

LAW ENFORCEMENT REVIEW AGENCY

File No. 40

BETWEEN:

H. W. (J.J. H. ),

Complainant,

v.

CONSTABLE R. C. ,

Respondent.

EXCERPTS FROM PENALTY HEARING

Law Enforcement Review Agency Hearing held before Madam Chairperson Martha Chuchman and Messrs. Charles Meighen, Robert Rae, Bruce Chegus and Robert Fabbri at the Charter House Hotel, SE Hargrave and York, Winnipeg, Manitoba, on Tuesday, November 3, 1992.

APPEARANCES:

PANEL:

Presiding Officer:	Madam Chairperson M. Chuchman
Deputy Presiding Officer:	Mr. C. Meighen
Board Member:	Mr. R. Rae
Board Member:	Mr. B. Chegus
Board Member:	Mr. R. Fabbri

Counsel for Complainant:	Mr. M.J. Pollock
Counsels for Respondent:	Messrs. A. McGregor and P.R. McKenna

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Per: Violette Michaylow

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

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M. Z. , having first been sworn,  
testified as follows:

EXAMINED BY THE CHAIRPERSON:

Q Inspector Z. , the board has summoned you here this morning in accordance with section 28(1) of The Law Enforcement Review Act where in determining a penalty with respect to disciplinary default, the board shall hear submissions from the parties and then subsequently details of the service record of the respondent, and we have summoned you here this morning for that particular purpose. If you wish, you may sit down.

A Thank you very much.

Q And perhaps you can advise the board now of Constable C. service record.

A I certainly will. Perhaps to do that, to assist you in your understanding of how the service records are maintained, I will explain very briefly the five items that comprise the service record. Some of these items are actually kept in hard copy within the personnel division, in a paper file, and two of the other items that will be referred to are actually computer-based and are generated as required.

The two items that I will be producing for you are two of the documents that are computer-based, one being an

outline of the divisions that Constable C. served; the second being an outline of the training that he took as a member of the Winnipeg Police Department.

The three other items that normally would comprise a service record are any records related to defaults under the Law Enforcement Review Act, any convictions for charges under the City of Winnipeg Police Department regulations, and lastly, any commendations earned by the officer as a member of the department.

In relation to the last three, I can inform you that there are no default convictions under L.E.R.A., there are no convictions under the regulations, and during his service with the department, Constable C. has not received any commendations.

So what I will do is present to you the first two documents that I referred to.

Q These are the only copies you brought with you, Inspector Z. ?

A That's correct.

THE CHAIRPERSON: Before we have these records marked as exhibits, I will allow counsel the opportunity to -- I take it there are no objections from either counsel to these documents. I will have them marked as exhibits then.

If we can have them marked separately as exhibits, not collectively, my recollection is that there were no

other exhibits in this sentencing portion of the hearing. Perhaps we could just have it marked as Exhibit 1 and then Exhibit 2 in the sentencing hearing -- or penalty hearing, rather.

(EXHIBIT 1: Personal History - Placement or Assignment Record of Constable C. )

(EXHIBIT 2: Personal History - Record of Training of Constable C. )

THE CHAIRPERSON: Since this witness was summoned by the board, do the members of the board have any questions for this witness with respect to the evidence? Do either counsel have questions for this witness? Mr. Pollock.

CROSS-EXAMINATION BY MR. POLLOCK:

Q Inspector Z. what is a commendation?

A A commendation is a recognition given to an officer for work that is exemplary.

Q And so if an officer does a good deed or is reported by a citizen, is that the subject matter of a commendation?

A No. The way the process works is, if an officer is involved in an activity that his supervisor feels goes beyond what we would normally expect an officer to do, he would put that forward for consideration by a committee within the department for special recognition.

If that committee agrees that such recognition

would be appropriate, the officer is then given a commendation for the service he provided. It could be an arrest. It could be saving an individual from a fire situation. Those are common examples.

Q I see. And you stated a common example being an arrest, did you say?

A An arrest that is out of the ordinary and where the officer went above and beyond the call of duty.

Q And what is the period of time that this record represents? How many years' period? Is it a three-year period?

A I believe it's from the date Constable C. was hired, which I think was around 1984. I would have to refer to the actual record.

Q So this is 1984 until when?

A Well, until the present time.

Q Now you stated that you are looking at defaults, convictions under the City of Winnipeg regulations and any earned commendations. What about the conviction under the City of Winnipeg regulations, what is that?

A If an individual were charged with an offence under our regulations, the process is somewhat similar to L.E.R.A. in that there is an investigation. At the outset, if there is a complaint, there is an investigation conducted which may result in a hearing where a finding could be levied and a penalty then imposed by the chief of police as

opposed to, in this case, the L.E.R.A. board.

Q And you stated that there is a hard copy and there is a computer-based copy. This is obviously the computer-based copy?

A These two items that I have presented, yes, are on the computer and are printed out as required. The copies of convictions under L.E.R.A., the regulations and commendations are, in fact, maintained in hard copy and stored in the officer's file.

Q Are complaints to L.E.R.A. also kept in this service record?

A Only if there is a conviction registered.

Q So there may be complaints that may have fallen by the wayside which, as department policy -- that is department policy, I take it, that it's only convictions?

A It's not department policy.

MR. MCGREGOR: It's right under the Law Enforcement Review Act.

THE WITNESS: It's part of the legislation which establishes what will and what will not be put in the service record.

MR. POLLOCK: Thank you very much.

THE CHAIRPERSON: Mr. McGregor, any questions for this witness?

MR. MCGREGOR: Could I see those exhibits again, please?



THE CHAIRPERSON: Perhaps I can just ask, which exhibit was marked Exhibit 1 and which 2? One was the record of placement and the other was record of training, as I recall.

THE REPORTER: Exhibit 1 was the personal history attendance record.

THE CHAIRPERSON: It is the placement or assignment, record of placement or assignment, is Exhibit 1, and then the record of training is Exhibit 2. Thank you.

CROSS-EXAMINATION BY MR. MCGREGOR:

Q To assist the board, division 34 is training division or --

A 34 is personnel.

Q Division 16 is district 6, is that correct?

A That's correct.

Q Which is the Fort Garry area, Fort Garry out to Headingly, is that right?

A Yes, it is.

Q And district 12 is basically the St. James/Assiniboia area?

A That's correct.

Q Because it shows that he was in division 16 and then in division 12. Then division 33 --

A Is training.

Q Division 33 is training division. What was 34

again, personnel?

A Personnel.

Q So from January 15, 1990 to the present date, you have him in the personnel division, is that right?

A That is for record purposes because he isn't at work.

Q Now it shows district 2, he was there from 1984, which I assume would be his first posting, active posting --

A That's correct.

Q -- there from December 3, 1984 through to March 19, 1989, is that correct?

A I don't have the benefit of referring to the record, but if --

Q Yes. You can --

THE CHAIRPERSON: You have used district 2 and then you have used division 12. Is that one and the same, St. James/Assiniboia, not having that in front of us?

BY MR. MCGREGOR:

Q Yes, 2 and 12 and 6 and 16 are one at the same. It's the latter number that always is the applicable one.

A Your dates were correct.

MR. FABBRI: Is that latter date March 19, 1989, is that right?

THE WITNESS: March 19, 1989, yes.

BY MR. MCGREGOR:

Q Your position presently, Superintendent Z.

is what the executive --

A First of all, thank you for the promotion. I'm an inspector. I'm the executive assistant to the chief.

Q I do what I can for you. Now the service record, under section 32(2) of the Act, it says, "... all matters relevant to the professional conduct of the member ..." and includes other things. That then is the department's service record vis-a-vis this individual, is that correct?

A Yes, it is, sir.

Q The record shows no defaults whatsoever under the Law Enforcement Review Act, is that correct?

A That's correct.

Q The record shows absolutely no criminal convictions or convictions for Highway Traffic Act offences or the like, is that correct?

A That's correct.

Q And this issue of commendations, as you have explained, it's for something above and beyond normal duty, isn't it?

A Yes, it is.

Q You would agree with me, would you not, that many service records show no commendations as you understand commendations?

A That's correct.

Q Because the commendation is something that is, indeed, somewhat special?

A Very much so.

Q And when you talk about an arrest, you don't give people commendations for an ordinary type of arrest. It's a special type of arrest where something special has been shown by the officer, is that right?

A Yes, sir.

Q Now you also have, as you explained, an internal disciplinary procedure, don't you?

A Yes, we do.

Q Now no charges have ever been laid against Constable C. for default of any internal discipline matters, have they?

A That's correct.

Q And those internal disciplinary matters cover virtually everything, don't they?

A The regulations are somewhat extensive, yes, in terms of the conduct that they would address.

Q If there was any misuse of a firearm, that would come forward, wouldn't it?

A That would be covered by the regulations, yes, if there was such a situation.

Q And in fact the discharging of a firearm must be reported at all times, doesn't it?

A Yes, it does, unless if it's in training.

Q And with Constable C. , you have only one discharge of a firearm during the course of his work, isn't

that correct?

A I presume you probably are correct. I didn't specifically look for that.

Q When you were going through his record, there are things that we know as performance evaluation reports?

A Yes, all members of the department receive an annual performance evaluation report.

Q Can you explain who does that performance evaluation?

A It's done jointly by the officer's immediate supervisor and another supervisor in that division as a secondary evaluator.

Q And where does the report go to then?

A The report is maintained by the evaluation officer who is assigned to the personnel division.

Q All right. If there is anything wrong or if the individual is not performing satisfactory, does something take place?

A If there is documented performance or documented evidence of below standard performance in any of the categories that the officers are rated, and it is of such a nature that the supervisor feels that it needs to be formally brought to the attention of the department, it would be documented in the performance evaluation report.

And a performance objective could then be put in place to address the below-standard performance and that

performance objective would become part of the performance evaluation report.

Q One of the things, as I recall, in a performance evaluation report, is public contact. It's dealings with the public?

A That's one of the factors that they are evaluated on, yes.

Q Have you ever found that Constable C. had any difficulties in his dealings with the public?

A I reviewed the P.E.R. file and although it falls outside of the service record, if the board wishes me to comment on it --

MR. POLLOCK: Well, excuse, objection. We're here to deal with the service record.

THE CHAIRPERSON: We are here to deal with the service record, I would agree, and if that is not a portion of the service record, then we do not wish to hear from this witness on that.

MR. MCGREGOR: Am I being told that I can't ask this witness in general terms as to what this individual who has been found guilty of an offence, what his position was in this regard? Because if I am being told that, I want to put my objection strongly on the record. And for the purposes of the record at this point in time --

THE CHAIRPERSON: Well, this witness has been called by the board to comment on the service record, the

contents of the service record, specifically for that purpose. It seems to me it would have been up to you, Mr. McGregor, if you wanted to ask those questions, it would have been up to you to produce the witness to give that information.

MR. MCGREGOR: No, I think we will reach another point in a continuing series of errors by people, in that it's going to become apparent that the recommendation that goes forward to you did not take into account any service records whatsoever and it's mandatory under the Act.

THE CHAIRPERSON: I am sorry. I do not understand your point.

MR. MCGREGOR: I will leave it for another time. I'm just looking at the first words of section 32(2), "The chief of police shall record on the service record all matters relevant to the professional conduct of the member, including ..."

Now if I'm being told that assessments contained in -- or a performance evaluation report is not relevant to the professional conduct of a member, I will object, but you have already made that decision. Do not the performance evaluation reports show the professional conduct of a member? That is a question.

THE CHAIRPERSON: Well, the section also reads that it shall be recorded on the service record and this witness has already indicated that it is not recorded on the

service record. And what this board is entitled to hear is what is recorded on the service record.

It seems to me that had Mr. Pollock brought up that question or counsel acting for a complainant in any other matter brought up that question, that I would be hearing objections from counsel for the respondent officer that it is not part of the service record.

MR. MCGREGOR: I just want it clear as to that is the position of the board, that personnel evaluation reports are not part of the service record.

RE-EXAMINED BY THE CHAIRPERSON:

Q Well, perhaps maybe the board can ask this question of the witness. It is called the personnel -- what do the letters stand for?

A Performance evaluation report.

Q Performance evaluation report. Is that recorded on the service record?

A No, it is not. The performance evaluation reports on each member are maintained in a totally separate file from the file which contains the service record, and it's a decision that was made by the executive of the department in terms of what was going to be part of the service record and what was not.

The decision, as I understand it, that was made, was that the performance evaluation reports did not comprise



part of the service record.

Q Is there anything else on the service record or anything else that is recorded on the service record that you have not mentioned earlier today?

A No. It consists of the five areas that I discussed at the outset.

THE CHAIRPERSON: Well, it seems that the section is quite clear in that this board is entitled to hear evidence only with respect to the service record and what is reported on the service record. In fact, if the personnel -- sorry, the P.W. --

THE WITNESS: P.E.R.

THE CHAIRPERSON: -- P.E.R. is not part of the service record, is not recorded on the service record, then we are not entitled to hear evidence pertaining to the P.E.R.

RE-CROSS-EXAMINATION BY MR. MCGREGOR:

Q Did your department carry out an investigation as to the events of March 9, 1988? And if so, what was the result of that investigation?

MR. POLLOCK: What is the relevance of that question? That doesn't pertain to the service record?

THE CHAIRPERSON: First of all, perhaps this witness should be asked whether he has any knowledge or personal knowledge of an investigation being carried out, if

the witness can answer that question.

THE WITNESS: Well, first of all, I presume we're talking about the initial date of the incident as March 9, 1988?

BY MR. MCGREGOR:

Q Yes, the date of the death of J.J. H.

A I don't have any firsthand knowledge about that investigation and I wasn't personally involved in that investigation.

THE CHAIRPERSON: And I guess the second question would be, is there anything recorded on the service record with respect to any such investigation?

THE WITNESS: No, there isn't.

THE CHAIRPERSON: Then that question is improper.

MR. MCGREGOR: Okay. Over my objections on those points, and I hope you understand my objections on those points because they are quite relevant, but I have no further questions of this witness.

THE CHAIRPERSON: Are there any questions arising as a result of the questions put by the counsel to this witness from the board? Mr. Chegus.

EXAMINED BY MR. CHEGUS:

Q Yes, my question is a little removed from the questions posed by the counsel, but I am just curious a little on what you mentioned, that right now Constable

C. status is in the personnel department. I am not familiar with how your groups insurance works and so on, but is there any third category? In other words, right now he is still recorded as in active employment in personnel?

A No. What we do is they're classified as supernumerary and transferred to personnel division for accounting purposes, but the actual position he occupied can then be filled once he is placed on the supernumerary status.

Q So somewhere in there, is there a status of being disabled or being paid through disability or whatever? Like, is there --

A A person that is paid through disability would go on the supernumerary status.

Q I see. So he's not, basically, technically actively employed?

A My understanding is he's currently on workers' compensation.

MR. CHEGUS: Fine. Thank you.

THE CHAIRPERSON: Mr. Pollock, any questions resulting from the questions of Mr. McGregor or the board?

MR. POLLOCK: No, Madam Chairperson.

THE CHAIRPERSON: And, Mr. McGregor, do you have a question as a result of the question put to this witness by Mr. Chegus?

MR. MCGREGOR: No.

THE CHAIRPERSON: In that case, we have finished with this witness. Thank you, Inspector Z. . You may be excused.

THE WITNESS: Thank you.

I, Violette Michaylow, Court Reporter, do hereby certify that the foregoing pages, numbered 1 to 17, is a true and accurate transcript of the proceedings herein as recorded by me to the best of my skill and ability.

V. Michaylow  
Violette Michaylow  
Court Reporter

THE LAW ENFORCEMENT REVIEW ACT  
LERA COMPLAINT NO. 819  
BOARD HEARING NO. 40

B E T W E E N:

H. W. (J.J. H. , Deceased),

Complainant,

- and -

CONSTABLE R. A. C. ,

Respondent.

D E C I S I O N

MAJORITY (CHUCHMAN, FABBRI, CHEGUS):

In the early morning hours of March 9th, 1988, J. J. H.  
("J.J. H. ") received a bullet wound which caused his death.  
Immediately prior to the incident Constable R. A. C. of the  
City of Winnipeg Police Department had in the course of his duty  
been acting in response to a reported stolen vehicle.

Constable C. and his partner came on the scene in the vicinity  
of X ADDRESS , in the City of Winnipeg and subsequently  
Constable C. separated from his partner. Fellow officers

joined in the search for the car thief suspect who was described as wearing a grey jacket, native and approximately 22 years of age. A suspect was apprehended at 2:39 a.m. and placed into custody. Constable C. did not participate in the actual arrest of the suspect but was, during the course of the pursuit, carrying and using his portable radio.

At approximately 2:41 a.m. a loud noise was heard followed by radio communication from Constable C. asking for assistance and a request for an ambulance. Constable C. was found with his service revolver in his right hand standing over the body of a man later identified as J. J. H. Mr. H. received a mortal gunshot wound in the chest area. He was given medical attention at the scene and conveyed to hospital whereupon he subsequently died.

The Complainant, H. W. brother of the deceased, J. J. H. filed a complaint against Constable R. A. C. alleging certain disciplinary defaults pursuant to Section 29 of The Law Enforcement Review Act ("the Act"). Mr. W. made his complaint as a third party and as a person aggrieved by his brother's death as contemplated by section 6(2) of the Act. Mr. H., the person affected under the complaint was not competent to give consent to the processing of the complaint, by virtue of his demise.

Therefore section 9(2) did not apply.

The alleged disciplinary defaults set out in the Notice of Alleged Disciplinary Default, (Exhibit 1), and forming the basis of the complaint were as follows:

(1) On or about March 9, 1988 abuse his authority by committing an assault and/or battery upon the person of J. J. H. in contravention of Section 29(a) of The Law Enforcement Review Act.

(2) On or about March 9, 1988 abuse his authority by using unnecessary violence or excessive force towards J. J. H. in contravention of Section 29(a)(ii) of The Law Enforcement Review Act.

(3) On or about March 9, 1988 abuse his authority by using oppressive or abusive conduct or language towards J. J. H. in contravention of Section 29(a)(iii) of The Law Enforcement Review Act.

(4) On or about March 9, 1988 abuse his authority by failing to exercise discretion or restraint in the use and care of firearms in contravention of Section 29(d) of The Law Enforcement Review Act.

Act.

The Board dealt with a preliminary motion put forward prior to commencement of the hearing and determined that it had jurisdiction to hear the complaint. Further, the Board decided that the alleged disciplinary defaults itemized under (1) above should be struck out thereby leaving the remaining alleged defaults itemized in (2), (3) and (4), as the basis on which the hearing would proceed.

At the hearing upon completion of the evidence for the Complainant, a further motion was made that the complaint should be dismissed for lack of any evidence. The Board decided that there was no evidence to support the disciplinary defaults alleged under (3) above but that there was evidence for the complaint to proceed in respect of the disciplinary defaults itemized in (2) and (4) above.

When the hearing resumed, counsel for the Respondent Officer chose not to call any witnesses. The hearing concluded with argument from counsel for both parties.

As an initial consideration the Board reviewed the argument of counsel for the Complainant that the matter be referred to the Attorney-General for the possible laying of criminal charges. The circumstances of the incident giving rise to this complaint have



been subject to previous reviews. A referral at this time pursuant to section 35(1) of the Act would only be warranted if new and relevant evidence was disclosed during the hearing which was not available at the previous reviews. We find that no such evidence has been disclosed.

The Board must consider whether the essential elements of the alleged disciplinary defaults now before this Board have been proven. In facing the alleged disciplinary defaults, the Respondent Officer is presumed innocent of such action until proven otherwise. Section 27(2) of the Act imposes upon the Complainant the burden of proving the alleged disciplinary default beyond a reasonable doubt.

In argument, Counsel for the Respondent Officer has again raised the issue of identity and contends that this element has not been proven beyond a reasonable doubt. This argument was first put forward by Respondent's Counsel in his motion at the conclusion of the Complainant's case. In Law Enforcement Review Board proceedings the Respondent is neither compellable to testify nor required to attend the proceedings. As a result of the non-attendance of the Respondent, the Board did not have the benefit of direct identification evidence, however in considering the Respondent's said motion, the Board was satisfied that identity had

been proven, based on the evidence adduced. There is no basis for this Board to reach a contrary conclusion.

With respect to the element of jurisdiction, the Board heard evidence from a number of witnesses as to the date, time and location of the incident giving rise to the alleged disciplinary defaults. It is noteworthy that these witnesses were professional witnesses and we are satisfied that jurisdiction has been proven.

Finally, the Board must consider whether the commission of each disciplinary default has been proven beyond a reasonable doubt. We find that with respect to the alleged disciplinary defaults of failing to exercise discretion or restraint in the use of firearms, there is not sufficient evidence before the Board to find beyond a reasonable doubt, that the said disciplinary defaults have been committed. They are therefore dismissed.

The Board has considered the remaining alleged disciplinary defaults of abuse of authority by using unnecessary violence and abuse of authority by using excessive force towards J. J. H. . Based on the evidence adduced we find that the allegation of abuse of authority by using unnecessary violence has not been proven beyond a reasonable doubt and therefore dismiss same. The majority of the Board came to a different conclusion when dealing

with the allegation of abuse of authority in use of excessive force.

It is important to note that the alleged disciplinary default occurred in the presence of two individuals - the Respondent Officer and an adult male civilian. The civilian died shortly after the incident at issue, and the Respondent Officer did not give evidence during the hearing. Section 24(10) of the Act guarantees the Respondent Officer the right to refuse to testify, with section 24(9) allowing the Board to conduct its hearing in the absence of the Respondent Officer.

With the Respondent Officer having the right to be presumed innocent of the alleged disciplinary default, the Complainant is required to prove the alleged disciplinary default beyond a reasonable doubt. In doing so, the evidence may be highly circumstantial, but the actual facts are known to the Respondent Officer, and he has the right to explain any justification with regard to his actions when discharging his duties.

From an overall analysis of the evidence, what became clear to the Board is the fact that discharging a firearm so as to lodge a bullet into the body of a person is a measure of excessive force. Moreover, the use of excessive force, without justification,

amounts to an abuse of authority. With the only living witness to the actual facts surrounding the incident at issue being the Respondent Officer, and the Respondent Officer not being compellable as a witness, the Complainant faced a heavy onus in proving the alleged disciplinary default beyond a reasonable doubt.

What evidence did the Complainant put forward on the issue of excessive force? From the testimony of Constable D. S. , we learned that after he heard a loud "report" (sound), he recognized Constable C. voice over the radio asking for his (C. ) partner's assistance and an ambulance at a certain location on X ADDRESS Constable S. and his partner, Constable H. attended at the location in question on the north side of X ADDRESS, east of X ADDRESS , at which location Constable S. encountered Constable C. standing at the feet of an adult male lying on the ground, which individual would later be identified as J. J. H.

In his testimony, Constable S. recalled his conversation with Constable C. immediately upon attending at the scene of the incident. After asking whether Constable C. was "okay" Constable S. asked "Is this guy (J. J. H. ) shot?". According to Constable S. , Constable C. responded "Ya, he went for my gun and I shot him".

From the statement made by Constable C. and the subsequent Autopsy Report (Exhibit No. 26), it is certain that J. J. H. sustained a gunshot wound during the time at issue. From other evidence during the hearing, it is clear that the gunshot wound was from a revolver issued to Constable C. . It is equally clear from the evidence of several police officers called, that discharging the firearm and lodging a bullet into the body of a person is the ultimate method of force in the continuum of force.

From the evidence of several different police officers it is also apparent that the ultimate force would be applied only in a case where it appeared no other application of force would be appropriate in the circumstances. In other words, application of the ultimate force, regardless of its excessive nature, would be appropriate or justified in exceptional cases. In the present case, the statement "He went for my gun and I shot him" could be the basis of a claim that the actions of the Respondent police officer were justified. However, on its own, that evidence does not substantiate justification for the use of the ultimate or excessive force. Indeed, several police officers testified that a number of actions are available to a police officer if someone goes for an officer's revolver, and that other methods should be applied before resulting to the ultimate force. Accordingly, in the absence of some clear explanation, the Board is faced with

evidence from a number of different sources that the use of the ultimate or excessive force is not warranted simply because someone went for an officer's gun.

In the present case, the Board must determine whether the application of the ultimate force by the Respondent Officer amounted to excessive force within the meaning of subsection 29(a)(ii). From an overall analysis of the evidence the majority of the Board is satisfied that the Complainant has proven beyond a reasonable doubt that the Respondent Officer's discharging of his firearm and lodging a bullet into the person of the late J. J. H. amounted to an act of excessive force.

There is no evidence offered by the Respondent Officer as to an explanation or justification for application of such force. Based on the evidence presented, and in the absence of any actual direct evidence as to justification, the majority of the Board is satisfied that the Complainant has proven beyond a reasonable doubt that Constable R. A. C. did on March 9, 1988, commit a disciplinary default of abusing his authority by using excessive force towards the late J. J. H. .

MINORITY (MEIGHEN, RAE):

We agree with our fellow Board Members that:

1. There is insufficient evidence with respect to the allegations of the use of unnecessary violence, a failure to exercise discretion in the use and care of a firearm and that these alleged disciplinary defaults must be dismissed.
  
2. We also agree that a referral to the Attorney-General under Section 35 would be redundant at this stage.

In arriving at this Minority Decision we are mindful that the Law Enforcement Review Board is a quasi-criminal administrative board. We are restricted to the powers contained in our enabling statute. We are subject to the following specific provisions:

- (a) Section 27(2) mandates the Board to dismiss a complaint in respect of an alleged disciplinary default unless satisfied beyond a reasonable doubt that the Respondent has committed the disciplinary default;

(b) Section 24(4) provides that basically the rules of procedure that apply are those applicable to summary conviction proceedings;

(c) Section 24(1) provides the Respondent is not compellable as a witness.

The obvious starting point in considering this matter is the presumption of the Respondent's innocence. The Complainant argues a shifting onus and that once a "prima facie" case is established the onus switches to the Respondent to justify the conduct complained of, namely whether there was the use of excessive force. With respect, we disagree with the notion of this shifting onus and believe that the Complainant maintains the onus to establish the alleged disciplinary default beyond a reasonable doubt.

It is alarming that after all the time that has been devoted to this complaint, the Board has little concrete evidence before it as to what really occurred on the early morning of March 9, 1988. Basically what we know and what is germane are the following:

(i) we have the statement against interest "he went for my gun and I shot him";



- (ii) J. J. H. died from a fatal gunshot wound from the gun of Constable R. C.

We also have evidence as to what is a theoretical continuum of force and we have evidence from three witnesses called by the Complainant who, with respect to this continuum of force, have testified as follows:

- (a) Constable I. gave evidence that there are no holds barred to gain control of a firearm and that you use whatever force you think is necessary in the circumstances with respect to a fight over your gun. He also gave evidence to the effect that it was almost endless the number of factors involved that would influence what steps should be taken to protect your firearm.
- (b) Constable S. testified that if he felt his life was threatened (with respect to control of his firearm) there would be no holds barred in taking steps to maintain control.
- (c) Deputy Chief G, testified that an officer isn't encouraged to run around with

his gun out. He testified that an officer must use common sense and his own discretion as to if and when he draws his revolver.

What we don't know is the circumstances surrounding the encounter between the deceased and the Respondent on March 9, 1988.

D. R. gave evidence that the Respondent said words to him to the effect "of course we had our guns out". We are not able, on that evidence alone, to determine conclusively whether the Respondent had his gun out when he encountered the deceased. We don't know what happened between the Respondent and the deceased. There is little physical evidence of a struggle between the deceased and the Respondent, except that it appears probable that the deceased did knock the Respondent "on his butt".

Shooting someone fatally is obviously at the top end of the spectrum in the continuum of force. What precipitated this tragedy, however, is not clear. Counsel for the Complainant in his argument at page 33 says "Why C. used his weapon against citizen H. remains a mystery" and at page 41 "What happened from the time C. went down to the moment he shot H. remains a mystery".

Without knowing what did happen, we feel this Board is left in a position of uncertainty and doubt as to the circumstances surrounding the conduct complained of. There is insufficient evidence to allow us to determine whether the force used by the Respondent was excessive. We are of the view that the onus of proving this fact is on the Complainant.

Based on the foregoing, we are unable to conclude beyond a reasonable doubt that the Respondent abused his authority by using excessive force and we would dismiss the last allegation of the complaint.

In making the above findings, we acknowledge the difficulty that the Complainant finds himself in, namely being unable to compel the attendance of the Respondent. That statutory provision in circumstances such as were found in this case goes a long way to frustrate what we perceive to be the intent of the legislation, that is, to review the conduct of Peace Officers to determine whether they have abused their authority.

It is hoped that the replacement legislation is better thought out, better worded and more workable than the present statute.

Without being able to make reasonable conclusions as to the facts surrounding the alleged incident, the ability of the Board to make a reasoned decision is severely handicapped.

DATED this 1st day of September, 1992.

THE LAW ENFORCEMENT REVIEW BOARD:

*Martha I. Chuchman*

MARTHA I. CHUCHMAN

*Charles O. Meighen*

CHARLES O. MEIGHEN, Q.C.

*Robert R. Fabbri*

ROBERT R. FABBRI

*Robert Bae*

ROBERT BAE

*Bruce Chegus*

BRUCE CHEGUS