

IN THE MATTER OF: Law Enforcement Review Act
Complaint No. 5724

AND IN THE MATTER OF: An application pursuant to s. 13 of
The Law Enforcement Review Act
R.S.M. 1987, c.L75

BETWEEN:

D.D.,

Complainant,

- and -

CST. A. B., CST. E. H.,
CST. M. S., CST. R. R.,
CST. B. G.

and

P/SGT. M. H.,

Respondents.

TRANSCRIPT OF PROCEEDINGS had and taken before The Honourable Judge Everett, held at the Law Courts Complex, 408 York Avenue, in the City of Winnipeg, Province of Manitoba, on the 8th day of October, 2003.

APPEARANCES:

MR. D. GUÉNETTE, for the Commissioner.

MR. P. MCKENNA, for the Winnipeg Police Service.

MR. D. D., in person.

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OCTOBER 8, 2003

MR. MCKENNA: Good afternoon, Your Honour.

THE CLERK: Court is open, the Honourable Judge Everett presiding, please be seated.

MR. GUÉNETTE: Good afternoon, Your Honour.

THE COURT: Good afternoon.

MR. D.D.: Good afternoon.

THE COURT: Good afternoon.

Is D.D. here?

MR. D.D. : Yes, Your Honour, I am.

THE COURT: That's you?

MR. D.D. : Yes, Your Honour.

THE COURT: Okay. And what other appearances do we have for the record?

MR. MCKENNA: Paul McKenna on behalf of the respondent officers, Your Honour.

THE COURT: Okay.

MR. GUÉNETTE: And Denis Guénette on behalf of the commissioner, Your Honour. From the commissioner's office is J.H.

MR. D.X.: And D.X., brother of D.D.

THE COURT: Okay. And I think you were interrupted.

MR. D.X.: Oh, sorry, sorry.

MR. GUÉNETTE: Yes, J. H. investigator from the commissioner's office.

THE COURT: Thank you.

MR. D.X.: Sorry.

THE COURT: Okay go-ahead sir.

MR. D.D.: Good afternoon, Your Honour.

THE COURT: Good afternoon.

MR. D.D.: Just before we start I just wanted

to, I got this brief from the commissioner of Law Enforcement Review Agency as of yesterday, haven't even had a chance to read it, however, that's okay. This things been going on for over a two-year period now.

THE COURT: So you're wanting to -- you're not asking for an adjournment --

MR. D.D.: No, I, no --

THE COURT: -- of the case to read that?

MR. D.D.: -- I just, I'd rather just get on with it --

THE COURT: Okay.

MR. D.D.: -- and present what I think is right and let you make a decision, if that's okay.

THE COURT: All right.

MR. D.D.: First of all I lodged a complaint of foul language being used upon me about a time, when I was arrested back in 2001, by a couple of members of the Winnipeg Police Service. Referred the complaint immediately to LERA for investigation.

At the time of the investigation, the commissioner of LERA, Mr. George Wright, took the investigation on, on himself and I feel there was a conflict of interest. He shouldn't have proceeded with that investigation because he had a working relationship with my brother D.X., 25 years ago. They do not like one another. The name D-- means mud to him. So therefore I don't feel it was a fair and independent and objective investigation in the first place. Whether it's real or perceived it should be given, it should have been given to, as far as I'm concerned in my humble opinion, to a neutral investigator. That's step one.

Step two, the night I was arrested there was a consent search done at the apartment where I was arrested and in all of the officers' notebooks that I have they didn't follow their own procedure which is laid out in their NOTE: For the purposes of distribution, personal information has been removed by the commissioner.

operational manual, that -- which is quite clear. They have to read the accused the notice of arrest, notice re legal counsel, police caution, notice re, notice re warrantless consent search.

At the beginning they were allowed in there by Ms. B. who was my, the woman I was living with, but nothing was explained to her of her rights that any time the search was to be terminated it's to be done so. And according to their operational manual, the Winnipeg Police Service, this all has to be recorded in the notebook of all appropriate responses. I have the lead investigator's notebook here, there's not one note on that consent search therefore I believe the search was illegal. However, that's just what I can see from obtaining the notes of the police officers and their operational policy says it has to be done, very clear, Your Honour.

And the third thing, the commissioner of LERA didn't interview my brother, who was present during that arrest or the, the -- or the other occupant of the apartment, Ms. D.B., to either corroborate what I had to say about their foul and abusive language at the time of my arrest.

I asked them to leave the apartment when I was being brought out of the bedroom and I was told in no uncertain terms with foul language, which I won't repeat, to shut my mouth. Like I say, and I believe the commissioner should have had my brother interviewed and Ms. D.B.

The court transcripts of Ms. B. and some of the police officers indicated they were using foul language in there and that was the whole issue of the complaint, the unprofessional manner in which I was dealt with.

And the fourth thing, I was assaulted by the lead investigator, Constable R. At the police station, when I was taken into custody, I was put in arm locks and lead around
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the building. It was the most disgusting performance I've ever seen.

And that's basically the issue of my submission. And I, I wanted, I wanted this thing to be investigated properly, objectively and basically I guess the main issue, I still think it's a conflict of interest by the commissioner of LERA himself right at the beginning. And that's all I have to say, Your Honour.

THE COURT: Okay, do you want to say anything more about -- do you know the test that you have to meet here?

MR. D.D.: Just that --

THE COURT: You have to show me that the commissioner erred.

MR. D.D.: He had bias, bias, it's in there and error, and I think it was bias, conflict of interest and it should have been given to a neutral party to investigate in the first place and I don't think justice was done to my complaint.

THE COURT: Okay, now I had noticed the name of another investigator on your file. Are you saying that Mr. Wright --

MR. D.D.: At the beginning they had --

THE COURT: -- investigated this matter himself or --

MR. D.D.: Yes ma'am.

THE COURT: -- that it was not assigned to a different --

MR. D.D.: It was at the beginning but that investigator retired or resigned and went somewhere else and he took the investigation over himself.

THE COURT: Okay. Okay, is that your complete submission?

MR. D.D.: Unless I hear of something to the contrary from the other side.

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THE COURT: Okay, so you're reserving the right to respond?

MR. D.D.: Yes ma'am.

THE COURT: Okay, thank you.

MR. MCKENNA: Your Honour, with regard to -- I'll, I'll address them in the points that they were brought forward. With regard to the fact that Mr. Wright took the investigation upon himself. You will find, I believe, in the file that Mr. Wright invites the, the complainant to come and have a look at the file and the practice is, of course, that they can ask for an entire copy of the file, and an entire copy will be made for them. There's nothing that I have access to that they don't have access to. I have the entire file and I understand that you have it as well.

THE COURT: Yes.

MR. MCKENNA: And you will see, Your Honour, that they have what are called occurrence reports and that, that is their form of note to file so that anybody can pick up the file at any time and see where they're at. And they are all initialed, each of these notes is initialed. You will see that the investigator, at all times, is somebody other than George Wright. In fact you will see that there is a note from the investigator that he will now refer the matter to George Wright for a decision based on the investigation. Now if, if you, if you wish I will take just a moment, I didn't anticipate this, but if you wish I'll take a moment to find that, that note for you?

THE COURT: That, that's okay, thank you for offering.

MR. MCKENNA: Thank you, all right.

THE COURT: In fact was it, was it a female investigator?

MR. MCKENNA: It was a B.P. at

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first --

THE COURT: Yes.

MR. MCKENNA: -- and, and I believe J. H. and I believe B.T. (phonetic) as well, I believe, had a bit to do with that. I'm not entirely sure.

UNIDENTIFIED VOICE: Not B.

THE COURT: Okay, yes but I had noted other names of --

MR. MCKENNA: Yes, yes, I, I can tell you and I've read through the entire thing. I can tell you without being able to recite for you exactly who picked up when --

THE COURT: Um-hum.

MR. MCKENNA: -- I can tell you that there are no notes of any investigation being done by Commissioner Wright.

THE COURT: Yes.

MR. MCKENNA: Okay. That is standard, I don't know that, that anybody would be able to establish that there was a conflict in any event, but that is standard practice. I can tell you that the commissioner does not investigate these --

THE COURT: Right.

MR. MCKENNA: -- there just, probably just too many of them for there.

With regard to --

THE COURT: Can I, can I just -- do you mind if I interrupt you just --

MR. MCKENNA: Certainly, absolutely.

THE COURT: -- to be a bit informal? Mr. D. D. --

MR. D.D.: Yes.

THE COURT: -- now, now that you've heard that on this issue of Mr. Wright being the investigator, he was not the investigator at any time.

MR. D.D.: Okay.

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THE COURT: Do, do you -- do you stand corrected on that or do you want to still take the position that he was the investigator?

MR. D.D.: I still think -- I, I'm not sure on that, but I still think he is bias because of he relationship he had with my brother in the '70s and --

THE COURT: So in being the decision-maker perhaps?

MR. D.D.: Yes and also in the investigation whether he was the investigator or not the investigator, whoever was the investigator didn't interview my brother, take the time to interview my brother to corroborate what I said. Didn't take time to even go out and interview Ms. B., who was also detained at that time. So I just -- just from an investigative standpoint.

THE COURT: Okay, thank you. I have you on that point --

MR. D.D.: Okay.

THE COURT: -- I just wanted to know, based on what Mr. McKenna.

MR. D.D.: No I won't argue, I won't argue with him on that one but --

THE COURT: Mr. McKenna, I'm, I'm being a bit informal again --

MR. MCKENNA: Yes, absolutely.

THE COURT: -- just because the, Mr. D. D. isn't represented by counsel --

MR. MCKENNA: Yes.

THE COURT: -- but I, I think that you could interpret Mr. D.D.'s argument on that point, on the point of bias. I guess what he's saying is even if Mr. Wright was the commissioner and making a decision --

MR. MCKENNA: Uh-hum.

THE COURT: -- because he knew him or knew his

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brother he was biased. So I'll direct your argument on the bias point just if you want for the record to respond to that --

MR. MCKENNA: Fine. Thank you.

THE COURT: -- argument.

MR. MCKENNA: You know, Your Honour, I think that that's a little late in the day to be making this argument. You will find, replete throughout the file, letters from Mr. D. D. to Mr. Wright giving Mr. Wright certain information with of course the view that he is hoping to encourage Mr. Wright to see the file in his way. So I think that what you, what you have here is an individual who was perfectly happy to make representations on an ongoing basis in written form on the file with Mr. Wright, and when he doesn't get the decision he likes now it is unacceptable to have the presence of Mr. Wright on that file. I think it's a little, too little too late, and I don't think there's any substance to it, Your Honour.

THE COURT: Okay, thank you. Sir I'm, I'm in the middle of hearing --

MR. D.D.: Oh, I'm sorry, I'm sorry.

THE COURT: -- Mr. McKenna. I don't intend for this to be a back and forth --

MR. D.D.: Okay.

THE COURT: -- but I just wanted to give you the chance given that it appeared --

MR. D.D.: Okay.

THE COURT: -- there was some incorrect information --

MR. D.D.: Okay, ma'am.

THE COURT: -- misunderstood by you. I just wanted to give you the chance and to withdraw that argument if you chose.

MR. MCKENNA: Your Honour, with regard to the

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consent search we know that the residence in question was the residence of Diane Bartlett, and if there is going to be a complaint about the search it ought to be from Diane Bartlett. Having said that I believe you have our material that I filed in, when you look through the file you, you will note that, that I think your file has handwritten numbers on the top right hand corner.

THE COURT: Okay just, I'll just --

MR. MCKENNA: So that, just for ease of reference.

THE COURT: Okay I just -- what are you directing me to the --

MR. MCKENNA: I'm -- first of all I want to know that your file has these handwritten numbers on the top right hand corner so I can direct you to page numbers.

THE COURT: Okay. The, and you're talking about he commissioner's file now?

MR. MCKENNA: It would be the commissioner's file, Your Honour, yes.

THE COURT: The commissioner's file (inaudible).

Yes, there are handwritten --

MR. MCKENNA: All right. Well then if you look at page 81, I believe it is, and I'm not going to repeat this, Your Honour, I would rather just draw your attention to it. I'm not going to repeat or read into the record --

THE COURT: Okay we have a bit of a problem here.

MR. MCKENNA: Okay.

THE COURT: I seem to start -- are you saying you filed materials?

MR. MCKENNA: No.

THE COURT: Oh, okay.

MR. MCKENNA: These -- what this is is a copy of the file. My understanding is that you would have a similar copy.

THE COURT: Oh it goes, yes, it goes -- I'm sorry,

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it goes down in number.

MR. MCKENNA: Yes.

THE COURT: Okay. Yes I do have page 81.

MR. MCKENNA: All right. Page 81, Your Honour, is a letter that sets out what our position is on the, on the legality of entering into the, into the residence, and of course even the Criminal Code has been modified since the Feeney decision came out --

THE COURT: Um-hum.

MR. MCKENNA: -- but nevertheless there is this concept of fresh pursuit and if I draw your attention to page 80, which is the 2nd page of that letter, and I'm summarizing from Justice Lamer in there and, and it's a very similar sort of fact scenario as in the Macoux (phonetic) case.

THE COURT: Um-hum.

MR. MCKENNA: Former Justice, Chief Justice Lamer, writing for a unanimous court, accepted the right of warrantless entry to a dwelling where a person is taking refuge, whether the offence is indictable or summary conviction. Justice Lamer ruled that it would be completely unacceptable for peace officers who are about to make a completely legal arrest to be prevented from doing so merely because the offender had taken refuge in his home or that of a third party.

Now, this -- and he goes on to say, he noted further that the police could not be obliged to end the pursuit on the offender's doorstep and that the offender is not being bothered by police unexpectedly while in domestic tranquillity.

What Justice Lamer was saying is that you don't have an expectation of privacy if you are taking refuge in your house, your residence or someone else's residence. And, and this particular case goes further than, than the NOTE: For the purposes of distribution, personal information has been removed by the commissioner.

Macoux case, because the crime is being committed from the residence. No one enjoys protection in a residence when they are committing a crime from that residence, Your Honour, no one. Unless of course it can be established, and that would be a very rare circumstance, that there is no potential for harm and let's wait it out and --

THE COURT: Um-hum.

MR. MCKENNA: -- and, and -- and get a warrant. Well what can you possibly do to prevent the continuation of the offence that's happening from a 19th floor balcony while you're getting a warrant. There's nothing you can do and, and people passing by are, are vulnerable. There is no doubt that an individual who takes refuge in a home, a residence of any kind, even that of a third party does not enjoy that kind of protection, and that, with the greatest of respect, Your Honour, is probably an argument that should be left only for a complaint being filed by Ms. B.

THE COURT: Yes, now what do you have to say about, I know that in the legislation a third party can file a complaint or -- on, on behalf of someone else.

MR. MCKENNA: Yes.

THE COURT: What, what do you have to say because I was concerned --

MR. MCKENNA: Yes.

THE COURT: -- about the, the Ms. B. part of the argument although --

MR. MCKENNA: Yes, yes.

THE COURT: -- what do you, what is your position Mr. --

MR. MCKENNA: The only time that they can do that is if they obtain the consent -- the, the commissioner has to obtain the consent of the, of the third party and there is no such consent.

THE COURT: And does that exist in this case?

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MR. MCKENNA: No, none, not whatsoever.

THE COURT: Okay, so you're asking me then to disregard the complaint with respect to the warrantless search --

MR. MCKENNA: I'm asking --

THE COURT: -- because it's not coming from Ms. B.?

MR. MCKENNA: That's correct, and in the alternative to rely on the case law that we provided to the commissioner which is set out at, beginning at -- well it goes backwards, it's between pages 62 and 81.

THE COURT: Right.

MR. MCKENNA: So this, that would be our alternative argument.

With regard to the foul language issue, Your Honour, there, there is evidence from Ms. B. at a trial, and of course Mr. Wright was privy to the transcripts of that trial and a finding from Judge Conner, that it was the accused that were using the foul language. And as well you have a comment from Commissioner Wright that the first words out of Mr. D.D.'s mouth were expletives. And so that he can hardly --

THE COURT: At the time of the incident you mean or?

MR. MCKENNA: At the time of the incident, and he can hardly be, said to be upset by that as well. So, so even if you were to believe Mr. D. D. that the, the -- that there were expletives being used, and of course we don't think you should because there's, we have a ruling from a provincial judge about that that -- on that very point, Mr., Mr. D. D. ought not to be believed. And in fact Judge Conner goes on to say that he believes the Crown's witnesses whenever they conflict and of course one of the Crown witnesses was Ms. D. B. Now keep in mind, Your Honour, that NOTE: For the purposes of distribution, personal information has been removed by the commissioner.

Ms. B., as well, was subject of coercion from Mr. D. D. and Mr. D. D. was ultimately found guilty so what Mr. D. D. is trying to do and he's probably --

THE COURT: Subject of coercion in terms of testifying?

MR. MCKENNA: Yes.

THE COURT: And was that a -- in --

MR. MCKENNA: A finding of guilt, Your Honour, yes.

THE COURT: On an obstruction?

MR. MCKENNA: Yes.

THE COURT: Was it an obstruction -- and she was the complainant on --

MR. MCKENNA: Yes she was the complainant/victim of coercion on her testimony and so what Mr. D. D. is trying to do today is introduce some facts that are not in, on Commissioner Wright's record. What Mr., what Commissioner Wright has on his record is evidence of the coercion that comes through the, the criminal trial.

With regard to the arm lock, Your Honour, the arm lock is a hold that is taught at the police academy and it, it's -- you'd be hard pressed to, to describe as excessive force a restraining hold that is taught at the academy. And you can well imagine, given the, with the evidence that's in front of us is, is the type of behaviour that was being elicited by Mr. D. D. at the time. That he was very aggressive and that he was very confrontational. That he was using abusive language and that he spent the entire time barking like a dog, and that you may --

THE COURT: Where, where did he spend --

MR. MCKENNA: The, the entire time that they dealt with him, Your Honour, every time that he was asked a question he barked like a dog. You'll find that on the record. If you'd like me to find that for you Your Honour?

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Thank you, if you'll give me just a moment.

THE COURT: I think I might have missed that when I went through the file.

MR. MCKENNA: Yes, Your Honour, I will find that for you.

THE COURT: Thank you.

MR. MCKENNA: Perhaps if I can just have a couple of minutes, Your Honour.

THE COURT: Oh sure. Or am I interrupting your train of thought by --

MR. MCKENNA: No that's fine, I, I thought I had this marked down and I, perhaps I don't.

THE COURT: Thank you, take your time.

MR. MCKENNA: Thank you.

Your Honour, thank you for your patience in this matter. If you turn to page 145, now I'm speaking of the right hand numbered column.

THE COURT: Yes.

MR. MCKENNA: Page 145 is in fact page 3 of the reasons of Judge Conner.

THE COURT: Yes.

MR. MCKENNA: And if you look, starting at lines 23, Your Honour, he summarizes the evidence that was before him and you'll see, by the time he gets to line 28, 27 and 28;

"When he asks for his name and arrest he --"

I think that's probably a typo for address;

-- he barked like a dog. D. D. was transported to the Public Safety Building and placed in an interview room. When again asked

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for his name and address he again barked. He was taken for print (sic) fingerprints and he continued to bark."

And of course he's summarizing the evidence of the police witnesses and you know from his findings that he found them --

THE COURT: Right.

MR. MCKENNA: -- to be credible and when the conflict with Mr. D. D. that he prefers the evidence of, of the officers.

So you have officers that were met with that kind of behaviour, of course they are going to use some precautions with the accused as they're leading him around and the, an arm lock is the most inoffensive sort of a procedure. It just basically is a method of placing the arms so that if you try something you can't, you can't do anything; that's all it does. And it's taught at the academy and it was something that was used and I think perfectly reasonable in the circumstances.

Your Honour the, the -- the test in this regard has been set out by Judge Miller. Judge Miller is the only judge to have pronounced on the, on the test when it comes to a decision of a commissioner as to whether something is frivolous. And frivolous when is rejected as frivolous it is under s. 13(1)(a).

THE COURT: Right.

MR. MCKENNA: Judge Miller is the only one to have had to decide that to date and his decision in that regard is found at tab 3 of the commissioner's brief in this matter. If you look at the top of page 10 of Judge Miller's decision, Your Honour. This is the only case that has yet pronounced itself on this matter.

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THE COURT: Thank you.

MR. MCKENNA: In respect of the former -- do you see that at the, at the top?

THE COURT: Yes.

MR. MCKENNA: When he, when he says the former and if you look back at the previous page it is with regard to decisions where it's found to be frivolous or vexatious. That's what the former means.

THE COURT: Right.

MR. MCKENNA: As opposed to not within the scope of s. 29, that would be the latter. So the former is frivolous and vexatious, that's what we're here today about.

In respect of the former I believe that the standard would tend to be reasonableness simpliciter while in the latter it would tend to be correctness. That's the only pronouncement on the test, I think he's correct, Your Honour.

THE COURT: So he, so he finds that it's the middle test, the reasonableness we'll just call it.

MR. MCKENNA: It's the middle test, yes Your Honour, and when you, when you think about it and I invite you now to look at the, the words of s. 13(1). Do you have that?

THE COURT: Yes I do.

MR. MCKENNA: All right.

THE COURT: Thank you again, on the record, to Mr. Guénette for these materials. I found them very helpful. Okay, yes I have 13(1).

MR. MCKENNA: 13(1):

"Where the Commissioner is satisfied (a) that the subject matter of a complaint is frivolous or vexatious . . ."

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So the commissioner must be satisfied, and it's a latitude that is given to the commissioner to determine something which is very subjective, whether something is frivolous or vexatious. And the legislature has given the commissioner that, that latitude to deal with something that is, is -- is very, it's a nebulous concept and for that reason, I believe, Judge Miller was persuaded that the test ought to be reasonableness simplicitor.

THE COURT: But then did he go on in that particular -- were you counsel in that particular case?

MR. MCKENNA: Yes I was.

THE COURT: Does he go on then -- do I read his next paragraph correctly that he goes on then and applies the more generous test to the applicant --

MR. MCKENNA: Yes, he gives the, he gives the applicant --

THE COURT: -- and uses correctness anyway, like he --

MR. MCKENNA: Anyway.

THE COURT: Anyway, okay.

MR. MCKENNA: Yes, and, and of course we did not seek to have judicial review of that because at the end of the day the result was positive for us.

THE COURT: Right.

MR. MCKENNA: But we believe that the, the -- the pronouncement was from him, and in fact he admitted, that I'll give you the other test out of the benefit of the doubt.

THE COURT: Right.

MR. MCKENNA: All right. And, and for no other reason but that.

Now, when you examine this, the circumstances her as a whole and you look at what the commissioner had to do
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and you have to appreciate that, that of course you're reading the record you're not the commissioner nor do you have the time to be, and nor was it ever meant that you be. So you must give the commissioner some latitude when the commissioner is making this determination of what is frivolous. And I can tell you, Your Honour, in -- I thought I would never start doing this because McGregor used to do that all the time, he would say in all my years and I'm starting to have a lot of years of LERA experience and I've been doing this 1988, I'm hard pressed, Your Honour, to find a more frivolous matter than this, I really am. I wholeheartedly agree with Judge Conner's comments about the fact that Mr. D. D. was a disgrace to the police uniform on that evening. I wholeheartedly agree, and you, you -- when you examine what the commissioner was faced with you, you have to understand that the commissioner gets this complaint that says these people came in and arrested us for no valid reason. And then, in his first conversation, Mr. D.D.'s first conversation with the, the -- the investigator advises that there was someone on the, the floor below who was seen to be throwing something, so well let's, let's -- let's lead the, let's lead LERA along. We'll tell them it's something on the floor below. Well the commissioner has the file and knows from the police report that the onion peels were seized from the balcony of 1912 not 1812. The commissioner has the statement of D. B. that says; they were throwing things, and is now told, well it was somebody on the floor below. And then a few days later is told, well it was a third party who left before and I don't want to tell you the name because I'm going to save that for the trial. Well guess what, there was no third party that left before, a third party male, because by the time they got to the trial it was D. B. who was throwing everything. That's according to Mr. D. D. According to his brother it was D. B. and D. D.

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You put yourself in the shoes of the commissioner, Your Honour --

THE COURT: Um-hum.

MR. MCKENNA: -- and you look at all of that and you read the findings of Judge Conner and I don't think you can come to the conclusion that the commissioner's decision was anything but reasonable, with the greatest of respect. If you have any question, unless you have any questions those are my comments and I thank you.

THE COURT: Just one procedural point. I'm of the view that this is a review --

MR. MCKENNA: Yes.

THE COURT: -- rather than a hearing --

MR. MCKENNA: Yes.

THE COURT: -- and from my reading of the Act I'm not required to give reasons in writing. If, if I were able to deliver a decision today.

MR. MCKENNA: That's correct, Your Honour.

THE COURT: I could deliver it orally today because it's, the requirement for in writing is only with respect to a hearing. Is that your(inaudible)?

MR. MCKENNA: That's correct, Your Honour, and I can tell you that most often we do not receive written reasons. Most often we receive them from the bench after a short recess.

THE COURT: Okay.

MR. MCKENNA: That is the most common method.

THE COURT: Thank you.

MR. MCKENNA: Thank you. Your Honour, may I, I -- there was one thing I ought to have asked you --

THE COURT: Um-hum.

MR. MCKENNA: -- as a preliminary matter and, and that is a ban on publication pursuant to s. 13(4.1) of the Act.

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THE COURT: Yes I was remiss, I should have ordered that, thank you.

MR. MCKENNA: Thank you.

THE COURT: I'm going to hear from you again, sir, in a moment.

MR. D.D.: Thank you.

THE COURT: I just -- there was just something else. One argument that you -- I, I think you covered it generally but do you want to say anything specifically on another area of concern to Mr. D. D. was that neither D. B. or D. X. were interviewed by the commissioner.

MR. MCKENNA: Yes. Your Honour, the, the commissioner relied on sworn evidence from, from all the parties including sworn evidence from D. X.

THE COURT: The sworn evidence from the hearing --

MR. MCKENNA: From the trial.

THE COURT: -- from the trial, the criminal trial.

MR. MCKENNA: Yes, and, and -- and those of the police officers as well, which was a full record of what happened. And, and we're all well aware of the, the fact that the finding of credibility, at the end of the day, was that the Crown witnesses, the police officers and D. B. were to be preferred over, over the D--'S.

THE COURT: Okay, thank you.

MR. MCKENNA: Thank you, Your Honour.

THE COURT: Is there anything you, any submissions you want to make Mr. Guénette?

MR. GUÉNETTE: Only our written submission, Your Honour, we have nothing else to add.

THE COURT: Thank you, I have that as does Mr. D. D. Now I, I let you reserve the opportunity to respond sir. Do you have anything more to add?

MR. D.D.: Yes I do ma'am.

THE COURT: Go ahead.

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MR. D.D.: Since he raised it, I didn't know we were getting into evidence today, but there's a couple of points I'd like make if that's okay.

THE COURT: Sure take your time.

MR. D.: Just take my time and --

THE COURT: Pardon me?

MR. D.D.: I'd just like to take my time because I have never been involved in one of these.

THE COURT: Absolutely, we've got all afternoon, don't feel any, any rush at all.

MR. D.D.: Okay. First of all I wasn't considered a liar and a disgrace to the police force until after I got convicted. The complaint was almost, the day after the event occurred so it's easy to say I'm a liar and a disgrace to policeman a year later after you're convicted, here nor there. I'd just like to have that on the record.

I had a good reputation, I was a fine officer and I was a sergeant in the Royal Canadian Mounted Police.

THE COURT: Where, where were you stationed sir?

MR. D.D.: Newfoundland, Ottawa, Kinston, Brockville, all over Canada. Prime Minister's body guard.

THE COURT: Yes, I saw that.

MR. D.D.: I didn't make this frivolously. This, just this complaint was not investigated properly. Any novice investigator could have done a better job than they did. However, I want to go back to a couple of points please.

THE COURT: Okay.

MR. D.D.: He raised the thing about fresh pursuit. It wasn't fresh pursuit. Forty minutes after the event stopped they come to the door. If it was fresh pursuit why did they knock and ask permission to come in? They knocked, asked permission; Ms. B. let them in. No problem with that, none whatsoever.

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I'm fully behind law enforcement all the way but in this day and age every "I" has to be dotted and every "T" has to be crossed, and where I come to it wasn't a proper consent search. I was living with that lady, common-law at the time. It was my apartment as well as her. I asked them to leave and I was told to shut my fucking mouth, quote, unquote by Constable R. And the only two officers I have a bone with on this whole brief is Constable R. and S. The rest of the officers were gentlemen.

THE COURT: Okay, can I just stop you for a moment?

MR. D.D.: Okay, ma'am.

THE COURT: Are --

MR. D.D.: I'm going back to the fresh pursuit.

THE COURT: Oh, just on the fresh pursuit issue, okay.

MR. D.D.: Yes, I won't get into any more, I just --

THE COURT: Because I just wonder whether that meant you were withdrawing your application --

MR. D.D.: No I, they --

THE COURT: -- with respect to the other --

MR. D.D.: No, but, but just go back to fresh pursuit ma'am.

THE COURT: Okay, just on the fresh pursuit argument.

MR. D.D.: Yeah. Okay, there's an offence occurring, they have the right to come right in and stop an indictable offence. My question is why did they knock, why did they ask permission. If they had that right, why didn't they come right in? It's 40 minutes after the event so the fresh pursuit thing, I don't think cuts any water.

MR. D.X.: It's in the transcripts.

MR. D.: And it's in the transcripts also, Your

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Honour.

The 2nd thing is in the transcripts, I don't know what transcripts the commissioner was reading or the investigator, the police officers admitted they were cursing in the court transcript. So did D. B. I don't know what court transcripts they were reading.

Now, because all this was going back and forth and this, writing they're saying I'm contriving and I had no other option to write back and forth on points of issue that were raised throughout the complaints that I was making. And then when it started to become a credibility issue because I'm liar I offered to take a polygraph examination on two occasions at my expense. Denied. I'll still take it today ma'am. I don't think they will.

Now, I, I barked like a dog, you want to hear that story, because I was being harassed by Constable R. When I was taken out of the apartment I was being threatened by him verbally to be arrested for being drunk in a public place. I said, "You're the man that brought me into the public place, I was in a private residence." That's why I barked like a dog before I said anything more that I would regret later on. And I was threatened with other, being charged with other offences too, as well.

However, now, taken to the police station the thing, police thing with arm locks. I wasn't in any cuffs; I was not aggressive. I wasn't being cooperative, but I was not aggressive. I was not handcuffed at the police station. Ask to go to the washroom, puts me in an arm lock, I said, "What's this all about?" He said, "This is the way we do it in the Winnipeg Police Service." Okay. I'm just saying that for the record since it's been said the other way, it was a normal police tactic to put you in an arm lock, and when you're not being aggressive -- if I was being aggressive why wasn't I cuffed at the police station. I NOTE: For the purposes of distribution, personal information has been removed by the commissioner.

think that should be taken into consideration.

THE COURT: But, I'm sorry sir, I didn't follow that argument. You're, you're --

MR. D.D.: You see what he's saying was I was being aggressive so they put me in a, a police arm lock to restrain me. That's not the case. I wasn't handcuffed at the police station because I wasn't giving them any aggression. I'm not an aggressive person. I was uncooperative, I'll agree to that. Ask to go to the washroom puts me in an arm lock, takes me to the washroom I said, "What's this all about sir?" He said, "This is the way we do it in the Winnipeg Police Service." I know he was frustrated with me; that's not the point. All the times I've been told off when I'm a policeman, you don't have the right to be cursing and swearing and putting people in arm locks and taking them from "A" to "B" when they're not being aggressive.

So I don't think it was fresh pursuit it was 40 minutes after the event, because if it was fresh pursuit they would have just come right in the apartment made the arrest to stop an indictable offence. So I just don't believe that's true.

I asked for a polygraph examination because my reputation was ruined, to clear the air, no dice. Two times, it's in writing.

Court transcripts, as far as I'm concerned, the two officers, and I have them. They admitted there was cursing and -- they initiated the cursing and swearing by the way ma'am and I followed it up with the same, I regret that now. And it was only the two, the two officers that come through the door. The first ones was R. and S. that instigated it and started it. And I did follow up with cursing and swearing also and I'm sorry for that, I should have been smarter.

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I just -- and I still think, in the bottom line, the commissioner was bias right from the beginning. They didn't even want to deal with this properly or objectively. That's all I wanted was an objective, thorough investigation. I don't believe that's the case here Your Honour.

I can't think of anything else. Is it appropriate in this hearing that my brother could say something in regard to this matter because he was, he was there at the time of that occurrence? Is it appropriate or not appropriate?

THE COURT: Well this hearing is based just on submissions. This is actually not a hearing. This --

MR. D.D.: I, I realize that but they sort of got into it on their side of it ma'am and then, I'm just trying to rebut what he had to say about, you know.

THE COURT: I'm going to give a lot of leeway here. I'll let your brother say whatever it is you want him to have him say --

MR. D.D.: Oh, okay.

THE COURT: -- because you're not represented and I want to make sure I have everything possible from you.

MR. D.D.: Okay, okay, and then also I want to go right back to their police policy on consent search, which I have it here in the -- it all has to be documented. And the way I understand consent search -- may I search I'm trying to prevent a crime from happening or a crime committed here. May I search your apartment? I'm just put it common, common language. And then anytime during the search you wish me to stop this search I have to, I have to so do so and go get a search warrant. That was not told to Ms. B. The whole search was illegal.

THE COURT: Okay, now, what do you have to say about the fact that Ms. B. has never signed a consent form
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for the commissioner to investigate, because that's really her complaint, if she wanted to bring it.

MR. D.D.: You see at the, at the time we were together. And at the time I started making my complaint to LERA. When I went to LERA they said everything you give us is going to the police. And once I started seeing what went to the police, they knew everything that was going on, they were affecting my defence for trial time, so I said, wait 'til this is all over, then you'll put your statements in. But in the meantime it went adversarial, obviously she, she gave evidence against us and we gave evidence against her. It turned into a trial, well she's not going to now, but at the point it's an investigation, she's still a party to the -- she should have been, she should have been interviewed. That's my opinion, and my brother should have been interviewed and if they didn't believe it well marry it up. I just don't think it was a proper full objective investigation. I didn't make this thing frivolously. Everything I said is true --

THE COURT: Okay.

MR. D.D.: -- and that's all I can say ma'am.

THE COURT: Thank you.

MR. D.D.: Thank you.

THE COURT: All right Mr. D. D. you wanted to add something?

MR. D.X.: Yes ma'am, thank you for the opportunity of speaking here today. I'd just like to add, I don't know if I can add anything to it. Just, just to briefly go over it. I, I agree and I submit to Your Honour that that search was, was not a hot pursuit search. I've been in many of them over the years myself. If you're chasing somebody and you're on the heels of somebody then you simply kick in the door, you go in and do your investigation; you secure the scene automatically. And I NOTE: For the purposes of distribution, personal information has been removed by the commissioner.

respectfully submit from the transcripts that -- don't take my word for it, go to the transcripts. In the transcripts it is quite clear by the police it was sometime after that everything had stopped, that Ms. B. had stopped throwing fruit off that balcony, that the police determined that it was apartment 1912 and they did that by contacting the caretaker of that building which took, I respectfully submit again, it took a considerable amount of investigation to determining where in fact the fruit was coming from.

So it was not hot pursuit. The police came up there and did in fact ask permission from Ms. B. to enter the apartment, and if they were in hot pursuit there would be no permission asked they simply would have --

THE COURT: Did she give her permission?

MR. D. X.: She initially gave permission for the police to come in. Actually --

THE COURT: So when it was -- so your position is it was a consent entry then?

MR. D.X.: At, at the time when they entered the apartment it was, and then the cursing and the swearing started at myself and my brother. My brother got up and responded with the same kind of language and then told them bluntly to get the "F" out of his apartment because he was living common-law with Ms. B. at the time, and I know that because he didn't live with me he lived in the city with her.

THE COURT: Um-hum. I don't know what you mean by the use of the term common-law.

MR. D. X.: Well what I, what I'm submitting --

THE COURT: I don't know what that means?

MR. D. X.: -- is that it's his apartment as well as it was her apartment. If they're both living together they both share the common grounds, so wouldn't he not have a right to tell somebody to get out of his apartment. If,
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if it -- if, if somebody just walked into that apartment and Ms. B. wasn't there would he not have the right to tell that person to leave? It's his common ground. They're, they're both living there. They're both splitting the expenses. So it's his, his -- what I'm getting at it's his dwelling as well as it is her dwelling. And getting back to the policy of the Winnipeg Police clearly states that it is up to the police officer to tell a person, even on a consent search, that when they came in there to tell Ms. B., if at any time Ms. B. you want this search stopped you can do so by telling us to leave and then we are required to go get a warrant. That was never ever done and it clearly states they're supposed to mark that in their, in their notebook and that was never ever marked in their notebook because it was never ever done. So they're in contravention of their own policy, and that, that's all I'm trying to say here.

So they didn't do that. They, they did a, like I say, they, they -- they conducted themselves like rogues in that, in that building when they come in, which started this whole thing in the first place. And getting back to this gentleman over here. Yes we were convicted of, of this fruiting incident, but I, but the only I can submit on that is that that entire thing is under appeal because Judge Conner is simply wrong in his decision. He convicted two innocent people and that decision is being appealed and is coming up in November, and what we're looking for is, is not an overturning but we're looking for a new trial and I suspectly (sic) respectfully submit that we're going to get because there was a lot of errors made in that trial.

Getting back to George Wright, he is the commissioner and him being the commissioner, I have a long sordid past with George Wright as a 25-year police officer in this province. And when George Wright saw the name D--- and married it up that it's D. X.'s brother that's making in NOTE: For the purposes of distribution, personal information has been removed by the commissioner.

a complaint, George Wright should have completely washed his hands of the whole entire mess, because it's, it's a -- George has no love loss for, love loss for me and I have no love loss for him. So I think the, the commissioner of LERA should be above reproach. That there should be no real or even perceived conflict of interest and he simply should have put that over to somebody else to make that decision, and not, by not doing that then the, the public are, I, I think that they're, they're expected to have a fair and impartial hearing by the LERA Commission to make sure that the police are doing their job properly and, and the simple fact is the police didn't do their job properly. The, the -- the police were, were bold, rude and aggressive and then when my brother makes a complaint of that to the commission, then George Wright, who is obviously in a, in a conflict situation with me, which would automatically put him in a conflict situation with my brother, makes the decision. And I don't think it's right. I don't think it's fair. I don't think it's equitable. And I think a real or perceived conflict should be, should be absolutely taken off the books and I think this thing should be, go to hearing and let everybody go in and say their piece.

And the other thing is that my brother made this complaint, neither D. B. was, was interviewed, I was never contacted and Ms. P., who was initially doing the investigation for it had, I think, five years service in the police force. I probably forgotten more than she's ever learned. And I, I heard after that that she was, that she was let go because of, of incompetence. So I'm, I'm saying this whole thing was incompetent and getting back to it I, I just think that a hearing should be afforded for this to, to make sure that everything is, looks above board. That's all I can say ma'am.

THE COURT: Thank you.

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MR. D. X.: Okay.

THE COURT: I have one more question for you Mr. D. D. --

MR. D.D.: Okay.

THE COURT: -- how long was the criminal trial in front of Judge -- or Judge Conner, pardon me?

MR. D.D.: It -- how long did it take?

THE COURT: Yeah, how many weeks?

MR. D.D.: It started on March 27th and it ended on July the 2nd when I was convicted.

THE COURT: Um-hum, how many days? It didn't --

MR. D.D.: Eight, eight full days.

THE COURT: Eight full days.

MR. D.D.: Yeah, in total, but that was spaced over several months.

THE COURT: Okay.

MR. D.D.: Okay, thank you.

THE COURT: What I propose to do is recess for approximately 45 minutes, it might be a little bit longer but I'll try to come back at about 20 to three, or 20 to four.

MR. MCKENNA: Your Honour, I wonder if I may just have one comment --

THE COURT: Oh, yes, sorry.

MR. MCKENNA: -- about -- thank you. Something that Mr. D. D. introduced into the record when you allowed him to speak he said that Mr. D. D. was in fact living with this, this D. B. at apartment 1912. It's funny because the complaint form, which you'll find as page 6 in your materials, and sets out Mr. D. D.'s address and it's 319 Queen Street in Selkirk. And I can tell you, Your Honour, I was at one of these s. 13 reviews yesterday with regard to a search warrant at 319 Queen Street, and it was made clear by the owner of 319 Queen Street that she occupied the, the NOTE: For the purposes of distribution, personal information has been removed by the commissioner.

second floor and that D. X. occupied the main floor and rented out a room to D. D.

THE COURT: And this was at the time of --

MR. MCKENNA: Yes.

THE COURT: -- the incident?

MR. MCKENNA: Well, and this is a, we're, this complaint is filed the day after the incident, Your Honour, and D. D. is using as an address 319 Queen Street, and uses that address throughout, Your Honour.

THE COURT: Thank you.

MR. MCKENNA: Thank you Your Honour.

THE COURT: We'll recess now 'til 20 to four.

THE CLERK: Order all rise.

(BRIEF RECESS)

THE CLERK: This hearing is re-opened, please be seated.

THE COURT: All right, first of all this is a review that's before me and with respect to the standard of review that I should apply I do accept the reasoning of Associate Chief Judge Miller, with respect to that matter. In his decision, I guess it would be in the matter of LERA v. Constable "L" and Constable "P", where he finds that the test in a situation such as this would be reasonableness simplicitor. And I am also going to follow the procedure that Judge Miller followed in that case where even though I think the standard or I, I accept and agree that the standard is the reasonableness one that I've just articulated, to give every latitude to Mr. D. D. I'm going to apply the more generous standard from his point of view which would be the correctness standard, to ensure that I've given the broadest most extensive sort of benefit to Mr. D.D.

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So in that case, applying that standard, which is the correctness of the decision made by the decisioner (sic), the, by the commissioner and Mr. D. D. you do have the materials that have been filed and if you look at the submission you can see each of the standards defined in the, the submission in the first part of your booklet. I don't have a page number to give you. Page 5 of 11, pardon me.

MR. D.D.: Page 5, yes ma'am.

THE COURT: Okay, so I'm applying the correctness standard, which to put it in the simplest terms that's the most generous from your point of view, rather than the stricter standard. So I could overturn the commissioner's decision, basically, on, if I find anything about it to be incorrect, or if I don't agree with anything about it. It gives me more latitude to overturn him than, than test number 2 at part 2 would, which is the reasonableness test. That would restrict my authority to overturn him, just to make sure you're following along with this.

MR. D.D.: Yes, Your Honour.

THE COURT: The commissioner, basically, dismissed the application or refused to take any further action on the basis that it was vexatious, declining to take no further action.

Now, on the submissions I've heard here today and in, and in my own review of the materials and I have reviewed them extensively. I have the commissioner's file, and I've reviewed all of those materials in addition to hearing the submissions, I'm going to just briefly touch on each of the arguments made to me by Mr. D. D. and I'm going to paraphrase.

The first argument was bias where he indicated that a different investigator should have been brought in and that was clarified by Mr. McKenna that Mr. Wright was not the investigator of the matter. But I understand Mr. D. NOTE: For the purposes of distribution, personal information has been removed by the commissioner.

D. refined that bias argument or appearance of bias argument to say then that Mr. Wright should not have been involved in any way in, in making the decision or even as the commissioner in this matter because of some prior knowledge of D. D. through them both being RCMP officers.

I find this evidence or this, this submission to be anecdotal. There was certainly no complaint made during the, the -- when the investigation was going on. It's clear that there was communications between Mr. D. D. He was aware that Mr. Wright was the commissioner. Mr. Wright wasn't, was not the investigator and a submission made to me now that there was no love loss between Mr. Wright and D. X., the brother, some 25 years ago when they were both RCMP officers, does not in my mind satisfy in any way shape or form a bias or even an appearance of bias test. It's information coming to me from D. D. that's not been substantiated. I don't know if Mr. Wright would even know this gentleman, D. D., or whether there was any kind of prior relationship between them at all except that they were on the force together. But certainly I don't accept and reject the argument that the commissioner in this case was bias.

With respect to the suggestion that there was a warrantless search into Ms. B.'s apartment. Ms. B. has not brought a complaint before me or an application for review with respect to that matter before me and I find there actually is no proper application for review before me on that basis. That would be Ms. B. that would have to properly and within the parameters of the legislation bring that complaint to the commissioner. And even if that complaint were before me, it appears clear that it was a consensual search of her apartment.

With the -- Mr. D. D. has argued that D. X. should have been interviewed and D. B. should have been

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interviewed. Well in this case it appears that the investigators had not a need to conduct the interviews as suggested by Mr. D. D. They had transcript from eight days of hearing which spoke for itself. They had findings of fact made by His Honour Judge Conner with respect to the credibility of D. D. and, which was found to, he was found to not be believable. There was the, I might say, the history of the complaint itself in which the nature of the complaint was changed and which a third party was mentioned as having thrown the vegetables from the balcony, who had left before the police officer arrived. That, the history of the complaint itself can't be ignored in assessing the commissioner's actions and conclusions, and even within that history there was contradictions.

Lastly, the -- or second lastly, the complaint, the argument was made here today that the use of the arm lock should have been -- that the commissioner erred somehow with respect to his decision on the use of the arm lock. It appears that the commissioner considered that. It appears it was, you know, appropriate discretionary use of, of whatever had to be done to properly bring the suspect, who was under arrest, into the police station. Given what I have read in the materials about his conduct from the time that the police commenced their investigation in this matter and from the time they were exposed to the accused, I would say that the use of an arm lock like that was a moderate approach given his extraordinarily strange and abusive behaviour to the, towards the officers.

Lastly, with respect to the profanity argument and the commissioner's investigation of that it appeared that the commissioner relied on the findings of provincial court Judge Conner with respect to that point. It appears that Judge Conner accepted the evidence from the Crown that it was actually Mr. D. D. who was using profanity towards the

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officers. And I do note that the evidence of the Crown was accepted by Judge Conner where it differed from Mr. D.D.'s evidence. And I note on that point that there was evidence from, for example, Ms. B. who indicated at the hearing that Mr. D. D. was swearing a lot at the officers and that she did note that the officers had acted professionally.

So, returning then to the test for me. This is a review, I haven't conducted the investigation but I've reviewed what the commissioner did and I've reviewed his findings. I've not mentioned, of course, in any extensive way everything that the investigation was composed of or the findings but I find even on the most generous test, Mr. D., absolutely no error by the commissioner. I note that he defined vexatious behaviour in his letter, declining to take further action to Mr. D.D., and found that Mr. D.D.'s actions most certainly fell within any definition one might use of vexatious behaviour under the legislation.

MR. D.D.: Thank you.

THE COURT: Thank you.

MR. MCKENNA: Thank you, Your Honour.

THE COURT: Thank you.

(PROCEEDINGS CONCLUDED)

CERTIFICATE OF TRANSCRIPT

I, **ALAIN ROCH**, hereby certify that the foregoing pages of printed matter, numbered 1 to 36 are a true and accurate transcript of the proceedings recorded by a sound recording device that has been approved by the Attorney-General and operated by court clerk/monitor, Charlene Gutscher, and has been transcribed by me to the best of my skill and ability.

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