The Honourable Judge Marva J. Smith

In The Matter Of: An application pursuant to Section 13(2) of ***The Law Enforcement Review Act***, R.S.M. 1987, c L75. (L.E.R.A. Complaint No. 3771)

B E T W E E N:

Mr. P.	)	Mr. P. in person
	)	and unrepresented by counsel
- and -	)	
	)	
CONSTABLE M.	)	
Respondent	)	Mr. Paul McKenna
	)	for the Respondents
CONSTABLE V.	)	
Respondent	)	
	)	Mr. Denis Guénette
	)	Counsel for L.E.R.A.
	)	
NOTE: These reasons are subject to a	)	Judgment Delivered:
ban on publication of the respondents'	)	July 3, 2002
names pursuant to s. 13(4.1) (c)	)	

INTRODUCTION

[1] The Applicant, Mr. P., made a complaint under *The Law Enforcement Review Act*, R.S.M. 1987, c. L75 (the "Act") to the Law Enforcement Review Agency (LERA) about two aspects of the conduct of police in their investigation of a possible drinking and driving offence. The Commissioner, after an investigation, found the evidence related to the complaint to be insufficient to justify a public hearing, and declined to take any further action on the complaint. This is a review of the Commissioner's decision under s. 13 of the Act.

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THE SCHEME OF THE LEGISLATION

[2] The police play an important role in the maintenance of a just and peaceful democratic society ruled by law. The duties and responsibilities of police officers are significant. In order to carry out those important responsibilities the police have considerable power and authority in dealing with members of the public including those whom they suspect of criminal acts. The community expects that police will live up to certain professional standards in their dealings with the public.

[3] The Act provides a discipline code by setting out certain conduct that will constitute a disciplinary default. Section 29 provides, in relevant part to this proceeding, as follows:

> *Discipline Code*
>
> *29 A member commits a disciplinary default where he affects the complainant . . . by means of any of the following acts or omissions arising out of or in the execution of his duties:*
>
> *(a) abuse of authority, including*
>
> *(iv) being discourteous or uncivil,*
>
> *. . .;*
>
> *(b) making a false statement, or destroying, concealing, or altering any official document or record;*

[4] The statute is more than a typical discipline code governing employer – employee relations. In recognition of the public role and responsibilities of those who hold the office of police officer, citizens can complain, under s. 6(1) of the Act, about alleged violations that have affected them. Complaints are considered by LERA, an agency independent of the police force. See *Blair v. Soltys* (1999), 141 Man. R. (2d) 319 (Q.B.)

[5] Once a complaint is made, s. 12 of the Act obliges LERA's Commissioner to conduct a prompt and thorough investigation.

[6] Once an investigation is complete, the Commissioner attempts to resolve the complaint informally, pursuant to s. 15. If such a resolution is not possible, the matter is referred to a Provincial Court Judge under s. 17(1) for hearing and

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determination. The Act requires the Provincial Court Judge to dismiss the complaint unless the judge is satisfied ". . . on clear and convincing evidence" that the respondent committed the disciplinary default.

[7] The Act also provides that the Commissioner may effectively screen out of the process certain complaints. The screening mechanism recognizes that in some cases a public hearing may be unwarranted. It provides some measure of protection to police officers, who are no doubt vulnerable to unwarranted or specious complaints. Subsection 13(1) provides:

> Where the Commissioner is satisfied
>
> (a) that the subject matter of a complaint is frivolous or vexatious or does not fall within the scope of section 29;
>
> (b) that a complaint has been abandoned; or
>
> (c) that there is insufficient evidence supporting the complaint to justify a public hearing;
>
> the Commissioner shall decline to take further action on the complaint . . . .

[8] As noted above, on April 24, 2001, the Commissioner utilized the screening mechanism when he declined to take further action on Mr. P.'s complaint, relying on s. 13(1)(c), "that there is insufficient evidence supporting the complaint to justify a public hearing."

OVERVIEW OF FACTS

[9] On August 6, 1998 Constables V. and M. received information that a vehicle registered to the Applicant had been spotted erratically driven. The officers attended to Mr. P.'s address. There they confronted him with their suspicions that he had just arrived home and had been drinking and driving. He denied the accusation. He stated he had arrived home some 20 minutes prior and consumed some alcohol after coming home. He was arrested and taken for a breathalyser test that disclosed readings of 110 and 120.

[10] At the police station, the officers learned they were mistaken in their belief that it was a member of the RCMP who had observed the erratic driving. Rather it was an unknown citizen's complaint without any particulars. On the advice of their

sergeant the accused was not charged but released for a possible later summons. Presumably the sergeant gave this advice for lack of reliable information that the accused was driving. Mr. P. was not served at that time with a notice of suspension of his licence under *The Highway Traffic Act.*

[11] Mr. P. alleged that during the investigation one of the officers engaged in abusive conduct toward him by calling him a liar and a coward. There was a dispute between the officers and Mr. P. about when he had parked his vehicle. The officers apparently believed that Mr. P. had just arrived home and that he had been drinking and driving. According to the investigator's notes Constable M. agreed that he called him a liar. He believed Mr. P. was not being truthful with the officers, and challenged his alibi. While the same officer denied using the word coward, he admits he pressed him to ". . . be a man and take responsibility for your actions." The Commissioner, in his letter declining to take action, clearly misread the investigator's report and stated that the officer had *denied* referring to Mr. P. a liar.

[12] Mr. P.'s second complaint alleged that the officers made a false statement in a court assistance report which, he alleges, resulted in the suspension of his driver's licence some eight months after the incident. As that Report, which was prepared by Constable V., is relatively brief and important to these reasons, I will quote it extensively. The portion with which Mr. P. takes particular issue is in italics.

> On Thursday, August 6, 1998 at approximately 10:41 p.m. the accused P. was operating his 1990 Ford Ranger black pickup truck, bearing Manitoba Licence AAM328, eastbound on Highway Number One at the Perimeter Highway underpass. The accused was driving in an intoxicated state.
>
> Members of the Winnipeg Police Service, acting on information provided, attended to the address of the registered owner, this being at 688 Ebby St.
>
> *The registered owner/P. was located after just getting out of his vehicle* and learning he was the driver. He was observed to be unsteady on his feet. When asked for his identification, he was observed to have difficulty in producing his wallet and identification. The accused was observed to have a mild odor of liquor on his breath.
>
> At approximately 11:20 p.m., the accused was placed under arrest for Driving Impaired. . . . The accused was conveyed to District 2 police station, where he provided to (Sic.) samples of his breath resulting in readings of:

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1st Test @12:17 a.m. @ 110 mg%, 2nd Test @12:34 a.m. @ 120 mg %

The accused was released for summons

[13] The investigation was complete when Mr. P. was released for a possible summons in the early hours of August 9, 1998. He heard nothing further about the matter for over seven months.

[14] In January 1999 the challenged court assistance report, initially forwarded to the Traffic division as part of standard procedure, was returned to Constable V. from the Traffic Division. There was a handwritten note on it directing him to serve a notice of suspension, or asking why that had not been done. On March 21, 1999 Constable V. chose to suspend Mr. P.'s license, serving him with a notice of suspension for a period of three months, pursuant to s. 263.1(1) of *The Highway Traffic Act*. Mr. P. expressed concern about the effect on his livelihood when he was served. This delayed suspension is most unusual as the procedure contemplates service at the time of the investigation. The suspension takes effect seven days after it is served, subject to a right to have the matter reviewed by the Registrar. The suspension was to take effect March 28, 1999.

[15] The court assistance report was forwarded to the Motor Vehicles Branch. Mr. P.'s contention is that it was false and was relied on by the Registrar in upholding the police officer's suspension.

[16] An information was sworn concerning charges of impaired driving and over .08 on March 24, 1999. The matter first appeared in court in April of 1999. Those proceedings were later stayed.

[17] In addition to filing his LERA complaint, Mr. P. brought proceedings in the Court of Queen's Bench. The proceedings resulted in an interim stay of the suspension order on May 6, 1999 and a subsequent quashing of it. See: *P. v. Winnipeg (City) Police Service*, [2001] M.J. No. 360. I allowed the Applicant to file an affidavit and transcript of cross-examination of Constable V.conducted January 2000 in relation to the Queen's Bench proceedings. I also reviewed the Queen's Bench decision, which was issued August 13, 2001.

[18] The Commissioner of LERA investigated Mr. P.'s complaints and on April 24, 2001 declined to take further action on them pursuant to s. 13(1)(c) of *The Law Enforcement Review Act*. He stated:

> I have carefully reviewed all of the information you have provided in your complaint, as well as the information uncovered as a result of our investigation.
>
> It is my view that a Provincial Judge would not reasonable (sic.) be satisfied from the evidence that Constable M. and Constable V. have clearly and convincingly committed the disciplinary defaults you have alleged. As such, the evidence supporting the claim is insufficient evidence to justify a public hearing. . .

[19] In Justice Kennedy's August 13, 2001 decision quashing the police officer's suspension order, there is support, at para. 14, for Mr. P.'s contention that the information provided by Constable V. was false:

> . . . . The legislation makes it clear that he shall suspend, but he did not do so, from which it must be inferred that he was uncertain as to the reasonable and probable ground for both the arrest and the breathalyzer. Further, the Crown stayed the proceedings, which is further indication that evidence was lacking yet it, *along with the false information supplied by the police officer*, resulted in maintaining the suspension. (Emphasis added)

[20] Justice Kennedy found it unnecessary to deal with the ruling by the Registrar upholding the officer's suspension. He observed that the fact that the Breathalyzer readings were rising was consistent with Mr. P.'s version of recent consumption – that is that the alcohol was consumed after he returned home from work and before the officers arrived.

[21] In his letter declining to take further action, the Commissioner observed that the second portion of the disputed sentence "*and learning he was the driver*" indicates the officer "learned" that Mr. P. was the driver. He observed that the court assistance report is only intended to be a summary. He observed that the fuller report in the narrative authored by Constable V. supports the court assistance report. It is not clear to me what conclusions if any were made by the Commissioner in relation to whether or not the court assistance report could be considered to be inaccurate or misleading in isolation from the other documents. It is not clear from the letter or the investigation file whether the fuller narrative is always attached to the court assistance report when it is sent to the Traffic Division or the Registrar, or what Constable V.s' knowledge was concerning the procedures. It is also not entirely clear what documents are normally forwarded to the Registrar and which ones were forwarded in this case. Nor is it clear from the

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file whether the Commissioner considers that there must be evidence of malice, or intention to mislead, to constitute a false statement.

<u>THE STANDARD OF REVIEW</u>

[22] As noted above, pursuant to s. 13(2) of the Act, Mr. P. requested a review of the Commissioner's decision. I must determine whether the Commissioner erred in declining to take further action on the complaint. The Applicant bears the burden to convince me that the Commissioner erred: s. 13(4).

[23] In *Bartel v. S.(C.)*, unrep. May 30, 2002 (Man. P.C.) my colleague Chartier P.J. extensively analyzed the standards applicable to a s. 13(2) review of a Commissioner's decision to decline further action. He summarized his conclusions at p. 18 – 19:

> 1. Where the review is one which relates to the jurisdiction of the Commissioner and more specifically, does the complaint "fall within the scope of section 29" of the L.E.R. Act as same is found in 13 (1) (a) of the L.E.R. Act the standard of review will tend to be "the correctness" of the decision made by the Commissioner.
>
> 2. Where the review is related to an error of law or an error of mixed facts and law within the jurisdiction of the Commissioner and more specifically, when the Commissioner has to decide whether or not 'there is insufficient evidence supporting the complaint to justify a public hearing" as same is found in clause 13(1) (c) of the L.E.R. Act, the standard of review will tend to be "the correctness" of the decision made by the commissioner.
>
> 3. Where the review is related to a finding of fact within the jurisdiction of the Commissioner, the standard of review applied to the decision of the Commissioner will be closer to "reasonableness *simpliciter*".

[24] When considering whether a given issue involves a question of law or fact the following guidance by Iacobucci J. in *Southam Inc. v. Director of Investigation and Research,* [1997] 1 S.C.R. 748 at 766-767, referred to by Chartier P.C.J. in *Bartel, supra,* is helpful:

> Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took

> place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.

[25] As Chartier, P.C.J. observed in *Bartel, supra* at p. 16, the problem in most cases will be a question of mixed fact and law as the issue will be whether the Commissioner applied the appropriate "sufficiency of evidence" test – a legal test – to the available evidence – the facts.

[26] In this case, the Respondents argued that the applicable standard of review was simple reasonableness, and the decisions of the Commissioner met that standard. It was argued that the Commissioner had made findings of fact, in the course of his review, particularly in relation to the alleged false report. Deference should be shown to those findings. It was submitted that whether a given statement is false, or whether there is sufficient evidence concerning the falsity of the statement is a finding of fact.

[27] In the alternative, the Respondents argued that the decisions made were correct and should not be disturbed.

[28] The Commissioner intervened in the proceedings and, in response to some of the Respondents' submissions on this point, filed written submissions related to the process followed by the Commissioner, and the implications for the approach to s. 13 reviews. He argued that the Commissioner does not make findings of fact in the process of coming to a conclusion under s. 13(1) (c). The Commissioner noted:

> . . . the Commissioner's position is that when he makes a decision in relation to clause 13(1)(c), he is not making any "finding of fact" in the sense of adjudicating finally and conclusively what did or did not occur. The Commissioner believes that any role of adjudicating findings of fact belongs exclusively to the Provincial Judge.

[29] Where the Respondents point to "findings" in the Commissioner's letter declining to take action, the submissions by the Commissioner suggest that the letter may be in large part a recitation of the position taken by the officer.

[30] In his written submissions, the Commissioner also elaborated on his approach to determining whether there is sufficient evidence, stating:

> What the Commissioner does, in considering whether clause 13(1)(c) applies in any given case, is determine whether, there is <u>sufficient evidence</u> (or insufficient evidence, as the case may be) for the complaint to proceed to the Provincial Judge for adjudication on the merits of the complaint. If there is

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insufficient evidence, then the Commissioner is required to take no further action on the complaint. If that is not true (i.e. if there is not insufficient evidence), then the complaint process continues. To this end, the Commissioner will review the evidence accumulated as a result of his office's investigation, and he will ask himself the following question:

> "Is there sufficient evidence to justify a public hearing on the merits of this complaint? Would this evidence allow a complainant to go to a hearing on the merits of the complaint with a reasonable chance of success? Or is it more realistic to conclude that the complainant would not have a reasonable chance of success?"

. . .

. . . As far as the Commissioner is concerned, if he concludes that the complainant would not have a reasonable chance of success at a hearing on the merits, then the test in clause 13(1)(c) is met. At that point the Commissioner will decline to take further action.

By contrast, the Commissioner is not asking himself the following questions (despite what counsel for the police officer argues):

> "Based on the evidence that has been uncovered, what do I conclude actually happened that day? Does this evidence convince me that a certain event did or did not occur?"

The distinction between the questions that the Commissioner could be asking is perhaps a fine one, but it is an important one. The Commissioner is not deciding in any conclusive manner whether an event did or did not happen. The Commissioner is looking at the evidence to determine whether, on the whole, it is sufficient to allow the Provincial Judge to make the necessary conclusive findings.

[31] I will comment later in these reasons on the Commissioner's approach to assessing the sufficiency of the evidence.

[32] In my view, however, whether there is sufficient evidence that a given statement is false is a question of mixed fact and law. Similarly whether there is sufficient evidence of abuse of authority to justify a public hearing, is likewise a question of mixed fact and law.

[33] Thus the standard to be applied is whether the Commissioner was correct in his determination that there was insufficient evidence of the disciplinary defaults to justify a public hearing.

[34] Before applying the appropriate standard of review to the Commissioner's decisions, I must consider the legal standards the Commissioner should apply when assessing the sufficiency of evidence.

THE APPROACH TO SUFFICIENCY OF THE EVIDENCE UNDER S. 13(1)(C)

[35] It must be remembered that when the Commissioner declines to take further action, that decision ends the complaint process before a hearing on the merits has ever taken place. On the other hand, a decision to refer a complaint for hearing allows the complaint to be determined on its merits, with significant procedural safeguards to respondent officers.

[36] In my opinion, the "reasonable chance of success" touchstone that the Commissioner is using to guide him in assessing the "sufficiency" of the evidence is more robust than that contemplated in s. 13(1)(c) of the Act. Incorporating reference to the ultimate burden of proof to be applied by a judge at a public hearing in determining sufficiency is likewise inappropriate. Yet that is what the Commissioner did in this case - see para. 16, *supra*.

[37] The Commissioner should take care not to weigh 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.

[38] The question of sufficiency of evidence under s. 13(1)(c) should, in my view, be approached in a fashion akin to that of a judge hearing a preliminary enquiry and considering whether there is sufficient evidence to commit an accused for trial. See: s. 548 of *The Criminal Code* and *R. v. Arcuri,* [2001] 2 S.C.R. 828.

[39] 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.

DETERMINING THE CORRECTNESS OF THE COMMISSIONER'S DECISIONS

A. The complaint of abuse of authority

[40] The Commissioner's decision to decline to take action on this portion of Mr. P.'s complaint was correct, albeit, in my respectful view, not for the reasons articulated by the Commissioner. There was certainly evidence to support the allegation that the Constable called the Applicant a liar. The Constable admitted this, and the Commissioner misread the file when he stated that the officer denied it. Moreover, the Constable's recollection that he urged the Applicant to be a man and take responsibility for his actions is close to the version of the Applicant that the officer called him a coward. I do not consider that the issue the Commissioner faced was the sufficiency of the evidence.

[41] However, in the context, even presuming the truth of the allegations, the statements attributed to the Constable do not rise to abuse of authority within the meaning of s. 29. Here the police were investigating a serious criminal offence. Provided they respect *Charter* rights, police generally can use the technique of confronting an accused or suspect in forceful and direct language with their theories or suspicions, and take note of the responses. As Lamer J. (as he then was) observed in an oft-quoted passage in *Rothman v. The Queen,* [1981] 1 S.C.R. 640 at 691, *"[i]t must be borne in mind that the detection of criminals is not a game to be governed by the Marquess of Queensbury rules."* At the same time, as experience with miscarriages of justice demonstrate, in using such techniques, officers must take care to ensure they do not fall prey to tunnel vision in fixing on only one theory of what may have occurred.

[42] I have concluded that the subject matter of this portion of Mr. P.'s complaint does not fall within s. 29 – see s. 13(1)(a). Therefore the Commissioner's ultimate decision to decline to take further action was correct. This aspect of the Applicant's case, which concerns Constable M., is dismissed.

[43] In view of this finding, I find it unnecessary to deal with an issue raised by the Respondent concerning the timeliness of the complaint.

B. The complaint concerning the court assistance report

[44] The Applicant's complaint is that Constable V. affected him adversely by means of a false statement contained in the court summary. The Applicant believes that the way the court summary was worded led to the Registrar's upholding the three-month driving suspension. While the suspension was ultimately quashed, it was in effect for a time and adversely effected his livelihood and resulted in substantial legal costs.

[45] First I will consider the ambit of the particular disciplinary default, and then, consider whether the Commissioner was correct in his finding of insufficient evidence.

1. <u>The ambit of the disciplinary default of making a false statement</u>

[46] The Discipline Code provides in relevant part:

> A member commits a disciplinary default where he affects the complainant . . . by means of any of the following acts or omissions arising out of or in execution of his duties:
>
> (b) *making a false statement*, or destroying, concealing, or altering any official document or record;

[47] Is there evidence upon which a provincial judge could conclude that the court summary report constituted a false statement? This requires some consideration of what is meant by that term in the legislative provision.

[48] Counsel drew my attention to *C. v. K.,* [1999] M.J. No.581 (Prov. Ct.) In that case Garfinkel P.C. J. was asked to review the Commissioner's decision declining to take action on a complaint of a false statement. Judge Garfinkel found the Commissioner was in error as the Applicant ". . . was not advised that the standard for establishing that making of a false statement is malicious intent; nor was she given an opportunity to show malicious intent." (para 26)

[49] It was common ground between counsel for the Commissioner and counsel for the Respondents (both of whom were counsel in the *Caldwell* case) that the issue of whether this statutory interpretation by the Commissioner was correct was never raised in that case.

[50] However, the Respondents argued that the standard applied by the Commissioner in the *C.* case is the correct one thus, a false statement is an untrue statement made with malice or intention to mislead. It was argued there is simply no evidence of the requisite intent, and that the fact that Constable V.'s supplementary report accurately sets out the detailed chronology of the officers' dealings with Mr. P. is further proof of innocent intent. The contested phrase was not false but at most ambiguous, and reflected an honest conclusion reached by the officer.

[51] In the case before me, the Commissioner declined to take a position as to whether a false statement must be interpreted as restricted to an untrue statement made with malice or intention to deceive, or whether an untrue statement made negligently might constitute a disciplinary default. In my opinion, it may be difficult for both a complainant and an investigator if the necessary elements of the disciplinary default are vague or undefined.

[52] The Canadian Oxford Dictionary (1998) defines false as follows:

> Adj. 1. Not according with fact; wrong, incorrect
>
> 2. a: spurious, sham, artificial; b: acting as such; appearing to be such, esp. deceptively
>
> 3. illusory; not actually so
>
> 4. improperly so called
>
> 5. deceptive
>
> 6. deceitful, treacherous or unfaithful
>
> 7. fictitious or assumed
>
> 8. unlawful

[53] The Cambridge International Dictionary of English (Cambridge Dictionaries Online)gives the following definition:

> **False** (NOT CORRECT)
>
> Adjective (of information or an idea) not correct or true

[54] Merriam Webster's Collegiate Dictionary (Merriam-Webster OnLine) gives two meanings that may be applicable:

> 2.a: intentionally untrue . . .; b: adjusted or made so as to deceive; c: intended or tending to mislead;
>
> 3. not true

[55] The Respondents argue that falsity implies deceit, or an intention to mislead. They submit that it goes beyond a mere untrue statement. The Respondents denied it could encompass a negligently made untrue or inaccurate statement.

[56] Unfortunately, there are no authorities on point dealing with this or similar legislation. However, in support of their interpretation the Respondents relied on *Kingsdale Securities Co. v. Canada (Minister of National Revenue)* [1974], 2 F.C. 760 (F.C.A.), at para. 83, p.21 wherein it is noted "[*w]ith regard to the declarations of limited partnership the use of the word 'false' in Section 10 of the Ontario The Limited Partnerships Act (sic.) should be distinguished from the word inaccurate as the word "false" implies an intention to mislead."* I observe that this quotation was taken from the dissenting judgment of Justice Bastin, and not from the majority judgment as asserted by the Respondents. It appears that the majority judgments did not disturb the interpretation of the Trial Judge, who, it seems found that no partnership had arisen, partly on the basis of false statements. In any event the purposes of the two statutes are quite different.

[57] Also brought to my attention was *R. v. Frank,* [1945] C.T.C. 11 (P.E.I.S.C.). In that case it was held, on the one hand, that a prosecution for an offence under the Income Tax War Act for making a false statement requires a fraudulent intention or and intent to deceive, but, on the other hand, that where the accused certifies the truth of statements without due care as to its accuracy, the offense will be made out. Perhaps of somewhat more persuasive authority - as it deals with disciplinary proceedings - is *Re Imrie and Institute of Chartered Accountants,* [1972] 3 O.R. 275 (Ont. H.C.J.), and it points towards a negligence standard as the proper interpretation under that legislation.

[58] The Applicant, who represented himself, was not able to offer much assistance on this point to the Court. It appears to be his belief that the statement must have been intentional.

[59] Other legislative regimes have attempted to provide more guidance to the courts. For example, in Alberta, section 5(2)(d) of Reg. 356/90 defines the discipline offence to consist of one or more of the following components:

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(i) <u>wilfully or negligently</u> making or signing a <u>false, misleading or inaccurate statement</u> or entry in an official document or record;

(ii) <u>wilfully or negligently</u> making or signing <u>a false, misleading or inaccurate</u> statement pertaining to the police officer's official duties;

(iii) without lawful excuse,

(A) destroying, mutilating or concealing an official document or record, or

(B) altering or erasing an entry in an official document or record.

[60] According to an extract from *Legal Aspects of Policing*, by Paul Ceyssens, provided by counsel for the Commissioner, it appears that most Canadian legislation or regulations expressly include *both* intentional (wilful) and negligent false statements in the corresponding disciplinary offence. What should be made of the Manitoba Legislature's silence on this point? The Respondents argue for a narrow interpretation – requiring wilfulness, malice, or proof of intent to mislead.

[61] In my view, given the overall purpose of the statute, it is more likely that the legislature, by failing to qualify the statement, intended to cast a wide net. I interpret the disciplinary default to encompass both negligently untrue or inaccurate and wilfully false statements. I also find that a material omission may render a statement false. The public has a right to expect police officers, who hold such significant powers, to not only act without malice, but to live up to professional standards of reasonable care in discharging their duties.

[62] If officers are careless in their reports and statements - especially in regard to material matters, citizens can suffer significant negative consequences. The case at bar *may* illustrate this danger. The public has a right to expect that officers will exercise care and be as accurate as possible when they document their investigations. Police officers generally ought not to record their conclusions, or even their honest beliefs, but rather they ought to record their observations and the information they receive in the course of an investigation. Special care should be taken when the reports may be relied on in civil proceedings, such as in this case on a review of the officer's suspension order.

[63] On the other hand, in interpreting the ambit of this disciplinary default I have no doubt that courts will not find simple errors on non-material matters within its scope. Such matters would likely be screened out of the process as frivolous or

too trivial to merit a public hearing. Police officers are human and can make errors. In addition, there must be evidence that the false statement *affected* the Applicant in some material way. In any event, an intentional or malicious false statement will doubtless be treated more seriously than a negligent one at the penalty stage.

2. The sufficiency of the evidence as to a false statement

[64] It seems to me that it is arguable that a reasonable person reading the court summary could be left with a false or incorrect impression about material particulars of the police investigation.

[65] In addition, we have the unique situation of a Queen's Bench judge having opined - in a case between the same parties dealing with the same factual situation - that Constable V. provided false information. Certainly that Court was not determining the same issue of whether a disciplinary default was committed.

[66] Even apart from that decision – which was not available to the Commissioner when he made his decision - I find it difficult to conclude that the problem here is one of *sufficiency* of evidence. There is evidence upon which a judge *could* make the finding the Applicant seeks. I emphasize that in making this determination I am not making any finding of facts or determining what inferences should be drawn.

[67] I conclude that the Commissioner erred when he declined to take further action on this aspect of the complaint. It appears to me that he attempted to predict what inferences or conclusions a judge at a public hearing would draw. The approach of evaluating whether the complaint bore a "reasonable chance of success" led the Commissioner to weigh the evidence, and to attempt to forecast if the ultimate burden of proof would be met. As noted above, this was not the proper approach.

[68] I also found the investigation to be less complete than would be desirable. Hopefully, the record can be clarified as to what the general practice was concerning the forwarding of reports and other documents to the Traffic Division and to the Registrar, and which particular reports were forwarded to each of those entities in this case.

CONCLUSION

[69] I find the Commissioner to have erred in declining to take further action on the complaint concerning the alleged false statements in the court summary. There is sufficient evidence to justify a public hearing. Pursuant to s. 13(3) of the Act I therefore direct the Commissioner to refer the complaint with respect to the court assistance report to a public hearing. I also direct him to make every effort to garner the missing information referred to in paragraph. [68] within four weeks of this decision and to provide that information, together with the relevant documents to the Applicant and to the Respondent V.

[70] The Applicant contends that the nature of the encounter between Mr. P. and the officers at his home may be related to the way in which the court summary was written. Although I have found no basis for a disciplinary default in the words used by the officers at the scene as alleged, I expect that he will be able to lead evidence of this encounter as part of the overall factual underpinning to his complaint.

[71] This matter dates back some time and is complex. Should the Applicant apply for Legal aid under s. 24(8) of the Act and be found financially ineligible, the Commissioner may find it appropriate, in view of the substantial legal costs already incurred by the Applicant in separate successful proceedings, to recommend that the Minister appoint counsel to present the case in support of the complaint.

[72] Pursuant to s. 13(4.1)(c) of the Act, I order that the ban on the publication of the Respondents' names continue until the complaint is disposed of in accordance with the Act.

Dated at Winnipeg, July 3, 2002.

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Marva J. Smith, P.C.J.