IN THE MATTER OF:	Law Enforcement Review Act Complaint #6142	
AND IN THE MATTER OF:	A hearing pursuant to Section 17 of ***The Law Enforcement Review Act, C.C.S.M. c. L75***	
BETWEEN:		
Y.R. **Complainant**	)	**Mr. Odaro Omonuwa,** **For the Complainant**
- and -	)	
Cst. N.B. #X **Cst. B.G. #X** **Cst. S.H. #X**	)	**Mr. Rocky Pollack, Q.C.** **and Mr. Paul McKenna,** **For the Respondents**
NOTE: These reasons are subject to a ban on publication of the respondents' names pursuant to s. 13(4.1).	)	**Hearing dates: February 6, 7, 8, 9 & 10, 2006** **Decision delivered this 30th day of November, 2006**

SIDNEY LERNER, P.J.

INTRODUCTION

[1] The respondents are members of the Winnipeg Police Service. The complaint herein relates to an incident alleged to have occurred on January 18, 2003. In summary, the complainant alleges that in the course of an encounter between the complainant and the respondents he was handcuffed, taken to a stairwell, and punched by two police officers while being held by two others.

RECORD OF PROCEEDINGS

[2] Y.R. made a complaint about the respondent officers' conduct to the Law Enforcement Review Commissioner (the Commissioner) on

January 21, 2003. An investigation was conducted by the Commissioner's office. Pursuant to section 17(1) of ***The Law Enforcement Review Act*** (the Act), by notice dated July 26, 2004 the Commissioner referred the matter to a Provincial Judge for a hearing to determine the merits of the complaint.

[3] Prior to the hearing on the merits, the respondent officers filed a preliminary application submitting that the allegations against them had not been sufficiently particularized, and seeking a declaration that the noted defect deprived the Commissioner of jurisdiction to deal with the complaint and to refer it for hearing, and further deprived a Provincial Court Judge of the jurisdiction to conduct a hearing into the merits of the complaint. The respondents' application was dismissed with written reasons being provided on January 16, 2006. The hearing on the merits of the complaint proceeded on February 6-10, 2006. At the conclusion of the complainant's evidence, I granted a no evidence motion with respect to the respondent Cst. B.C., #2168, as no evidence had been presented by the complainant linking him to the alleged disciplinary default.

NOTICE OF ALLEGED DISCIPLINARY DEFAULT

[4] The notice of alleged disciplinary default and referral to a Provincial Court Judge was filed as Appendix 6 to Exhibit 2 on the preliminary application herein.

[5] The complaint in this case alleged a disciplinary default under s. 29 of the Act, namely, that the respondent officers abused their authority by using unnecessary violence or excessive force on the complainant.

THE STANDARD OF PROOF

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

[7] These are civil proceedings and generally the standard of proof in such proceedings is on a balance of probabilities.

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

> "The provincial judge hearing the matter shall dismiss a complaint in respect of an alleged disciplinary default unless he or she is satisfied on

> clear and convincing evidence that the respondent has committed the disciplinary default."

[9] In the November 14, 2004 unreported L.E.R.A. decision No. 5328 ***Morgan v. Constables P. & T.***, my colleague Giesbrecht J. reviewed a number of authorities in the course of determining what is required for proof on clear and convincing evidence:

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

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

[12] The decision of Chartier J. in the October 26, 2000 unreported L.E.R.A. decision ***Anderson v. Constables D. & K.*** In that decision, Chartier J. held that the standard of proof under section 27(2) of the Act is a high standard. He stated at page 3 of his decision:

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

[13] The decision of Enns P.J. in his December 3, 1998 unreported L.E.R.A. decision ***Sutton v. Constable D.***, where he concluded at paragraph 16:

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

[14] The June 21, 1996 L.E.R.A. decision of Cohen P.J in ***Weselake v. K.***, where he adopted the interpretation of the term 'clear and convincing evidence' that was approved by the British Columbia Court of Appeal in the case of ***College of Physicians and Surgeons of British Columbia v. J.C.*** (1992), W.W.R. 673. The Court of Appeal in ***J.C.*** accepted that clear and convincing evidence involved "a high standard of proof…going beyond the

balance of probabilities", and that "to be convinced means more than merely to be persuaded."

[15] Based on the noted review of the cases, Giesbrecht J. concluded that a complainant under the Act must satisfy a relatively high standard of proof, and that "the standard is higher than mere proof on a balance of probabilities. While proof beyond a reasonable doubt is not required, I must be convinced by clear and compelling evidence…[and] to be convinced means more than merely to be persuaded." I adopt that assessment as being the standard of proof in the instant case.

THE EVIDENCE

[16] Having considered all of the evidence in this case, I find that the complainant has not satisfied the requisite test, namely to convince me by clear and compelling evidence that the respondents committed the alleged disciplinary default.

[17] I will begin by reviewing the evidence of the complainant, and then identify the areas of evidence which have left me uncertain as to the validity of the complaint in the instant case.

Evidence of Y.R.

[18] Y.R. testified that on the evening of January 17, 2003 he and his girlfriend had gone out to a restaurant for dinner, where he had consumed a couple of bottles of beer. Between 9-10 p.m. he and his girlfriend then returned to his apartment on Hargrave St., where they began to drink whisky. He testified that by 2-3 a.m. on the 18th, when the subject matter of the complaint first began to unfold, he and his girlfriend had consumed approximately half of a 26 oz. bottle of Five Star whisky. It was his evidence in direct examination that notwithstanding the amount of alcohol that he had consumed by that point, he was not intoxicated. It was at this time that he heard the sounds of a fight in the hallway of his apartment building, and opened his apartment door to investigate. He saw his friend, J. M., in the hallway, bleeding badly from cuts to his neck and chest. Y.R. testified that he then took Mr. M. up to his (M.'s) apartment, on the floor above his own, to try to stop the bleeding.

[19] It was while the complainant and M. were in M.'s suite that two police officers attended to the suite. The complainant was unable to identify these officers. Y.R. testified that the officers asked both him and M. what

had happened, and he told them that he didn't know. He asked the officers to call an ambulance for his friend, and was told that one was on its way.

[20] Y.R. testified that once the ambulance arrived, he went back to his suite to wash the blood from his hands and himself. After doing so, he returned to his friend's suite to check on how his friend was doing. At this point, he found two officers by the door. The officers told him to "stop right there". His evidence was that he replied that M. was his friend and that he just wanted to see how he was doing. Y.R. testified that it was at this point that he was "automatically" pushed to the floor of the hallway, face-down and handcuffed. He denied having tried to push past police into the suite. It was his evidence that once on the floor he was able to see what was happening in the hallway, but not in M.'s apartment. He testified that he was kept in this position until Mr. M. was removed from his apartment on a stretcher. He also testified that the building caretaker was standing in the hallway at this point, as were a female officer and paramedics.

[21] Y.R. testified that after all of the above-noted people had left the hallway, two officers then picked him up. He testified that he was taken through the fire door to a small landing at the top of the stairwell, where the two officers stopped and waited. His evidence was that at some point thereafter, two other police officers came through the fire door. One of the officers put a glove on his hand, said either "you cop hater" or "you cop hitter", and then punched Y.R. in the mouth. Y.R. described the blow as "really strong", and caused blood to fly out of his mouth.

[22] Y.R. testified that he was then repeatedly struck about his body by this second pair of officers, all while being held by the two officers who had originally brought him to the landing.

[23] Y.R. testified that when the attack ended, he was taken down the stairs by the two officers who had first taken him to the landing, and then transported in a police car to 75 Martha St. (the Main Street Project). He was clad in shorts and a "muscle shirt", with no shoes. At the Main Street Project, he was given pants, shoes, and a winter jacket. Y.R. testified that the police were "pushing [him] around" at the Main Street Project, and that staff at the Project would have seen this. Y.R. also says that he later advised a staff member at that location that he was injured, but was told that, per policy, they were obliged to hold him there for six hours. He remained at 75 Martha until 10:30-11:00 a.m. that morning, when he called a cab and returned home.

Identification

[24] As noted, Y.R. was unable to identify the two officers who picked him up and took him to the landing (their identification is established through his testimony that these were the officers who took him to the detoxification centre at 75 Martha St., coupled with documentary evidence that establishes who those officers were). He was also unable to identify the second officer who entered the landing with the officer who he says punched him in the mouth.

[25] As to the identification of the officer who allegedly first punched him, that purported identification came only in the course of the hearing. Y.R. was asked by his counsel to look around the courtroom to determine whether he could identify his assailant. Y.R. pointed to an individual in the courtroom and said "I believe the one with the green jacket" (this individual later identifying himself for the record as Cst. B.G.). As to the weight to be attached to the purported in court identification, it should be noted that it was Y.R.'s evidence that he had never seen the individual in question before the night of the incident, and that he had not seen him again in the three years that had passed since the incident occurred. His comment after the purported identification was "I'm pretty much certain" (emphasis added). It was only after the purported identification, and therefore only after having viewed the person he had purported to identify, that Y.R. was asked to describe the person who had assaulted him. The description offered was limited to height (6'1"- 6'2") and build ("nice build"). After offering the noted identification and description, Y.R. added: "all I know is that I was beaten up after that", suggesting that his attention was focused on the alleged attack, rather than on the identity of his alleged attacker. Similarly, Y.R. testified to having been dizzy after being struck. There was also no evidence adduced from Y.R. as to the lighting in the area where the attack is alleged to have taken place (he testified that there was a light there, but not as to the quality of the lighting). There was also no evidence as to the length of time he observed the individual in question; absent such evidence, it is reasonable to infer that, given the nature of the encounter, the opportunity for observation would have been brief.

[26] Y.R. was cross-examined on the description of this initial assailant provided in his January 22nd statement to L.E.R.A. In that statement, Y.R. described the officer who had punched him first as having "a little bit of Asian complexion". I note that the individual who was pointed to in the courtroom by Y.R. does not in any way appear to be of Asian descent or of

Asian complexion. When cross-examined on this point, Y.R. explained that in his country of origin (Ethiopia), an individual with a "big face" is described as having a "Chinese face", suggesting, in effect, that the reference to "complexion" was a reference to "features" and "shape of face", rather than colour of skin. Y.R.'s evidence on this point therefore appeared to be that the reference to "Asian complexion" was to an individual with a wide or broad face. While this linguistic explanation may be true, and if so would make the description more applicable to Cst. B.G., I note that no evidence was called on Y.R.'s behalf in support of this contention as to the cultural/linguistic difference. I also note that Y.R. testified that he has been in Canada since 1990, and although an interpreter was available to assist him in his evidence when necessary, his evidence was given in well-spoken and appropriate English. In the absence of at least some supporting evidence on the issue of the language difference, I am left with at least some question as to the accuracy of Y.R.'s evidence on this point, and therefore a question as to the reliability of the purported identification.

[27] I also note that when challenged on the latter point, Y.R. attempted to bolster his purported identification by saying that he "doesn't forget when a man punches [him]". I found this evidence somewhat disingenuous, in that Y.R. was unable to offer any identification, at any stage of the proceedings, with respect to his other alleged attacker, who he testified also punched him repeatedly.

[28] Y.R. was of the view that there were no differences between the uniforms of the various officers he encountered in the course of this incident. He conceded that it was probable that there were times when the officers had their backs turned to him as he was being questioned by them. In that regard, I note that there was no challenge to the subsequent evidence of Cst. B.G., identified by Y.R. as his first attacker, that he is a dog handler with the police canine unit who wears a distinct police uniform. The unchallenged evidence from Cst. B.G. was that on the night in question he was wearing his canine unit uniform: inter alia, a yellow jacket with the word POLICE emblazoned in large bold black lettering on the back. The jacket in question was identified in the course of the evidence of Cst. B.G. The undisputed evidence was that Cst. B.G. was the only police officer who attended to this incident who was dressed in this fashion. As well, Cst. B.G.'s unchallenged evidence was that he spent some time in Y.R.'s presence attempting to investigate the matter. Given the unique nature of Cst. B.G.'s uniform - and in particular the strong visual impact created by the size and boldness of the lettering on Cst. B.G.'s jacket - as well as the length of time he would have

been in Y.R.'s presence as Cst. B.G. investigated this incident, Y.R.'s failure to note the distinctive nature of Cst. B.G.'s uniform is a significant defect that goes not only to the complainant's powers of observation, and therefore the reliability of his identification, but also to the reliability of his evidence generally.

[29] The cumulative effect of the foregoing is that Y.R.'s purported courtroom identification of the individual who struck him must be considered questionable at best.

Injuries

[30] As noted, Y.R. testified that during his stay at the Main Street Project he advised a staff member at the Project that he was injured, but was told that, per policy, they were obliged to hold him there for six hours. Y.R. testified in cross-examination that he believed he was released from the Project by this same staff member, who had checked on him from time to time in the course of his stay there. He testified that when he was released, he told this staff member that his injuries were caused by police. He testified that on release he had to be helped on with his jacket. His evidence was that neither the staff member nor anyone else at the Main Street Project asked if he wished to see a doctor or to be taken to the Emergency Department at the hospital.

[31] I note that Y.R. did not call evidence to confirm this contention, and in particular did not call the Main Street Project staff member to whom he claims he made his complaints of injury. To the contrary, the only evidence called by Y.R. with respect to the events at the Main Street Project came from the witness David Warman (see below), called by the complainant, who testified that he would have expected a note of Y.R.'s complaints and apparent injuries to have been documented. No such notation or evidence was presented in the course of the hearing.

[32] The complainant testified that when he left the Main Street Project, his most painful injury was to his hands, but that his elbow was hurting, his lip was cut and his tooth was loose. Y.R. also testified that his arm and ribs were broken as a result of the attack. He testified that he sustained the injury to his rib as a result of the alleged assault by police, and testified that he showed that injury to the physician who examined him at Misericordia Hospital. There is no record of that injury in the chart of his examination, which was filed as Exhibit 1 in the hearing. Similarly, there is no reference

to a rib injury in the complainant's initial statement to the L.E.R.A. investigator, despite what appears to have been a detailed description in that report of the complainant's injuries: specifically a broken tooth and a bruise to the inside of the complainant's left arm, which description included the dimensions of the bruise. The L.E.R.A. file, to which Y.R. was referred by his counsel in the course of re-direct examination, discloses that Y.R. did not mention a rib injury to L.E.R.A. investigators until March 2003.

[33] Similarly, although Y.R. testified that he sustained an injury to his wrists in the course of the alleged attack, that his wrists were bruised, and that he showed these bruises to the physician who examined him, there is no record of those alleged injuries in the medical chart. There was also no reference to same in the viva voce evidence of the physician who examined Y.R., Dr. Anne Marie Cairns, who testified as a witness for the complainant in the course of the trial. To the contrary, the medical report indicates that the complainant's hand and wrist were "okay".

[34] To a similar effect is the report of Dr. Engel, attached as Exhibit B to the October 24, 2005 affidavit of the complainant, filed in a pre-hearing motion, which describes tenderness to the complainant's left elbow and "no other tenderness" anywhere else. When cross-examined on that notation in the medical report, Y.R. described it as being "wrong", and stated that he believed he showed the doctor the bruise to his ribcage. I note that Dr. Engel was not called by the complainant at the hearing of this matter.

[35] Dr. Engel's report also records the complainant's account of the elbow injury as occurring when the complainant's elbow was twisted as he was arrested and handcuffed. To a similar effect, Dr. Cairns, the Emergency Department physician who examined Y.R. on January 19th, testified that the information she received from Y.R. was that the elbow injury occurred while being handcuffed by police. However, in his evidence at the hearing, Y.R. testified that he was not injured when handcuffed, but rather when he was later taken to the stairwell and punched about his body by his alleged police assailants.

[36] Y.R. was also cross-examined on his account of the incident, provided to a physiotherapist on January 24th, some six days after the incident. In that account, Y.R. is described as claiming to have been kicked in the left ribcage in the course of the assault on him. When presented with this latter account in cross-examination, Y.R. first conceded that he had "probably" told the physiotherapist that he had been kicked, then stated that he was unsure

whether he had said this, and finally maintained that he had in fact been kicked in the assault. When asked to explain this apparently recent development in his evidence, Y.R. testified that in his native language, “kick” and “punch” mean the same thing. I note, however, that there is no reference by Y.R. in his statement to L.E.R.A., in any of the other accounts of the incident referred to in evidence, or in his evidence under oath at the hearing itself, to being “kicked” in the course of the alleged assault.

[37] Y.R. was also cross-examined on a discrepancy between his evidence under oath at the hearing and his sworn affidavit of October 24, 2005. Y.R. testified that on the day of the incident, police attended without having been called by himself or his friend M. In contrast, at paragraph two of the affidavit Y.R. deposes that he and M. called the police. Y.R.’s evidence was that when he swore the affidavit he relied on a general description of its contents by his counsel, and that he was not taken through the affidavit in detailed fashion before he swore to its contents.

[38] Similarly, Y.R. was cross-examined with respect to a further inconsistency between his sworn affidavit and his evidence at trial: at paragraph six of his affidavit, Y.R. states that after he was assaulted, he was removed from the apartment by the four officers who were involved in the assault. As noted, Y.R.’s sworn evidence at the hearing was that he was taken from the building only by the two officers who had first taken him to the landing. Y.R.’s explanation for the inconsistency is that he did not read the affidavit before signing it, the suggestion being that the error in the affidavit was that of counsel, not Y.R.

[39] With respect to the discrepancies between Y.R.’s evidence at the hearing and his sworn affidavit, I agree in general terms with the submission of counsel for the respondents that I am entitled to conclude that material in affidavit form is drafted by counsel on a client’s instructions. While the question of whether this was so in the instant case is a matter of some uncertainty, I conclude that I am obliged to resolve that uncertainty in favour of the respondents.

[40] Y.R. was also cross-examined on a discrepancy between his evidence under oath at the hearing, his statement to L.E.R.A., and his affidavit. In both his L.E.R.A. statement and in his affidavit, Y.R. explained that his return to Mr. M.’s suite was to determine if the ambulance/paramedics had arrived to assist his friend. At the hearing, Y.R. testified that he was aware prior to his return to his friend’s suite that the ambulance had arrived.

While on its face a seemingly innocuous inconsistency, I note that in both his L.E.R.A. statement and his affidavit, Y.R. offers his purported uncertainty as to the presence of medical assistance as the reason that he wanted to gain entry to his friend's suite; in other words, to ensure that his friend was being attended to. But if that reason is removed, as it is when Y.R. concedes that he was aware prior to his return to the suite that paramedics had arrived, his attempt to enter the suite against the instructions of police (which I accept to be the case, per the evidence of the witness Fawcett), in addition to being an inconsistency that goes to credibility, suggests an aggressiveness on the part of the complainant that, along with other evidence, may reflect the extent of his intoxication on the evening in question.

[41] While the various contradictions and inconsistencies between Y.R.'s evidence at the hearing and his previous statements and depositions are of moderate significance when examined individually, when considered collectively and in particular against a backdrop of significant alcohol consumption by the complainant prior to the incident, I find that they assume a significance that impacts negatively on the reliability of the complainant's account of the incident.

The Evidence of D. J. M.

[42] Mr. M. testified that when he encountered the complainant the following day, the complainant advised him that his injuries were inflicted by one officer, who beat him 2-3 times. This is in contradiction to the version of the incident offered by the complainant to L.E.R.A., in his affidavit, and in his evidence at the hearing of this matter, which alleges multiple blows inflicted by two officers.

[43] Mr. M. also testified that he walked out of the apartment building after being treated by paramedics; this was confirmed by Cst. B.G. in his evidence. It was Y.R.'s evidence that he observed his friend M. being wheeled out of the building on a stretcher.

The Evidence of D. F.

[44] Mr. F. was the caretaker at 45 Hargrave, the apartment building where Y.R. resided. He testified that on the evening of the incident he received a call to attend to suite XX of that building. On arrival, he observed police attending to Mr. M., who he described as intoxicated. Of note, he also testified that he was present when Y.R. attended to the suite, wanting to see

his friend M. He testified that Y.R. was told by police that he couldn't enter the suite. He testified that he then observed Y.R., who he described as drunk, loud, and a little off balance, attempt to get by the officer at the door of the suite. He was unsure whether Y.R. had to touch the officer when trying to get by him. He testified that the officer took the complainant by the jacket, "threw him" to the floor in the hallway, and placed him under arrest. He acknowledged that the complainant was "a reasonably big guy" and was unsure how easy it would have been to take him to the ground. He testified that another officer then got on top of the complainant and placed him in handcuffs. He observed what he described as "a bit of wrestling on the ground", in the course of which Y.R.'s face was pushed into the carpet on the floor, and after which he says police were able to subdue Y.R. and take him away. He testified that based on his observations, "for all [he] knew, that's when Y.R. may have injured his mouth", which was the only injury to Y.R. that he subsequently became aware of. Of note, when asked in direct examination by counsel for the complainant whether he had observed Y.R. fighting with anyone that night, his response was that the only fight he had observed was Y.R. struggling with police.

[45] The impression that I have from Mr. F.'s evidence is of a complainant who'd had too much to drink (an assessment confirmed by each of the police witnesses who testified), who attempted to disregard a police officer's direction not to enter M.'s apartment as M.'s injuries were being attended to, and who had to be forcibly subdued as a result. It is unclear whether some of the complainant's injuries were caused at this point, but if so I find that they were incurred in the course of a reasonable response by police to obstreperous conduct on the part of the complainant.

[46] Of particular significance is Mr. F.'s evidence that he observed Y.R. being escorted from the apartment building by police prior to the ambulance attendants' departure with Mr. M. Of equal significance is his evidence that he did not see any other police go through the stairwell door after the police left with Y.R. As noted above, Y.R.'s evidence is that police waited to take him to the stairwell, preparatory to the assault, until everyone else had left the area, and that his attackers (the second two police officers) came through the stairwell door just prior to assaulting him. In other words, the plausibility of Y.R.'s version of the incident rests on the initial two officers holding him on the stairwell landing until potential witnesses had first left the scene, with the second two officers then coming through the stairwell to begin their assault. If Mr. F.'s evidence is correct, and it was unchallenged, the scenario described by Y.R. could not have taken place. To the contrary, it would have

required the second two officers to have either been waiting in the stairwell, or have come up the stairwell, to commit the assault, and not have come through the stairwell door, contrary to Y.R.'s version of the incident. It would also have required the assault to have taken place when other police, ambulance personnel, and Mr. F. himself, were still in the building and very nearby, potentially able to enter the stairwell at any moment and witness the alleged assault.

The Evidence of D. W.

[47] Mr. W. was the Intake worker who was responsible for admitting Y.R. to the Main Street Project. While he had no recollection of this incident, he did identify the Intake sheet (Exhibit 3) which he filled out on Y.R.'s admission. He testified that if there had been a complaint of police brutality, his practice was to make a notation re same on the intake sheet. No such notation is to be found on Exhibit 3.

[48] Although Mr. W. was not the individual responsible for checking on Y.R. once he was admitted, he testified that if an individual were complaining to Project staff of pain and soreness as a result of conduct by police, as Y.R. testified he did in this case, he would expect to find a notation re same on the Intake sheet. No such notation is to be found on Exhibit 3.

[49] I also note that Y.R.'s evidence was that police were "pushing [him] around" at the Main Street Project, and that staff at the Project would have seen this. There was no indication of any such conduct having been witnessed or recorded by Mr. W.

[50] Finally, although Mr. W. was not on duty at the time Y.R. was discharged from the Project, he testified that if a person were so sore at the time of discharge that they needed assistance getting dressed, as Y.R. testified he did, he would have made a note of same. No such notation or evidence from any staff member was presented in the course of the hearing.

The Evidence of Sgt. R.L.

[51] Sgt. R.L.'s evidence requires mention, although not because it left me with doubt as to the validity of the complainant's evidence. Sgt. R.L. testified that he was the street supervisor who attended to this incident to assist Cst. B.G. and Cst. B.C. He testified that he was the officer who was standing at the doorway of Mr. M.'s suite when Y.R. attempted to re-enter

the suite. His description of Y.R.'s conduct at this point is generally along the same lines as that of Mr. F., the caretaker. He describes Y.R. as yelling and swearing with respect to getting medical aid for his friend, and then attempting to enter the suite. He testified that Y.R. ignored his warning to stay outside in the hall. He describes Y.R. as attempting to push his way into the suite, placing one hand on one of the two ambulance attendants (who were both also attempting to enter the suite), and leaning into Sgt. R.L. with his shoulder, pushing him backwards. Sgt. R.L. testified that at this point he punched the complainant once in the head and facial area, at which point the complainant stepped back. He testified that he then put the complainant to the floor and handcuffed him with the assistance of Cst. B.C.

[52] I am unable to accept that Sgt. R.L. struck Y.R. Mr. F. was in a position to have observed the blow and did not testify to having seen it. Sgt. R.L. made a statement to a L.E.R.A. investigator in April of 2003. In that statement he stated that he used "force" with respect to Y.R., but there is no reference in the statement to having punched the complainant. Although Sgt. R.L. testified that he believes he did tell the L.E.R.A. investigator at one point in the interview that he had punched the complainant, it seems inconceivable that such a relevant piece of information would not have been specifically included in the statement. I note as well that senior and experienced counsel for the respondents did not put Sgt. R.L.'s version of the incident to the complainant in cross-examination, or to any other witness in direct or cross-examination. The failure to do so leaves an available inference that this version of the incident was not shared with counsel for the respondents in pre-hearing preparations.

[53] Having made this finding, I note that Sgt. R.L. is not a respondent, and I do not draw any negative inference from his evidence vis-à-vis the evidence of the respondents. I also note that the onus remains on the complainant to prove his case by clear and compelling evidence.

Conclusion as to the use of unnecessary violence and excessive force

[54] As discussed above, I find that there is a general negative inference to be drawn from the lack of support for Y.R.'s description of the events that occurred at the Main Street Project, from the nature of Y.R.'s difficulties in identification, from the various inconsistencies between Y.R.'s evidence at the hearing, his statement to L.E.R.A., and his affidavit, and the contradictions between his evidence and that of independent witnesses. I find that the weaknesses in his evidence undermine the reliability of his

evidence not simply with respect to the areas in which those weaknesses are to be found, but with respect to his account of the incident generally.

[55] In that regard, I am mindful of the fact that Y.R. had consumed a significant amount of alcohol prior to the incident and, according to the evidence not only of the respondents but also of a disinterested witness, the caretaker F., was drunk at the time of this incident. And while it is clear that Y.R. sustained injuries at some point in the course of the events of January 18th, I am unable to determine with any confidence how those injuries were caused, and by whom they were caused. Y.R. maintains that his injuries were caused by blows inflicted by police. Counsel for the respondents suggests that they were caused by Y.R.'s participation in a fight (which Y.R. denies) that took place prior to the arrival of police, and that ultimately ended up on Y.R.'s doorstep. Given the evidence of the witness F., some of the injuries may well have been sustained when Y.R. was taken to the ground by police as he attempted to enter M.'s suite against police instructions (Y.R. has not alleged that the conduct of police in this aspect of the incident constituted a disciplinary default). Perhaps as a consequence of Y.R.'s alcohol consumption, perhaps as a consequence of the passage of time between the date of the incident and the hearing of this matter, perhaps for other reasons not identified, at the end of the day there are simply too many contradictions, inconsistencies, and weaknesses in the evidence of Y.R. for me to be able to conclude with any certainty that the events of this incident unfolded in the fashion he has alleged. Accordingly, I find that the complainant has not met the burden of proof in this case to establish that the respondent officers committed a disciplinary default by abusing their authority in using unnecessary violence or excessive force on the complainant. I therefore dismiss the allegation of disciplinary default against the remaining respondents.

[56] I order that the ban on publication of the respondents' names continue.

Sidney Lerner, P.J.