even where that perception is wrong, leads to a loss of respect for and confidence in the police that is of no benefit to anyone. Every effort must be made to ensure that there is no basis for such perceptions to exist.

THE USE OF UNNECESSARY VIOLENCE OR EXCESSIVE FORCE

[171] The most serious of the alleged disciplinary defaults in this case is the the alleged assault on Ms M. by Cst. T. in the presence of Sgt. P. . It is alleged that this unnecessary use of violence occurred during the interview of Ms M. at the Public Safety Building. This is not a situation where the police officers admit that they used force in the lawful execution of their duties and argue that it was reasonable in the circumstances. The police officers deny the use of any force whatsoever. If the incident occurred as Ms M. testified, then there is no doubt that an assault occurred. There was no justification for the use of any force in the circumstances of this case.

[172] Once again there is a credibility contest between Ms M. and the respondent officers. To a large extent this credibility contest arises because of the failure of the Winnipeg Police Service to require officers to videotape all interviews with suspects. I will say more about this later in these reasons.

[173] The evidence respecting this allegation of assault is not complicated. Briefly stated, Ms M. testified that while she was being interviewed by the officers she was repeatedly accused of lying. Cst. T. twice pushed her head against the wall with her hand and held her head against the wall asking her if she was lying. As a result of this, Ms M. alleges that her head was sore. The officer also slapped the left side of Ms M.'s head with her hand and grabbed Ms M.'s wrists and shook her. When Ms M. protested this treatment, she testified that Sgt. P. told her that he had not seen anything and that no one would believe her if she complained.

[174] The respondent officers adamantly deny that any of the assaults occurred. They deny that there was any physical contact at all by Cst. T. or Sgt. P. . They deny that the comment attributed to Sgt. P. was made.

[175] It is difficult to assess credibility in situations like this. The police officers say simply and repeatedly that there was no assault. It is their word against Ms M.'s. She says it happened, they say it did not. In light of the burden of proof in this case, the officers need not prove anything. It is Ms M.'s burden to establish on clear and convincing evidence that the assault happened. I recognize that this is a difficult and almost impossible burden for any person in Ms M.'s position to meet. She is alone in an interview room with two police officers. The police officers are able to corroborate each other while Ms M. has no one to support her version of events. Someone is telling the truth and someone is lying. Who falls into which category is difficult to determine.

[176] I cannot say that I disbelieve the evidence of the respondent officers when they say that there was no assault. Their evidence in this regard was not shaken in cross-examination and they remained firm and unwavering in their denials. At the same time I found Ms M.'s evidence to be credible and consistent. Her behaviour after she left the police station is consistent with her complaints. She complained to her friend Ms K. She was upset and crying. She went to the hospital to be examined by a doctor. The most significant evidence in support of Ms M.'s allegation is the medical evidence. No witnesses were called in this regard but some reports were filed. There is some suggestion of a possible injury to her head. In this regard I must carefully assess the weight to be given to the medical reports which were marked as exhibits in this case.

[177] The handwritten notes apparently made by the triage nurse and the examining doctor are of negligible weight. It is not clear what the notes mean. Certainly these reports confirm that Ms M. attended to the Emergency Department and was examined by a doctor within a few hours of leaving the police station. She complained of an assault by the police. While this is hearsay, it does eliminate any suggestion of later fabrication by Ms M.

[178] The report by Dr. G. which was provided to Mr. D. during the hearing provides a few more details. The relevant portion of the report states that on examination there was 'some tenderness to occiput'. What does this mean? According to the dictionary definition, occiput refers to the occipital bone which is at the back of the head or skull. But what does 'tenderness' to the back of the head mean? Did the doctor feel an injury for himself, or did he

assess the tenderness based on a complaint of pain by Ms M. Can tenderness be objectively felt by a doctor? Or must he rely on Ms M.'s subjective response? This is not clear. As a result very little weight can be attributed to these reports. Viva voce evidence by the doctor would certainly have been much more compelling and convincing in these circumstances. It is unfortunate that Dr. G. was not subpoenaed to testify at this hearing.

Section 24(8) of the Act

[179] I must note at this point that the presentation of Ms M.'s case was certainly hampered by not having counsel to represent her. Mr. D. did an admirable job of assisting his daughter at this hearing, and I do not mean to denigrate his performance in any way. However, while he obviously has some familiarity with the criminal justice system and the court process, he was not able to provide the kind of representation and advice that legally trained counsel could have provided. Not all the evidence that should have been called was called. Not all the questions that should have been asked were asked. Issues that might have been pursued by counsel in cross-examination were not canvassed. Some issues that were pursued aggressively were not particularly relevant. I appreciate that the complainant's position, as outlined by Mr. D. on her behalf, was that she did not need legal counsel as she was of the view that 'the truth would prevail' at this hearing. However, the truth can only prevail where the necessary evidence is presented.

[180] I recognize that this is a private civil proceeding and that the complainant bears the responsibility for obtaining counsel. By the same token there is a broader public interest aspect to proceedings under the Act which I have alluded to previously. The public has a considerable interest in the outcome of proceedings of this nature. This public interest purpose would suggest that more consideration should be given to providing counsel for a complainant in the appropriate case.

[181] Section 24(8) of the Act provides that where a complainant applies for but is financially ineligible for legal aid, the Commissioner may recommend that the minister appoint counsel to present the case in support of the complaint. I was led to believe by counsel for the Commissioner during pre-hearing proceedings in this case that this section is infrequently utilized and that counsel is rarely if ever appointed by the minister. It is my view that this section should be utilized more regularly in the appropriate case in

order to give voice to the broad public purpose of proceedings under this Act.

Conclusion as to the use of unnecessary violence and excessive force

[182] I agree with the complainant's submission that there is no evidence of any motive on her part for fabricating this complaint. She was never charged with an offence, so the usual motive for claiming police misconduct during an investigation is not present here. However, the absence of a motive to fabricate is not enough to satisfy the burden of proof in this case. I certainly don't disbelieve Ms M. However, I cannot say that the evidence of the assault is clear and convincing. I cannot say that I disbelieve the evidence of the respondent officers in this regard.

[183] Ultimately I am not able to resolve the credibility contest between the complainant and the officers. I don't know who is lying and who is telling the truth. While I suspect that the complainant is the one who is telling the truth I am not satisfied of that to the requisite standard. With respect to this particular allegation, the truth may not necessarily prevail. I am not satisfied that the respondent officers committed a disciplinary default by using unnecessary violence or excessive force on Ms M. That allegation is accordingly dismissed.

Videotaping of police interrogations of suspects

[184] As I have noted above, in circumstances such as these the central issue is credibility. The reason such credibility contests arise is frequently because too little effort is made to utilize the modern technology that is readily available in order to videotape all contacts between police officers and individuals in their custody whenever possible. There is no compelling reason that I can see as to why all police interview rooms are not equipped with video equipment. I don't understand the apparent reluctance to do this. This would serve not only to protect suspects and accused persons who are in police custody, but would also protect the integrity and reputation of police officers. They would be protected from false accusations of abuse.

[185] The conclusion I have reached above with respect to the alleged assault certainly does not vindicate the respondent officers. I have merely concluded that the allegations have not been proven to the standard that is required. If the respondent officers had chosen to videotape their interview

with Ms M., the kinds of allegations that were made in this case would be much less likely to arise.

[186] There is also a cost to the criminal justice system when videotaping is not used where possible. Countless hours of court time could be saved if this was a general practice. A videotape allows a fact finder to be 'present' during the interview. The fact finder can form his or her own opinion of the demeanor of the person being interviewed, and whether the resulting statement was voluntarily given. This is a huge help whenever there are differing versions of events as is so often the case.

[187] I appreciate that there may have been some policy changes since the interview with Ms M. occurred four years ago, in terms of the circumstances under which Winnipeg police officers will videotape interviews with suspects. However, the evidence given by the respondent officers during this hearing provides me with no assurance that these changes are sufficient to address my concerns.

[188] I asked Sgt. P. whether there was any consideration given to videotaping the interview with Ms M. His response in my view was very candid but disturbing. He stated:

> "**The only time that we allow ourselves to video-tape is usually if a person is going to provide a confession.** The reason being is we only have one video room in Division 11. We have 10 holding rooms in Division 11 and quite often they're – because of the area, they're full and it's just not practical to have everybody on a video tape at the time during an interview." (Emphasis added)

[189] Cst. T. was also asked why the interview with Ms M. was not video or audio taped. She stated:

> "Well, at the time, this was 2000, we just got the video equipment probably a year or two before that, and I know when we first started with it there was only major crimes that were allowed to – they had to be a major offence, like robbery or murder or sexual assault, or things of that nature where you'd use the video statement."

Cst. T. indicated that it was her belief that this was the WPS policy at that time.

[190] When asked about the use of audio taping if the video room was not available she indicated that she had never heard of the use of an audio tape in this context and that this was not the normal practice. Cst. T. testified that the practice or policy respecting the use of videotaping has changed since 2000. She noted that all divisions now have two or more video interview rooms, that there is more equipment and more people are trained to use it. She indicated that police officers are now using the video rooms for all varieties of offences.

[191] Sgt. P. was also asked about the practice of recording an interview with a suspect in an officer's notebook as opposed to taking a more formal written statement which the suspect would have an opportunity to read and sign and verify as an accurate record of what was said. Sgt. P. confirmed that where a statement or interview is recorded in his notebook the person providing the statement would not normally be given the opportunity to read it over. When asked why Ms M.'s interview was not recorded on a formal written statement form, which has the police caution and *Charter* warnings set out at the beginning, he responded as follows:

> "Well, **our practice, as a police department is this is the way we do it originally, and then if a confession is given, they have the choice of either doing it on a video-taped statement or a formal written statement.** And if they agree to the formal written statement, yes, then that's how we would do it and then they would read it over and sign it afterwards." (Emphasis added)

[192] While Cst. T. 's evidence about changes in policy since 2000 is somewhat encouraging I am troubled by Sgt. P. 's expressed opinion of when videotaping will be 'allowed'. His suggestion that only confessions will usually be videotaped is disturbing. This policy encourages and perpetuates the practice of conducting a 'pre-statement' interview which is not videotaped, to determine whether the suspect will confess. Indeed, that is what occurred in the present case. Police officers will interview a suspect for a period of time and only if the suspect confesses will there be a more formal statement taken, either in writing or on videotape.

[193] Even where a videotaped statement is later taken, this practice ensures that a substantial portion of the police contact with a suspect during interrogation is not videotaped. This practice should be discontinued. This practice suggests that only confessions are worth videotaping. This kind of

attitude means that individuals who maintain their innocence, as Ms M. did, don't have the option of having their statement videotaped.

[194] Police policies and practices in relation to interviews of suspects have been the subject of much judicial commentary in recent years. Courts have repeatedly remarked on the desirability of videotaping police interrogations. Iacobucci J. for the majority in ***R. v. Oickle*** (2000), 147 C.C.C. (3d) 321 (S.C.C.) referred to four reasons why videotaping is so important as follows at paragraph 46:

> "First, it provides a means by which courts can monitor interrogation practices and thereby enforce the other safeguards. Second, it deters the police from employing interrogation methods likely to lead to untrustworthy confessions. Third, it enables courts to make more informed judgments about whether interrogation practices were likely to lead to an untrustworthy confession. Finally, mandating this safeguard accords with sound public policy because the safeguard will have the additional salutary effects besides reducing untrustworthy confessions, including more net benefits for law enforcement."

He concluded:

> "This is not to suggest that non-recorded interrogations are inherently suspect; it is simply to make the obvious point that when a recording is made, it can greatly assist the trier of fact in assessing the confession."

[195] The Ontario Court of Appeal in ***R. v. Moore-McFarlane*** (2001), 160 C.C.C. (3d) 493 went a step further. While she agreed that there is no absolute rule requiring the videotaping of statements, Charron J.A. (as she then was) for the Court noted that the Crown bears the onus of establishing a sufficient record of the interaction between the suspect and the police. She went on to say at paragraph 65:

> "That onus may be readily satisfied by the use of audio, or better still, video recording. Indeed, it is my view that where the suspect is in custody, recording facilities are readily available, and the police deliberately set out to interrogate the suspect without giving any thought to the making of a reliable record, the context inevitably makes the resulting non-recorded interrogation suspect. In such cases, it will be a matter for the trial judge on the voir dire to determine whether or not a sufficient substitute for an audio or videotape record has been provided to satisfy the heavy onus on the Crown to prove voluntariness beyond a reasonable doubt."

[196] The Honourable Peter deC. Cory made the following recommendations in The Inquiry Regarding Thomas Sophonow, in September 2001 at page 19:

- "The evidence pertaining to statements given by an accused will always be of great importance in a trial. The possibility of errors occurring in manually transcribing a verbal statement by anyone other than a skilled shorthand reporter is great; the possibility of misinterpreting the words of the accused is great; and the possibility of abusive procedures, although slight, exists in those circumstances. That, coupled with the ease with which a tape recording can be made, make it necessary to exclude unrecorded statements of an accused. It is the only sure means of avoiding the admission of inaccurate, misinterpreted and false statements.
- I would recommend that videotaping of interviews with suspects be made a rule and an adequate explanation given before the audiotaping of an interview is accepted as admissible. This is to say, all interviews must be videotaped or, at the very least, audiotaped.
- Further, interviews that are not taped should, as a general rule, be inadmissible. There is too great a danger in admitting oral statements. They are not verbatim and are subject to misinterpretation and errors, particularly of omission. Their dangers are too many and too serious to permit admission. Tape recorders are sufficiently inexpensive and accessible that they can be provided to all investigation officers and used to record the statements of any suspect."

[197] In ***R. v. Ducharme,*** [2004] M.J. No. 60 the Manitoba Court of Appeal addressed the desirability of videotaping police interviews of accused persons as follows at paragraphs 22 - 23:

> "It is only recently that we reached a stage in criminal investigation where it can be said that when an accused person is in police custody, there will usually be no reason why interviews and interrogations cannot be recorded electronically and, more specifically, videotaped. Such a requirement is economically and technically feasible. A statutory requirement that videotaping, perhaps subject to exceptions, becomes a prerequisite of admissibility and would be capable of enforcement. Indeed, the Homicide Department of the Winnipeg Police Service already follows a self-imposed protocol for videotaping the statements that go on in its interview rooms.
>
> If such a policy were enshrined in law, it would protect accused persons from actual or threatened force or intimidation. At the same time, it would limit the possibility of police misconduct and protect them from false accusations of abuse or oppression."

[198] The Court continued at paragraph 39:

> "I doubt that any Canadian court would suggest that, in the consideration of voluntariness and the concern about police oppression, there are not advantages to be gained by videotaping of those things, verbal and physical, that take place between police officers and accused persons."

[199] The decision of McCawley J. in ***R. v. Gauvin*** (2003), M.B.Q.B. 95 is also instructive on this issue. She stated at paragraph 54:

> "There was nothing to prevent the videotaping of most of Mr. Gauvin's dealings with the various officers while at the District 3 station and the PSB, other than the existing police policy. That policy does not require the videotaping of all those suspected of or charged with a serious crime and permits "pre-interview" question and answer sessions before a formal statement is taken. This policy continues to exist in the face of strong condemnation by commissions of inquiry as well as clear and unequivocal pronouncements from the courts that it is wrong. There is no question that the best evidence is a videotaped statement that depicts the appearance, body language, and demeanour of the individuals on it. It also captures the tone of voice used, the pace of the interview and all the subtleties of interaction not reflected in the handwritten notes of a police officer trying to do several things at once and who is subject to the same human frailties as the rest of us. It also unfairly puts officers in the untenable position of defending a policy that has been strongly criticized by the judiciary and leaves them open to allegations which may, whether true or not, be sufficiently grounded in the evidence to raise a reasonable doubt."

[200] The last case to which I wish to refer dealing with the videotaping of police interrogations is the decision of MacInnes J. in ***R. v. Gill,*** [2002] M.J. No. 385 (Man. Q.B.). Justice MacInnes set out a compelling and detailed explanation of why videotaping is so important. He strongly urged changes to police policies and practices in this area. I propose to quote at length from his reasons as they are relevant to many aspects of the present case. I can't say it any better than he did. His remarks bear repeating and careful scrutiny and attention by police departments.

[201] Perhaps the fact that the present case involves alleged abuses of authority by police officers will have a salutary effect on those who are responsible for developing and implementing police policies and practices. This is not a case where the failure to videotape resulted in the statement of

an accused person being ruled inadmissible. This is a case where the failure to videotape the interview with a suspect could have resulted in serious consequences to the careers of two senior police officers. If the potential loss of evidence in a criminal trial is not sufficient incentive to change police practices, perhaps the possibility of serious consequences to the careers and reputations of police officers will have that effect.

[202] Justice MacInnes stated at paragraphs 61 – 72:

> "There is an additional point upon which I would like to comment. In doing so, I confess that my comments are probably futile because such comments have been made on many occasions by this court and other courts throughout the country without effect. My comments pertain to the failure of the police - in this case the Winnipeg Police Service - to videotape the detention and interrogation process of an accused in its entirety.
>
> Why? Several officers testified that it was contrary to the policy of the Major Crimes Unit of the City of Winnipeg Police Service to do so. I heard no evidence, however, as to the rationale for that policy and on reflection conclude that that probably was because there is no sound rationale for it.
>
> At the time of the accused's arrest in this case, two of seven interview rooms in the Major Crimes Unit were equipped with videotaping equipment. If two can be equipped, why not all seven? I heard no evidence as to this being cost prohibitive and, indeed, expect that it would not be. Even if it were costly to equip the remaining interview rooms with video capability, which might also necessitate the use of personnel to operate the additional video cameras, I doubt the cost of so doing would be anything close to the costs which result all too frequently from a failure to videotape.
>
> In this case I heard evidence for five days, almost all of it on voir dire pertaining to the admissibility of the accused's statements. Once I ruled the statements admissible, the accused changed his plea to guilty. This is but one of the countless number of criminal cases that go to trial every day in this country where the voluntariness of statements is a fundamental issue. Had all of the accused's detention and interrogation been videotaped, would there have been a voir dire or simply a guilty plea as ultimately occurred? Would there have been a trial in this case or many of the countless cases to which I refer?

What is the cost to the system in terms of loss of respect when a statement is not admitted because of doubt, but a videotape would have disclosed that the statement was voluntary, or worse, when a statement is allowed and forms the basis for conviction, only to be discovered years later that the statement was not voluntary and the accused was wrongly convicted? What is the cost to the system, funded by the taxpayer, for the trial time expended which includes the use of the court facility, the wages of the police who testify, the wages of Crown counsel, of the court clerk and the judge, the fees of defence counsel and the like? What is the cost to the victim of the crime, likely traumatized by the original incident, and now having to anticipate re-living that incident or in fact re-living it through their testimony? **What is the cost to those police officers whose reputation for professionalism and integrity could be tarnished by the rejection of a statement because of doubt, which doubt could have been removed by a videotape? I am astonished that police associations, in order to protect the reputations of their members, do not demand that videotaping occur throughout.**

And a videotaped statement alone, taken after lengthy detention and interview, does not address or answer these questions or concerns. It shows nothing of what may have gone before. While in this case, the videotape of the statement alone removed any doubt I had, that was only because the accused had so oversold the alleged beating that his conduct, appearance and demeanour on the videotaped interview confirmed the falsity of his allegations and the fact that whatever his injuries, they had occurred in a fight or fights prior to his arrest. But had his evidence been simply that he had been kicked in the leg and threatened with more to follow, the videotape would not necessarily have been convincing. Indeed, it might have increased the doubt because it did indeed show him limping into and out of the interview.

One can only infer that the reason there is not videotaping throughout is because there is at worst conduct occurring which would cause the court to rule statements involuntary or, more likely, cause police officers to run the risk of embarrassment in that their conduct in interrogating accused persons might appear unseemly, albeit not crossing the line resulting in rejection of the statement. But the courts have said, and any right thinking member of society would surely appreciate, that these interviews are not and cannot be expected to be conducted as models of politeness and good manners. In **Rothman v. The Queen,** [1981] 1 S.C.R. 640 Lamer J. wrote at p. 697:

> 'The investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury Rules. The authorities in dealing with shrewd

> and often sophisticated criminals must sometimes of necessity resort to tricks or other forms of deceit and should not through the rule be hampered in their work. What should be repressed vigorously is conduct on their part that shocks the community.'
>
> While those comments pertained largely to the issue of police trickery, the fact is that some considerable latitude must necessarily be afforded to police officers in permitting them to do their job in the interests of society, and there is indeed much latitude afforded before their conduct would be such as to shock the community.
>
> There is a certain irony associated with this case, namely, that any doubt which may have existed as to voluntariness of the accused's statements based upon the traditional viva voce evidence only, was in my mind totally resolved by reason of the videotape which showed clearly the condition of the accused including his state of mental alertness and, more particularly, his apparent pain-free physical agility which totally put the lie to his evidence of an alleged beating and fortified the truthfulness of the police evidence denying any such assault. It had a direct bearing on my concluding that the statements which he gave had been voluntarily given. In short, videotaping, which is apparently only sparingly used in light of the policy of the Major Crimes Unit, had the effect for me of resolving any doubt which might otherwise have existed on the issue of voluntariness.
>
> This brought an end to the trial, saved the complainant the trauma of testifying, and the Winnipeg Police Service and its officers, the risk of having their reputations sullied.
>
> All of this could occur regularly if videotaping were used in a more fulsome way, as I and other judges have suggested.
>
> I strongly urge the Winnipeg Police Service and other forces who have the facilities available to change their policies or practices and begin videotaping the detention and interview process of an accused in its entirety." (Emphasis added)

[203] I adopt these comments without reservation and echo the recommendation made by Justice MacInnes. Such a recommendation falls well within my mandate in proceedings of this kind having regard to the provisions of s. 33 of the Act previously referred to.

The 'viewing out' procedure before the sergeant in charge

[204] I would like to comment on another issue that was raised in this case in the context of the alleged assault at the police station. It was noted by the respondent officers that Ms M. was viewed by the sergeant in charge when they arrived at the Public Safety Building and again later when they released her from custody. The sergeant in charge has an office right next to the interview rooms and individuals in custody are brought into that office to be viewed. Sgt. P. testified that when prisoners are signed out they are brought back before the sergeant in charge who will ask them how they have been treated and whether they have any complaints. The prisoner log form is then signed by the sergeant in charge. One question on that form is whether there are any injuries or whether medical attention is required. This same process was followed with Ms M. It was noted by the respondent officers that she made no complaints when she was viewed out.

[205] The evidence was clear that during the viewing out process for Ms M. both respondent officers were present in the office with her. It is hardly surprising that no complaint was made by Ms M. at that time in light of the presence of the very officers that she is accusing of abuse. The absence of any complaint by a suspect being released from custody should not suggest that any subsequent complaint about officers' conduct is unworthy of belief. The evidence I heard about the viewing process does not provide me with any assurance that a suspect who has suffered any abusive conduct by arresting officers would have any inclination to complain about it in this forum. In this regard I agree with the comments made by McCawley J. in ***Gauvin*** at paragraphs 62-63. She described the viewing procedure as an exercise that "is perfunctory at best and for the most part lasts only seconds." She then stated:

> "If the police are going to rely on information or observations made by the viewing sergeant, they must do more than go through the motions as occurred here. A more comprehensive interaction with the accused, properly recorded, and conducted pursuant to a written policy, would make the exercise more meaningful and the information more reliable and of assistance to the court."

OPPRESSIVE OR ABUSIVE CONDUCT OR LANGUAGE - DISCOURTEOUS OR UNCIVIL BEHAVIOUR

[206] I propose to deal with the last two alleged disciplinary defaults together. In my view these allegations overlap one another in many ways.

Which specific conduct by the police officers is alleged to be the basis of each of these two disciplinary defaults is not entirely clear. Ms M. testified that aside from the assault she was most concerned about the police officers denying her right to call a lawyer, handcuffing her before she was arrested and insulting her. She was also upset by the manner in which the officers accused her of lying and indicated that in her view the officers were rude, intimidating and not very nice.

[207] Ms M. also testified that the officers were rude to Ms K. when they accused her of abusing her children. It should be noted that the notice of disciplinary default refers only to alleged abusive, oppressive, uncivil and discourteous conduct towards Ms M. Any alleged abusive or discourteous conduct in relation to Ms K. (aside from the search of the apartment which I have already dealt with) is not something that I have jurisdiction to consider.

[208] The contact between the respondent officers and the complainant can be broken down into three distinct periods of time. These are the contact in the apartment, the contact in the police vehicle and the contact in the interview room at the police station. I will deal with each of these time periods in turn.

The contact in the apartment

[209] According to Ms M. and Ms K., while the police officers were in the apartment they were accusing Ms M. of taking the property that had been stolen from Ms A. They accused her of lying when she denied taking the property. Both women testified that the officers did not arrest Ms M. in the apartment. They told her that she would have to accompany them to the Public Safety Building, and they handcuffed her. Ms M. stated that she was upset about the tone of voice used by the officers and the way they were acting – 'rude and accusing'.

[210] The officers both testified that Ms M. was arrested a short time after they were allowed into the apartment. They agree that she was handcuffed while in the apartment, although their evidence is different as to when this occurred. Sgt. P. testified that Ms M. was handcuffed immediately after he advised her that she was under arrest. Cst. T. indicated that Ms M. was handcuffed just before they left the apartment. On this point Cst. T.'s evidence is more consistent with the evidence of Ms M. and Ms K.

[211] In my view, there is no clear and convincing evidence that the officers abused their authority in handcuffing Ms M. Whether or not the word 'arrest' was actually used in the apartment, I am satisfied that in fact an arrest occurred in the apartment before Ms M. was handcuffed. She concedes that she was told that she was under investigation for stealing some property from her ex-roommate, and that the officers told her that they believed that she had the property. Ms M. testified that she did not believe that she was a suspect. However, based on all the evidence in this case, I am satisfied that she was a suspect and that the police officers had reasonable and probable grounds for regarding her as such and arresting her for the offence they were investigating. I cannot find that the use of the handcuffs was oppressive in all the circumstances.

The contact in the police vehicle

[212] Ms M. claims that the respondent officers were rude to her and insulted her in the police car on the way to the police station. She testified that they said that she and her mother were hookers and that she was working as a prostitute. They accused her of using drugs. They told her that if she did not tell them where the stolen property was she would be taken to the Remand Centre and she would never see her daughter again. She indicated that both of the officers made comments of this sort.

[213] The respondent officers deny all of these comments. Sgt. P. testified that Ms M. was crying and upset in the vehicle and he asked her why she was crying. She said that she was trying to stay out of trouble and that this incident would affect her ability to see her child. He denies that anything was said by either him or Cst. T. to the effect that Ms M. would never see her child again if she did not provide them with information. Sgt. P. specifically denied calling Ms M. or her mother a hooker, and said that he does not make derogatory comments. He testified that he would regard calling someone a hooker as a derogatory comment and stated that "I would never make a comment like that." Cst. T. confirmed Sgt. P. 's evidence and stated that she did not participate in any conversation in the police vehicle.

[214] Sgt. P. admitted that as a result of his investigation he was aware that Ms M. had worked with Ms A. at the Cheyenne Social Club. He testified that it was his belief that this was an escort service and it was his opinion that most of the people who worked at that club were prostitutes. I found

Sgt. P.'s denial that he called Ms M. a prostitute less than convincing. However, even if such a comment was made I am not satisfied that in these circumstances this amounts to a disciplinary default or an abuse of authority.

[215] It must be remembered that Ms M. was under arrest and was the suspect in a break-in. It was a fact that she had worked at this club. As was noted by Justice MacInnes in the ***Gill*** case, police officers involved with accused persons need not always act as models of politeness and good manners. In my view this kind of comment in circumstances such as these would not shock the community. Further if there was any kind of comment suggesting that Ms M. used drugs, I find again that such a comment or accusation does not in this context amount to discourteous, uncivil or abusive conduct.

[216] The evidence is not clear as to the exact content or context of the conversation in the police vehicle about Ms M.'s daughter. The nature and intent of what was said by the officer in this regard could have been misunderstood. I am not satisfied on clear and convincing evidence that the comment alleged by Ms M. was made, or that there was any abuse of authority by the respondent officers in this respect.

The contact in the interview room at the police station

[217] I have already dealt with the assault that was alleged to have taken place during the interview at the police station. However, it was suggested by Ms M. that there was other conduct by the police officers during this interview that was abusive. She testified that she asked to call a lawyer and was told by Sgt. P., "If we want we'll give you a fucking lawyer, and you're under arrest and you have to do what we say." When she said it was her right to call a lawyer, he allegedly told her that she had no rights. Ms M. agreed that the officer advised her of her right to counsel while she was in the police vehicle and that at that time she indicated that she did not want to call a lawyer. She insisted that after she was assaulted she changed her mind and told the officers that she wanted to call a lawyer.

[218] Ms M. also testified that the officers repeatedly accused her of lying and kept asking her where the stolen property was. She stated that Cst. T. slammed her chair down on the floor of the interview room. She indicated that she expected the officers to be friendlier while questioning her. She said that they were not very nice and that there should be a limit to the way

that police officers speak to someone during an interrogation. She agreed in cross-examination that she would have felt more comfortable during the interview if the officers had spoken in a gentler softer tone of voice. She indicated that she was upset because she was being accused. She thought that the police officers were rude and accusing.

[219] Sgt. P. testified that he believed Ms M. was lying when she denied any knowledge of the stolen items. He indicated that he accused her of lying and told her to tell the truth. He stated that if he believes that someone is not telling the truth he will pointedly say to them that they are lying to him. He admitted that he told Ms M. hat he was having a real hard time believing her story and that he was tired of her lies and wanted her to tell the truth. He denied that he ever used any obscene language during the interview. He also disputed that Ms M. ever requested a lawyer at any time. He denied any of the abusive comments that were attributed to him by Ms M. Cst. T. testified that she was present during the interview but that she said nothing. She basically confirmed Sgt. P.'s evidence as to the conversation during the interview. She did not have any of her own notes of the interview. She relied on Sgt. P.'s notes which she reviewed after the interview was completed.

[220] I agree with Ms M. that there is a limit to what police officers can say and do while interrogating a suspect. This limit, however, may be very different from what it is understood to be by Ms M. These limits have been delineated by courts over many years in the process of determining whether statements made to police officers should be admissible in evidence against them. Denying a person in police custody his or her right to call a lawyer could amount to oppressive or abusive conduct in some circumstances. Certainly, unnecessary violence or excessive force can never be justified. However, pointed, persistent questions, accusations that the suspect is lying, even tricks and deceitful conduct on the part of the police may all be quite acceptable. Each situation must be looked at in context. It must be established that statements were made freely and voluntarily by an accused person. A statement will be excluded if its' admission would bring the administration of justice into disrepute as a result of what the police officer said or did to elicit the statement.

[221] The comments of Lamer J. (as he then was) in the ***Rothman*** case are important in this regard. He noted that there was nothing wrong in bringing

about a confession by a guilty person. What is to be repressed is if this is done in a way that offends our basic values. He stated that the courts are vested with two responsibilities, namely the protection of the innocent against conviction and the protection of the criminal justice system itself, "by ensuring that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society." He also stated that there was nothing inherently wrong in outsmarting criminals into admitting their guilt. It was during his discussion on this issue that he made the comment that was noted by MacInnes J. in the ***Gill*** case, namely that the investigation of crime and detection of criminals is not a game to be governed by the Marquess of Queensbury Rules. In other words, in some circumstances it may be perfectly permissible for the police to resort to tricks, deceit and to 'not play by the rules', as long as their conduct is not so appalling as to shock the community. As stated by McCawley J. in ***Gauvin***, it must be recognized that police questioning of a suspect is not a 'tea party'.

[222] The 'shocks the community' test was held by the majority of the Supreme Court of Canada in ***Oickle*** to still be an important consideration when looking at police conduct in relation to the taking of a statement from a suspect. It was noted that very few suspects will spontaneously confess to a crime and that the police should not be unduly hampered in their ability to investigate crimes. However, an atmosphere of oppression created by hostile, excessively aggressive and intimidating questioning for a prolonged period of time will likely be improper. The Court in ***Oickle*** held that there can be no hard and fast rules, each case must be resolved based on a contextual approach. Lamer J. in ***Rothman*** provided some examples of the kind of tricks or deceitful conduct that would shock the community. He suggested that a police officer who pretended to be a chaplain, or a legal aid lawyer, or who injected truth serum into a diabetic under the guise that it was insulin are examples of the kind of police conduct that would shock the community.

[223] In the present case I am not satisfied on clear and convincing evidence that the complainant was dealt with in an abusive or oppressive manner during the interview with the respondent officers. As I have noted several times in these reasons, the burden is on Ms M. Had this been a criminal trial where the Crown had the burden to prove beyond a reasonable doubt that the statement was freely and voluntarily given, I would not have admitted the

statement. I would have been left with a reasonable doubt based on the evidence of Ms M.

[224] However, in these proceedings it is not sufficient to have a reasonable doubt about the voluntariness of the statement. It is not enough to suspect that the atmosphere was oppressive and intimidating. I must be satisfied of that on evidence that is compelling and clear. The conduct that the officers admit to, namely accusing Ms M. of lying and telling her firmly and pointedly that she should tell the truth is not an abuse of authority for the reasons that I have given above. The other conduct complained of by Ms M. has not been established to the requisite standard.

Conclusion as to oppressive, abusive, discourteous and uncivil conduct

[225] For all of the reasons given I find that the complainant has not met the burden of proof in this case to establish that the respondent officers abused their authority and committed a disciplinary default by the use of oppressive, abusive, discourteous or uncivil conduct. This is not a situation where I am satisfied that these alleged abuses did not happen. It is simply a situation where I am not satisfied on clear and convincing evidence that the abuses did happen. It is important to make this distinction. There is no winner in a case such as this. The complainant has not had her most acute concerns validated. The respondent officers have had their reputations tarnished because of the doubt that I have expressed about what occurred. In my view, one way to avoid these kinds of situations in the future is for the police to videotape all interviews of suspects in their custody whenever possible.

[226] This is important for several reasons, a number of which have been referred to previously. For the most part the only time judicial officers have an opportunity to scrutinize the conduct of police officers in relation to the interrogation of suspects in their custody is in the context of a criminal trial where the prosecution is seeking the admission of evidence. Police interviews of suspects like Ms M. who are never charged with any offence are in general not subject to any judicial scrutiny, except where a complaint has been made under this Act. It is important that police conduct during these interviews also passes the ‘shocks the community’ test.

[227] While the burden of proof in proceedings under the Act is on the complainant, in the future the failure to video tape an interview where recording facilities are readily available may be seen as support for a

complainant's allegations of abuse. Judges may infer that the only reason the statement was not videotaped is because there was abusive conduct by the police officers.

SUMMARY OF FINDINGS

- The respondent officers committed a disciplinary default by searching the apartment without lawful authority.

- The other complaints set out in the notice of alleged disciplinary default, Exhibit 1, have not been established by the complainant on clear and convincing evidence and as a result those allegations are dismissed.

[228] In view of my finding that the respondent officers committed a disciplinary default by searching the apartment without lawful authority the ban on the publication of the respondents' names pursuant to s. 25 of the Act, which was granted at the outset of these proceedings is no longer in effect.

[229] Ms M. B., the judicial assistant responsible for arranging dates in L.E.R.A. matters, will contact the parties in order to arrange an appropriate date for submissions to be heard pursuant to s. 28(1) of the Act.

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Linda Giesbrecht, P.J.