

IN THE MATTER OF: *The Law Enforcement Review Act*  
Complaint #6099

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

B E T W E E N:

<b>Complainant</b>	)	In person, unrepresented by Counsel
	)	
	)	
<b>- and -</b>	)	
	)	
<b>Cst. #1,</b>	)	Paul R. McKenna,
<b>Cst. #2,</b>	)	Counsel for the Respondents and
<b>Respondents</b>	)	the Winnipeg Police Association
	)	
	)	Sean D. Boyd, Counsel for L.E.R.A.
	)	Hearing date: December 12, 2003
	)	Decision date: February 16, 2004

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

**Chartier, P.J.**

## **DECISION ON REVIEW**

### **I. THE FACTUAL BACKGROUND**

1. The Complainant alleges that on November 21, 2002, members of the Winnipeg Police Service used oppressive or abusive conduct or language and were discourteous or uncivil when dealing with him.
2. In a letter dated March 12, 2003, the Commissioner reported to the Complainant the results of his investigation into his complaint. The

Note: For the purposes of distribution, personal information has been removed by the commissioner.

Commissioner was satisfied that the subject matter of the complaint was vexatious. Pursuant to s.13(1)(a) of **The Law Enforcement Review Act** (hereinafter called the “Act”), the Commissioner declined from taking any further action on the matter.

3. The Complainant has applied, pursuant to s.13(2) of the Act, to have a provincial judge review the Commissioner’s decision to decline from taking further action on the complaint.

## **II. STANDARDS OF REVIEW**

4. I previously held in L.E.R.A. Complaint # 3597, that the applicable standards of review for s.13(2) reviews were as follows:

### **Where review relates to the jurisdiction of the Commissioner:**

5. Where the review is one that relates to the jurisdiction of the Commissioner and more specifically, does the complaint “fall within the scope of s.29” of the Act as same is found in clause 13(1)(a) of the Act, the standard of review will tend to be the “correctness” of the decision made by the Commissioner.

### **Where the review is related to an error of law or an error of mixed facts and law:**

6. 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 sufficient evidence supporting the complaint to justify a public hearing” as same is found in clause 13(1)(c) of the Act, the standard of review will tend to be “the correctness” of the decision made by the Commissioner.

### **Where the review is related to a finding of fact within the jurisdiction of the Commissioner:**

7. 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”.

8. The standards of review have been described in the following terms:
9. **Correctness**: It is the most exacting of review standards. It results in the provincial judge affording the least amount of deference to the Commissioner's decision. When this standard is applied, the Commissioner's decision can be overturned on the basis of simple error.
10. **Reasonableness simpliciter**: If the provincial judge finds that the Commissioner's decision was reasonable in the circumstances, whether or not the provincial judge thinks he or she would have come to the same conclusion, the Commissioner's decision must be allowed to stand.
11. Counsel for the Respondents submit that as a review is related to a finding of fact within the jurisdiction of the Commissioner in that the Commissioner found on the facts that the complaint was vexatious, that the standard of review will be closer to "reasonableness simpliciter". I will deal with the issue of the appropriate standard of review with respect to this matter, later in my decision.

### **III. BURDEN OF PROOF**

12. Pursuant to s.13(4) of the Act, the burden of proof is on the Complainant to show that the Commissioner erred in declining to take further action on this complaint.

### **IV. REVIEWING THE COMMISSIONER'S DECISION**

13. By letter dated March 12, 2003, the Commissioner informed the Complainant that he was satisfied that the subject matter of the complaint was vexatious pursuant to s.13(1)(a) of the Act and declined to take any further action on the matter.
14. The word "vexatious" is often used as part of the expression "frivolous and vexatious". That expression was described in **57655 Manitoba Ltd. v. Iliffe** (1988), 57 Man. R. (2<sup>d</sup>) 276 (Q.B.), wherein Monnin, J., as he then was, concurred with the observations of the learned Referee where he stated (as set forth at p. 278):

“For pleadings to be struck as frivolous and vexatious I believe that it must be shown that the pleadings are made without any probable justification at law, mala fide with a clear intent only to annoy or embarrass the opposing party. This has not been demonstrated in this case.”

15. Keeping the above description in mind, I shall now review the Commissioner’s reporting letter.

### **PART I: - Receipt of Complainant’s Allegations and Statement**

16. On December 19, 2002, the Complainant filed with the Law Enforcement Review Agency (hereinafter called the “Agency”) his complaint alleging that on November 21, 2002, members of the Winnipeg Police Force:

- used oppressive or abusive conduct or language; and
- were discourteous or uncivil.

17. The Complainant attended the Agency on November 22, 2002 and spoke with an investigator. He stated that on November 21, 2002, two police officers had attended his residence. The Complainant felt that the questions being asked by the police officers were inappropriate. He also stated that one of the officers pointed a finger at him and told him that if it was reported he would “hang you (the Complainant) by the balls.” The Complainant then advised the investigator that he would prepare a written complaint and provide it to the Agency on November 28, 2002. The matter was not attended to until December 19, 2002 when the Complainant attended to the Agency to file a written complaint and sign the L.E.R.A. complaint form.

18. The written complaint goes into much more detail. The Complainant says police officers entered his residence without knocking or being invited in. The Complainant states that a discussion followed with respect to guidelines relating to hospital visits. He states the police officers became rude and that Constable #2 blocked the stairs preventing the Complainant from going back into his residence. The Complainant then told that officer he would file a L.E.R.A. complaint. He states the other officer, Constable #1, started pointing and yelling at him that if he filed a LERA

complaint, he would get him charged. The Complainant then states that this officer called him a psycho and that both then drove away laughing.

19. On January 27, 2003, the Complainant returned to the Agency complaining that the police officers had advised the hospital staff of his previous criminal record.

## **PART II: - Commissioner's Investigation**

### **Police Reports**

20. Misericordia Hospital officials contacted police to advise them that the Complainant was intimidating their staff by being loud and by making inappropriate comments. The hospital staff had no problem with the Complainant visiting a patient there, but felt that he should have a security escort when doing so. Police then attended the Complainant's residence at 12:53 p.m. on November 21, 2002, and found the Complainant uncooperative from the start. He refused to listen to the hospital staff's concerns and started yelling "LERA, LERA, LERA" at them. Police attended a short time later with the hospital's visiting guidelines. They report that he ripped up the guidelines in front of them. They then drove away.

### **Interview with Mr. X from Misericordia Hospital**

21. Mr. X is an official at Misericordia Hospital. He advised the Agency's investigator that he found the Complainant to be loud and demanding and that as a result of his behaviour he should be put on restrictions when visiting a patient. He says he asked the police officers to deliver visiting guidelines to the Complainant as the hospital was not able to do so. Mr. X also told the investigator that the police officers had not disclosed any personal information about the Complainant to the hospital.

## **PART III - Commissioner's Reasons for Decision**

22. In his March 12, 2003 letter, the Commissioner determines that the subject matter of the complaint is vexatious and declines from taking any further action. The basis for his decision is based on the following three reasons (as stated in his reporting letter):

23. The Commissioner notes that:

- 1) The Complainant's account and the police officers' accounts are completely different;
- 2) The hospital's version of what happened tends to support the police officers' account in that:
  - (a) it confirms, contrary to what the Complainant alleges, that the police officers never disclosed any personal information;
  - (b) the hospital staff found, like the police, the Complainant to be uncooperative by being loud and very easily agitated; and
  - (c) the hospital official confirms that the police officers told the hospital that the Complainant had ripped up the hospital's visiting guidelines.
- 3) There was an important omission in the written complaint filed on December 19, 2002, in that it does not even mention the "hang you by your balls" comment that was revealed in the initial complaint on November 22, 2002.

24. When I review the definition of "frivolous and vexatious" found in **57655 Manitoba Ltd.** (supra), I am not sure that the Commissioner's description of the complaint being "vexatious" is correct. I do feel however that this is a sufficiency of evidence issue based on s.13(1)(c) of the Act. As a result the standard of review tends to be the standard of correctness.

25. I recently decided in L.E.R.A. Complaint #5643 that when considering a matter pursuant to s.13(1)(c), the Commissioner must determine whether there is a reasonable basis in the evidence to justify a public hearing. In making this determination I found that though the Commissioner is not to weigh the evidence, as in a judicial proceeding (in terms of determining credibility or drawing inferences), he must do a limited weighing having regard to all the facts and not just the prima facie elements of the complaint. (the underlining is mine)

26. When the Commissioner weighed, in a limited way, all of the evidence gathered by the investigators, he found that the complaint was not a complaint that should proceed further in light of the opposing evidence that contradicted and seriously weakened what at first blush appeared to be a strong complaint. The fact that a most disturbing comment, attributed to the police at the initial meeting with the investigators, was not even mentioned in the formal written complaint did not help matters for the Complainant.

**V. DECISION ON THIS REVIEW**

27. Considering that the onus of proof is on the Complainant and after having reviewed the basis upon which the Commissioner reached his decision, I am of the view that the Commissioner was correct in declining to take further action as there was no reasonable basis in the evidence gathered by the Commissioner pursuant to his investigative powers in this instance to justify a public hearing against the Respondents.

28. Pursuant to s.13(4.1)(b) of the Act, I order a ban on the publication of the Respondents names.

DATED at Winnipeg, this 16th day of February 2004.

*« original signed by »*

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Judge Richard Chartier