IN THE MATTER OF:		*The Law Enforcement Review Act* Complaint #2008-103
AND IN THE MATTER OF:		An Application pursuant to s. 13 of *The Law Enforcement Review Act*, R.S.M. 1987, c.L75

BETWEEN:

L. V., Complainant/Appellant	)	M. D. Glazer, Counsel for the Complainant/Appellant
- and -	)	
Constable D. C., **Constable S. M.,** **Sergeant R. H.,** **Constable T. D. and** **Constable E. H.,** Respondents	)	P. R. McKenna, Counsel for the Respondents
	)	S. D. Boyd, Counsel for the Commissioner of the Law Enforcement Review Agency (L.E.R.A.)
	)	S. L. Hanlin, Counsel for the Winnipeg Police Service
	)	April 14, 2010

NOTE: These Reasons are subject to a ban on publication of the Respondents' names pursuant to s. 25 of *The Law Enforcement Review Act*.

Corrin, P.J.

Introduction

[1] The Law Enforcement Review Agency, more commonly known as L.E.R.A., is a provincial entity created by statute, *The Law Enforcement Review*

Act, in order to allow the investigation of complaints made by citizens about the way the police have treated them. This complaint regime recognizes a belief in the principle that police officers must always treat our citizens with respect, professionalism and evenhandedness. If a police officer is found to have abused this authority, the officer will be subject to penalty. L.V. filed a written complaint dated May 21, 2008 regarding an alleged incident occurring on May 17, 2008. In his complaint, he outlined that he had been assaulted by a number of police officers, both during his arrest and while he was detained in custody thereafter.

[2] After investigation of the complaint, the Commissioner issued a letter of decision dated December 19, 2008, giving reasons why he was of the view that the evidence did not support the matter being referred to a provincial court judge for full hearing pursuant to s. 17 of *The Law Enforcement Review Act*.

[3] The Appellant has sought judicial review of the Commissioner's decision pursuant to s. 13(2) of the Act.

[4] The Appellant's counsel, Mr. Martin Glazer, made submissions on behalf of Mr. V. on January 25, 2010. The Respondents and counsel for the City of Winnipeg Police Service and L.E.R.A. presented submissions on March 15, 2010.

The Relevant Provisions of *The Law Enforcement Review Act*

Commissioner not to act on certain complaints

13(1) Where the Commissioner is satisfied

(a) that the subject matter of a complaint is frivolous or vexatious or does not fall within the scope of section 29;

(b) that a complaint has been abandoned; or

(c) that there is insufficient evidence supporting the complaint to justify a public hearing;

the Commissioner shall decline to take further action on the complaint and shall in writing inform the complainant, the respondent, and the respondent's Chief of Police of his or her reasons for declining to take further action.

Notice to complainant

13(1.1) A complainant may be informed of a decision not to take further action under subsection (1) by the Commissioner's sending a notice, by registered mail, to the complainant at the complainant's last address contained in the Commissioner's records.

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Application to provincial judge

13(2) Where the Commissioner has declined to take further action on a complaint under subsection (1), the complainant may, within 30 days after the sending of the notice to the complainant under subsection (1.1), apply to the Commissioner to have the decision reviewed by a provincial judge.

Procedure on application

13(3) On receiving an application under subsection (2), the Commissioner shall refer the complaint to a provincial judge who, after hearing any submissions from the parties in support of or in opposition to the application, and if satisfied that the Commissioner erred in declining to take further action on the complaint, shall order the Commissioner

(a) to refer the complaint for a hearing; or

(b) to take such other action under this Act respecting the complaint as the provincial judge directs.

Burden of proof on complainant

13(4) Where an application is brought under subsection (2), the burden of proof is on the complainant to show that the Commissioner erred in declining to take further action on the complaint.

Ban on publication

13(4.1) Notwithstanding that all or part of a hearing under this section is public, the provincial judge hearing the matter shall, unless satisfied that such an order would be ineffectual,

(a) order that no person shall cause the respondent's name to be published in a newspaper or other periodical publication, or broadcast on radio or television, until the judge has determined the merits of the application;

(b) if the application is dismissed, order that the ban on publication of the respondent's name continue; and

(c) if the application is successful, order that the ban on publication of the respondent's name continue until the complaint has been disposed of in accordance with this Act.

Decision of provincial judge final

13(5) The decision of the provincial judge on an application under subsection (2) is final and shall not be subject to appeal or review of any kind.

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Issues Requiring Determination

[5] As always, the legal determinations for a provincial judge in a s. 13 review will depend upon what the appellant alleges are the errors committed by the Commissioner in the making of his decision.

[6] On a s. 13 review, the identification of the alleged error is critical because of the connection between the alleged error, the standard of review and the ultimate legal determination required of the judge. Depending upon the issues or errors alleged, the court's ultimate determination has to be made using a more, or perhaps less, demanding standard of review.

[7] The most demanding standard of review to be imposed upon the Commissioner in a s. 13 review is the standard of correctness. That standard is to be imposed only in cases where the Commissioner has committed an identifiable jurisdictional error.

[8] A jurisdictional error in the context of the Commissioner's initial decision can be committed in three ways:

1. The Commissioner has failed to act as required by his jurisdiction.

2. The Commissioner has failed to act within the limits of his jurisdiction.

3. The Commissioner has reached his decision by applying the wrong test or by misapplying the right test (either of which may involve an error of mixed fact and law).

[9] If this reviewing court determines that none of the above three jurisdictional errors have been committed, the court must move to the next step of analysis where the determination will involve a standard of review based on reasonableness, not correctness.

[10] At this next stage of its analysis, the court must determine whether the Commissioner has assessed and evaluated the evidence "reasonably". At this stage the court must determine whether the Commissioner undertook his assessment and evaluation of the evidence reasonably, i.e., whether the Commissioner's conclusion was rational in the context of the evidence.

[11] In addressing the question of reasonableness, the court is required to determine whether the Commissioner's decision to not proceed further is a

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decision that can be seen as rationally consistent or coherent in the context of the available evidence. If such rationality does exist, the Commissioner's decision should not be disturbed.

Standard of Review Discussed

[12] In his decision in L.E.R.A. Complaint No. 2004/172, Provincial Judge G. Joyal, as he then was, examined the considerations that a judge must take into account when reviewing a decision of the Commissioner, i.e., what standard of review should a judge apply.

[13] In Judge Joyal's analysis, if no jurisdictional error is present the judge then moves to the next stage of analysis. This will involve reviewing the reasonableness of the Commissioner's investigation of the matter and his assessment of the evidence (see paragraphs 9 and 10). Judge Joyal states at paragraph 21:

> …if the Commissioner's conclusion is based on a reasonable assessment of the evidence and if that conclusion is one of the rational conclusions that could be arrived at, the Commissioner's determination is entitled to deference and it ought not to be disturbed.

[14] Subsequent to Judge Joyal's decision in L.E.R.A. Complaint No. 2004/172 the Supreme Court of Canada has revisited the law of judicial review and the standard of review applicable to decision makers (see *Dunsmuir v. New Brunswick*, 2008 S.C.C. 9). Essentially the Supreme Court comes to the same conclusion as Judge Joyal, stating that there are essentially two standards of review: correctness and reasonableness.

[15] The Supreme Court states that the standard of reasonableness is applicable because certain questions that come before administrative bodies do not lend themselves to one specific, particular result, i.e., they may give rise to a number of possible and reasonable conclusions. At paragraph 47 the Supreme Court states:

> …Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

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[16] More recently, in L.E.R.A. Complaint No. 2005/186, Provincial Judge T. Preston relied on and adopted the reasoning of Judge Joyal and the new test set out in *Dunsmuir*. Concluding that the standard of review when looking at the Commissioner's decision is "reasonableness", Judge Preston stated at paragraph 25:

> The question to be answered is this: did the Commissioner assess the evidence reasonably? In other words, have the Commissioner's reasons been transparently, intelligibly and rationally articulated?

[17] Judge Preston went on to describe the role of the reviewing judge in s. 13 reviews. He stated as follows at paragraph 26:

> It is important for Ms P. to know that other people, herself included, may draw an equally supportable conclusion. I may have reached another, rational conclusion. That is not my function. My function is to see if the Commissioner has made a reasonable assessment of the evidence. In other words, I must examine whether the Commissioner drew a rational conclusion, one that could reasonably be drawn on the facts of this case….

and at paragraph 39:

> …I may not have drawn the same conclusion. That is not the test here. As long as the Commissioner has properly assessed the complaint reasonably and has drawn a rational conclusion, and I have concluded that he has done so, I will not interfere with his decision.

[18] This Court concurs with Judge Preston's reasoning and conclusion in such regard.

The Complaint

[19] L.V. made numerous claims in his complaint. The Appellant alleged that the Respondent officers used excessive force and unnecessary violence when arresting and detaining him in relation to an allegation that he committed break and enter at XXXXX Street in the City of Winnipeg on May 17, 2008. Allegations of police assault and violence were documented in his signed L.E.R.A. complaint dated May 21, 2008 as follows:

- Being thrown against the police car during arrest;
- Locking the handcuffs used to restrain the Appellant in an excessively tight manner;

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- Several of the officers forcibly shoved a small object that the Appellant described as feeling like a small crucifix or a baggie into his rectum;
- The Respondents and several unidentified police officers kicked the Appellant while he was at the Public Safety Building;
- The Respondents also stomped on the Appellant's toe causing the toenail to later come off. The Public Safety Building "beating" was alleged to have been administered for about 30 to 45 minutes;
- It was also alleged that the officers prevented the Appellant from going to sleep at the hospital and purposely kept squeezing his handcuffs at such time; and
- The Appellant reported that he was injured during the incident and in such regard received a scrape to the left side of his face, a black left eye, a swollen left hand, scrapes on both his wrists and his back, soreness to his back, scrapes on both knees as well as his left elbow, fracture of the left elbow, and the loss of his toenail on his left big toe.

L.E.R.A. Investigation

[20] On September 24, 2008 the Respondent officers attended upon Investigator James Haslam at the offices of the Law Enforcement Review Agency in Winnipeg. At such time the officers were interviewed and all confirmed the accuracy of the information reported in their various police reports and completely denied the allegations of abuse as described by Mr. V. They all related that the Appellant was very intoxicated and seemingly under the influence of drugs and that his behaviour was both bizarre and violent. The officers indicated that the injuries Mr. V. suffered were as a result of his resistance upon being arrested, there being only one exception and that was the injury to the big toe, which they were either unaware of or could not comment on. The Respondents said that Mr. V. informed them after being released from hospital that he had consumed cocaine and magic mushrooms just prior to his arrest. The officers advised Mr. Haslam that they used only appropriate force consonant with the resistive behaviour displayed by Mr. V.

[21] Mr. Haslam obtained copies of all police reports filed by the Respondents incidental to Mr. V.'s arrest. These included Narrative Reports, a Prisoner Injury Form, a Prisoner Log Sheet, a Use of Force Report, an Event Chronology Report,

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an Event Unit Information Report, a Unit History Report, a Subject Profile Report, an Offence Detail Report, an Arrest Report and Narratives, an identification photograph of Mr. V. and all the Respondent officers' notes. The police reports and interviews differed, sometimes radically, from Mr. V.'s version of events. The arresting officers told the investigator that on May 17, 2008 at approximately 3:25 p.m. they attended to a complaint of break and enter at XXXX Street in the City of Winnipeg and located the Appellant in an upstairs bathroom of the residence with the door locked. When he refused to surrender to police, they forced the door, which struck Mr. V. Observing a knife in his right hand, the Appellant allegedly not being compliant with police voice commands, one of the officers put Mr. V. in a joint lock. At this time the Appellant was noted to strike his head on the door frame and resist the officer's attempt to secure his free arm. One of the officers then applied fist strikes to the Appellant's back and shoulder, commanding him to expose his free right arm. The Appellant was then disarmed and handcuffs were then applied.

[22] The Use of Force Summary Report observed that the Appellant resisted being searched for additional weapons and began to fight with two of the officers before being placed in the rear of the cruiser car.

[23] Upon arrival at the Public Safety Building at 3:45 p.m., the Report related that Mr. V. was removed from the cruiser and taken up the elevator for viewing by Sergeant H. He was then placed in an interview room. At this point the officers stated that they attempted to search him for concealed weapons. Mr. V. resisted and was allegedly forced to the floor on his stomach. One of the officers, Constable E.H., pulled Mr. V.'s pants halfway off at this time. No weapon was found at this time but $1,320, consisting of 46 twenty dollar bills, two fifty dollar bills and three one hundred dollar bills, fell to the floor from his crotch area. At this point it was observed that Mr. V. had an abrasion on his forehead with minor bleeding.

[24] It was observed that Mr. V. continued to be in an "excited state". The writer of the Report states that he was accordingly shackled to a holding room table in order to prevent any further altercation. While in this state, the accused is alleged to have told the officers that he had a large crucifix inserted in his rectum. The Summary Report indicates that it was then that the police decided that a medical examination was required to examine both the accused's rectum and the cause of his "excited state".

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[25] In making his decision, the Commissioner also obtained copies of various medical reports and assessment sheets from the Winnipeg Fire Paramedic Service, the Health Sciences Centre and the Winnipeg Remand Centre. As well, a newspaper article dated May 30, 2008 from the Winnipeg Free Press was placed on file. There were no independent witnesses identified in this matter.

[26] The Commissioner determined that there was insufficient evidence to draw a conclusion that the police acted with unnecessary violence or excessive force as defined in s. 29(a)(ii) of *The Law Enforcement Review Act*.

The Commissioner's Decisions

Various Allegations of Police Brutality

[27] The December 19, 2008 letter of decision makes it clear that since there were two distinctly different versions of what occurred at the scene of the arrest, the Public Safety Building and the hospital, the Commissioner's main concern became the reliability of the Complainant. The Commissioner's decision is particularly concerned about Mr. V.'s admitted use of drugs and alcohol on the incident date and the effects these substances appeared to have had on him.

[28] The Commissioner learned that two independent third parties rendered medical assistance to Mr. V. after the police decided to have him transported to the Health Sciences Centre for examination. The first such party to interact with the Appellant, a paramedic, noted the Appellant complained of rectal pain and bleeding following **self-insertion of a foreign object, thought to be a crucifix**. The paramedics recorded the Appellant to have advised normal bathroom habits and frequency but stated that he was presently unable to pass the foreign object after several attempts. They also noted that the Appellant freely admitted to having consumed "four grams of mushrooms" and "five or six beers today" (see Patient Care Report, page 60 of Commissioner's file).

[29] The second independent third party was staff at the Health Sciences Centre ER. Their records advised the Commissioner that the Appellant again reported a **self-inflicted foreign body in his rectum**, possibly a crucifix. They also reported that Mr. V. was violent and had to be restrained. Their medical reports indicate that a rectal examination was performed and no foreign object was found. It was also noted that there was no visible injury to Mr. V.'s anus or rectum. The Intake Sheet notes that the Appellant informed staff that he had consumed four grams of mushrooms and some beer, as well as cocaine. There was a determination that the Appellant suffered from drug intoxication. The hospital Integrated

[30] The impact of the effects of drugs and alcohol on Mr. V. in terms of the Commissioner's assessment of his reliability is certainly highlighted by the Complainant's description of the "crucifix/baggie incident". Initially Mr. V. told attending paramedics that he had put an object, possibly a crucifix, in his rectum. The paramedics noted this information in their Patient Care Report as follows: "33Y/O male c/o rectal pain and bleeding following self-insertion of foreign object thought to be a crucifix". At the hospital, the Complainant proceeded to describe the incident in two different ways: the HSC Intake Sheet notes "Pt has self-inflicted foreign body to rectum? Crucifix." Mr. V. then proceeded to describe the "crucifix incident" two different ways in his initial L.E.R.A. complaint of May 21, 2008. On the first handwritten page of his complaint, he contradicts what he told the ambulance crew and the hospital staff about self-insertion, now claiming "They ripped down my pants and it felt like a small crucifix they were trying to shove up my ass." Then on the second handwritten page of his complaint, the Complainant changes the description of the object completely to a baggie, stating "It felt like a baggie that they shoved up my ass." Mr. V. then goes on to allege in his L.E.R.A. complaint that a Health Sciences Centre doctor actually pulled such an objection from his rectum: "I was examined at the hospital, I told them I had something up my ass, I didn't know what it was. They (the Doctor) said it was a baggie and he asked me if it was drugs. I told him I wasn't sure. I thought it was. When they took it out I didn't see it."

[31] It is no wonder that the Commissioner would possess little confidence in the reliability of the Complainant on the basis of this conflicting evidence. After all, Mr. V. was essentially alleging that the doctor would have removed a baggie, presumably in front of other Emergency medical staff, disposed of it somehow and made a false entry on the official Health Sciences Centre records to the effect that no foreign body was actually found. In this context, Mr. V.'s claim that the doctor told him it was a baggie and asked if it contained drugs seems outright preposterous. It seems simply unimaginable that a medical doctor, having found a baggie containing a substance that he thought might be drugs, would unilaterally dispose of such a baggie and then file a false report.

[32] The reliability of the Complainant is seemingly further compromised by the lack of any injury to his anus or rectum, notwithstanding his complaint to paramedics that he was suffering rectal pain and bleeding following self-insertion of an object, thought to be a crucifix. Given that Mr. V.'s L.E.R.A. complaint states that "it felt like a small crucifix they were trying to shove up my ass" and that "They were spreading my ass cheeks and trying to shove it." and further, "I was trying to prevent them from shoving anything up my ass", it is obviously inconceivable in the face of all these contradictions that the Commissioner would solely rely on Mr. V.'s information. The Commissioner was quite properly within his jurisdiction to give consideration to the absence of injuries in this regard in assessing the reliability of Mr. V.'s assertions in light of all the various inconsistencies.

[33] There was also other independent evidence before the Commissioner suggesting that Mr. V. was in a highly unstable, volatile and potentially unreliable state on the date of the incident. The Health Sciences Centre Primary Patient Supplemental Care Record indicates that at 7:40 p.m. "Patient mumbling, incoherent babble, asking to call his girlfriend." and at 11:55 p.m. "Pt. becoming severely more agitated. Pulling dangerously (to skin) on cuffs. Security called to add leather restraints for safer restraint." and at 1:50 a.m. "Patient continues to yell and scream." and at 2:10 a.m. "Pt continues to yell."

[34] In this regard, yet another erroneous misrepresentation, albeit of less concern and overall effect, was clearly made by the Complainant with respect to the sequencing of treatment at the Health Sciences Centre. The Complainant told the L.E.R.A. investigator, Mr. Haslam, that he had the sigmoidoscopy and woke up with a cast on his arm. In point of fact, the hospital materials indicate that the cast was applied some 10½ hours after the sigmoidoscopy (see Health Sciences Centre Primary Patient Supplemental Care Record) and that Mr. V. was awake and continued to "yell and scream" for several hours after the first procedure and was again awake prior to the application of the cast.

<u>The Decision to Call an Ambulance and Seek Medical Assistance</u>

[35] The Complainant also alleged that the calling of an ambulance was an abuse of authority by the police because there was insufficient cause to do so and no consent provided by him. The Court agrees with counsel for the Respondents and the Commissioner that this suggestion of wrongdoing is unfounded on the basis of the following evidence:

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(1) Independent evidence provided by the Winnipeg Ambulance crew indicated that Mr. V. complained of rectal pain and bleeding when they first interviewed him at the Public Safety Building; that he also advised self-insertion of a foreign object thought to be a crucifix in his rectal cavity and that he had been unable to pass this foreign object after several attempts. Their Patient Care Report goes on to also indicate that he was spitting blood. Ambulance personnel also noted that they were monitoring his heart, assumably because Mr. V. complained of chest pains. The final Patient Care Report indicates that one of the paramedics did ECG testing because of a suspected cardiac problem. Supraventricular tachycardia, a rapid heart rate, was noted to be detected on three different occasions, assumably during the drive to the Health Sciences Centre. The rapid heart rate was also detected in a Health Sciences Centre report which was obtained by the Commissioner. This report, which was prepared at 4:57 p.m. shortly after Mr. V.'s arrival at the Health Sciences Centre E.R. notes a complaint of irregular heart rate which was verified at 160 beats per minute. The same report also indicates a diagnosis of drug intoxication.

(2) The various reports reviewed by the Commissioner further support the Respondents' advice to the Commissioner's investigative staff that Mr. V. was "non-stop rambling and not making sense" and "obviously high on drugs" (see Occurrence Report dated September 25, 2008 and pages 6 and 7 of the Respondents' statements taken by Investigator Haslam on September 24, 2008). The officers advised Mr. Haslam that at the Public Safety Building Mr. V. "was non-stop rambling and not making sense", "obviously high on drugs" and "He was in quite an agitated state, not coherent, under influence." and finally "He was obviously high on drugs, clearly under the influence." Of course, this was all confirmed to L.E.R.A. investigators by the Winnipeg Ambulance paramedics who noted in their Patient Care Report that "Male freely admits to having 4 grams of mushrooms and 5 or 6 beers today."

[36] All the foregoing information accumulated by the Commissioner reasonably appears to support his implicit decision not to take any action in this regard.

<u>The Allegation That Police Arranged for an Invasive Rectal Examination and Treatment Without the Appellant's Consent</u>

[37] The Commissioner was able to confirm that Mr. V. was subject to a rectal cavity examination at the Health Sciences Centre in which a scope was inserted into his rectum by medical personnel. Information on the Health Sciences Centre files reviewed by the Commissioner's office did not support the Appellant's contention that the police arranged for or attempted to influence medical personnel to conduct the rectal examination. The Diagnostic Imaging Report associated with the testing in question clearly indicates that a referring physician, Dr. R. M., authorized and conducted the procedure in response to a clinical history indicating a foreign body was in Mr. V.'s rectum. Of course, this information, that there was a foreign body inserted in his rectum, was provided to the treating medical personnel by Mr. V. himself. The Commissioner's file also indicates that he reviewed another Health Sciences Centre report (see page 39 of his file) wherein a third doctor is clearly directed by Drs. C. and M. to "assess" Mr. V. "for foreign body removal". Neither report makes any mention of police interference with regular medical procedures. There is absolutely no indication on any of the documentation that the police attempted to further a criminal investigation by way of interference with Health Sciences Centre medical professionals. A review of the many files, reports and progress notes provided to the Commissioner's office by the Health Sciences Centre and the Winnipeg Fire Paramedic Service clearly do not support the allegations made in this regard by the Appellant.

<u>The Allegation of Handcuffing and Shackling in the Public Safety Building Interview Room, the Ambulance and at the Health Sciences Centre</u>

[38] Mr. V. complained that the Respondents abused their authority by handcuffing and shackling him to his hospital bed.

[39] This allegation is not supported by the Health Sciences Centre reports and records that were obtained and reviewed by the Commissioner's office. Indeed, those materials seem to suggest that the handcuffing and shackling resulted from safety concerns expressed by medical personnel. The Health Sciences Centre triage report (see the Commissioner's file at page 28) indicates that "Pt is very violent, initially tried to bolt." The Primary Patient Supplemental Care Record on file (see page 44 and following of the Commissioner's file) indicates at 7:40 p.m. "Patient mumbling incoherent babble."; at 10:15 "patient grabbing @ writers arms attempting to kick writers hands and feet remain in cuffs patient speaking about incident with police; at 11:55 p.m. "Patient constantly fighting against cuffs yelling @ writer to loosen same…pulling dangerously (to skin) on cuffs…security called to add leather restraints for safer restraint"; and finally at 1:50 a.m. there is an entry

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"Patient continues to yell & scream 4 point restraints intact". The report indicates that both haldol and valium are administered "for extreme agitation".

[40] The foregoing materials clearly do not support the Appellant's contention of unnecessary violence or excessive force on the part of the Respondents in this regard. Indeed, the Health Sciences Centre materials confirm and corroborate the propriety of the Respondents' initial decision to handcuff and shackle Mr. V. in the interview room at the Public Safety Building and on the way to the Health Sciences Centre in the ambulance.

The Allegation of Respondents Conducting Unlawful Strip Search

[41] The Appellant complained that the Respondents conducted a strip search "without warrant, without warning and for no reason…that could by law justify such use of force." The Respondents' position, when interviewed by L.E.R.A. Investigator Haslam, was that the search in the privacy of the interview room at the Public Safety Building was necessary to ensure officer safety.

[42] The Respondents advised the L.E.R.A. investigator that the Appellant had been holding a nine-inch knife at the time of his arrest and that they had only been able to perform a pat-down search for officer safety at the scene of the incident. The Respondents contended that it was necessary to thoroughly search him for further weapons at the Public Safety Building. The latter search, according to the Respondents, met with resistance. One of the Respondents, Sergeant H., told Investigator Haslam "When he was being searched, I went to see what was going on. He was fighting the search. Officer didn't feel he was searched well enough. Told him he had to be searched properly." (see page 141 of the Commissioner's file).

[43] The Appellant's counsel filed the Supreme Court of Canada case of *R. v. Golden* (2001), 159 C.C.C. (3d) 449, which condoned strip searches for officer safety as follows at paragraph 94:

> …Only if the frisk search reveals a possible weapon secreted on the detainee's person or if the particular circumstances of the case raise the risk that a weapon is concealed on the detainee's person will a strip search be justified.

[44] In the context of Mr. V.'s arrest and detention, the Complainant was alleged to be holding a knife at the time of his apprehension and subsequently resisted an officer pat-down at the cruiser car. That scenario, if accurate, would seemingly justify a more thorough weapons search in the Public Safety Building interview room.

[45] A decision by Provincial Judge W. Swail in *F.D. and Constables E.D. and M.C.* dated December 12, 2005 makes it clear that the test for a police disciplinary hearing is completely different than the test appropriate for *Charter* challenge to admissibility of evidence in the context of a criminal case. In *F.D.*, Judge Swail ruled on allegations that the Respondent officers had violated the Complainant's. 8 and s. 10 *Charter* rights. At paragraph 84 he quoted, with approval, from the decision of *Rampersaud v. Ford*, Board of Inquiry (Ontario *Police Services Act*), a decision dated January 26, 1994 as follows:

> The Board's decision in this matter under the heading "Is Every Charter Breach by a Police Officer a Disciplinary Offence?" reads as follows:
>
>> Anyone who attends at criminal court on a regular basis will be aware of the fact that charges against accused persons are regularly dismissed because of both serious and technical breaches of the accused's *Charter* rights by investigating officers. If police officers were subjected to disciplinary proceedings every time a judge made such a finding, police work would be impossible, and police officers would operate under a form of "disciplinary chill". Police officers are not lawyers and cannot be expected to know every nuance of *Charter*-related law. Further, the rights of accused with regard to arbitrary detention, arbitrary arrest, and unreasonable search and seizure are constantly being refined by our higher courts. The common-law regarding such rights may well change between the time of an individual's arrest and his or her trial. Police officers, acting in good faith, should not be held to a retroactive standard of conduct.
>
> I agree with these comments.

[46] Following the reasoning of Judge Swail and the Ontario Board of Inquiry aforementioned, and the Supreme Court's dicta in *R. v. Golden*, I am of the view that the Commissioner, absent evidence of egregious abuse of police powers, had no jurisdiction to review the strip search in the context of a disciplinary default arising in the execution of the Respondents' duties.

Decision on this Review

[47] As a result of having reviewed the Commissioner's decision and bearing in mind the applicable standards of review, the scope and nature of a s. 13(2) review, the appropriate assessment that the Commissioner is to make under s. 13(1)(c) and noting that the burden of proof is on the Complainant/Appellant to show that the Commissioner erred in declining to take further action on the complaint, I am of the view that the Commissioner was correct in determining that there was no

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reasonable basis in the evidence to justify a public hearing against the Respondents. Indeed, if the legislation provided for the making of an order of costs against an appellant, I would, on application, give very serious consideration to ordering same in this case.

Original signed by Judge B.M. Corrin

P.J.

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