

THE PROVINCIAL COURT OF MANITOBA
Winnipeg Centre

IN THE MATTER OF: ***The Law Enforcement Review Act***
 Complaint #2007-73

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

BETWEEN

D.H.)	Complainant,
Complainant)	Self-represented
)	
- and -)	
)	
Constable S.M.)	Mr. Paul McKenna
Respondent)	Representing the Respondent
)	
)	
)	Hearing dates scheduled:
)	
)	Decision date: March 12, 2010

CARENA ROLLER, 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.

1) Counsel for the respondent officer has raised a preliminary issue that he requests be dealt with prior to a hearing on the complaint as contemplated by section 17 of the *Law Enforcement Review Act*. The Complainant is self-represented in these proceedings and did provide a letter indicating that he supports the position of the Commissioner and wants the respondent's preliminary application deferred to the end of a substantive hearing on the complaint itself.

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

Counsel for the Commissioner and the respondent officer both filed written materials, including case law.

2) The preliminary issue that has been raised by the respondent officer is that the Commissioner was without jurisdiction to address the complaint levied against the respondent officers and, therefore, I am effectively without jurisdiction as well. Some background as to the history of this complaint and reference is necessary to set the stage for the issues before me.

3) The complainant made a complaint to the Commissioner pursuant to s. 6 of LERA. The substance of his complaint was that he had an encounter with the respondent officer in traffic on March 20, 2007. The complainant alleged that the respondent officer was not in uniform and not in a marked police vehicle but rather was in a private vehicle. During the course of this encounter, the complainant alleges the respondent showed the complainant his police badge. The complainant characterizes this as an abuse of his authority.

4) The Commissioner received the complaint and on May 22, 2007, made the decision that the matter could not be resolved and it was referred pursuant to s. 17 for a hearing before Judge Garson, as he then was. When Judge Garson left the Provincial Court, I assumed conduct of this matter and it was agreed that the complainant, counsel for the respondent officer, and counsel for the Commissioner would each be provided with the opportunity to provide me with written submissions – to supplement the earlier oral submissions made before Judge Garson – on the following issues:

- a) Whether the respondent's preliminary motion to dispute the jurisdiction of a Provincial Judge to hear this complaint as referred by the Commissioner should be heard in advance of the oral hearing on the complaint, or whether the oral hearing on the substantive matter should proceed and the evidence then go to the question of jurisdiction;
- b) Although it was agreed by all counsel and by the complainant that the Commissioner should properly have standing for the matter of his own jurisdiction, should the Commissioner be permitted standing to address the procedural question of whether the "preliminary jurisdictional" motion filed by the respondent can properly proceed before a *viva voce* hearing of the complaint.

5) I will address the second issue first. The Commissioner takes the position that he should be permitted to make submissions on the issue of the proper

procedure to be followed in dealing with the respondent's application and the substantive matter. As stated by his counsel:

“The Commissioner is not asking to be added as a party for the purpose of defending his decision to refer this matter to a hearing (which decision is an implicit decision that there may be evidence that the matters complained of fall within the scope of the *Act*). Rather, the Commissioner seeks to make submissions with respect to the appropriate stage of the hearing for your Honour to entertain submissions on the issue raised by the Applicant, i.e. the Commissioner is not concerned with what decision is ultimately made about whether the subject matter of the complaint falls within scope.”

6) While it is agreed that a Provincial Judge sitting at a hearing under s. 17 of the *Act* has the discretion to add parties considered appropriate, counsel for the respondent takes the view that the Commissioner ought not to have standing to address issues of procedure at a hearing, and he urged that I not permit the submissions.

7) Counsel for the respondent referred me to case law including *Northwestern Utilities Ltd., v. Edmonton (City)*, [1979] 1 S.C.R. 684 and *Unicity Taxi Ltd. V. Manitoba Taxicab Board*, [1992] M.J. No. 381 (Q.B.). In the latter case, Justice Scollin considered the role taken at the hearing by counsel for the Taxicab Board and determined that throughout the proceedings, counsel “restricted himself to a justification in law of the procedure followed by the Board.” In doing so, the Board did not “stray from the path of discretion.”

8) In the matter before me, it is agreed that the Commissioner will have standing for the jurisdictional argument raised by the respondent officer, and in making representations on the issue of whether the matter will be heard before or after the viva voce hearing on the complaint itself, the Commissioner is not addressing the merits of the substantive matter. Counsel for the Commissioner has not requested – nor would he be afforded – an opportunity to “justify either the reasoning or the merits” of the Commissioner’s decision to refer the complaint pursuant to s. 17.

9) It is my finding that the role requested for the Commissioner in these preliminary matters does not offend the principles enunciated in *Northwestern Utilities* or the cases that followed.

10) I turn then to the question of whether the jurisdictional question will be addressed before or after a *viva voce* hearing. The submissions – both oral and

written – from the respondent, the complainant, and Commissioner were very helpful.

11) The Respondent argued that the jurisdictional matters raised in his application are best dealt with in advance of a hearing on the substantive complaint. He has provided a Preliminary Application and the Affidavit of Constable S.M., sworn April 7, 2008. Attached to that affidavit are the following exhibits:

- a) Copy of Complaint No. 2007/73;
- b) Copy of “Notice of Alleged Disciplinary Default and Referral to a Provincial Court Judge under *The Law Enforcement Review Act*”, filed April 5, 2007.

12) The relief sought in the Preliminary Application is as follows:

- a) A declaration that the Law Enforcement Review Agency and the Commissioner of that Agency acted without jurisdiction in receiving and processing Complaint No. 2007/73 from the complainant;
- b) A declaration that LERA and the Commissioner acted without jurisdiction in referring the complaint to a Provincial Judge for a hearing on the merits;
- c) A declaration that a Provincial Judge has no jurisdiction to conduct a hearing into the merits of the complaint;
- d) And finally, such other declaration and/or orders as may be just and reasonable.

13) The Respondent argues that the evidence collected by the Commissioner, in reviewing the complaint, does not properly permit a referral to a Provincial Judge pursuant to s. 17 of the *Act*. In order to support that argument, he has provided a statement of the factual background of the incident that gave rise to Mr. H. complaint, and also filed a copy of the complaint itself. In addition, he assures the Court that he and the complainant have each received, as they are entitled, a copy of the Commissioner’s file. He asserts that this is the only evidence that is relevant to the application, that it is the evidence that was before the Commissioner and therefore the basis for the decision that is being challenged for want of jurisdiction. His argument continues that if the Commissioner acted without jurisdiction, there is no jurisdiction for the Provincial Judge either.

14) Counsel for the respondent also argues that it would muddy the waters to hear oral testimony before ruling on whether the Commissioner, based on the evidence known to him, could have made the decision he did in referring the matter under s. 17. To hear additional *viva voce* evidence regarding the complaint would, it was argued, put two or perhaps more versions of the incident before me which risks contaminating the question of whether the evidence collected by the Commissioner can sustain a referral under s. 17.

15) Another danger, the respondent argues, if the preliminary jurisdiction application is not addressed before a further evidentiary hearing, is that the Commissioner, who would have the opportunity to make representations on the matter of his jurisdiction, would end up making representations based on the evidence tendered at the s. 17 hearing which, it is agreed, he is not entitled to do.

16) Counsel for the Commissioner argues this is a risk that can be easily managed. He proposes that he is unlikely to even attend the s. 17 hearing, and would instead attend only at the end for the argument. He proposed to restrict his arguments to matters of jurisdiction, and pointed out the Commissioner enjoys a specialized knowledge and interest in the *Law Enforcement Review Act* and its functioning that would assist me in my final deliberations. The Commissioner's goal is to ensure fully-informed adjudication and that in this unique case, the determination of jurisdiction and the complaint itself are so fact-dependent that it only makes sense to decide the jurisdiction issue after a full hearing of the facts, permitting the examination and cross-examination of witnesses. Counsel raised the possibility of conflicting evidence being placed before me if the matter was restricted to affidavit material.

17) His additional argument is founded on the intent of the legislation to provide oral hearings and not to have paper-intensive proceedings that may preclude effective participation by self-represented complainants. Mr. Boyd does agree that there may be some circumstances when a preliminary motion can properly proceed before there is any evidence called, but argues that this is not that case.

18) Given the unique nature of the issue being challenged by the respondent, namely whether the evidence gathered by the Commissioner was sufficient to sustain the referral under s. 17, I agree that the matter should be addressed first without requiring the parties to undertake a full hearing on the merits. That procedure is best able to ensure that the evidence before the Commissioner is not confused with the *viva voce* evidence called at a substantive hearing on the complaint. The respondent has raised a distinct issue at this stage of the proceeding, namely whether the respondent officer was "in the course of

exercising his duties” when he interacted with the complainant. Depending on the Court’s ruling of that issue, a hearing under s. 17 may or may not be necessary. The evidence gathered by the Commissioner is available and it properly forms the basis for this preliminary determination as well.

19) The parties, and counsel for the Commissioner are to be in contact with the Trial Coordinator in order to schedule the argument on the respondent’s motion.

CARENA ROLLER, P.J.