

**IN THE MATTER OF:** *The Law Enforcement Review Act*  
Complaint #6179

**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:**

L. M., Complainant	)	In person, unrepresented by Counsel
	)	
- and -	)	
	)	
Cst. Z.	)	Mr. Paul McKenna
Cst. M.	)	Counsel for the Respondents
Respondents	)	
	)	Mr. Sean Boyd
	)	Counsel for L.E.R.A.
	)	
	)	Hearing date: October 12, 2004
	)	Decision date: April 7 <sup>th</sup> , 2005

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

**T. J. LISMER, P.J.**

**DECISION ON REVIEW**

[1] The incident that gives rise to the complainant arose on March 9<sup>th</sup>,  
2002.

[2] The details of the complaint are set out in a written statement of the complainant filed with the Commissioner, together with the questions and answers. This Statement of Complaint was entered as Exhibit #4 at the Review Hearing. The complainant alleges that members of the Winnipeg Police Service committed disciplinary defaults contrary to the *Law Enforcement Review Act* by:

- i) Not being read the right to counsel under the Charter of Rights and not afforded the opportunity to call a lawyer, even though the request was made a number of times, contrary to clause 29(a).
- ii) Using unnecessary violence or excessive force, contrary to clause 29(a)(ii).
- iii) Using oppressive or abusive conduct or language, contrary to clause 29(a)(iii). And
- iv) Being discourteous or uncivil, contrary to clause 29(a)(iv).

[3] Pursuant to section 13(1) of *L.E.R.A.*, the Commissioner declined in writing to take further action on the complaint on the ground that there was insufficient evidence supporting the complaint to justify a public hearing.

[4] The 22-page Report of the Commissioner dated April 4<sup>th</sup>, 2004, was sent to L. M. confirming that in reviewing the available information, he is declining under section 13(1)(c) of *L.E.R.A.* to take further action on the complaint. This Report was entered as Exhibit #1 at the Review Hearing.

[5] The Commissioner's Report (Exhibit #1) is an accurate summary of the Commission File #6179, a compendium of 221 pages, and includes summaries of interviews of the persons involved in the investigation. This Report identifies the four civilian witnesses including Ms. A. C.– referred to as Mr. M.'s spouse, four persons discharging various duties at the Remand Centre, and nine police officers.

[6] The Commissioner detailed the police report and the follow-up interviews by the L.E.R.A. investigator. He indicates that he also considered

the medical report received from the Winnipeg Remand Centre and the reports provided by the Winnipeg Remand Centre.

[7] Pages 10 – 12 of Exhibit #1 details the Commissioner's analysis leading to his conclusion to decline to take further action.

[8] A letter to the complainant dated May 19<sup>th</sup>, 2004 from Commissioner Wright, entered as Exhibit #2, acknowledges the telephone conversations with the complainant on May 12<sup>th</sup>, 2004, when L. M. advised that he wished to have the decision reviewed by a Provincial Judge.

In this letter, the Commissioner advised Mr. M. that in order to prepare for this review, he might want to examine File #6179, and further advised him that he may wish to engage legal counsel as a burden of proof is on him as the complainant to show the Judge that the Commissioner erred in declining to take further action on the complaint.

[9] The four typed summaries of the admission process (part of File #6179) in respect of L. M. on March 10<sup>th</sup>, 2003 describing activities from approximately 2:50 p.m. by:

- (1) Staff Operator/Manager B. V.;
- (2) Staff member S. W.;
- (3) Staff member D. K.; and
- (4) Supervisor on Duty P. H..

These four summaries are attached hereto as Appendix A.

[10] This admission process was video-taped. The video-tape was entered as Exhibit #3 at the Review Hearing. I viewed this tape and find that the summaries in Appendix A accurately describe the scenario as recorded on the video tape.

[11] At the Review Hearing, the complainant essentially affirmed his written complaint. On October 12<sup>th</sup>, 2004, he displayed no symptoms of alcohol consumption. He articulated in a civil and polite manner that he continues to take issue with the abuse of authority by the police towards him on March 9<sup>th</sup>, 2003.

[12] It is the complaint of Mr. M.'s partner, A.C., about his abusive behaviour towards her that brought the police to the scene and the complaint. The information before the Commissioner, all contained in File #6179, depicts the complainant as apparently intoxicated, behaving abusively and aggressively and totally uncooperative towards everyone he encountered.

[13] The complainant is the only source of his complaint. Each police officer and person in authority denies any improper conduct towards the complainant.

[14] Under section 13(3) of *L.E.R.A.*, the Provincial Judge after hearing any submissions from the parties in support of or in opposition to the application, and if satisfied that the Commissioner erred in declining to take further action on the complaint, shall order the Commissioner to (a) refer the complaint to a hearing, or (b) to take such other action under the Act respecting the complaint as the Provincial Judge directs.

[15] Under section 13(4), the burden of proof is on the complainant to show that the Commissioner erred in declining to take further action on a complaint.

[16] L. M. seeks a hearing under section 27(2) of *L.E.R.A.*, where under a Provincial Judge hearing the matter shall dismiss the complaint in respect of an alleged disciplinary default unless he is satisfied on clear and convincing evidence that the respondent has committed the disciplinary default.

[17] As to whether "clear and convincing evidence" means "on a preponderance of evidence" or proof beyond a reasonable doubt or a standard of proof somewhere in between is a moot point, and it is not the function of the Provincial Judge acting in review under section 13 of *L.E.R.A.* to second guess the finding of the Hearing Judge under section 27.

[18] At the hearing under section 27, the Hearing Judge will have the benefit of assessing the credibility of witnesses testifying under oath or affirmation, subject to the usual cross-examination, in addition to all the information available to the Commissioner. It has to be recognized that the evidence of a single complaint as the only witness on the hearing may be sufficient to convince the Hearing Judge that a respondent has committed the disciplinary default.

[19] It is well established that the Commissioner under section 13 of *L.E.R.A.* must consider all of the evidence gathered by the investigator and not just the *prima facie* evidence of the complainant. The reporting letter of the Commissioner (Exhibit #1) confirms this.

[20] All the evidence before the Commissioner that he must consider whether in written reports or *viva voce* interviews by the investigator is not sworn or affirmed under *The Evidence Act*. It is not intended that the Commissioner's decision be a determination based on weighing the evidence as at a judicial proceeding, but rather that the Commissioner must determine whether there is a reasonable basis in the evidence before him for a proceeding to the next stage. He is obviously not in a position to weigh the credibility of witnesses, but he is in the position of a limited weighing of the evidence available in considering it at its face value, in according the words in the evidence their common and natural meaning in trying to determine whether there is any reasonable basis to proceed to the next stage.

[21] On the question of sufficiency of evidence under section 13(1)(c), I am in complete agreement with the reasoning of my colleague Chartier, P.J. in his Decision on Review in Complaint #5643. He adopted the approach in the case of **Cooper v. Canada** (1996) 3 S.C.R. 854, where at page 891, Justice Laforest said:

When deciding whether a complaint should proceed to be inquired into by a tribunal the Commission fulfills a screening analogous to that of a judge at a preliminary inquiry.

[22] Justice Forest clarified that in the following reference to another Supreme Court of Canada decision, at page 891:

When deciding whether a complaint should proceed to be inquired into by a tribunal, the Commission fulfills a screening analysis analogous to that of a judge at a preliminary inquiry. It is not the job of the Commission to determine if the complaint is made out. Rather its duty is to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts. The central component of the Commission's role then, is that of assessing the sufficiency of the evidence before it. Justice Sopinka emphasized this point in *Syndicat*

des employes de production du Quebec et de L'Acadie v. Canada (Canada Human Rights Commission), [1989] 2 S.C.R. 879 at 899:

The other course of action is to dismiss the complaint. In my opinion, it is the intention of s. 36(3)(b) that this occur where there is insufficient evidence to warrant appointment of a tribunal under s. 39. It is not intended that this be a determination whether the evidence is weighed as in a judicial proceeding but rather the Commission must determine whether there is a reasonable basis in the evidence for proceeding to the next stage.

[23] On the information presented before me, I am satisfied that the Commissioner considered all the evidence gathered by his investigators and not just the *prima facie* evidence of the complaint, that he did not determine the credibility, draw inferences or make definitive findings of fact, and that he did in a limited way as indicated on his analysis and conclusion on pages 10, 11 and 12 of his Report (Exhibit #1) weighed all the evidence to determine whether the evidence constitutes a reasonable basis to proceed further.

[24] I apply the standard of correctness as the appropriate standard of the view. This is the most exacting of review standards, affords the least amount of deference by the Provincial Judge to the Commissioner's decision, and is the standard most favourable to the complainant, because when this standard is applied, the Commissioner's decision can be overturned on the basis of simple error.

[25] The complainant failed to satisfy me that the Commissioner erred in declining to take further action on the complaint.

[26] I believe that as the Reviewing Judge, I have all the same information on this Review that the Commissioner had in his considerations. In my own assessment of the evidence on this Review, I am satisfied that he came to the correct determination in declining to take further action on the complaint.

[27] Finally, in considering whether the Commissioner made the correct determination by declining to proceed further on the complaint, I ask myself, would this decision bring the administration of justice at this investigative stage into disrepute? My opinion is that it would not do so.

SIGNED at Winnipeg, Manitoba, this 7<sup>th</sup> day of April, 2005.

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Judge Theodore J. Lismer