

JANUARY 28, 2004

IN THE MATTER OF: **Law Enforcement Review Act
Complaint No. 5974**

BETWEEN:

T.L.T.

Complainant,

- and -

**CONSTABLE C.
and CONSTABLE K.,**

Respondents.

EXCERPT FROM PROCEEDINGS, REASONS FOR DECISION had and taken before The Honourable Judge Swail, held at the Law Courts Complex, 408 York Avenue, in the City of Winnipeg, Province of Manitoba, on the 28th day of January, 2004.

APPEARANCES:

MR. S. BOYD, for the Commissioner.

MR. P. MCKENNA, for the Winnipeg Police Association.

MR. T. L. T., in person.

THE JUDGE: To start off with, the report from the commissioner, I believe is comprehensive. He refers to and I'm referring to the commissioners report -- reporting letter of April 10th, 2003, his letter to Mr. T.. In the second paragraph, he says,

"In your complaint you allege members of the Winnipeg Police Service abused their authority, used oppressive or abusive conduct or language, and were discourteous or uncivil when dealing with you on July 17, 2002."

I think that effectively is a fair summary of the complaints against the police officers.

The commissioner goes on later in the letter to summarize the response of the officers. At page 3 of the letter, he says,

"On November 13, 2002, Constable K. and Constable C. attended this office for interview. The police received the call from a female, who reported a male who resides in the same apartment block was videotaping her. The officers attended and spoke to the complainant, she told them on previous occasions the male was seen videotaping her and others. She told the officers you were sitting at your window with your video camera pointed at them. She

also said you had been doing this earlier that night as well.

The complainant went to her window, and Constable K. did as well. He said when he looked towards your window, he could see two little lights flickering on and off, a red light and a green one. After obtaining information from her, the officers then attended your apartment. When the officers arrived, they knocked at your door and identified themselves as police. They said that they could hear shuffling around inside the apartment, then after a minute or so, you came to the door. The officers said you were naked when you answered the door.

Constable K. said he asked if you lived here, and you said that you did. You were told to put some clothes on, and asked to turn on a light so they could speak with you. You were then told by the complaint, you asked him which people were complaining and asked what window.

Constable K. said he went to the window that he had looked in from the other apartment. He indicated that there were no longer any lights visible that he would have

seen from the other apartment. You told --"

MR. T.: My modem is on 24 hours a day.

THE JUDGE:

"-- Constable K. it was your computer modem, however he said that there was nothing at the windowsill at this time.

The officers noted there was a video camera in the living area on a bookshelf or table. They said there were also numerous videotapes. They told you they had received complaints, and told you not to do this. You told them about the noise problems and that you were letting the caretaker know. You said the videotaping was so that you would have evidence to show the caretaker. Constable K. said you had no right to do that and you should stop. They said if you had complaints, you should report it to the caretaker and it was his responsibility to deal with the problem.

The officers said they obtained your name and address, and told you to smarten up. Constable K. said at one point in time, you did grab your telephone."

MR. T.: He did.

THE JUDGE:

"He asked who were you were calling and you told him you were calling the caretaker. Constable K. said he took the phone and hung it up because it was late. He said he told you the complaint was about you, the caretaker had nothing to do with this matter. After speaking to you and telling you not to videotape anyone anymore, the officers then left."

Now, that was the summarization of the police officers response.

There are several cases referred to in the commissioner's brief and at page 9 of the first section, the argument, I think it's phrased, starting at page 8, I should say. There's reference to Her Honour Judge Smith's decision in LERA complaint number 3771. These comments by Judge Smith, starting by the paragraph number 37 from that decision,

The commissioner should take care not to weigh --

MR. T.: Not to weigh the --

THE JUDGE:

-- the evidence. In a criminal case, a judge can convict on the evidence of a single uncorroborated witness, if that evidence is sufficient to meet the heavy burden of proof beyond a reasonable doubt.

Although the judge who ultimately hears a LERA case must be convinced on clear and convincing evidence. It is surely likewise possible for that standard to be met on the evidence of a single complainant. The commissioner's role in the screening process is not to apply the standard of proof set out in the Act, or to attempt to forecast how a judge would apply it to the information uncovered in the investigation.

The questions of sufficiency of evidence under Section 13(1)(c) should in my view be approached in a fashion akin to that of a judge hearing a preliminary inquiry and considering whether there is sufficient evidence to commit an accused for trial.

And there's reference to Section 548 of the Criminal Code, and the R. v. Currie case, the citation of which I'm not going to bother with.

The next paragraph in Judge Smith's decision as quoted here, it reads,

The commissioner must consider whether there is evidence upon which a judge hearing the matter under the Act, could conclude that a disciplinary default has occurred. As in the case of the

preliminary hearing, to the extent evidence is circumstantial, the commissioner will have to engage in a limited weighing of it to determine if the evidence is capable of supporting the necessary inferences. Whether those inferences should be drawn, should be left for the judge to determine in a public hearing.

Likewise, determinations of credibility should be left for a hearing before a judge. The process used by the commissioner is ill-suited to determining credibility or making findings on contested facts, as the commissioner readily acknowledged. One exception might be the ability to make findings about what has occurred in LERA's internal processes.

Now, that's what Judge Smith referred to or said in that particular decision and --

MR. T.: Your Honour --

THE JUDGE: I'm sorry, sir, if you'll just bear with me, please.

I would comment that with regard to the question of sufficiency being approached in a fashion akin to a judge in a preliminary hearing.

Really, the test in a preliminary hearing is best set out, I believe, in this paragraph from the U.S.A. v. Sheppard case, which is of course referred to Martin's

Criminal Code following Section 548, with this quote attributed to Mr. Justice Ritchie of the Supreme Court of Canada at that time, reading this way,

"I agree that the duty imposed upon a "justice" under s. 475(1) [now s. 548(1)] is the same as that which governs a trial judge sitting with a jury in deciding whether the evidence is "sufficient" to justify him in withdrawing the case from the jury and this is to be determined according to whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty. The "justice", in accordance with this principle, is, in my opinion, required to commit an accused person for trial in any case in which there is admissible evidence which could, if it were believed, result in a conviction."

Here the evidence that was obtained by the investigators for the commissioner came up with two very different stories as to what happened when the police came to Mr. T.'s apartment.

MR. T.: What, what --

THE JUDGE: I think this is a situation where on the basis of Mr. T.'s evidence, what he says, there is a sufficiency of evidence for the hearing. The question of whether or not there would be a determination by a judge at a hearing that indeed this is clear and convincing evidence

which should prevail over evidence to the contrary from the police officers is not at issue here. It was not the function of the commissioner to weigh the evidence of Mr. T. against the evidence of the police officers.

In my view then, the commissioner did error in determining that there was not sufficient evidence for a hearing -- for the matter to be referred for a hearing.

I certainly am satisfied that according to Mr. T.'s version of events that there was a breach of the discipline code by Officer K., as I understand it, and I'll seek submissions, perhaps from both parties, as to whether or not in disposing of this matter under section 13(3), whether the matter should be -- whether the commissioner should be directed to refer the matter for hearing with regard to both officers or not. Any comments about that, Mr. McKenna?

MR. MCKENNA: Your Honour, I think if you'll check the record for a moment that you said that you found that there had been a disciplinary default committed by Constable K.

THE JUDGE: I don't believe that I said that. I said that the -- I'm not making any findings about disciplinary default.

MR. MCKENNA: I think that's the way it came out, though. Perhaps just out of an abundance of caution, if we can clarify that for the record.

THE JUDGE: Certainly, if I misspoke --

MR. MCKENNA: Thank you, Your Honour.

THE JUDGE: -- myself in some way, I apologize for that.

MR. MCKENNA: I appreciate that.

THE JUDGE: It is not my function here and I did not intend, by any stretch of the imagination to determine a disciplinary default. All that I intended to indicate was

that according to what Mr. T. said, that it would be unquestionable that that alleged conduct would constitute a disciplinary default. And perhaps that's where I ran into --

MR. MCKENNA: Thank you.

THE JUDGE: -- problems in expressing myself and I apologize for that.

In any event, I would appreciate your observations on whether or not in the circumstances of what Mr. T. has said happened with these two officers on that occasion, it would be appropriate to direct the commissioner to refer complaints against both officers or simply Constable K. for hearing.

MR. MCKENNA: Well, I think, Your Honour, when you're, when you're reviewing the decision of sufficiency of evidence, it's evidence as against respondent officers, plural, and in this particular case. And the -- you may find it is open for you to find that there is sufficient evidence to justify a public hearing against one respondent and not the other. That's, I mean, that's I suppose probably is as plain as can be.

You can well imagine that you may review a file and say, well, I see something here against one but not the other. That's entirely within the realm of the possible, just as it is for the commissioner. If it is open to the commissioner after reviewing a matter to determine that charges should stand against one of two officers, then certainly it's open to Your Honour to do the same thing.

THE JUDGE: All right, I appreciate that. To clarify then, my conclusion is that there is or there was sufficient evidence before the commissioner for him to direct a hearing with regard to Constable K., but not with regard to Constable C.

Accordingly, this application by Mr. T. is dismissed with regard to Constable C. With regard to

Constable K., there will be a direction to the commissioner to refer Mr. T.'s complaint against Constable K. for hearing.

Unless there's anything else, that's the disposition of the matter.

(PROCEEDINGS CONCLUDED)

CERTIFICATE OF TRANSCRIPT

I, **SUE MYMKO**, hereby certify that the foregoing pages of printed matter, numbered 1 to 10, 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, Monique Navitka, and has been transcribed by me to the best of my skill and ability.

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