

IN THE MATTER OF: *The Law Enforcement Review Act* Complaint #2005/122

AND IN THE MATTER OF: An Application pursuant to s.13(1) of *The Law Enforcement Review Act* R.S.M. 1987, c.L75

B E T W E E N:

<b>Z. A.</b>	)	R. Nadeau
<b>Complainant/Appellant</b>	)	
	)	
<b>- and -</b>	)	
	)	
<b>Cst. T. M.</b>	)	P. McKenna,
<b>Cst. K. D.</b>	)	Counsel for the Respondents
<b>Cst. K. L.</b>	)	
<b>Cst. W. Y.</b>	)	Sean D. Boyd,
<b>Respondents</b>	)	Counsel for L.E.R.A.
	)	
	)	Judgement issued: February 12, 2007

*NOTE: These reasons are subject to a ban on publication of the respondents' names pursuant to s. 13(4.1) (b)*

**S., P.J.**

1. By way of written complaint dated April 26, 2005 the Complainant alleged an act of 'oppressive conduct' against the Respondents.

2. The complaint reads:

*On April 25<sup>th</sup>, 2005 at about 2:45 p.m. the officer, T.M., along with 3 others officers knocked at our door and forced their way inside our house and ordered me to go to the police station with them. No warrant was produced; all four officers searched the house without cause. My father had already arranged the appointment for April 27/05 at 12:p.m. at Division #14 along with counsel, Mr. Pollock. The police behavior was very aggressive and I was treated like a criminal. I strongly believe that my rights were totally ignored. I was forced to the police station. Therefore a thorough investigation about this misuse of power by the police should be conducted.*

3. In a 10 page letter dated November 10<sup>th</sup>, 2005 the Commissioner declined further action on the complaint. The Commissioner advised that there was insufficient evidence to support the allegation that the police officer or officers committed an act of abuse of authority, namely an act of oppressive or abuse conduct contrary to section 29(a) (iii) of The Law Enforcement Review Act.

4. The basic facts leading up to the complaint is that the Complainant, who is a male teenager, had been suspected in sending a threatening email to a teacher at his school. The Complainant lived with his mother and his father. The date of the email was April 9<sup>th</sup>, 2005. Police investigation revealed that the Complainant had possibly been present, on the day the email had been sent, from the home computer of a friend. The computers location had been found as a result of an identification of an IP address from an internet service provider. Attempts were made by the police to interview the Complainant, but such a meeting was repeatedly refuted by the father. Finally an arrest warrant was issued and executed on April 25, 2005.

5. The Complainant, along with his father, P. A., applied pursuant to Section 13(2) of the L.E.R.A. Act to have a Provincial Judge review the Commissioner's decision.

6. Paragraphs 7 to 18 following are condensations of the exact wordings of previous judgments of this Court regarding the applicable law.

7. The standards of review are covered by Judge Chartier in his written decision on a L.E.R.A. complaint number 3597 starting at page 17, The Appropriate Standard for Issues, and I quote,

a) Having now carefully considered each of the four factors identified by the Supreme Court of Canada, I must now relate them to the review to be conducted by the Provincial Judge. I have tried to categorize the issues facing the Commissioner when conducting his investigation of the complaint pursuant to Section 13(1). I have found three. With respect to those issues, I find that the appropriate standard of review will be as follows:

1) Where the review is one which relates to the Jurisdiction of the Commissioner and more specifically, does the complaint "fall within the scope of Section 29" of the L.E.R.A. Act as same is found in clause 13(1)(a) of the L.E.R.A. Act, the standard of review will tend to be "the correctness" of the decision made by the Commissioner.

2) Where the review is related to an error of law or an error of mixed facts and law within the jurisdiction of the Commissioner and more specifically, when the Commissioner has to decide whether or not "there is insufficient evidence supporting the complaint to justify a public hearing" as same is found in clause

Section 13(1)(c) of the L.E.R.A. Act, the standard of review will tend to be “the correctness” of the decision made by the Commissioner.

3) Where the review is related to finding of fact within the jurisdiction of the Commissioner, the standard of review to be applied to the decision of the Commissioner will be closer to “reasonableness simpliciter”.

8. The correctness standard is the most exacting of the three standards. The Commissioner’s decision can be overturned on the basis of simple error.

9. The reasonableness simpliciter standard allows the Commissioner’s decision to stand if the Provincial Judge finds the Commissioner’s decision was reasonable under the circumstances.

10. The third standard is the one of patent unreasonableness. The Provincial Judge can overturn the Commissioner’s decision if the Judge finds the Commissioner acted in excess of his jurisdiction or acted with bias.

11. The correctness standard was followed by Judge Chartier in the L.E.R.A. complaint number 3597, by Provincial Judge Miller in L.E.R.A. complaint number 3208, Provincial Judge Smith in L.E.R.A. complaint number 3771, Provincial Judge Swail in L.E.R.A. complaint number 5792.

12. The burden of proof is on the Complainant, that being Mr. Evans, to show that the Commissioner erred in declining to take further action.

13. This is found under Section 13(4) of the Act.

14. The standard of proof is for clear and convincing evidence that the Respondent has committed the disciplinary default. This is found under Section 27(2) of the Act.

15. How is the Commissioner to evaluate the information when he reaches a decision under Section 13(1)(c)?

16. In coming to his decision, the Commissioner may decide not to act on certain complaints:

- 1) If the subject matter of the complaint is frivolous and vexatious. This is under Section 13(1)(a).
- 2) If the subject matter of the complaint does not fall within the scope of Section 29. This is under Section 13(1)(a) or

- 3) If there is insufficient evidence supporting the complaint to justify a public hearing, [Section 13(1)(c)].

17. Provincial Judge Chartier, in the 2000 L.E.R.A. number 3597, considered Section 13(1)(c) of the L.E.R.A. Act. He referred to the Supreme Court of Canada in the Cooper case and quoted Justice La Forest at page 891,

When deciding whether a complaint should proceed to be inquired into by a tribunal, the Commission fulfills a screening analysis analogous to that of a judge at a preliminary inquiry. It is not the job of the Commission to determine if the complaint is made out. Rather its duty is to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts. The central component of the Commission's role then, is that of assessing the sufficiency of the evidence before it.

18. And then it goes on further,

It is not intended that this be a determination where the evidence is weighed as in a judicial proceeding but rather the Commission must determine whether there is a reasonable basis in the evidence for proceeding to the next stage.

19. In effect, the test described is the Commissioner determining whether there is a reasonable basis in the evidence for proceeding to the next stage. This point was clarified by Judge Chartier in the L.E.R.A. complaint number 5643, decision delivered February 2004.

20. In its essence the complaint before me is that:

- 1) no arrest warrant was shown;
- 2) the police should not have arrested the complainant, particularly when arrangements had been made to attend at an upcoming time to attend to the police station with counsel;
- 3) the complainant was not given all of his rights to counsel and information regarding the grounds for his arrest;
- 4) the Respondents were rude and abusive.

21. With regards to 1), the Commissioners investigation revealed that a valid arrest warrant had been issued. The Commissioner further found that although there was conflicting evidence, as between the Complainant and his family, and the Respondents, regarding whether the Complainant or his father had been shown the warrant, there was insufficient evidence to justify further action.

22. With regards to 2), the Commissioners investigation revealed that the Winnipeg city police had attempted on several occasions in the days prior to execution of the warrant to meet the Complainant without an arrest being affected, but that the Complainant, acting on behalf of his son, refused to cooperate. The acting of police on a valid arrest warrant is not a disciplinary offence.

23. With regards to 3), the Commissioners investigation revealed that there was ample evidence contrary to the position of the Complainant.

24. With regards to 4), the Commissioners investigation revealed that the preponderance of evidence was the Respondents had been courteous and acted appropriately.

25. Having reviewed the Commissioner's decision and bearing in mind the applicable standard of review, the scope and nature of a s.13(2) review, the appropriate assessment that the Commissioner is to make under s. 13(1)(c) and the burden of proof is on the Complainant/Appellant to show that the Commissioner erred in declining to take further action on the complaint, I am of the view that the Commissioner was correct in determining that there was no reasonable basis in the evidence to justify a public hearing against the Respondents.

26. I am further of the view that the Commissioner came to a decision that was rationally based upon a reasonable assessment of the evidence. Accordingly, I find the Commissioner did not err in declining to take further action.

27. Pursuant to s 13(4.1)(b) of the Act, I order a ban on the publication of the Respondents names.

DATED at Winnipeg, this 12<sup>th</sup> day of February 2007.

*Original signed by:*

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Judge Fred H. Sandhu