

IN THE MATTER OF:

**Law Enforcement Review Act
Complaint #3735**

AND IN THE MATTER OF:

BETWEEN:

N.S.

Complainant/Applicant,

- and -

CST. W.D

and CST. R.K.

Respondents.

THE HONOURABLE ASSOCIATE CHIEF JUDGE BRUCE MILLER

I. THE ISSUE

The Applicant, N.S. made a complaint pursuant to the Law Enforcement Review Act, C.C.S.M. c. L-75 (hereinafter referred to as "L.E.R.Act") against the respondent police officers, W.D. and R.K. in relation to the officers' actions and behaviour in their capacity as members of the Winnipeg Police Service.

The complaint was received by the Commissioner appointed pursuant to the L.E.R.Act who, thereafter, caused the complaint to be investigated. Ultimately, in accordance with s. 13(1)(c) of the L.E.R.Act, the Commissioner was satisfied that "the evidence supporting the

complaint is insufficient to justify a public hearing” and that he was therefore obliged to decline to take further action on the complaint.

The complainant then applied to have the Commissioner’s decision reviewed by a Provincial Court Judge pursuant to s. 13(2) of the L.E.R.Act.

The application was set for hearing before me and I heard submissions from Mr. S. as well as Mr. Paul McKenna, counsel for both respondent officers. In addition to the oral representations, I was provided, for my consideration and review, the file compiled by the Commissioner in the course of the investigation which he had caused to be undertaken.

The issue now to be determined is whether or not I am satisfied that the Commissioner erred in declining to take further action in respect of Mr. S.’s complaint. In the event that, upon applying the appropriate test, I am so satisfied, I must direct that the Commissioner either:

s. 13(3)

- (a)** refer the complaint for a hearing; or
- (b)** take such other action under the L.E.R.Act respecting the complaint as I direct.

In the event that, upon applying the appropriate test, I am satisfied the Commissioner did not err, the matter is effectively ended.

II. THE FACTS

Mr. S. was, at all material times, President and a member of the Board of Directors of the Indian and Metis Friendship Centre of Winnipeg (hereinafter referred to as the "I.M.F.C."). Prior to the circumstances of Mr. S.'s own complaint arising, he had, to some degree, publicly expressed support for another individual (Mr. J.Z.) in his complaint brought pursuant to the L.E.R. Act against members of the Winnipeg Police Service (NOT Cst. D. or Cst. K.). At all times material to Mr. S.'s complaint, the separate and distinct complaint of Mr. Z. was pending the outcome of the Commissioner's investigation.

Cst. D. and Cst. K. were working as Community Police Officers in the District #3 area of the City of Winnipeg. As such, they would come into daily contact with people from all walks of life, and open lines of communication, both personal and professional, with many of them. One such person was Mr. I.F. , a representative of a local support agency known as "Beat the Street" and a member of the Board of Directors of the I.M.F.C.

One day in early 1999, Cst. D. and Cst. K. were invited to attend the "Beat the Street" offices by Mr. F. so as to

observe and to discuss the operation of the project. During that discussion many subjects were touched upon including the outstanding L.E.R.Act complaint of Mr. Z. Mr. F. was interested in receiving feedback from the officers, particularly Cst. D. on how the matter was affecting the community.

In the Minutes of the Meeting of the Board of Directors of the I.M.F.C. on February 19, 1999, reference is made, at page 3, to a discussion of the involvement of "N." with "J." . It was agreed after some discussion that a policy would be put in place relative to what a spokesperson should or should not say. Subsequently, Mr.

I.F. moved and Mr. R.C. seconded the following motion:

"That the I.M.F.C. do not get involved in the J.Z. case till after the L.E.R.Act report."

The motion was carried.

On February 20, 1999, Mr. N.S. met with Cst. D. at the Community Police Office at Aberdeen Avenue and William Street. He wished to ascertain the nature of the discussions which had taken place previously between Cst. D. and Mr. I.F. relative to Mr. Z.'s outstanding matter.

A special meeting of the Board of Directors of the I.M.F.C. was convened on March 2, 1999, to revisit the issue of the motion carried on

February 19. The Minutes of the meeting reveal that Cst. D, was present as an invited guest and participated in the discussions. Cst. D, eventually retired from the meeting and in camera discussions followed.

On March 12, 1999, Mr. N.S. presented a letter of complaint to the Law Enforcement Review Agency wherein he states, in part:

"I N.S. allege that two policemen from District (3) Station used suppressive tactics that may have influenced a board motion at the Indian and Metis Friendship Centre Director's meeting held on February 19, 1999 which was carried and reads as follows...."

He further states:

"I believe that the intent of these two officers was to silence the Frienship Centre through manipulation and intimidation. Therefore, it is my opinion that the irresponsible and suppressive actions taken by the Winnipeg Police Service through these two officers have tainted the investigation into J.'s case presently before L.E.R.A."

He effectively complains that Cst. D. and Cst. K. committed a disciplinary default in the execution of their duties by abusing their authority as police officers. He alleges that by using oppressive or abusive conduct or language, they committed a breach of the Discipline Code contained in the L.E.R.Act and, in particular, section 29(a).

As previously noted, upon receipt of the complaint, the Commissioner caused an investigation to be undertaken. Mr. S. was interviewed on April 12, 1999 and provided a written statement outlining in detail the specifics of his complaint. Cst. D. and Cst. K. were interviewed on May 27, 1999, and both denied any attempt to influence or intimidate any Board members at any time.

Mr. I.F. was interviewed on April 7, 1999 and provided a written statement advising that he was never intimidated by either Cst. D. or Cst. K. Moreover, it was he who broached the subject of Mr. Z's complaint and at no time did either officer mention any problems with the I.M.F.C. He concludes by stating:

"I have no complaint against the Winnipeg Police Service and no complaint against Cst.'s W and R. "

Mr. J.F. Executive Director of the I.M.F.C., was interviewed on April 19, 1999 and provided a written statement wherein he expressed his opinion that the Board of Directors did not feel intimidated and manipulated by Constables D. and K. On April 26, 1999, Mr. F. wrote a letter to the Commissioner, on the instructions of the Board of Directors of the I.M.F.C., advising that:

"...The Board wanted you to know that these views are only the views of N.S. and not the views of the Centre.

In fact, the Board feels they have a good working relationship with Constables W and R and in no way ever felt intimidated by these two officers. ...”

Another member of the Board of Directors, Mr. J.L. was spoken with on April 29, 1999, and expressed the same sentiments.

In the course of the investigation, documents were received including copies of the Minutes of the meetings of the Board of Directors of the I.M.F.C. on February 19th, 1999; March 2, 1999; and March 18, 1999.

Once the investigation was completed the Commissioner reviewed the materials and concluded that the “evidence supporting the complaint is insufficient to justify a public hearing”. He declined to take any further action.

III. THE REVIEW HEARING

In accordance with s. 13(2) of the L.E.R.Act, the complainant exercised his right to apply to the Commissioner to have the decision reviewed by a provincial judge.

At the hearing before me, Mr. S. made submissions in support of his application.

Mr. S. reiterated his contention that the attendance of the officers to "Beat the Street" and discussions with Mr. I.F. amounted to an interference, intimidation and manipulation on their part in the affairs of the I.M.F.C. in that it resulted directly in the motion which was carried on February 19, 1999. Members of the Winnipeg Police Service, he contends, must be absolutely circumspect and vigilant in ensuring that when matters such as the L.E.R.Act complaint of Mr. Z. are still outstanding, they are not seen to be meddling in same in any way. They must be sensitive to the perception of conflict of interest and avoid that at all costs. This, he suggests, was not recognized or respected by Cst. D. or Cst. K. in their actions - actions which caused the Board of Directors of the I.M.F.C. to take a position contrary to their stated Mission Statement of advocating on behalf of individuals and also which tainted the investigation of Mr. Z's complaint.

Mr. McKenna, on behalf of the respondents, suggested that not only did the information accumulated during the course of the L.E.R.Act investigation not support the contention of interference, intimidation and manipulation, but also that it clearly supported the opposite position.

Furthermore, there is nothing whatsoever , either in writing or in oral presentation, to support the notion that Mr. Z's complaint was, in any way, tainted.

In conclusion, he states, there is nothing incorrect in the way in which the Commissioner weighed and assessed the results of the investigation or in his determination to take no further action.

IV. THE TEST TO BE APPLIED AT THE REVIEW HEARING

At the commencement of the proceedings, Mr. Denis Guenette appeared on behalf of the Commissioner for the limited purpose of addressing the issue of the appropriate test to be applied by a provincial judge in conducting a review pursuant to s. 13(2).

Mr. Guenette had previously presented written argument in support of the position that the applicable standard of review is that of "correctness" as opposed to "patently unreasonable".

Mr. McKenna, without conceding the point absolutely, invited me to apply the test of "correctness" in the course of my review of this particular case.

In fairness to Mr. S. , it must be pointed out that the “correctness” test is, in actuality, the most preferable standard of review to be applied from his standpoint. That is due to the fact that, as the Supreme Court of Canada stated in **Southam Inc. et al v. Director of Investigation and Research** [1997] 1 S.C.R. 748 at page 765:

“...Depending on how the factors play out in a particular instance, the standard may fall somewhere between correctness, at the more exacting end of the spectrum, and patently unreasonable, at the more deferential end.”

In effect, where, based upon consideration of a number of factors, less deference is to be paid to the decision of the Commissioner, the more applicable the test of “correctness”.

Moreover, this review relates to a determination made by the Commissioner wherein he has found that “the evidence supporting the complaint is insufficient to justify a public hearing”. Consequently, I am of the view that the question to be determined is one of mixed fact and law as the question relates to whether the facts (the evidence supporting the complaint) satisfy the legal test (insufficient to justify a public hearing). This also, in my opinion, supports the application of the more exacting test of “correctness”.

I will, therefore, for the purposes of this hearing, apply the standard of review or test of “correctness”, at the same time

acknowledging that the complainant has the onus to show that the Commissioner erred.

V. REVIEW OF THE DECISION OF THE COMMISSIONER

In his written application to review the decision of the Commissioner, dated August 23, 1999, Mr. S. amongst other representations, states:

“The officers conduct into interference into the LERA case was not mentioned in the response letter from Mr. George Wright.”

I respectfully disagree. In his reporting letter of July 23, 1999, to Mr. S. the Commissioner places the complaint in the following context:

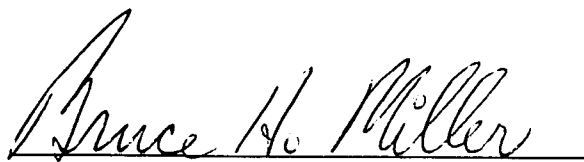
Your complaint alleges Constable W.D. and Constable R. K. used suppressive tactics that may have influenced a board motion at The Indian and Metis Friendship Centre Director’s meeting held on February 19, 1999. Further that the intent of these two officers was to silence the Friendship Centre through manipulation and intimidation.”

Thereafter, he proceeds to outline in detail the investigation conducted including specific references to the motion carried on February 19, 1999 as well as to the results of interviews of various independent individuals privy to the actions of Cst. D, and Cst.

K. The verbatim accounts provided by those persons are contained within the file compiled by the Commissioner.

As previously indicated, I have been afforded the opportunity to consider the Commissioner's file and have done so at great length. Furthermore, I have had the benefit of oral presentations from both sides.

While I appreciate and respect that Mr. S. feels very strongly about this matter, having regard to all of the facts, in particular the information provided by independent sources, and in applying the test of "correctness", I am satisfied that the Commissioner did not err in declining to take further action in respect of Mr. S.'s complaint (#3735).


Bruce H. Miller, A.C.J.