#3358

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

THE LAW ENFORCEMENT REVIEW ACT

BETWEEN:

S.W.

Applicant,

- and -

P.K.

Respondent.

REASONS FOR JUDGMENT

The Law Enforcement Review Commissioner has referred this matter to Provincial Court for a hearing to determine the merits of a complaint which alleges the following disciplinary defaults as defined under Section 29 of the Law Enforcement Review Act, R.S.M. 1987, c.L75:

1. Using unnecessary force;
2. Using oppressive conduct.

The City of Winnipeg Police Communication Centre received a telephone call from the Health Sciences Centre on November 27th, 1994 at approximately 12:15 a.m., to advise that a male person was threatening suicide, had slashed his throat and was at home alone. That person had a knife and was identified as MR. B. who was known to be a chronic schizophrenic. An address was not provided to the communications centre initially, but a phone number was and the communications centre was attempting to locate an address from the Manitoba Telephone System.

At 12:18 a.m., the Health Sciences Centre advised the communications centre of an address for a MR. B. namely apartment X Street. The respondent, who was a Staff Sergeant with 24 years of service with the City of Winnipeg Police was acting Duty Inspector that evening. He was on patrol with a civilian member of the City of Winnipeg Police Communications Centre, who was described as a "ride along", being there to observe first hand what occurs on patrol. The information received by the communications centre appeared on the computer screen in the respondent's police vehicle and he proceeded to the address as this call had a high priority. Sergeant F. was also dispatched to that address.

A City of Winnipeg Ambulance Crew who also had been dispatched arrived at the address prior to the police officers. J.J. , one of the ambulance attendants testified that she and her partner approached the door to apartment X and knocked. The applicant who appeared to have been sleeping answered the door. On being told why the ambulance attendants were there, the applicant, who appeared to be upset at being bothered, denied that he required assistance. J. recalled that the applicant raised his voice in conversation but she did not have a distinct recollection of the entire event. The ambulance attendants left the building and at that time the police officers approached.

The respondent and Sergeant F. attended at the applicant's door and announced their presence, identifying themselves as police officers. This occurred a few minutes after the ambulance attendants left the premises. A conversation took place through the closed apartment door. According to the applicant he told the police the same information that he gave the ambulance attendants and that the police asked him for identification.

The respondent testified that the applicant was most belligerent and that the respondent attempted to calm him down and reassure the applicant that they were there for the applicants safety and to see if he was alright. Both the applicant and the respondent agreed in their evidence that the police officers asked if they could enter and the applicant allowed them to do so. He lived in a small bachelor apartment.

To this point the evidence of the parties was not in dispute.

The applicants version of what happened after the police officers entered his apartment was that the officers looked around the apartment. The applicant sat on the chesterfield or bed and put his hands over his face. The respondent suddenly put his hands on the applicants throat and eased him back onto the bed. The police officers requested that the applicant produce identification. He said that he told the respondent that they were let in to look around and the applicant then asked them to leave. According to the applicant, the respondent flashed his hand cuffs a few times.

The applicant then showed his birth certificate and upon further request for photo identification, his drivers license. The applicant asked for the respondents police number which the respondent gave, but the applicant did not remember. The applicant denied that the police asked him how he was feeling, if he was alright, about his mental health and if he called 911 or if his name was that of the caller, M.B. . The applicant said that Sergeant F. had left the apartment and the respondent was proceeding towards the door with his back to the applicant when the respondent again asked for identification. The applicant testified that he was sitting with his hands in his face when the respondent held his throat and that the respondent threatened to take the applicant to the police station if he did not produce identification.

In cross-examination, the applicant agreed that he was agitated and upset and it would be reasonable for the police officers to so conclude. He agreed that the police officers were there because of a suicide call, that the police officers were concerned for his safety and that he told the police officers that he was not the caller and that the police officers asked for his identification. The applicant further acknowledged that he may have discussed his private life with the police officer. I find that he did so as the respondent knew about the death of the applicant's sister and the applicant's feeling about living in the City of Winnipeg.

H.C. was the "ride along" with the respondent. She had attended at the door of the applicant's apartment, but she did not recall the event nor the applicant for reasons that she gave at the hearing.

The respondent testified that he did not know the name of the person in the apartment but was looking for M.B. . On entering the apartment, the respondent and Sergeant F. looked about the apartment. The respondent described the applicant as dishevelled and dressed in a housecoat. The respondent was looking for a man with a slashed throat and it was evident that the applicant was not in that condition. The respondent testified that he looked for a knife and did not find one. He did not leave at that time as he believed persons who may commit suicide can be irrational. The respondent had during his years with the City of Winnipeg Police service attended many attempted suicide situations in the past.

The respondent knew at that time that the applicant gave his name as W , but the respondent wanted to ascertain that the applicant and B were not the same person. The applicant told the respondent that they had looked around the apartment and they should leave.

The respondent testified that he told the applicant that they did not want to leave now and return in several days to find the applicant had committed suicide. The respondent felt the applicant

was emotional at that time as he had spoken of his sister's death and that he did not like living in Winnipeg. The respondent described the applicant as agitated, pacing up and down.

The respondent's version of what occurred subsequently differs from the evidence of the applicant. The respondent described the applicant as waving his arms and then clenching his fists as a result of which the applicant used his left arm to protect himself as the applicant was swinging his arm in an upward motion. The respondent testified that he thought that he was going to be struck by the applicant so the respondent grabbed the applicant's arm and forced him onto the bed. Sergeant F. who had heard the noise from the hall, came to assist by holding the applicant's right arm. The respondent believed that the applicant was "sick" . The respondent acknowledges that he may have had his hand on the applicant's throat. The applicant agreed to produce his identification and was released. The respondent was satisfied that the applicant was not M.B. . The respondent further testified that he remained for another minute during which time the applicant apologized for his behaviour.

Sergeant F.'s evidence was that the applicant appeared calm when he answered the door but the applicant become angry as the incident progressed. F. left the apartment to use the police radio, in the hall outside of the apartment, heard a scuffle and returned. He found the respondent on top of the applicant on the couch or bed. F. held the applicant's arm for what he

described as seconds. The applicant produced identification and F. and the respondent left. Upon returning to the police vehicle, they found from the computer screen that the communications centre had a new address for M.B. . Neither the respondent nor F. were aware of this prior to this incident occurring.

In determining which version of the events is true, I have considered the following:

1. Whatever occurred at or near the bed or couch between the applicant and the respondent was not observed by either F. or the civilian ride-along witness.

2. The respondent is an experienced police officer who has had considerable experience with suicide situations. He was there in a preventative capacity and wanted to ascertain whether or not the applicant was M.B. .

3. The applicant had become annoyed by the intrusion of the police officers and subsequently became agitated. I am satisfied that the respondent tried to calm the applicant in discussing his personal situation during which he found out about the applicant's sister's death and the applicant's feelings for the City of Winnipeg.

It would be most unusual, in my opinion, for an experienced police officer to ask for the applicant's identification while walking away from him and with his back to the applicant. In my opinion it is more probable that the respondent's version of the events is true and I so find.

The respondent's authority to deal with potential suicide victims is found in Section 10 of the Mental Health Act, R.S.M. 1987, c.M110 which is as follows:

"10(1) A peace officer may take a person into custody and take him or her forthwith to a place for involuntary examination by a physician if

(a) the peace officer has reasonable grounds to believe that the person

(i) has threatened or attempted or is threatening or attempting to cause bodily harm to himself or herself, or

(ii) has behaved or is behaving violently towards another person or has caused or is causing another person to fear bodily harm from him or her, or

(iii) has shown or is showing a lack of competence to care for himself or herself; and

(b) the peace officer is of the opinion that the person is apparently suffering from a mental disorder of a nature that likely will result in

(i) serious harm to the person,

(ii) serious harm to another person, or

(iii) substantial mental or physical deterioration of the person; and

(c) the urgency of the situation does not allow for a judicial order for medical examination.

R.S.M. 1987 Supp., c.23, s. 7.

10(2) A peace officer who is proceeding under subsection (1) may take any reasonable measure including the entering of any premises to take the person into custody."

Subsection 1 authorizes a police officer to arrest without warrant anyone who the police officer believes on reasonable grounds comes within the subparagraph of that section. Subsection 2 gives the police officer the right to enter the premises.

The police officers attendance was not to arrest or question someone with respect to a crime, but rather for the protection of

life or to prevent injury to M.B. The police officers gained entrance with the consent of the applicant. I am satisfied that the respondent acted in a calm and reassuring manner in dealing with the applicant. The respondent endeavoured to ascertain if the applicant was M.B. who was reported to be a schizophrenic. I accept the respondent's testimony that because of his conversation with the applicant the respondent believed that the applicant may have been disturbed.

In light of the foregoing, I must consider whether the respondent used unnecessary force or oppressive conduct toward the applicant.

Section 27(2) of the Law Enforcement Review Act is as follows:

"The provincial judge hearing the matter shall dismiss a complaint in respect of an alleged disciplinary default unless he or she is satisfied on clear and convincing evidence that the respondent has committed the disciplinary default."

The complainant must establish proof of the alleged default on clear and convincing evidence. The term "clear and convincing evidence" was considered in the case of College of Physicians and Surgeons of British Columbia v. J. C., 1992, W.W.R. 673, a decision of the Court of Appeal of British Columbia.

The following passage from the trial judges judgment was approved by the Court of Appeal:

"In the instant case, the trial judge said at pp.1581 and 1582 [p.399 B.C.L.R.]:

In the present case the disciplinary committee considered the required standard at the outset of its report. It says:

The onus of proving the facts against [the doctor] rests with the College. To discharge that burden a high standard of proof is called for going beyond the balance of probabilities and based on clear and convincing evidence. The case for the College must be proven by a fair and reasonable preponderance of credible evidence.

This is essentially the view adopted by McLachlin J. (as she then was) in the decision of this court in *Jory v. College of Physicians & Surgeons of B.C.*, B.C.S.C., Vancouver No A850601, 13th December 1985 (not yet reported).

While the cases provide no clear rule, the most helpful term used in various judicial pronouncements on this subject seems to me to be the word "convincing". To be "convinced" means more than merely to be persuaded. I think the test to be applied in the present case is whether, on the evidence before it, the committee could properly have been convinced that the patient had told the truth in making her accusations of sexual misconduct against the doctor.

I am content to adopt that extract from the trial judge as setting out the law, and am satisfied that the committee properly directed themselves in this regard."

I accept that interpretation of the phrase "clear and convincing evidence".

Counsel for the applicant argues that the respondent does not have the right to demand the applicant identify himself. In support of this argument reference was made to the following decisions:

1. R. v. Waterfield and Lynn, 1963, 3 A.E.R. 659;
2. Rice v. Connolly, 1966, 2 A.E.R. 649.

Both of these decisions have been considered and adopted in the Canadian decisions. The Waterfield decision decided that while the police have a duty to prevent crime, that right is not unlimited. Rice v. Connolly decided that at common-law a person does not have to identify himself to police officers unless arrested.

In Moore v. The Queen, 90 D.L.R. (3d) 112, the Supreme Court of Canada found that the British Columbia Motor Vehicle Act did not require a cyclist to stop and identify himself to the police. However, the British Columbia Police Act gave the police officer involved power to arrest to establish the identity of the person

seen committing a summary conviction offense. Counsel also referred to the cases of R. v. Guthrie, 69 C.C.C. 2d @ 216, a decision of the Alberta Court of Appeal and R. v. Deadman, 20 D.L.R. 4th, 321, a decision of the Supreme Court of Canada. In these cases there was statutory authority to demand identification.

Another issue raised by the applicant's counsel was that when the applicant requested the police officers to leave and they did not do so, they became trespassers. In support of that argument, counsel cited the case of R. v. Thomas, 67 C.C.C. 3d. p.81, a decision of the New Foundland Court of Appeal, which was affirmed by The Supreme Court of Canada. In that case, police officers were investigating a possible breach of a noise by-law. The court found that they were trespassers when they were requested to leave by the accused and did not do so, unless their right to remain stemmed from statute or common-law.

Section 10 (2) of the Mental Health Act empowers the police officers to enter premises to take the suspected person into custody. A warrant to enter is not required. When the applicant requested the police officers to leave, they were not obliged to do so until they determined if the applicant had to be taken into custody. Accordingly, I find that they were not trespassers, so long as they were there in attempting to ascertain if the applicant was the person about whom they were inquiring.

Applicant's counsel argues that the respondent's actions were an unnecessary use of force. I stated previously that I believe the respondent's version of events. The use of force was justified in my opinion as the respondent attempted to prevent an assault by the applicant, whom the respondent believed was about to strike him. The respondent acted in self defense. The applicant's actions resulted in his being restrained for a short period of time until he became less agitated. The allegation of unnecessary force has not been established.

The second alleged disciplinary default was that of oppressive conduct on the part of the respondent. The term "oppressive conduct" has been considered in relation to dealings between shareholders of corporations. The Canadian courts have adopted the meaning given to that term in Scottish Co-op Wholesale Soc. Ltd. v. Meyer, 1959 AC 324 @ 342, a decision of the House of Lords.

"Oppressive in this context means conduct that is burdensome, harsh or wrongful or which lacks probity or fair dealing."

In Nystad v. Harcrest Apartments Ltd. 1986 3 BCLR 2d 39 Chief Justice McEachern equates oppressive conduct with bad faith.

In considering the respondent's conduct with the applicant, I am not satisfied that it was burdensome, harsh or wrongful. It can

not be said that it was burdensome or wrongful to have the applicant identify himself. I have dealt with the use of force which was neither harsh or wrongful. I conclude that the respondent's conduct was not oppressive.

In the result, I find that the respondent has not committed the disciplinary defaults referred by the Commissioner.

June 21, 1996

Provincial Judge

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