Date: 2004/05/19

IN THE MATTER OF: **The Law Enforcement Review Act R.S.M. 1987, c. L75**
Complaint Number: 5125

AND IN THE MATTER OF: **A Preliminary Application before a Provincial Judge**

BETWEEN:

W. L. (Complainant)	**)**	**Mr. W. L.**
	)	**on his own behalf**
	)	
	)	**Mr. Sean Boyd**
	)	**For the Commissioner**
- and -	**)**	
	)	
Retired Staff Sgt. W. M.	**)**	**Mr. Paul McKenna**
Cst. J. S. and	**)**	**For the Respondent Officers**
Cst. B. B.	**)**	
(Respondent Officers)	**)**	
	)	

Note: These reasons are subject to a ban on publication of the Respondents' names pursuant to s. 13(4.1)

SAM MINUK, P.J.

[1] The Respondent's bring an application for:

1. A declaration that the Law Enforcement Review Agency (LERA) has no jurisdiction to deal with LERA complaint #5125 brought by Mr. W. L. ("the complainant").

2. A declaration that LERA has no jurisdiction to refer the complaint to a Provincial Judge for a s. 13 Review.

3. A declaration that the Provincial Judge has no jurisdiction to deal with the complaint and no jurisdiction to conduct a s. 13 Review of the complaint.

THE FACTUAL BACKGROUND

[2] On or about March 2nd, 2000, Mr. W.L. filed a complaint under LERA (complaint # 5125) regarding an alleged incident which occurred at the Toronto International Airport on February 23rd, 2000, at approximately 4:00 p.m. E.S.T.

[3] LERA did not provide a copy of the complaint to any of the respondent police officers as required by s. 7(2) of the ***Law Enforcement Review Act*** **R.S.M. 1987, c. L75** ("the Act") which provides as follows:

> **COPY OF COMPLAINT TO RESPONDENTS**
>
> **7(2)** Upon receiving a complaint the Commissioner shall, as soon as it is practicable, provide the respondent with a copy of the Complaint.

[4] The LERA Commissioner, Mr. George Wright, conducted an investigation of Mr. W.L. complaint under s. 13(1) of "the Act" and concluded that there was insufficient evidence supporting the complaint to justify a public hearing. Mr. Wright wrote to Mr. W.L. on September 25th, 2001 informing him of his reasons for declining to take further action.

[5] In the same letter Mr. Wright informed Mr. W.L. that under s. 13(2) of the ***Law Enforcement Review Act*** Mr. W.L. had the right to make an application to a Provincial Judge to have the Commissioner's decision reviewed. He also informed Mr. W.L. in the same letter that his application had to be received in the Commissioner's office within 30 days from the date of the letter.

[6] It is common ground that the respondents did not receive a copy of the above letter.

[7] On October 13th, 2001 pursuant to his rights under s. 3 of "the Act" Mr. W.L. sent a letter to the Commissioner informing him that he wished to have the Commissioner's decision reviewed by a Provincial Judge.

[8] It is common ground also that the respondents did not receive a copy of the above letter.

[9] The matter was originally set for hearing for September 23rd, 2002, but was adjourned at the request of Mr. W.L. who stated he would not be in the province at that time. The matter was then adjourned to December 23rd, 2003. Judge Minuk sitting at that time ordered that the respondents' receive notice of the complaint and the matter was further adjourned until April 22nd, 2004 at 9:30 a.m.

[10] It is common ground that the first time Respondents heard of the complaint was January 7th, 2004 when they received a letter from the Commissioner. This was some 4 ½ years after the alleged incident. (Emphasis is mine)

THE LAW

[11] In their application the Respondent Officers raise a preliminary objection to the jurisdiction of LERA and a Provincial Judge on the basis that LERA has failed to comply with the mandatory provisions of s. 7(2) of the Act concerning notice. Section 7(2) provides as follows:

> **COPY OF COMPLAINT TO RESPONDENTS**
>
> **7(2)** Upon receiving a complaint the Commissioner shall, as soon as it is practicable, provide the respondent with a copy of the Complaint.

[12] The Respondents argue that s. 7(2) is mandatory and that a failure to comply with the section results in a loss of jurisdiction for both LERA to deal with the complaint and also it results in a loss of jurisdiction in a Provincial Judge to conduct a review of the complainant's decision pursuant to s. 13 of the Act.

[13] The use of the term "shall" in s. 7(2) was explained and considered by the Supreme Court of Canada in the case of **Manitoba v. Language Rights Reference** (1985) 25 Man.R. (2d) 83 (S.C.C.). The question there was whether the requirements of s. 133 of the ***Constitution Act*** 1867 and s. 23 of the ***Manitoba Act*** 1870 respectively, the use of both English and French in acts of Parliament and the Legislature were "mandatory".

[14] The Court stated at pp. 97, paragraph 27 as follows:

> As used in its normal grammatical sense the word 'shall' is presumably imperative. It is therefore incumbent upon this Court to conclude that Parliament when it used the word 'shall' in s. 23 of the ***Manitoba Act*** 1870 plus s. 133 of the ***Constitution Act*** 1867 intended that those sections be construed as mandatory or imperative in the sense that they must be obeyed, unless such an interpretation of the word 'shall' would be utterly inconsistent with the context in which it has been used and would render the section irrational or meaningless…

[15] The Respondents allege that the Commissioner failed to provide the Respondents with a copy of the complaint as soon as practicable as required by s. 7(2) of the Act. As stated earlier the officers did not receive notice of the alleged complaints until some four years later.

[16] A case similar to the one at bar is **Ruchief Constable of the Mersetside Police** (1986) 1 ALL E.R. 257. Complaints of assault were laid against five police officers. The investigation of the complaints were suspended pending the investigation of criminal charges that had been laid against the complainants, of

which they were eventually acquitted. As a result of the lengthy investigation of the criminal charges the police officers were not notified of the complaints until 2 ½ years after the complaints were made. The statute in force at the time like the one in the present case, provided that the subject of the complaint receive notice "as soon as possible".

[17] The regulation in the above **Mersetside** case regulation #7 was similar to s. 7(2) of our Act, it reads as follows:

> **Regulation 7**
>
> The investigating officer shall, as soon as practicable (without prejudicing any other investigation of the matter) in writing inform the member subject to the investigation of the report, allegations or complaint and give him a written notice informing him that he is not obliged to say anything concerning the matter, but that he may if he so desires make a written or oral statement concerning the matter of the investigating officer or to the Chief Officer concerned and (b) warn him that if he makes such a statement it may be used in any subsequent disciplinary proceedings.

[18] The Court held that the failure to inform the Constables of the complaints for over 2 ½ years constituted a breach of regulation #7 and so seriously prejudiced their ability to defend themselves of the disciplinary charges as to amount to a denial of natural justice.

[19] At p. 261 of the report the Court stated:

> As soon as is practicable should be read with all the emphasis on the word 'soon'… The purpose of the regulation is to put the officers on notice that a complaint has been made and to give him a very early opportunity to put forward a denial, which in some cases might even take the form of an alibi, or an explanation and to collect evidence in support of that denial or explanation.

[20] The term "as soon as practicable" was also considered in the British Columbia Court of Appeal case of **Glenburn Dairy Ltd. v. Canadian General Insurance Company** 1953 4 D.L.R. 33 (B.C.C.A.).

[21] A condition in a liability insurance policy required notice of the occurrence of the accident to be given by the insured to the insurer "as soon as practicable".

[22] Some ten months elapsed between an accident and notification thereof to the insurance company. As a result of the delay the insurer denied liability.

[23] The Court held that the giving of notice as soon as practicable was a condition precedent to any recourse the insurer might have had under the policy and since this was not done the action was dismissed.

[24] Applying the clear provisions of the Act and the law as above presented, I am of the view that the Respondents must succeed.

[25] I therefore order as follows:

1. There will be a Declaration that LERA has no jurisdiction to deal with the LERA complaint # 5125 instituted by Mr. W.L.
2. There will be a declaration that LERA has no jurisdiction to refer the complaint to a Provincial Judge for a s. 13 review.
3. There will be a declaration that a Provincial Judge has no jurisdiction to deal with Mr. W.L. complaint and has no jurisdiction to conduct a s. 13 review of his complaint.

Judge Sam Minuk