

**IN THE MATTER OF:**                *The Law Enforcement Review Act* Complaint #5595

**AND IN THE MATTER OF:** An Application pursuant to s. 13 of *The Law Enforcement Review Act* R.S.M. 1987, c.L75

B E T W E E N:

<b>Ms. C.,</b>	)	
<b>Complainant</b>	)	
	)	
	)	
<b>- and -</b>	)	
	)	
<b>Sergeant D. B. ,</b>	)	Mr. Paul R. McKenna,
<b>Respondent</b>	)	Counsel for the Respondent and
	)	the Winnipeg Police Association
	)	
	)	Mr. Denis Gu�nette,
	)	Counsel for L.E.R.A.
	)	
<i>NOTE: These reasons are subject to a</i>	)	
<i>ban on publication of the respondent's</i>	)	November 17, 2003
<i>name pursuant to s. 13(4.1).</i>	)	

**Elliott, P.J.**

[1] The Applicant, Ms. C., initially made her complaint to the Attorney General of Manitoba, and framed it under section 8 of the *Canadian Charter of Rights and Freedoms*. She complained of an "illegal search" of her residence and also about officers' "abuse of authority" in their threats to have her arrested for "obstruction" if she interfered with the search. Ms. C.'s complaint was referred to the Law Enforcement Review Agency ("LERA"). It was therefore treated, apparently

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

without opposition by Ms. C., as a complaint under *The Law Enforcement Review Act* R.S.M. 1987, c.L75 (the "Act").

[2] A file was opened and the following offence codes under the Act were checked off: "29(a) abuse of authority", "29(a)(iii) using oppressive or abusive conduct or language" and "29(a)(iv) being discourteous or uncivil". These refer to disciplinary defaults under s. 29 of the Act. Actually, section 29(a), "abuse of authority", is one default and includes such things as "(iii) using oppressive or abusive conduct or language" and "(iv) being discourteous or uncivil". By its wording, this is not an exhaustive list.

[3] With Ms. C.'s concurrence her complaint was narrowed to include only the Respondent in these proceedings - Sergeant B.

[4] The Commissioner of LERA, after an investigation that included both the gathering of documentary evidence and interviews with the Applicant and the Respondent, found that there was "insufficient evidence supporting the complaint to justify a public hearing". Therefore, pursuant to section 13(1)(c) of the Act, he declined to take any further action on the complaint.

[5] Ms. C. exercised her right under section 13 of the Act to have the decision of the Commissioner reviewed by a provincial judge. Submissions were made on October 7, 2003.

[6] Section 13(3) provides that a provincial judge:

if satisfied that the Commissioner erred in declining to take further action on the complaint, shall order the Commissioner

(a) to refer the complaint for hearing; or

(b) to take such other action under this Act respecting the complaint as the provincial judge directs.

[7] Section 13(4) provides that:

Where an application is brought under subsection (2), the burden of proof is on the complainant to show that the Commissioner erred in declining to take further action on the complaint.

### **The Facts**

[8] It appears that there is no serious dispute as to most of the facts. Ms. C. was the owner or co-owner of 319 Queen Avenue in Selkirk, Manitoba. The residence

is a multi-dwelling unit with two separate and private apartments. She, at the relevant time, resided in the upstairs apartment with her seven-year-old granddaughter. Mr. D. D. rented or owned the main floor apartment and he rented a room to his brother, Mr. D.

[9] On February 21, 2002 in the late evening Sergeant B. and other police officers attended to the residence of Ms. C. According to her, she was told that the officers were going to search her residence. She requested to examine the search warrant and then told the Respondent that the warrant stipulated the residence of D. D. of 319 Queen Avenue, Selkirk, and that he did not reside in Ms. C.'s residence. She informed the police that Mr. D. lived in the main floor apartment. She was asked if she had a key for that apartment and advised that she did not. She then advised the members of the Winnipeg Police Service that they could not search her apartment. She said that the warrant did not stipulate her residence. Sergeant B. then told her in no uncertain terms that they were going to search her apartment with or without her permission. She was told to get out of their way or she would be arrested for obstruction. The officers went in and conducted a search of the apartment. Ms. C. asked that they be quiet as her granddaughter was asleep and they did comply with that request. The residence was searched and no firearms or ammunition were found. Both firearms and ammunition were seized from the portion of the residence controlled by D. and D. D.. D.D. was present and was arrested for unsafe storage of firearms and unauthorized possession of a firearm.

[10] When Sergeant B. was interviewed, he reported that he had been involved in an investigation involving both D. and D. D. As a result of that investigation he was requested by the Crown prosecutor to re-interview a witness, Ms. D. B. Prior to contacting this witness, Sergeant B. had been contacted by an R.C.M.P. officer who had spoken with the brother and son of the witness. These persons expressed concerns about the witness' safety and felt that D. and D. D. had some control over her. Ms. B.'s son told Sergeant B. that he was present when his mother was told that if she testified they would turn it around and blame the whole incident on her. He was very concerned about his mother's well being. The brother of the witness also told Sergeant B. that he was very concerned about his sister's safety. He said that D. and D. D. had taken his sister out of his house and he thought she might now be in Selkirk. He told Sergeant B. that his sister told them she was very afraid that D. and D. D. would kill her. He told Sergeant B. he had witnessed his sister being assaulted by D. D. He also said his sister was forced to sign a letter indicating she would be in British Columbia if a sheriff's officer attempted to serve her with a subpoena. The witness had also been forced to move out of her apartment, and the licence plates on her vehicle were changed. A warrant was

authorized for the arrest of D. D. and he was brought before Sergeant B., where he was asked where the witness could be located. He refused to disclose any information to Sergeant B. Mr. D. had admitted to owning a rifle but would not tell Sergeant B. where it was. Sergeant B. told Mr. D. that a search warrant was going to be requested and he also entered a broadcast for the witness and her vehicle. A search warrant was obtained for 319 Queen Street, Selkirk, pursuant to section 117.04(1) of the *Criminal Code*, which allows for searches for firearms.

[11] Sergeant B. then, along with four other Winnipeg Police Service members, attended to Selkirk. Four R.C.M.P. officers were briefed on the matter and all attended to 319 Queen Avenue. Sergeant B.'s position is that when they presented the search warrant to Ms. C. she told them they could not come in and he indicated that she could not prevent them from coming in to search. He confirms that he told Ms. C. that if she interfered with the police officers entering she would be charged with obstruction. He said that she then went up the stairs with two of the Winnipeg police officers while he remained on the main floor. No firearms were located in her residence. However, the witness was located inside.

[12] Sergeant B. further indicated that when the police officers attended the residence they believed it to be a single-family residence and did not know that Ms. C. was living upstairs. The search warrant had been issued for the residence of 319 Queen Avenue and Sergeant B. said that he believed that they had the authority to search the entire property. He also noted that the missing witness' vehicle was located parked at the residence. The licence plates had been changed and the vehicle was not registered in her name. The old licence plates were located in the trunk of the car.

[13] Sergeant B. said he felt it was absolutely necessary to search the entire residence. He noted that the search warrant authorized this, as well as section 117.04(2) of the *Criminal Code* which authorizes the police officers to search without a warrant if it is in the public interest and obtaining a warrant is not practical.

**Submissions of the Parties at the section 13 hearing:**

[14] Ms. C. argued that the search was illegal in that the search warrant specified that permission was given to search "the residence of D. D. of 319 Queen Avenue". Ms. C. pointed out that 319 Queen Avenue contains two separate residences with separate entrances, a fact that was obvious to Sergeant B. She argued that she had also told Sergeant B. that there were two separate residences, and because the search warrant did not stipulate her residence, she objected to the search taking

place. However, she said she was told by Sergeant B. to step out of the way - that she would be charged with obstruction of justice for interfering with the search. Ms. C. indicated that she was concerned for her young granddaughter who was staying with her, were Ms. C. to be arrested, and therefore cooperated from that point.

[15] The copy of the search warrant on the Commissioner's file actually indicates that authority was given to search "the residence of D.D. of 319 Queen Street at the Town of Selkirk". The tax bill from the Town of Selkirk refers to "Queen Avenue". None of the parties seem to have noticed this discrepancy, and thus I do not believe it is relevant to my decision.

[16] Ms. C. also indicated that if Sergeant B. had asked to search without being "abrasive" she probably would have let him search voluntarily, but that she objected to the whole manner in which the search took place.

[17] Counsel for Sergeant B. argued that although the Commissioner had said there was "insufficient evidence" to order a hearing, there was, in fact, "no evidence", as Sergeant B. was operating "in good faith". He was executing a warrant authorizing a search of "319 Queen" and believed he had authority to search all of 319 Queen. Counsel referred me to subsection 25(2) of the *Criminal Code of Canada* which reads as follows:

Where a person is required or authorized by law to execute a process or to carry out a sentence, that person or any person who assists him is, if that person acts in good faith, justified in executing the process or in carrying out the sentence notwithstanding that the process or sentence is defective or that it was issued or imposed without jurisdiction or in excess of jurisdiction.

[18] In addition, Mr. McKenna pointed out that Sergeant B. had reason to be concerned about the safety of the witness, D. B., having received information from both her brother and her son that D. D. had threatened her. Mr. D. had refused to tell Sergeant B. where Ms. B. was. Her vehicle was found, with the licence plates changed, outside 319 Queen Avenue. Therefore, counsel argued, Sergeant B. believed that, even without a warrant, subsection 117.04(2) of the *Criminal Code* justified the search. It reads:

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.

[19] Subsection 117.04 (1) reads:

Where, pursuant to an application made by a peace officer with respect to any person, a justice is satisfied that there are reasonable grounds to believe that it is not desirable in the interests of the safety of the person, or of any other person, for the person to possess any weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, the justice may issue a warrant authorizing a peace officer to 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.

[20] The argument was, as I understood it, that there was no evidence Sergeant B. was not acting in good faith, thinking that this section gave him authority to search without a warrant because of his concerns for the safety of Ms. B.

[21] Counsel therefore submitted that the Commissioner was correct in deciding that Sergeant B. should have the protection of the fact that he was operating in good faith.

[22] On behalf of the Commissioner, counsel stated that the standard to be used in reviewing the Commissioner's decision was the "correctness standard", as referred to in the case law. In a written brief prepared by counsel, the Commissioner chose to make no submission as to whether the decision made by him was correct.

[23] In regards to the issue of "good faith", counsel for the Commissioner said that the Commissioner does not make findings of fact.

[24] Ms. C., when asked if she wished to respond, said she did not understand the concept of "good faith". When I tried to explain it in the context of this case she noted that she had pointed out that the warrant did specify the "the residence of...".

## **THE ISSUES**

[25] The issue I must decide is not whether the search of Ms. C.'s residence was illegal. Rather, I must decide whether the Commissioner was correct in determining that there was insufficient evidence of a disciplinary default to refer the complaint for a hearing.

[26] There is no dispute that Sergeant B. ordered a search of Ms. C.'s residence, despite the fact that the warrant specified the "residence of D. D.". Arguably, this constituted an abuse of his authority. The Act sets out no defences. Section 25(2) of the *Code* was argued. If it applies, however, it would require a finding that Sergeant B. acted in "good faith", a finding that would require a "finding of fact". The Commissioner does not claim to have jurisdiction to make such findings. It appeared from her submission to me that the Applicant would like to have the opportunity to question whether the Respondent was acting in good faith.

[27] Although initially appearing to provide a justification, section 25(2) of the *Code* may not even apply. The Ontario Court of Appeal mentioned section 25(2) in its decision in *Hudson v. Brantford Police Services Board*, 158 C.C.C. (3d) 390. In that case, the Court found that section 25(2) had no application, because it was not a case where the law or the process under which the officers were operating was later found to be defective.

[28] Similarly, in this case the warrant itself appears to be valid on its face and, other than the designation of "street" instead of "avenue," not defective.

[29] Whether the search warrant, including the name of "D. D.", includes information that is not required to be included, that is, the name of the resident, is a question that is still unclear in my mind. The warrant was issued under section 117.04 (1) of the *Code* – which provides authority to issue a warrant to search for firearms.

[30] The section does not indicate, as does section 487, the general search warrant section, that the warrant is to search "a building, receptacle or place". Nor does it specify the form to be used for the search warrant. Section 487 does specify a form - Form 5. Form 5 provides that where (items) "are in ...at ... hereinafter called the premises...".

[31] Presumably Form 5 calls for the street address and the town or city, but not the name of the resident. On the other hand, Form 1 - the "Information to obtain a search warrant" - does have a space for the name of the resident. There is no form prescribed for a warrant under section 117, although the form that was used did have a blank space for the resident's name.

[32] Given however, that the warrant did specify the residence of D.D., when Sergeant B. was made aware that there were indeed two residences at 319 Queen, it is at least arguable that he abused his authority by insisting on searching both. A privacy issue is an important one and arguably he should have at the least

telephoned the issuing magistrate to seek direction. It is highly unlikely, in my opinion, that she would have said that the warrant included Ms. C.'s residence.

[33] Even if subsection 25(2) does apply, it would require a finding that Sergeant B. acted in "good faith". That would require a finding of fact. The decision of Judge Smith in L.E.R.A. Complaint #3771 also focused on the issue of making findings of fact for the purposes of the "sufficiency of evidence" test in clause 13(1)(c). It appears that here, the Commissioner has, perhaps unwittingly, made a finding of fact. Although he did not refer to subsection 25(2), he did refer in his decision to "case law that where officers are acting on good faith, evidence found on a search may be admissible even if there has been a violation of the Charter of Rights and Freedoms." Or he may have thought that good faith was a defence and that there was no evidence that Sergeant B. did not act in good faith. However, there was information on his file indicating that Sergeant B. was aware that the warrant stipulated a residence other than that of Ms. C. Therefore there was and is evidence that a trier of fact might determine that Sergeant B. was not operating in good faith.

[34] The question the Commissioner should have asked himself is, rather, as stated by Judge Smith at para. 39, *supra*, "whether there is evidence upon which a judge hearing the matter under the Act *could* conclude that a disciplinary default has occurred."

[35] Counsel for Sergeant B. argued that his client had serious concerns about the safety of the missing witness D.B. Her vehicle was found at 319 Selkirk. The Commissioner also referred to this in his decision, saying that Sergeant B. believed subsection 117.04(2) authorized "police officers to search without a warrant if it is in the public interest and obtaining a warrant is not practical".

[36] While I am sympathetic to Sergeant B.'s very valid concerns, I do not believe that section 117.04(2) is relevant. This section allows the police to search only for weapons.

[37] There may however be another section of the *Criminal Code* that allows the police to enter a dwelling house without a warrant to search for a missing witness who may be in danger. For example, section 529.3 reads:

(1) Without limiting or restricting any power a peace officer may have to enter a dwelling-house under this or any other Act or law, the peace officer may enter the dwelling-house for the purpose of arresting or apprehending a person, without a warrant referred to in section 529 or 529.1 authorizing the entry, if the peace officer has reasonable grounds to believe that the person is present in the



dwelling-house, and the conditions for obtaining a warrant under 529.1 exist but by reason of exigent circumstances it would be impracticable to obtain a warrant.

(2) For the purposes of subsection (1), exigent circumstances include circumstances in which the peace officer

(a) has reasonable grounds to suspect that entry into the dwelling-house is necessary to prevent imminent bodily harm or death to any person; or

(b) (not applicable)

[38] Whether there were reasonable grounds to suspect the missing witness faced imminent bodily harm or death, with D. D. in custody, would presumably depend on evidence establishing how "imminent" the concern was, evidence that there were grounds for apprehending Ms. B., as well as evidence establishing why it would have been impractical to get a warrant, including a telewarrant. It turned out D. D. was at home, but at the time Sergeant B. declared his intention to enter Ms. C.'s residence it does not appear that that fact was known. On the other hand, the witness had previously expressed a concern that "they" (referring to both D. brothers) would kill her.

[39] Section 29 of the Act, in enumerating the ways that an officer can abuse his authority, does not define an exclusive list. Is there any evidence that Sergeant. B. "used oppressive or abusive conduct or language?" Possibly, by threatening to charge Ms. C. with obstruction of justice if she did not allow the search to take place. Obstructing justice is an offence under section 139(1) of the *Criminal Code* and reads as follows: "Everyone who willfully attempts in any manner to obstruct, pervert or defeat the course of justice in a judicial proceeding...is guilty of an...offence." A "judicial proceeding" is defined in section 118 to include "a proceeding (a) in or under the authority of a court of justice". The case law would appear to indicate that someone interfering with the execution of a search warrant could be charged with such an offence - although it might also be arguable that had Ms. C. been charged, she might have had a defence. Threatening Ms. C. with such a charge was not in itself an abuse of authority, although doing so to facilitate an illegal search might be.

[40] Is there evidence that Sergeant B. was "discourteous or uncivil"? Police officers searching premises under a search warrant are obviously concerned about items being secreted out and therefore have cause to act quickly. D. D. was actually on the premises and could have acted to leave with some or all of the firearms if enough time was allowed to have elapsed. On the other hand, there were numerous officers present to guard the exits to the residence. Additionally,

Sergeant B. apparently had concerns about the safety of the missing witness. Although he may have not acted in as diplomatic a manner as Ms. C. may have wished, I conclude that Sergeant B. should not face disciplinary proceedings for being "discourteous or uncivil" alone, unless, again, it is determined he did so in the course of abusing his authority by conducting a search without justification.

[41] These issues are ones that are best decided by a trier of fact with jurisdiction to make findings on both the factual and legal issues. I do therefore conclude that the Commissioner erred in declining to take further action on the Applicant's complaint, and I order that he refer the complaint for a hearing.

*Original signed by J. Elliott*

Judith A. Elliott, P.J.