

MEMORANDUM

August 8th, 2000

TO: File

FROM: Marilyn Baron

Re: **Review – Complaint of K A**
LERA FILE 3261

Judge Philip Ashdown dismissed this review on July 20th, 2000.

Marilyn Baron

IN THE MATTER OF: Law Enforcement Review Act
Complaint No. 3261

AND IN THE MATTER OF: An Application pursuant to
Section 13(2) of The Law
Enforcement Review Act,
R.S.M. 1987, c L75

BETWEEN:

K A

Complainant/Appellant,

- and -

CONSTABLE V. D # , and
CONSTABLE G. H #1

Respondents.

TRANSCRIPT OF PROCEEDINGS had and taken before The
Honourable Judge Ashdown, held at the Law Courts Complex,
408 York Avenue, in the City of Winnipeg, Province of
Manitoba, on the 20th day of July, 2000.

APPEARANCES:

MR. T. HARWOOD-JONES, for the Complainant/Appellant.

MR. M. BARTEAUX, for the Commissioner, G. Wright.

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

1 JULY 20, 2000

2

3 THE JUDGE: At this time I wish to give my
4 decision with respect to the matter before the court
5 involving K A as complainant/appellant and
6 Constable V. D and Constable G. H respondents.

7 By letter dated August the 4th, 1999 Mr. George
8 Wright, hereinafter referred to as the Commissioner, advised
9 that the complainant K A that the evidence
10 supporting the complainant was insufficient to support a
11 public hearing. He stated that he declined to take further
12 action on the complaint.

13 In a letter dated September 3rd, 1999 the
14 complainant and her husband R A indicated they
15 desired to make an application under s. 13(2) of The Law
16 Enforcement Review Act hereafter referred to as LERA so that
17 the matter would come before a provincial judge.

18 The hearing was held on April the 7th of this year
19 in Winnipeg. The Commissioner, as I've stated declined to
20 take further action. The facts in this matter may be
21 briefly stated as follows: Mrs. K A called
22 the police when she was attempting to remove certain goods
23 from her former residence at X ADDRESS in Winnipeg
24 and was prevented from doing so by the landlord's lawyer Mr.
25 Shawa. Mrs. A further alleges that the police 1)
26 refused to take a statement from her; 2) that the police
27 told her she was "mental"; 3) that they were aware of other
28 incidents they could use against her which could result in
29 her being placed into custody; 4) that the police prevented
30 the complainant from phoning the Rentalsmen; 5) that the
31 police were becoming hostile; 6) that the police were
32 blocking the complainant's truck, thereby impeding the move;
33 7) that 39 people could have given evidence but did not and
34 none were interviewed by the LERA investigator.

1 The police for their side advise that there was no
2 need to take a statement in this landlord and tenant
3 dispute. The police deny making a statement to the
4 complainant indicating that she was "mental" and also that
5 they were aware of other incidents which could result in
6 custody. The police denied preventing the complainant from
7 using her cellphone, advising there was no need to do so.
8 The police deny that they became hostile and state that the
9 conversation was cordial and that the complainant was
10 cooperative. The police deny blocking the movement of the
11 mover's truck. The police deny that it was necessary to
12 interview an additional 39 persons and one can only conclude
13 that the testimony is highly conflicted.

14 In reviewing this conflicting testimony I am aware
15 that my review is limited to determining whether the
16 commissioner acted within the jurisdiction given him by The
17 Law Enforcement Review Act. It is not a review based on the
18 merits of the case.

19 The commissioner has specifically requested to be
20 heard as to the appropriate standard of review in dealing
21 with the application. What standard should be employed in a
22 review of his character? In answering I'm assisted by the
23 reasoning of the Honourable Judge Richard Chartier in the
24 B case, a decision given comparatively recently on May
25 the 30th of this year. In the B matter two cases were
26 referred to so as to sustain a standard of review. These
27 cases are Southam Incorporated et al v. The Director of
28 Investigation and Research 1997, 1 S.C.R. 748 and
29 Pushpanathan v. The Minister of Citizenship and Immigration,
30 1998 1 S.C.R. 92. In these cases the standard of review has
31 found result from the operation of four factors; 1) does a
32 privative clause exist; 2) the expertise of the person or
33 body hearing the matter; 3) the intent of a statute as a
34 whole and the provision in particular; 4) the nature of the

1 problem, is it a matter of fact or of law?

2 At page 1005 in the Pushpanathan case Bastarache,
3 J. confirmed that another standard existed in addition to
4 the standard of patent unreasonableness and correctness.

5
6 "...Traditionally the 'correctness'
7 standard and the 'patent
8 unreasonableness' standard were the
9 only two approaches available to a
10 reviewing court. But in Canada
11 (Director of Investigation and
12 Research) v. Southam Inc. [1997] 1
13 S.C.R. 748, a 'reasonableness
14 simpliciter' standard was applied
15 as the most accurate reflection."

16
17 In the Southam case at page 765 the Supreme Court
18 held that,

19
20 "...Depending on how the factors
21 play out in a particular instance,
22 the standard may fall somewhere
23 between correctness, at the more
24 exacting end of the spectrum, and
25 patently unreasonable, at the more
26 differential end."

27
28 Turning to the first of four factors referred to
29 above, it is clear from s. 13(3) of LERA that there is no
30 limit on the provincial judge's jurisdiction to review a
31 decision of the commissioner because there is no private
32 clause in existence. The absence of such a clause points
33 towards a standard of correctness.

34 The second factor that the expertise is dealt

1 with, that is of expertise is dealt with in the Pushpanathan
2 at page 1007 as follows,

3
4 "....If a tribunal has been
5 constituted with a particular
6 expertise with respect to achieving
7 the aims of an Act, whether because
8 of the specialized knowledge of its
9 decision-makers, special procedure,
10 or non-judicial means of
11 implementing the Act, then a
12 greater degree of deference will be
13 accorded."

14
15 In the case of making a decision under s. 13 the
16 commissioner must determine what is meant by frivolous or
17 vexatious or insufficient evidence and no specialized
18 knowledge is required for decisions of this character. In
19 my opinion the requirement for a deference would, with all
20 due respect to the commissioner, be at the low end of the
21 scale in this case.

22 My conclusion is that the test is one of
23 correctness since the commissioner's carrying out a mandate
24 and a requirement with little discretionary power.

25 Turn to the third factor; that is the purpose and
26 intent of a statute as a whole and the provision in
27 particular. It is not the duty of the commissioner to
28 decide if under the provisions of the Act an inquiry is
29 warranted. It is essential in this case to have an
30 assessment of the sufficiency of the evidence. Having
31 regard to this factor I find that the appropriate test would
32 be the standard of correctness.

33 The fourth factor to be considered is the nature
34 of the problem, is it a question of fact or law. I believe

1 it is a question of fact and that the standard of
2 correctness should be applied. In reaching this conclusion
3 I have had the opportunity to read the letter dated
4 September 3rd, 1999 signed by the complainant and her
5 husband R A written on the
6 stationary. I read the letter dated August the 4th, 1999
7 written by the commissioner to Mrs. A . In addition,
8 I've had the benefit of submissions by both counsel. I've
9 noted also that pursuant to s. 13(4) the burden of proof is
10 on the complainant to show that that commissioner erred in
11 declining to take further action.

12 The commissioner has decided to take no further
13 action on the complaint before me on the ground that there
14 is insufficient evidence supporting the complaint to justify
15 a public hearing. I am satisfied that he was acting
16 reasonably in so doing in view of the intense conflict of
17 the evidence before me as indicated in the description of
18 the claims and counter claims referred to above.

19 In reaching this conclusion I have determined that
20 the complainant -- that the complaint is not frivolous or
21 vexatious; that is has not been abandoned and as indicated
22 that the evidence is insufficient due to its contradictory
23 nature to justify a public hearing. Applying these factors
24 I find that the commissioner's decision to be a reasonable
25 one based upon a standard of correctness. That is the end
26 of my decision. Is there anything further?

27

28

(PROCEEDINGS CONCLUDED)

CERTIFICATE OF TRANSCRIPT

I, TARA L. FAGNAN hereby certify that the foregoing pages of printed matter, numbered 1 to 5, are a true and accurate transcript of the proceedings recorded by a sound recording device that has been approved by the Attorney-General and operated by court clerk/monitor, Donna Jorgerson, and has been transcribed by me to the best of my skill and ability.



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