PROVINCIAL COURT OF MANITOBA
BRANDON CENTRE

In the matter of: A Referral for Hearing pursuant to s. 17 (1) of the ***Law Enforcement Review Act*** R.S.M. 1987 C.L. 75; Lera Complaint #2895

BETWEEN	)	
	)	
C. N.	)	
	)	**Mr. Norm Sims, Q.C.**
Complainant	)	For The Complainant
	)	
- and -	)	
	)	
Former Brandon Police Service	)	
Constable K. L.	)	
	)	**Mr. Jake Jansen**
Respondent	)	For The Respondent
	)	
		Judgment Date: March 12, 2002

THOMPSON, P. J.

This matter has been referred to this court for a hearing of a complaint which alleges disciplinary default by the Respondent as defined under s. 29 of the ***Law Enforcement Review Act*** (hereinafter referred to as the ***Act***) namely that: on or about July 29, 1999 the Respondent did abuse his authority by using oppressive or abusive conduct or language toward the complainant C. N. I heard this matter on February 13 and 14, 2002 as *persona designata* pursuant to s. 1 (2) of the ***Act.***

EVIDENCE

In hearing this matter I received the evidence of the complainant Ms. N., Sgt. G. J. of the Brandon Police Service and Mr. B. J. of Manitoba Telephone Systems.

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In short, the uncontroverted facts are these; Ms. N. received a telephone call at 3:54 a.m. on the morning of June 29, 1999. Ms. N. testified that she was in bed sleeping when she received this phone call. When she answered, she could hear breathing for a few seconds after which the caller hung up.

The complainant reported this matter to the police and it was Sgt. J. who was involved in the investigation. Sgt. J. testified that she advised Ms. N., that a single, isolated call could not be viewed as being harassing pursuant to the Criminal Code of Canada. She also advised Ms. N. that investigation revealed that the phone call originated from a cellular phone listed in the name of K. L. of Brandon, Manitoba who at the time was a constable with the Brandon Police Service.

The evidence revealed two other points about Cst. L.

1. The letter received and marked as exhibit 2 in this proceeding signed by the Police Chief F. Richard Bruce of the Brandon Police Service discloses that Cst. L. was on duty from 2100 hrs. on June 28, 1999 to 0400 hrs. on June 29, 1999. Accordingly, Cst. L. was on duty at the time this telephone call from his cellular phone was made. The police records also indicate that Cst. L. was at the Brandon Police Service building at 3:49 a.m.
2. I learned further that Cst. L. was no stranger to Ms. N. She testified that she had previous contact with Cst. L. whom she described as having a bad attitude. She described comments that Cst. L. made to her in the past as being hurtful and sarcastic.

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This provides the backdrop for Ms. N.'s complaint to the Law Enforcement Review Agency. However, it is not these past dealings for which the complaint has been made. Rather, it is in respect of the telephone call of June 29, 1999. It is alleged that this is disciplinary default and constitutes oppressive or abusive conduct towards the complainant.

The evidence also disclosed that there were other calls that Ms. N. would view as harassing. However, it is the call at 3:54 a.m. on June 29, 1999 which was specifically traced to the cellular phone owned by Cst. L.

LAW

The significant law as it relates to this case is as follows:

> Section 17 (1)(b) of the ***Act*** provides that "the commissioner shall refer a complaint to a Provincial Judge for a hearing on the merits of the complaint when the disposition of the complaint within the terms of s. 15 or 16 is not possible."
>
> Section 9 of the ***Act*** provides "where the Respondent absconds or refuses or neglects without good and sufficient cause to attend the hearing the Provincial Judge may hold the hearing in the Respondent's absence."
>
> Section 24 (10) provides that "the Respondent is not compellable as a witness at a hearing before a Provincial Judge."

> Section 27 (2) of the ***Act*** provides that "the Provincial Judge hearing the matter shall dismiss a complaint in respect of an alleged disciplinary default unless he or she is satisfied on clear and convincing evidence that the Respondent has committed the disciplinary default."

In the circumstances of this case I was informed by Mr. Jansen on behalf of the Respondent, that former Cst. L. is no longer employed with the Brandon Police Service and is residing out of Province. Mr. Jansen advised that his client would not attend the hearing and that he (Mr. Jansen) had been instructed not to participate in the hearing.

No issue was taken with the hearing proceeding or with the jurisdiction of the Provincial Judge a *persona designata* to hold the hearing pursuant to the ***Act***. The issue of jurisdiction in such circumstances was decided in a decision of my learned colleague, Associate Chief Judge B. Giesbrecht, on July 19, 1998. This decision, ***Blair v. Solis,*** was appealed in the Manitoba Court of Queen's Bench on November 4, 1999 in the matter of ***Blair v. Solis*** which can be cited as [1999] M.J. #470, a decision of the Honourable Michael, J.

ISSUE

The issue in this case is the evidentiary effect of the combination of s. 24(9) and 24(10) of the ***Act*** and the ultimate application of s. 27(2) of the ***Act***.

This tribunal must be satisfied on clear and convincing evidence that the Respondent has committed the disciplinary default.

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The meaning of clear and convincing evidence was considered at length by my learned colleague the Honourable R. Wyant, P.J. in the decision of ***Graham and Gillespie & Baker*** dated August 14, 2000. Judge Wyant notes at page 3 of his decision:

> "Because these are civil proceedings the standard of proof on the Applicant is that of the balance of probabilities. But "clear and convincing evidence" speaks to the quality of the evidence necessary to meet that standard of proof on a balance of probabilities. "

Judge Wyant goes on to cite the case of ***Huard & Romualdi*** 1 PLR 1993 page 217 wherein the phrase clear and convincing evidence is discussed.

> "it means that the proof must be clear and convincing and based on cogent evidence because the consequences to a police officer's career flowing from an adverse decision were very serious."

The phrase clear and convincing evidence appears to be often used in statutes governing professional conduct. Indeed this standard of proof was considered in the ***Law Enforcement Review Act*** decision between ***Weselake & Kentziger*** a decision of the Honourable S. Cohan, P.J. delivered June 21, 1996.

In that decision at pages 10 and 11 the term clear and convincing evidence is discussed and references made to two cases involving the College of Physicians and Surgeons of British Columbia.

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Based on all of the above, I conclude that the Complainant must satisfy a relatively high standard of proof. This standard is higher than mere probability. I need not be satisfied beyond a reasonable doubt, but must be convinced on clear evidence.

EFFECT OF RESPONDENTS NON ATTENDANCE AND FAILURE TO TESTIFY

The Respondent is not obliged to testify in these proceedings and indeed in this case he has chosen not to attend the hearing. S. 24 (9) affords the Provincial Judge hearing the matter jurisdiction to proceed in the Respondent's absence.

What is the effect of this non-attendance? Firstly, all evidence put forward by the Complainant is uncontroverted and indeed accepted. However, although the evidence is uncontroverted, I am not satisfied that the Respondent can be taken to admit any elements of this disciplinary default owing to his absence. I am not satisfied that any adverse inference can be drawn from the Respondent's failure to testify or his absence from the hearing.

The effect, in law, of the Respondent's absence from this hearing is that he waives any right to challenge any portion of the evidence which I have heard and any inferences that may be drawn from the evidence.

APPLICATION OF THE LAW TO THE FACTS

This is an unusual case. Generally cases alleging disciplinary default arise from face to face encounters between a citizen and the police. In this case, although there had been previous contact and the Complainant and Respondent are known to each other, the complaint is not in respect of these previous dealings.

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The previous dealings offer only a background and perhaps suggest some motivation for the phone call of June 29.

I summarize the Complainant's argument as follows:

1. The Respondent did not attend the hearing.
2. He offered no explanation for this telephone call being made from his cellular phone.
3. Accordingly, I am not in a position to consider any alternatives to the Respondent being the maker of the call.

The Complainant submits that I draw the inference that it must have been Cst. L. who made the call because it was made from his cellular phone. Further, the circumstantial evidence is such that it points necessarily to this conclusion and, in that sense, is clear and convincing evidence.

The other elements of this disciplinary default which are established by the evidence are that Cst. L. was on duty and making this phone call would appear to be oppressive and abusive conduct towards the Complainant.

Returning then to the consideration of the circumstantial evidence, the rule regarding such evidence is that it must lead to the conclusion being urged. The circumstances must be such that they are inconsistent with any other rational conclusion.

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In this case, I heard some rather brief details of previous dealings between the Complainant and Respondent. I have evidence that the Respondent was on duty on the night in question.

I have evidence that the phone call was made from the cellular phone owned the Respondent. The nature of that call when answered by the Complainant was a brief period wherein she could hear breathing at the other end of the line and then the caller hung up.

It is fair to say, that I am highly suspicious in these circumstances that the Respondent, K L made this call. Is the evidence such that I am convinced that he was the caller and accordingly has committed a disciplinary default as defined in s. 29 of the ***Act***?

When I consider the standard of evidence I cannot be convinced that he was the caller to the extend that I would feel comfortable finding that he was in disciplinary default. This is a serious matter which would result in serious consequences under s. 29.

One can only speculate as to what further evidence might have made this a clear and convincing case of disciplinary default. Nonetheless some examples come to mind. For instance, if there were testimony of one of Cst. L.'s fellow officers that L. was seen, around the relevant time possessing his cellular phone, I might have been convinced. Similarly, if Ms. N.'s testimony had been that she received this call and heard a voice which sounded like the Respondent, this might have been sufficient.

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However, this is *obiter dicta.* It is difficult to describe what is absent in evidence that leaves one unconvinced. Suffice it to say, the evidence fell short of being clear and convincing.

Following s. 27 (2) of the ***Act*** I dismiss the complaint in respect of this alleged disciplinary default having not being satisfied on clear and convincing evidence that the Respondent has committed such default. Accordingly, I order that the ban on publication of the Respondent's name continue.

SIGNED at the City of Dauphin, in the Province of Manitoba, this 12th day of March, 2002.

_____
Judge R. W. Thompson

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