

IN THE MATTER OF: *The Law Enforcement Review Act* Complaint #6100

AND IN THE MATTER OF: An Application pursuant to s.29 of *The Law Enforcement Review Act* R.S.M. 1987, c.L75

BETWEEN

A. C. ) A. C. in person,  
 ) unrepresented by counsel  
 - and - )  
 )  
 )  
 CONSTABLE G. S. ) for the Respondent  
 )  
 )

**JOYAL, P.J.**

**I. INTRODUCTION**

[1] *The Law Enforcement Review Act* Complaint No. 6100 was filed on November 25, 2002 by Mr. A. C. (“the complainant”) against a member of the Winnipeg Police Service, Constable G.S. (“the respondent”).

[2] That complaint came before this Court for a hearing on the merits as a result of a referral (Exhibit 1 in this proceedings) dated January 27, 2005 made by the commissioner pursuant to s.17(a) of the *Act*. The complaint alleges that on November 23, 2002, the respondent officer did: “abuse his authority by being discourteous or uncivil towards Mr. C., contrary to s.29(a)(iv) of *The Law Enforcement Review Act*.”

[3] The complaint arises from an encounter at the Public Safety Building between the Mr. C. and Constable S. Mr. C. had attended to the Public Safety Building for the purpose of providing information respecting the commission of a fraud about which he was the victim. Constable S. was the police officer on duty at the front desk intake counter at which place basic information is ordinarily received for the purposes of commencing a police report. During the course of their interaction at the front counter, both Mr. C. and Constable S. came to their own precipitous conclusions about how each was being treated by the other. Each concluded that the other was behaving inappropriately in the circumstances.

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

[4] The respective perceptions of Mr. C. and Constable S. concerning the circumstances of their encounter were fully explained when they provided testimony at the hearing. As my determinations will suggest, those perceptions animated the actions and reactions of both Mr. C. and Constable S. For his part, Mr. C. (an apparent victim of a crime), explained his attempts to report a fraud to a police officer who Mr. C. asserts became not only unreceptive to the complaint, but also rude and discourteous to him and the person who accompanied him. For his part, Constable S. asserts that based on the background of Mr. C. and what he perceived as an evasive and uncooperative approach to the provision of the necessary information on the part of Mr. C. (his reluctance to provide his address), he (Constable S.), as the intake officer, became increasingly frustrated with and suspicious of Mr. C. and his motives.

[5] Based on the totality of the evidence and the findings of fact that are explained below, I cannot conclude that there is clear and convincing proof that Constable S. abused his authority by being discourteous and uncivil towards Mr. C. The interpersonal interaction which took place between Mr. C. and Constable S. on November 23, 2002 at the Public Safety Building caused a level of frustration and suspicion on the part of Constable S. that manifested in an unfortunate impatience and at times, a questionable professionalism. Yet, even if Constable S.'s behaviour could be characterized as behaviour that falls below the ideal for courtesy and civility, on the facts as I have found them in the particular context of this complaint, the seriousness of Constable S.'s behaviour does not rise to the point where it constitutes an "abuse of his authority".

## **II. THE HEARING**

### **The Evidence in support of the Complaint**

*Alexander C.*

[6] At the hearing, Mr. C. adduced evidence through his own testimony and through the testimony of his only other witness, P. B.

[7] In his own testimony, Mr. C. described his having received on November 23, 2003, the letter (along with an expensive bill) from Telus Mobility concerning a payment required for the use of a cell phone seemingly acquired under Mr. C.'s name. The letter caused Mr. C. surprise and concern as he had never agreed to rent or purchase such a phone or any such related service from TelusMobility. Mr. C. quickly concluded that an unauthorized person or persons

had improperly used his personal information for the purpose of acquiring the telephone service in question.

[8] In his frustration, Mr. C. reviewed the documents received from TelusMobility, which included incoming and out going phone numbers associated with the telephone. In his review of those telephone numbers, Mr. C. noticed the phone number of his ex-wife. As he later described, Mr. C. and his ex-wife were as of that date (November 23, 2003), not on good terms. In fact, Mr. C. was pending on a domestic related charge of utter threats (as against his ex-wife), and he was prohibited from having contact with that ex-wife or attending to her address (the home in which they use to live and for which he remained the mortgagee).

[9] After having called TelusMobility that same day, and after having formulated a suspicion that it was possibly his ex-wife or members of her family who were responsible for the apparent fraud, Mr. C. attended to the Public Safety Building for the purpose of making a police report. Mr. C. described how he had been advised by TelusMobility that they would require a police generated “incident number”, which, for their purposes (TelusMobility), would signal the initiation of a police investigation.

[10] At approximately 10:40 p.m. on November 23, 2003, the same date on which the letter from TelusMobility was received, Mr. C. attended the reporting desk at the Public Safety Building. He arrived accompanied by his then girlfriend, Patricia B.

[11] Mr. C. noticed two police officers at the reporting desk: one female, the other a male, the respondent, Constable S.

[12] Mr. C. presented at the front desk and was told to be seated. After an approximately two to three minute wait (during which time Mr. C. noticed the arrival of a pizza delivery), he was called to the desk. Mr. C. was now at the counter/desk across from Constable S., who in turn, was seated in front of the computer. The initial conversation took place with Mr. C. describing the purpose of his visit. For his part, Constable S. was using the computer keyboard and screen to record and check basic information about Mr. C.’s complaint and personal background.

[13] As part of the initial explanation provided to Constable S., Mr. C. advised of his suspicion concerning the possible involvement of his ex-wife. According to Mr. C., it was during this portion of the conversation that Constable S. uttered: “Address?” The manner in which Constable S. said “Address”, seemed to suggest

two things to Mr. C. First, that it was a question seeking an address. Second, given the context of the conversation at that particular point in time (a discussion about Mr. C.'s suspicion respecting the possible involvement of his ex-wife), it was a question seeking to know the address of his ex-wife. Accordingly, based on that interpretation of what Mr. C. thought Constable S. was seeking, Mr. C. testified that he gave Constable S. his ex-wife's address. Sitting at the computer keyboard, that was the address that Constable S. entered into the computer.

[14] At no point in time in his testimony, did Mr. C. ever question the fact that Constable S. would have remained in front of the computer screen where he would have been in a position to record not only the information provided by Mr. C. , but also, to note whatever background information that was being generated by the computer.

[15] It was after the provision of the information about his ex-wife's address, that Mr. C. observed that Constable S. became frustrated. While Mr. C.'s testimony never specifically addressed this point, it seems from the totality of his evidence and indeed all the other evidence, that Mr. C. realized that Constable S. had access to information (on the computer screen) identifying the address given by Mr. C. as no longer his own. According to Mr. C.'s best recollection, obviously not verbatim nor recorded by him at the time, an increasingly impatient and uncivil exchange ensued between he and Constable S.

[16] Constable S. accused Mr. C. of "messing with my mind", suggesting that if an accurate address was not provided, he would erase or delete what he had already recorded on the computer. Mr. C. stated that he tried to explain: "No, that's not my actual address." Mr. C. testified as to how he tried to explain to Constable S. why "I didn't like giving the police my current address." For reasons that I will address later, that explanation seemed not to have been received by Constable S. during the ten to fifteen minute encounter that gave rise to this LERA complaint. The explanation that Mr. C. said he tried to provide to Constable S. (and did provide to the court), related to Mr. C.'s frustration at having had his then "actual" address fall into the hands of his ex-wife with whom he did not want and indeed could not have contact. Mr. C. explained how his concerns in that regard were founded on a previous experience (sometime prior to November 23, 2003) wherein the police would have given his ex-wife a copy of Mr. C.'s recognizance. That recognizance governed Mr. C.'s release generally, and specifically, it required that he not have contact and not attend to his ex-wife's address. The recognizance existed in virtue of Mr. C.'s previously mentioned domestic related utter threats allegation (charged before November 23, 2003 and stayed by the Crown sometime after).

[17] Despite what Mr. C. said were his attempts to clarify his reluctance to not provide his true address, Constable S. grew more frustrated and impatient. At one point, according to Mr. C., Constable S. pointed to the door and said: “there’s the door, get out.” Mr. C. says that he tried to explain to Constable S. his connection to the address he provided. Specifically, Mr. C. said he explained the background concerning his removal from that home and his efforts to acquire a protection order vis-à-vis his ex-wife. According to Mr. C., his explanations were not registering with Constable S. and Constable S. repeated his earlier suggestion that Mr. C. leave.

[18] Feeling some frustration of his own at what seemed to be Constable S.’s inaction, Mr. C. declared: “You have to take my report. I’m a taxpayer.” According to Mr. C. (again, a recollection not recorded at the time and certainly not held out as verbatim), the following exchange took place:

Constable S.:	You don’t pay my salary.
Mr. C:	I make a lot of money. I work as a network engineer.
Constable S.:	Legally or illegally?
Mr. C.:	I’ve been here 22 years.
Constable S.:	I’ve been here 29 years, longer than you.

[19] Mr. C. advises that it was at this point that his female friend, P. B. attempted to intervene. Mr. C. advises that to that intervention, Constable S. responded: “I’m dealing with him, not you.” At this point, Mr. C. walked a distance away from the counter in order to calm down. From where he had moved, Mr. C. saw that Ms. B. remained at the counter apparently still in conversation with Constable S.

[20] Mr. C. returned to the counter approximately two minutes later at which time he says that Constable S. abruptly placed a card with an incident number on the counter. It was at that point that Mr. C. and Ms. B. left the Public Safety Building.

*Patricia B.*

[21] Ms. B. testified on behalf of the complaint, Mr. C. . . . At the time of her testimony, she and Mr. C. were “just friends”. Ms. B. explained that despite the surprise and concern about the bill received from TelusMobility on November 23,

2003, both she and Mr. C. were happy that they finally “had something on” Mr. C.’s ex-wife. Ms. B. described how there were lingering domestic issues between Mr. C. and his ex-wife (and her family) that required resolution. Ms. B. gave the impression that this apparent fraud was just the latest manifestation of the problems Mr. C. had been having.

[22] Ms. B. stated that when she and Mr. C. arrived at the Public Safety Building, they were both in a good mood. Ms. B. was aware that Mr. C. was reluctant to provide his current and actual address. In view of the fact that Mr. C. was, as of November 23, 2003, staying with Ms. B., at her residence, she also wished to keep that address private.

[23] Ms. B. described how the episode at the reporting desk at the Public Safety Building unfolded. After providing his name and birthdate to Constable S., Mr. C. proceeded to provide background respecting the letter from TelusMobility. Part of that background according to Ms. B., would have included Mr. C. mentioning his ex-wife. Ms. B. confirms that it was in that context that she remembers hearing Constable S. say: “Address?”

[24] Ms. B. says that she assumed from the context of that portion of the conversation (between Mr. C. and Constable S.) that the address sought by Constable S. was “the address of origin” in relation to phone calls which Ms. B. believed constituted evidence the officer was interested in gathering for the purpose of implicating Mr. C.’s ex-wife in the alleged fraud. By “address of origin”, Ms. B. meant Mr. C.’s ex-wife’s address, the address from which certain phone calls were made.

[25] It became clear for Ms. B., that there existed a misunderstanding as between Mr. C. and Constable S. That misunderstanding became obvious when Constable S. declared: “If you don’t want to give me your personal address, you can walk out the door.”

[26] On the basis of her evidence, it would seem that Ms. B. believes that on at least two occasions, Mr. C. tried to inform Constable S. of his true address. In that regard however, Ms. B. cannot say whether Constable S. would have heard what Mr. C. was trying to say. Ms. B. suggests that that information may not have been heard either because Constable S. was not listening, or because Constable S. and Mr. C. were talking over each other.

[27] In the midst of the exchanges taking place between Mr. C. and Constable S., Ms. B. recalls Mr. C. saying words to the effect: “You have to take my report, I

pay your salary.” She further recalls Mr. C. saying: “I make a lot of money.” According to Ms. B.’ testimony, Constable S. responded in a taunting manner, saying: “Legally or illegally?”

[28] Ms. B. noted that by this point in the conversation, the confrontational tone between Mr. C. and Constable S. was escalating. At one point, Ms. B. heard Constable S. say: “These things happen when you associate with people like C.M.” Based on the conversation between Constable S. and Mr. C., Constable S. had apparently become aware of C. M.’s connection to Mr. C.’s ex-wife. As will be noted from my review of Constable S.’s evidence, C. M. is someone well known to the police and specifically, to Constable S.

[29] After Mr. C. had walked away from the counter, Ms. B. said she spoke to Constable S. in an attempt to “smooth things over.” She also explained on her own behalf that because of her continuing fear of Mr. C.’s ex-wife, she as well, was concerned about disclosing the accurate address.

[30] It is important to note that in respect of her evidence, Ms. B. acknowledged not having made notes or provided a formal statement before March of 2004. Moreover, she acknowledges that between the date in question (November 23, 2003) and the giving of her statement (March 2004), she would have discussed the incident with Mr. C. Indeed, she admits to perhaps having seen and read Mr. C.’s statement respecting his recollections of what happened prior to giving her own statement and prior to her testimony at this hearing.

### **The Evidence of the Respondent**

#### *Constable Glen S.*

[31] Constable G. S. is a 32 ½ year veteran of the Winnipeg Police Service. At the time of the incident in question, he was working station duty at the role of a “front desk officer”. The duties of that officer, include the intake and receipt of information which may lead to the initiation of reports respecting various criminal offences and the reporting of missing persons.

[32] When Mr. C. and his female friend attended to the Public Safety Building, he had never met Mr. C. and knew nothing of him. Constable S. recalls an approximate one minute delay between the arrival of Mr. C. and their conversation commencing at the front desk. In respect of the previously mentioned pizza delivery, it is Constable S.’s recollection that that delivery was for someone “in the back”.

[33] When the intake interview began with Mr. C., Constable S. was seated in front of a computer where he began getting background information respecting the alleged offence and Mr. C. personally. Constable S. explained that part of the background questioning respecting the offence, requires the intake officer to determine whether the reported problem in question is of a criminal or civil nature. Mr. C. provided the basic details concerning what appeared to be a fraud for which Mr. C. explained, he had already conducted some preliminary inquiries of his own. Mr. C. explained to Constable S. that based upon those inquiries, Mr. C. was of the view that his ex-wife and daughter may have been involved.

[34] After having received those background details, Constable S. recalls having asked Mr. C. to provide "his" (Mr. C.'s) address. The address he received was 30 Elmpoint. Mr. C. continued to provide more details (while Constable S. remained in front of his screen inputting and verifying information) about his ex-wife and Mr. C.'s suspicions. It was during this time that Mr. C. started mentioning names, included the name of C. M. According to Constable S., as soon as the name C. M. was mentioned (a name well known to the police officer because of M.'s prior associations with the criminal justice system), Constable S. began developing suspicions of his own. It was on the basis of those suspicions and concerns, that Constable S. used the computer to determine that Mr. C., the person standing before him, was pending on a domestic allegation and furthermore, was prohibited from being anywhere near the very address that he had just provided as his own.

[35] Even after being confronted with Constable S.'s discovery concerning the outstanding charges and the recognizance prohibiting the attendance at the address given, Mr. C. provided no "correct" address. Instead, Mr. C. continued to provide details of the fraud. Constable S. indicates that at one point it would have become clear to Mr. C. that Constable S. was not satisfied with the information that he was being given about Mr. C.'s address and that Mr. C. (in an apparent attempt to reassure) would have said something to the effect that he "wasn't going to go back there".

[36] By this point, Constable S. acknowledges knowing that the address given couldn't have been the accurate address. What Constable S. didn't know, was whether Mr. C. was breaching his recognizance or (given what Constable S. was observing as Mr. C.'s uncooperative and suspicious behaviour), perhaps making a mischievous report about his ex-wife. In the circumstances, Constable S. suspected that Mr. C. may have been making a complaint in retaliation for pending domestic charges and the ongoing family dispute. Constable S. testified that this uncertainty made him impatient to get the necessary information to determine whether or not this was a legitimate and lawful complaint.



[37] The totality of Constable S.'s testimony suggests that given the above mentioned uncertainty on the part of Constable S. and the delay on the part of the Mr. C. in providing clarity or more accurate information, their interaction didn't go smoothly.

[38] The evidence of Constable S. does confirm some general and specific aspects of the earlier testimony given by the Mr. C. and his witness Ms. B. However, there are significant differences and noteworthy denials:

- Constable S. admits to being frustrated with the Mr. C. and he acknowledges that his voice may have been raised slightly in order to be heard. Constable S. denies "a heated discussion".
- Constable S. denies ever having received the truthful and accurate current address from the Mr. C. . . Constable S. does acknowledge receiving that address from Patricia B. later in the encounter. Constable S. does recall at one point, the explanation from the Mr. C. as to why he did not want to provide his address.
- Constable S. acknowledges that in the context of Mr. C.'s defiant refusal to provide his true and current address, he may have said: "the door is over there." While denying saying that "you're messing with my mind" and that he would have threatened to delete "everything" from the report, Constable S. does remember saying that he would be required to delete the initial false address.
- Constable S. acknowledges that after the Mr. C. brought up the name C. M., a discussion took place about Mr. M. wherein Constable S. may have suggested that it is not advisable to associate with people like Mr. M.
- Constable S. does recall the exchange where, in response to Constable S.'s unwillingness to continue with the report (because of the Mr. C.'s refusal to give his real address), the Mr. C. said: "You have to take my complaint . . . because I pay your salary. I make more money than you." Constable S. acknowledges responding: "legally or illegally." To that, Constable S. remembers the Mr. C. offering that he worked as a hospital computer programmer where he made \$75,000 to \$80,000.
- Constable S. denies ever having made references to Mr. C. being a drug dealer. Similarly, he denies any "name calling" or references of a discriminatory nature.

- Constable S. described Ms. B. as simply “tagging along.” According to Constable S., she remained somewhat apart and stayed “away down the counter.” At one point, Constable S. noted that Ms. B. said to Mr. C. “just tell him where you live.” In the end, Constable S. explained that it was Ms. B. who gave him Mr. C.’s accurate address that enabled him to generate an incident number.

### **III. POSITION OF THE PARTIES**

#### **Alexander C.**

[39] The essence of Mr. C.’s position is that despite having given false information about his address to Constable S., Constable S.’s frustration with that inaccurate information gave rise to comments that were discourteous and uncivil and which contributed to an interaction which prevented Mr. C. from properly explaining why he could not provide his real address.

[40] Mr. C. believes that the verbal comments and the demeanor that he describes in his evidence (demeanor on the part of Constable S.), is corroborated by his witness Ms. B. He submits that such discourteous and uncivil comments made by a police officer, amounts to an abuse of authority.

#### **Constable S.**

[41] Constable S. admits that what he perceived in the circumstances as Mr. C.’s surprising elusiveness and lack of candor on the question of his address, may have caused him frustration. Indeed, in the context of the other factors that he was considering (the pending domestic charge, the recognizance, possible association with C. M. and concerns that the fraud report might be a retaliation against Mr. C.’s ex-wife), Constable S. allows that any impatience and irritation on his part may have been rooted in suspicions about Mr. C.’s motives for wanting to make the report. Constable S. also points to the corresponding uncertainty respecting whether Mr. C. was perhaps breaching his recognizance.

[42] Despite an acknowledgement by both he and his counsel, that he may have been frustrated and that he may not have responded with a calm that corresponds to the ideal for a police officer in such a situation, Constable S. vehemently denies having done or said anything, generally or specifically, which in the context, could be considered an abuse of authority.

### **IV. ANALYSIS**

### **Standard of proof**

[43] The burden of proof in these proceedings rests with Mr. C. It is he who must establish the disciplinary default alleged.

[44] The standard of proof under the Act is set out in section 27(2):

“A provincial judge hearing the matter shall dismiss the complaint in respect to an alleged disciplinary default unless he or she is satisfied on clear and convincing evidence that he has committed the disciplinary default.”

[45] The standard of “clear and convincing evidence” has been the subject of comment and consequently, the object of developing definition in a number of cases under this Act. Chartier P.J. (as he then was), noted the need for a comparatively high standard of proof when attempting to establish a complaint on “clear and convincing evidence” (see *K.A.A. and Cst. S.D. and Cst R.K.* dated October 26, 2000). In his decision, he noted that the standard had to be sufficiently high because:

“...the consequences to the careers of the police officers resulting from an adverse decision are very serious. The evidence must be clear; it must be free from confusion. It must also be convincing which, when combined with the words ‘clear’ in my view means that it must be compelling.”

[46] While the standard of proof is high – greater than proof on the balance of probabilities – it does not require proof beyond a reasonable doubt. Proceedings under section 29 of the Act, have sometimes been described as “civil proceedings” (see Law Enforcement Review Act Complaint #6180, August 18, 2006) after which comment is made about an “elevated” standard of proof (elevated from the traditional balance of probabilities). In my view, it is easier to characterize these proceedings as administrative proceedings. As such, they contain a unique standard of proof (rooted in the statute) which cannot be confused nor need it be reconciled with anything approaching proof on a balance of probabilities.

[47] In her attempts to position the standard of proof as somewhere between proof on a balance of probabilities and proof beyond a reasonable doubt, Giesbrecht P.J. identifies “clear and convincing” proof as requiring the presiding judge to be “convinced” and not merely “persuaded”. (see *R.J.M. v. Sergeant P. and Constable T.* (February 24, 2004).

### **Abuse of authority**

[48] Section 29 of the Act states:

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## 29 Discipline Code

A member commits a disciplinary default where he affects the complainant or any other person by means of any of the following acts or omissions arising out of or in the execution of his duties:

- (a) abuse of authority, including
  - (i) making an arrest without reasonable or probable grounds,
  - (ii) using unnecessary violence or excessive force;
  - (iii) using oppressive or abusive conduct or language,\
  - (iv) being discourteous or uncivil,
  - (v) seeking improper pecuniary or personal advantage,
  - (vi) without authorization, serving or executing documents in a civil process, and
  - (vii) differential treatment without reasonable cause on the basis of any characteristic set out in subsection 9(2) of *The Human Rights Code*;
- (b) making a false statement, or destroying, concealing, or altering any official document or record;
- (c) improperly disclosing any information acquired as a member of the police department;
- (d) failing to exercise discretion or restraint in the use and care of firearms;
- (e) damaging property or failing to report the damage;
- (f) being present and failing to assist any person in circumstances where there is a clear danger to the safety of that person or the security of that person's property;
- (g) violating the privacy of any person within the meaning of *The Privacy Act*;
- (h) contravening this Act or any regulation under this Act, except where the Act or regulation provides a separate penalty for the contravention;
- (i) assisting any person in committing a disciplinary default, or counseling or procuring another person to commit a disciplinary default.

[49] I agree with Judges Chartier (J.W.P. v. Constable R.L. November 15, 2004) and Smith (Law Enforcement Review Act Complaint #6180), that the word

“including” means that an abuse of authority is not limited to the seven enumerated clauses listed in section 29(a). I am also of the view, that not all of the conduct set out in the clauses enumerated in section 29(a) gives rise to an automatic finding of an abuse of authority.

[50] It is “an abuse of authority” (either an act or an omission) by a police officer, which is the object of the disciplinary proceedings taken under section 29(a). In the case at bar, the supposed manifestation of such an abuse of authority arises out of the stipulated discourtesy and incivility alleged by Mr. C. .

[51] Read contextually in the entirety of the Act, it would seem that the legislators have, with section 29(a), recognized a police officer’s “abuse of authority” as one category of behaviour which, along with the other sorts of behaviour and conduct set out in section 29(b)-(i), is deserving of a disciplinary default. It is only the cases where a police officer’s behaviour or conduct can be concluded to be abusive of his authority that are sanctionable pursuant to section 29(a). Default is not to be found for absolutely any and all manifestations of the impunable behaviour set out in section 29(a)(i)-(vii). Each case will depend upon its own facts.

[52] On a contextual reading of the Act and the consideration of its purposes, one can conclude that an “abuse of authority” connotes conduct of an exploitative character. The exploitative potential flows from an officer’s position of authority which permits the impugned conduct to have an inappropriately and unjustifiably controlling, intimidating or inhibiting effect on a given complainant in the context of a particular fact situation. Police conduct which can be properly found as an “abuse of authority” is that exploitative conduct which, even after an examination of the factual context of a given case, cannot be viewed as consistent with a reasonable police officer’s good faith intention to lawfully perform his duties and uphold the public trust. Judicial decisions such as the one in the case at bar, continue to develop a set of reference points and criteria by which an alleged abuse of authority can be evaluated. The development of those reference points and criteria must find a way to balance the need to hold police officers to account, while not defining “abuse of authority” too broadly or vaguely.

[53] In continuing to confirm the expectation of appropriate and justifiable police conduct and in giving more clear meaning to the idea of police “abuse of authority”, this Court’s future decisions (while not foreclosing the possibility in appropriate cases -- see LERA Complaint #6180, August 18, 2006) must take care to not encourage hearings pursuant to section 29(a) for every example of sub-par police behaviour. The developing definition of an “abuse of authority” must

ensure, for example, that the LERA forum not become a means for attacking all police conduct which may have been the subject of earlier judicial determination respecting such matters as Charter breaches and the consequent exclusion of evidence. (see for example, Swail P.J.'s warning about the potential for "disciplinary chill" in *F.D. v. Cst E.D. and Cst. M.C.*, December 12, 2005, paras. 83-85)

[54] The above warning should not be seen to suggest that a police officer's good faith preempts a finding of an abuse of authority. In a LERA proceeding, good faith in the course of police investigative conduct will not always or necessarily be determinative. Certain types of conduct, depending upon its seriousness, will vitiate a police officer's good intentions and/or good faith. In examining the seriousness of the impugned conduct pursuant to a proceeding under section 29(a), it might be useful to invoke (as did not colleague Smith P.J. in Complaint #6180) the plain dictionary meaning of "abusive". In paragraph 118 of her judgment, Smith P.J. noted that the Random House Dictionary (2<sup>nd</sup> edition) identifies abusive as meaning "treating badly or injuriously, mistreating, especially physically".

[55] The notion of "treatment" in the above definition (with the accompanying qualifiers: badly, injuriously, physically, etc.) provides a useful reference point for evaluating the reasonableness of a police officer's conduct. It will also assist in determining whether the good faith of a police officer, is nonetheless outweighed by the seriousness of the impugned conduct.

[56] As always, determining whether the impugned police conduct involves treatment of the complainant which rises to the level of "mistreatment", will depend upon the situation and context. Objectively identifiable "mistreatment" at the hands of a police officer – such treatment will probably be injurious physically or otherwise – is, by definition, an abuse of authority.

[57] Even accepting that an officer's good faith is not determinative, in some circumstances, it may be impossible to find good faith or good intentions on the part of the police officer. In those cases, the officer's conduct or treatment of a given complainant may be more easy to condemn. In *Winnipeg City Assessor v. Licharson*, Manitoba Court of Appeal 2005 Carswell Man. 311, Huband J.A., defined abuse of authority as involving "bad faith" or "improper motive". Although that definition arises in a case involving a municipal assessor, it nonetheless deals with the relationship of public trust involving a person in a position of authority.

### **The application of section 29(a) to my findings of fact.**

[58] Despite the existing divergence and discrepancy as to what exactly Mr. C. and Constable S. said during their ten to fifteen minute encounter, there are three fundamental facts which seem common through all of the witnesses' testimony:

- 1) The information initially provided by Mr. C. about his address was false.
- 2) For the reasons provided by Mr. C. in court, he remained reluctant to disclose his address to Constable S.
- 3) After finally hearing the accurate address at which Mr. C. was staying as of November 23, 2003, Constable S. provided Mr. C. with the requested incident number (signaling the beginning of the police investigation).

[59] It should be noted that it was only the evidence of Patricia B. that suggested that Mr. C. actually tried to provide to Constable S. ("twice") with the accurate address. Yet, even in that same testimony, Ms. B. acknowledges that Constable S. may not have been listening or as likely, may not have heard that information, given that Mr. C. and he were at times, talking over each other. As with other portions of her evidence, the court is cautious and hesitant (for the reasons explained below) respecting Ms. B.'s reliability concerning her recollection of the precise details of the encounter in question. Accordingly, I find that where Ms. B. gives significantly different details about what either Mr. C. or Constable S. said, her evidence ought not to be relied upon.

[60] A brief explanation is required in order to understand why Ms. B.'s testimony is of questionable reliability in terms of providing what may be independent or confirming detail. Ms. B. admits to not having provided a formal statement about the events of November 23, 2003 until March of the following year. Between November 23, 2003 and that date in March on which she gave her statement, she concedes she may have not only spoken to Mr. C. about his recollection of the incident, but she may also have reviewed his statement. According to Ms. B., similar discussion with Mr. C. and a review of his statement, may also have occurred between March 2004 and her testimony at this LERA hearing. While I was given no reason to impugn her credibility and apparent honest attempts to assist the court, Ms. B.'s status as a witness capable of providing reliable information and evidence about something she saw and could independently recall, has been tainted.

[61] That which remains in terms of the evidence that constitutes the essence of Mr. C.'s complaint, is surprisingly uncontested by Constable S. In other words,

despite some details, most of the statements described by Mr. C. , are to varying degrees, admitted. What Constable S. does contest is that those words, statements or comments that he admits to making were, given the context, statements which constitute an abuse of authority.

[62] On the question of context, I have no difficulty finding, based on the totality of the evidence in this case, that Mr. C. 's false information about his address, gave rise to initial suspicions that seriously hampered what should have been a more civil conversation between Mr. C. and Constable S. The growing frustration and impatience on the part of both Mr. C. and Constable S. (Mr. C. 's frustration with Constable S. 's insistence that he give his true address and Constable S. 's impatience with the set of circumstances which appeared to him to be increasingly uncertain and suspicions) created an interaction that made neither the clarification nor the receipt of information as civil and courteous as it should have been.

[63] I can appreciate how in the course of his dealings with Constable S., Mr. C. could take offence to the suggestion that he "get out" or "leave". I can also understand Mr. C.'s irritation at Constable S.'s question about the legality of Mr. C.'s income. Such declarations and questions by Constable S. , do not correspond to the sort of ideal courtesy and civility to which police officers (including desk officers dealing with front line complaints by members of the public) ought to aspire. While recognizing Constable S.'s failure to attain the ideal, the question still need be asked: Were Constable S. 's words and behaviour "discourteous and uncivil", and if so, do they constitute an abuse of authority? Based on the evidence advanced at the hearing, is there "clear and compelling" proof sufficient so as to permit the Court to find the section 29(a)(iv) default as alleged in the Commissioner's letter dated January 27, 2005?

[64] Having heard the viva voce testimony of Constable S., and having examined it for internal consistency, I cannot find reasons (grounded in credibility or reliability) to reject his evidence where it differs from that of Mr. C. Where he denies those statements attributed to him by Mr. C., I can again neither formulate nor articulate reasons to not accept that testimony.

[65] Although the raising of a mere doubt by Constable S. would not necessarily preempt the finding of clear and convincing proof, the judicial function nonetheless requires the provision of reasons which identify and explain in a meaningful way, a judge's articulable concerns about (or the outright rejection of) certain testimony and proof. If reasons cannot be formulated or articulated, to impugn or reject a respondent's testimony (or the relevant proof that his or her



witnesses may have adduced), it would seem unsafe to find the alleged disciplinary default on a standard of clear and convincing proof.

[66] When I consider the circumstances which Constable S. explained caused him uncertainty and suspicion respecting Mr. C.'s complaint, I can understand why Constable S. might have, in the absence of a more prompt and forthright clarification from Mr. C., become frustrated with Mr. C.'s failure to provide his true address. The initial false address, the continuing reluctance to provide the true address, Mr. C.'s pending charge, the possible violation of recognizance, the apparent association with C. M. and the concern that the fraud allegation may have been an opportunistic attempt to retaliate against his ex-wife, are all factors which represent a context wherein Constable S.'s frustration and impatience are at the very least, comprehensible.

[67] As a basic matter, it is not unreasonable for a police officer to expect a citizen to understand that for a police report to be validly initiated, true and accurate personal information must be provided. The failure of Mr. C. to provide such honest information and Constable S.'s resulting suspicions in the particular circumstances of this case, created frustration and impatience on the part of Mr. C. which in turn triggered similar irritation from Constable S.

[68] Based on Mr. C.'s testimony and Constable S.'s own admissions, I do find as a fact that in his irritation, Constable S. made comments whose words – even if they were never recorded verbatim and not now precisely verifiable – communicated the following:

- If the accurate address was not provided Mr. C. should leave.
- Certain information in the report, would have to be deleted because of the discovery of the inaccurate address.
- Trouble comes to those who associate with people like C. M.
- In response to Mr. C.'s own comments about making more money than Constable S., he (Constable S.) would have communicated “legally or illegally”?

[69] The above comments can be viewed as an impatient response to a citizen misguidedly trying to keep needed information to himself. Could Constable S. have been more courteous and civil? It would be a questionable proposition to suggest that simply because those declarations were made by a police officer in a frustrating situation (and in circumstances that Constable S. found suspicious),

that they should thus not be viewed as discourteous and uncivil. However, it would be a similarly questionable proposition to suggest that simply because those declarations may be discourteous and uncivil, that they necessarily constitute an abuse of authority. Even recognizing the important public trust placed in police officers, not all discourteous and uncivil statements made by a police officer to a citizen will rise to the level of an abuse of authority. Context will, in most circumstances, provide the necessary assistance in determining the sensible parameters by which to evaluate discourteous and uncivil statements for possible abuse of authority.

## **V. DECISION**

[70] A complainant bears the onus of establishing on “clear and convincing” proof, the stipulated discourtesy and incivility. In a proceeding pursuant to section 29(a) (iv), the impugned discourtesy and incivility must be demonstrated to amount to an abuse of authority. To not separate the question of abuse of authority and require the complainant to show that the impugned conduct constitutes such an abuse of authority, would oblige the presiding judge in cases such as this one, to reflexively conclude that in any situation involving a discourtesy and incivility, there must be an automatic finding that an abuse of authority has occurred. Such an automatic conclusion would seem to cast an exceedingly broad, loose and potentially unfair definition on an infinite variety of situational police conduct. That approach would be especially unfair given the required police responses in the vast array of sometimes dangerous, volatile, unpleasant and indeed, uncivil situations in which police officers find themselves in the course of their daily functions.

[71] If language is to have meaning and if police officers are to have ideals to which to aspire, it is important that discourteous and uncivil statements be identified and described as such. However, in a hearing such as this one, is a court to ignore the surrounding circumstances for such discourteous and uncivil statements? To do so would implicitly impose a standard of near perfection on a police officer’s conduct when interacting with members of the public.

[72] The diverse and often uncertain tension-filled circumstances that make up a police officer’s day-to-day activities, cannot become an easy excuse for behaviour that amounts to an abuse of public trust on the part of a person in a position of

authority. Conversely, the evaluation of a possible abuse of authority, without having considered the particular circumstances surrounding an officer's conduct, is both unfair and incomplete.

[73] In the circumstances of this case, I find that some of the comments made by Constable S. were indeed discourteous and uncivil.

[74] Do these same comments constitute exploitative conduct which is, even viewed in context, conduct inconsistent with a reasonable police officer's good faith intention to lawfully perform his duty and uphold the public trust?

[75] Notwithstanding the lack of ideal courtesy and civility of some of these comments, in the context of what Constable S. was facing, the comments do not represent an unjustifiably controlling, inhibiting or intimidating treatment of the complainant.

[76] On the totality of the evidence, Constable S.'s comments do not amount to an abuse of authority such so as to establish that a default has been committed under section 29 of *The Law Enforcement Review Act*.

DATED this 20th day of February, 2007.

*Original signed by:*

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**GLENN D. JOYAL, P.J.**