IN THE MATTER OF: **Law Enforcement Review Act**
Complaint No. 2895

BETWEEN:

C.F.N.,

Complainant,

- and -

CONSTABLE K.L.,

Respondent.

TRANSCRIPT OF PROCEEDINGS had and taken before The Honourable Justice Menzies, held at the Brandon Courthouse, 1104 Princess Avenue, in the City of Brandon, Province of Manitoba, on the 16th day of December, 2003.

APPEARANCES:

MR. D. GUENETTE, for the Commissioner.
MR. J. JANZEN, for the Brandon Police Association.
MR. N. SIMS, for the Complainant.

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

I N D E X

Page

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

MR. SIMS: My Lord, Sims for the record. Appearing on behalf of the Complainant / Appellant, C.F.N., who is also present in Court, to my left.

To my right is Mr. Denis Guenette from the commissioner of LERA. And he's here with consent of the -- both my client and also the Brandon City Police. He has a consent order that was signed this morning permitting him to participate.

THE JUDGE: Yes.

MR. SIMS: And Mr. Jake Janzen for the Brandon City Police department.

MR. JANZEN: And we are ready to proceed, My Lord.

THE JUDGE: All right.

MR. GUENETTE: I should apologize for my attire, My Lord. I went under the assumption that it was equivalent to an application, which I've always understood to be non-robed. So I do send an apology to the Court.

THE JUDGE: Fine.

MR. GUENETTE: I do have this consent order. Unfortunately, I only have one -- I don't have a duplicate. Did your Lordship want it now?

THE JUDGE: It should, probably -- yeah, it should probably find its way to the file. I'll ask the clerk to provide counsel with copies at first break.

MR. GUENETTE: Thank you, My Lord.

MR. SIMS: What I would propose, My Lord, is perhaps to have Mr. Guenette address the Court first with regards to his material file, to lay a foundation for both myself and Mr. Janzen.

THE JUDGE: He is arguing the standard of proof?

MR. SIMS: Yeah.

THE JUDGE: Let's just proceed with it. You are the Applicant. Let's just proceed with your application and I'll hear Mr. Guenette during the course of...

SUBMISSION BY MR. SIMS:

As I indicated, My Lord, we have consented to the commissioner being added, but only for the purpose of addressing issues of procedure, jurisdiction and the Law Enforcement Review Act. And the issue before this honorable Court this morning is, what is the standard of proof required under section 27(2) of the Law Enforcement Review Act? What does clear and convincing evidence mean?

As Mr. Guenette's material discloses, prior to 1992, the test was beyond a reasonable doubt, the criminal standard, the highest standard. And as Mr. Guenette has suggested in his material, it is possible that clear and convincing may be viewed as a third standard of proof somewhere between a criminal standard, beyond a reasonable doubt, and a civil standard, the balance of probabilities. And Mr. Guenette, in his material, suggests that clear and convincing really refers to the quality of the evidence, and that you need to look at the balance of probabilities but also the quality of the evidence before the Court.

This appeal this morning is restricted to questions involving -- well, can be for questions involving jurisdiction of the Provincial Judge or questions of law alone, under section 31(1) of the Act.

Mr. Janzen is correct when he asserts that this appeal is not about jurisdiction. It is not. Rather, it is about questions of law alone.

My respectful submission, and we're looking at what is the meaning of clear and convincing evidence and also whether Judge Thompson, could, in the circumstances, draw an adverse inference from the non-participation from Constable L. in the proceeding.

So, the first point is -- question of law before this Court, what is the standard of proof? What does clear and convincing evidence mean, and did Judge Thompson correctly apply that test?

The finding of facts of Judge Thompson are set out on page six of my argument, or the factum, and I won't belabor those points.

Addressing a point raised by Mr. Janzen in his material, he argues that there must be a police purpose to the telephone call in order to find a disciplinary default.

THE JUDGE: Well, I am very interested to hear that argument from Mr. Janzen, because that argument, if we follow it, means that if I'm going to be oppressive to somebody, if I'm a police officer, I'm smart, I'm going to kick him in the groin or I'm going to beat the ever loving out of him because then it takes it right out of LERA. The more egregious I act, the less chances there are of me becoming disciplined.

MR. SIMS: Yeah.

THE JUDGE: And he's using an insurance case to determine whether an insurance company -- or a union case to determine whether a union has to pay for defence counsel on criminal charges to argue that if my behavior is so egregious I fall outside of the disciplinary process. It's an uphill battle as far as I'm concerned, but he can make the argument.

MR. SIMS: Don't need to -- all right. I won't.

THE JUDGE: I find it interesting to note that I can be as bad as I want while I'm on duty and the worse I am, the less chance there is I'll be disciplined.

MR. SIMS: Yeah. I was going to say that the argument is, in my opinion...

THE JUDGE: It's an interesting argument, ...

MR. SIMS: ...absurd.

THE JUDGE: ...but, I'll wait to hear from Mr. Janzen. I haven't closed my mind on the subject as I'm sure he's aware.

MR. JANZEN: That's comforting to hear.

THE JUDGE: Mr. Janzen always has a way of putting a nice twist on arguments. I'll wait to hear what he has to say.

MR. SIMS: Well, it's my submission that what happened, if it could be proven, was an abusive police power, and I'll leave it at that.

The problem that we have is that Mr. L. did not testify at the proceedings. He did not participate in them. He, in fact,

remained silent. And, with respect to my friend, in the face of evidence that I suggest demanded an explanation from him, and Judge Thompson at page 12 of his decision states that he was highly suspicious of the circumstances. He indicated that -- Judge Thompson indicated he accepted Ms. N.'s evidence, yet he concludes in his decision that he cannot make any adverse inference from his failure -- from Constable L.'s failure to testify or his absence from the hearing.

And I provide the Court with cases of Cross v. Wood where Justice DeGraves stated that the failure of Cross, in that case, to testify, did have an adverse inference on the board. And the Court of Appeal stated that the board was entitled to comment on his failure to testify. That although, did not shift the burden of proof.

THE JUDGE: Aren't we dealing with different issues? All right. I think what the problem here is that we -- counsel have mis-categorized the issue. Plain and simple.

In criminal law, you cannot compel an accused to testify.

MR. SIMS: Right.

THE JUDGE: And you cannot use the fact that he does not testify to negatively affect the facts or to create evidence that isn't there.

MR. SIMS: Um-hum.

THE JUDGE: In this procedure, you cannot compel the police officer to testify. If you cannot compel him, how can you use the fact that he did not testify as a negative inference?

Are we not talking about, in the situation, as in the Woods case, where there is a prima face case, and this is the same as in criminal law, a prima face case that calls out for a response, then the accused, or, in a disciplinary proceeding, the police officer, doesn't testify at their own risk.

MR. SIMS: Right.

THE JUDGE: If the Judge is satisfied that there's something here that demands a response,...

MR. SIMS: Right.

THE JUDGE: ...and the response is not forthcoming, then he can say, Fine. Failing a response the case is made out.

MR. SIMS: Right.

THE JUDGE: There can be all kinds of cases where the proper response would result in a different finding, but failing a response, I'm satisfied.

MR. SIMS: Um-hum.

THE JUDGE: It's the same in criminal law. If the Crown makes out a prima face case, failing a response, you are guilty.

MR. SIMS: Um-hum.

THE JUDGE: In this, if you make out a prima face case, failing a response from the police officer, you are going to be disciplined. But that's not a negative inference. That's a prima face case that requires an answer.

Isn't that what we're really dealing with here?

MR. SIMS: Yeah.

THE JUDGE: Is it not open to the Court to say that if I'm satisfied there's a prima face case, if the police officer doesn't say anything in response, then he's done?

MR. SIMS: Yes.

THE JUDGE: Isn't that what we're -- we're not talking with a negative inference such as if you are found in possession of goods taken from a break and enter. Immediately after the break and enter there's a negative inference that you committed the break and enter. That's not what we're dealing with here.

MR. SIMS: Um-hum.

THE JUDGE: But, if, 10 days afterwards, they break in and find every item from the break and enter sitting in your house, absent some kind of explanation from the accused as to how that came to be here, you are guilty.

MR. SIMS: Um-hum.

THE JUDGE: And that's what we are dealing with.

MR. SIMS: Yeah.

THE JUDGE: We are not saying you have to testify. We are not saying we are dealing with a negative inference. We are dealing with a situation that if a prima face case is made out that calls for a response, then you don't respond at your own risk.

MR. SIMS: Yeah.

THE JUDGE: And isn't that what Cross v. Woods...

MR. SIMS: Yeah, that's basically what this all boils down to.

THE JUDGE: Right.

MR. SIMS: Yeah.

THE JUDGE: It's not a negative inference. It's if the prima face case is made out then you better respond. And if you don't, fine.

MR. SIMS: Right.

THE JUDGE: That's my assessment of the case.

MR. SIMS: Yeah, no -- and I appreciate what your Lordship is saying. I guess my submission would be it would have been an easy thing for Constable L. to testify at the hearing and explained how it was that a call was made to my client from his cell phone while on duty. And he chose not to do so. And Judge Thompson's suspicion, together with the past conduct of Constable L. to my client and his failure to testify, I submit, made clear and convincing evidence that the disciplinary default occurred, that he did make the call while on duty. And Judge Thompson erred and should have found him to have committed a disciplinary default. That is my submission.

THE JUDGE: Mr. Guenette?

SUBMISSION BY MR. GUENETTE:

My Lord, our brief is relatively detailed.

THE JUDGE: Yes.

MR. GUENETTE: I don't propose to go through it.

THE JUDGE: Your brief is not brief?

MR. GUENETTE: So I don't think that I need to add much more to it other than simply point out when those -- that Cross v. Woods case was decided, although the decision was delivered in 1993, it's clear from the decision itself that the standard that was being implied, in that case, was the old standard that was in the Act. It was the patent unreasonable standard. Subsequent to that decision, the law has become that it's a lesser standard, clear and convincing evidence.

And we pointed out some of the authorities that shed -- attempted to shed some light on how you apply that test. And we simply suggest that the reasons of now Chief Justice Wyant, and Associate Chief Justice Miller are probably the most accurate at capturing what the law is. It's that --

it's you don't -- it's not creating a third standard of proof as much as working within the context of an existing standard of proof which is the balance of probabilities.

THE JUDGE: It's like proving a criminal act in a civil trial. It's on the balance of probabilities, but it's not the same as you would apply to any other fact.

MR. GUENETTE: That's right.

THE JUDGE: Bearing in mind the seriousness of the allegation, you have to assess the quality of the evidence.

MR. GUENETTE: That's right. And we just wanted to -- our purpose in...

THE JUDGE: I accept your brief.

MR. GUENETTE: ...coming here was to make sure that those cases were here.

THE JUDGE: I thought your brief was well done and I accept that.

MR. GUENETTE: Thank you, My Lord.

THE JUDGE: Mr. Janzen.

MR. JANZEN: My Lord.

THE JUDGE: This is the argument I've been looking forward to all day.

MR. JANZEN: Good. I will deal with, firstly then, with the argument which you characterize as an uphill battle. That was under the heading in my brief that the appeal would fail under any standard.

THE JUDGE: Mr. Janzen, if Mr. -- if Judge Thompson, hearing the facts that he did, was not satisfied that there is a prima face case, what is the standard that I have, in able to review that decision?

SUBMISSION BY MR. JANZEN:

The standard is that of clear and convincing evidence as set out in the Act.

In my submission, clearly there is a third standard. It lies between the civil standard and the criminal standard. That is the standard which applies to these proceedings.

It is plain, My Lord, that in common law there are two views. One is -- one view of common law is that indeed there is a third standard. The other view of common law is that there are only the two standards, but as to the civil standard, there are degrees of probability within it. And there are ample -- and again I won't review them, but in my learned friend, Mr. Guenette's material, Sopinka, paragraphs 5.45 and 5.46. That's at tab six of my learned friend, Guenette's material, there is a discussion that involves two competing common law views, and Sopinka, the author, I think, comes down on the view that at common law there are only two standards, but even in the course of his text he refers to Mr. Justice Dickson. If we could just look at that, that's at tab six. Paragraphs 5.45 and 5.46. 5.45, "there was common law authority that a higher standard of proof applied to divorce proceedings". Do you have that?

THE JUDGE: Yes, I do now. Yeah.

MR. JANZEN: Okay, and then there's a discussion there. He refers to Justice Laskin, who, relying on remarks of Lord Denning in Bater v. Bater. The case may be proved by preponderance of probability, but there may be degrees of probability within that standard.

Then if I can refer you to the last paragraph on that page, more recently in R v. Oakes, Chief Justice Dickson held that within the broad category, there exists different degrees of probability depending on the nature of the case.

So in my brief, I say that this Court need not decide the academic question of whether there is a third standard or whether there are only two standards and degrees of probability within the civil standard. That having been said, in my submission this morning, my submission is that the correct view, in my submission, is that there is a third standard for proceedings under LERA. The reason I say that is because at common law,

there is also the self evident proposition, that it is always open to a legislature to prescribe a different standard of proof. I say that's a self evidence proposition and in fact, that statement is found explicitly at tab eight of the commissioner's material.

THE JUDGE: I'm satisfied the legislature can...

MR. JANZEN: Okay.

THE JUDGE: ...legislate standards.

MR. JANZEN: In any event, at tab eight, page 12 -- 11, the author of the text there says explicitly, "Of course it's always open to a legislature to prescribe a different standard". So, what we have then is, in the Province of Manitoba, My Lord, we have a legislature which has explicitly spoken.

Originally, when originally conceived, the Law Enforcement Review Act prescribed a standard of proof which was a standard beyond a reason doubt. In the 1992 amendment, a different standard of proof was prescribed, namely, proof on clear and convincing evidence. As my learned friend, Mr. Guenette's brief points out, that is a unique provision. There is no other statutory provision to our knowledge in the Province of Manitoba that explicitly states that as a standard of proof. The wording is unique, and it replaces the earlier criminal standard.

In my submission, if the legislature of the Province of Manitoba had intended, with that amendment, to replace the criminal standard with the bare, unadorned civil standard, it would not have elected and chosen the wording which it did. It chose the wording that it did for a specific intended purpose, namely, that there be a special standard for proceedings under this Act. That view, in my submission, is emphasized, or underlined by the fact that in a LERA proceeding, as your Lordship pointed out earlier, there is the provision that the Respondent is non-compellable. That, typically, is a feature only of criminal proceedings. The non-compellability of the Respondent. And in my submission, the protection given to the Respondent of the Respondent's non-compellability would not make

conceptual sense if it were tied to a regime where the standard of proof were the simple civil standard. Because in a simple civil standard, the protection given to a Respondent of non-compellability would virtually vanish. It is the very rare civil proceeding indeed where a Respondent might safely not testify.

So in my submission, the legislature of the Province of Manitoba, by choosing the wording which it did, and by coupling that wording, by leaving in place the non-compellability of the Respondent, clearly intended that there be a special standard applied here, a third standard of proof. So that is my submission.

As I say, in my brief, the alternative view would be that there -- it is the civil standard but there is a higher degree of probability that is required.

In that connection then, it is my submission that the British Columbia cases, which are found in the materials, and I draw your attention specifically to the J.C. -- BC College of Physicians case v. J.C. found at the Respondent's tab 3D at paragraphs 52 and 53. Paragraphs 52 and 53 sets out the standard of proof following Justice McLachlin in the Jory decision, and that, in the discussion there, and I think what is particularly important there is that in the discussion at paragraphs 52 and 53 there is a discussion of the very terminology clear and convincing and the British Columbia Court's view that clear and convincing articulates a third standard. Bearing in mind that the British Columbia discussion takes place in a common -- as I understand it at least My Lord, takes place in a common-law environment and not in an environment in where there is a legislated standard for the proceedings before it.

So I think that, in summary, is my submission as to the standard of proof issue, My Lord. It is an issue which is of vital importance to the members of the Brandon Police Association, that the standard of proof articulated in the Law Enforcement Review Act, while it once was that of beyond a reasonable doubt, that when that standard was diminished with the

amendment in 1992, that, in our submission, it was not diminished to the status of merely the civil standard.

The other issue I want to deal with is, as I said before, the -- you said you were looking, or you said it would be an uphill battle, the more egregious the conduct of the officer, the more likely the officer would be immune to discipline. I want to emphatically disagree with the analysis that your Lordship has given.

THE JUDGE: Well, that's what it says. The case was dealing with an officer who sexually assaulted somebody and they said the behavior was so egregious it falls outside the (inaudible) of duty.

MR. JANZEN: It is not conduct that is -- it is patently unreasonable to characterize that conduct as being conduct in the execution of the officer's duty.

THE JUDGE: So if the officer is driving down the street in his police car, in his uniform, with his buddy and they see somebody they don't like and they both get out and kick the crap out of him and then get back in the car and they get a complaint [from] LERA [and] say, "Hey, this had nothing to do with our duty, we just felt like beating him up. You can't use it. It may be oppressive, it may be conduct that's completely unbecoming of a police officer. Yes, we were on duty but it had nothing to do with our duty".

MR. JANZEN: Right.

THE JUDGE: "We just wanted to do it. LERA can't touch us".

MR. JANZEN: That's my submission.

THE JUDGE: Well, let's hear it.

MR. JANZEN: But the conclusion of that analysis, which is that therefore the officer is immune to discipline, is the conclusion which I reject emphatically. They...

THE JUDGE: Well, except that if the police could -- it's the same as Woods v. Cross. The police conduct their own investigation. "No, we don't see anything". So they bring a

LERA application. And you are saying the LERA can say, "Sorry, we can't touch it"?

MR. JANZEN: My Lord, the -- I want to just make the point clearly that an officer's conduct while on duty is of interest to the employer at all times. Just because that conduct may fall outside of the scope of LERA does not make that officer's conduct immune to discipline. If the conduct falls...

THE JUDGE: No, but it...

MR. JANZEN: ...outside of the ambit of the definition of a disciplinary default under the Law Enforcement Review Act, then the officer is disciplinable internally, by the internal discipline procedures of the police service.

THE JUDGE: So why do we have LERA then? Why do we have it if the police service can take care of their own business?

MR. JANZEN: We have LERA in order to...

THE JUDGE: To give the public a right...

MR. JANZEN: Avenue -- an avenue...

THE JUDGE: ...to appeal this type of...

MR. JANZEN: ...to appeal conduct where police officers engaging in the exercise of their authority, misuse that authority.

THE JUDGE: And if the officer can argue that no matter how egregious my conduct was, I wasn't using my authority at that time, even though I may have been wearing my sidearm and in the police car and in full uniform, and if the guy had hit me I would have charged him with assault a peace officer. It's outside of LERA. Sorry.

MR. JANZEN: Well, sorry, My Lord, but the police officer is subject to discipline.

THE JUDGE: If the...

MR. JANZEN: The police officer in question in my submission would be suspended on the spot. The police officer in question...

THE JUDGE: How do we know that?

MR. JANZEN: ...would be dismissed.

THE JUDGE: How do we know that? Why do we have LERA then? Why do we have LERA?

MR. JANZEN: My Lord, I didn't fashion the legislation. The legislation might easily have said, anything a police officer does while on duty falls within the scope of the Law Enforcement Review Act. The legislation does not say that.

THE JUDGE: I think it does.

MR. JANZEN: The legislation uses the terminology which it does do and that terminology, My Lord, with the greatest of respect, is terminology analyzed at some length by, as he then was, Associate Chief Justice Scott.

THE JUDGE: In a completely, completely different situation. This is where an officer is saying, "Someone has to pay my legal fees". We're now into an insurance type realm of -- and it's clear an insurance type realm. It's clear a labor type realm. If your behavior is so egregious, we don't have to pay for your lawyer. We are not going to. You stepped outside of your protection.

But that same argument does not apply to disciplinary proceedings, that if my behavior is so egregious, now I am not subject to LERA. I've stepped over that wonderful line. If I, all of the sudden walking down the street am like, "Whoa, that's a LERA complaint. I better go back and beat the crap out of him because then that takes me right outside of LERA. Wow, I sure avoided that one".

MR. JANZEN: Well, with the greatest of respect, My Lord, the error, if I may so characterize it in the analysis which your Lordship is giving to those scenarios, lies in the implication that the conduct of that officer is then immune to discipline, ...

THE JUDGE: No.

MR. JANZEN: ...which it plainly is not.

THE JUDGE: That's -- no, it's not. I don't care about discipline. I really don't really don't care what the chief of

police decides. I don't care if the chief police sits down and says, "Yeah, you beat this guy up, but we know he's a real -- we don't like him. Nobody likes him in town so we'll give you a one hour suspension".

And he says, "Whoa, hold it here. I'm going to LERA. Enough of that. Sorry, our behavior was so egregious towards you that you can't complain". Hum, isn't that a bummer, eh [sic]?

LERA is there so the public has a way of saying to police departments that your disciplinary process is not working. Didn't work, period. So I'm taking you to LERA. If you won't deal with it, LERA will.

MR. JANZEN: Well...

THE JUDGE: Here is an officer in this case, who wouldn't know -- according to the evidence -- Ms. N. if he wasn't a police officer, because he responds to her calls. If he's not a police officer, he doesn't know her.

On duty, no questions asked. If we accept her allegations, phoning her at four in the morning to breathe heavily into her phone.

MR. JANZEN: With respect, that is not in the evidence, My Lord.

THE JUDGE: Well, the breathing heavy is.

MR. JANZEN: No, it's not.

THE JUDGE: I said, if we accept her allegations.

MR. JANZEN: That is not in the evidence, Sir.

THE JUDGE: This is the situation you are asking me to deal with. If the Judge finds that, you are saying he can't touch it, because that phone call is outside of his duties? You are going to have a hard time convincing me that a police officer can sit in his police car and drive around and make harassing phone calls to people all day long and he's not subject to LERA. You are going to have a hard time convincing me of that.

MR. JANZEN: Well, in the -- in my view, you have the definition of a disciplinary default.

THE JUDGE: Um-hum.

MR. JANZEN: The definition of a disciplinary default, My Lord, clearly uses the very same language that is used in insurance cases, in civil cases. The language which -- to use older language, is the employee on a frolic of his or her own or not? If the employee is on a frolic of his or her own then it is not conduct which falls within the scope of their employment.

THE JUDGE: But when that employee...

MR. JANZEN: It does not fall within the execution of their duties.

THE JUDGE: When that employee is furnished with a uniform and the authority that follows from that uniform and the authority to deal with individuals that follows from that uniform and he violates that...

MR. JANZEN: That is exactly the argument that was accepted by the Manitoba Police Commission in the City of Brandon v. Dunton case. And a line of analysis that Associate Chief Justice Scott rejected and found to be patently unreasonable.

THE JUDGE: Right. In those circumstances it was.

MR. JANZEN: And that is, in my view -- or -- it is the same language that is used by the legislation.

THE JUDGE: But a different issue to be considered.

MR. JANZEN: The legislation could have easily, had it wished to, taken within its scope, any conduct of any police officer while on duty no matter what it is falls within the scope of LERA. The legislation could have easily have articulated...

THE JUDGE: And I think the legislation has done that.

MR. JANZEN: ...that, and in my submission, ought then to have used very different language than the language which is before us.

THE JUDGE: In my submission, to use the Court of Appeal decision on whether or not the officer should have had legal fees paid for to argue that because he doesn't get his legal fees he therefore falls outside of LERA -- nope. It's not going to get you very far. Two different issues with two different standards.

MR. JANZEN: Using the same language.

THE JUDGE: Yeah, happens in law all the time as you are aware.

MR. JANZEN: Well, that is...

THE JUDGE: Okay.

MR. JANZEN: You did characterize yourself, My Lord, as not having a closed mind on the issue.

THE JUDGE: All right. Maybe I was wrong. I just do not find that that case stands for the proposition that you want it to stand for because the issue in front of the Court was so vastly different than the one in front of this Court. Completely different. Not even similar. Doesn't even have the same aura to it. It's, pay me my legal fees.

Sorry, your behavior was so egregious they don't have to pay it. But that doesn't mean you escape discipline. That doesn't mean you escape the review of LERA.

MR. JANZEN: Well, as I say, I urgently submit to the Court...

THE JUDGE: I'm not going to accept.

MR. JANZEN: ...that there are two schemes, two possible schemes of discipline to which every police officer remains vulnerable...

THE JUDGE: And LERA is...

MR. JANZEN: ...without their careers, and LERA is one of them...

THE JUDGE: And it is there for a purpose.

MR. JANZEN: ...and at the same time there is the internal disciplinary procedure.

THE JUDGE: Right, and if the internal worked so well, we wouldn't need LERA. That's why LERA is here.

MR. JANZEN: And...

THE JUDGE: I'm not saying it doesn't work. I'm saying that the government recognizes that it doesn't always work. That's why we have it. Otherwise, why would we have it?

I'm not going to rule on it anyway. I don't think I have to.

MR. JANZEN: Okay. Well, those are the two principle issues...

THE JUDGE: Yeah.

MR. JANZEN: ...that called for my involvement in the appeal. One was the standard of proof and our submission that the legislation does articulate a third standard. And secondly, the submission that the definition of a disciplinary default under the Law Enforcement Review Act...

THE JUDGE: Doesn't encompass his behavior.

MR. JANZEN: ...precludes LERA proceedings for conduct which, as I say, to use more ancient language, conduct which is characterizable as a frolic of his or her own. And in my submission, the more one characterizes -- is able to characterize this conduct as being offensive, the less one is able to characterize the conduct as being conduct which is the exercise of any police authority at all.

In the larger view, in our submission, the decision reached by Judge Thompson on this evidence is simply not sufficient, and I speak to that briefly in my brief. I don't know that I need to deal with that further this morning?

THE JUDGE: Oh, you mean not sufficient to meet the standard.

MR. JANZEN: It is not sufficient to meet the standard in any event, ...

THE JUDGE: Okay.

MR. JANZEN: ...even...

THE JUDGE: The lower standard...

MR. JANZEN: ...putting aside...

THE JUDGE: ...or the higher standard...

MR. JANZEN: Even putting aside your doubts on my submission on the definition of disciplinary default.

THE JUDGE: The issue is, has he made an error in law?

MR. JANZEN: And, in our view, to go back to the very first point made in the brief, the sufficiency of evidence is not reviewable on this appeal. And even if this

Court disagrees with Judge Thompson, that isn't sufficient in order to allow the appeal.

THE JUDGE: Yes. Thank you.

Mr. Sims, anything in response?

RESPONSE BY MR. SIMS:

Yes, just on the point about the disciplinary default, the Act talks about acts or admissions arising out of or in the execution of duty and I join your Lordship in your raising of that point for sure.

And it's clear to me why LERA is there. It is to protect the public from police misconduct in view of their behavior in the execution of their duty or otherwise.

THE JUDGE: Mr. Guenette?

RESPONSE BY MR. GUENETTE:

It is in answer to that last question, My Lord, that I rise. Why do we have LERA? In fact, there is some judicial guidance on that very question, and I'll point your Lordship, and I do not have cases of the case to hand out, Blair v. Saltesz. It's a decision of Justice Mykle I believe.

MR. SIMS: No.

MR. GUENETTE: It was out of Brandon anyway. A Queen's Bench decision in which there is discussion about the purpose and intent of the Act. And it speaks about the different interests. Discipline is one aspect of it, but there's a public interest element as well.

I simply point that decision out in answer to -- because it does discuss why do we have the Law Enforcement Review Act.

REASONS FOR DECISION:

I have considered all the material of the file. I've

spent a weekend reading all of this material. There is some very interesting issues to be decided. There are some very interesting issues raised.

Perhaps one of the reasons why my mind is so closed on your issue, Mr. Janzen, is because I don't think it has to be answered. Perhaps one of the issues that has to be decided at some time is the standard of proof, but I don't think it needs to be answered.

The issue before the Court was that Judge Thompson had evidence before him. He had evidence that the officer owned a cell phone. He had evidence that there was a phone call to Ms. N. at close to 4:00 in the morning when the officer was on duty, and he had evidence that that cell phone was registered to that police officer. That's the evidence he had. With all that evidence in front of him, Judge Thompson considered the facts, considered whether or not the onus had been met, and I agreed by whatever standard.

I cannot say that Judge Thompson made an error in law when he found -- or was not prepared to draw the inferences that the applicant asked him to draw, namely that the officer was in fact the person that made the phone call, and that the phone call was in fact -- fell under the Act as a definition of conduct that could be dealt with. Judge Thompson considered the issues. I feel he considered them carefully. He reviewed the evidence carefully. He reviewed the law as he saw it carefully, and he came to the conclusions he did in dismissing the application. I can't say that he was wrong in dismissing the application.

As Mr. Janzen pointed out, it doesn't matter what I would have done with the case. The issue is did Judge Thompson do what he did, was it within his authority, and did he make an error in law? On reviewing the evidence, this is not a clear cut case. This is not a case where the

evidence compels the police officer to respond. This is not a case where one could say clearly what else could have happened. This is a case that leaves a lot of questions open.

At the end of the day after having heard the evidence, Judge Thompson felt those questions were such that he could not make a finding against the officer. It was a proper decision. It was a decision that was open to him in law and one that I do not feel that I should disturb. And that's the decision of the Court. The application for review is dismissed.

(PROCEEDINGS CONCLUDED)

These are my reasons for judgement in the case of C. F. N. v. Constable K. L.

_____

Menzies, J.

CERTIFICATE OF TRANSCRIPT

I, CHRISTIN N. D. PHINNEY, hereby certify that the foregoing pages of printed matter, numbered 1 to 22, are a true and accurate transcript of the proceedings recorded by a sound recording device that has been approved by the Attorney-General and operated by court clerk/monitor, V. SMITH, and has been transcribed by me to the best of my skill, understanding and ability.

_____

COURT TRANSCRIBER