

**THE QUEEN'S BENCH
WINNIPEG CENTRE**

BETWEEN:

SGT. S.B. #1259 and CST. B.S. #1893,

Applicants,

- and -

S. [REDACTED] H. [REDACTED],

Respondent.

TRANSCRIPT OF PROCEEDINGS before The Honourable
Mr. Justice Menzies, held at the Law Courts Complex, 408
York Avenue, in the City of Winnipeg, Province of Manitoba,
on the 12th day of May, 2008.

APPEARANCES:

MR. W. HAIGHT, for the Winnipeg Police Association

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3 THE JUDGE: I'm not sure how you say it, but
4 H [REDACTED]?

5 MR. HAIGHT: Correct.

6 THE JUDGE: And who are the respondents?

7 MR. HAIGHT: The respondents are officers
8 Sergeant B [REDACTED] and Constable E [REDACTED] and S [REDACTED]. Sergeant
9 B [REDACTED] is not able to be here. He is out of town. He sends
10 his apologies. The date was set, My Lord, without
11 consulting him, so he wasn't aware, I was, I didn't ask him
12 whether he was available or not. Constable S [REDACTED] is on
13 his way here. He's in the middle of an investigation and
14 has been delayed as a result of that investigation, but he
15 is on his way to, to court this morning.

16 THE JUDGE: Did you want to wait until he gets
17 here?

18 MR. HAIGHT: Perhaps that might be -- we might,
19 there's a couple of procedural matters that we could
20 possibly deal with, My Lord.

21 THE JUDGE: Sure.

22 MR. HAIGHT: I'm told also present, just outside
23 the courtroom, they're just on their way in, they're trying
24 to reach Officer S [REDACTED] to see where he's at right now,
25 is M [REDACTED] S [REDACTED] and M [REDACTED] P [REDACTED], the new president and
26 vice-president of the association and they will also be
27 joining us, us this morning.

28 But who is not present is Ms. H [REDACTED] and
29 perhaps, I don't know if Madam Clerk has the ability to
30 page her to see --

31 THE CLERK: I do.

32 MR. HAIGHT: Because the court will see from the
33 record that there was an order for substitutional service
34 made, My Lord, the, she was served with a date to attend

1 in, in court to set the hearing of this matter and she did
2 not attend. But out of an abundance of caution I advised
3 Justice Schulman, who set the date, that I would serve her
4 in the same fashion that she had been served with the
5 substitutional service order advising of today's, of
6 today's date.

7 This, My Lord, is, is M [REDACTED] S [REDACTED], the
8 president of the Winnipeg Police Association.

9 THE JUDGE: All right.

10 MR. HAIGHT: So I don't expect that she's going
11 to be here. I've had no contact with her.

12 Also present in court is George Wright the
13 Commissioner of --

14 THE JUDGE: I know Mr. Wright.

15 MR. HAIGHT: Yes, and I can tell the court Mr.
16 Wright --

17 THE JUDGE: And I know Mr. Churley (phonetic)
18 too.

19 MR. HAIGHT: -- has also attempted to, to contact
20 Ms. H [REDACTED] and left messages at her place of employment
21 and neither of us have heard anything from, from her. So I
22 don't expect that she's going to be here today.

23 THE JUDGE: All right. I do have one procedural
24 matter to raise with you.

25 MR. HAIGHT: Yes.

26 THE JUDGE: How did you ever file a notice of
27 application with initials?

28 MR. HAIGHT: Well, the provisions of the, of the
29 Law Enforcement Review Act require that the, until there is
30 a finding of disciplinary default --

31 THE JUDGE: There is a finding of disciplinary
32 default.

33 MR. HAIGHT: I appreciate that, My Lord, but the
34 matter has been appealed and so I --

1 THE JUDGE: It doesn't matter, there's still a
2 finding of disciplinary default. Where's your order
3 allowing you to file with initials.

4 MR. HAIGHT: There is none, My Lord.

5 THE JUDGE: Then you will re-file the notice of
6 application.

7 MR. HAIGHT: I will do so.

8 THE JUDGE: Okay.

9 MR. HAIGHT: With the names of the officers.

10 THE JUDGE: With the names of the officers.

11 MR. HAIGHT: Yes.

12 THE JUDGE: Now, if you want to wait for
13 Constable S [REDACTED] that's fine.

14 MR. HAIGHT: Perhaps I can just ask --

15 THE JUDGE: Sure.

16 MR. HAIGHT: -- see if ...

17 Just spoken with President S [REDACTED]. Constable
18 S [REDACTED] is, is on his way here, but he has no objection if
19 we wanted to begin proceedings --

20 THE JUDGE: I have no objection to waiting for
21 the constable if he wants to be here.

22 MR. HAIGHT: He'll be here in 10 minutes, we can
23 maybe stand the matter down for 10 minutes.

24 THE JUDGE: Sure, just let the clerk know when
25 you're ready.

26 MR. HAIGHT: Okay. Thank you.

27 THE CLERK: Order, all rise.

28

29 (BRIEF RECESS)

30

31 THE CLERK: Thank you, please be seated.

32 MR. HAIGHT: My Lord, Officer S [REDACTED] will be
33 here shortly, but we can commence.

34 THE JUDGE: All right.

1 MR. HAIGHT: This is an appeal under Section 31
2 of the Law Enforcement Review Act, My Lord. Just to make
3 sure that you have the material, there is a brief.

4 THE JUDGE: Yeah.

5 MR. HAIGHT: There is a book of documents which
6 is essentially all the documents that were placed before
7 Judge Smith and including her reasons for decision, both on
8 the disciplinary default hearing and on the disposition
9 hearing, penalty hearing. And then I have filed separately
10 the transcripts of the proceedings that were before Judge
11 Smith.

12 And as the court knows, under Section 31 there is
13 a limited right of appeal. Appeals are restricted to
14 question of jurisdiction of the Provincial Judge that made
15 the decision, or questions of law alone. This appeal is on
16 a question of law, My Lord, and there are two issues that
17 I'm going to ask the court to, to deal with today.

18 The first is: Did the Provincial Judge commit an
19 error of law when she found that the applicant officer is
20 said to have abused their authority and therefore committed
21 a disciplinary default under Section 29 of the Act. I say
22 that the, the, that she did commit a jurisdictional error
23 and therefore the court has jurisdiction to review that
24 error, to determine what it would do with the evidence.

25 That brings us to the second issue and that is:
26 Is the impugned conduct of both the officers abuse of
27 authority? And the applicant says that clearly the conduct
28 is not an abuse of authority.

29 Dealing with the first issue, errors of law,
30 there is three areas of law. The primary one is that she
31 interpreted the words "abuse of authority" too broadly and
32 too vaguely. What's interesting, My Lord, was you look at
33 the authorities, is that there is a, a fair bit of, of
34 decisions out there dealing with abuse of authority under

1 Section 29 of the Act, but there is very little definition
2 given to that. Those, basically I think most judges say I
3 know it when I see it and in this case, though we do have
4 the decision of Judge Joyal, as he then was, that attempts
5 to put some meat on those bones.

6 The second error of law we say the judge made is
7 that she failed to consider the concept of good faith in
8 determining whether an abuse of authority occurred. And we
9 say finally that she erred in finding that the impugned
10 conduct constituted a disciplinary default.

11 Two separate acts which the judge finds to be
12 disciplinary default. The first is the Charter violation
13 of Sergeant B [REDACTED], failing to give the complainant her
14 Section 10 rights.

15 The second relates to Officer S [REDACTED] and that
16 is he's found to abuse his authority by failing to offer
17 the complainant or her son something to eat or drink, or
18 ask if they needed to use the washroom.

19 And entering the court right now, My Lord, is
20 Constable S [REDACTED]

21 So dealing with the Charter issue first, if I
22 can, My Lord, that begins with looking at Section 29(a) of
23 the Act which is found at tab 1 of the applicant's brief.
24 And it says that a, you commit a disciplinary default as an
25 officer if you abuse the authority that was given to you as
26 a police officer. And it gives seven examples. And we
27 know from the authorities that those are not, that's not an
28 exhaustive list, they're only examples, My Lord. And I am
29 prepared to acknowledge before the court today, as I did in
30 my brief, that a Charter violation can be a disciplinary
31 default. The issue is, is whether this one is and I
32 clearly say that this one isn't a disciplinary default
33 because if this one is, then every Charter violation, in my
34 respectful view, could be a disciplinary default.

1 And I've attached at tabs 10 and 11 of the brief
2 a couple of cases. One from Judge Chartier and the other
3 from Judge Swail that involved complaints made against
4 officers for Charter violations. And it's interesting to
5 compare those cases to this one. The first one at tab 10
6 is J.W.P., is the complainant, Constable R.L. is the
7 respondent. That's the decision of Judge Chartier. And in
8 that case, and I won't go into it in, in a lot of detail,
9 but at page 5, pages, paragraphs 17, 18 and 19 give some
10 detail on what the actual Charter violation was in that
11 case. In that case they pulled a guy into a room. Him and
12 his wife were both being investigation for arson. The wife
13 was cautioned. He was put in a separate room, was not
14 cautioned, was not given his Section 10 rights under the
15 Charter and then for two and a half hours was grilled, was
16 subjected to what would, some would feel to be intimidating
17 behaviour and gestures. Slamming of files, pointing of
18 fingers, derogatory terms, swearing and ranting, yelling at
19 the guy for two and a half hours and the issue was whether
20 that was a Charter, that Charter violation, it was, the,
21 Judge Chartier found that that was, that his Section 10
22 rights were not given and then had to determine whether or
23 not that was, that Charter violation amounted to a
24 disciplinary default.

25 And over at page 8 of that decision, My Lord,
26 paragraphs 32, 33 and 34 are instructive. It says:

27

28 I've already found that the
29 complainant was detained by the
30 respondent and that his detention
31 was prima facie reasonable. The
32 question I must now answer is
33 whether the respondent's omission
34 to inform the complainant of his

1 Section 10 rights constitutes an
2 abuse of authority.

3 Clearly such an omission
4 brings about legal consequences,
5 specifically what may very have
6 been admissible evidence, had it
7 not been for the Charter breach,
8 could not be rendered inadmissible
9 in a court of law. The
10 respondent's superiors may also be
11 concerned by his mistake.

12
13 But, he says:

14
15 I find the fact that the
16 respondent did not inform the
17 complainant of his Charter rights
18 to be a professional error with
19 important legal ramifications. It
20 is not, however, an abuse of
21 authority.

22
23 So that case was not found to be an abuse of
24 authority, how could this one?

25 And when you have an honest but mistaken belief
26 regarding detention occur and I'll, I'll get into that in a
27 moment, but -- and I won't go into the Judge Swail decision
28 at tab 11, other than to read one quote that is very
29 instructive.

30 In that case, officers, there was a roadside stop
31 made of an individual that was seen to be besetting and
32 watching the, an office of the Winnipeg Police Service.
33 And he was pulled over by four, two officers, another two
34 officers joined. He was held at the side at the road,

1 physically putten (phonetic) onto the back of his truck and
2 grilled for about 45 minutes to an hour. He made a
3 complaint about, to the Law Enforcement Review Agency and
4 that appeared before Judge Swail and Judge Swail found that
5 that was not a disciplinary default.

6 But the important quote comes from page 22, My
7 Lord, under the heading: Breaches of Charter Rights
8 Constituting Disciplinary Default. And there is a quote
9 from a, an article called: Is Every Charter Breach by a
10 Police Officer a Disciplinary Offence? And halfway down
11 that quote, fourth line in, it says:

12

13 If police officers were subjected
14 to disciplinary proceedings every
15 time a judge made such a finding,
16 police work would be impossible
17 and police officers would operate
18 under a form of disciplinary
19 chill. Police officers are not
20 lawyers and cannot be expected to
21 know every nuance of Charter
22 related law.

23

24 Now, what we know about the facts of this case,
25 which are uncontradicted, is that Sergeant B [REDACTED] was in
26 charge on March 23rd of 2003 and he was in charge of an
27 execution of a search warrant at the complainant's
28 residence. They were looking for a handgun. And they had
29 just come from a residence at [REDACTED] where a search
30 warrant had been executed for a handgun as a result of
31 evidence given by the same informant. They found handguns
32 at [REDACTED]. It was expected that they would do the same
33 at, on [REDACTED] Avenue, the home of the complainants.

34

The search warrant said that the complainant's

1 husband had a handgun. That was the information given
2 by the informant for both that residence and [REDACTED]

3 [REDACTED]
4 The husband was the subject of the warrant, his
5 wife, the complainant, and her son were not. The husband
6 was placed in a police vehicle with two officers and he was
7 given his Section 10 rights, because he was the subject of
8 that warrant.

9 It was March 23rd, it was late winter, early
10 spring. It was cold. It was six o'clock in the morning.
11 So Officer B [REDACTED] said that he put the complainant and her
12 son in the back of a warm police cruiser with Officer
13 [REDACTED] here and his partner for her safety and for her
14 comfort. The emergency response unit was, was conducting a
15 raid to execute the search warrant. They were making sure
16 that the, that the, that the premises were safe before the
17 search warrant was conducted, because they were looking for
18 a handgun and it was a volatile situation. So there could
19 be nobody around on the street. She certainly couldn't be
20 in the house. She couldn't be on the street. Her safety,
21 officer safety was paramount and so she was put in the back
22 of a police car with her, with her son for her comfort and
23 her safety. And Officer B [REDACTED] said that: I did not feel
24 that she was detained. I thought --

25 THE JUDGE: Well, he'd have to be in a fantasy
26 world not to think she was detained.

27 MR. HAIGHT: Well --

28 THE JUDGE: Any officer, come on now, you get a
29 phone call at 6:30 in the morning saying all three of you
30 come out, show us your hands, one at a time. As they walk
31 out every police officer has their gun drawn, not pointing
32 at them, but they all have their gun drawn.

33 MR. HAIGHT: Um-hum.

34 THE JUDGE: The husband is handcuffed and put in

1 one car and they're put in the back of another car. Who
2 here really doesn't think they were detained? Come on.

3 MR. HAIGHT: Well, the --

4 THE JUDGE: Let's, let's not going into fantasy
5 world here.

6 MR. HAIGHT: I'm not going into fantasy world.

7 THE JUDGE: It is fantasy world.

8 MR. HAIGHT: I, I respectfully disagree. Look --

9 THE JUDGE: Well, no, no, come on.

10 MR. HAIGHT: -- look at it from this
11 perspective --

12 THE JUDGE: What would you think? All right?
13 You're a, you're a lawyer, what would you think if a police
14 officer phoned you at 6:30 in the morning and said: Come
15 out with your hands showing. You walk out, there's 10
16 officers there with guns and you're told to get in the back
17 of the car. You're, oh, well, I know I can leave anytime I
18 want.

19 MR. HAIGHT: My Lord, I, I'm not saying that I,
20 that I --

21 THE JUDGE: They should have --

22 MR. HAIGHT: -- that I agree --

23 THE JUDGE: -- they should have told her --

24 MR. HAIGHT: -- with the --

25 THE JUDGE: -- that she wasn't detained.

26 MR. HAIGHT: Without a doubt and that that's what
27 I told Officer B [REDACTED] and Officer S [REDACTED] when, when I took
28 on this case. I said she was detained and she should have
29 been -- two things should have happened: She should have
30 been given her rights, or she should have been saying, or
31 she should have said you're not detained, would you like to
32 go somewhere?

33 THE JUDGE: She should have been told she could
34 leave anytime she wanted.

1 MR. HAIGHT: She should have told (sic) she could
2 leave. One of the two. And one of the two is done, we're
3 not here. So what you're saying is, is it's an error and
4 it's a bad error.

5 THE JUDGE: Well, I don't know, even know if it's
6 -- it's an error.

7 MR. HAIGHT: Look at it -- yeah. And, and --

8 THE JUDGE: It's an error.

9 MR. HAIGHT: -- so, but is it --

10 THE JUDGE: Any evidence they got out of her
11 would have been booted so fast and if they, if the police
12 are sitting here thinking: Gee, we didn't know she was
13 detained, well, they better improve their training.

14 MR. HAIGHT: The, the -- look at it, and I, I
15 hear what you're saying, My Lord, and I can, I can agree
16 with you and still say that this, this Charter violation is
17 not a disciplinary default.

18 THE JUDGE: I absolutely agree it's not a
19 disciplinary default.

20 MR. HAIGHT: Yeah. And it's not an abuse of
21 authority.

22 THE JUDGE: I absolutely agree it's not an abuse
23 of authority.

24 MR. HAIGHT: All right. Then can I, should I
25 then direct my comments towards Officer S [REDACTED] and the
26 discourteous issue.

27 THE JUDGE: Sure.

28 MR. HAIGHT: Okay. Do you need to hear from on
29 that, or if I said --

30 THE JUDGE: Well, I, I have a hard time
31 supporting the provincial judge's findings.

32 MR. HAIGHT: Yes.

33 THE JUDGE: She says that they were all honest
34 individuals endeavouring to tell the truth and Officer

1 S [REDACTED] and Officer, it starts with F --

2 MR. HAIGHT: F [REDACTED]

3 THE JUDGE: -- F [REDACTED] said that they were
4 trying to be as courteous as possible.

5 MR. HAIGHT: They --

6 THE JUDGE: They thought the thing would be over
7 in 45 minutes, it went for two and a half hours. They
8 never thought it would last that long.

9 MR. HAIGHT: Yeah.

10 THE JUDGE: S [REDACTED] goes in to see if he can
11 hurry them up.

12 MR. HAIGHT: Correct.

13 THE JUDGE: Yeah, I'm having trouble finding out
14 how that becomes disreputable conduct, or how it becomes an
15 abuse of authority or a disciplinary default.

16 MR. HAIGHT: I, and then the only thing I will
17 say, My Lord, is, is this and that is, is that, is that I
18 think Judge Joyal had put a pretty good start on trying to
19 put some meat on the bones on what abuse of authority is.
20 He indicates that it should have some exploitative
21 character in nature to it. Clearly that's not the case
22 here. And I'm mindful of, of the court's comment and so,
23 unless there's something that you think that you want me to
24 address, I'll rest.

25 THE JUDGE: Eleven o'clock?

26 MR. HAIGHT: Sure.

27 THE CLERK: Order, all rise.

28

29 (BRIEF RECESS)

30

31 THE CLERK: Please be seated.

32 THE JUDGE: I'm in a position to render a
33 decision.

34

1 (REASONS FOR JUDGMENT DELIVERED)
2
3 (PROCEEDINGS CONCLUDED/PROCEEDINGS
4 ADJOURNED TO ###)

CERTIFICATE OF TRANSCRIPT

I hereby certify the foregoing pages of printed matter, numbered 1 to ###, are a true and accurate transcript of the proceedings, transcribed by me to the best of my skill and ability.

PAMELA M. MOORE
COURT TRANSCRIBER

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(REASONS FOR JUDGMENT DELIVERED)

(PROCEEDINGS CONCLUDED)

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D. KEHLER

DAVID KEHLER
COURT TRANSCRIBER

PER: P. MOORE

CERTIFIED COURT TRANSCRIPT
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1 situation of detention. This is clearly a situation where
2 Ms. should have been advised of her Charter of
3 Rights.

4 Sergeant testified and I must say as I go
5 through this decision, the learned Provincial Court judge
6 indicated that she accepted the evidence of everyone who
7 testified, found them all to be truthful, which gives me
8 some concerns, because the evidence does vary from time to
9 time, but she does not indicate who she accepts when this
10 variance occurs. But in any event, I feel confident in
11 relying upon the evidence of not only the respondent, but
12 the officers, as the learned Provincial Judge found that
13 they were telling the truth as best as they could.

14 Sergeant advised that he did not advise Ms.
15 of her Charter rights because one, in his opinion,
16 she was not detained, although she clearly was and two, she
17 was not a suspect. I agree that Sergeant should have
18 advised her of her Charter rights because she clearly was
19 detained, even if she wasn't a suspect.

20 However, I am firmly of the opinion, and I agree
21 with the case law that indicates that, absent more, the
22 failure to advise of a right to counsel is not an abuse of
23 authority. As was indicated by Provincial Court judge
24 Chartier, as he then was, in J.W.P. v. Cst. R.L., a
25 decision given on November 15th, 2004:

26
27 The failure to advise of Section
28 10 rights is a professional error
29 which could result in legal
30 ramifications, such as the
31 rendering of evidence inadmissible
32 if any is obtained, but absent
33 more than that, it is not an abuse
34 of authority.

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1
2 The evidence as I have before me, both from the
3 respondent and from Sergeant was that he acted
4 professionally throughout. He was not abusive, he was not
5 threatening and accordingly, I find that his failure to
6 provide Ms. with her rights under Section 10 of the
7 Charter does not amount to a disciplinary default.

8 The other officer who was found to have committed
9 a disciplinary default was Constable He was
10 found to have committed that default by being discourteous
11 and uncivil and failing to offer Ms. child any
12 food, drink or the use of bathroom facilities.

13 This section of the LERA Act has always bothered
14 me. It is interesting to note that an officer can be found
15 to have committed a disciplinary default by being
16 discourteous.

17 In interpreting this section I think that the
18 courts should be slow to find that the mere discourteous
19 conduct is sufficient to constitute disciplinary default.
20 Police officers work in high pressure situations with
21 potentially dangerous work and much of the time the people
22 they are dealing with do not want to be dealt with by
23 police officers. And to make a finding that merely being
24 discourteous in some way or another should constitute
25 disciplinary default leaves officers at a standard that
26 cannot be met.

27 Discourteous conduct, in order to constitute a
28 disciplinary default must reach a level equal to an abuse
29 of authority. It must be more than merely being
30 discourteous. That did not happen here.

31 I appreciate that Ms. and her son likely
32 found the situation they were in oppressive, likely found
33 it to be one filled with an uncertainty and perhaps fear.
34 But the evidence of Ms. , the evidence of Constable

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1 and the evidence of Constable , as
2 accepted by the learned Provincial judge showed officers
3 that once again, I find, were acting in a very professional
4 fashion. Things went wrong. Instead of having to deal
5 with Ms. and her son for 45 minutes it took two and
6 a half hours. In retrospect, Officer admitted
7 that he could have been more accommodating. He did not
8 advise them of the fact that they were not detained and
9 could leave if they wished. He indicated he could have
10 made more and better inquiries of the complainant and her
11 child, but this behaviour does not amount to an abuse of
12 authority.

13 Accordingly, the appeal of Sergeant and the
14 appeal of Constable are allowed. The findings of
15 the learned Provincial judge are set aside and the
16 complaints are dismissed.

17 Anything else, Mr. Haight?

18 MR. HAIGHT: Nothing further, My Lord, thank you.

19 THE CLERK: Order, all rise.
20

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