IN THE MATTER OF: Law Enforcement Review Act Complaint #5792

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

BETWEEN:

T. G.,

Complainant/Appellant,

- and –

CST. D. B and CST. J. S,

Respondents.

DECISION ON REVIEW

I. FACTUAL BACKGROUND

[1] On the evening of September 22nd, 2001 E. G. was involved in an altercation with the respondent police officers. Although Mr. E.G. was 39 years of age at the time, his brother, the complainant, advises that E. G .actually only has the mental capacity of a four to six year old.

[2] In a letter dated June 5th, 2002, the Commissioner reported to Mr. T. G. on the results of the Commissioner's investigation of Mr. T.G.'s complaint that the respondent police officers used excessive force on the arrest of his brother E.G. This reporting letter sets out the details of the incident. It is attached to this decision as Appendix A.

[3] Section 6(2) of ***The Law Enforcement Review Act*** (hereinafter called the L.E.R. Act) provides that a complaint of a disciplinary default by a member of a police department may be filed notwithstanding that the alleged default affected

some other person. It should be noted that very early on in the investigation of Mr. T. G.'s complaint, it was ascertained that E. G.'s written consent to this complaint, as required by section 9(2) of the L.E.R. Act, did not have to be provided. It was concluded that subsection (3) of section 9 of the L.E.R. Act was applicable. This subsection reads as follows:

> **Where no consent required**
> **9(3)** Subsection (2) does not apply where the person affected by the alleged disciplinary default is an infant or is not competent to give consent.

[4] I have reviewed the Commissioner's file, and conclude that his reporting letter of June 5th, 2002 fairly sets forth the essence and results of his investigation. I shall, however, comment later in this decision on the Commissioner's observation in the penultimate paragraph that:

> It is my view that a provincial judge would not reasonably be satisfied from the evidence that Constable B and Constable S committed the disciplinary default you have alleged.

as the basis for his conclusion that he must decline to take further action pursuant to section 13(1)(c) of the L.E.R. Act.

II. THE ISSUES

(a) Standard of Review Under the L.E.R. Act and Applicability of Canadian Human Rights Cases

(i) Mr. McKenna's Position

[5] Mr. McKenna, the counsel representing the respondents, has filed a rather voluminous Brief. Under a heading reading:

> **The LERA Commissioner's discretionary power not to refer a matter to a hearing is similar to that of the Commissioner of the Canadian Human Rights Commission.**

Mr. McKenna states the following:

> 3.1) Under the **Canadian Human Rights Act** R.S.C., 1985, c.H-6 **(*Tab 3*)** the Canadian Human Rights Commission receives a report from an Investigator and then performs the same "screening function" as the LERA Commissioner performs. In essence, the Canadian Human Rights Commission decides whether to refer the matter to a hearing or not. The power to do so is found at s. 44(3)(b)(i) of the Act, which reads:

> '"44(3) *On receipt of a report referred to in subsection (1), the Commission*
>
> *(b) shall dismiss the complaint to which the report relates if it is satisfied*
>
> *(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted"*

[6] It can be noted parenthetically that this provision is, of course, quite similar to section 13(1) of the L.E.R. Act which reads in part:

> Where the Commissioner is satisfied…
>
> (c) that there is insufficient evidence supporting the complaint to justify a public hearing;
>
> the Commissioner shall decline to take further action on the complaint and shall in writing inform the complainant, the respondent, and the respondent's Chief of Police of his or her reasons for declining to take further action.

[7] Mr. McKenna's Brief continues:

> 3.2) The test for judicial review of this "screening function" has been the subject of much judicial comment. As a result, the Courts have, through much litigation, arrived at a virtual consensus that the "screening function" decisions of the Canadian Human Rights Commission ought not to be lightly interfered with.
>
> 3.3) For the first time, this extensive jurisprudence is being presented to a Provincial Judge reviewing the LERA Commissioner's discretionary "screening function". It is submitted that earlier decisions have misinterpreted the role of judicial review of the LERA Commissioner's decisions, and the Respondents feel that it is necessary to fully develop in this Brief the history of its judicial evolution in the parallel system of the **Canadian Human Rights Act**.

[8] Mr. McKenna's contention is that because the history of the Canadian Human Rights decisions "clearly and unanimously" reflects deference to the screening function of the Commissioner of the Canadian Human Rights Commission, that provincial court judges reviewing a decision of the Commissioner under the L.E.R. Act should apply a similar standard of review, and should emphasize deference rather than interventionism on a LERA review; with the possible exception of a conclusion by the reviewing judge on a question of whether or not a complaint does or does not fall within the scope of section 29 of the L.E.R. Act. Mr. McKenna concedes that in this latter instance the more rigorous standard of "correctness" should be applied to the Commissioner's decision.

(ii) Mr. Guénette's Position

[9] For his part, Mr. Guénette on behalf of the LERA Commissioner takes the position in his Brief that Provincial Court Judges have been correctly applying the law on the standard of review for section 13(2) reviews of the Commissioner's decisions, as that law was interpreted in the leading case decision of His Honour Judge Chartier in LERA Complaint #3597; and further amplified in later decisions by Associate Chief Judge Miller, and Judge Smith, respectively in LERA Complaints Numbered 3208 and 3771.

[10] Mr. McKenna challenges this contention by the Commissioner on the basis that the Supreme of Court Canada cases referred to in Judge Chartier's decision in LERA #3597 are decisions on reviews of final findings on a complaint; while the CHRC cases which he relies upon in the respondent's Brief are decisions on the Commissioner's screening function, which is what the provincial judge is dealing with under section 13(2) of the L.E.R. Act. Accordingly, Mr. McKenna contends that Judge Chartier's decision, and the others following it, have proceeded on the wrong basis.

(b) Provincial Judge as *Persona Designata*

[11] Mr. Guénette raises another point. He refers to section 1(2) of the L.E.R. Act which states that:

> A provincial judge acts as *persona designata.* and not as a court when performing a duty or exercising a power under this Act.

His position then is that a provincial court judge, in a review under section 13(2):

> …cannot even be said to be acting as a court of record – the *persona designata* designation takes the function outside the judge's usual role of a judge of that court.

[12] The Commissioner's Brief then emphasizes:

> 58. There is one critical distinction that must be taken in account between the processes at section 13 of *The Law Enforcement Review Act* and those under human rights law. Under *The Law Enforcement Review Act*, the Commissioner's decision to screen out a complaint is subject to a statutory right of a complainant to have that decision reviewed before the step of judicial review takes place. By contrast, under both the *Human Rights Act* (Canada) and *The Human Rights Code* (Manitoba), there is no similar statutory right of review before judicial review takes place.
>
> 59. In short, under the human rights process, the Commissions are the administrative actors who have the final say. Under *The Law Enforcement*

> *Review Act*, the final say of the administrative actors rests with the Provincial Judge, not the Commissioner.

[13] In further support of his position that a provincial judge acting pursuant to section 13(2) of the L.E.R. Act is acting in an administrative capacity, Mr. Guénette goes on to say:

> 63. Prior to 1992, the legislation relied on specialist administrative tribunals to perform certain functions. For the purposes of section 13(2) reviews, the body that reviewed the Commissioner's decisions was the Manitoba Police Commission. When that body's role under the Act was eliminated, its functions were handed over to the provincial judges, who previously had no role to play under *The Law Enforcement Review Act*. At the same time, provincial judges were directed to sit as *persona designata* and not as members of the Provincial Court. Clearly, the above legislative history demonstrates an intention to keep the section 13(2) process within the realm of a more administrative function, rather than a truly judicial function.
>
> 64. To this end, the Legislature has chosen to create a process in *The Law Enforcement Review Act* that includes an additional administrative safeguard that simply has no equivalent in the human rights process: the administrative review by the Provincial Judge of the decision to screen out a complaint.

(c) Application of Test from Preliminary Hearing to Determination by the Commissioner of Sufficiency of Evidence

[14] In Part Two of the Commissioner's Brief, Mr. Guénette makes reference to my decision in LERA Complaint #5649 where I said:

> The question of what evidence there has to be established in the investigation by the Commissioner for him to refer it to a hearing would seem to me to appropriately be the test from a preliminary hearing.

[15] The Commissioner's Brief then goes on to say:

> This was not the position advanced by the Commissioner before Judge Swail. The Commissioner's view was that, while there will be some similarities between the two processes, they are not identical.

III. Review Standards as Established in Provincial Court LERA Decisions

[16] In Part One of the LERA Commissioner's Brief in this matter, Mr. Guénette makes particular reference to the decisions of Their Honours Judges Chartier and

Smith and His Honour Associate Chief Judge Miller in the L.E.R. Act reviews which I have referred to above. He has quoted certain portions of these cases in each instant, and I shall make reference to these quotes in an effort to outline the standard of review which has been established by these leading decisions on L.E.R. Act reviews by provincial judges under section 13(3).

[17] In LERA Complaint #3597, Judge Chartier, after reviewing the Supreme Court decisions in the following cases:

> ***Canada (Director of Investigation and Research) v. Southam Inc.***, [1997] 1 S.C.R. 748
>
> ***Canada (Minister of Citizenship and Immigration) v. Pushpanathan***, [1998] 1 S.C.R. 982
>
> ***Baker v. Canada (Minister of Citizenship and Immigration)***, [1999] 2 S.C.R. 817

concluded:

> e) Appropriate Standard for Issues.
>
> Having now carefully considered each of the four factors identified by the Supreme Court of Canada, I must now relate them to the review to be conducted by the Provincial Judge. I have tried to categorize the issues facing the Commissioner when conducting his investigation of a complaint pursuant to ss. 13(1). I have found three. With respect to those issues, I find that the appropriate standard of review will be 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 L.E.R. Act as same is found in clause 13(1)(1) 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 to

> be applied to the decision of the Commissioner will be closer to 'reasonableness *simpliciter*'.

[18] Not long after this decision, Associate Chief Judge Miller said this in LERA Complaint #3208:

> …Section 13(1)(a) permits a finding by the Commissioner that the subject matter of the complaint is 'frivolous' or 'vexatious' or 'does not fall within the scope of section 29'. Mr. W was not advised directly which criterion or combination thereof was applied by the Commissioner. This is important in that I am of the view that upon due consideration of the factors previously enunciated, the standard to be applied to the review differs in respect of a complaint that has been found to be 'frivolous' or 'vexatious' on the one hand and 'not within the scope of section 29' on the other.
>
> In respect of the former, I believe that the standard would tend to be 'reasonableness simpliciter' while in the latter it would tend to be 'correctness'.

[19] In LERA Complaint #3771, Her Honour Judge Smith followed the reasoning in the above two cases and adopted the standard of review recommended by His Honour Judge Chartier. She then went on to say:

> [24] When considering whether a given issue involves a question of law or fact the following guidance by Iacobucci J. in *Southam Inc. v. Director of Investigation and Research*, [1997] 1 S.C.R. 748 at 766-767, referred to by Chartier P.C.J. in *Bartel, supra*, is helpful:
>
> > Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.
>
> [25] As Chartier P.C.J. observed in *B, supra* at p. 16, the problem in most cases will be a question of mixed fact and law as the issue will be whether the Commissioner applied the appropriate 'sufficiency of evidence' test – a legal test – to the available evidence – the facts.

[20] In the Commissioner's Brief, Mr. Guénette goes on to quote this further portion of Her Honour Judge Smith's decision:

> [37] The Commissioner should take care not to 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 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 questions 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 enquiry 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.

[39] The Commissioner must consider whether there is evidence upon which a judge hearing the matter under the Act *could* conclude that a disciplinary default has occurred. As in the case of the preliminary hearing, to the extent evidence is circumstantial, the Commissioner will have to engage in a limited weighing of it to determine if the evidence is *capable* of supporting the necessary inferences. Whether those inferences should be drawn should be left for the judge to determine in a public hearing. Likewise, determinations of credibility should be left for a hearing before a judge. The process used by the Commissioner is ill suited to determining credibility or making findings on contested facts, as the Commissioner readily acknowledged. One exception might be the ability to make findings about what has occurred in LERA's internal processes.

IV. CONCLUSIONS ON ISSUES

(a) Standard of Review Under the L.E.R. Act and Applicability of Canadian Human Rights Cases

[21] ***Baker v. Canada (Minister of Citizenship and Immigration), supra***, appears to be the most recent decision by the Supreme Court of Canada in this area of administrative law. As such, it must be looked upon as effectively the "last word" in this area. It seems to me that this case does not support Mr. McKenna's contention that there is a distinct "deference" standard of review which must be employed in a review of the "screening" function of an administrative tribunal. Mr. McKenna emphasized in argument the "discretionary" nature of this function, and his contention (as indicated above) was that the appropriate standard of review in these instances has been established in law as quite different from the standard of review of final decision of administrative tribunals.

[22] It is true that, at page 853 of that decision, Madam Justice L'Heureux-Dubé, under the heading "The Approach to Review of Discretionary Decision Making", says:

> Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation

> of rules of law. The rule has been that decisions classified as discretionary may only be reviewed on limited grounds such as the bad faith of decision-makers, the exercise of discretion for an improper purpose, and the use of irrelevant considerations; see, for example, *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2, at pp. 7-8; *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231.

But she then goes on to say (at page 854):

> It is, however, inaccurate to speak of a rigid dichotomy of "discretionary" or "non-discretionary" decisions. Most administrative decisions involve the exercise of implicit discretion in relation to many aspects of decision making. To give just one example, decision-makers may have considerable discretion as to the remedies they order. In addition, there is no easy distinction to be made between interpretation and the exercise of discretion; interpreting legal rules involves considerable discretion to clarify, fill in legislative gaps, and make choices among various options. As stated by Brown and Evans, *supra*, at p. 14-47:
>
> > The degree of discretion in a grant of power can range from one where the decision-maker is constrained only by the purposes and objects of the legislation, to one where it is so specific that there is almost no discretion involved. In between, of course, there may be any number of limitations placed on the decision-maker's freedom of choice, sometimes referred to as "structured" discretion.
>
> The "pragmatic and functional" approach recognizes that standards of review for errors of law are appropriately seen as a spectrum, with certain decisions being entitled to more deference, and others entitled to less: *Pezim*, *supra*, at pp. 589-90; *Southam*, *supra*, at para. 30; *Pushpanathan*, *supra*, at para. 27. Three standards of review have been defined; patent unreasonableness, reasonableness *simpliciter*, and correctness: *Southam*, at paras. 54-56. In my opinion the standard of review of the substantive aspects of discretionary decisions is best approached within this framework, especially given the difficulty in making rigid classifications between discretionary and non-discretionary decisions.

[23] In my opinion then, the law expressed in the decision of my colleagues Judges Chartier and Smith, and Associate Chief Judge Miller, referred to above, are entirely in accord with the law expressed in the ***Baker*** case. Accordingly, the standard of review to be applied by a provincial court judge under sections 13(2) and (3) of the L.E.R. Act is properly that indicated in those LERA decisions.

(b) Provincial Judge as *Persona Designata*

[24] I conclude that Mr. Guénette's contention that a provincial judge reviewing a decision of the Commissioner under section 13(2) of the L.E.R. Act is acting in

an administrative capacity, rather than performing a judicial function as such, is well taken. It must be observed however that in selecting provincial judges as a group to act as *persona designata* under the L.E.R. Act, it would appear evident that the Manitoba Legislature has taken care to select a group of individuals who are well-trained in the law.

[25] The carefully researched decisions of Judges Chartier and Smith, and of Associate Chief Judge Miller, in the LERA complaint cases referred to herein in my view reflect precisely the judicious approach which the legislation evidently contemplates on the exercise of this administrative function. The standard of review in section 13(2) reviews established in those cases then seems to be well in accord with the evident intent of the legislation.

(c) <u>Application of Test from a Preliminary Hearing to Determination by the Commissioner of Sufficiency of Evidence</u>

[26] Her Honour Judge Smith at paragraph 38 of the decision in LERA Complaint #3771 says that the Commissioner should approach the question of sufficiency of evidence under section 13(1)(c) o the L.E.R. Act:

> …in a fashion akin to that of a judge at a preliminary enquiry and considering whether there is sufficient evidence to commit an accused for trial.

[27] It would appear from the Commissioner's Brief (as quoted at paragraph 15 hereof) that the Commissioner agrees with this statement of the law, but not with my statement in LERA Complaint #5649 that:

> The question of what evidence there has to be established in the investigation by the Commissioner for him to refer it to a hearing would seem to me to appropriately be the test from a preliminary hearing.

[28] The Commissioner's view is that:

> While there will be some similarities between the two processes, they are not identical.

[29] My response to this contention is simply to repeat my view expressed above as to the appropriate test, and to conclude further that if the Commissioner strays from this test on a question of sufficiency of evidence under section 13(1)(c) of the L.E.R. Act, he does so at the risk of falling into reversible error.

V. DECISION ON THIS REVIEW

(a) The Commissioner's Decision

[30] The Commissioner's decision in this instance was to decline to take further action on the complaint. Unfortunately, it would appear to me that the Commissioner expressed his decision in his reporting letter to the complainant in a manner that contravened the opinion expressed by Judge Smith in LERA Complaint #3771 where, in paragraph 37 (quoted in paragraph 16 of this decision), Her Honour Judge Smith said in part:

> 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.

Judge Smith then said:

> [38] The questions 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 enquiry 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.

[31] Unfortunately, the Commissioner in this instance did attempt to "forecast" how a judge would apply information uncovered in this investigation, by saying

> It is my view that a provincial judge would not reasonably be satisfied from the evidence that Constable B and Constable S committed the disciplinary default you have alleged.

[32] Despite this infelicitous manner of expression by the Commissioner of his decision, I am satisfied that the Commissioner did not err in declining to take further action on the complaint.

[33] The only direct evidence other than very tentative hearsay repeated by Mr. T.G. from his brother (from whom he indicated he had a very difficult time trying to get his brother's version of what happened) was the evidence of the respondent police officers. That evidence very clearly indicates that initially they exerted no force whatsoever. They simply called E. G. over to their police vehicle. Mr. E.G. refused to come and in fact began to run away. This caused the police officers to chase and ultimately tackle him down. Obviously, this was a resort to physical force necessitated by E G's refusal to comply with a legitimate request from the police officers. It must, of course, be borne in mind that at this point in

time, with E G having been identified by a witness as the perpetrator of a criminal offence, Officers B and S had reasonable and probable grounds to arrest E.G.

[34] Once this initial physical contact between the officers, and Constable B in particular, was established, the evidence of the police officers indicates that E. G., despite apparently being quite a small man, violently physically resisted arrest. He kicked at Constable B and ultimately bit his arm. It is to be noted that Constable B did not at that point escalate use of force on E. G.

[35] It was only when E. G. bit the police officer's finger, and refused to let go, that Constable B said he hit E G in the face with his fist. He said he hit E. G. twice, hard. The injuries depicted in the pictures filed by the complainant seem to be entirely consistent with the two blows that Constable B said he had to inflict before E G would release his teeth from the police officer's finger.

[36] The consistent theme of the police officers' evidence as established by the Commissioner's investigation is that the police use of force was only escalated as was necessitated by the initially uncooperative, and ultimately violent, conduct of E. G. It seems clear that this escalation of force (i.e., the officer hitting E. G. in the face twice hard to force E.G. to release the police officer's finger) was necessary and unavoidable in the circumstances. Accordingly, it was entirely appropriate for the Commissioner to conclude that there was insufficient evidence in reporting the complaint to justify a public hearing. Such a conclusion, of course, should not have been based by the Commissioner on his view of whether or not a provincial judge would have been "reasonably satisfied" about the disciplinary default, but should rather have been based on the appropriate test indicated in Her Honour Smith's decision in LERA Complaint #3771, that being the test applicable on preliminary hearing. That test is whether or not there is any evidence upon which a reasonable jury, properly instructed, could return a verdict of guilty. The evidence assembled by the Commissioner through his thorough investigation in this instance did not meet this necessary test for "sufficiency of evidence" in clause 13(1)(c) of the L.E.R. Act.

[37] Having concluded then that the Commissioner did not err in declining to take further action on this complaint, it remains only to comment that the complainant in this instance is to be commended for his exceptional concern for and commitment to his handicapped brother. I have no doubt in my mind that Mr. T. G. suffered as much anguish from the injuries he saw on his brother's face after this incident as if he had received those injuries directly to his own person. I am sure that that anguish and concern for his brother was the major motivator for the complaint that Mr. T. G. filed in this instance.

[38] I am heartened from the comments Mr. T. G. made during the course of his submissions before me to the effect that he understood the police had a very difficult job. I hope that in all of the circumstances he can accept that the police officers in this instance had little or no alternative than to proceed on the course which they ultimately followed here.

[39] I hereby direct that the order of non-publication pursuant to section 13(4.1) of the L.E.R. Act made by me at the outset of this hearing shall continue.

Dated at Winnipeg, Manitoba, the 19th day of February, 2003.

Wesley H. Swail, P.J.