

The Honourable Judge Murray Howell

**In The Matter Of:** An application pursuant to Section 13(2) of *The Law Enforcement Review Act*, R.S.M. 1987, c. L75.  
(L.E.RA. Complaint No. 5597)

B E T W E E N:

<b>Mr. C.</b>	)	Mr. C. in person
	)	and unrepresented by counsel
	)	
<b>- and -</b>	)	
	)	
<b>CONSTABLE K.</b>	)	
<b>Respondent</b>	)	Mr. Keith Labossiere
	)	for the Respondents
<b>CONSTABLE M.</b>	)	
<b>Respondent</b>	)	
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<i>NOTE: These reasons are subject to a</i>	)	Judgment Delivered:
<i>ban on publication of the parties'</i>	)	February 28, 2003
<i>names pursuant to s. 13(4.1)(c).</i>	)	

**INTRODUCTION**

[1] The Applicant, Mr. C. , has made a complaint under *The Law Enforcement Review Act*, R.S.M. 1987, c. L75 (the “Act”) to the Law Enforcement Review Agency (LERA) about the conduct of the Respondents when they stopped his vehicle in the course of checking suspicious vehicles in an area of central Winnipeg. Mr. C. claimed that the conduct of the police was oppressive and abusive and further that they were discourteous and uncivil in their treatment of him. After an investigation and review of the matter, the Commissioner of LERA

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

was satisfied that there was insufficient evidence supporting the complaint to justify a public hearing and declined to take further action on the complaint. The complainant has sought a review pursuant to s. 13(2) of the Act.

### **THE FACTS**

[2] The facts are not in agreement. There are two differing versions of what transpired during the contact between the complainant and the Respondents.

[3] The complainant's position is that on April 19<sup>th</sup> of 2002 at 12:40 a.m. a Winnipeg Police cruiser pulled over his vehicle in which he was the sole occupant and asked him for his driver's licence. The licence was provided and the officer returned to the police vehicle. He came back to the complainant's vehicle a short time later and a conversation took place about whether the complainant had been talking to prostitutes that evening and whether he had been abusing police officers. The complainant indicated he didn't know what the police were talking about and the officer stated "Good. Now get the hell out of here." and threw the complainant's licence in at him. The complainant noted after driving away that he didn't have part of the licence. He turned his vehicle around and returned to the area of the police car. He told the officers that he didn't have the photo ID portion of the licence. The complainant pulled up behind the police vehicle and both officers exited it with their hands on their guns. There was a further conversation about the missing driver's licence photo and the complainant found it under the seat. Another police vehicle pulled up behind the complainant. The complainant requested the badge number of the police officer who replied "No, I don't have to give it to you. Now why don't you get out of here before you get beat up."

[4] The complainant left the area and subsequently reported the matter to LERA.

[5] The Respondent officers indicated that they were in the area pursuant to a report of suspicious vehicles by an off-duty officer. They initially located the vehicle driven by the complainant in a darkened lot with its lights off. The vehicle then started up and drove past the police car and the officers decided to stop the vehicle to check it and did so shortly after. The Respondent M. indicated that he approached the driver's door of the complainant's vehicle and told him the officers were checking suspicious vehicles reported in the area. The complainant was asked why he was in the area and the complainant responded that he had been on his way home from a family member's place. The Respondent M. went back to the police car and did some checks on the licence of the complainant. As a result of these checks and the Respondent K.'s recollection of information he had heard, the

Respondent K. returned to the complainant's vehicle and asked if the complainant had been speaking to any prostitutes and if he had been watching or harassing police officers earlier that night. The Respondent K. indicated that the complainant became "enraged" and demanded to know why such questions were being asked. The Respondent K. told the complainant that the police computer had provided information that the complainant was "a police hater" and that he had in the past acted out violently towards the police. He stated the complainant refused to provide any more information and that when the complainant's driver's licence was handed to him he refused to take it. The Respondent K. said he threw the licence on the dash of the complainant's car and told him he was free to leave. The complainant stated "This is why I hate you guys." and squealed his tires as he pulled away very rapidly. The Respondents returned to the police car and noted the complainant's vehicle stopped about a hundred metres down the street. In the meantime, another police vehicle had attended. The complainant's vehicle made a U-turn and returned to where the officers were parked. The complainant swore at the officers, asking about the photo portion of the driver's licence. The complainant then made a U-turn and pulled in behind the police vehicles. There was further discussion about the photo ID. It was noted by the Respondents that the complainant was looking around in his car for the missing photo. The complainant then asked the Respondents for their "cards", then asked for badge numbers. The Respondent K. said the numbers were right on their shoulders. The complainant further indicated he was going to call LERA and again squealing his tires pulled away. Both Respondents deny any comment being made about the complainant "getting out of there before he got beat up".

[6] Faced with this evidence, the LERA Commissioner exercised authority pursuant to s. 13 of the Act and declined to take further action after his investigation.

[7] The issue of the test for the standard of review pursuant to s. 13(2) of the Act was before Chartier P.J. in *Bartel v. S.(C.)*, unreported, May 30<sup>th</sup>, 2002 (Man. P.C.). The conclusions were 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. Act as same is found in 13(1)(a) of the L.E.R. 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 13(1)(c) of the L.E.R. 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 a finding of fact within the jurisdiction of the Commissioner, the standard of review applied to the decision of the Commissioner will be closer to “reasonableness *simpliciter*”.

[8] The issues here are clearly questions of law and fact. There is a question about what took place and whether the correct legal test was applied. Is the test one of simple reasonableness as the *Bartel* case suggests? In the case of *P. v. M and V*, unreported, July 3, 2002 (Man. P.C.) Smith P.J. set out the standard:

[33] Thus the standard to be applied is whether the Commissioner was correct in his determination that there was insufficient evidence of the disciplinary defaults to justify a public hearing.

[9] The *P.* decision further equates the test for sufficiency as follows:

[37] The Commissioner should take care not weigh the evidence. In a criminal case a judge can convict on the evidence of a single uncorroborated witness, if that evidence is sufficient to meet the heavy burden of a proof beyond a reasonable doubt. Although the judge who ultimately hears a LERA case must be convinced on clear and convincing evidence, it is surely likewise possible for that standard to be met on the evidence of a single complainant. The Commissioner’s role in the screening process is not to apply the standard of proof set out in the Act, or to attempt to forecast how a judge would apply it to the information uncovered in the investigation.

[38] The question of sufficiency of evidence under s. 13(1)(c) should, in my view, be approached in a fashion akin to that of a judge hearing a preliminary inquiry and considering whether there is sufficient evidence to commit an accused for trial. See: s. 548 of *The Criminal Code* and *R. v. Arcuri*, [2001] 2 S.C.R. 828.

[10] The standard of review was most recently considered by this Court in the case of *G. v. D.B. and J.S.*, a decision of Swail J. on February 19<sup>th</sup>, 2003. The test

previously enunciated in the *Bartel* and *P.* decisions of Judges Chartier and Smith, respectively, was reviewed and it was determined by Judge Swail that the test applied by a judge at a preliminary hearing to determine the sufficiency of evidence was the one to be applied in cases such as this. This confirms that the test set out by the Supreme Court in *R. v. Arcuri*, [2001] 2 S.C.R. 828, is that which will be applied. This present case is being decided in accordance with that test.

[11] Nevertheless, consideration must be had for the statutory duty of the Commissioner set out in the legislation to screen out complaints as described in s. 13 of the Act. The legislation does not determine that if contrary versions of the facts at issue are disclosed to the Commissioner, that the matter must be referred to a hearing. The information the Commissioner had was that the most serious aspects of the complaint to LERA were the parting comment by the officer about the complainant being beaten up, the comment at the time of the police officer leaving the vehicle for the complainant to “get the hell out of here” and the police officer throwing the licence at the complainant. Both of these allegations are denied by the Respondent officers. In reviewing the statements of the complainant and the Respondent K., there is no clear allegation of any misconduct by the Respondent M. The complainant in his statement refers to both officers as their vehicle number (103) but indicates that it is the officer who returned with the driver’s licence who was the one whose conduct he complained about. Further it was admitted by the Respondent K. that he was the officer who returned with the driver’s licence and had the subsequent contact with the complainant. He also indicates it was he who spoke to the complainant when the complainant returned to the police vehicle concerned about the whereabouts of part of his driver’s licence.

[12] Regarding the complaint against the Respondent M., there is no evidence that meets the test set out in the *G.* case by Judge Swail that is the test similar to that of a judge at a preliminary inquiry and I am satisfied that a judge would decide there was not sufficient evidence to commit this matter for trial. Here there is no direct evidence implicating the Respondent M.

[13] Concerning the Respondent K., there is an allegation against him by the complainant. This was denied in his statement to the investigator. There is no doubt that the evidence of a single witness can be sufficient to establish guilt to the clear and convincing level set out in the LERA statute and even further to establish guilt beyond a reasonable doubt in a criminal proceeding, but the level of evidence has to at least rise to the point of whether a properly instructed jury could reasonably convict on the set of facts or whether a judge sitting with a jury would direct a verdict were these facts before the court. There is no direct evidence from the complainant that it was the Respondent K. who uttered the threat complained

of; it was the Respondent K. who admitted he was the one that spoke to the complainant when he returned to the police vehicle. Given the nature of the alleged misconduct and the lack of precision in the identification of who made the remark, I am satisfied that the evidence does not meet the test to have the matter set down for hearing.

[14] I am therefore satisfied the Commissioner did not err in declining to take further action on this complaint.

[15] Pursuant to s. 13(4.1)(c) of the Act, I order a ban on the publication of the Respondents' names.

Dated at Winnipeg, February 28, 2003.

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Murray W. Howell, P.J.