

**IN THE MATTER OF THE *POLICE ACT*, RSBC 1996, c.367 (as amended)**

**AND IN THE MATTER OF THE PUBLIC HEARING INTO THE COMPLAINT  
AGAINST CONSTABLE DAVID BRUCE-THOMAS OF THE VANCOUVER  
POLICE DEPARTMENT**

**Reasons for Decision  
Adjudicator Brian C. Weddell, Q.C.**

Commission Counsel  
Respondent's Counsel  
Third Party Complainant

D. Urban, Q.C.  
W. Smart, Q.C.  
Julie Berg

[1] THE ADJUDICATOR: On June the 24th, 2003, the Police Complaint Commissioner ("Commissioner") issued a Notice of Public Hearing pursuant to the *Police Act* of British Columbia directing that the adjudicator appointed pursuant to the *Police Act* hear evidence and determine whether or not the allegation of the discipline default set out has been proven under a civil burden of proof and, if so proven, to impose disciplinary or corrective measures.

[2] The disciplinary default so set out is as follows:

"David Bruce-Thomas being a police officer and a member of the Vancouver Police Department, on or about October the 22nd, 2000, in the East Lane of 4800 Slocan Street, in the City of Vancouver, in the Province of British Columbia, did commit the disciplinary default of abuse of authority by using unnecessary force on the person of Jeffrey Michael Berg causing his death, contrary to Section 10(b) of the *Code of Professional Conduct Regulation*, BC Reg. 205/98."

[3] After various preliminary applications and submissions of counsel, the "Case Management Conference" proper took place on September 13th, 2004. Evidence was given commencing on September 14th, 2004 and following various adjournments concluded on December 17th, 2004. In all, 26 witnesses testified and three days of submissions by counsel and the complainant, Julie Berg, were made.

[4] All counsel gave lengthy and careful submissions. In general terms, they are *ad idem* with respect to the law that is applicable. They diverge, however, in respect to the inferences I should draw from certain evidence and the weight I should attach to the evidence of various witnesses.

[5] Julie Berg, the complainant and sister of the deceased Jeff Berg, availed herself of her right to make a submission at the conclusion of the evidence. She gave a well prepared and eloquent submission that reflected her depth of feeling at the loss of her brother. In her submission, she referred to a large number of matters concerning her view of the activities of the Vancouver City Police that were not part of the evidence at this inquiry. She did not also attend on many days of the proceedings here for reasons she explained were largely financial. She expressed her views, however, in a forthright and passionate manner and no one can deny her passionate and vital interest in the outcome of these proceedings. I am bound by law, however, to decide the matter on the basis of the evidence called at this inquiry only.

[6] The incident which gave rise to this public inquiry occurred on October the 22nd, 2000 when the respondent, Cst. David Bruce-Thomas, used force against Jeffrey Michael Berg while arresting him. On October the 24th, 2000, Jeff Berg died in a hospital as a result of injuries he received during the October 22nd, 2000 arrest.

[7] Pursuant to the Public Hearing Rules made pursuant to Section 61(8) of the *Police Act*, an Agreed Statement of Facts as required by Section 13 of the Rules was filed herein as Exhibit 27. Those agreed facts contained, *inter alia*, the following:

5. The events and incidents involved in this Public Hearing took place in October 22nd, 2000, involving the arrest of Jeffrey Michael Berg (deceased) in the back alley of 4800 Slocan Street, in the City of Vancouver, in the Province of British Columbia.

6. At 9:36 pm, on October 22nd, 2000, the Vancouver Police Department received an anonymous 911 call reporting a break and enter in progress at 4525 McHardy Street, in the City of Vancouver, Province of British Columbia.

7. At 9:37 pm, on October 22nd, 2000, the Vancouver Police Department received a 911 call from Mr. Huu Le, reporting a break and enter in progress at his residence at 4870 Slocan Street, in the City of Vancouver, Province of British Columbia.

8. Jeffrey Berg was actively involved in the break and enter that occurred at 4870 Slocan Street on October 22nd, 2000.

9. That for some months prior to October 22nd, 2000, Jeffrey Berg was living with his brother, Dan Berg, in East Vancouver.

10. On Saturday evening, October 21st, 2000, Dan Berg overheard an individual asking his brother, Jeffrey Berg, to "do a grow-op" to which Jeff Berg responded, "Tomorrow night". Jeff Berg told his brother that he had done "grow-ops" in the recent past.

11. Jeffrey Berg's sister, Julie Berg, was told by Jeffrey Berg that he had been "ripping off grow-ops" in the recent past. He also told her that he used a fake gun to scare the occupants and that he used tape or a cord to tie them up. On October 26th, 2000, Ms. Berg found in Jeffrey Berg's belongings

a diagram which she recognized as being in his handwriting. A true and accurate copy of which is entered as Exhibit 25.

12. At the time of the home invasion at the Le's residence on October 22nd, 2000, there were seven occupants in the residence. Huu Le, Mo Thi Le, two grandparents and three children.

13. That in June 2000, the Vancouver Police entered the Le residence at 4870 Slocan Street based on information that the home was used for a "grow-op". As a result of evidence found in the home, Mr. Le's wife, Mo Thi Le, was charged with cultivation of marihuana and theft of electricity.

14. The RCMP have recently made significant efforts to locate Mr. and Mrs. Le in order that they could be served Summons as witnesses in this Public Hearing. They have been unable to locate the Le's. The RCMP believe based on all information available to them, that the Le's have returned to their native country Vietnam.

15. Jeffrey Berg's Criminal Record contains only one conviction that being for possession of a narcotic, to wit marihuana, on January 20th, 1988, for which he received a \$50 fine, or one day in default.

16. After the home invasion at the property of the Le property, Huu Le told the police words to the following effect:

He was watching television in the kitchen with his wife when he heard banging on the door. He saw two people wearing masks holding something. He took two of his children and ran out the back door. As he ran out into the lane, there was a small red car sitting behind his garage. There were two people in the front driver and passenger seat. The engine was running. He banged on the garage of his neighbours and called for help. He then banged on the passenger side of the car but the occupants did nothing. He then ran to the neighbours and asked them to call the police. He left his twelve year old daughter, Angela, at the neighbours and ran back to the lane. He saw the same two people who had been wearing masks getting into the red car. He heard someone say, "Stop, stop", but they did not stop and drove fast north in the lane. The police car hit the red car. Mr. Le then returned to his residence.

17. Mo Thi Le told the police after the incident the following:

The two males who came into her house were dressed in dark clothes and wearing masks. One guy had a metal bar the kind that is used for exercise. They told her not to move and she stayed in the kitchen. After five or ten minutes, the men left through the front door.

18. No member of the Le family suffered any physical harm during this home invasion.
19. Constable David Bruce-Thomas was the officer who initially dealt with Jeffrey Berg on October 22nd, 2000.
22. Prior to Constable Bruce-Thomas's interaction with Jeffrey Berg on October 22nd, 2000, Jeffrey Berg had no physical injuries that contributed to or caused his death.
23. After Constable Bruce-Thomas's interaction with Jeffrey Berg on October 22nd, 2000, no other person caused any injury to Jeffrey Berg that contributed to or caused his death.
24. Dr. Thank Thai, a physician licensed to practice medicine within the Province of British Columbia, pronounced Jeffrey Berg dead at 6:52 pm on October 24th, 2000, at the Vancouver General Hospital. Jeffrey Berg died as a result of injuries he received during his arrest by the Vancouver Police in the east lane of the 4800 block of Slocan Street, Vancouver, British Columbia, on October 22nd, 2000.
25. On October 25th, 2000, an autopsy on the body of Jeffrey Berg was conducted by Dr. Laurel Gray, a Forensic Pathologist licensed to practice medicine within the Province of British Columbia. Dr. Gray determined that Jeffrey Berg died as a result of a traumatic aneurysm to the left carotid artery and sequelae due to or as a consequence of a blow to the left side of the neck.
26. Blood samples taken from Jeffrey Berg upon admittance to the Vancouver General Hospital on October 22nd, 2000, were forwarded to the Forensic Laboratory in Vancouver, British Columbia, for toxicological testing. R. Ulrich examined the blood samples for the presence of ethanol and common drugs, and determined as follows:
  - (a) No ethanol was detected;
  - (b) 23.8 ng/mL of carboxy-THC was detected in the antemortem blood of Jeffrey Berg; and
  - (c) No other common drugs, including TCH, were detected in the samples.

THC is the active component of Cannabis products. Carboxy-THC is the primary metabolite of THC within the human body, but does not contribute to the behavioural effects of Cannabis.

The absence of THC in the blood suggests that there has been no ingestion of a Cannabis product within the previous four to six hours of the

sample being taken. R. Ulrich would not expect the person to be under the effects of Cannabis at the time the blood was sampled. The concentration of carboxy-THC suggests the person was a moderate (one to two times per week) user of marihuana.

29. At the time of the incident on October 22nd, 2000, Jeffrey Berg was wearing a pair of black pants over a pair of black sweat pants, with a black t-shirt. The photographs in Exhibit 12, Tab 5, at paged 44, 45 and 46, respectively, are true and accurate depictions of the aforesaid clothing.

30. At the Vancouver General Hospital, Constable Wallace seized a number of items from the clothing of Jeffrey Berg worn on October 22nd, 2000. Among the items seized were:

- A pair of scissors found in the back right pocket of the black pants worn by Jeffrey Berg. The photograph in Exhibit 12, Tab 5, at page 47, is an accurate and true depiction of the aforesaid pair of scissors.
- Four separate electrical cords, each knotted at the ends and measuring approximately 54 to 57 inches in length, were found in each of the four pockets of the pants worn by Jeffrey Berg. The photograph in Exhibit 12, Tab 5, at page 7, is an accurate and true depiction of one of the aforesaid electrical cords.
- A dark coloured nylon, knotted at the top, was located in the front left pocket on the pants worn by Jeffrey Berg. The photograph in Exhibit 12, Tab 5, at page 45, is an accurate and true depiction of the aforesaid dark coloured nylon.

31. A replica toy gun was located at the scene outside the passenger side door of the red vehicle and was seized as an exhibit by Constable Wendell of the Forensic Identification Section, Vancouver Police Department. The photograph in Exhibit 12, Tab 5, at page 48, is an accurate and true depiction of the aforesaid replica gun.

32. A set of keys were located at the scene outside by the passenger side door of the red vehicle and were seized as an exhibit by Constable Wendell.

33. In the rear seat footwell of the red Nissan motor vehicle was found, amongst other items, a pair of black nylon pantyhose with the legs knotted. Lodged between the front passenger seat and the central console was a metal dumbbell. Both these items were seized by Constable Dunn, of the Forensic Identification Section, Vancouver Police Department.

34. A forensic examination and comparison of the dumbbell with the marks found on the front door of the Le's residence, determined that the dumbbell caused those marks.

35. The red Nissan with BC License plate JJP 803 was found to be inactive to a 1997 Buick Skylark with the registered owner by the name of Ruben Lorne Bunn. The red 1984 Nissan Pulsar is registered to Chandra Rae Guston. Records indicate the Nissan was abandoned in the 4500 block of Albert Street, in Burnaby, British Columbia.

36. Sandi Greenfield is a Voice Records Co-ordinator with the Emergency Communications for Southwest British Columbia (E-Comm). Ms. Greenfield's Curriculum Vitae is entered as Exhibit 15.

37. At the request of Commission Counsel, Ms. Greenfield prepared a document entitled "Time Line with Unrelated Tran." in which she combined entries from the CAD reports from Police Incident #P00243540 (re. Slocan Street call) and #P00243539 (re. McHardy Street call) with the radio transmissions relating to Police Incident #P00243540 and P00243539. In addition, Ms. Greenfield prepared a separate transcript entitled "Recorded Radio Dispatch Activity, October 22nd, 2000, Incident 00-243539 & 00-243540" that is a true and accurate transcription of the radio transmissions.

[8] Ms. Greenfield was an important witness and was tendered and accepted as an expert witness with expertise for the purposes of this Inquiry in six areas:

1. Expertise in the Computer-Aided Dispatch System (commonly referred to as the CAD).
2. Radio communications system of the VPD (Vancouver Police Department).
3. 911 communications.
4. Radio and 911 communication information storage, processing, retrieving and interpretation.
5. The interpretation of radio language and police lingo or slang.
6. The call signs and voice recognition of many of the police officers on duty the night of October 22nd 2000.

[9] She was tendered as a witness with expertise in the above enumerated areas as they existed on October 22nd, 2000 and then in use by the VPD.

[10] She prepared what is filed as Exhibit 16 which is a chronological record, set out in chronological numerical column, of all the radio transmissions and telephone 911 calls made on the night in question from all of the radio traffic relative to this incident. She also included in the exhibit a definition column by which she translates slang and lingo into plain English and identifies in another column by name, where known, the author of the specific communication. That exhibit shows that the elapsed time of the incident from the time when the respondent became actively involved, from the time of his transmission that he had come upon people running (Item 42) 21:39:41, until the broadcast that the fourth suspect was being taken into custody (Item 90) 21:44:24, was five minutes and 17 seconds.

[11] That short space of time was the length of time during which the respondent used whatever force he did upon the person of Jeff Berg.

[12] There is no dispute between counsel as to the propriety of the respondent Bruce-Thomas's activities from the time he first heard the radio transmissions prior to his broadcast that he was "heading up", meaning he was heading toward the location of the McHardy incident (Item 4), until the time when he had succeeded in pinning the red car against a wall and exited his police vehicle. It is his actions from that time until the time when all four of the suspects were in custody that is in question.

[13] The respondent's recitation of the events as he recalled them unfolding were that he was parked in a parking lot waiting to meet up with some other constables for the purpose of going for coffee when he heard the first broadcast of an incident on McHardy (Item 4) and decided he would assist in that incident and started to go there. It was while he was en route that he came upon two persons acting in what he considered to be a suspicious manner and he elected to follow them. During that time, he heard the "warble tone" which was described as a tone on his radio indicating an emergent situation (Item 27) and which he regarded as an extremely serious and dangerous situation.

[14] All of the police officers who testified indicated that such a broadcast would indicate to them a very serious incident and one of the more dangerous situations into which a police officer would be involved.

[15] The respondent then related that the two persons he had been following started to run and got into a red car parked behind a residence which car accelerated at a high rate of speed. The respondent has expertise in racing cars and used this expertise to manoeuvre his police car into such a position that he was able to force the red car to a standstill by forcing it into the side of the building and pinning it there with his police vehicle. He then exited his vehicle, drew his weapon and went to the rear of the red vehicle he had just forced into the side of a building. At this point, he observed that there were three or four people, he thought, in the vehicle, one of whom was able to exit the red car by crawling out of the passenger side window and coming to the rear of the red car. The evidence indicated that this was the deceased, Jeff Berg, and the confrontation between them took place.

[16] The respondent readily admits that he applied force at this juncture to the person of Jeff Berg who he testified would not obey any of his commands. His purpose was to get Berg on the ground and under control as there still remained three other occupants of the red car to be dealt with. The respondent testified that he used various means and attempts to get Berg to the ground which included blows and kicks. Berg did go down on the ground and other police officers arrived at this juncture and no further difficulty was experienced with the other three occupants of the red vehicle who were all taken into custody. Berg, once he was on the ground, was handcuffed by the respondent with the assistance of Cst. Silver who had arrived at 21:40:57 (Item 63).

[17] A distillation of the arguments of counsel here reveal that the period of time that the alleged excessive force could have been used commenced with the exiting of the red car by Jeff Berg. Counsel here agreed that up to then, the actions of the respondent were reasonable and proper in the circumstances.

[18] Counsel have provided comprehensive briefs on the law which have been most helpful. They appear to be mostly *ad idem* regarding the principles that are applicable to the issues raised in this inquiry and, indeed, both rely on many of the same precedents to support the respective positions they advance.

[19] The *Police Act* in Section 61(1) provides that the standard of proof relative to the alleged disciplinary default here is the "civil standard of proof". This standard has been described by McLachlin, C.J., as she then was, in ***Jory v. The College of Physicians and Surgeons of British Columbia***, [1985] B.C.J. No. 320(S.C.):

"The standard of proof required in cases such as this is high. It is not the criminal standard of proof beyond a reasonable doubt. It is something more than a bare balance of probabilities. The authorities establish that the case against a professional person on a disciplinary hearing must be proved by a fair and reasonable preponderance of credible evidence.... The evidence must be sufficiently cogent to make it safe to uphold the findings with all the consequences for the professional person's career and status in the community."

This standard was later affirmed by the Supreme Court again by McLachlin, C.J., in ***Doctor Q v. College of Physicians and Surgeons of British Columbia***, [2003] 1 S.C.R. 226, para. 11.

[20] Authorities have held that two sections of the Criminal Code, R.S.C. [1985], Chapter C-46, are applicable to disciplinary hearings, those sections being:

25(1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law.... as a peace officer.... is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

32(1) Every peace officer is justified in using or in ordering the use of as much force as the peace officer believes, in good faith and on reasonable grounds, (a) is necessary to suppress a riot; and (b) is not excessive, having regard to the danger to be apprehended from the continuance of the riot.

[21] Both counsel have submitted in their arguments that these two sections as interpreted by the authorities fundamentally reduce to the same test as that set out in Section 32, namely, an assessment of the reasonableness of the officer's subjective assessment of the situation, with significant deference to the circumstances facing the officer. That test was articulated in ***Berntt v. Vancouver (City)***, [1999] B.C.J. No. 1257 (C.A.) where Southin, J.A., expresses the test thusly:

17 In my opinion, the present section requires the judge to ask of himself or herself these questions:

1. Did the peace officer believe that the force he or she was about to use (and did use) was necessary to suppress the riot?

2. Did the peace officer believe that the force he or she was about to use (and did use) was not excessive having regard to the danger to be apprehended from the continuance of the riot?

3. If the answer to the first question is "yes", did the peace officer have reasonable grounds for that belief?

4. If the answer to the second question is "yes", did the peace officer have reasonable grounds for that belief?

18 If all four questions are answered "yes", the defence succeeds.

[22] These four elements have since been applied in ***Abbotsford (City) Police Department v. British Columbia (Police Complaint Commissioner)***, [2001] B.C.J. No. 2012 [2003] B.C.J. No. 989 (B.C.S.C.) paragraph 72.

[23] Turning then to an assessment of the evidence in respect to the activities that took place following the respondent's pinning of the red car to the wall and the deceased, Jeff Berg, exiting the red car. All of the witnesses who saw this part of the incident agree that the two came together at the rear of the red car. The differences in their evidence arise from their respective recollections as to what happened after that.

[24] The respondent testified that he heard the radio transmissions set out in the transcript thereof in Exhibit 16 prior to his first broadcast (Item 12). He testified that he then heard the radio transmissions up to and including transmission number 42 and does not recall any radio transmissions thereafter, presumably because he was

then out of his vehicle and engaged in the activities which form the subject of this inquiry.

[25] He testified that he exited his police vehicle and "crawled" to the rear of the red car and, in the process, had lost sight of the occupants of that car. He took out his firearm and pointed it at the car. He testified that he was concerned as to the whereabouts of the occupants of the car, having lost sight of them when he had crawled to the rear of his police car. He was unsure if there were three or four people in the red car. He said he, by this time, had withdrawn his revolver, pointed it at the car and challenged the parties therein instructing them not to move and to show him their hands. Nobody did and he observed movement in the car and then a person (Berg) came out of the car and squeezed out between the passenger window and the garage door. He testified that this person then became, in his view, his immediate threat and gave Berg commands to stop and stay where he was, which commands were not obeyed. Berg then advanced toward the respondent and was ordered again to get on the ground again with no compliance. The respondent said Berg continued coming towards the respondent and was told to stop and was pushed by the respondent.

[26] It is at this point that the respondent testified that he felt he had to use physical force to get control of this suspect and make him understand his commands. He then kicked Berg in the crotch area, which he testified didn't seem to have any effect. He pushed him back and then attempted a karate kick aimed higher in his midsection, which had the effect of making Berg bend over. The respondent testified he was yelling at him all this time to get on the ground. He

testified he recalled a third attempt to kick but could not say whether this kick landed. He says he next recalls seeing Cst. Silver arrive and next being on the ground on top of Berg. The respondent testified he didn't know how they got there and testified that he had no memory of the events between the third kick and being on the ground. When on the ground, he was trying to control Berg and trying to handcuff him. He did not have his sidearm in his hand, although he has no recollection of putting the sidearm back in the holster. He testified that when he first saw Cst. Silver, Cst. Silver had his weapon out and the respondent called to Silver to help him and Silver did help the respondent handcuff Berg.

[27] The respondent testified that after he exited his police car and lost sight of the occupants of the red car and after he had moved to the rear of the red car, he felt exposed to the line of fire of the remaining occupants of the red car and with Berg escaping, he said he felt he was in trouble. He denied ever striking Berg with the butt of his gun and he denied ever kicking Berg while Berg was on the ground, although he did agree that while struggling on the ground while attempting to handcuff Berg, his actions could well have been interpreted by a bystander as delivering blows to Berg. In the course of giving his evidence, he demonstrated on a volunteer who was in the courtroom the methods he felt he used in his attempt to get the handcuffs on Berg and to induce Berg's compliance. He testified that after he and Cst. Silver had succeeded in handcuffing Berg, they dragged him to the centre of the lane. The respondent then testified that he left Berg to perform other duties in and around the scene and did not touch or have any further dealings with Berg from that point on.

[28] As the evidence showed, Berg had in fact sustained injuries from which he later died, being pronounced dead on October the 24th, 2000 at the Vancouver General Hospital. The pathologist who performed the autopsy on Berg determined that he died as a result of a traumatic aneurysm to the left carotid artery and sequelae due to or as a consequence of a blow to the left side of the neck (Admission of Facts, paragraph 25). In her testimony, Dr. Gray, the Pathologist, referred specifically to what she considered to be the cause of death. She testified that there was no visible surface mark on the outer skin at the site of the injury which caused the deep bruising which, in turn, in her opinion, caused the artery to burst and, indeed, described it as an injury that may be "considered to be a "fluke" injury and may be associated with only relatively minor trauma". (Transcript, pages 49/50)

[29] She testified it would be virtually impossible to reproduce the exact circumstances that the aneurysm developed. She said, "We know there was bruising about the artery in the neck but that's not where the artery was damaged. It was damaged up in the head." (Transcript p.50, l 19-46).

[30] A number of witnesses testified as to having seen certain of the actions or interactions between the respondent and the deceased, Jeff Berg.

[31] Sari Fujikawa was one of these. Her view of the incident was from an apartment of her parents which overlooked the alleyway where the incident occurred. She testified that she heard a crash, looked out and saw a man behind a red car and a police officer with a gun approaching him. She then ran downstairs and out to the lane. She said the police officer came and hit the man in the head

with a gun and then kicked him twice while the man was on the ground and the man didn't move. She never saw any handcuffs being applied. She never contacted the police about what she had seen but she later saw a poster requesting details of any actions any person may have seen in the alley that night which poster gave a phone number and she then telephoned that number and ultimately gave a statement. The evidence showed that this poster was posted in the area by the complainant here, Julie Berg. She testified that she heard the police officer yelling at the man to "get down, get down" but that the man was not complying. She went back into her house upon the arrival of the first ambulance.

[32] Mr. Wu lives in an apartment or condominium that had a view of the alley and although not called as a witness, did testify at the inquest into this matter, which was heard prior to this hearing concluding, and his evidence from that inquest was read in. Mr. Wu said he saw a policeman shouting something to some people in a red car and then said the driver of that car came out and the policeman was asking the driver to lie down but he did not. He then says the policeman kicked the knee of the man and then he testified that the policeman put handcuffs on the man and when the man was lying face down on the ground with the handcuffs on, the policeman started to kick him many times. He then testified that another policeman came and the two of them dragged the man in handcuffs into the centre of the lane.

[33] Steve Silver was formerly a member of the Vancouver City Police Department on the day in question but has since left that force. He was riding in a police car with Cst. Maher and their involvement in the matter commences with the radio transmissions they received and authored as are set out in Exhibit 16. In any event,

he testified that when he arrived in the laneway he saw the respondent dealing with a male just north of the red car. He also saw three occupants in the red car and saw the respondent pointing his sidearm at Berg. He said he heard the respondent giving verbal commands to Berg to lay on the ground but he was not complying. He then saw the respondent holster his sidearm and attempt to physically place Berg on the ground so he could be handcuffed but Berg continued to resist. He said Berg was acting irrationally. He saw the respondent kick Berg one or two times in the upper thigh mid-section region. He described these kicks as "leg sweeps" and said one may have landed in the testicle area. He saw that the respondent did pull Berg to the ground and while he had control of him, he was unable to handcuff him due to continued struggling and resistance. Silver then moved in to assist in the handcuffing of the male and upon succeeding in that, the male stopped resisting and he and the respondent dragged him to the centre of the lane.

[34] Robin Gullachsen lives in a condominium which overlooks the alley. He testified that he heard a crash and looked out and saw a man being dragged by handcuffs by the police. He went and got his video camera and filmed the scene. That video was shown several times and the tape thereof is filed herein as Exhibit 14. He continued filming until the medics arrived. The actual video itself, which was played in the courtroom, did not reveal any activities that involved the altercation between the respondent and the deceased.

[35] Two of the occupants of the red car, Steven Morrison and Edward Borden, testified. Their evidence confirmed that there were four occupants of the red vehicle with Morrison driving and Edward Borden who testified that he was passed out in the

backseat of the car. Morrison testified that it was Kelly Studer and Jeff Berg who left the red car prior to the confrontation and then came back and jumped in when Morrison drove off.

[36] Neither Morrison or Borden were particularly helpful with respect to the actual confrontation that took place between Berg and the respondent due, no doubt, to their condition with respect to sobriety. Morrison testified that he, Borden and Studer had all consumed a substantial quantity of alcoholic beverages but that Berg did not. That fact is confirmed by paragraph 26 of the Agreed Statement of Facts.

[37] In determining the question of whether unnecessary force was used, I must, in the words of Southin J.A. in *Berntt*, supra: act as a doppelganger to the Police Officer whose conduct is in issue.

[38] The evidence shows that the respondent had heard the radio transmissions which stated that a home invasion was in progress; that a number of male parties were involved; that they were all armed. He had followed two men and saw them run and enter the red car and depart rapidly. The red car was occupied by more than the two people and would not stop for the police car.

[39] His conclusion that these people were involved in the house invasion was a reasonable one, I find.

[40] I also find that the respondent's action in stopping the red car was reasonable. After the respondent exited his police car, he saw one of its occupants

(Berg) exit it and come towards him and was not obeying the respondent's commands.

[41] Applying the Doppelganger approach, the respondent knew that there were other occupants of the red car, he thought three, who were reported to be armed and who had just been involved in a home invasion. He knew he was alone and in the line of fire of the man approaching him and the other occupants of the red car.

[42] He decided to get control of Berg at once as that was the immediate threat. I find that decision was a reasonable one and that the decision to use force for that purpose was reasonable.

[43] In assessing the degree of force used, the whole of the surrounding circumstances as they existed must be considered. The respondent decided to use kicks and blows to get Berg on the ground and under control. The respondent said he was concerned about the other occupants in the red car of whom he did not then have control.

[44] I find that it was after Berg was on the ground that Constables Maher and Silver arrived and the respondent's focus was then primarily directed to gaining control of Berg by the use of handcuffs, which ultimately the respondent and Cst. Silver accomplished.

[45] There is conflicting evidence of when and where various blows and kicks were delivered by the respondent and when the handcuffs were applied to Berg. It is clear that when the first paramedic arrived, Berg was in handcuffs and I accept the

evidence of Mr. Saat that he arrived on the scene at 21:50 and that Berg was then handcuffed which Saat ordered removed.

[46] I find that the handcuffs were applied by both the respondent and Silver when Berg was on the ground and after a struggle.

[47] I find that the respondent had a reasonable belief in facts that persuaded him to use the force he did and to deliver the blows and kicks that he did.

[48] In order for a finding of excessive force to be made, it must be established on a civil standard which has been held in cases such as this to be high and something more than a bare balance of probabilities. There must be “clear and cogent” evidence. (see: *Jory* and *Dr. Q*, supra)

[49] In the result, I find that it has not been proved to the degree necessary that the respondent committed the disciplinary default of abuse of authority by using unnecessary force on the person of Jeffrey Michael Berg causing his death.