

BRITISH COLUMBIA
CANADA
(BEFORE THE HONOURABLE PETER J. MILLWARD, QC
SITTING AS ADJUDICATOR)

Vancouver, B.C.
File: PH99-01

PUBLIC HEARING
Pursuant to the *Police Act*, Section 60(6), 60.1(3)

**IN THE MATTER OF THE PUBLIC HEARING
INTO THE COMPLAINT AGAINST: CONSTABLE M. SEKELA;
CONSTABLE K. HARDER; CONSTABLE C. THOMSON;
CONSTABLE D. MITCHELL, AND CONSTABLE D. SCHMIRLER OF THE
ABBOTSFORD POLICE DEPARTMENT**

FINDINGS OF THE HONOURABLE PETER J. MILLWARD, QC

June 29, 2000

Findings of the Honourable Peter J. Millward, QC:

On 3 January 1999, Constables Sekela, Harder, Schmirler, Thomson and Mitchell, the Respondents, were employed and on duty with the Abbotsford Police Department (APD). On that date they were members of the APD Emergency Response Team ("ERT"). Each of the officers was experienced in police work and as a member of the ERT.

On that date Ronald Raber ("Raber") lived at a dwelling house situate at 2386 Center Street, Abbotsford, B.C. At about 5:00 p.m. the Respondents, along with

APD ERT Constable Sansalone, entered Raber's house in order to effect execution of a search warrant obtained earlier that day. At the time of the ERT entry, a children's birthday party was taking place in the Raber home, attended by 14 children aged between 1 month and 9 years of age, and 14 adults.

Raber's wife had custody of the 2 children of the marriage and he was entitled to periodic access. Raber was exercising that access that day and entertaining his children and 12 of their friends with a birthday party for his son Scott, who was 7 years old that day. The other children were accompanied by parents and relatives and, in all, the party numbered 28 – comprised of 14 adults as well as the 14 children. The children had enjoyed gift opening, games, including street hockey in the driveway of the residence, using a net and sticks Scott had received as gifts that day.

The children had been called in to the house and were gathered in the living room, where they were being served birthday cake. Raber was in the kitchen, cutting the cake with a kitchen knife. The children were seated around the coffee table and on chairs among the parents in the living room. One mother of 3 was breast-feeding her weeks old baby while her 2 other children were on the floor at her feet, beside Raber's dog Kona. The noise level in the small house was high and the children were excited.

At that point shouts were heard and men dressed in dark clothing and wearing balaclavas and goggles appeared at the top of the stairs, at the entrance to the living room, shouting "Police! Every one get down!" The first officer to enter the room, Officer Thomson, encountered a woman seated at the top of the stairs and directed her to lie down. Thomson carried a machine pistol. When the woman was "non-compliant" (his term), he reached out, grabbed her and forced her to the ground. At that point Thomson saw what he described as a pit bull dog run up from behind the woman, jump up and seize the back of his left arm in its jaw. Officer Schmirler, who was following Thomson, upon seeing the dog attacking Thomson, stepped forward to within a foot of the dog and fired two shots from his MP5 machine pistol, striking a glancing blow and a direct hit, killing the dog. At the moment of firing Schmirler was not aware of any person in the room other than Thomson and a person "beyond Thomson".

Following Schmirler were Constables Sansalone and Harder, while Constables Mitchell and Sekela entered the lower floor of the dwelling. When the dog was shot the scene became chaotic, with children crying and screaming, Raber cursing at the man who shot his dog, and many of the other adults crying out. The police officers caused several of the males whom they found in the kitchen to lie prone on the floor, handcuffed, and began to usher the children and parents downstairs and out of doors into the driveway and front yard. Downstairs, the two males found there by Mitchell and Sekela were forced into a prone position and then removed from the house.

The police officers were acting on information that drugs and a firearm or firearms were located in the residence, and the entry was made in the course of executing a search warrant. As a result of the entry and the conduct of the officers in the course of the entry, complaints were made to the Police Complaints Commissioner. A public hearing was convened to consider the complaints in front of an adjudicator, all in accordance with the *Police Complaints Commission Act*. Following some 24 days of hearings, extending over the period from November 1999 to June 2000, and submission of written arguments by counsel, and oral submissions heard on Friday, 16 June 2000, I ruled that Counts 5 through 8, inclusive, had not been proven on the civil standard of proof, and directed that those complaints be dismissed accordingly. The other complaints require more detailed consideration.

Count 1

Section 4(1)(a) Discreditable Conduct

Code of Professional Conduct Regulations

That Police Constable #264 Matthew Sekela, on or about the 3rd day of January, 1999, without good and sufficient cause entered, and caused others to enter, a dwelling house at 2368 Center Street, in the City of Abbotsford, in the Province of British Columbia, in a manner and at a time that was unjustified in the circumstances, to wit: he entered, and caused other constables to enter, the said dwelling house while he and the other constables were attired and armed as members of an emergency response team, in circumstances where he knew, or ought reasonably to have known, that present within the said dwelling house, at the time of entry, were visitors, including children.

On the evidence, the police had information that Raber was actively engaged in the selling of illegal drugs, particularly marijuana, and that drugs were to be found in his residence, along with a firearm or firearms. Constable Sekela had participated in the execution of a warrant at Raber's residence on 26 November 1998, when drug paraphernalia, a .22 rifle and ammunition had been found. Raber was prohibited by court order from possessing any firearms.

The Raber residence at 2386 Center Street was shared with one, Scott Blair. Raber's former spouse, the mother of his children Deneen, 4 years, and Scott, 7 years, had custody of the children. Raber had access to the children and was entitled to have the children with him every other weekend, every Wednesday, and alternating birthdays and holidays. According to Raber, the front upper bedroom was reserved for his children and, at the time of the November raid, contained double bunk beds, two dressers, and a variety of toys and children's clothing, as well as "things on the wall" (p.16 Nov. 30).

Raber testified that the police had been in the children's room during the November raid, and that "The drawers were pulled out and dumped, toy boxes

from the closet were pulled out and dumped, stuff from the top shelf in the closet was dumped on the floor, and the blankets had been pulled back on the bed."

Raber and Amberlea Stevens both testified that at around 2:00 p.m. on 3 January 1999 they left the house and drove in a blue Ford Taurus towards the downtown Abbotsford area, to get party decorations, a present for the boy Scott, and an ice-cream cake. Raber said there were 8 or 9 adults and a similar number of children at the house when he drove away. A few blocks from the residence, the car was stopped by a police officer and his registration and license were required of him. On being asked where they were going, Raber said:

I told him we were going to pick up party supplies and a present for my child's birthday party.

Q. Any other exchange?

A. He spoke to Amberlea Stevens about the birthday.

Q. What did he say and what did she say?

A. She said, we're having a party at my house and that the child – children were already there, and we were going to get decorations and a cake and a present, and that's about it.

Ms. Stevens said in her testimony that she had known Raber for about 6 months before the day of the party. She was at the Raber home to help with the party for the child Scott. She expected Ron to be taken into custody as he had told her he was prohibited from driving, and he asked her to return to the house if he was arrested, and to carry on with the party.

Jason Rowsom testified that he was at the Raber place from about 2:00 p.m. on and, following the opening of gifts and a "Pinata", he and several children went outside to the carport and driveway with a street hockey set so that some of the children could play hockey. He said there were 8 or 9 children. The children ran back and forth from the back yard, through the carport door to the driveway, and exchanged hockey sticks, as there were not enough sticks for all the children. He said that, all told, there were 10 or 11 children in the drive and the carport and the backyard. Just before 5:00 p.m. the afternoon was growing darker and the children and Rowsom began to return to the house through the front door. All of the children were back in the house by 4:50 p.m. and had taken off their outdoor clothing. Raber started cutting the birthday cake and handing it out.

Constable Sansalone gave evidence as to his involvement. He joined Sekela, Mitchell, Schmirler, Harder and Thomson at 3:00 p.m. when Sekela briefed the team. This was to be Sansalone's first ERT operation.

Mr. Janzen, counsel for Constable Sekela, argues that in order to find his client committed the disciplinary default alleged in Count 1, the following must be established, namely, that he:

1. without good and sufficient cause,
2. entered, and caused others to enter, a dwelling house at 2368 Center Street, Abbotsford, B.C. ("the residence")
3. in a manner, i.e. attired and armed as members of an emergency response team,
4. at a time when present in the residence were visitors, including children, and
5. that was unjustified in the circumstances, i.e., where (i) he knew that visitors, including children, were present in the residence, or (ii) was reckless as to whether visitors, including children were present in the residence.

The evidence is clear that Constable Sekela and the other 5 members of the team under his direction entered the residence attired in the garb usually worn by assault team members, fully armed with sidearms, machine pistols, pepper spray, and other weapons, while there were 28 persons in the small residence, including 14 children. Similarly, there is clear evidence that the entry was made pursuant to a warrant authorizing a "high risk entry", based on information and belief, all in accordance with the usual practice approved by the superior officers of the team, and in accord with the lengthy and rigorous training which Constable Sekela had undergone.

The real question is whether Sekela knew, or should have known, that there were likely to be a number of children and their parents and relatives present at the time of entry. If the answer to that question is "yes", then the disciplinary default will be found to have been established, as it is acknowledged that the probable existence of a small quantity of marijuana and possible existence of a weapon hidden on the premises did not constitute an emergency requiring precipitate action on the part of the police.

Commission counsel says that one need only look at the information presented to Constable Sekela, as testified to by:

Ronald Raber, in describing the regular use of the front bedroom by the children during access visits, and the presence there of the bunk beds, toys and children's clothes, the "things on the wall", and the fact that Sekela was one of the officers who carefully searched the house, including the children's room, on 26 November 1998.

Ronald Raber and Amberlea Stevens, referring to the stopping of the car driven by Raber around 2:00 p.m. on the afternoon of 3 January 1999, when Raber "... told him we were going to pick up party supplies and a present for my child's birthday party." And, in response to the question, "Any other exchange?" said "He spoke to Amberlea Stevens about the birthday and she said we're having a party at my house and that the child – the children – were already there, and we were going to get decorations and a cake and a present, and that's about it."

Ms. Stevens said in her testimony that she had known Raber for about 6 months before the day of the party. She was at the Raber home to help with the party for the child Scott. She expected Raber to be taken into custody as he had told her he was prohibited from driving, and he asked her to return to the house if he was arrested, and to carry on with the party. Ms. Stevens testified that when the officer, who was Sekela, approached the car:

He came over and proceeded to ask where we were going and what we were doing and Ron said, well, we're going to get birthday party supplies and - - for his son's birthday.

Q. Sorry I can't hear you.

A. For his son's birthday. Well, he didn't say his son's birthday. The officer asked who the party was for and I had said, "It's for his son Scott who only comes to see his Dad every other weekend and this weekend is his birthday."

In cross-examination she said:

No, he asked who the party was for, and I said it was for his son, he only comes every other weekend and it's his birthday this weekend, and he was, like, listening to me."

Constable Sansalone told us that Constable Sekela had briefed the ERT group on the vehicle stop and Raber's reference to a birthday gift for his son.

Sansalone also referred to Sekela telling the group during the second briefing that the lookout man, Constable Teichman, had reported seeing an adult and 2 or 3 kids playing in the driveway of the target residence. Sekela instructed the group to the effect that if children were still in the driveway when the team arrived on the scene, then Sansalone was to isolate the children and any adult with them, while the other members proceeded with the entry.

Chief Constable Daniel testified. He denied being told that Sekela had stopped Raber at around 1:30 p.m. the day of the entry. He said that if he had suspected there might a children's birthday party he would not have approved the use of the ERT. When asked:

It perhaps goes without saying, but I will ask it anyway, any information which might suggest even remotely that a children's birthday party was to take place at the time of the ERT entry, is that information that, as the authorizing officer, you must have?

Chief Daniel replied "Yes". Chief Daniel also recalled that as the hour of the proposed entry approached, he was in the briefing room listening to the instructions and discussions among the team and learned that the lookout officer, Constable Teichman, had communicated something about children playing in the front yard, and that the plan was modified to assign one man to deal with the children and one adult male outside the residence while the remainder of the team continued with the entry.

Officer Sekela acknowledged learning from Raber, during the vehicle stop, that Raber was driving to a store to buy a birthday gift for his son, who was said to be either 7 or 10 years old, but denies hearing of a cake or a birthday party. At around 3:00 p.m. he spoke with the officer who was to conduct surveillance and he then discussed the operational plan with members of the team and told them of Raber's mention of his son during the vehicle stop. At the next briefing, at 4:45 p.m., the lookout officer, Constable Teichman, reported by radio that 2 or 3 kids and an adult were in the driveway. The team discussed using one officer to isolate the children and adult outside the house. At 4:50 p.m. the lookout reported seeing 1 male and 3 females in the house, and 3 children and 1 male outside. When the team approached the house and Schmirler said "No kids!", Sekela decided to proceed, assuming there to be 5 adults and 3 children in the house.

The evidence establishes, on an overwhelming balance of probabilities, that Constable Sekela knew or ought reasonably to have known of the presence of children in the house. There is no suggestion that there was good and sufficient cause to have the team enter the residence under those circumstances, and I

find the allegations in Count 1 to have been established and, accordingly, Constable Sekela guilty.

Count 2

Section 4(1)(a) Discreditable Conduct

Code of Professional Conduct Regulation

That Police Constable #264, Matthew Sekela, on or about the 3rd day of January, 1999, in the City of Abbotsford, in the Province of British Columbia, did not comply with Operational Procedure Part II.A 10.5(d) of the municipal police department with which he is employed, and ensure that the dwelling house at 2368 Center Street was under surveillance while a search warrant was being obtained.

Counsel for Constable Sekela says that the date is not in question, and that nothing was done to arrange surveillance until after he had possession of the warrant, but that the operational procedure did not impose a mandatory requirement that the residence be kept under surveillance while the warrant was obtained. The dictionary defines "should" as the past tense of "shall", and says that it is more often used as an auxiliary verb expressing degrees of the present and future and for various shades of attendant meaning indicating obligation; duty; necessity. Constable Sekela submits that the decision not to establish surveillance at the residence until after the search warrant was obtained was consistent with the practice of the APD, and was tacitly approved by his superior officers, A/Sergeant Schultz, A/Sergeant Marshall, and Chief Constable Daniel. He adds that, in the circumstances, a reasonable person in the community would not consider the conduct of Constable Sekela as likely to discredit the APD.

Considerable testimony was adduced to justify neglecting to arrange surveillance until after the warrant was obtained. In addition to Constables Schultz, Marshall and Chief Constable Daniel, Sergeant William Emery, who has considerable experience with emergency response teams, and Inspector Douglas Stuckel, who is also fully experienced in emergency response team matters, both agreed that the word "should" is interpreted as conferring discretion in establishing surveillance. The justification for deferring the establishment of surveillance put forward by Constable Sekela was that, to follow the practice suggested by the Commission counsel as that required by the manual, would be to tax the manpower resources of the police department, and that 90 minutes of surveillance was usually enough.

At no point in the evidence did I apprehend that Constable Sekela made an inquiry as to the quality of the surveillance. In fact, the officer conducting surveillance, while seemingly qualified, was located on the third floor landing of an apartment building some 83 metres from the front door of the residence. His view was partly obstructed by an evergreen tree on the apartment block corner

but he could see the front door and the entrance to the carport and part of the front lawn. His instructions were to report back to Sekela any persons or vehicles coming to the residence and leaving the residence. He could not see into the carport and could not see into the front window because of the angle of his view. He could not see the rear yard. After reporting the adult male and children in the driveway, just before the entry of the team into the house, he left his post and went to his vehicle, which was parked, on Center Street in front of the apartment.

In my view, Constable Sekela clearly did not follow the requirement of the operational procedure and, equally clearly, there was no compelling factor justifying his failure to do so. It would seem abundantly apparent that had he ensured that the surveillance available to him was reasonably sufficient to inform him of the information referred to by Inspector Stuckel as required, that is to say:

1. whether suspect is present on the premises;
2. verify the address of the target residence;
3. determine whether other persons are present at the location;
4. pedestrian and vehicle traffic to and from the location;
5. the structure of the building and the general geographical layout of the surrounding area.

Then he would not have led the team into the building and the incident would have been avoided.

It cannot be said with certainty that simply by commencing and maintaining surveillance while the warrant was being obtained, the true facts would have been made known to Constable Sekela. However, I find, on the civil standard of proof, that Constable Sekela's failure to follow the operational procedure as laid down in the manual of procedure was a significant factor in leading to the entry of the team during the birthday party and the consequent traumatic events that ensued. I conclude that a reasonable person in the Abbotsford community would consider the failure of Constable Sekela to ensure that the residence was kept under surveillance while he obtained the search warrant was conduct likely to discredit the Abbotsford Police Department.

Count 3

Section 4(1)(f) Abuse of Authority

Code of Professional Conduct Regulation

That Police Constable #263, David Schmirler, on or about the 3rd day of January, 1999, at 2368 Center Street, in the City of Abbotsford, in the Province of British Columbia, used unnecessary force on the person of Ronald Raber.

Raber suffered soft tissue contusions over his left eye and on his rib area, and alleges having suffered a mild concussion. The existence of those injuries and the fact that they were occasioned by contact between the team members and Raber has been amply established by credible evidence. The officers themselves have stated frankly that they administered physical force to the person of Raber, but minimize the degree of force applied and say that whatever force they did apply was justified by Raber's conduct in continuing to be verbally abusive and non-compliant with their instructions to him to remain prone on the floor and to refrain from looking at the officers.

In my view, the force applied to Raber was excessive and unnecessary in the circumstances. The team members, heavily armed and fitted in body armour, helmets and goggles, were trained young officers, physically fit and capable of controlling the persons found in the residence, without causing injury to those persons. Not one of the occupants in the house offered any resistance to the officers and all the occupants complied with the police commands, with varying degrees of alacrity. Raber was lying on the kitchen floor, with his hands handcuffed behind his back, when force was applied to his person, causing the injuries in question. The evidence is that Constables Harder, Thomson and Schmirler each dealt with Raber, in the moments after the shooting incident, and I am unable to say with any degree of confidence that the others were caused by Constable Schmirler and not by one of the other two team members.

Respondents' counsel urges that "depending on the seriousness of the allegations, and of the potential consequences, the application of a civil standard may require clear and convincing evidence for a case to be regarded as proven". Whether that caution has application in this question, or not, on the preponderance of evidence I am not satisfied that Constable Schmirler was the agent who caused the injuries to Raber, and must find the allegations not proven.

Count 4

Section 4(1)(g) Improper Use of Firearm

Code of Professional Conduct

That Police Constable #263, David Schmirler, on or about the 3rd day of January, 1999, at 2368 Center Street, in the City of Abbotsford, in the Province of British Columbia, discharged his firearm without reasonable grounds, and when unsafe to do so.

Constable Schmirler testified that as the team approached the residence he was under the impression that there were 2 or 3 children in the driveway, perhaps

with an adult. When the team was less than 10 seconds from the front door, Schmirler noticed that there was no one outside the house in the driveway, and he said to the other members of the team, "No kids!" He said that he realized there was a strong possibility they were actually in the house. He was the second officer up the stairs behind Thomson, and followed 4 or 5 feet behind him. At the top of the stairs Schmirler looked left and saw Thomson with a "large pit bull" attacking his left upper arm. He was aware of another person just beyond Thomson. Schmirler decided to shoot the dog. The muzzle of his machine pistol was about 1 foot from the dog. He fired two shots within half a second. He had been in the house 5, 6 or 7 seconds when the shots were fired. He testified that his decision to shoot the dog occurred as he entered the living room, and the only other person of whom he was aware at that precise moment was the person located beyond Constable Thomson. The evidence shows that one of the rounds fired by Schmirler passed through the dog and the other struck it a glancing blow on the side of the body and one leg. After shooting the dog, the officer's attention turned to the rest of the room. After a few seconds it became apparent that there was a birthday party in progress. There were a large number of children and adults sitting in various locations in the room. He stated that the presence of the children and the large number of people in general influenced him to put his gun on safe.

During the hearing, a good deal of examination and cross-examination was directed to the angle of the rifle when the shots were fired. Commission counsel argued that the evidence pointed to the necessity for the rifle to have been fired more or less parallel to the floor, or horizontally. Counsel for the Respondents urged me to accept their position that the weapon was pointed nearly vertically, or at least at 75 degrees from the horizontal. While Commission counsel's argument seems to me to more closely accord with the evidence, I am unable to form any clear conclusion on the matter. With respect to both points of view, the precise angle of the trajectory is not determinative of the issue. I hold that to fire two shots from the machine pistol in close quarters in the living room, without first having viewed the premises for the presence of other persons and their location in the room, particularly in the belief that at least 3 children and a number of adult persons might well be there, was unsafe.

In cross-examination, Constable Schmirler was asked, "Is that the primary danger that you're concerned about, that dissuades - - that makes it preposterous that you could make such an entry when a birthday party was in progress, that a child might get shot?" to which he replied, "That would be the primary and predominant one, yes."

Clearly, there were other courses of action open to Constable Schmirler. He could have elected to adopt one or more of a number of alternative steps to deal with the dog. While the dog was attacking his fellow officer it was apparently biting his arm, which was hardly a life-threatening attack. To instantly fire two

shots toward the dog without considering alternatives or comprehending the surroundings was to act without reasonable grounds.

I find Constable Schmirler to have committed the discipline default of which he is accused. The *Police Firearm Regulation* provides:

5(3) Before discharging a firearm, a member of a police force must be satisfied that assistance and a lesser means of force are not readily available or would not gain control over a dangerous situation.

On the evidence, Constable Schmirler made the decision to shoot the dog immediately he saw it hanging from Thomson's arm. No consideration was given to "assistance and a lesser means of force" or their availability.

Under the *Police Act Public Hearing Rules*, the hearing is limited to those issues, witnesses and documents set out in the case management record unless the adjudicator determines otherwise. The entry of the ERT into the Raber residence on the afternoon of 3 January 1999 raises a larger issue than those set out in the case management record.

A tactical team of 6 officers is a powerful force. The members are experienced police officers, well educated, highly trained in tactics, firearms use and physical fitness, crowd control and various weapons use. They are trained to act as a unit in following the instructions of the team leader in order to accomplish their objectives. They are trained to act swiftly and decisively, and to exercise control over all those persons to be found located in a target area, and perceived to constitute possible threats to the rapid realization of the team's objectives. They are instructed that when effecting an entry they are to continuously assess risk and apply necessary intervention to ensure public and police safety. By "necessary intervention" is meant "necessary level of force". According to the evidence heard at this hearing, the team members are trained and ready to respond to resistance and non-compliance with their commands with such level of force as is deemed necessary to achieve compliance.

In the Raber entry, no resistance was encountered. No non-compliance with commands was seen, although Raber's failure to continue to remain face down and quiet was seen by up to 3 of the officers as threatening in some way. The household dog, in response to the startling entry of the threatening figures of hooded and armed officers, one of whom pushed a young woman to the floor, jumped up and fastened its jaws on the arm of the officer who acted so precipitately. The immediate shooting of the dog, twice, and the strident bursting into the home of 6 gun-wielding, masked officers,

caused a high degree of agitation among the 13 adults and 14 children, none of whom were shown to have any connection to the illegal drugs and suspected weapon which were the target of the warrant. Two of the guests filed "impact statements", describing in graphic terms the traumatically negative reactions they and their children have suffered as a result of the incident.

Chief Constable Daniel had ultimate responsibility for authorizing the team's entry that afternoon. His testimony was less than compelling, but he stated most emphatically that had he been informed by Constable Sekela (as Sekela says he was) that, when stopped by Sekela, Raber had made mention of the purchase of a present, or presents, for his son's birthday, he would have required further inquiries to be made.

Neither Chief Constable Daniel, nor any of the other senior officers of the Abbotsford Police Department present that day, appears to have paid attention to the quality of the surveillance information, the location of the surveillance point, the view of the dwelling to be had from that point, any obstruction of the view, or the appearance of the front of the house or the back yard. Indeed, all that was done was to designate an officer to undertake surveillance. Had any reasonable care been taken to secure the information specified by Inspector Stuckel as required before undertaking an operation of this kind, clearly, the entry would not have taken place that afternoon and the traumatic confrontation, with its lamentable consequences, would have been avoided.

The tactical team of the Abbotsford Police Department is a powerful and dangerous weapon. Once launched, it moves as a unified force to the rapid attainment of its objective and is not readily deterred or deflected. It should not be used capriciously, or without the benefit of full and, as far as possible, accurate information as to the number and disposition of the occupants of the target location. This is particularly so when the target does not represent a clear and present danger.

In my view, a careful reconsideration of the use of tactical teams, and the circumstances under which such use may be authorized, is required.

Submitted this 29th day of June, 2000.

"Peter J. Millward, Q.C."