IN THE MATTER OF: The *Law Enforcement Review Act*, Complaint No. 6227

AND IN THE MATTER OF: A hearing pursuant to Section 17 of the *Law Enforcement Review Act*, C.C.S.M., c. L75

BETWEEN

T. M.	**)**	**Mr. T. M.,**
Complainant	**)**	**representing himself**
	)	
- and –	**)**	
	)	
Constable R. H.,	**)**	
Badge X	**)**	**Mr. Josh Weinstein**
Constable F. W.,	**)**	**representing the respondents**
Badge Y	**)**	
Constable J. C.,	**)**	**Hearing date scheduled:**
Badge Z	**)**	**October 30th, 2006**
Respondents	**)**	**Decision date: January 22nd, 2007**

HOWARD COLLERMAN, P.J.

Ban on Publication
It should be noted that pursuant to the provisions of s. 25 of the *Law Enforcement Review Act*, I have ordered that no person shall cause the respondents' names to be published in a newspaper or other periodical publication or broadcast on radio or television pending the determination of the merits of the complaint.

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

INTRODUCTION, JURISDICTION, ONUS OF PROOF AND STANDARD OF PROOF:

[1] The respondent officers are members of the City of Winnipeg Police Service and on or about April 11th, 2003, participated in an investigation arising first from a complaint made by Mr. T. M. and shortly thereafter a linked complaint allegedly filed by one L. K. In the course of this investigation various firearms and other items were seized from Mr. M.'s home, which is situated at XXX Alfred Avenue, Winnipeg, Manitoba. The investigation ultimately led to Mr. M. being charged with the offence of Uttering Threats pursuant to the provisions of s. 264.1 of the *Criminal Code of Canada*. Mr. M. filed his complaint pursuant to the provisions of the *Law Enforcement Review Act* on May 14th, 2003. He alleged that the officers committed the following disciplinary defaults, as defined under s. 29 of the aforementioned legislation:

> That on or about April 11th, 2003:
>
> 1. abused their authority by searching a residence at xxx Alfred Avenue, Winnipeg, Manitoba without lawful authority, contrary to s. 29(a) of the *Law Enforcement Review Act*.
>
> 2. abused their authority by using oppressive or abusive conduct or language on the complainant, contrary to s. 29(a)(iii) of the *Law Enforcement Review Act*.

[2] Mr. George Wright, Commissioner of the Law Enforcement Review Agency forwarded a letter to Mr. M. under date of July 18th, 2005, advising him in part as follows:

> Please be advised that Constable H., Constable W., and Constable C. have not admitted the disciplinary defaults that were presented to them with my letter dated June 15th, 2005...
>
> As a result, I have referred this matter to the Chief Provincial Judge for a hearing by a provincial judge based on the merits of your complaint, pursuant to s. 17(1) of the *Law Enforcement Review Act*....

[3] Having been assigned to preside over this matter, I directed that a pre-hearing take place on December 19th, 2005 at which Mr. M. advised that he had decided not to pursue one of the allegations initially made by him that the three officers in question:

> Abused their authority by using oppressive or abusive conduct or language on the complainant, contrary to s. 29(a)(iii) of the *Law Enforcement Review Act*.

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

Mr. M. confirmed the above decision at the opening of the hearing of this matter on October 30th, 2006 and as a result I proceeded to hear evidence and submissions only with respect to the one allegation of disciplinary default that the officers, on or about April 11th, 2003, abused their authority by searching a residence at XXX Alfred Avenue, Winnipeg, Manitoba, without lawful authority, contrary to s. 29(a) of the *Law Enforcement Review Act*.

[4] "Disciplinary default" is defined in s. 1 of the legislation as meaning any act or omission referred to in s. 29. This section in turn, commences as follows:

> 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:....

One category of acts or omissions referred to in s. 29 relates to an abuse of authority, which in turn includes seven examples of conduct which fall within that general category. Searching a residence without lawful authority is not specifically included in the aforementioned seven examples; however, it must be kept in mind that the legislation is drafted in such a way so as to provide these seven different forms of conduct as no more than examples of what could fall within the general scope of "abuse of authority". It is open to conclude that the conduct alleged by Mr. M. falls within the reference of "abuse of authority", and counsel for the respondents did not raise this as an issue. At this point I am prepared to accept that the conduct alleged is capable of falling within the general term "abuse of authority".

[5] Support for the above conclusion can be found in the law cited by Wyant, P.J. (as he then was) in the decision of *Graham v. Constables B.G. and J.B.*, wherein at page two of same he stated:

> The first issue deals with the jurisdiction of this court on complaint number one. The applicant, and counsel for the Law Enforcement Review Agency, argue that the enumerated offences in section 29(a) are not exhaustive but only illustrative of the types of "abuse of authority" that can be committed by a Peace Officer. Counsel for the respondents indicates that the enumerated articles in section 29(a) are inclusive and that, therefore, there is no jurisdiction or authority to deal with a complaint of abusing authority by becoming involved in a civil dispute.
>
> I have been provided with extensive briefs from both counsel on behalf of the Commissioner and counsel on behalf of the respondents. Having reviewed those precedents, I am persuaded by the argument of counsel for the Commissioner. Sub-clauses (i to vii) of section 29(a) of the ***Law Enforcement Review Act*** are preceded by the term "including". I agree with counsel for the Commissioner that

an abuse of authority under section 29(a) is not limited to only those types of conduct that specifically fall within the seven enumerated sub-clauses but will include anything that falls within the general meaning of "abuse of authority". The issue revolves around the meaning and purpose of the word "including". There is authority for the general proposition that the terms "includes" or "including" are enlarging whereas the terms "mean" or "meaning" are restricting. Quoting from the Privy Council's decision in ***Dilworth v. New Zealand Commissioner of Stamps*** [1899] AC. 99 @ pages 105 and 106:

> The word "include" is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to the natural import, but also those things which the interpretation clause declares that they shall include.

Section 12 of ***The Interpretation Act*** C.C.S.M. C170, says as follows:

> Every enactment shall be deemed remedial, and shall be given such fair, large, and liberal construction and interpretation as best ensures the attainment of their objects.

I find that the context in the ***Law Enforcement Review Act***, in which the word "including" was used, was not meant to be restrictive in any fashion. What may be deemed to be an "abuse of authority" can be determined on a case by case basis, the particulars of which can be itemized and therefore answerable by a respondent.

[6] It should be noted that pursuant to s. 1(2) of the legislation a provincial judge acts as *persona designata* and not as a Court when performing a duty or exercising a power under the said legislation. A provincial judge to whom a complaint has been referred for a hearing on the merits pursuant to s. 17(1) possesses all the powers of commissioners under Part V of the *Manitoba Evidence Act*, and operates in accordance with the rules of procedure in summary conviction proceedings unless a provision within the said legislation or accompanying regulations indicates otherwise. A provincial judge may receive and accept such evidence and information on oath, affirmation, affidavit or otherwise as the judge in his or her discretion considers appropriate, whether or not that evidence or information would be admissible in a court of law. [see sections 24(3), 24(4) and 24(5)].

[7] It must be kept in mind that the <u>burden of proof</u> in these proceedings rests with the complainant to prove that the respondent officers did indeed commit the

disciplinary defaults which have been alleged. The respondent officers bear no burden to prove that they did not commit any disciplinary defaults.

[8] Section 27(2) of the legislation refers to the standard of proof which is required at a hearing on the merits of the complaint. This section reads as follows:

> The provincial judge hearing the matter shall dismiss a complaint in respect of an alleged disciplinary default unless he or she is satisfied on clear and convincing evidence that the respondent has committed the disciplinary default.

[9] The term "clear and convincing evidence" has received the benefit of substantial consideration by my colleagues, and I can do no better than to quote my colleague L. Giesbrecht, P.J., who dealt with the issue in her reasons for decision in the Law Enforcement Review Act hearing of complaint #5328. She stated at pages three and following of said decision, that:

> The term 'clear and convincing evidence' has not been the subject of the same kind of judicial scrutiny or commentary as have the terms 'beyond a reasonable doubt' and 'on a balance of probabilities' in the criminal and civil context. Nevertheless a number of decisions have considered what is required for proof on clear and convincing evidence.
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> My colleague Wyant P.J. (as he then was) in his August 14, 2000 unreported L.E.R.A. decision, ***Graham v. Constables G. & B.*** concluded at paragraph 7, that the term 'clear and convincing evidence', "speaks to the quality of the evidence necessary to meet that standard of proof on a balance of probabilities".
>
> He referred to the case of ***Huard v. Romualdi*** (1993), 1 P.L.R. 217 where it was held that clear and convincing proof in proceedings of this kind must be based on cogent evidence because the consequences to a police officer's career flowing from an adverse decision are very serious.
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> My colleague Chartier P.J. in his October 26, 2000 unreported L.E.R.A. decision ***Anderson v. Constables D. and K.*** held that the standard of proof under section 27(2) of the Act is a high standard. He stated at page 3 of his decision:
>
> > (page 4) 'The evidence must be clear; it must be free from confusion. It must also be convincing which, when combined with the word 'clear', in my view means that it must be compelling'.
>
> My former colleague Enns P.J. in his December 3, 1998 unreported L.E.R.A. decision ***Sutton v. Constable D.*** also discussed the meaning of the term 'clear and convincing evidence'. He held that "the onus of proof is something less than in a criminal case, but something more stringent than a balance of probabilities as in a civil case..." He concluded as follows at paragraph 16:

> In themselves, the terms are relatively plane, and applying ordinary dictionary definitions, it may be said that the degree of proof must be easy to see or transparent, persuasive of being true, and essentially reliable.

> In his June 21, 1996 L.E.R.A. decision in ***Weselake v. K.*** Cohan P.J. adopted the interpretation of the term 'clear and convincing evidence' that was approved by the British Columbia Court of Appeal in the case of ***College of Physicians and Surgeons of British Columbia v. J.C.*** (1992), W.W.R. 673. The Court of Appeal in that case accepted the trial judge's comments as to what is meant by clear and convincing evidence. The trial judge indicated that "a high standard of proof is called for going beyond the balance of probabilities and based on clear and convincing evidence" and that the case must be "proven by a fair and reasonable preponderance of credible evidence." The trial judge held that the most helpful term used in various judicial pronouncements on this subject is 'convincing' and that "to be convinced means more than merely to be persuaded."
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> (It should be noted that in the L.E.R.A. decisions I (L. Giesbrecht P.J.) have referred to above, I have used initials rather than the full names of the officers involved as in each case the officer's name was the subject of a ban on publication.)
>
> Based on this review of the cases I conclude that a complainant under the Act must satisfy a relatively high standard of proof. I agree with respondents' counsel, that the standard is higher than mere proof on a balance of probabilities. While proof beyond a reasonable doubt is not required, I must be convinced by clear and compelling evidence. I agree with the judge in the B.C. case cited above, that to be convinced means more than merely to be persuaded.

I concur with my colleague L. Giesbrecht P.J. in her assessment of what amounts to the standard of proof required in these hearings.

[10] In considering whether the officers' abused their authority by searching the residence at XXX Alfred Avenue without lawful authority, one must consider what amounts to "lawful authority" for searches of the type undertaken by the respondent officers. Once again I refer to my colleague L. Giesbrecht P.J. who dealt as well with this subject in the aforementioned Law Enforcement Review Act hearing of complaint #5328. My learned colleague had the following to say on the subject (at pages 30 and ff.):

> Section 8 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) provides that everyone has the right to be secure against unreasonable search and seizure. That section is designed to be a safeguard against unreasonable state-sponsored intrusions on an individual's privacy. There was no warrant to search in the present case. Where a search is conducted without a warrant it is presumed prima

facie to be an unreasonable search: See ***Hunter v. Southam Inc***. (1984), 14 C.C.C. (3d) 97 (S.C.C.).

There are three requirements that must be met for a search to be reasonable: (1) it must be authorized by law; (2) the law itself must be reasonable; and (3) the manner in which the search was carried out must be reasonable: See ***Collins v. The Queen*** (1987), 33 C.C.C. (3d) 1 (S.C.C.).

Consent

Individuals may waive their privacy rights under the *Charter* and may consent to the police doing what they otherwise would not be authorized to do. At common law the police may conduct a lawful search if there is consent to the search. Where the lawfulness of a search depends on consent there must be an informed and true consent. In this regard the comments of Doherty J.A. speaking for the Court in ***R. v. Wills*** (1992), 70 C.C.C. (3d) 529 (Ont.C.A.) at pages 540-541 are particularly instructive:

> Certain underlying values give definition to the concept of consent in the present context. Members of the community are encouraged to co-operate with the police. Co-operative policing will often be less intrusive and more effective than confrontational policing. ...Co-operation must, however, be distinguished from mere acquiescence in or compliance with a police request. True co-operation connotes a decision to allow the police to do something which they could not otherwise do. Acquiescence and compliance signal only a failure to object, they do not constitute consent.
>
> The dynamics which operate when a police officer 'requests' the assistance of an individual cannot be ignored. It would be naive to equate most requests made by a police officer with similar requests made by one private individual to another. The very nature of the policing function and the circumstances which often bring the police in contact with individuals introduce an element of authority, if not compulsion, into a request made by a police officer. This is particularly true where the request is made of someone who is the target of an ongoing investigation....
>
> ...**When the police rely on the consent of an individual as their authority for taking something, care must be taken to ensure that the consent was real. Otherwise, consent becomes a euphemism for failure to object or resist, and an inducement to the police to circumvent established limitations on their investigative powers by reliance on uninformed and sometimes situationally compelled acquiescence in or compliance with police requests...** (Emphasis added)

> Doherty J.A. expanded on what is required for a valid consent to a search in ***R. v. Lewis*** (1998), 122 C.C.C. (3d) 481 at paragraph 12. He held that while the police do not have a duty to advise a person of the right to refuse to consent to a search, failure to do so may lead to a violation of s. 8 where the police conduct can only be justified on the basis of an informed consent. He stated that "it is well established that a person cannot give an effective consent to a search unless the person is aware of their right to refuse to consent to that search..." and that if the police do not tell an individual of the right to refuse to consent to a search they "run the very real risk that any apparent consent will be found to be no consent at all..."
>
> Iacobucci J. for the majority in ***R. v. Borden***, [1994] 3 S.C.R.145 at paragraph 34 held that in order for a consent to be effective "the person purporting to consent must be possessed of the requisite informational foundation" for a true relinquishment of the right to be secure from an unreasonable search or seizure.

FACTS

[11] T.E.M. advised that he was forty years of age and that he had purchased a home at XXX Alfred Avenue, which he described as being in the North End of Winnipeg near the Strathcona School. He stated that although people in the area were attempting to revitalize this part of the city, it still experienced a good deal of trouble. He filed a series of eight photographs (Exhibit 1), depicting various angles of his home and property. Photograph number three of the series of eight photographs depicted the rear of XXX Aberdeen Avenue, which he stated was situated in such a position in relation to his home that when he walked into his back yard towards his garage, he would of necessity have to look at this property. He described XXX Aberdeen Avenue as a triplex rental property, and that some of the inhabitants of said property had caused him problems which led him to phone the police on April 11th, 2003. He referred to the two occupants at XXX Aberdeen Avenue who were causing him difficulty as L. K. and her boyfriend J. D. S. (phonetic). Mr. M. stated that Ms K. was trying to entice him to fight with her boyfriend S. He described Ms K. as being intoxicated, that she had a beer bottle in her hand and that she threw it at him or into his property. Mr. M. stated that K. and her boyfriend shook the gate depicted in photographs four and five (Exhibit 1) and in the process bent same. Mr. M. claimed as well that one or both of these parties damaged the overhead door to his garage by kicking panels two and three (from the bottom up) and that same is depicted in photograph number seven.

[12] Mr. M. stated that at one point during this confrontation, apparently after Ms K. had enticed him to fight with her boyfriend and threw the aforementioned beer bottle, he, that is M., said to her:

> Would you like a ride to the Remand Centre tonight?

He indicated that at this point the small side door of his garage was open and he was in the process of locking same. He indicated that she yelled out to him:

> Lock it up good, I have friends who can get past those locks.

He stated that it was at this time that he returned to his home and he believed that it was at this point that they went to the overhead door of his garage and caused the damage referred to earlier.

[13] At this point which he estimated as being between 7:30 p.m. and 8:00 p.m. on April 11th, 2003, he went into his home and phoned the police on a non-emergency basis. He indicated that he waited for the police to attend, but by this point, had completed a twelve hour shift at work as a power engineer for the Province of Manitoba and had as well done some repair work on his van. He stated clearly that he was tired. He advised that the police dispatcher had phoned his home on two occasions following his initial call to inquire as to the state of the complaint. He stated that when the police officers actually attended his home and spoke to him, they advised him that they had attended earlier but that he had not answered the door. In cross-examination Mr. M. conceded that the police may have attempted to contact him earlier but that he may have fallen asleep.

[14] He stated that it was dark outside by the time police made contact with him, and on that occasion they spoke to him about the neighbours' complaint against him.

[15] Constable F. W. testified in response to Mr. M.'s allegations of a disciplinary default, by stating that he and his partner Constable J. C. were advised at 8:17 p.m. of Mr. M.'s complaint concerning his neighbours and that after taking other priorized calls, were dispatched to Mr. M.'s home at 10:01 p.m. They attended to the side door of XXX Alfred Avenue and knocked, but received no answer. Constable W. indicated that en route to Mr. M.'s home he and his partner received what he described as a "linked call"; that is a second call or complaint which was factually related in some fashion to the first complaint made by Mr. M. The complainant in this "linked complaint" was L. K. Accordingly, when they received no response to their initial knocking at Mr. M.'s door, they proceeded to

Ms K.'s residence at XXX Aberdeen Avenue to deal with her complaint. It should be recalled that XXX Aberdeen Avenue backed onto XXX Alfred Avenue. Constable W. stated that he found Ms K. to be somewhat under the influence of alcohol, distraught and crying and that she complained about threats having been made by the first complainant, Mr. M. The constable stated that he and his partner collected information from the second complainant and then went back to check it off with the first complainant. It should be noted that Constable W. had advised that at this point in time they had no cell phone available to them within the cruiser car and that accordingly, they were unable to make a phone call to Mr. M.'s home when he failed to respond to their knocking at his door.

[16] When the police finally did make contact with Mr. M. they spoke to him concerning the neighbour's complaint and he in turn, asked them why they did not come to talk to him first. Constable W.'s explanation as to how they attended at Mr. M.'s home, received no response and therefore followed up on the "linked complaint" is believable and sheds some light and perspective to Mr. M.'s concern that they had not spoken to him first. Clearly an attempt had been made to do so, and when that failed the police followed up on the second and related complaint which emanated from a complainant who lived directly behind Mr. M.

[17] The police advised Mr. M. that Ms K. had complained that he, that is Mr. M., had planted an F.M. communicator – a wireless device – within her home and they had taken possession of that communicator from Ms K. It would appear that one of the officers actually had possession of that item when he attended Mr. M.'s home. Mr. M. advised the police that indeed that had been his communicator, that it was broken and that he had thrown it into the garbage. Mr. M. advised that he had had several of these communicator devices and aside from the one which the police seized from Ms K., they eventually took possession of a second such device which was located in Mr. M.'s garage.

[18] The police apparently asked him as well if he had a pair of binoculars and he indicated that he did. He advised the police that he pursued a hobby of target shooting and belonged to the Selkirk Rifle Club. I understood this to be in response to questions by police as to why he would have binoculars. The police ultimately seized a pair of binoculars from him. He stated that the police asked him if he had a pair of binoculars and he handed them to the police. These binoculars were apparently in a bedroom and he went and retrieved them for the police.

[19] Mr. M. recognized the fact that Ms K. apparently had made a number of allegations and he understood why the police might be interested in following up

on same, but was of the opinion that the police had spent no time investigating his complaint with respect to property damage being caused by K. and her boyfriend. He stated that instead of investigating his complaint, they "went with" the complaint made by Ms K. and her boyfriend and by doing so, they "tunneled". I took this term to mean that the police took a narrow approach to the investigation.

[20] Constable W. testified that after he and his partner originally had knocked at Mr. M.'s door and received no response, they passed through his back yard in order to attend to the second complaint at XXX Aberdeen Avenue. He stated that at this point he observed beer bottles on the ground in Mr. M.'s back yard but did not notice any damage to the garage. He did state that given the time of day when they passed through Mr. M.'s yard in order to respond to the second complaint, that the lighting conditions may have been such that they overlooked the damage to the garage door.

[21] Mr. M. suggested that Ms K. and her boyfriend had "cooked up" a story to keep them out of trouble and as a response to Mr. M.'s complaint. Constable W. stated that in the course of relating her complaint concerning Mr. M. to this officer and his partner, it is alleged Ms K. stated that Millar told her:

> You better watch out, I'll come get you – I am watching you – God has sent me to be with you.

Ms K. did not testify at the hearing, and as a result could not be questioned with respect to this allegation; however, presented with this allegation, one can well understand why the police might be interested in ascertaining whether or not Mr. M. possessed any more of these communication devices or binoculars. It should be recalled that as part of her complaint she had alleged that Mr. M. had planted one of these listening devices within her home and in fact provided police with just such a device. In addition, the reference to "watching" Ms K. and that God had sent Mr. M. to be with her would clearly motivate an investigating officer to ascertain whether or not Mr. M. indeed had the wherewithal to carry out what allegedly had been threatened.

[22] Mr. M. stated that he had no issue with respect to the police seizure of his firearms as he accepted that they did so in the interests of public safety. He was concerned, however, about the fact that the police carried out what he described as a "fishing expedition" in looking for the binoculars. He stated that they could not go through his house looking for things to base a charge on. He stated that he did not believe that one could go through someone's house and look for things such as

binoculars and the F.M. communicator without first obtaining a warrant for doing so.

[23] Mr. M. stated that the police to his knowledge attended his home on three occasions on the night in question: that on the first occasion they questioned him about his guns and he invited them into the house and showed the police both the guns and the registration papers required to possess the guns. He indicated that the officers were satisfied and left. He indicated they attended a second time, at which point one of the officers showed him the F.M. communicator which they had seized from Ms K. He went on to state that they attended on a third occasion, at which point Officer H. attended along with Officers W. and C. and a search was commenced. Apparently the police had knocked on Mr. M.'s door and asked him to step out of his house in order to make sure that the area that they intended to search was safe. Mr. M. indicated that eventually he sat in his kitchen with Officer H. and found this officer to be a gentleman. In fact, Mr. M. stated that if the officers had left the premises after seizing just the firearms, there would have been no issue or complaint but that indeed they had gone further, searched the home and ultimately took a pair of binoculars and another F.M. communicator.

[24] Mr. M. advised that this police investigation led to him being charged with the offence of uttering threats. Ultimately, the Crown authorities entered a "stay of proceedings" with respect to this charge and on November 26th, 2003, acting on the advice of whoever was representing him at the time, he entered into a peace bond requiring him to comply with various conditions for a period of one year from that date. He stated that he was not aware that the peace bond proceeding was based upon Ms K. fearing on reasonable grounds that he, that is, Mr. M., might cause personal injury to her or otherwise cause a breach of the peace. It is hard to imagine that this information was not conveyed to him prior to his entering into the peace bond; however, that is the position that he has taken and no evidence was presented to me to the contrary.

[25] Mr. M. advised that as of April 11th, 2003 he had been employed by the Province of Manitoba as a power engineer for approximately 20 years, and that upon having been charged with the offence of uttering threats he was demoted and suffered a loss of approximately 30% of his salary. He stated that the charges led to a "witch hunt" of sorts at his place of employment, and even when the Crown Attorney entered a "stay of proceedings" with respect to the uttering threats charge, his employer, apparently understanding that the Crown could reinstate the charges at any time within one year from the date of the "stay of proceedings", maintained his demotion for that one-year period. Ultimately, his position at work was

reinstated. He advised further that he had agreed to a one-year prohibition with respect to possessing firearms and during that period they were left in the possession and control of a third party. Eventually his firearms were returned and apparently the firearms prohibition has terminated.

[26] Mr. M. stated in direct examination that he was of the belief that the police did not have the right to take articles from his house without a warrant and that they should have investigated his complaint against Ms K. and her boyfriend rather than just acting on the complaint emanating from Ms K. with respect to his conduct. He was of the belief that if the police had investigated his complaint, the charges against him would never have materialized.

[27] He stated again in cross-examination that his complaint primarily related to the warrantless search for and seizure of binoculars and the F.M. communicator. Counsel for the respondent officers confronted Mr. M. with the fact that he had signed a complaint and supporting statement at some point during the L.E.R.A. proceedings which included therein a question as to the nature of Mr. M.'s specific complaint against the police, and that in his response he did not make any reference to the illegal seizure of the binoculars and/or the F.M. communicator. The respondent officers' counsel suggested to Mr. M. that his real complaint was that the police did not fully investigate his complaint against Ms K. and her boyfriend as he felt they should have, and that as a result his employment status was impacted and that he felt that people looked at him askance because of all of this, in spite of the fact that a "stay of proceedings" had been entered with respect to the charge of uttering threats. Mr. M. stated that he was of the belief that the police always act in good faith and that clearly they had done so on this occasion; however, they should have effected the seizures of the F.M. communicator and binoculars only after having obtained a warrant.

[28] The respondent officers' counsel reviewed the chronology of events with Mr. M., underscoring the fact that as a result of the allegations of April 11th, 2003 Mr. M. was charged with the offence of uttering threats and released on a promise to appear on May 12th, 2003 after which he, that is, Mr. M., filed his complaint on May 14th, 2003. Although it wasn't stated, the inference seemed to be that Mr. M.'s complaint against the police officers with respect to their committing disciplinary defaults was a direct response to his having been charged with the offence of uttering threats. Mr. M. responded by stating that while he was at the police station being processed for the charge of uttering threats, he was supplied with a brochure which referred to the "*Law Enforcement Review Act*", and that up until that point in time he did not even know that such a piece of legislation existed. He indicated

that he acted on the information he obtained from the brochure, and was of the belief that the subject matter of his complaint was covered by that legislation. He thereafter stated that all he asked from the police officers was that they apologize to him and that when they chose not to provide him with that apology he pursued his complaint in accordance with the provisions of the *Law Enforcement Review Act*.

[29] In the course of cross-examination he talked about the interchange between himself and the officers when they attended upon his residence. He stated that he had invited the officers into his home, and that he did not, and would not ask the officers to obtain a warrant. He indicated that he felt that he had nothing to hide and told the officers that he had several pairs of binoculars and indeed provided one pair of said binoculars to the officers. He stated as well that the officers asked him if the F.M. communicator which they had seized from Ms Kubica was his and he indicated that that indeed was the case and that at one point he had three of them. He indicated that the police asked him where the other F.M. communicators were located and he said that they probably were in his garage, after which they attended to the garage, examined various items and found a communicator. He stated that if he had known where it was specifically, he would have given it to them. He then stated that he thought all they wanted to do was see it, not seize it and use it against him. He stated that they were fishing and that that "was not allowed" and he found all of this to be a very disturbing episode in his life. With respect to the allegation made by Mr. M. that the police were "fishing" when they looked for and seized a pair of binoculars and a second F.M. communicator, it must be kept in mind that during the course of the police investigation into the complaint made by Ms K., she apparently had advised them that she had located the F.M. communicator which they seized from her, under her bed, and that when Mr. M. was shown the communicator he accepted and stated that that indeed was his.

[30] Mr. M. reiterated that he never asked the police to obtain a search warrant.

[31] Constable F. W. testified in response to the allegations made by Mr. M. He indicated that he had eight and a half years of experience as a police officer with the City of Winnipeg Police and as of April 11th, 2003, he had been assigned to District 3 located on Hartford Avenue in the City of Winnipeg and that on that date he had been partnered with Constable J. C. As indicated earlier in these reasons for decision, Constable W. testified that they were dispatched to and subsequently responded to Mr. M.'s complaint at 10:01 p.m. on the date in question, that they attended his home at XXX Alfred Avenue, knocked on the side door of that

residence and received no response, as a result of which they proceeded to investigate the "linked" complaint which they had received while en route to Mr. M.'s home. In fact, Constable W. stated that the two complaints had been received within a couple of minutes of one another, and that in each case the dispatcher had provided them with details of the complaints as made. Constable W. advised that he found Ms K. to be under the influence of alcohol to some extent, distraught and crying, and that she alleged that Mr. M. had threatened her. Based on the information which they received from Ms K., Constables W. and C. attended Mr. M.'s home, and again based on the information received, they asked Mr. M. if he had a military background and owned any binoculars. They asked Mr. M. as to his version of what had happened and took down the information as he provided it to them. As stated, Mr. M. was asked whether or not he owned any binoculars and when he responded "Yes, I have several pairs.", he appeared to be nervous, shaking and wavering. He was asked whether or not he owned firearms and was then asked if he recognized the F.M. communicator which Constable C. then had in his possession. He responded by stating that the communicator was his. Constable W. indicated that in his mind the matter was still under investigation. Mr. M. was not charged at that point in time but was advised to stay away from Ms K.. He indicated that Ms K. was given similar advice; that is, to stay away from Mr. M. Constables W. and C. returned to their district station and reviewed the investigation with their supervisor, Sergeant P. Constable W. stated that he was acting in part on a gut reaction that the situation as between Mr. M. and Ms K. could escalate. It was decided to return to Mr. M.'s home and seize the firearms, and one R. H., who was at the time a constable acting in a sergeant's position, was instructed to attend with the other officers to oversee the seizure of the firearms. They left the district station at 12:05 a.m. and arrived on the scene at 12:15 a.m. Constable W. stated that they knocked on Mr. M.'s door and when he responded they advised him of the situation and explained the procedure that would be undertaken. Constable W. stated that Mr. M. invited the officers in, took them to his gun cabinet and eventually the firearms were seized. Constable W. stated further that Mr. M. was spoken to with respect to possessing binoculars and as a result Mr. M. presented either him or Constable C. with a pair of binoculars. He said he produced them and handed them to the police. Once the guns were removed from the premises, Mr. M. and the constables attended to the garage at the rear of the premises and Mr. M. opened the garage door. Apparently he was not sure exactly where within the garage the additional F.M. communicators could be found, so items within the garage were examined and a communicator was found. Constable W. stated that at no time did Mr. M. ask them to leave the premises. He stated further that originally they had attended Mr. M.'s residence to seize the

firearms but the other items presented themselves to him and that Ms K. earlier on had made reference both to binoculars and to a communicator.

[32] In an attempt to explain why he did not obtain a search warrant for the last two mentioned items, Constable W. stated that if he had left to obtain a warrant, the items in question could have been removed or otherwise disposed of. He did not comment upon nor was he asked concerning the option of leaving one of the officers present at the scene while another officer attended to obtain a warrant, which very probably could have addressed the concern which he articulated. Constable W. stated as well that had he or one of his fellow constables proceeded to seek a warrant, it would have been 3:00 or 4:00 in the morning by the time they had completed that process whereas having seized the items in the manner in which they did, they were able to clear the scene by 1:00 a.m.

[33] Constable W. advised that the details of Mr. M.'s complaint as noted by the dispatcher were to the effect that Mr. M.'s neighbour across the back lane was in an intoxicated state and was throwing beer bottles and other debris into the complainant's yard and that, further, this neighbour was taunting Mr. M. to fight with her boyfriend. This original complaint included details that the complainant, that is, Mr. M., did not know these neighbours and felt that the situation was escalating. The constable advised that when they had attended at Mr. M.'s side door the first time and received no response, they had looked for damage within the yard but found none. If indeed Constable W.'s recitation of the details of the complaint as originally conveyed by the dispatcher is complete and correct, there is no reference to damage being done either to a fence or a garage door. As of the time that Constable W. and his partner examined the yard they had no further information concerning the complaint, as at that point they had not yet had an opportunity to speak to Mr. M. It was at that time that they turned their attention to the linked complaint and having received specific details with respect to that complaint from the complainant in <u>that</u> case, they then returned eventually to Mr. M.'s home and followed up on the information they had received to that point.

[34] Officer R. H. testified that he had been a constable at the time in question, that he had 16 years of service with the City of Winnipeg Police Force and currently, and for the past one and a half years, has held the rank of sergeant. He confirmed in his testimony that on the date in question the police force was short one street supervisor in the district he was assigned to and as a result he had been "bumped up" to the position of acting patrol sergeant. He advised that Sergeant R. P. was his senior officer on April 11th, 2003. Sergeant H. advised that on April 11th, 2003 Sergeant P., who at that time had approximately 25 years of

service and experience with the Winnipeg Police Force, called him in and reviewed the linked complaints with him. It was decided by the officers that it was in the public interest to seize Mr. M.'s firearms and Sergeant H. proceeded in a separate cruiser car to the scene to oversee that process. Sergeant H. indicated that they attended Mr. M.'s home, knocked on the door and when Mr. M. answered same he was told that the police had received an allegation of a threat and that for public safety reasons they intended to seize his firearms. This officer indicated that Mr. Millar was cooperative. He sought information from the police as to how ultimately he would be able to obtain the return of his firearms and questioned them with respect to a firearm prohibition which apparently they had spoken to him about. Sergeant H. indicated that they had a concern for Ms K., and that they had as well received information from other neighbours.

[35] Sergeant H. indicated that Mr. M. was asked if he had a pair of binoculars, and after responding that he did, Mr. M. went into another room in the house and retrieved them. The sergeant stated that he believed that Mr. M. was aware of the allegations made against him and specifically of the neighbours' concern about his use of binoculars and further that an F.M. communicator had been located under Ms K.'s bed. Apparently Ms K., in the course of her complaint, had alleged that she was being listened to and as a result the police asked Mr. M. if he had additional F.M. communicators. When he was asked, he responded in the affirmative and that they could be located in his garage somewhere. He thereafter directed the police officers to his garage, attended with them and unlocked the door. This officer indicated that both Mr. M. and the police officers rummaged through various items in the garage and found the communicator. The sergeant indicated that several of these devices were located and the police seized only one of the devices which matched the description of the one seized from Ms K.

[36] Sergeant H. described Mr. M. as being very cooperative, and he was of the belief that Mr. M. wanted to give the communicator to the police. He described the police conversations with Mr. M. as being respectful and even friendly.

[37] Sergeant H. repeated Constable W.'s explanation for not obtaining a warrant; indicating that if they had left the scene to obtain such a document, the items in question might disappear. He stated that he felt it was his responsibility, having them in hand, to ensure that they were seized. As was the case with Constable W., this officer was not questioned with respect to any options that may have been available to him which would have ensured the safe keeping of the items in question while at the same time providing them with an opportunity to seek a search warrant to ground their seizure.

ANALYSIS:

[38] Although not specifically referred to during the presentation of evidence at this hearing, I am assuming that the respondent officers relied upon the provisions of s. 117.04(2) of the *Criminal Code* to carry out a search of Mr. M.'s premises and to seize the weapons, ammunition and related authorizations, licences and registration certificates as itemized on what has been marked as Exhibit 2.

[39] Section 117.04(2) reads as follows:

> Where, with respect to any person, a peace officer is satisfied that there are reasonable grounds to believe that it is not desirable, in the interests of the safety of the person or any other person, for the person to possess any weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, the peace officer may, where the grounds for obtaining a warrant under subsection (1) exist but, by reason of a possible danger to the safety of that person or any other person, it would not be practicable to obtain a warrant, search for and seize any such thing, and any authorization licence or registration certificate relating to any such thing that is held by or in the possession of the person.

[40] As indicated in the above referred to subsection of the *Criminal Code*, the actions authorized by this provision may be undertaken only where (a) the grounds for obtaining a warrant under subsection 1 exist, and (b) by reason of a possible danger to the safety of that person or any other person it would not be practicable to obtain such a warrant.

[41] Subsection (1) of s. 117.04 to which reference is made in subsection 2, reads as follows:

> Where, pursuant to an application made by a peace officer with respect to any person, a justice is satisfied by information on oath that there are reasonable grounds to believe that the person possesses a weapon, a prohibited device, ammunition, prohibited ammunition or an explosive substance in a building, receptacle or place and that it is not desirable in the interests of the safety of the person, or of any other person, for the person to possess the weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, the justice may issue a warrant authorizing a peace officer to search the building, receptacle or place and seize any such thing, and any authorization licence or registration certificate relating to any such thing, that is held by or in the possession of the person.

[42] There was no challenge undertaken with respect to whether the circumstances existed which would make it appropriate for the police to act in accordance with s. 117.04(2); that is, whether a situation existed which would not

make it practicable to obtain a warrant before searching Mr. M.'s premises. Mr. M. by his evidence in court made it clear that he had no issue with respect to the police seizure of the firearms, ammunition and related certificates, licences and registration certificates. He accepted that the police were acting in the interests of public safety in so doing.

[43] It should be noted that s. 117.04, subsections (1) and (2) of the *Criminal Code* do not authorize the seizure of items beyond those referred to specifically in the enactment. Thus the search for, and/or the seizure of, the FM communicators and the binoculars would have to be founded upon an authorization emanating from some other source.

[44] The respondents take the position that the complainant, M., cooperated with them at all times; that this cooperation extended beyond merely agreeing to relinquish his firearms and ammunition, but as well to producing a pair of binoculars for the officers when asked if he had such an item, and to advising the officers when asked, that he had additional FM communicators similar to the one seized from Ms K. and even to facilitating their ultimate production by taking the police to his garage, unlocking and opening the garage door and if not assisting them, then certainly not preventing them from rummaging through items within the garage until they were found.

[45] It is instructive to look once again at portions of Mr. M.'s evidence with respect to these items:

1. He stated that he accepted that the communicator in the possession of police (as seized from Ms K.) was his, stating that it looked like his and that he had three of them.

2. That when the police asked where these other communicators were, he responded by saying probably in the garage and that thereafter, he was present when they went through the items in the garage and found them. He stated that if he had known where they were, he would have given them to the police. He stated as well at this point, that he thought they wanted to see it – not seize it and use it against him. I have difficulty in accepting this last comment. By the time this particular event, that is, the locating of the FM communicators took place, Mr. M. had to be aware that the police were pursuing an active complaint concerning his conduct, and that an investigation was underway. By this time they had been at his home on several

occasions within a short span of time and had related to him that they had received a complaint from a neighbour, and as a result, in the name of public safety, thought it appropriate to seize his weaponry. I have concluded on the basis of the evidence presented to me that Mr. M. well knew at this point in time that he was the subject of a criminal investigation.

3. With respect to the binoculars, he testified that he realized that the police must have had information that he was in possession of one or more pairs of binoculars. He did not challenge the police with respect to this information and cooperated with them.

4. He stated that he invited them into his home. He did not tell them "go get a warrant", and he stated that he would not have said such a thing to them. He stated that he felt that he had nothing to hide. He told them that he had several pairs of binoculars and he in fact gave a pair of binoculars to the police.

5. He pointed out and identified the three respondent officers and stated "I must say I have no problem with any of the officers".

6. With respect to the respondent Officer H. in particular, he stated, that he had no difficulty with him and found him to be very much a gentleman.

7. He stated that he never asked them to get a warrant.

[46] In the circumstances I have concluded that the officers had a reasonable basis for believing that Mr. M. had provided them with his consent to search for and seize the binoculars and FM communicators, and that although the evidence does not specifically disclose that the officers had provided him, chapter and verse, with respect to why they were searching for and seizing these items and what use they may make of them upon seizure, a conclusion that he in fact did not consent to the search and seizure and that if he did consent, that same was uninformed, would be difficult to support based upon the evidence presented. The evidence that might lead to such a conclusion is neither clear nor convincing.

[47] With respect to the issue as to whether a *Charter* breach can constitute an abuse of authority and thus a disciplinary default, I refer to the decision of my colleague Marva Smith P.J. in the *Law Enforcement Review Act* decision relating

to complaint #6180. At page 14, paragraph 69 and following of her decision she stated:

> (69) The issue then arises whether a *Charter* breach can constitute an abuse of authority and hence a disciplinary default. I agree with colleagues who have indicated that a *Charter* breach, in itself, does not automatically constitute a disciplinary default. But I also conclude that careful scrutiny needs to be afforded to apparent disregard for such fundamental rights and that such misconduct can constitute an abuse of authority. Indeed, where there is clear and convincing evidence that these rights have not been respected I find that there is an evidential burden on the officers to provide (page 15) some explanation for the lapse. All of the evidence must then be considered when determining if a disciplinary default has been established by the complainant.
>
> (70) Moreover, in evaluating apparent violations of constitutional rights by police officers, ignorance or lack of malice will not necessarily suffice as an explanation. Although the term 'abuse of authority' could connote some element of malice, when the term is viewed in context and having regard to the purpose of the legislation – police accountability to the public – an overly restrictive interpretation is inappropriate. Certainly the presence or absence of malice or intentional wrongdoing is a factor that would attract careful attention in determining an appropriate penalty for any disciplinary default that has been established by clear and convincing evidence. Citizens have the right to be served by a professional and competent police service.
>
> (71) On the other hand, I agree that in adjudicating cases under *L.E.R.A.* we decision makers must avoid the proposition that a breach of any *Charter* obligation leads directly to a finding of abuse of authority. In his *L.E.R.A.* decision F.D. v. Const. E.D. and Const. M.C. (December 12, 2005) my former colleague Judge Swail warned about the potential for 'disciplinary chill' (paras. 83-85) of such an approach.

[48] I share the view articulated by my learned colleague Smith P.J. in paragraph 69 of the decision referred to immediately above. Indeed, a *Charter* breach can constitute an abuse of authority and hence a disciplinary default as envisaged by s. 29 of *L.E.R.A.* legislation. Similarly, I share the view that a *Charter* breach, in itself, does not automatically constitute a disciplinary default. Having concluded, as I have, on the basis of all the evidence that has been presented to me that the respondent officers had a reasonable basis for believing that Mr. M. had provided them with his consent to search for and seize the questioned items and that the evidence to conclude otherwise was neither clear nor convincing and was found by me not to be compelling, I feel nevertheless that I must comment on the evidence of Constable W. and Sergeant H. with respect to their not having obtained a search warrant for fear that if they left to do so the items might disappear and that the

obtaining of a search warrant would result in their spending more time at the scene then they in fact did. Standing alone, those reasons would not withstand a *Charter* challenge. Police officers must recognize the importance of ensuring the protection of the fundamental rights recognized by the *Charter of Rights* and they will have to make certain accommodations and spend additional time to comply with the *Charter* provisions if they expect to have their efforts recognized and accepted by a court of law. This is the law of the land; this law protects both the police authority and an accused person and it will not tolerate shortcuts in procedure which may lead to the compromising of these rights.

CONCLUSION

[49] The evidence in support of the respondent officers having committed the disciplinary default alleged is, in my opinion, neither clear nor convincing, and accordingly, I am not satisfied that these respondents have committed a disciplinary default. I hereby dismiss the complaint of the alleged disciplinary default against each of the respondent officers, that they did abuse their authority by searching a residence at XXX Alfred Avenue, Winnipeg, Manitoba, without lawful authority contrary to s. 29(a) of the *Law Enforcement Review Act*.

[50] Prior to the commencement of the hearing of this matter on October 30th, 2006, the complainant, M., confirmed that he had decided not to pursue the allegation initially made by him that the three respondent officers abused their authority by using oppressive or abusive conduct or language on the complainant, contrary to s. 29(a)(iii) of the *Law Enforcement Review Act*. As a result of this decision on Mr. M.'s part no evidence was called with respect to this allegation, and for the sake of clarity and in the event that his stated withdrawal of that allegation does not suffice, I hereby dismiss that complaint as well.

[51] Pursuant to the provisions of s. 25(b) of the *Law Enforcement Review Act*, my earlier order that no person shall cause the respondents' names to be published in a newspaper or other periodical, publication or broadcast on radio or television shall continue in effect.

Howard Collerman, P.J.

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