IN THE MATTER OF:			***The Law Enforcement Review Act*** Complaint No. 6374 (2003-157)
AND IN THE MATTER OF:			An Application for stay in a L.E.R.A. Case on ground of loss of jurisdiction by Commissioner
BETWEEN			
G.D.,	Complainant	)	Gerri Wiebe**,** Counsel for the Complainant,
- and -		)	
Cst. J.N. **D/Sgt. D.K.** **Cst. B.F.** **Cst. P.O.** **Cst. T.H.** **Cst. F.W.**	Respondents	)	Paul McKenna Counsel for the Respondents and The Winnipeg Police Association Sean Boyd Counsel for L.E.R.A. Shannon Hanlin Counsel for Winnipeg Police Service
		)	Hearing Date: May 14th, 2010 Decision Date: June 18th, 2010

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 APPLICATION FOR STAY OF PROCEEDINGS ON GROUND OF LOSS OF JURSDICTION BY COMMISSIONER

[1] The Respondents make application for:

a) A Declaration that the Law Enforcement Review Agency ("LERA") has no jurisdiction to deal with LERA Complaint No. 6374 (2003-157) (the "Complaint") from G. D.

b) A Declaration that LERA has no jurisdiction to refer the Complaint to a Provincial Judge pursuant to s. 17 of *The Law Enforcement Review Act* R.S.M. 1987, c. L75 (the "Act") (***Tab 1)*** for a hearing on the merits.

c) A Declaration that the Provincial Judge has no jurisdiction to deal with the Complaint and no jurisdiction to conduct the hearing on the merits.

d) Such other Orders and/or Declaration as may be just and reasonable in the circumstances.

[2] The complaint of a disciplinary default or discipline Code under s. 29 of *The Law Enforcement Review Act* (hereinafter referred to as "LERA" or "the Act") by the Respondent police officers arises from an alleged incident of September 22, 2003.

[3] The complaint in writing was filed by G. D. with LERA on July 12, 2004, beyond 30 days from the alleged incident.

[4] Under s. 6(3) of LERA, every complaint shall be in writing signed by the complainant setting out the particulars of the complaint, and shall be submitted to the Commissioner, or the Chief of Police of the department involved in the complaint or any member of the department involved in the complaint <u>not later</u> than 30 days after the date of the alleged disciplinary default.

[5] The Commissioner, George Wright, granted D. an extension of the statutory 30 day requirement to file the complaint, pursuant to s. 6(7) of the Act, because D. was facing criminal charges arising from the incident.

[6] In his six page complaint D. alleges abuse of authority under the discipline Code provisions of s. 29 of LERA by using unnecessary violence or excessive force, causing him internal stomach bleeding, two cracked ribs, torn stomach muscles and broken and cracked teeth. He identified P.O. as one of the Respondent officers involved but did not know the identity of the other officers.

[7] The criminal charges against D. alleging threats to D/Sgt. T. and Cst. F.W. were stayed by the crown on January 12, 2006.

[8] On or about August 23, 2004, on the Commissioner's behalf, Max Churley, an investigator with LERA, sent a letter to J.J. Ewatski, Chief of the Winnipeg Police Service, enclosing a copy of the complaint and requesting that his office be provided with copies of all documents, statements, videotapes, and other material relevant to this complaint including any notes or reports prepared or completed by members of that police department and also, specifically, asked to be advised of the names of the officers and the shifts each is assigned to in order to expedite the scheduling of the officer interviews when they are on the day shifts.

[9] This letter connects the request for the names of the officers with expediting scheduling and officer interviews and is silent as to the purpose of enabling the Commissioner to comply with the provisions of s. 7(2) of the Act.

[10] Section 7(2) of the Act imposes the duty of the Commissioner in these words:

> 7(2) Upon receiving a complaint, the Commissioner shall, as soon as it is practicable, provide the member or extra-provincial police officer who is the subject of the complaint with a copy of the complaint.

[11] There is no explanation in any of the materials filed, or submissions made, for failure by the Commissioner to comply with s. 7(2) at least as to Officer P.O., who was identified in the written complaint by D. as one of the officers allegedly involved.

[12] On September 1, 2004, Inspector A. Katz of the Professional Standards Unit ("PSU") sent a letter to the Commissioner advising that the Winnipeg Police Service is presently conducting a criminal investigation into Mr. D.'s complaint made to the PSU and as a result of the ongoing investigation, the Winnipeg Police Service is requesting a delay of the LERA investigation into the matter, pursuant to s. 12(1.1) of the Act.

[13] Section 12(1) to 12(4) of the Act provide:

> **Investigation by Commissioner**
>
> 12(1) Upon receiving a complaint, the Commissioner shall forthwith cause the complaint to be investigated and for this purpose, the Commissioner has all the powers of Commissioners under Part V of *The Manitoba Evidence Act*.
>
> **Delay of investigation**
>
> 12(1.1) Notwithstanding subsection (1), if the Commissioner is satisfied that immediate investigation of a complaint would unreasonably interfere with an ongoing criminal investigation, the

Commissioner may delay the investigation of the complaint for such period as the Commissioner considers reasonable in the circumstances.

Relevant materials forwarded to Commissioner

12(2) At the request of the Commissioner, the Chief of Police of the department involved in the complaint shall forthwith forward to the Commissioner copies of all documents, statements, and other materials relevant to the complaint which are in the possession, or under the control, of the police department involved in the complaint, including any notes or reports prepared or compiled by members of the police department.

Materials required for criminal investigation

12(3) Where any of the materials referred to in subsection (2) are required for the purpose of a criminal investigation, the Chief of Police may request, and the Commissioner may grant, an extension of time for forwarding copies of such materials.

Questions of privilege

12(4) Where the Chief of Police declines to forward copies of any of the materials referred to in subsection (2) on the ground that the materials are privileged, the Commissioner may make summary application to a judge of the Court of Queen's Bench for a ruling on the question of privilege.

[14] The Commissioner in reply sent a letter dated September 10, 2005 to J.J. Ewatski as Chief of Police as follows:

Re: LERA Complaint No. 6374 – Mr. G. D.

Thank you for your letter dated 2004-09-01, in which you advise that you are conducting a criminal investigation in this matter.

Please be advised that Section 7(2) of *The Law Enforcement Review Act* requires that I advise the officer(s) involved of the complaint against him/her as soon as practicable.

Therefore, upon completion of the criminal investigation interviews, could you please confirm the name(s) of the officer(s) involved in this incident?

I would also request that when this investigation has been completed, you provide this office with a copy of your report.

I look forward to your response in due course.

[15] The Commissioner blurred and appeared to confuse his duty and obligation under s. 7(2) and s. 12. He had the right to impose as a condition for the delay in the LERA investigation as requested the forthwith compliance with the requested names of the officers involved. This the Commissioner did not do. Without the granting of the extension of time for providing the requested material, the Chief of Police was obliged to comply forthwith with the Commissioner's request.

[16] The Commissioner has the statutory power under LERA and as Commissioner has all the powers of the Commissioner under Part V of *The Manitoba Evidence Act*.

[17] He has recourse to s. 4 of *The Summary Conviction Act* which reads:

> **Offence and penalty**
>
> 4 Any person who contravenes, violates, disobeys, or refuses, omits, neglects, or fails to comply with,
>
> (a) any provision of any Act of the Legislature; or
>
> (b) any provision of any regulation;
>
> is guilty of an offence, and unless another penalty therefore is provided by or under an Act of the Legislature, is liable, on summary conviction, to a fine not exceeding $5,000. or to imprisonment for a term not exceeding three months, or to both such a fine and such an imprisonment.

[18] Where the Chief of Police declines to forward copies of any of the materials referred to in s. 12 (2) on the ground that the materials are privileged, the Commission may make summary application to a Judge of the Court of Queen's Bench for a ruling on the question of privilege.

[19] The Commissioner also has the benefit of s. 42 of LERA which provides:

> **Failure to comply**
>
> 42 Every person who, without lawful excuse,
>
> (a) fails to comply with an order or decision of the Commissioner or a provincial judge; or
>
> (b) contravenes section 25;
>
> is guilty of an offence and is liable on summary conviction to a fine of not more than $2,000. and in default thereof to imprisonment for a term not exceeding three months or to both such fine and such imprisonment.

[20] Granting a requested delay under s. 12, on the ground that the Winnipeg Police Service is conducting a criminal investigation on D.'s complaint is *prima facie* a rational decision for a reasonable period of time for completion of that investigation resulting either in clearing the officers of any criminal charges arising from D.'s complaint or in laying charges against the officers. The laying of charges stops the LERA investigation under s. 34 of LERA which provides:

> **Effect of criminal charge**
>
> 34 Where a member or an extra-provincial police officer has been charged with a criminal offence, there shall be no investigation, review, hearing or disciplinary action under this Act in

> respect of the conduct which constitutes the alleged criminal offence unless a stay of proceedings is entered on the charge or the charge is otherwise not disposed of on its merits.

The officers were finally cleared on September 15, 2005

[21] Winnipeg Police Service Investigator L. noted in his report of October 19, 2006, that he could not form any reasonable and probable ground to believe that G.D. has been assaulted by members of the Street Gang Unit (the Respondents) but in fact believed that D. was involved in an altercation at the rear of XXXXX Avenue and it was there that he received his injuries.

[22] The PSU interviewed only two of the six respondent officers as part of the investigation of the D. complaint: Constable B.F. on September 26, 2003 and Constable T. H. on September 19, 2003. The PSU never interviewed the other officers named as offenders in the complaint. According to Sgt. V. of PSU, in essence the active investigation concluded in the latter part of 2003.

[23] It would appear that LERA interviews of the four officers who were never interviewed by PSU could not have adversely impacted on the PSU investigation in any way.

[24] In my opinion the mandatory statutory requirements under s. 7(2) of LERA to provide the respondents with a copy of the complaint as soon as it was practicable and under s. 12(1) forthwith cause the complaint to be investigated, imposed a corresponding duty on the Commissioner to make inquiries to determine to his satisfaction whether firstly, a forthwith investigation would unreasonably interfere with the ongoing investigation by PSU, and secondly, to determine a reasonable period of delay of the LERA investigation and thirdly, to make regular inquiries as to the progress of the PSU investigation with the necessary detailed information on it to determine the reasonableness of any delay and to ensure that the police investigation is conducted diligently with all due dispatch, and thereby clearly place himself as the Commissioner within the letter and spirit of the words “as soon as practicable” and “forthwith” in s. 7(2) and 12 (1).

[25] The indication of a criminal investigation of the respondents on the D. complaint that may lead to the laying of criminal charges in itself without any details prompts a favourable response by the Commissioner to delay the LERA investigation by virtue of s. 34 of the Act which would stop the LERA investigation until a stay of proceeding is entered on any charge or otherwise not disposed of on its merits.

The Commissioner had the power and the duty to impose as a condition for the granting of the delay of the LERA investigation that the police investigation be conducted and completed forthwith and as soon as practicable to ensure that the Commissioner himself at all times for the LERA investigation does fall within the statutory terms as soon as practicable and forthwith.

[26] Upon receipt of information from PSU of the Winnipeg Police Service that the police officers involved were the subject of a criminal investigation by Winnipeg Police Service into the D. complaint the Commissioner must report the possible criminal offence to the Attorney General pursuant to the provisions of s. 35 of LERA which provides:

> **Disclosure of possible criminal offence**
>
> 35(1) Where a matter before the Commissioner or a provincial judge discloses evidence that a member or an extra-provincial police officer may have committed a criminal offence, the Commissioner or the provincial judge shall report the possible criminal offence to the Attorney-General and shall forward all relevant material, except privileged material, to the Attorney-General for the possible laying of charges.
>
> **Effect of decision to lay charges**
>
> 35(2) If the Attorney-General charges the member or extra-provincial police officer with a criminal offence, there shall be no further investigation, review, hearing or disciplinary action under this Act in respect of the conduct which constitutes the alleged criminal offence unless a stay of proceedings is entered on the charge or the charge is otherwise not disposed of on its merits.
>
> **Objection conclusively deemed**
>
> 35(3) Where a member or extra-provincial police officer who testifies before a provincial judge is subsequently charged with a criminal offence, the member or extra-provincial police officer shall be conclusively deemed to have objected to answering every question put to him before the provincial judge on the ground that his statement or his answer may tend to criminate him or to establish his liability to a legal proceeding at the instance of the Crown or of any person.
>
> S.M. 1992, c. 45, s. 19; S.M. 2004, c. 4, s. 47.
>
> **Prosecution for offences**
>
> 36 No investigation, review, hearing, or disciplinary action under this Act precludes the subsequent prosecution of any member or extra-provincial police officer for an offence.

The Attorney General of Manitoba thus formally brought into this complaint, on behalf of the citizens of Manitoba into overseeing the investigation of the PSU of the City of Winnipeg in investigating their own members would have the opportunity if not the duty of speeding up the PSU investigation, ensuring that it was properly carried out and determining as early as reasonably possible for the laying of any criminal charges.

[27] The respondent officers received copies of the LERA complaint on October 20, 2006, a delay of three years, one month after the September 23, 2003 incident and over two years, three months after the LERA complaint was filed.

[28] The complainant has no control over whether the Commissioner complies with s. 7(2) or any other provision of the Act, but he does have the option of commencing a civil suit against the respondent officers. During submissions on May 14, 2010 Ms. Gerri Wiebe as counsel for the complainant confirmed that the complainant did file a similar action against the respondent officers in the Court of Queen's Bench in September 2005.

[29] Part of the delay in PSU completing its investigation of possible criminal charges against the respondent officers on the D. complaint was attributed to completing the investigation of the criminal charges against D. The investigation against D. was concluded with a stay of proceedings on January 12, 2006.

[30] I find on the basis of the case law presented, the submissions made, that the Commissioner failed to provide a copy of the complaint to the respondent officers as soon as practicable under s. 7(2) and forthwith caused an investigation to be made under s. 12 of the Act.

[31] Counsel for the respondents takes the position that the only appropriate remedy in the circumstances of delay before me is a finding of loss of jurisdiction by the Commissioner and termination of proceedings without a hearing on the merits. The hearing dates on the merits are set for dates from June 21 -30 and July 2, 2010 in Courtroom 408.

THE LAW

[32] I next refer to the cited cases for guidance as to the correct disposition.

[33] In the Manitoba *Interpretation Act* C.C.S.M. c. I 80, in s. 15 on the word "shall" and "must" provides as follows:

> **Imperative and permissive language**
>
> 15 In the English version of an Act or regulation, "shall" and "must" are imperative and "may" is permissive and empowering. In the French version, obligation may be expressed by using the present indicative form of the relevant verb, or by other verbs or expressions that convey that meaning; the conferring of a power, right, authorization or permission may be expressed by using the verb "pouvoir", or by other expressions that convey those meanings.

[34] In Tab 2 in the Preliminary Application of the respondent officers reference is made to the *Manitoba Language Rights Reference* case (1985), 25 Man. R. (2d) 83 (S.C.C.). Paragraphs 26 and 27 of the Supreme Court decision provide:

> 26. Section 23 of the *Manitoba Act, 1870*, provides that both English and French "*shall* be used in the ... Records and Journals" of the Manitoba Legislature. It further provides that "[t] he Acts of the Legislature *shall* be printed and published in both those languages". Section 133 of the *Constitution Act, 1867*, is strikingly similar. It provides that both English and French "*shall* be used in the respective Records and Journals" of Parliament and the Legislature of Quebec. It also provides that "[t] he Acts of the Parliament of Canada and the Legislature of Quebec *shall* be printed and published in both those Languages".
>
> 27. As used in its normal grammatical sense, the word "shall" is presumptively imperative. See *Odgers' Construction of Deeds and Statutes* (5th ed. 1967) at p. 377; *The Interpretation Act*, 1867 (Can.), 31 Vict., c. 1, s. 6(3); *Interpretation Act*, R.S.C. 1970, c. I-23, s. 28 ("shall is to be construed as imperative"). It is therefore incumbent upon this Court to conclude that Parliament, when it used the word "shall" in s. 23 of the *Manitoba Act, 1870* and s. 133 of the *Constitution Act, 1867*, intended that those sections be construed as mandatory or imperative, in the sense that they must be obeyed, unless such an interpretation of the word "shall" would be utterly inconsistent with the context in which it has been used and would render the sections irrational or meaningless.

[35] In ***Apostle v. Robson et al.*** (1996), 114 Man. R. (2d) 240 (Q.B.), MacInnes, J. ruled that the time limits of s. 6 of the LERA are mandatory:

> In my opinion, the law is clear that limitation to time provisions of the kind set forth in section 6(3) of the Act are mandatory and that particularly where, as here, the private rights of the applicant are involved, compliance is a necessary prerequisite to jurisdiction.

[36] In ***Forde and O.S.S.T.F.*** (1980), O.R. (2d) 169 (Div. Ct.), a teacher was being disciplined pursuant to Regulations under the *Teaching Profession Act* (Ontario) and that Federation's By-law No. 5 required that (at page 3):

> (b) On receipt of a complaint, the General Secretary shall:
>
> i. transmit copies of the complaint and any supporting documentation to the Professional Standards and Practices Council, and to the member or members complained against . . .

The Court noted (at page 6)

> It is no answer to suggest, as counsel for the O.S.S.T.F. does, that the breaches of art. 5 were merely "technical" and thus ought not to invalidate the proceedings or to say that the applicant was furnished with copies of the constitution and by-laws and could by examining them have discovered his

> rights. Nor is there merit in the argument that having regard to all that had transpired the applicant in fact was aware of what the complaints were all about. As a result of the non-compliance with the by-law requirements the applicant undoubtedly was denied the opportunity to reply to, to explain, to contradict the complaints before an adverse decision was made against him.
>
> Members of the O.S.S.T.F. are entitled to the full protection of the procedural safeguards in the by-laws and to insist that those by-laws be satisfied at every step of the discipline process. Disciplinary proceedings are manifestly important involving, as they may, serious consequences to members of the teaching profession and their future careers. Simple fairness demands that the O.S.S.T.F. rigorously adhere to the by-laws it has itself enacted. Not having done so in this case, the decision of the Professional Standards and Practices Council, and the proceedings pursuant to it, cannot be allowed to stand.

[37] In ***Re Vialoux and Registered Psychiatric Nurses' Association of Manitoba*** (1983), 2 D.L.R. (4th) 187 (C.A.) the headnote summarized that:

> Section 37(1) of the Registered Psychiatric Nurses Act, 1980 (Man.), c. 46 (C.C.S.M., c. P170), which provides that the Discipline Committee of the Registered Psychiatric Nurses Association shall fix a date, time and place for holding an inquiry within 30 days from a direction that an inquiry should be held into the conduct of a member and shall commence the hearing no later than 60 days from the date of the direction, contains a mandatory time requirement, which ought to be strictly observed, as the provision involves the private rights of an individual. In failing to commence an inquiry no later than 60 days from the date of a direction, the discipline committee acts without jurisdiction and any order made in such an inquiry is a nullity.

As to whether actions in neglect of such an obligation or duty are null and void Philp, J.A. at page 3 stated.

> I have come to the conclusion that the time requirement in s. 37(1) is absolute. In falling [sic] to commence the inquiry no later than 60 days from the date of the direction, the discipline committee acted without jurisdiction. Its order is a nullity.
>
> Whether a statutory provision is absolute or directory may not be readily apparent. The use of the word "shall" indicates and imperative obligation or duty. That is the clear statutory direction found in s. 8(3) of the Interpretation Act, R.S. M. 1979, c. 180.

Philp, J.A. further stated:

> The courts have distinguished between enactments relating to the performance of a public duty and provision affecting private rights. That distinction was drawn in

> Bilodeau and in Smith. In Bilodeau, Freedman C.J.M said, at p. 224 C.C.C., p.401 W.W.R.:
>
> One of the sets for determining whether a statute is mandatory or directory is the degree of hardship, difficulty, or public inconvenience that will result from treating it as mandatory. The rationale for this approach is that the legislature could not have intended widespread chaos to be the consequence of non-compliance with a particular statute. Hence, to avoid this consequence of chaos, an intention will be imputed to the Legislature that the statute was directory in its effect, and not mandatory.

He further stated:

> There is an element of public concern in proceedings under s. 37 of the Registered Psychiatric Nurses Act. The public has an interest in the standards for the practice of psychiatric nursing in Manitoba and in the standards of professional ethics of registered psychiatric nurses. However, at stake in the inquiry before the discipline committee was the right of Vialoux to practise his profession. This is not a case of "widespread chaos" which was the concern of Freedman C.J.M. in Bilodeau. In my view, the apprehended or potential public concern must yield to the private rights of Vialoux.
>
> In my view, the time requirements of this statute ought to be strictly observed, involving as it does the private rights of an individual. The time requirements were not strictly observed in the proceedings taken against Vialoux. The procedural deficiency goes to the jurisdiction of the discipline committee. It acted without jurisdiction and its order is a nullity.

[38] The Manitoba Queen's Bench decision of M.A.R.N. v. Tataryn, [1990] M.J. No. 209 (Q.B.) in which Scott, A.C.J., held that on s. 36(1) of *The Registered Nurses Act* requiring that an inquiry into a nurse's conduct must commence within 60 days from a direction and decision to hold the inquiry was mandatory. Accordingly the inquiry was quashed.

[39] In ***Nicholas v. Freeman et al***, LERA decision dated January 24, 2002, Rubin, P.J. at page 7 of the decision said:

> Having satisfied myself that the law is such that compliance with the statutory requirements is an absolute. The respondents [sic] motion for dismissal for lack of jurisdiction is granted, and the matter is dismissed.

[40] Reference was also made to a decision of Judge Elliott of Provincial Court delivered June 27, 2007. After referring to the ***Apostle*** case and the ***Vialoux*** case and the ***M.A.R.N. v. Tataryn*** case, under circumstances similar to the D. case before me, terminated the proceedings.

ANALYSIS AND CONCLUSION

[41] The Commissioner confirmed (in para. 15 of the Commissioner's Brief) that the purpose of the *Law Enforcement Review Act* is to permit members of the public to bring complaints about the conduct of officers in an independent public forum and for the complainant to be heard in a fair manner for all parties.

[42] Subject to his right of *mandamus* in the Court of Queen's Bench where the Commissioner fails to exercise his jurisdictional powers a diligent and cooperative complainant has no control over the proceedings and in the public interest is entitled to have his complaint considered by the Commissioner in the first stage of a LERA investigation and proceeding in a timely manner.

[43] The complainant has a right of *mandamus* also where a Provincial Judge stays the LERA proceedings on the ground of loss of jurisdiction and seeks an order directing the Provincial Judge to continue with the LERA proceeding.

[44] The interests of the police officers as pointed out in ***R. v. Chief Constable of the Merseyside Police***, [1986] 1 All ER 257, CA., (Tab 10 in the Respondents' Brief). The requirement of notice as soon as practicable provides an essential protection of police officers and it gives them an opportunity to deal with the allegations including explaining, denying and/or collecting evidence to defend against any allegations, including the right to counsel, the right to request particulars and the ability to deal with the allegations and consult with counsel when the facts are fresh in their minds and have recollections independent of any notes made in accordance with their practice and training.

[45] The legislature enacted a procedure for dealing with apprehended or potential public concerns arising out of a complaint of violation of discipline code under s. 29 of LERA by police officers but also specifies time limitations in protecting the private interests of the respondents as well as addressing the concerns of the complainant and promoting the progress of the LERA proceeding towards a timely conclusion.

[46] In this regard to the statutory time limitation Max Churley, on behalf of the Commissioner, on September 10, 2004 wrote to Inspector Katz of the PSU requesting that "he provide LERA with names of the officers after the interviews were completed".

[47] If the legislature intended that the words “as soon as practicable” in s. 7(2) be given a broad and liberal interpretation in tandem with the words “forthwith” in s. 12(2) it could have clearly said so.

[48] As the *Law Enforcement Review Act* stands the Commissioner’s duty under s. 7(2) and s. 12(2) are separate and distinct and are aimed at different objectives: under s. 7(2) to inform the respondent officers by sending a copy of the complaint as soon as practicable; and under s. 12(2) to delay a forthwith LERA investigation pending completion of the indicated investigation of criminal charges against the respondent officers, for no longer period than is reasonably necessary.

[49] Unfortunately the Commissioner failed to engage the Attorney General under s. 35(1) by reporting the criminal investigation of the respondent officers and thereby deprived himself of assistance in conducting the necessary enquiries into speeding the investigation towards a forthwith determination as to any charges and he relied too heavily in the discretion of the Winnipeg Police Service and PSU for their internal investigation into its own officers. His follow-up on the original request for a delay on the LERA investigation was cursory and grossly inadequate.

[50] The Commissioner states that his office enjoys generally a good relationship with the PSU and Winnipeg Police Service and takes information received from them at face value.

[51] The period of delay for the criminal investigation by PSU was taken from September 1, 2004, when the delay of LERA investigation was requested until October 18, 2006 – a period of two years one and one-half months.

[52] Essentially the Commissioner was content to wait until the officer interviews were completed.

[53] LERA Commissioner may not have the direct authority to speed up criminal investigation but he does have the jurisdiction and power to withhold a request for delay beyond a readily ascertainable reasonable time and to require PSU to report to the Commission regularly on the progress of the investigation, or require the sending of the names of the involved officers.

[54] As well the Commissioner must report to the Attorney General under s. 35(1) of who is at a greater arm’s length from the PSU and not in a “cozy and cordial relationship” with Winnipeg Police Service and PSU as acknowledged by the Commissioner. The Attorney General is better able to apply pressure to the PSU to expedite the investigation and to keep the Commissioner informed.

[55] Neither in the Brief of the Commissioner nor in submissions is the assertion made that there was compliance under s. 35 of LERA.

[56] In the Brief of the Winnipeg Police Service (para. 14) is the statement that:

> "Furthermore, although not obligated under LERA the position of WPS is that it is willing to assess requests by the Commissioner for respondent officers' names. Where the criminal investigation will not be affected, names are provided to the Commissioner.

[57] The Commissioner did not insist that the officers' names be provided without delay but in completion of PSU investigation. His position that when he provided the officers with the copies of the complaint on October 20, 2006 this was as soon as practicable within s. 7(2), is untenable.

[58] In short the Commission had power and jurisdiction to fully comply with sections 7 and 12 of LERA.

[59] He did not exercise his powers and apply his jurisdiction. By not exercising it, in my view, on the submissions made, the material filed, the cases considered, the reasons and remarks in the foregoing paragraphs he lost his jurisdiction. As the saying goes in so many other areas, "if you do not use it, you lose it".

[60] I declare that the Commissioner has lost jurisdiction. This proceeding is stayed and the application of the Respondent officers is granted.

DATED and sent this 18th day of June, 2010.

ORIGINAL SIGNED BY JUDGE LISMER

T.J. Lismer, P.J.