Date: 19990225
Docket: CI
(Winnipeg Centre)

COURT OF QUEEN'S BENCH OF MANITOBA

LERA 343

BETWEEN:	)	
	)	
S. K. and	)	
J. K.	)	
	)	COUNSEL
Applicants,	)	
	)	
- and -	)	
	)	Applicants:
	)	Paul R. McKenna
	)	
THE COMMISSIONER APPOINTED	)	Respondents:
PURSUANT TO THE LAW	)	Denis G. Guénette
ENFORCEMENT REVIEW ACT and	)	
J. V. M. ,	)	
	)	Judgment delivered:
Respondents.	)	February 25, 1999.

BEARD J.

I. The Issue

[1] The applicants have applied for various remedies to prevent the continuation of proceedings against them under ***The Law Enforcement Review Act***, C.C.S.M. c. L75 (the ***Act*** or ***LERA***) on the basis of an allegation of a breach of the rules of natural justice by the commissioner. Prior to that application being heard on the merits, the parties consented to an order being granted which referred the following question for preliminary determination:

> Whether the issues raised in the Notice of Application and the Amended Notice of Application should be heard and determined by this Honourable

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> Court, or whether this Honourable court should direct that the issues raised in the Notice of Application and the Amended Notice of Application be dealt with before the Provincial Judge.

[2] Thus, the preliminary question I must decide is whether the motion for the prerogative orders should be heard by a judge of the Court of Queen's Bench or by a provincial judge in the course of exercising his responsibilities under the ***Act***. The hearing before me at this stage is not to make any decisions on the merits of the application.

[3] The applicants and the respondents have approached this question from two different perspectives. The applicants have argued the issue from the perspective of the commissioner's jurisdiction to order a hearing and whether a court or the tribunal under the statute is the appropriate forum to rule on whether he has lost jurisdiction to order a hearing due to the alleged deficiencies in his handling of the complaint. The respondents have argued the motion from the perspective of the jurisdiction of the provincial judge to undertake a hearing and whether the provincial judge has lost jurisdiction to hold any form of a hearing due to the alleged deficiencies on the part of the commissioner in the handling of the complaint.

II. The Facts

[4] The parties have agreed that, for the purposes of this hearing, the facts will consist of the allegations made by the applicants in their affidavits, both sworn June 2, 1998. Briefly, those facts are as follows:

- the applicants are both members of the Winnipeg Police Service;
- in the course of their employment, they arrested the respondent J. V. M. on October 13, 1996;
- on November 29, 1996, V. M. filed a complaint pursuant to the ***LERA*** regarding the way he was treated by the applicants at the time of his arrest – this was 47 days after the events forming the basis of the complaint;
- both applicants were interviewed by the Internal Investigation Unit of the Winnipeg Police Service in March 1997;
- on or about July 31, 1997, the applicants were advised that a senior crown attorney had recommended that no criminal charges be laid;
- the first notice that the two applicants received regarding the complaint under ***LERA*** was by letter dated January 2, 1998, which letter also notified the applicants of the commissioner's decision to refer the matter to a provincial judge for a hearing under the ***Act***;
- following the setting of the hearing date, the applicants commenced this proceeding in this court, alleging that the commissioner was without jurisdiction to refer this matter for hearing by a provincial judge as a result of the failure to give timely notice of the complaint to the applicants and other procedural irregularities under the ***LERA***.

[5] No affidavit material has been filed on behalf of the commissioner, there have been no cross-examinations of the applicants on their affidavits and no evidence has been called other than the affidavits filed by each of the applicants.

[6] The procedural irregularities of which the applicants have complained are as follows:

(1) that the complaint was filed more than 30 days after the alleged disciplinary default contrary to s. 6(3) of the ***Act***;

(2) that the complaint was not forwarded to the applicants "as soon as practicable", contrary to s. 7(2) of the ***Act***;

(3) that the commissioner obtained further particulars from the complainant but failed to provide them to the applicants, contrary to s. 10 of the ***Act***;

(4) that the commissioner failed to properly investigate the complaint, contrary to s. 12 of the ***Act***;

(5) that the commissioner failed to interview the applicants to give them an opportunity to respond to the complaint, contrary to ss. 7, 10 and 12 of the ***Act***;

(6) that the commissioner failed to attempt to resolve the complaint informally contrary to s. 15 of the ***Act*** or by way of admission under s. 16 or the ***Act***; and

(7) the applicants were effectively denied their right to counsel during the investigative stage of the proceeding because they were not

notified of the complaint until the matter was referred for a hearing, contrary to s. 21 of the ***Act.***

III. The Law

[7] The law regarding a court's decision to exercise its discretion to hear an application for judicial review has been clarified with the recent Supreme Court case of ***Matsqui Indian Band et al. v. Canadian Pacific Railway et al.*** (1995), 122 D.L.R. (4th) 129 (***Matsqui***) and the cases which have followed it. I find that the following principles apply:

1. The relief which a court may grant by way of judicial review is, in essence, discretionary, which flows from the fact that prerogative writs are extraordinary remedies. (***Matsqui***, p. 143.)
2. While the decision of an administrative tribunal lacks the force of *res judicata*, a tribunal may embark upon an examination of the boundaries of its jurisdiction, but in so doing, it must be correct in its decision and the courts will generally afford little deference to its decision. (***Matsqui***, p. 141.)
3. A variety of factors should be considered by courts in determining whether they should enter into judicial review or, alternatively, should require an applicant to proceed through a statutory appeal procedure. These factors include: the convenience of the alternative remedy; the nature of the error; and the nature of the appellant body (*i.e.*, its investigatory, decision-making and remedial

capacities). The category of factors is not closed, as it is for the courts in particular circumstances to isolate and balance the factors which are relevant. (***Matsqui*** p. 145.)

4. The practice is for the courts to decline jurisdiction in favour of the statutory appeal procedure where there is such a statutory right except in special circumstances – this is the "adequate alternative remedy" principle. (***Matsqui***, p. 137, quoting from the trial decision.)

5. In the case of the adequate alternative remedy principle, the question which should be posed is: Is the appeal tribunal an adequate forum for resolving, at first instance, the jurisdictional challenge? This does not necessarily require a finding that the tribunals are a *better* forum than the courts. (***Matsqui***, p. 150.)

[8] The decision in ***Matsqui*** was followed by the Manitoba Court of Appeal in ***Turnbull v. Canadian Institute of Actuaries*** (1995), 129 D.L.R.(4th) 42. In that case, the court held as follows at p. 49:

> In a nutshell it can be said that a clear majority of the court, consisting of at least six judges, adopted the reasons of Lamer C.J.C. with respect to the principle that an adequate alternative remedy can exist even if the issue before the alternative administrative tribunal is one going to jurisdiction.

At p. 50, the court held:

> Furthermore, I do not read this conclusion of Lamer C.J.C. as detracting in any way from the force of the general principle earlier enunciated by him that, in determining whether an adequate alternative remedy exists,

> an administrative tribunal was, ordinarily, an appropriate body to deal with questions of its own jurisdiction.

[9] In reference to authorities decided before ***Matsqui***, the court said at p. 51:

> These cases were decided before *Matsqui* and must now be understood in light of its emphasis on the utilization of an efficacious administrative process if one is available.

[10] The question of the availability of judicial review was again considered by our Court of Appeal in the case of ***Mondesir v. Manitoba Association of Optometrists*** (1998), 129 Man.R.(2d) 96. In the ***Mondesir*** case, the court stated as follows at pp. 102-103:

> [25] . . . I have concluded that the decision to grant or dismiss an application for prerogative relief depends principally upon the legislative intent, as evidenced by the words of the statute creating the administrative scheme and the relief provided by that scheme. Ultimately, the court's obligation in dealing with these applications is to weigh the interests of the applicant against the interests of the public for whose protection and benefit the administrative scheme has been created. The question for the court in each case is: Has the applicant been so prejudiced by the decision or actions of the administrative body charged with the impropriety that his interests cannot be adequately protected within the administrative scheme?
>
> [26] Generally, the courts have concluded that mistakes made by a first-stage investigative committee can be remedied or addressed at the second-stage hearing before a discipline committee. . . . However, where an investigative body has erred and the error has not resulted in real and substantial prejudice to its member, then the courts will be slow to intervene in the administrative process, especially when that process provides for judicial review at its conclusion. . . .

[11] This emphasis on allowing the matter to proceed through the statutory administrative scheme is echoed by Blake in her text ***Administrative Law in Canada,*** 2nd ed. (Toronto: Butterworths, 1997) at p. 187, wherein she states

that courts often dismiss applications which are filed before the tribunal has completed its proceeding as being premature. She notes as follows:

> Premature applications are not encouraged because they have the effect of fragmenting and protracting proceedings before the tribunal. They defeat one of the purposes of tribunal proceedings which is to provide expeditious and inexpensive proceedings to deal with certain types of issues or problems. Often by the end of the proceeding, preliminary complaints are no longer of importance. A party may succeed in the result after having lost a number of preliminary challenges. In addition, courts prefer to consider all issues at once, rather than piecemeal, on the basis of a full record of the proceeding before the tribunal and the reasons for decision of the tribunal.

[12] On the issue of procedural deficiencies, Blake states at p. 19:

> To determine whether fair procedure has been followed, one must examine the entire proceeding. Although procedural irregularities at one stage may appear to have prejudiced a party's rights, they may diminish in significance if the party has been accorded a full and fair hearing at a later stage in the proceeding. A tribunal may cure its procedural defaults. In the end, the party may be seen not to have suffered any prejudice.

[13] Thus, the preferred procedure is to continue with the statutory hearings if that is possible.

[14] Finally, the ***LERA*** sets out the authority of the provincial judge to review a decision of the commissioner and defines the procedure to appeal from a decision of the provincial judge. Those sections are as follows:

> 13(2) Where the Commissioner has declined to take further action on a complaint under subsection (1), the complainant may, within 30 days after the sending of the notice to the complainant under subsection (1l1), apply to the Commissioner to have the decision reviewed by a provincial judge.
>
> 31(1) An appeal from a decision of a provincial judge lies to the Court of Queen's Bench upon any question involving the jurisdiction of the provincial judge or upon any question of law alone.

[15] There is no procedure to either have a provincial judge review the acts of the commissioner or the commissioner's decision to order a hearing or to appeal any decision by the commissioner.

IV. Analysis

[16] The irregularities complained of in this case are of two types, as follows:

(i) The complaints in items 1 – 5 and 7 relate, generally, to late filing, late notice and the commissioner's failure to investigate the complaints properly.

(ii) The complaint in item (6) relates to the commissioner's failure to attempt to resolve the complaint informally under s. 15 and his failure to give the applicants an opportunity to admit a disciplinary default and resolve the matter without a hearing under s. 16.

(i) *Complaints in items 1 – 5 and 7*

[17] All of the complaints in items 1 – 5 and 7 may be able to be remedied by a provincial judge in the course of an application to determine whether he has jurisdiction to proceed. If he or she found that one or more of the procedural irregularities complained of resulted in a breach of the rules of natural justice and that there had been prejudice to the applicants, he or she may also find on the facts that the breach could be remedied at the hearing stage by ordering disclosure, an adjournment or other such relief at that stage, and he or she could make such an order.

[18] On the other hand, if he or she found that there was no remedy which would resolve the prejudice to the applicants, then he or she would have to find that he or she was without jurisdiction to proceed with a hearing and refuse to hold a hearing.

[19] On a review of these complaints, it is clear that, if there has been a breach/breaches which have prejudiced the applicants and if relief is available which would remedy those breaches, that relief would not require an order directed to the commissioner. It is likely that any remedy short of a finding of a complete loss of jurisdiction would be directed to ordering further particulars, to an adjournment or other such relief. A provincial judge is in as good a position to deal with these procedural irregularities as is the Court of Queen's Bench. As the breach/breaches could be remedied, if at all, in the same manner by either a provincial judge or this court, the presumption in favour of following the statutory procedure would dictate that the matter proceed before the provincial judge on these parts of the application.

(ii) *Complaint in item 6*

[20] The procedural irregularity in item 6 is different from the others. The procedures under ss. 15 and 16 would give the police officer the opportunity to resolve the complaint without a public hearing and, in the case of an informal resolution under s. 15, without having a record of the complaint or informal resolution on his or her service record. The commissioner has failed to take any

steps under either of these sections and, instead, has referred the matter directly for a hearing.

[21] The alleged prejudice to the applicants arises in two ways. Firstly, as I have already noted, there is the lost opportunity to resolve the matter under s. 15 without any record of the complaint or resolution in the applicants' service records. Secondly, prejudice arises because the statute requires that the hearing before the provincial judge be public unless the party asking for an in-camera hearing can obtain an order in that regard by satisfying the provincial judge that the matter requires an in-camera hearing. Thus, the applicants may be deprived of the opportunity to resolve the complaint without a public hearing. These procedural irregularities deprive the applicants of two forms of resolution which the legislation makes available to all police officers who are subject to a complaint. As the actions of the commissioner have deprived them of access to these two options, they appear to have been unfairly prejudiced. As only the commissioner can undertake these steps, these irregularities can only be resolved by referring the matter back to the commissioner to undertake the proceedings set out in ss. 15 and 16.

[22] Under the ***LERA,*** a provincial judge does not have the authority to review the actions of the commissioner other than when he dismisses a complaint. As this complaint was not dismissed, a provincial judge has no authority to review the commissioner's decisions. In this instance, once the commissioner referred

the complaint for hearing there was no statutory authority for a provincial judge to order him to attempt to resolve the matter pursuant to ss. 15 and 16.

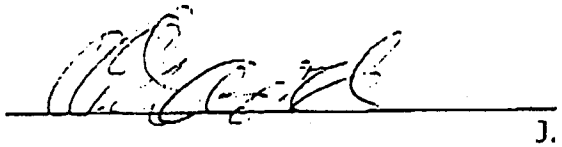
[23] A provincial judge could proceed to hear the matter as a question of whether he or she had the jurisdiction to proceed with a hearing as has been suggested by the respondents. It would be open to him or her to find that the commissioner's failure to attempt to resolve the matter pursuant to ss. 15 and 16 was a breach of his duty to act fairly which had prejudiced the applicants and could not be remedied by the provincial judge. The provincial judge could declare that he or she was without jurisdiction to proceed with a hearing of the complaint on the merits and refuse to hold a hearing. This, however, would be unfair to the complainant who is entitled to have his complaint judged on the merits provided that irregularities have not rendered the procedure so unfair that the applicants cannot get a fair hearing.

[24] While the provincial judge could not grant the relief that may be necessary to overcome the commissioner's failure to fulfil his obligations under ss. 15 and 16, a judge of the Court of Queen's Bench could make such an order. I therefore find that the statutory tribunal, being the provincial judge, does not have the statutory authority to grant the remedy that may be required to overcome the apparent prejudice that may have caused to the applicants by the commissioner's failure to offer them the opportunity to resolve this matter under ss. 15 or 16. This part of the application should be heard by the Court of

Queen's Bench because it has the inherent power to refer the matter back to the commissioner to carry out his duties under ss. 15 and 16 if the court found that such action would remedy the prejudice caused by the commissioner's failure to act.

[25] An appeal under s. 31(1) is not an adequate alternative remedy because the court does not have the jurisdiction to deal with the actions of the commissioner on an appeal under that subsection as an appeal is limited to questions of the jurisdiction of the provincial judge and questions of law and there is no reference to an appeal court dealing with the jurisdiction of the commissioner or referring a complaint back to the commissioner.

[26] Given that administrative procedures are to be an expeditious, it would make no sense to have this application severed and heard in part by a provincial judge and in part by this court. I therefore find that this entire application should be heard on its merits by this court.



J.

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