IN THE MATTER OF: ***The Law Enforcement Review Act***
Complaint #6180

AND IN THE MATTER OF: An Application pursuant to s.17(1) of ***The Law Enforcement Review Act*** R.S.M. 1987, c.L75

B E T W E E N:

S.H.	)	Self-represented
Complainant/Appellant	)	
	)	
- and –	)	
	)	
Det. Sergeant R. H.	)	William Haight,
Cst. T. F.	)	Counsel for the Respondents
Cst. B. S.	)	
Sergeant S. B.	)	Sean D. Boyd,
Cst. M. G.	)	Counsel for L.E.R.A.
Det. Sergeant R.K. K.	)	
Respondents	)	

NOTE: THESE PROCEEDINGS ARE SUBJECT TO AN ORDER UNDER s.25 OF THE *LAW ENFORCEMENT REVIEW ACT* THAT NO PERSON SHALL CAUSE THE RESPONDENTS' NAMES TO BE PUBLISHED IN A NEWSPAPER OR OTHER PERIODICAL PUBLICATION, OR BROADCAST ON RADIO OR TELEVISION, OTHER THAN THE NAMES OF SERGEANT B. AND CONSTABLE S. WHOSE NAMES MAY BE PUBLISHED ONLY IN RESPECT OF THE DEFAULTS FOUND AS NOTED IN PARAGRAPHS 128 AND 129.

MARVA J. SMITH, P.J.

INTRODUCTION

[1] Ms S. H. filed a number of complaints under *The Law Enforcement Review Act* (the Act) concerning the conduct of six members of Winnipeg Police Service. The complaints arose out of the execution of a search warrant at Ms H.'s Winnipeg home early in the morning of March 23, 2003. Police were looking for a firearm. The occupants of the house, Ms H., her husband W. C., and their nine year old son N. H.-C. were ordered from their home while the search was conducted. Mr. C. was placed in one police

cruiser for a time, while Ms H. and their son were placed in another. In the course of the search, one officer discharged his firearm in an unoccupied washroom. When an officer discharges a firearm, police protocol dictates that the circumstances be investigated and the scene photographed promptly. Because of this procedure, it was quite some time before the family was allowed back in their home. During all of this time, Ms H. and her son were in a police cruiser.

[2] Both Ms H. and her husband were at all times co-operative with the police authorities. Both maintained that they had nothing to hide. No firearm was ever found.

[3] The Commissioner of the Law Enforcement Review Agency referred Ms H.'s allegations of disciplinary defaults to me for a hearing on the merits pursuant to s. 17(1) of the Act.

[4] Counsel for LERA was granted standing to make legal and jurisdictional arguments only.

[5] The Act provides a mechanism for citizens to complain about alleged police misconduct. The proceedings under LERA are somewhat akin to employer disciplinary proceedings. However, when police discharge their duties and exercise their powers they are performing a vital public function with obligations to the citizenry. LERA therefore provides an additional mechanism for oversight and discipline.

OVERVIEW OF COMPLAINTS

[6] There were three principal complaints. One concerned the discharge of a firearm in the home of the complainant by Detective Sgt. H.(now Sgt. H.). The complaint was that the officer abused his authority in contravention of s. 29(d) of the Act, in "failing to use discretion or restraint in the use and care of his firearm."

[7] The second concerned alleged disciplinary defaults by Detective Sgt. K. and Constable G. in their dealings with W. C. The allegation was that the officers failed to inform Mr. C. upon his detention of his right under s. 10(a) the *Canadian Charter of Rights and Freedoms (Charter)* to be informed promptly of the reasons for his detention, and of his right under s. 10(b) of the *Charter* to be informed of his right to retain and instruct counsel without delay. The complaint stated that these failures amounted to an abuse of authority under s. 29(a) of the Act.

[8] The third area of complaint concerned the conduct of Constables S. and F. in whose cruiser car Ms H. and her son N. were placed. They were in

the police car for approximately two and one-half hours. Ms H. alleged these officers likewise failed to inform her and her son of their *Charter* rights under s. 10(a) and (b) and that this failure constituted an abuse of authority under s. 29(a) of the Act. She also alleged that Sgt. B., as the officer in charge, abused his authority in failing to provide these rights.

[9] Ms H. also complained of further disciplinary defaults involving Constables S. and F. She alleges that these officers had abused their authority by using oppressive or abusive conduct contrary to s. 29(a) (iii) of the Act and further abused their authority by being discourteous or uncivil contrary to s. 29(a)(iv) of the Act, complaints which related to both her and her son. Her complaints revolved around keeping her and her son in the car for such a long time while not offering any food or drink or opportunities to use a washroom, and ignoring her requests to use the washroom, and generally being insensitive to the effect of the prolonged confinement in the cruiser car on her nine year old son.

[10] At the conclusion of the hearing Sgt. B. indicated a desire as senior officer in charge of Constables S. and F. to accept responsibility for any disciplinary defaults established in relation to those officers. Ms H. stated that she wished me to consider whether Constables S. and F. committed any disciplinary defaults as outlined in her complaint.

[11] At the outset of the hearing, Ms H. indicated that she was looking for answers to explain the officers' conduct in relation to the search. She filed this complaint because she believed her rights - and those of her son - were violated and they had been treated with discourtesy. She also alleged that the rights of her husband W. C. were violated, and that Sgt. H. was guilty of misconduct when he fired his weapon in her home.

THE HEARING – GENERAL OBSERVATIONS

[12] The complainant, her husband and child all testified. So did all of the respondents and a number of other officers who were on scene the morning in question.

[13] I observe that all of the witnesses in this hearing impressed me as honest individuals, endeavouring to provide me with their true recollections of the events that unfolded on the morning in question.

[14] The police were conducting a good faith investigation on a matter related to public safety. They proceeded in a manner carefully designed to minimize any risks of harm to the officers and the public, including the complainant and her family. The question in these proceedings is whether in

the course of the operation they overlooked their duties to or rights of the complainant and her family, and in so doing if they committed disciplinary defaults.

[15] As will be noted below, the position of the complainant Ms H. changed somewhat after hearing the explanations and evidence of the officers.

OVERVIEW OF FACTS LEADING TO THE COMPLAINTS

[16] The search warrant authorized the police to enter the H.–C. home at XXX Atlantic (and the garage at rear) in search of a black long barrel seven millimeter handgun, a leather holster and 10 rounds of ammunition. The warrant, issued by a magistrate after consideration of a sworn information to obtain the warrant, recited that there were reasonable grounds to believe that W. C., Ms H.'s husband, was in possession of a prohibited weapon. It should be noted that the same confidential informant provided the basis for two search warrants, one executed at XXX Lipton a matter of a couple of hours earlier. That search resulted in guns being located and two arrests being made.

[17] On the morning in question, special arrangements were made in conjunction with the intended search of the premises on Atlantic because the search was for a firearm. There were teams of officers who were assigned different duties. Sgt. B. was in charge of directing the search and the execution of the search warrant. He enlisted the assistance of Sgt. M. and members of his Emergency Response Unit (ERU). Sgt. M. assigned some ERU members to safeguard the outer perimeter (OP team) to ensure no one was coming and going, and others, as the assault or entry team, to enter the home and clear the premises – that is to ensure no one was remaining in the home after the known occupants – the H.-.family – had left. Sgt H. was part of the entry team – he was to be the lead officer entering the premises.

[18] Once the ERU unit cleared the premises and determined that the home was vacant it was to be the responsibility of the search team, as directed by Sgt. B., to enter and look for the items authorized by the search warrant.

[19] Sgt. B. determined that a dynamic or forced entry would not be required in this case having regard to the fact that Mr. C. had only a very minor and unrelated record. He decided that the first step in the operation would be to secure the perimeter with a visible police presence by positioning a cruiser car outside the home with overhead lights activated. Sgt. B. told Det. Sgt. K. and Constable G. they were assigned to take Mr. C.

into custody upon his exit from the home; Constables S. and F. he assigned to take control of the others in the home.

[20] Once the police presence was established (sometime before 6 a.m.) Sgt. B. attempted to contact the residents by phone to notify them that police were on scene to search the premises pursuant to a search warrant. His objective was to enlist their co-operation to vacate the premises. When the police arrived, the residents, Mr. C., Ms H. and her nine year old son N. were asleep. Sgt. B. telephoned several times but the family did not answer. In fact they heard the phone ringing but decided to ignore it as it was very early on a Sunday morning and they were in bed. Sgt. B. then employed a loudhailer (an amplified device on the police car) to rouse the residents, and tried calling again. Finally Mr. C. got out of bed, looked out the window and saw what appeared to be an armed "SWAT" team. He told his wife to answer the phone. According to Sgt. B. this occurred at about 6:10 a.m.

[21] When Sgt. B. spoke to Ms H. he learned there were two adults and a child inside. He instructed Ms H. that the family must vacate the premises immediately. He refused to discuss details of the search warrant over the phone. He told them they must leave the premises in single file with their hands visible. Ms H.'s recollection was that he told her their hands should be over their head. Perhaps she understood "hands visible" as hands above their head. At Sgt. B.'s instructions, the phone was turned over to Mr. C. when Ms H. went to go to the bathroom. Mr. C. roused their child.

[22] B. remained on the phone with Mr. C. until the family was ready to leave. They left quickly – Mr. C. did not take the time to put on shoes – he was barefoot. The family exited the house within 5 minutes of the first telephone contact with Sgt. B., with their hands over their heads. It was acknowledged that such an instruction could have been shouted by the OP team to the residents on their exit.

[23] When they got to the front porch, Ms H. could see members of what she thought was a SWAT team pointing guns at them from the neighbour's yard on the east side of the house. When the family left the home, the outer perimeter team had their guns visible and at the ready. I accept the testimony of the officers that guns were not pointed at anyone's head. That is completely contrary to training and would be grounds for possible removal from the ERU. Officers were however authorized to have their guns at the low ready - pointed at a part of the body at the low torso or below.

[24] However, the outside perimeter officers were at ground level and the house occupants left from an elevated porch. This could have affected

perspectives on the location of the body at which the guns were aimed. If guns were pointed at Ms H.'s lower torso, and her son was nearby, this too could have affected her perception. I daresay guns pointed in the direction of a person, even if at a low level on the body, would be extremely alarming to most citizens. The manner in which the family was awakened and the forced exit from the house with hands over their heads and guns visible, was no doubt very alarming, and especially so for Ms H. and her young son.

[25] Mr. C. had to unlock a padlock on their front gate, and as soon as he set foot on the public sidewalk he was handcuffed and taken to an unmarked police car and placed in the back seat. He was in the custody of Det. Sgt. K. and Const. G.

[26] Ms H. was taken to another police car – the one with lights flashing - and told she was to sit in the police car in the back seat. She was seated in the car by 6:16 a.m. Once in the cruiser car, she could not leave without the assistance of officers because the doors are not capable of being opened from the inside.

[27] Her son was also taken to the same police car by an officer who had his gun visible. She was alarmed and frightened but above all concerned about her son N. Her first priority was to comfort and protect her child, and to make sure he was safe. To calm him and put him at ease she tried to make light of the situation in her conversation with him. Yet it is clear that she was upset from the outset. It was suggested to her that she should have asked for information from the officers to help her deal with her son. She replied:

> "I think being detained and being told to sit in a car and not move, I think you're in fear when you're dealing with what's happening, you're in shock, you're stunned, you're not quite sure of what's going to happen to you. So I don't think I'm going to give the officers a full interrogation on exactly what they are doing. I did make mention that I just didn't understand what was going on and why this was happening to us."

[28] When questioned about who told her not to move, she replied:

> "I'm under the assumption not to move. Was I able to leave the vehicle? . . . We were told to sit in the back of the police car, told to sit. We weren't, we weren't given instructions, okay, you can leave after half an hour, you can sit here for ten minutes and then leave. We were told and instructed to sit in the back of a police cruiser car."

[29] All this time she stated she was in her mind detained – she didn't know what the legal ramifications were if she left the car.

> " . . you're being detained, you're in fear that if you do move, that there's repercussions from the law on what could happen to you. . . . Your son and you are just being asked to come out of the house with a weapon pointing at your head. I don't think you're in the mood to start questioning authority." (p. 118)

[30] Sgt. B. testified that he instructed S. and F. that they were to "take control" of Ms H. and her son. He testified that was to be done for their safety and officer safety. ERU members were on scene to clear the house and Ms H. and her son were not going to be permitted to wander on the front sidewalk in that situation. In addition, they had been awoken from sleep on a cold March day and exited the house without proper dress. He testified that directing them to the police car was for their comfort as well.

[31] Sgt. B. noted that the outside perimeter team of the ERU needed to ensure the safety of the ERU entry team – "therefore any resident of the home is not going to be allowed to wander on the front sidewalk." He elaborated:

> "As well, should there be any kind of confrontation with anybody that may still remain in the house we want to ensure that the people that have voluntarily come out of the house are well protected. And therefore that's why we have somebody take control of those people." (p. 107)

[32] Ms H. testified that she was never offered a phone call or told why she was being detained. She was never allowed to leave the car. She was never given her legal rights. As time progressed she learned tidbits of what was occurring. I find that at some point she was told about the warrant, and much later about the mishap with the gun. However, she was never in fact told why, and on what authority she was being kept in the back of a police car. Nor was she told that the reasons for her detention and her status in the car changed over time.

[33] In any event, at 6:24 a.m. - less than 10 minutes of Ms H.'s 6:16 a.m. confinement in the police car – Sgt. H., who was in the house to clear it as part of the ERU team, discharged his firearm into some gyproc in a second floor bathroom that was under renovation. There was no one in the bathroom or indeed anywhere in the house. According to Sgt. H., the discharge was a highly embarrassing accident. He was attempting to clear the bathroom by entering the darkened area with his gun drawn and the light on the gun illuminated. He somehow tripped, lost his balance and fired. He thought that the location of the light switch on his pistol in proximity to the trigger may have possibly contributed to the mishap. He surmised that when he lost his balance his finger accidentally pulled the trigger. Since the time of the

incident the light switches on these handguns have been changed. He later concluded that he had tripped on a carpet runner in the hallway.

[34] Sgt. B. was informed of the accidental discharge at once. The discharge of a firearm is far from an everyday occurrence. There is a policy and protocol triggered when a shot is fired.

[35] By 6:28 a.m. Sgt. B. initiated the standard protocol – he reported the incident to Inspector P. by telephone. He knew that protocol required identification specialists to attend and take pictures of the scene of the discharge. He knew the shift of these officers did not begin until 7:00 a.m. As it turned out the identification officer did not even arrive on the scene until 7:53 a.m. By this time Sgt. B. had left, instructing Constables F. and S. to remain with Ms H. and her son until the identification officer's work was completed. This took almost another hour.

[36] In the meantime, very shortly after Sgt. B. contacted Inspector P. to report the firearm incident, he spoke to Det. Sgt. K. outside his police car and told him that there had been an accidental discharge. At the same time K. relayed information from Mr. C. that there was an old gun in parts in the garage. The officers turned their attention to how to deal with the family dog in gaining access to the garage. Meanwhile, the ERU entry team had determined there was no one in the house so the search team was in the home looking for the items listed in the warrant. That search proved negative.

[37] Around the time he spoke to Det. Sgt. K., Sgt. B. then attended to speak to Ms H. He introduced himself and told her he was in charge. At that time he did not mention the discharge although he knew about it and knew it would result in delays. He spoke to her about the warrant, telling her the police had informant information that led to two search warrants that they were executing. Ms H. wanted to know the source, but Sgt. B. explained that this was a confidential informant and that information would not be provided. Ms H. thought she had also spoken with Sgt. B. about the dog but he denied it. I believe she did have a conversation with an officer about the dog but I think she was mistaken about it being Sgt. B.

[38] Sometime later Sgt. B. came back to the car where Ms H. was confined and told her that a gun had been accidentally discharged in their home by an officer and the incident had to be investigated. He told her that it was standard procedure that they would now unfortunately have to wait for the identification unit.

[39] Sgt. B. never advised her that she could contact legal counsel, nor did he read any rights to her.

[40] When asked by the court why rights weren't afforded to her, it seems clear that Sgt. B. did not consider that he or the officers under his command were obliged to do so:

> ". . . she's not a subject of the search warrant and is not under arrest at that point in time, contrary to her husband who was named on the search warrant . . . "

[41] When asked specifically whether he did not consider Ms H. and her son detained at any time he replied:

> "They were taken into control from the residence so that it can be cleared, and it is an issue of officer safety, their safety, public safety, that they be placed in a position that they're not going to be harmed."

[42] He advised that the search for the weapon in the house was concluded roughly at quarter after seven.

[43] When asked whether, for the period of time between 6:15 and 7:15 he did not believe she was entitled to her *Charter* rights because she was not arrested, he stated:

> "Correct. She wasn't arrested. Had her situation changed, had there been information that changed that, in which she was becoming a subject of a possible charge or any charges her rights would have been advised to her."

[44] I also asked him, once the search had been completed at 7:15 what authority the police had to continue detaining Ms H. in the police car. He answered by indicating that had she made a request to go anywhere, by all means she would have been allowed to, "except the house itself because the house had to be examined by our Identification unit." He rejected a suggestion they could have been allowed into a portion of the house because protocol indicates the scene should be kept pristine until identification specialists arrive to preserve it.

[45] Later in his evidence he stated that he did not believe Ms H. and her son were ever detained, they were merely under police control for safety reasons and because of the temperature. He acknowledged that safety issues had evaporated by 7:15 and after that she remained in the police cruiser purely for her comfort. (In fact safety issues evaporated much earlier, once the ERU cleared the home.) In any event, he stated that had Ms H. requested to go somewhere else it would have been "off you go."

[46] Sgt. B. never advised Ms H. that she could be taken to another location nor did he offer her a warm beverage. He noted that the officers with her could have dealt with such requests, including a request to use the bathroom.

[47] Although Sgt. B. regretted the delays and inconvenience to the family, he was not prepared to second guess the handling of the incident:

> ". . . it's unfortunate that we had an incident happen within the house, accidental discharge, which delayed people getting back into the residence for a lengthy period of time. I apologize for that. Unfortunately I have to say that we would still act as we did with the warrant." (p. 121)

[48] Around 8:00 in the morning Mr. C. was allowed to leave the cruiser car he was in yet Ms H. and her son were still seated in the back of the cruiser without any indication that they could leave. Mr. C. came over to the car she was in and got in the back seat. He tried to make light of the situation with their son (as Ms H. had earlier done) – but by this time Ms H.'s patience had run out and she told her husband it was no laughing matter.

[49] The officers, based on their experience all thought it would take only a short time – perhaps 45 minutes - to execute the warrant and have matters completed. Once the discharge occurred however, it was clear this time estimation was completely unrealistic.

[50] Serious delays occurred, including waiting for an identification officer to come on shift, to be summoned, to arrive, and to examine the scene. A painstaking examination of each sheet of gyproc took place and fruitless attempts were made to locate the bullet which was lodged in the wall.

[51] Meanwhile Ms H. and her son were still in the back of a locked police car. Even as matters dragged on, no one thought to provide Ms H. with information about her right to call a lawyer or to give her an opportunity to do so. Indeed it appears that the officers did not even appreciate that she was detained and had a *Charter* protected right to be informed of the reasons for her detention, a right to be informed that she could contact legal counsel, and a right to be given a reasonable opportunity to do so. The officers involved seemed to think such rights would only be triggered if a person were a suspect or an accused.

[52] Moreover, no one thought to offer her and her son the opportunity to go anywhere else. No one thought to offer Ms H. or her son any food or drink or an opportunity to use the bathroom. As time went on, Ms H., alarmed and upset from the outset and particularly concerned with her child, grew more and more uncomfortable and unhappy. It was evident at the

hearing that she still felt violated and unfairly treated and was especially concerned about the impact of the entire incident on her son N.

GENERAL PRINCIPLES

The Burden and Standard of Proof

[53] In these proceedings the complainant must bear the burden of proof. The respondent officers do not need to establish that they did not commit disciplinary defaults.

[54] Under s. 27(2) the Act, I am required to dismiss a complaint in respect of an alleged disciplinary default unless I am satisfied on *clear and convincing evidence* that the respondent has committed the disciplinary default. Although these are civil and not criminal proceedings, the legislators have chosen to elevate the customary standard of proof – the balance of probabilities – for civil proceedings. As observed by my colleague Judge Linda Giesbrecht in *RJM v. Sgt. P and Constable T*. (November 24, 2004), a complainant must satisfy a relatively high standard of proof. While proof beyond a reasonable doubt is not required, the onus is on the applicant to provide clear and convincing evidence. To be *convinced*, Judge Giesbrecht observed, means more than merely to be *persuaded*.

[55] While the standard of proof is helpful in analyzing the factual underpinnings of the case, counsel for the respondent officers seemed to suggest it should also be invoked in the interpretation of the statute as to what conduct – established by convincing and compelling evidence – can constitute in law a disciplinary default. I do not find the burden and standard of proof of direct relevance in that task. To be sure, the purpose of the statute and the serious consequences of a disciplinary default can be an interpretive aid in both the determination of the standard of proof and the determination of the meaning of disciplinary default or abuse of authority. However, the reference to clear and convincing evidence in the legislation deals essentially with the proof of factual issues including credibility and not questions of law concerning the ambit of s. 29.

THE COMPLAINT CONCERNING SGT. H.'S DISCHARGE OF THE FIREARM

[56] Section 29 of the Act states, in relevant part:

> A member commits a disciplinary default where he affects the complainant of any other person by means of any of the following acts or omissions arising out of or in the execution of his duties:

. . . .

(d) failing to use discretion or restraint in the use and care of firearms;

[57] Ms H.'s complaint alleged Sgt. H. had committed such a default. Certainly the officer did discharge his firearm in the course of executing the search warrant.

[58] Sgt. H. testified that he was part of the ERU team assigned to clear the house – that is to make sure no one was remaining in the house – so that officers could enter and safely look for the firearm and ammunition. He went to the second floor. He assigned two officers to cover the rooms in the hallway with open doors – that is to watch those doors to ensure no one emerged and presented a danger.

[59] He approached a closed door in the second floor hallway – which turned out to be a bathroom being renovated – and according to standard procedures determined he would "clear it" before passing by, to make sure no one was inside. He opened the door with his left hand, pushed the door open. As he went to go inside he took his Glock pistol in his right hand and pointed it inside, again according to standard protocol. He went to illuminate the light on the Glock by pressing the light buttons on the pistol. As he was doing this, he stepped forward and stumbled. Illuminating the area and entering was intended by Sgt. H. to be a fluid motion. When he stumbled, he attempted to grab the doorway with his left hand to regain his balance. While he succeeded in doing this, he heard a shot at the same time and then discovered it was his own gun that he had accidentally discharged with his right hand.

[60] He concluded that he had likely tripped on a plastic hallway runner. Pictures were filed showing the runner was disturbed. Ms H. testified convincingly that the runner was not disturbed when she left the house. I accept that testimony and conclude that the runner was somehow dislodged at the time of the tripping incident.

[61] I accept the officer's testimony that he certainly never intentionally fired his weapon – such an act would be unprofessional and grounds for discharge from the ERU and quite probably even the police force. In final argument, the complainant also agreed that there was no basis for concluding otherwise.

[62] During his testimony, Sgt. H. apologized to Ms H. for the delay and disruption caused by the accidental discharge. He was exonerated of any

misconduct in the incident by an internal Firearms Inquiry Board. While I am not bound to accept their findings, on the evidence before me I am convinced that they reached the correct conclusion. I note that the lighting system on the Glock weapon has been changed as the positioning of the switch in proximity to the trigger may have been a factor in the accidental discharge.

[63] While a negligent discharge could also be grounds for a finding of disciplinary default, there is no basis on which I can conclude there was any negligence on Sgt. H.'s part in relation to the incident. Even the most skilled and careful professional can have an accident. Indeed, in her closing submission, in light of Sgt. H.'s testimony, Ms H. did not press me to find a disciplinary default on Sgt. H.'s part.

[64] For the foregoing reasons I dismiss the complaint that Sgt. H."abused his authority by failing to exercise discretion or restraint in the use and care of firearms".

THE COMPLAINTS REGARDING THE FAILURE TO PROVIDE *CHARTER* RIGHTS - INTRODUCTION

[65] The complaints alleged that Mr. C., Ms H., and their son were denied their rights under s. 10 of the *Canadian Charter of Rights and Freedoms* which states:

> 10. Everyone has the right on arrest or detention
>
> (a) to be informed promptly of the reasons therefor;
>
> (b) to retain and instruct counsel without delay and to be informed of that right;
>
> . . . . ..

[66] The complainant alleges that such conduct constitutes a disciplinary default in that it constitutes an abuse of authority under s. 29.

[67] Section 29 states:

> A member commits a disciplinary default where he affects the complainant or any other person by means of any of the following acts or omissions arising out of or in the execution of his duties:
>
> (a) abuse of authority, *including*
>
> (i) making an arrest without reasonable or probable grounds,
>
> (ii) using unnecessary violence or excessive force,

(iii) using oppressive or abusive conduct or language,

(iv) being discourteous or uncivil,

(v) seeking improper pecuniary or personal advantage,

(vi) without authorization, serving or executing documents in a civil process, and

(vii) differential treatment without reasonable cause on the basis of any characteristic set out in subsection 9(2) of The Human Rights Code;

[68] I agree with my colleague Judge Chartier's opinion that the use of the word "including" (which I italicized above) means that an abuse of authority is not limited to the seven enumerated clauses in s. 29(a). See *J.W.P. v. Cst. R.L.* (November 15, 2004) No issue was taken with this point by the respondent officers.

[69] The issue then arises whether a *Charter* breach can constitute an abuse of authority and hence a disciplinary default. I agree with colleagues who have indicated that a *Charter* breach, in itself, does not automatically constitute a disciplinary default. But I also conclude that careful scrutiny needs to be afforded to apparent disregard for such fundamental rights and that such misconduct can constitute an abuse of authority. Indeed, where there is clear and convincing evidence that these rights have not been respected I find that there is an evidential burden on the officers to provide some explanation for the lapse. All of the evidence must then be considered when determining if a disciplinary default has been established by the complainant.

[70] Moreover, in evaluating apparent violations of constitutional rights by police officers, ignorance or lack of malice will not necessarily suffice as an explanation. Although the term "abuse of authority" could connote some element of malice, when the term is viewed in context and having regard to the purpose of the legislation – police accountability to the public – an overly restrictive interpretation is inappropriate. Certainly, the presence or absence of malice or intentional wrongdoing is a factor that would attract careful attention in determining an appropriate penalty for any disciplinary default that has been established by clear and convincing evidence. Citizens have the right to be served by a professional and competent police service.

[71] On the other hand, I agree that in adjudicating cases under LERA we decision makers must avoid the proposition that a breach of any *Charter* obligation leads directly to a finding of abuse of authority. In his LERA decision *F.D. v. Const. E.D. and Const. M.C.* (December 12, 2005), my former colleague Judge Swail warned about the potential for "disciplinary chill" (paras. 83-85) of such an approach.

[72] I accept the argument of the Commissioner that, depending on the circumstances a *Charter* breach can constitute an abuse of authority.

[73] In brief reasons of my colleague Judge Chartier in *J.W.P. v. Cst. R.L., supra* he declined to find a failure to provide s. 10 rights an abuse of authority instead observing that this constituted "a professional error with important legal ramifications." He observed that the superiors in the police department may be concerned by such a mistake. This case was relied on by the respondents and it was argued it should be applied.

[74] Certainly police officers perform a difficult and fundamental role in a democratic society subject to the rule of law. In order that they can discharge their role to protect the community, they have significant powers and correlative duties. One of those duties is the obligation to respect rights afforded to Canadians under the *Charter*. Their responsibilities under the *Charter* have undoubtedly made their jobs more difficult, at a time when changes in society have also increased the complexity and danger of policing the community. It is for this reason that decisions under the Act have expressed reticence in branding technical – and sometimes even more significant – *Charter* breaches as disciplinary defaults.

[75] Yet citizens do have a legitimate expectation that their fundamental rights under the *Charter* will be respected. It has been said by the Supreme Court of Canada that the courts are the guardians of the constitution. While that is so, the actualization or negation of many *Charter* rights crystallizes when there is contact between citizen and police. *Charter* rights need to be made real in the streets and not simply in the courtrooms. Citizens have a right to expect that police, as professionals, will meet their constitutional obligations.

[76] I observe that the protection found in s. 10 from being held incommunicado by police is a particularly important protection. It allows a person to obtain independent advice when in police custody. This right of access to counsel when in confinement is vital to a democracy based on the rule of law.

[77] In my opinion, violations of s. 10 – if clearly and convincingly established - deserve particularly careful scrutiny as potential disciplinary defaults. The principle of judicial comity is an important one which I have considered. To the extent that my approach may be a departure from the approach of my colleague, a higher court may have to give direction on the correct approach.

THE COMPLAINT ALLEGING A FAILURE TO PROVIDE *CHARTER* s.10 RIGHTS TO W. C. BY K., G., AND B.

[78] Under direct testimony, Mr. C. indicated there had been delays or omissions in providing him with all of his rights. However, on cross-examination he was prepared to acknowledge that his time frames could be mistaken as he had no watch on, and that the position of the officers – that those rights were afforded - could be correct concerning the s. 10 complaints he had made.

[79] There were some areas of cross examination where he stood his ground, and others were he readily acknowledged that suggestions put to him could be correct. He came across as credible and believable. He acknowledged that Det. Sgt. K. and Const. G. were "nice guys". In fact, some of his complaints related to matters not before me. He was clearly still upset that some officer had threatened to shoot his dog if he could not get his dog under control; and he did not understand why his wife and son were detained for so long.

[80] Officers K. and G. testified that they had in fact shown Mr. C. the warrant as soon as he was detained in the police car and told him of the reasons for detention and advised him of his right to counsel without delay. Det. Sgt. K. had professional, detailed and chronological notes of his dealings with Mr. C. When the chronology of events noted is compared with other known information (such as the time when Sgt. H. fired his gun) it is clear to me that the *Charter* rights were afforded promptly. While Sgt. K. chose not to follow the customary wording, he certainly conveyed to Mr. C. his rights. Mr. C. knew he could contact a lawyer but chose not to do so. He said he had nothing to hide and was fully co-operative with police. I found the testimony of these officers on the critical points unassailable.

[81] In final argument, Ms H. fairly conceded that she could not take issue with the officers' testimony on these points. It was also conceded that these officers had no dealings with Ms H. or her son.

[82] It follows that the complaints against Det. Sgt. K., Constable G. and Sgt. B. insofar as they relate to dealings with W. C. are dismissed. In

addition any alleged default concerning Det. Sgt. K. and Constable G. and Ms H. and N. H.-C. is dismissed.

THE COMPLAINT ALLEGING A FAILURE TO PROVIDE *CHARTER* s.10 RIGHTS TO MS H. AND HER SON BY S., F. AND B.

The rights under s. 10 apply on arrest or detention. Ms H. and her son were clearly not under arrest. Were they detained? They spent some two and one half hours in the back of a locked police car, having been directed to sit inside the vehicle by police.

[83] Counsel for the officers conceded that the pair was detained, and that *Charter* s. 10 rights should have been afforded, but were not. He characterized the key issue as whether in the circumstances the failure to afford those rights was an abuse of the officers' authority. Yet as the overview of facts made clear, the duty to afford such rights was not appreciated by the officers. In general, because these individuals were not suspected of criminal wrongdoing, the officers seemed to believe that the rights did not apply.

[84] For this reason a review of the established legal principles on the law of detention is appropriate.

[85] The leading case on the meaning of detention remains the seminal decision of the Supreme Court of Canada in *R. v. Therens*, [1985] 1 S.C.R. 613. Justice Le Dain, though in dissent on the ultimate disposition of that case, wrote the portion of the judgment dealing with the meaning of detention that has been accepted as the classic definition by Canadian courts in the last twenty years of *Charter* jurisprudence. The particular issue in the case was whether a person to whom a demand for a breath sample was made was "detained". It was common ground that Mr. Therens was not arrested when the breathalyzer demand was made.

[86] Le Dain J. began his analysis by quoting from the decision by Justice Tallis in the court below. In part, Justice Tallis eloquently observed:

> "Our nation's constitutional ideals have been enshrined in the *Charter* and it will not be a "living" *Charter* unless it is interpreted in a meaningful way from the standpoint of the average citizen who seldom has a brush with the law. The fundamental rights accorded to a citizen under s. 10(b) should be approached on the basis application of the *Charter* should not be blunted or thwarted by technical or legalistic interpretations of ordinary words of the English language. Using this approach, our citizens will not be placed in a position of feeling that the statements in the *Charter* are only rights in theory. If these rights are to survive and be available on a day-to-day basis

> we must resist the temptation to opt in favour of a restrictive approach. . . (as quoted by Le Dain J. in *Therens, supra,* at para. 38.)"

[87] In a similar vein Justice Tallis also observed:

> "[s]urely the rights under s. 10(b) of the *Charter* are to be extended to the rank and file members of society who may have little contact with the justice system." (quoted by Le Dain J. in *Therens* at para. 39.

[88] The purpose of s. 10 of the *Charter*, Le Dain J. held, is to ensure that in certain situations a person is made aware of the right to counsel and is permitted to retain and instruct counsel without delay. While arrest or detention are not the only situations when a person may benefit from or need access to counsel, they are the situations in which the restraint of liberty prevents access to counsel or induces a person to assume that he or she does not have access to counsel. (para. 48)

[89] In *Therens, supra*, Justice Le Dain went on to detail three types of detention. First, when a person is subject to physical constraint, a person is clearly detained.

[90] Secondly, a detention occurs ". . . when a police officer or other agent of the state assumes control over the movement of a person by a demand or direction which may have significant legal consequence and which prevents or impedes access to counsel." (para 49) If a person who is the subject of a demand or direction by a police officer reasonably can regard himself or herself as free to refuse to comply, the person is not detained. However, if failure to comply could lead to legal consequences such as a criminal charge of failure to provide a breath sample or obstruction of a peace officer in the execution of his or her duties, there is clearly a detention. (paras. 51 and 52)

[91] Thirdly, Le Dain J. went further and discussed the concept of psychological detention, when a citizen may perceive that he or she must comply with a demand or direction of a peace officer. He explained:

> "In my opinion, it is not realistic, as a general rule, to regard compliance with a demand or direction by a police officer as truly voluntary, in the sense that the citizen feels that he or she has the choice to obey or not, even when there is in fact a lack of statutory or common law authority for the demand or direction and therefore an absence of criminal liability for failure to comply with it. Most citizens are not aware of the precise limits of police authority. Rather than risk the application of physical force or prosecution for willful obstruction, the reasonable person is likely to err on the side of caution, assume lawful authority and comply with the demand. The element of psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice, is enough to make the restraint of liberty involuntary." (para 53)

[92] Le Dain J. then concluded with this important statement of the law delineating a third mode of detention: "[d]etention may be effected without the application or threat of application of physical restraint if the person concerns submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist." (para 53)

[93] It seems to me that any reasonable bystander seeing Ms H. and her son confined in the back of a police cruiser for in excess of two and one-half hours would conclude that they were being detained by police. It is doubtful that this detention was merely "psychological" and thus arguably more complex for officers to appreciate. This was suggested by counsel for the officers. They were directed to sit in the back seat of a locked police car. They were never told they were free to go, and in fact were confined there for two and one half hours.

[94] While the armed ERU were clearing the house as a prelude to a search for a gun and ammunition, it is doubtful that Ms H. had any choice to refuse to comply with the direction that she be confined in the police car – she could likely have been charged with obstruction of a peace officer in this situation. In any event her liberty was physically restrained when confined in a locked police car as a result of a direction from police. So on any test of the meaning of detention, she (along with her son) was detained.

[95] Yet even at the hearing into this matter, and despite their counsel's concession that Ms H. was detained and her s. 10 rights were triggered, none of the officers with direct dealings with the mother and son seemed prepared to acknowledge this fact. It appears that the police believe *Charter* rights are only to be afforded to those they suspect of criminal activity.

[96] While the focus of police work is no doubt geared to detecting and apprehending criminal wrongdoers, police do come in contact with innocent citizens and on occasion subject them to detention. It is ironic indeed if on the ground and at street level lesser rights are provided to the apparently innocent than to those suspected of wrongdoing. This is exactly what happened here in that Mr. C. – who was initially a suspect - was afforded more rights and greater consideration than Ms H. and her son.

[97] The apparent failing by the officers to grasp their duty to Ms H. is perhaps understandable given that the focus of their work - and likely training - is to apprehend criminal wrongdoers. That is cold comfort to persons such as the complainant. Moreover, the attitude by the officers was not mean or malicious in any sense, rather it was mistaken, but it was also paternalistic, and discordant with rights based constitutional protections.

Citizens have come to expect that they have their rights when in contact with the authorities and this is a legitimate expectation in a democratic society based on the rule of law. The officers acknowledged that they had a cell phone and had they provided informational rights to counsel, it would have been simple to accommodate any such request.

[98] Ironically if the officers had simply complied with s. 10 rights – informing Ms H. of the changing status of her detention and affording her an opportunity to access counsel, options may have been explained and explored that would have been easily accommodated – such as taking her and her son to a friend or relative's, or having such a person pick them up and take them to another location, or dropping them off at a nearby restaurant. Providing rights would not only have benefited Ms H., but also the police officers involved.

[99] It has been observed that *Charter* jurisprudence is evolving and often complex. Is it fair to expect officers in the field to be aware of every developing nuance of the *Charter* and discipline them if they fall short? While that argument has merit, it is hard to accept its application to the case at bar. The definition of detention was delineated in *Therens* more than twenty years ago by the Supreme Court of Canada. It has been repeated in hundreds of cases since. Ms H. and her son fit four-square in that definition. With due respect to the officers, there is nothing gray or ambiguous about the facts or the legal status arising from them here.

[100] In the circumstances here, I conclude that the failure to provide *Charter* rights to Ms H. as required by s. 10(a) and (b) was an abuse of authority. At the hearing Sgt. B. offered to accept responsibility for any such disciplinary default found. He himself had at least two conversations with Ms H. in which these rights could and should have either been afforded or he should have directed and ensured that Officers S. and F. (whom he considered the less experienced team on site) did so.

[101] Sgt. B. is a very experienced and apparently otherwise very professional officer. He was in charge; if he held the misinformed and incorrect attitude he did, I think it is appropriate that the finding of abuse of authority be made against him and not against Constables S. and F., even though they were complicit in the *Charter* breach. I pause to add that broader accountability should be the norm in future, now that this issue has been addressed. I am not prepared to find a second default concerning the child N., as, in these circumstances, providing the rights to Ms H. would have sufficed. That aspect of the complaint is dismissed.

[102] Thus I find that Sgt. B. abused his authority by failing to provide Ms H. with her *Charter* rights under s.10(a) and 10(b). She was never told of her right to retain and instruct counsel without delay. She was never in fact told of the reasons for her detention, as opposed to the fact of the search warrant. Moreover, Sgt. B. left the scene without fully explaining why she remained effectively detained. This hearing will have to reconvene to determine the appropriate penalty for this default.

[103] Given my findings I dismiss the complaints against Constables S. and F. concerning their alleged abuses of authority related to S. H. and N. H.-C. in relation to *Charter* sections 10(a) and 10(b). They had no dealings with W. C. so the complaints against them in relation to Mr. C. are also dismissed.

[104] The issue of whether or not Ms H. and her son were lawfully detained was not directly at issue in these proceedings, given the way the complaints were framed. Here the police did in fact detain Ms H. and her son and therefore s. 10 rights crystallized.

[105] Generally speaking, a warrant to search does *not* authorize detention of those within the premises. See: *Levitz v. Ryan* (1972), 9 C.C.C. (2d) 182 (Ont. C.A.); *R. v. Kirby*, [2001] 10 W.W.R. 750 (Man Prov. Ct) at paras 79-83. However, there are circumstances where officers can take control of occupants to prevent interference with the search. Given that this was a search for a firearm and the police did not know if others were in the home (who could emerge with a firearm), the police were likely justified in briefly detaining Ms H. and her son while the house was cleared by the ERU. Again, given the search was for a firearm, they may possibly have been justified in preventing her from entering the home until the search for the firearm was completed, even after the ERU cleared the home. That does not mean they had a right to detain her in the police car during this search. I simply wish to make it clear that the authority for the detentions themselves – or even the exclusion of her from her home after the firearm mishap - were not issues requiring findings in these proceedings.

THE COMPLAINTS OF OPPRESSIVE OR UNCIVIL CONDUCT BY CONSTABLES S. AND F. IN THEIR DEALINGS WITH S. H. AND HER SON

[106] There are two remaining but related complaints. Ms H. says that Constables S. and F. abused their authority by using oppressive or abusive conduct or language (s. 29(a)(iv) and by being discourteous or uncivil(s. 29(a)(iv) to her and her son.

[107] The crux of these complaints is that during the two and a half hours they were in the police car, Ms H. and her nine year old son were never asked if they needed or were given the opportunity to use the washroom, to get something to drink or to eat. Nor were they asked if they needed anything else or wanted to go anywhere. These facts are essentially uncontested.

[108] Ms H. claims in addition that she repeatedly asked to use the washroom and was ignored. Her evidence on this point was supported to some considerable extent by her husband and her son. This evidence was believable. Officer F. denied that any such requests were made, and testified that had they been made he would have done something about them. His evidence was also believable. Perhaps requests were made but not heard and thus not intentionally disregarded. There was evidence that Officer F. was making a personal telephone call and the radio was on. In any event the evidence is not clear and convincing enough for me to make a finding that these requests were made and knowingly disregarded.

[109] Thus in analyzing this aspect of the complaint I will focus essentially on what the officers did not do, rather than what was done.

[110] It is uncontested that the mother and child were in the police car for two and a half hours, after having been awakened from their sleep very early on a Sunday morning. Moreover N. was a young child, only nine years old at the time, and the officers were well aware of that. Constable F. acknowledged that the back of a police car is an uncomfortable place.

[111] Constable S. admitted that during that time frame he never asked either if they had to go to the bathroom; that he never asked either of them if they were hungry or thirsty. Nor did Constable F. ask those questions of Ms H. or her son. Constable S. said that as the senior person in the car, doing those things should have been his responsibility. He conceded that those were the sorts of questions that he should have asked and expressed his regret that he had not done so. He maintained that there was nothing malicious or intentional. He kept thinking that things would take only a little bit longer, but they dragged on. He testified that he has experience dealing with children and that he would often buy children chocolate bars or take them for something to eat.

[112] He said he made an assumption that the priority was to get back in the house, but he never asked if Ms H. and her son wanted to go anywhere else. As things progressed he made various assumptions about how long things

would take, none of which he shared with Ms H. and several of which turned out to be incorrect.

[113] To his credit, Constable S. indicated that in hindsight, if he had known how long the whole scenario would take to unfold, he would have asked if they wanted to go somewhere for coffee or anywhere else. He testified he had done those types of things in other cases.

[114] Sgt. B. left the scene prior to the arrival of the identification unit, and with no real idea how much longer it would take. He told the officers to remain with Ms H. and N. until the identification unit had completed their work. He never suggested that they offer to take the pair anywhere.

[115] With this factual background in mind has the complainant established the alleged disciplinary breaches? Each one is quite distinct from the other, in my opinion.

[116] Do the facts justify a finding of oppressive or abusive conduct or language? In argument counsel for the officers suggested that the interpretation of oppression could be that indicated by Judge Cohan in *Weselake and Kentziger* (June 21, 1996) meaning "conduct that is burdensome, harsh or wrongful, or which lacks probity or fair dealing", suggesting that the conduct could not be so characterized in this case. Judge Cohan was relying on authorities which dealt with corporate law and in particular the context of a shareholder remedy for oppressive conduct. With respect, I find that dictionary meanings and case law from the field of criminal law – where liberty issues are potentially engaged - may be more helpful in analyzing the meaning under the Act, which deals with police and civilian encounters.

[117] According to the Random House Dictionary (2nd Edition) "abusive" means . . . "treating badly or injuriously, mistreating, especially physically.". That seems a reasonable interpretation of the legislator's intent. Likewise that dictionary defines "oppressive" as "the exercise of power in a burdensome, cruel or unjust manner." The thrust of that definition seems equally apt in interpreting the clause at issue. Also helpful is the decision of the Supreme Court of Canada when interpreting oppressive conduct as a ground for excluding a statement of an accused person. The court said that conduct that would shock the conscience of the community would justify exclusion. See *R. v. Oickle* [2000] 2 S.C.R. 3.

[118] Here the officers' conduct was not burdensome or cruel; nor did it smack of shockingly bad or injurious treatment. The complained of conduct constituted acts of omission only, and the omissions, while possibly

discourteous, as will be discussed below, cannot fairly be characterized as oppressive or abusive. In the result the complaint pursuant to s. 29(a) (iii) of the Act is dismissed.

[119] It remains to consider whether the officers abused their authority in being discourteous or uncivil. In interpreting the ambit of this provision, it must not be forgotten that the duties of a police officer are very difficult. They are often in contact with persons who are extremely dangerous, with others who hate police, or who may be in the midst of a volatile and emotional outburst or who are otherwise incredibly difficult to deal with. Moreover it has also been often observed that the investigation of crime cannot be conducted according to the rules of the Marquess of Queensbury. If every harsh word or uncivil remark was held to be an abuse of authority, police would be spending far too much time defending themselves from complaints under the Act. In my view that was not what the legislators intended.

[120] Context will be critically important in interpreting the reach of this provision. In this case police were dealing with a little nine year old boy and his mother, who had been awakened and forced to leave their house early in the morning at a time when guns were visible. The officers could not help but realize such an event could be frightening and upsetting; that the child might be hungry or thirsty; or might need to use the bathroom. They should have taken steps to reassure the child and offered to take the boy and his mother somewhere to get something to eat or drink and made sure a bathroom was available. Certainly, the two of them should never have been confined to a police car for two and a half hours without such offers being made.

[121] They were not handling any other duties at the same time that they were dealing with Ms H. and her son. They had plenty of time on their hands.

[122] The only excuse offered was that they didn't realize it would take that long until the family was allowed back into the home. At the latest, when they became aware of the accidental discharge, and were clearly unable to predict when the situation would end, they should have made the offers. Indeed given that this additional delay was entirely the result of the police mishap, special consideration and apologies would have been appropriate. Sgt. B. should have made sure that the boy's needs were considered before he left the scene.

[123] Given that the boy was with his mother, the lack of consideration is perhaps somewhat less serious than had he been alone with the officers. Yet this alone does not absolve the officers of their dereliction of duty towards the child. As Ms H. testified, and quite understandably, she was in no mood to question authority or make demands.

[124] I believe that in this case, Constable S. failed to live up to the high and considerate standard he usually follows when dealing with children. N. was entitled to the same thoughtful treatment and kindness that he has extended to other children. I find his omissions to amount to uncivil and discourteous conduct and an abuse of his authority in his dealings with Ms H. and her son. His conduct toward the child cannot be meaningfully separated from the conduct toward the mother.

[125] As the more senior of the two officers, and, according to his testimony, the one in charge as between him and his partner Constable F., it is appropriate Constable S. be the one found to have committed this abuse of authority.

[126] Late in the hearing Sgt. B. offered to take responsibility for any disciplinary defaults found against either Constable S. or Constable F. Although he could have done more to ensure appropriate consideration of the boy's needs, the original complaint did not name him and I believe it would be inappropriate and jurisdictionally suspect to hold him accountable. I decline to do so, particularly as the complainant made clear she would not abandon the original complaint against Constables S. and F. and accept Sgt. B. as a respondent in their place.

CONCLUSION

[127] I find that Sgt. B. committed a disciplinary default when he abused his authority by failing to provide Ms S. H. with her *Charter* s. 10(a) and 10(b) rights, in the circumstances outlined above.

[128] I find that Constable S. committed a disciplinary default when he abused his authority by being discourteous or uncivil towards N. H.-C. and his mother S. H. , in failing to offer the child food, drink, bathroom facilities and other considerations.

[129] I order that these proceedings be reconvened as soon as reasonably possible to hear submissions from the parties on the appropriate penalties for these disciplinary defaults pursuant to s. 28 of the Act.

[130] In all other respects, the complaints are dismissed.

[131] With respect to the named respondents, other than Sgt. B. and Constable S., the complaints having been dismissed, the ban on publication of their names pursuant to s. 25 shall continue indefinitely. The publication of the names of Sgt. B. and Constable S. is permitted only in respect of the disciplinary defaults referred to in paragraphs 128 and 129 above.

[132] I specifically recommend to the Chief of Police, that the Winnipeg Police Service, by appropriate means, remind officers that *Charter* rights apply in circumstances such as those before me. Further, officers should be given more information and training on their constitutional duties generally. According to the evidence I heard from the officers they may not be receiving adequate training in this regard.

[133] I thank counsel for the officers, counsel for LERA, and Ms H. for the helpful and thoughtful approach taken during these proceedings.

DATED at the City of Winnipeg, in Manitoba, the 18th day of August 2006.

"ORIGINAL SIGNED BY:"

MARVA J. SMITH, P.J.