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File No. CI
(Winnipeg Centre)

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	)	
R. E. W. ,	)	COUNSEL
Applicant,	)	Applicant appeared on own behalf
- and -	)	Respondent: Paul R. McKenna
K. W.	)	
Respondent.	)	Judgment delivered: June 5, 1995.

BEARD, J.

I. THE ISSUES

The applicant, R. E. W. ("W. "), made a complaint pursuant to the Law Enforcement Review Act, C.C.S.M., c. L75 ("L.E.R. Act") against the respondent, K. W. ("W. "), in relation to W. actions and behaviour while acting in the course of his employment as a police officer with the Winnipeg Police Department. The complaint was initially heard by a Commissioner appointed under the L.E.R. Act and later reviewed by a judge of the Provincial Judges Court of Manitoba. The Commissioner refused to order a public hearing into W. complaint, which decision was upheld on review by Cohan P.J. W. has now challenged the decision of Cohan P.J., which was made pursuant to s. 13(2) of the L.E.R. Act. More specifically, W. has applied for an order setting aside or quashing the decision of the Provincial Judge, for an order referring the matter to a

hearing on the merits before another Provincial Judge, and for an interpretation of s. 12(1.1) of the L.E.R. Act.

I have concluded that there is no basis on which to grant the orders requested by the applicant, so his application is dismissed for the reasons set out below.

II. THE FACTS

On or about January 4, 1993, W. received information from an informant that W. had a significant amount of marijuana in his house. After checking out certain details, W obtained a search warrant to search W. 's house and, together with three other police officers, conducted a search that same day. As the informant had advised W. that W. had a pitbull dog, W. arranged for a member of the police department's dog handling unit to be included in the group conducting the search in order to assist with the handling of the dog.

W. advised the Commissioner that he could hear the dog barking in the house when the police announced themselves at the door, so he drew his gun before the door was opened. He justified this action by stating that he was the first police officer in line when W. opened the door and felt that it was necessary to draw his gun to protect himself and the other officers from a possible attack by the dog. W. has questioned the need for W. to draw his gun, firstly, because, according to W. , he had the dog under control at all times, and secondly, because, according to W. , it was the dog unit officer who was first through the door and it was his responsibility, not that of W. , to control the dog if necessary.

On or about August 12, 1993, W. tried to file a complaint against W. with the L.E.R. Agency arising out of W. use of his firearm during the search. W. has alleged that, after the police entered the house and the dog was placed outside, W. placed the gun up to the side of his head and ordered him up against the wall. W. stated that this action was unnecessary as he was co-operative with the police throughout the search and that it constituted a breach of the discipline code contained in the L.E.R. Act, and in particular, s. 29(a)(ii).

The Commissioner refused to receive or to investigate the complaint on the basis that it was filed after the expiration of the limitation date for filing the complaint under s. 6(3) of the L.E.R. Act and after the maximum extension which could be granted by the Commissioner under s. 6(6) of that Act. W. 's applications to the Court of Queen's Bench and to the Court of Appeal to overturn this decision were denied. W. then resubmitted his complaint to the Commissioner, alleging new facts to bring his complaint within the longer limitation period set out in s. 6(7) of the L.E.R. Act, and the Commissioner accepted the complaint.

Section 6(7) of the L.E.R. Act provides for a longer limitation period where there are criminal charges against the complainant arising out of the same incident which is the subject of the complaint to the L.E.R. Agency. Having accepted the complaint on this basis, the Commissioner decided to delay his investigation until the criminal matters were dealt with, relying on s. 12(1.1) of the L.E.R. Act as the basis for that delay. According to the Commissioner, the intent of the delay was to prevent the complainant from having to provide particulars of the incident to the Commissioner to support his

L.E.R. Act complaint, which particulars might then be used against him in his ongoing criminal matter.

W. felt that a finding in his favour on the L.E.R. Act complaint could be of assistance to him in his criminal matter, so he wanted the Commissioner's investigation to proceed immediately. He therefore objected to the Commissioner's postponement on the basis of the wording of s. 12.1 which authorizes a delay during an "ongoing criminal investigation." W. took the position that, because he had already been charged, there was no longer an ongoing criminal investigation, so the Commissioner had no authority for the delay.

After reviewing W. 's objection to the postponement, the Commissioner immediately agreed to proceed with the investigation. He stated in a letter to W. that the investigation would take four to six weeks; however, his report was not completed and forwarded to W. until August 4, 1994, some five months later. There is no evidence before me to explain why the investigation took so much longer than originally indicated.

After completing his investigation, the Commissioner concluded that he was satisfied that W. and the other officers had not committed any disciplinary defaults as defined in the L.E.R. Act and, as a result, he declined to take any further action on the complaint, which decision was made pursuant to s. 13(1) of the Act.

In conducting his investigation, the Commissioner considered the following:

- W. 's several complaints

- statements from all of the police officers
- police department policies with regard to the use of firearms
- statements from the two men present at W. 's house at the time of the search
- the results of the investigators' report regarding the layout of W. 's house and their analysis of the statements taken from the witnesses
- the audio tapes made by W. regarding telephone conversations he had with W. and the dog unit officer (which recordings were made under false pretenses on W. 's part and were without the knowledge or consent of W. and the dog unit officer).

W. disagreed with the Commissioner's decision to take no further action on his complaint, so he applied to have the decision reviewed by a Provincial Judge pursuant to s. 13(2) of the L.E.R. Act, which review was held on January 6, 1994. After reading the documentation submitted to him, listening to the audio tapes and hearing arguments on behalf of W. and W. , Cohan P.J. concluded that the Commissioner had not erred in declining to take any further action on the complaint.

W. has now applied for a review of the judge's decision.

III. THE LAW

(1) Overview

W. has applied for an order to set aside or quash the decision of an administrative tribunal, in this case a decision of a Provincial Judge sitting in review of a decision of a Commissioner appointed under the L.E.R. Act. What follows is a brief description of the history and purpose of a judicial review by a superior court of a decision of an administrative tribunal.

Administrative law relates to the large body of decisions made by administrators, bureaucrats and others to whom power or decision-making authority is delegated pursuant to legislation passed by parliament and the legislatures. These elected bodies have the legal authority to delegate certain of their decision-making functions to others, subject always to the limits prescribed by Canada's constitutional laws, such as the British North America Act, 1967; the Constitution Act, 1982; and the Charter of Rights and Freedoms. This delegation by governments to administrators and bureaucrats is necessary to ensure that the sheer volume of work which must be done by government is, in fact, able to be done. It is the recipients of these various delegated powers and authorities who perform most of the activities and make most of the decisions essential to the proper functioning of the government and the implementation of our laws.

Administrative law is, more specifically, that area of the law related to insuring that those administrators and bureaucrats who exercise delegated powers or functions do so within their jurisdiction, that they follow the rules of natural justice or procedural fairness, that they act within the limits of the empowering statute, and that they apply the proper standard of review (Canada (A.G.) v. Public Service Alliance of Canada, [1993] 1 S.C.R. 941, per Cory J. at p. 962 ("PSAC No. 2")).

A judicial review of an administrative decision is much narrower than that of an appeal, where the appellate court is entitled to disagree with the lower court's reasoning (Bell Canada v. Canada (CRTC), [1989] 1 S.C.R. 1722, Gonthier J. at 1746) and often to assert its own interpretation of the law or view of the merits. On a judicial review, the reviewing court is generally limited to determining whether the delegate acted within his jurisdiction.

Under the doctrine of parliamentary supremacy, parliament and the legislatures can limit or exclude the court's right to review the actions of an administrative tribunal by including a privative clause in the empowering legislation. While such a clause can limit the scope of the judicial review, the courts have taken the position that where an administrative body exceeds its jurisdiction its actions are *ultra vires* or invalid - that is, there was never a valid decision - so there is nothing to be protected by the privative clause. In such circumstances, the decision will be struck down even if the empowering legislation contains a strong privative clause.

The extent of the court's ability to review administrative decisions is determined, in part, by how it classifies a particular issue - that is, whether it decides that the question at issue is one of jurisdiction or one within the jurisdiction of the administrative body. Obviously, the easier it is to classify an issue as one of jurisdiction, the more frequently the courts will be able to step in and review those decisions. The Supreme Court of Canada has recently tried to develop a more rational approach to the determination of whether an issue is jurisdictional with the adoption of the "pragmatic and functional approach" first defined by Beetz J. in U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048, at p. 1088.

A review of the history of the readiness of courts to intervene in administrative decisions on the basis of there being an excess of jurisdiction was undertaken by both Wilson J. in National Corn Growers Assn. v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324 and by Cory J. in PSAC No. 2. Until quite recently, the courts were ready and eager to find that an administrative tribunal had committed a jurisdictional error, even when the administrative tribunal was ruling on a question of law apparently within their jurisdiction,

whenever the courts concluded that the administrative body's decision on that question of law was wrong. This has changed with the Supreme Court of Canada's decision in Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation, [1979] 2 S.C.R. 227 ("CUPE"), in which the Supreme Court of Canada recognized the need to protect the decisions of administrative tribunals made within their jurisdiction. The court held that, at least in some situations, an error otherwise within jurisdiction would result in a loss of jurisdiction only if the decision was "patently unreasonable."

Cory J. summarized the law in PSAC No. 2 as follows (pp. 961-962):

> In summary, the courts have an important role to play in reviewing the decisions of specialized administrative tribunals. Indeed, judicial review has a constitutional foundation. See Crevier v. Attorney General of Quebec, [1981] 2 S.C.R. 220. In undertaking the review courts must ensure first that the board has acted within its jurisdiction by following the rules of procedural fairness, second, that it acted within the bounds of the jurisdiction conferred upon it by its empowering statute, and third, that the decision it reached when acting within its jurisdiction was not patently unreasonable. On this last issue, courts should accord substantial deference to administrative tribunals, particularly when composed of experts operating in a sensitive area.

(2) Privative Clauses and the Standard of Review

Lawmakers have enacted a broad range of privative clauses in various pieces of legislation to define the court's ability to review decisions of administrative bodies. In United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd., [1993] 2 S.C.R. 316, Sopinka J. reviewed the law relating to both the appropriate standard of review and the effect of privative clauses.

Sopinka J. began his review with the following comment at pp. 331-332:

> The question posed by the Court of Appeal seems to suggest that in the absence of a full privative clause, no juridical deference is accorded the decision of an administrative tribunal. The issue is not so straightforward. The standard of review to be applied to a decision of an administrative tribunal is governed by the legislative provisions which govern judicial review, the wording of the particular statute conferring jurisdiction on the administrative body, and the common law relating to judicial review of administrative action including the common law policy of judicial deference. The remedy of *certiorari* at common law and statutory provisions which provide for judicial review permit review of administrative decisions for errors of law on the face of the record. Legislative provisions conferring jurisdiction upon a tribunal often purport either to broaden the scope of judicial review by providing for a statutory right of appeal or to narrow it by invoking words of preclusive effect. Determining the appropriate standard of review, therefore, is largely a question of interpreting these legislative provisions in the context of the policy with respect to judicial deference.
>
> The legislative provisions in question must be interpreted in light of the nature of the particular tribunal and the type of questions which are entrusted to it. On this basis, the court must determine what the legislator intended should be the standard of review applied to the particular decision at issue, having due regard for the policy enunciated by this Court that, in the case of specialized tribunals, decisions upon matters entrusted to them by reason of their expertise should be accorded deference. The statutory provisions to be interpreted in this manner range from "true" privative clauses which clearly and specifically purport to oust all judicial review of decisions rendered by the tribunal (such as that in U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048) to clauses which provide for a full right of appeal on any question of law or fact and which allow the reviewing court to substitute its opinion for that of the tribunal (as in Zurich Insurance Co. v. Ontario (Human Rights Commission), [1992] 2 S.C.R. 321).

Sopinka J. went on to consider the past interpretation of privative clauses by the Supreme Court of Canada in various situations, as set out in earlier cases. In summary, he stated as follows (p. 332-339):

(i) True Privative Clauses

If the legislation is found to contain a true privative clause, judicial review is limited to errors of law resulting from an error in the interpretation of a legislative provision limiting the tribunal's powers or a patently unreasonable error on a question of law otherwise within the tribunal's jurisdiction.

The test for identifying a jurisdictional error is the pragmatic and functional approach first defined in Bibeault.

(ii) "Final" Clauses

A clause stating that an administrative tribunal's decision is "final", "final and binding", or words to like effect, has to be reviewed by the court to determine whether it is to be treated as a true privative clause. If the clause is merely one confirming that the decision is final and not interim, and/or that it is not subject to appeal, the clause will not be found to be a true privative clause and any decisions made will be subject to full judicial review.

The test to determine the privative effect of such a "final" clause is defined as the functional approach, being similar to that described in Bibeault for determining whether an issue is jurisdictional. The "functional test" requires an analysis of the privative clause in light of the purpose, nature and expertise of the tribunal in relation to the decision under consideration.

(iii) No Privative Clause - Deference

Where there is no true privative clause, or even if there is a full appeal provision, the court should show deference to decisions of specialized tribunals where: (i) the tribunal is specialized, has a high degree of expertise and the decision is on a matter squarely within the tribunal's jurisdiction; or (ii) the matter is classified as a finding of fact.

(iv) No Privative Clause - No Deference

Where there is no true privative clause, the review court will not defer to the decision of the administrative tribunal where there is a lack of expertise on the part of the tribunal as compared to the reviewing court on the particular matter at issue. This situation is often found to exist, and deference is refused, where the question at issue is the interpretation of a statute or a rule of common law.

The standard of review to be applied to a question before an administrative tribunal will be as follows:

(i) Where the decision is one which relates to the jurisdiction of the administrative tribunal, the standard of review is that of the correctness of the decision made by the tribunal, whether or not the tribunal is protected by a privative clause.

(ii) Where the review is related to an error of law within the jurisdiction of the administrative tribunal, and where there is a true privative clause, or where the reviewing court determines that deference should be shown to the decision of the administrative tribunal, the courts will intervene only where the decision of the reviewing tribunal is patently unreasonable - that is, "Was the board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the courts upon review?" (See CUPE, per Dickson J. at p. 237.)

(iii) Where the question under review relates to an error of law within jurisdiction and there is no true privative clause in effect and no requirement that deference be shown to the decision of the tribunal, the standard of review is that of the correctness of the decision of the administrative body.

(iv) Where the question under review is that of an error of fact, the "patently unreasonable" standard of review will apply to decisions of all tribunals.

IV. DECISION

(A) Privative Clause

The decision now under review was made pursuant to s. 13 of the L.E.R. Act, which contains the following privative clause:

> 13(5) The decision of the Provincial Judge on an application under subsection (2) is final and shall not be subject to appeal or review of any kind.

The wording of this provision places it somewhere in the middle of the spectrum, between the very strong and extensive wording of true privative clauses such as those found in some labour legislation and as was at issue in Bibeault and those clauses providing a full right of appeal such as that found in Zurich Insurance. Section 13(5) is similar in wording to the privative clauses found in Bradco and National Corn. According to Sopinka J. in Bradco, the effect of such a clause on an application for judicial review is to be determined in accordance with the functional test referred to in that case. This is similar to the position taken by La Forest J. in Dayco (Canada) Ltd. v. CAW-Canada, [1993] 2 S.C.R. 230, wherein he stated that (at p. 268):

> I cannot accept that courts should mechanically defer to a tribunal simply because of the presence of a "final and binding" or "final and conclusive" clause. These finality clauses can clearly signal deference, but they should also be considered in the context of the type of question and the nature and expertise of the tribunal.

Thus, the privative clause found as s. 13(5) of the L.E.R. Act must be interpreted using the functional test referred to in Bradco to determine the standard of review to be applied by this court to the questions referred to it for review.

In considering the four grounds for review referred to in W. 's application, I have determined that the following standards of review are applicable:

Ground No. 1 contains an allegation of bad faith on the part of the Commissioner. Such an allegation goes to the jurisdiction of the tribunal and, as a result, the applicable standard is that of correctness, whether or not there is a true privative clause in effect.

Ground No. 2 contains an allegation that there was an error of fact, or of interpretation of fact, and the standard of review is whether the decision was patently unreasonable, whether or not there is a true privative clause in effect.

Ground No. 3 relates to an interpretation of s. 12(1.1) of the L.E.R. Act. I have determined that an interpretation of this section is not necessary on the facts of this case, so it is not necessary to determine the applicable standard of review.

Ground No. 4 relates to the Commissioner's decision to refuse to hear the applicant's complaint that there was a disciplinary default under s. 29(b) of the L.E.R. Act. I have determined that, on the facts of this case, the Commissioner's decision in this regard was correct, so it is not necessary to determine whether the appropriate standard is that of correctness or that the decision was "patently unreasonable."

I have reviewed the grounds alleged by W. in support of this application for judicial review, and I find that none requires a determination of whether s. 13(5) of the L.E.R. Act is a "true" privative clause. Thus, I have not

undertaken the necessary functional analysis of that privative clause in order to make that determination.

(B) Specific Grounds of Review

W. has pleaded four grounds in support of his application to set aside the decision of Cohan P.J., which I will now consider separately.

(i) The appeal tribunal of L.E.R.A. erred in the face of abundantly clear evidence of bad faith on the part of L.E.R.A.'s Commissioner N. Ralph and L.E.R.A.'s counsel pertaining to their obstruction and denial of due process re: Applicant's complaints in not ordering a hearing on the merits of the case pursuant to Sec. 13(3)(a) thereby denying the Applicant's right to natural justice.

(a) The Facts

W. has alleged that the Commissioner acted in bad faith in refusing to order a hearing on the merits of his complaint. In his argument before me, he stated that the bad faith of the Commissioner consisted of his following acts:

1. his refusal or failure to investigate W. 's complaint regarding W. search warrant;

2. his refusal or failure to investigate W. 's complaint that the police falsified documents regarding the number, weight and value of the seized marijuana plants;

3. that he erred in his finding as to how the dog unit officer acted or should have acted during the search;

4. that he (W.) was not advised of the relevant time limits in s. 6 of the L.E.R. Act when he made his initial complaint;

5. that he failed to advise W. of the limitation to file a complaint pursuant to s. 6(7) of the L.E.R. Act and, instead, refused to hear the matter under s. 6(6);

6. that he refused to undertake the investigation "forthwith" as required in s. 12(1) and instead wrongly tried to delay that investigation under s. 12(1.1);

7. that he wrongly interpreted the words "ongoing criminal investigation" in s. 12(1.1) to apply to a situation where charges were already laid; and

8. that, although he agreed to undertake the hearing immediately, he delayed his report for six months rather than giving his decision within the four to six weeks originally indicated.

W. argued before me that there has been a cover-up of police actions by the Commissioner. He was more forceful in his comments to Cohan P.J., stating (transcript of the proceedings of January 6, 1995, pp. 60-61) that:

> So, all the points here I've made should tell you they're lying. They're covering up this police officer's actions. L.E.R.A. is just whitewashing this issue.

He used other very strong language before Cohan P.J., such as: "deceptively interpreting certain provisions"; "devious misinterpretation"; and "deliberately and maliciously attempted."

All of these things, he argued, are clear evidence of bad faith on the part of Commissioner Ralph.

(b) Law

Jones and de Villars, in their text Principles of Administrative Law (Carswell: Toronto, 1985), state as follows at p. 125:

> The phrase "bad faith" is frequently used to describe an abuse of discretionary power. Such an abuse may be dishonest, malicious, fraudulent or *mala fides*. . . .

The question of bad faith on the part of an administrative tribunal was considered by Rand J. in Roncarelli v. Duplessis, [1959] S.C.R. 121, where he stated at p. 140:

> . . . "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. . . .

Both Jones and de Villars, at p. 126, and Dussault and Borgeat, in their text Administrative Law, 2nd ed., Vol. 4 (Carswell: Toronto, 1990) at p. 346, note that the onus is on the person alleging bad faith to prove that allegation.

A finding that an administrative tribunal has acted in bad faith is an example of an abuse of discretion (Jones and de Villars at p. 119) or an irregularity in the exercise of discretion (Dussault and Borgeat at p. 336) which goes to the very jurisdiction of the tribunal. Such an allegation, if proven, renders the decision of that tribunal a nullity. Because this is a jurisdictional issue, the standard of review is that of correctness.

(c) Decision

All the arguments and issues that W. raised at this hearing, as set out in items 1 to 8 of section (a) The Facts, were raised even more forcefully before Cohan P.J.. After considering these arguments, Cohan P.J. concluded that (at pp. 65-66 of the transcript):

> There is nothing to indicate that [the Commissioner] acted in bad faith. Even if I disagree with his conclusion in that regard, there is nothing to establish bad faith. Delay does not establish bad faith.

In considering the correctness of the decision of Cohan P.J., I have reviewed all the documents provided to me, the transcript of the arguments before Cohan P.J. and the factors which W. has argued are evidence of bad faith on the part of the Commissioner. In considering the factors which I have enumerated as the basis of W. 's allegation of bad faith, I have also considered the Commissioner's reasons for making the decisions which he made, and I can find no evidence that he acted in bad faith.

The first two factors which I enumerated will be dealt with more specifically in my reasons relating to the fourth ground of review (which is found at p. 30 of this decision). In his report of August 4, 1994, the Commissioner indicated that he was not going to deal with those complaints for the following reason:

> I am satisfied that the subject matter of this aspect of your complaint is outside the scope of The Law Enforcement Review Act.
>
> Evidence submitted by the police at your trial was heard and accepted by the court. L.E.R.A. is not empowered to second-guess or review evidence accepted or decisions made by the courts. Consequently my office will take no further action on this aspect of your complaint.

There was no evidence before Cohan P.J., and there was no evidence before this court, to suggest that the reason for the Commissioner's refusal to deal with these two aspects of W. complaint was other than as quoted above. The above-noted reasons for that refusal, even if not correct, would not be evidence of bad faith on the part of the Commissioner.

The third factor enumerated in support of the allegation of bad faith is an allegation that the Commissioner erred in his finding as to how the dog unit officer acted or should have acted during the search. An error in fact-

finding on the part of an administrative tribunal does not amount to bad faith on the part of that tribunal. There is no evidence to suggest that the Commissioner considered improper evidence or refused to consider evidence properly before him in arriving at this finding of fact or that he deliberately misinterpreted facts for an inappropriate purpose. Even if he made an error of fact, that error, in and of itself, would not amount to bad faith.

The fourth and fifth factors enumerated in support of the allegation of bad faith relate to W. not being advised of the relevant time limitations under the various subsections of s. 6 of the L.E.R. Act. W. referred to s. 6(4), which places an obligation on a member who receives a complaint to advise the complainant of the time limits for filing that complaint. Section 6(4) does not apply to the Commissioner: firstly, because it refers to "a member" which is defined as a police officer; and secondly, because it relates to the making of a verbal complaint, while, in this case, W. had made a written complaint. The Commissioner did receive the written complaint and, based on the wording of that complaint, correctly determined that it was not filed within the time limits of ss. 6(3) and 6(6) of the L.E.R. Act, a decision upheld, first, by Schulman J. in his reasons in this matter dated September 30, 1993, and later by the Manitoba Court of Appeal in its decision dated December 10, 1993.

In relation to s. 6(7) of the L.E.R. Act, W. argued before me that, because this section was not relied on by the Commissioner, there must be bad faith. He argued that the crown attorney who advised the Commissioner should have known about s. 6(7), so "How could he make such a mistake, unless it was deliberate?"

There is no evidence before me from which I could conclude that the Commissioner's initial rejection of the complaint under s. 6(7) was motivated by any bad faith. The fact that the Court of Appeal appears to have given a contrary instruction at some point during the appeal process (although it should be noted that, notwithstanding that both the Commissioner, in his affidavit of February 10, 1995, and W. , in his argument, refer to such a ruling, there appears to be no written ruling in this regard) does not mean that the initial decision was made in bad faith. Certainly, there is no indication that the Court of Appeal expressed a concern that the Commissioner acted in bad faith in arriving at that decision. The Court of Appeal not infrequently overturns decisions of lower courts and tribunals, and something more than this is required to establish bad faith. The burden is on the person alleging bad faith to prove that allegation, and in relation to this factor, I find that W. has failed to adduce any evidence of bad faith and, therefore, has failed to meet that burden of proof.

The sixth and seventh factors cited in support of W. 's allegation relate to the Commissioner's decision to postpone his investigation under s. 12(1) of the L.E.R. Act. Whether or not the Commissioner's interpretation of the words "ongoing criminal investigation" as they are used in s. 12(1.1) is correct in law, that interpretation was not so unreasonable as to support a finding of bad faith. It is entirely appropriate, where there are unresolved criminal charges, for the Commissioner to postpone his investigation and, in particular, to postpone a demand for particulars from the complainant until that criminal charge has been disposed of because those particulars, if provided, might compromise a plea of not guilty or a defence to that criminal charge. An accused person has the right to remain silent, and he

cannot be forced to make a statement to the police in relation to any ongoing criminal charges. If a complainant is forced to provide full particulars before the resolution of the criminal charges in order to pursue his complaint against a police officer, that may well compromise his right to silence or make him choose between maintaining his right to silence and his right to pursue his complaint against the police officer. This may, in many instances, make the rights granted under the L.E.R. Act meaningless to many complainants. This was the reason given by counsel for the Commissioner in support of the decision to delay the investigation and is certainly not evidence of any bad faith. Further, there is no evidence that the Commissioner delayed his investigation for any reason other than that as set out above, so there is no evidence in support of the argument that this delay constitutes bad faith.

The eighth factor cited by W. in support of his allegation of bad faith relates to the fact that the Commissioner's report was released five months after he began his investigation, rather than in four to six weeks as was originally indicated. No explanation was given by the Commissioner for this delay (in fact, there is no evidence that the Commissioner was ever asked to explain the delay), and there was no evidence led by W. to indicate that the delay was motivated by bad faith on the part of the Commissioner. One could foresee many reasons for this delay other than bad faith on the part of the Commissioner. The Commissioner had to obtain statements from and/or conduct, or cause to be conducted, interviews with seven people and have his investigators view the accused's premises in relation to the statements made by those witnesses. There may well be difficulties in contacting witnesses, holidays may intervene to delay interviews, and other matters before the L.E.R. Agency may result in a matter not being dealt with as quickly as originally

anticipated. As an example, I had occasion to read the many important decisions in Cross v. Wood, the earliest reported decision being rendered on January 12, 1990, and the most recent being on December 16, 1993. This was a very controversial and highly-publicized case which involved the L.E.R. Agency. Philp J.A., in Wood v. Cross (1993), 92 Man.R.(2d) 94, noted at p. 95:

> This is another chapter in what has become one of the most publicized, debated, scrutinized, reviewed and litigated events in Winnipeg's recent history. . .

This matter involved controversial hearings under the L.E.R. Act which may well have consumed a great deal of the time and attention of the Commissioner during the early part of 1993. This is all speculation on my part, as there is no evidence in this regard before me. It does lead me to conclude, however, that there may be many explanations for the delay in the issuing of the Commissioner's report which are not indicative of bad faith on his part.

I have considered these factors, both individually and collectively. Keeping in mind that the person alleging bad faith has the onus to prove that allegation, I do not find that the factors raised by W. , either individually or collectively, support the allegation that the Commissioner was acting in bad faith. I have therefore concluded that the Provincial Judge was correct in his decision to reject the complaint that the Commissioner acted in bad faith.

(ii) The appeal tribunal erred in the face of abundantly clear evidence of inconsistent and unbelievable fact and testimony of police officers and thereby exceeded its jurisdiction or alternatively failed to exercise its jurisdiction in not ordering a hearing on the merits of the case pursuant

to Sec. 13(3)(a) thereby denying the Applicant's right to natural justice.

In this ground of review, W. is arguing that the tribunal made an error in exercising its fact-finding function and/or in its interpretation of the facts.

(a) The Standard of Review for an Error of Fact

Dussault and Borgeat state that the law related to an error of fact is as follows (at p. 236):

> The courts recognize that at common law, at least in theory, it is not their role to supervise an error of fact committed by an agency or inferior tribunal acting within jurisdiction, regardless of whether the error is the consequence of an insufficient knowledge of the facts or of an erroneous assessment or interpretation of them. But the rule is not absolute. In some circumstances, the seriousness of the error raises a question of jurisdiction or makes it tantamount to an error of law on the face of the record.

This issue was considered by the Supreme Court of Canada in Blanchard v. Control Data Canada Limited, [1984] 2 S.C.R. 476. Lamer J. (as he then was) stated that (at p. 494):

1. where a tribunal is protected by a privative clause, the distinction between an error of law within jurisdiction and an error of fact was of no use, as both affect jurisdiction only if the error is patently unreasonable;
2. where the tribunal is not protected by a privative clause, the distinction between an error of law and an error of fact is still important as, in that case, all errors of law are reviewable; however, only unreasonable errors of fact will affect jurisdiction.

The Supreme Court of Canada has acknowledged that reviewing courts should show deference to tribunals in respect of questions of fact, even in situations where there is either no privative clause or even where there is a full right of appeal (see Bradco at p. 535 and Canada (A.G.) v. Mossop, [1993] 1 S.C.R. 554, La Forest J., at pp. 584-585).

Thus, an error of fact made by an administrative tribunal is reviewable only where the error is determined to be patently unreasonable.

(b) "Patently Unreasonable" Standard

Cory J. (for the majority, concurred with on this point by the minority), in PSAC No. 2, considered the issue of what constitutes a patently unreasonable decision. After considering the dictionary definition of both words, he concluded at p. 964 that:

> . . . This is clearly a very strict test.
>
> . . . . .
>
> It is not enough that the decision of the Board is wrong in the eyes of the court; it must, in order to be patently unreasonable, be found by the court to be clearly irrational.

(c) Decision

In this case, W. has alleged that there is "abundantly clear evidence of inconsistent and unbelievable fact and testimony of police officers"; however, he has failed to put forward any evidence to support that allegation.

W. argued that W. admitted to pointing the gun in the course of the taped telephone conversation. In fact, W. has always admitted that he had his gun drawn when he entered W. 's premises. It therefore follows that it was pointed somewhere. There is, however, no

evidence other than that of W. himself to support his complaint that the gun was pointed directly at his temple in the manner described in his written complaint. It is the gun to the temple, rather than the drawing of the gun, which is the basis of W. 's complaint. An admission by W. that he had his gun drawn when he entered the premises is not evidence that he had the gun pointed at W. 's temple.

W. has alleged that the dog unit officer stated in the taped conversation that he entered the property first. While W. did not specifically argue this, I assume that he is referring to this statement as a contradiction of W. statement (as contained in the Commissioner's report to W. dated August 4, 1994) that W. was the "first officer in line" at the back door of W. residence. I am not satisfied that these two statements are necessarily contradictory, and that issue was not put to either officer as being a contradiction for either confirmation or explanation. Further, when one considers W. role in the search and arrest of W. , it appears that he was playing a lead role in relation to the other police officers, and it is not unreasonable to expect that he would be the one to have his gun drawn if that was appropriate. The factors which support this conclusion are contained in W. supplementary report dated January 7, 1993, which indicates that he was the officer who had received the complaint and verified some of the details; he obtained the search warrant; he was the officer who knocked on W. back door; he was the officer who was addressing W. both before and after the door was opened. This is consistent with his reported statement that he was first in line at the back door and not necessarily inconsistent with the dog unit officer's statement that he (that is, the dog unit officer) went into the residence first.

In any event, the complaint arising from the use of the gun relates to events occurring after the police had entered the premises, so the issue of who went first has little, if anything, to do with the substance of the complaint. W. states in his complaint that, "The police entered and not until all the police were in and I was co-operating with no resistance W. then pointed his gun at my head and said, 'Up against the wall.'"

W. raised other arguments regarding the gun; however, none of these were substantiated by any evidence. He argued that because the dog unit officer was there the other officers should not have been afraid of the dog and that it was ridiculous for W. to say that his gun was drawn because he was afraid of the dog. W. stated that his information was that W. had a pitbull dog, and they could hear the dog barking when they knocked on the door, which facts are not disputed by W. While W. claims to have had his dog under control, there is no evidence to suggest that the police had any knowledge of that before the door was opened, particularly given that the dog was barking and that the door was closed. There is, therefore, no evidence to support W. statement that W. fear of the dog was ridiculous. On the contrary, the evidence supports W. conclusion in that regard.

W. also argued that the gun could not have been pointed at the dog, as stated by W. , or the dog would have reacted. There was no evidence to support this conclusion.

W. also complained of the Commissioner's rejection of the statements of his two house guests in relation to this incident. I have reviewed the Commissioner's report of August 4, 1994, wherein he reviewed the

assessment of the information he received from those two individuals, in which he clearly sets out why he rejected their statements. W suggested that these witnesses were confused because it took more than a year to take their statements. There is no evidence before me which was not considered by the Commissioner to support W. argument that they were confused due to the passage of time, and even if one accepts that W. house guests were confused, this is hardly "abundantly clear evidence of inconsistent and unbelievable fact and testimony of police officers." If these two people were confused, as is alleged by W. it calls into question the reliability of their statements, not those of the police.

W. in argument, stated that the Commissioner rejected their evidence because they were confused as to the location of W. television; however, the Commissioner, in his report of August 4, 1994, refers, not to the location of a television set, but to other inconsistencies such as what the witnesses claim to have heard W. say, what they could see in the kitchen from where they were sitting in the living room and their statements as to where the dog was placed.

After considering the evidence and the arguments of counsel and of W. on his own behalf, I find that the Commissioner's findings of fact were neither patently unreasonable nor irrational; therefore, he had not exceeded his jurisdiction nor failed to exercise that jurisdiction. Cohan P.J. reviewed the same documents and heard the same arguments as were before this court. He concluded that the Commissioner did not err in his decision, and there is nothing before me to suggest that that finding was either patently unreasonable or irrational in relation to the findings of fact made by the Commissioner.

(iii) The appeal tribunal erred in law concerning the interpretation of Sec. 12(1.1) and thereby exceeded its jurisdiction or alternately failed to exercise its jurisdiction in not ordering a hearing on the merits of the case pursuant to Sec. 13(3)(a) thereby denying the Applicant's right to natural justice.

Section 12(1.1) of the L.E.R. Act states as follows:

> Notwithstanding subsection (1), if the Commissioner is satisfied that immediate investigation of a complaint would unreasonably interfere with an ongoing criminal investigation, the Commissioner may delay the investigation of the complaint for such a period as the Commissioner considers reasonable in the circumstances.

At issue is whether the words "ongoing criminal investigation" relate to the time period preceding the laying of criminal charges or continue until some later time, possibly to the final disposition of any charges. W. has alleged that the Commissioner and Cohan P.J. were wrong in finding that the Commissioner could delay his investigation under s. 12(1.1) on the ground that W. court action (that is, the criminal charges arising out of the search) constituted an ongoing criminal investigation. W. takes the position that an ongoing criminal investigation does not include the court process that follows the laying of a charge. He argued in his reply to the respondent's brief that a finding that the Commissioner and Cohan P.J. erred would "make evident that L.E.R.A. consistently and routinely subverted the intent of the legislation." He goes on in his reply to suggest that the real motive for L.E.R.A.'s delaying tactics is to prevent such benefits (that is, the complainant using a favourable L.E.R.A. finding in his/her criminal proceeding or sentencing) for accused persons and to protect police officers.

Notwithstanding that W. has been quite aggressive in pursuing his argument related to interpretation of s. 12(1.1) of the L.E.R. Act, I find that an interpretation of the wording of this section is not necessary to a resolution of the disciplinary complaints against W. which are the subject matter of this proceeding. I have come to this conclusion for the following reasons:

1. While the Commissioner initially took the position that he was going to delay his investigation under s. 12(1.1), as set out in his letter of February 14, 1994, when this decision was challenged by W. first by telephone and then by undated letter apparently delivered to the Commissioner's office on February 23, 1994, the Commissioner agreed to proceed with his investigation, and he confirmed that decision in writing on March 28, 1994. As a result, even if the Commissioner initially interpreted s. 12(1.1) wrongly (which issue I am not deciding), he did not act on that interpretation. Therefore, that decision did not materially affect the outcome of the proceedings before the Commissioner.

2. Even if the Commissioner had maintained and acted upon an erroneous interpretation of s. 12(1.1) to delay his investigation, the delay has not been shown to have affected the outcome of the investigation in any way which could be remedied by this court, that is, W. has shown no prejudice to the outcome of the investigation resulting from the delay which could be remedied at this much later date. W. has raised two concerns:

(i) that his house guests had confused some details as a result of the time span between his initial complaint and the actual interviews with the two house guests -- however, the length of that delay was not substantiated with any evidence as to the dates of the interviews with the two house guests nor with any evidence that they were, in fact, confused. If a further investigation was to be ordered now, these same witnesses would have to be re-interviewed and, as the time between the events and these further interviews would be even longer than the time between the events and the initial interviews, their memories are likely to be even less reliable due to the greater passage of time. Therefore, the problem of the reliability of their memories would not be improved by either a further investigation by the Commissioner or by a public hearing;

(ii) that he was prevented from using a favourable outcome to assist with his sentencing -- this does not assist him in this matter for the following reasons:

(a) the outcome of the Commissioner's investigation was not "favourable" to W.

(b) the best outcome which he could have obtained from the Commissioner was a reference for a public hearing, and it is unlikely that the public hearing would have been concluded much more quickly than the

release of the Commissioner's report and therefore would likely not have been of assistance to W. in his criminal matters;

(c) any collateral use that the applicant might wish made of the report is not relevant to the jurisdiction of the Commissioner in carrying out his function;

(d) there is nothing in W. version of the events which, if accepted, is likely to assist him on his criminal charges. He was charged in relation to the possession of marijuana and the possession or operation of a marijuana grow operation. As I understand his comments, he ultimately pled guilty to one or some of the charges and, for the purpose of sentencing, the crown agreed with his version of the number of plants in the house. There is no evidence that the matters at issue before the L.E.R. Agency would have had any effect on either the applicant's guilty plea or his subsequent sentence.

I therefore find that it is not necessary to determine either the issue of the interpretation of s. 12(1.1) or whether the Commissioner's interpretation was either correct or patently unreasonable.

(iv) <u>The appeal tribunal exceeded its jurisdiction or alternatively failed to exercise its jurisdiction in not ordering a hearing on</u>

> the merits of the case pertaining to Applicant's allegation and the clear evidence supporting said allegation that the commission by a police officer of a disciplinary default as described in Sec. 29(b) was not appropriately investigated by L.E.R.A. thereby denying the Applicant's right to natural justice.

In his report of August 4, 1994, the Commissioner deals with this issue as follows:

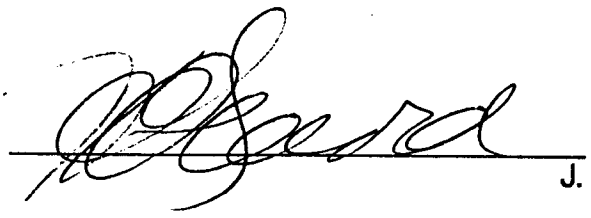
> In a later statement to my office, you also alleged that the officers involved had falsified official documents. Specifically, they lied in the information they provided to the court about the quantity of drugs present in your residence at the time of your arrest. You also expressed concerns about the information in the search warrant.
>
> I will deal with the latter part of your complaint first ("the latter" referring to all of the complaints in the preceding paragraph). I am satisfied that the subject matter of this aspect of your complaint is outside the scope of The Law Enforcement Review Act.
>
> Evidence submitted by the police at your trial was heard and accepted by the court. L.E.R.A. is not empowered to second guess or review evidence accepted or decisions made by the courts. Consequently my office will take no further action on this aspect of your complaint.
>
> (Words in parenthesis added.)

The L.E.R. Agency is not empowered to act as an appeal body regarding decisions made by a court. Therefore, if evidence has been presented and accepted by a court, the L.E.R. Agency cannot overrule that decision. Surely, if a person wishes to challenge police evidence or the basis for a search warrant, all of which are part of a criminal procedure, the time to do that is in the course of that criminal procedure. I have no evidence to suggest that that did not occur, and if it did not, to explain why not. To challenge that

now, and possibly invite a ruling which may be contradictory to that of the trial court, would be inappropriate.

It may be that, if a judge made a finding in the course of criminal proceeding that a police officer had falsified documents or otherwise acted in breach of s. 29, then a subsequent complaint to the L.E.R. Agency may be appropriate. In this case, I have no evidence that that occurred. The Commissioner stated that, "Evidence submitted by the police at your trial was heard and accepted by the court." As there is no evidence to suggest that this was not the case, I agree with the ruling by the Commissioner on this portion of the complaint. I therefore find that, as the Commissioner was correct in his decision not to proceed with an investigation into this portion of W. complaint, he has, therefore, not exceeded his jurisdiction in this regard.

As there is no basis on which to grant the orders requested, the application for judicial review is dismissed with costs to the respondent, W .



J.

Note: For the purposes of distribution, personal information has been removed by the Commissioner.