

IN THE MATTER OF:

Law Enforcement Review Act
Complaint No. 5917

BETWEEN:

J.N.,

Complainant,

- and -

CONSTABLE M. D. AND
CONSTABLE R. G.,

Respondents.

TRANSCRIPT OF PROCEEDINGS had and taken before The Honourable Judge Curtis, held at the Law Courts Complex, 408 York Avenue, in the City of Winnipeg, Province of Manitoba, on the 28th day of June, 2004.

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APPEARANCES:

MR. S. BOYD, for the Commissioner.

MR. J. WEINSTEIN, for the Winnipeg Police Association.

MR. J. N., in Person.

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MR. WEINSTEIN: Good morning, Your Honour. Josh Weinstein here on behalf of the respondent officers.

THE JUDGE: Okay.

MR. BOYD: Sean Boyd. I'm here on behalf of the Commissioner.

MR. WEINSTEIN: And I don't think we've seen the complainant come in yet.

THE JUDGE: Has there been any --

MR. WEINSTEIN: I think Mr. Boyd can speak to --

MR. BOYD: I can indicate that he did call me two weeks ago and was inquiring about the date. And I informed him that it was this morning and at that point he said likely he was going to come but I haven't heard from him during the last week or this morning at all.

THE JUDGE: We'll it's 20 minutes to ten.

MR. WEINSTEIN: And just to indicate, this is actually the second appearance in this matter. I believe the first review was in December.

THE JUDGE: Yes, I'm aware of that. This was originally set -- Mr. N. had moved and I believe received his copy of the documents and the file just before the hearing so it was adjourned to allow him --

MR. WEINSTEIN: Right.

MR. BOYD: Yes.

THE JUDGE: -- time for that.

MR. WEINSTEIN: So I'll speak to Your Honour once, I guess, we give a bit more time to see and then --

THE JUDGE: Yeah. There wasn't anybody in the hallway when we came down.

We'll recess until ten o'clock.

MR. WEINSTEIN: That's fine, Your Honour.

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THE JUDGE: And see if Mr. N. shows up by then.

MR. WEINSTEIN: And then I'll deal with my submission at that time. Thank you.

(BRIEF RECESS)

THE JUDGE: Thank you.

I don't see additions to the people in the courtroom.

MR. WEINSTEIN: No.

Your Honour, it will be my request that you dismiss this matter. As I've indicated before, this is the second time and Your Honour is aware that this is the second time that this matter is on. It was originally scheduled on December 11, 2003, two o'clock, actually, in this same courtroom.

I guess at that time he had indicated that he hadn't seen some of the material that was filed by the counsel for the Commissioner, needed some further time. It was re-scheduled to today's date. He is not here. It is his review. He's the one who initiates the process. He has to take responsibility for it.

I'm submitting in the circumstances that the, that the review be dismissed.

THE JUDGE: Thank you.

Mr. Boyd, you indicted that you had spoken to him within the last two weeks, or approximately two weeks ago?

MR. BOYD: That's right, Your Honour.

And the Commissioner is not taking any position with respect to --

THE JUDGE: No, no, I realize that. But I'm more concerned about canvassing the notice at this point. You did speak to him --

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MR. BOYD: Yeah. I spoke with him --

THE JUDGE: -- and he was aware --

MR. BOYD: -- two weeks ago.

And it would appear that he's here now.

THE JUDGE: Are you Mr. N.?

MR. N.: Yes, ma'am. Am I late?

THE JUDGE: Very. We were on the point of dismissing your application because the hearing started at nine-thirty.

MR. N.: Oh, I was under the impression it was ten o'clock. I'm sorry. I made a mistake.

THE JUDGE: Well, you corrected the mistake just on the very edge, sir.

MR. N.: I'm sorry about that, Your Honour.

MR. WEINSTEIN: Just, now that the matter is proceeding I'd just be requesting a ban on publication of the information about the respondents' name, pursuant to Section 25.

THE JUDGE: Twenty-five or 13?

MR. WEINSTEIN: Sorry.

THE JUDGE: Twenty-five, 25 refers to the actual hearing, does it not?

You're more familiar with this than I but I thought I had read --

MR. WEINSTEIN: I believe it's --

THE JUDGE: -- 13.4.1.

MR. WEINSTEIN: Yes. Sorry.

And also just to indicate I've provided cases. The, the first brief that was filed, since then there was a decision of Judge Chartier and it's actually, the brief, the more brief of the decisions that I'll be relying upon, which is, I think about six pages. I've included what Judge Chartier references when he says about his earlier decision

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about the test, or about the Commissioner's function. It's really a short passage from even the seven, or six page case that I'll be referring to but there's been sort of a number of new decisions that talk about the role of the Commissioner of LERA, and I'll make submissions on that at the appropriate time.

THE JUDGE: Thank you.

First things first, there will be a ban on publication pursuant to Section 13.4.1. And that reads that;

The judge hearing the matter shall,

"(a) order that no person shall cause the respondent's name to be published in a newspaper or other periodical publication, or broadcast on radio or television, until the judge has determined the merits of the application;

(b) if the application is dismissed, order that the ban on publication of the respondent's name continue; and

(c) if the application is successful, order that the ban on publication of the respondent's name continue until the complaint has been disposed of in accordance with this Act."

Now I think the second thing that has to be done is I've received a brief from the Commissioner. The

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Commissioner doesn't automatically have standing. Do you want to address the issue of standing, Mr. Boyd?

MR. BOYD: Yes, Your Honour.

Typically the Commissioner asks legal counsel to prepare a brief to just sort of discuss standard review and various issues regarding the tests the Commissioner must apply when looking at a complaint. And in doing so we also request for standing at these types of hearings in order just to make representation with respect to those matters. So in this case we're doing the same.

I can indicate that we do have some case law that I understand my learned friend is also planning to refer to that basically arose subsequent to this brief being filed originally, which may have some bearing on this which I would wish to refer to in my submission as well.

THE JUDGE: And are those the same two cases?

MR. BOYD: Yes.

THE JUDGE: With respect to the issue of the standard of review I have no difficulty with the Commissioner having standing.

Thank you, sir.

MR. BOYD: Thank you, Your Honour.

THE JUDGE: Mr. N., stand up. Okay.

You appear by yourself. Did you have an opportunity to speak to a lawyer?

MR. N.: At this time I do appear by myself to act as counsel for myself at this time. I am aware in the LERA Act it does state that I can basically apply to have counsel at any time during the proceedings I so desire, however, it's not my intention to waste the time of this court for far too longer beyond today.

Simple purpose for that, Your Honour, is that, you know, obviously the standard of review are which I believe

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my learned friends here have been discussing with you so far, is -- I've read through it and I do believe that the standard would just be simple basis of correctness. That's the standard, of course, that I'm aware that you would, you would set yourself, Your Honour.

Now the issue about the correctness is actually, it's a constitutional matter, Your Honour. It's a matter of a violation of habeas corpus. It's very clear. I have prepared a slight brief about it. As well as the file itself presents the evidence that I would put forward.

THE JUDGE: Well, you're on, Mr. N., because this is your hearing so I'll hear from you.

MR. N.: Thank you, Your Honour.

It's, it's quite simple, really. I actually prepared the docket before I ever even made the submission for a hearing. Prepared the docket and, you know, basically I've submitted it in a series, a series of briefs to the Commissioner, once when I made the complaint and once when they had decided to discontinue the complaint.

I cannot understand why they decided to discontinue the complaint because it's clear that a violation has occurred and that the officers have admitted to it when they say right here. "We told him we were doing an investigation on a bomb threat and we were doing a search. And afterwards he was released. He was questioned about the bomb threat," which is what this is all about; right? Which there was no, absolutely no evidence and it could be further argued that the probabilities that they base their probable cause on were vague.

I denied it, of course, and said if I, if I did it -- now this is the part that really disturbs me because at that time I was, I was woken up from a, from a four hour nap; right? And there was no legal counsel provided to me

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and, you know, the -- I do believe and I do know that the constitution accords citizens the right to be -- have counsel present during questioning at any time arrest occurs.

THE JUDGE: If there's an arrest.

MR. N.: If arrest occurs. Okay.

And it accords the same right upon a detention. Correct, Your Honour?

Now this was a detention, not an arrest.

And I'm willing to make the, concede the difference between those two, however, the same right is accorded. And since this was a detention the right to counsel was not accorded and therefore a violation is clearly admitted to in the file and the interview with the Law Enforcement Review Commissioner.

And on that basis, and that basis alone, I submit that this case should be reopened to the Commissioner and re-evaluated.

Thank you, Your Honour.

THE JUDGE: Thank you.

MR. WEINSTEIN: Your Honour, the, the -- one of the reasons for providing that decision of Judge Chartier, it's the more brief one, it's the complaint number 6099. It's just, it's appropriate for a number of reasons because it deals with the issue of vexatious and it also talks about standards of review and the function of the Commissioner.

THE JUDGE: Just hang on, Mr. Weinstein, because I don't see --

MR. WEINSTEIN: Yes.

THE JUDGE: Oh, there it is. I'm sorry.

MR. WEINSTEIN: Okay. Yes.

THE JUDGE: I was looking for the number on it.

MR. WEINSTEIN: Just at the top.

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The, that was a decision subsequent to a more lengthy decision of Judge Chartier where he had dealt with the issue of the standard of review, which has not really changed, but the function of the Commissioner. And again, it's appropriate because it also deals with the issue of vexatious. And what's interesting about this decision is what it talks about is that even if Your Honour deals with this matter and let's say, says, you know what? Maybe it wasn't the correct way to deal with it by way of vexatious.

In that case, in this LERA decision, your brother Judge Chartier deals with the fact that still the Commissioner has to perform the function of not really -- let's say maybe it's not finding fact but there is a, a weighing in terms of the information and has to make a call as to the sufficiency of the matter going forward.

And so specifically just to point out to Your Honour and also to, to the other parties, the, the passage that I'm referring to is -- sorry, I believe it's at paragraph 25. Just -- and that's at page 6. It says;

I recently decided in LERA
complaint 5643 --

Which is the one also I've provided you;

-- that when considering a matter pursuant to Section 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 the Commissioner is not to weigh the

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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.

If you look, actually, just the paragraph before deals with the fact that in a complaint Judge Chartier felt that -- indicates;

I'm 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 Section 13(1)(c) of the Act. As a result the standard of review tends to be the standard of correctness.

And just indicate on that point I don't think that my friend, Mr. Boyd, takes issue with the fact that that is something that's within the, the discretion of the court, that you may be dealing with something that came under a vexatious heading and then dealing with it by way of a sufficiency of evidence.

The -- when I speak of these matters I don't talk of any other information other than that which was before the Commissioner. And what was before the Commissioner was a very serious situation and a situation where the officers had to deal with, I think, general public safety and safety

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of, and officer safety. That's an admission by the other witness in this matter who's provided a letter which is on the file. And this woman -- and I'm going to apologize just for the pronunciation of the last name. It's M.D. (phonetic). And herself declares why, you know, why this individual was handcuffed, that it was an issue of officer safety. And you have to look at what the officers find in the suite.

Now they did not, they did not charge the complainant in this matter but the complainant will not be able to have it either way. I'm sure that if there were charges there would also be a complaint. They detained this individual for investigation. They determined not to proceed with charges and then that was the end of the matter.

The information disclosed by that other witness, I would submit, confirms the vexatious nature of it. Now I can appreciate that the statement doesn't indicate -- or there's indications there that, you know, all I saw was the search and that the fact that, that Mr. N. was being handcuffed. But the type of conduct that's complained of is not anything that was witnessed by this, by this person. And I would say that one would assume that there were issues that the complainant had in terms of right away, in terms of the entry into the suite, in terms of being dealt with right away. And that witness is right there with the police officers, and that's indicated, in fact, in her own statement.

I'm submitting that when you look at all of the information -- and this is actually quite a lengthy letter and the outlining of all of the information by the Commissioner spans some three and a half pages, I think it's single spaced, going through all of the information that's,

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that's come about.

It is always the onus of the complainant to establish that there's an error and also at the stage of investigation with LERA to establish the complaint.

I'm submitting that in the circumstances that, that even on a strict, the strictest of standards, that this was the correct decision. And given what Judge Chartier has said of the function of the Commissioner, that there is the ability to do that, I guess even limited weighing perhaps more than that which is allowed by a preliminary hearing judge, that the decision was a correct one and that the decision of the Commissioner must be upheld.

If there are any other areas that the court, or that Your Honour would wish me to canvass, I'm happy to deal with them, but otherwise that is my submission.

THE JUDGE: Thank you.

Mr. N., do you have any evidence? You made some reference to some things that you had.

MR. N.: Ma'am, Your Honour, in terms of what the counsel for the officers has said, I'm willing to concede that evidence concerning some of the complaints that I had made would not be feasible due to the fact that there was actually no injury that occurred during the interrogation and detention.

However, because of that, because that there is a lack of, of evidence, I'm concerned about the justice system, Your Honour. I have no intention to bring into disrepute the justice system at all. I, I am here solely on a constitutional matter. I cannot present any evidence about the allegations that I had made to the Commissioner. I simply represented how I experienced things to the Commissioner. And you know, the fact that I had woken up and suddenly I had no warning whatsoever when I opened the

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door, and everything, and police just rushed in. From that point on everything was fairly stressful for me because, you know, I was clearly innocent of the matter, you know.

And also -- not at the time, of course. Not at the time, of course, but during the --

THE JUDGE: Police didn't know.

MR. N.: -- the search and seizure, of course they didn't know. I'm willing to concede on that as well.

What I'm, what I'm not willing to concede on is the behaviour of the officers during the, the detention and the way they, you know, consistently, consistently interrogated me and repeated questions without legal counsel even after I had asked to speak to a lawyer.

They did admit to questioning me without legal counsel present. Again, I stress this matter.

However I'd like to focus Your Honour's attention to a matter about myself back in September 11, 2001. I was working at a hotel, in the tourism industry. I was mostly a citizen of Winnipeg most of my life but I was laid off from a job in the tourism industry directly as a result of a terrorist attack on the World Trade Center. Soon after the tourism industry fell apart and I was bereft of a job. So I returned to Winnipeg where family was so that I could seek support as well as my girlfriend, M. D., at the time, to seek support and to apply for EI until I could find a new job.

Now one of the circumstances of the probabilities involved in the, in the matter is that officers based part of their investigation on the fact that I had applied for a job at Kitchen Craft. Kitchen Craft is the location in question here. And I had previously worked at Kitchen Craft back in '93 for about six months, which I had left on goods terms with the company. And I reapplied and of course I was

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not given the position due to the fact that somebody more qualified for the spray painting position was, was hired. I had no, I had no issue with that whatsoever at all. In fact, I went to college. I took --

MR. WEINSTEIN: I'm just going to rise. I apologize. I'm going to rise at this point. This is -- in terms of this outlining of information. If this was stuff, or information that was before the Commissioner that it appears -- let's say the Commissioner did not deal with, then that is what's in the context of this hearing, that's appropriate. What is not appropriate is for new information --

THE JUDGE: This information is all contained within the Commissioner's file.

MR. WEINSTEIN: What's that?

THE JUDGE: This information is all contained within the Commissioner's file.

MR. WEINSTEIN: Well, but if --

MR. BOYD: Well --

MR. N.: I did not see. I do not see it.

And the fact that I do not see it is why I raise it now, because --

THE JUDGE: Well -- just hang on for a second, Mr. N.

MR. N.: -- I felt that it should have been brought up.

THE JUDGE: I'll hear the rest of your concern, Mr. Weinstein.

MR. WEINSTEIN: Well, if, again if, if Mr. N. can point to the fact that this is all information -- we don't doubt for a fact that the information about the Kitchen Craft and the relationship to that place of employment. But then to be explaining it either further or giving the

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background and I, I -- there was some liberty given to Mr. N. in terms of the, the --

THE JUDGE: Yes, he's not represented.

MR. WEINSTEIN: -- the issue.

And I'm sympathetic to, to his plight in terms of what had happened, but let's keep this in context of what the hearing is about. And that's why I just stand at this point. I mean, it has to be the information that was before the Commissioner and not any new or subsequent or extrinsic information just appearing for the first time in front of Your Honour.

THE JUDGE: Mr. N., Mr. Weinstein's point is well taken. The hearing is a review of the Commissioner's decision in light of the information that he had at the time.

Now is there anything else you wanted to say about that?

MR. N.: Yes, Your Honour.

My purpose for raising it was simply due to the fact that I, I feel that when police officers are making investigations of, of this nature I find the, the whole accusation and the matter to be grievous myself. I mean, to find the experience I went through, I find it to be quite grievous myself, actually, Your Honour. So I'm going to concede that to, to both the Commissioner and to him that the whole matter is grievous and vexatious, you know.

But I actually have here a letter in the file, which was submitted to the Commissioner as well, about, about my character, from M.D. No character, no investigation into my character was conducted prior to this, Your Honour, at all.

THE JUDGE: Prior to what?

MR. N.: Prior to the matter, prior to the police

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officers conducting their search. As well, there was no warrant issued for, for the search. They simply wrote -- got a document out and had M. -- permission --

THE JUDGE: They had, they had --

MR. N.: Yeah.

THE JUDGE: They had the permission of the owner of the apartment.

MR. N.: Had permission of the tenant. Yeah.

THE JUDGE: Yeah.

MR. N.: They, they spoke to her without legal counsel present at the, at the Kitchen Craft office as far, as far as I knew. She didn't have any legal counsel present either and it was actually her apartment that was being searched and not my own.

THE JUDGE: I think you're getting --

MR. N.: That was a little --

THE JUDGE: I hesitate to --

MR. N.: Well, I'm sorry if I sound like I'm getting off case here but she did give me a character reference. She did state through the whole, whole incident that I was, I was very cooperative, you know. She did state that I assume in order to just protect themselves they, they put handcuffs on me, of course.

THE JUDGE: Um-hum.

MR. N.: I, I'm fully aware of why police officers would do that. In fact, I resisted not at all, you know. I, I don't see why I was, was interrogated thus.

THE JUDGE: Mr. Boyd, is there any submission from the Commissioner?

MR. BOYD: I would just make a brief comment, Your Honour, with respect to one of the issues that my learned friend raised regarding the decision in number 6099.

At paragraphs 24 and 25 Judge Chartier basically

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found that in that case the complaint couldn't be characterized as vexatious but that there was a basis there for it being, having been dismissed on the basis of sufficiency of evidence. And the Commissioner just wishes to submit that that interpretation, that approach is something that we see as within reasonable interpretation of the Act in situations where it's demonstratable on file that the Commissioner has gone through a similar type of analysis.

I'd just like to point out there could conceivably be situations where analysis going to frivolous and vexatious might not necessarily go to sufficiency of evidence but in some cases it could. For instance, a frivolous and vexatious complaint could be based on a number of former complaints and that sort of analysis, whereas if the person is being difficult with repetitive proceedings of a similar nature, or something like that, as compared to a situation where the evidence just doesn't support the allegations made.

I'm not going to make any comment, and I think my learned friend has addressed this issue as to whether that was the case in this, in this case, but I would only submit that in a situation where the Commissioner's files are viewed and it's found that the Commissioner has undergone an appropriate analysis to lead to a decision under a different heading than is actually expressed, that that is something that was within the jurisdiction of the Commissioner. And a reviewing judge, in the Commissioner's submission, should have regard to that.

Thank you, Your Honour.

THE JUDGE: Thank you.

I'm going to ask if there's any last comment from Mr. Weinstein.

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MR. WEINSTEIN: No, Your Honour.

THE JUDGE: Mr. N.?

MR. N.: Yeah. So basically my submission to the court today, ma'am, is -- Your Honour, is to call for a re-opening of the file on the basis of the matter of habeas corpus.

THE JUDGE: Thank you.

MR. N.: In, just to make a quick note, in my brief, also in my original letter to the LERA Commissioner I had also made mention of, of my, of the fact that I felt that my constitutional rights were violated in that original document.

THE JUDGE: Thank you.

With respect to the -- I've read the file, the letters, the history of this and all of the brief that has been provided by the Commissioner. I'm not going to reserve my decision and right out a treatise on standard of review, and I'm not being facetious when I say that. I say that with all due respect to my colleague, Judge Chartier, who has put in an awful lot of work in reviewing and addressing the issue, as well as my other colleagues who have written on it as well.

This is a situation where the Commissioner did have to look at the facts. You can never avoid looking at the facts in a particular case. And taking all of the facts that were at his disposal, and this was investigated. There was the call history, there was the letter from the tenant of the building. There was a variety of information before the Commissioner on what exactly transpired in this particular situation.

I find that as a result of the information before the Commissioner, on review his decision was a reasonable one and the application for a further hearing is dismissed.

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(PROCEEDINGS CONCLUDED)

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CERTIFICATE OF TRANSCRIPT

I hereby certify the foregoing pages of printed matter, numbered 1 to 21, are a true and accurate transcript of the proceedings, transcribed by me to the best of my skill and ability.

JODY BROWN
COURT TRANSCRIBER

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