

2000-11-07

IN THE MATTER OF:

**Law Enforcement Review Act
Complaint #3208**

AND IN THE MATTER OF:

BETWEEN:

C.W. C.

W.

Complainant/Applicant,

- and -

CST. S. L,

and CST. D. P.

Respondents.

THE HONOURABLE ASSOCIATE CHIEF JUDGE BRUCE MILLER

I. THE BACKGROUND

The Applicant, Mr. C. W. 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, S. L. and D. P. in relation to the officers' actions and behaviour in their capacity as members of the Winnipeg Police Service.

The complaint, dated July 29th, 1997, was received the same day by the Commissioner appointed pursuant to the L.E.R.Act, who thereafter, caused it to be investigated.

Ultimately, in accordance with s. 13(1)(a) of the L.E.R.Act, the Commissioner was satisfied that "this complaint file is being closed". That being the case, by operation of s. 13(1) the Commissioner was obliged to decline to take further action on the complaint.

Thereafter, the Complainant applied to have the Commissioner's decision reviewed by a provincial judge pursuant to s. 13(2) of the L.E.R.Act.

The application was set for hearing and, in due course, I received written materials and heard oral submissions from Mr. W. as well as Mr. Paul McKenna, counsel for both respondent officers. In addition to that, 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.

II. THE ISSUE

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. W.'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.

III. THE FACTS

In his letter of complaint, Mr. W. recalled that he placed a call to the 911 Emergency Operator "on or about July 23, 1997" at "2:30 p.m. in the afternoon". The purpose of the call was to request the attendance of police to his residence at X ADDRESS in Winnipeg, to intervene in a situation wherein Mr. W. had allegedly been threatened.

Mr. W. complained that the police officers did not arrive in response to his call until 6:30 p.m. and that when they did meet and speak with him, they verbally harassed, intimidated and belittled him.

Mr. W.'s complaint was two-fold - 1) harassment by the officers (particularly Cst. D. P.) and 2) their tardiness in responding to his original emergency call.

The Commissioner undertook an investigation of the complaint and, in due course, was provided with a copy of the call history of this incident (W.P.S. incident # , as well as a cassette tape recording of Mr. W. 's call to the 911 operator.

Upon a review of those materials, the following is indisputable:

1. Mr. W. 's call was made on July 16, 1997;
2. The call was entered by the operator at 2:16 p.m.;
3. Given the nature and tone of the discussion between Mr. W. and the operator, the call was not designated by the operator as an emergency or high priority;
4. Officers P. and L. were dispatched to X ADDRESS , at 6:02 p.m. and arrived at 6:15 p.m.;
5. They dealt with the matter (including speaking with Mr. W.) and cleared the call at 7:13 p.m.

The investigating officer noted at the time that Mr. W. 's concern related to a family dispute over personal space within the shared home. The occupants accused each other of stealing food, mail and other items from the other. The officers listened to the various concerns, informed those present of their rights and concluded by advising all of them to act like grown-ups, get along or move out.

Officers P. and L. were eventually interviewed by the Commissioner and confirmed their dealings with Mr. W. .

Upon completion of the investigation, the Commissioner reviewed the materials and informed Mr. W. in writing of his conclusions as follows:

After a complete review of the complaint file which contains your letter of complaint, a record police dispatch sheet, tape recording of emergency 911 call and interview with the officers, I cannot support your allegations. Therefore, pursuant to Section 13(1)(a) of The Law Enforcement Review Act, this complaint file is being closed.

For the benefit of those reading these reasons, s. 13(1)(a) of the L.E.R. Act states:

s.13(1) Where the Commissioner is satisfied

(a) that the subject is frivolous or vexatious or does not fall within the scope of section 29;

the Commissioner shall decline to take further action on the complaint and shall in writing inform the complainant, the respondent, and the respondent's Chief of Police of his or her reasons for declining to take further action.

In his reporting letter to then Chief of Police, Dave Cassells, the Commissioner wrote:

I am satisfied that this complaint is frivolous and my office will not be taking any further action on this matter. As a consequence, this file will be closed pursuant to Section 13(1)(a) of the Law Enforcement Review Act.

In fairness to Mr. W. it must be pointed out that while the Commissioner did specify, in his letter to Chief Cassells, the basis for declining to take action ("frivolous"), he did not do so in his letter to Mr.

W. (general reference was made to Section 13(1)(a) of the L.E.R.Act).

This issue will be further addressed in the context of the test to be applied at the Review Hearing.

IV. 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, Mr. W. initially made submissions on certain preliminary matters which were responded to by counsel for the officers. After receiving my decision in respect of those issues, Mr. W. proceeded to make representations in support of his application. He reiterated his concerns relative to the conduct of the attending officers, which, he stated effectively amounted to a disciplinary default on their part in that it was an abuse of authority by using oppressive or abusive conduct or language and/or being discourteous or uncivil.

As well, Mr. W. made the point that since the Commissioner had never spoken directly with him, how could he (the Commissioner) say that the complaint had been investigated.

On behalf of the respondents, Mr. McKenna suggested that the officers, upon arrival at X ADDRESS, quickly identified the situation as one not requiring police intervention. Moreover, they met their responsibilities by ensuring no one was injured or in need of their assistance, by preventing a breach of the peace and by advising the parties accordingly.

He argued that the Commissioner conducted an investigation to the extent he felt it necessary, within the framework of the legislation, and dealt with the complaint in a fashion permitted by the legislation. Furthermore, upon a review of the decision of the Commissioner in this case, regardless of the test or standard to be applied, the Commissioner clearly did not err in declining to take further action.

V. THE TEST TO BE APPLIED AT THE REVIEW HEARING

As previously stated, the procedure on a review application is as found in s. 13(3) of the L.E.R.Act.

In order for the provincial judge to determine whether or not the Commissioner erred in declining to take further action, what standard of review is to be applied?

The Supreme Court of Canada has recognized that depending upon a consideration of certain express factors, the applicable test will vary. For example, in **Southam Inc. et al v. Director of Investigation and Research** [1997] 1 S.C.R. 748 it was stated:

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 the subsequent case of **Pushpanathan v. Minister of Citizenship and Immigration** [1998] 1 S.C.R. 982, a third standard was confirmed to exist. At page 1005 the Court stated:

Traditionally, the 'correctness' standard and the 'patent unreasonableness' standard were the only two approaches available to a reviewing court. But in **Southam** a 'reasonableness simpliciter' standard was applied as the most accurate reflection of the competence intended to be conferred on the tribunal by the legislator.

Where more deference is to be shown to the decision at first instance, the more applicable the test of "patent unreasonableness". When comparatively less deference is required, the test of "correctness" is appropriate. The third test, "reasonableness simpliciter", lies between the other two and is properly applied in certain instances after the

factors highlighted by the Supreme Court have been addressed. Those factors include:

1. The existence of a privative clause;
2. The expertise of the tribunal at first instance;
3. The purpose and intent of the statute as a whole and the provision in particular;
4. The nature of the problem – a question of law or of fact or of mixed law and fact.

I have previously noted that in his reporting letter to Mr. W. (August 4, 1998) the Commissioner advised that pursuant to s. 13(1)(a) of the L.E.R.Act, he was declining to take further action. The Commissioner was, however, more specific in his reporting letter to Chief Dave Cassels (August 4, 1998). The significance of this, in my view, is that it impacts upon the standard to be applied. Section 13(1)(a) permits a finding by the Commissioner that the subject matter of the complaint is "frivolous" or "vexatious" or "does not fall within the scope of section 29". Mr. W. was not advised directly which criterion or combination thereof was applied by the Commissioner. This is important in that I am of the view that upon due consideration of the factors previously enunciated, the standard to be applied to the review differs in respect of a complaint that has been found to be "frivolous" or vexatious" on the one hand and "not within the scope of section 29" on the other.

In respect of the former, I believe that the standard would tend to be "reasonableness simpliciter" while in the latter it would tend to be "correctness".

Out of fairness to Mr. W, I will conduct my review on the more stringent standard of "correctness".

VI. REVIEW OF THE DECISION OF THE COMMISSIONER

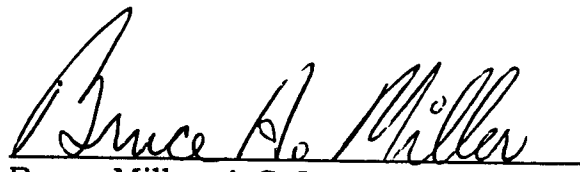
I have had the benefit of hearing oral representations as well as reviewing the entire file compiled by the Commissioner which included the printed call history of the phone call made by Mr. W. and a tape recording of the call (which I have listened to several times).

I believe that the Commissioner effectively determined that the subject matter of the complaint did fall within the scope of section 29 but, thereafter, on its facts, was found by him to be frivolous and unsupportable.

It is also noteworthy that pursuant to s. 13(4) of the L.E.R.Act, in these proceedings, "the burden of proof is on the complainant to show that the Commissioner erred in declining to take further action on the complaint".

With all due respect to Mr. W. _____, having regard to all of the facts and in applying (from Mr. W. _____'s standpoint), the more stringent and favourable standard of "correctness", I am satisfied that the Commissioner did not err in declining to take further action in respect of complaint #3208.

It is hereby further ordered that the ban on publication of the respondents names originally imposed pursuant to s. 13(4.1)(a) of the L.E.R.Act, will continue in accordance with the provisions of s. 13(4.1)(b)


Bruce Miller, A.C.J.