

IN THE MATTER OF: *The Law Enforcement Review Act*  
Complaint #2004/172

AND IN THE MATTER OF: An Application pursuant to s.13(2) of *The Law Enforcement Review Act* R.S.M. 1987, c.L75

B E T W E E N:

<b>M. S.</b>	)	Self-represented
<b>Applicant</b>	)	
	)	
<b>- and -</b>	)	
	)	
<b>Cst. P. B.</b>	)	Paul McKenna
<b>Cst. G. D.</b>	)	Counsel for the Respondents and
<b>Respondents</b>	)	the Winnipeg Police Association
	)	
	)	Sean D. Boyd, Counsel for L.E.R.A.
<i>Note: These reasons are subject to a ban</i>	)	
<i>on publication of the Respondents' names</i>	)	Hearing date: April 20, 2006
<i>pursuant to s.13(4.1).</i>	)	Decision delivered: June 21, 2006

**JOYAL, P.J.**

**I. INTRODUCTION**

1. Pursuant to s.13 of *The Law Enforcement Review Act*, R.S.M. 1987, c.L75 (hereafter referred to as the Act), the Applicant (who is self-represented) has asked the Court to review the decision of the Commissioner, wherein the Commissioner determined that notwithstanding his investigation and consideration of the Applicant's complaint, there was insufficient evidence to proceed further.

2. On April 20, 2006, the Court heard submissions from the Applicant, counsel for the Respondents and counsel for LERA.

**II. ISSUES REQUIRING DETERMINATION**

3. As always, the legal determinations for a provincial judge in a s.13 Review, will depend upon what the Applicant alleges are the errors committed by the Commissioner in the making of the initial decision.

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4. As many s.13 Reviews occur in the context of applications made by self-represented Applicants, the errors alleged are not always clearly identified or articulated. As a matter of both fairness and legal orderliness, the reviewing judge has a responsibility within limits, to try to clarify and or discern the nature of the alleged error.

5. On a s.13 Review of a Commissioner's decision, the identification of the alleged error is critical because of the inextricable connection between the alleged error, the standard of review and the ultimate legal determination required of the judge. Depending upon the issues or errors alleged, the Court's determination could be made using a more or perhaps less demanding standard of review.

6. The most demanding standard of review to be imposed upon a Commissioner in a s.13 LERA Review, is the standard of correctness. That standard is to be imposed only in those cases where the Commissioner has committed an identifiable jurisdictional error.

7. The first issue on this application requiring my determination relates to whether the Commissioner has, in making his decision, committed a jurisdictional error such so as to require a review using the more demanding standard of correctness.

8. A jurisdictional error in the context of a Commissioner's initial decision can be committed in three ways:

**1. The Commissioner has failed to act as required by his jurisdiction.**

**2. The Commissioner has failed to act within the limits of his jurisdiction.**

**3. The Commissioner has reached his decision by applying the wrong test or by misapplying the right test (either of which may involve an error of mixed fact and law). See *Southam Inc. v. Director of Investigation and Research* [1997] 1 S.C.R. 748 at 766-767.**

9. If the reviewing court determines that none of the above three jurisdictional errors have been committed, the court must move to the next

step of the review analysis where the determination will involve a standard of review different from that of correctness.

10. At this next stage of its analysis, the court must determine whether, after what should have been a thorough investigation, the Commissioner has assessed and evaluated the evidence “reasonably”. It is at this stage that the judge must recognize and expect that in the course of the Commissioner’s assessment and evaluation of the evidence, the Commissioner will have engaged in a limited but necessary “weighing of the evidence”. If the court determines that the Commissioner undertook his assessment and evaluation of the evidence reasonably, it must then turn to the “rationality” of the Commissioner’s conclusion.

11. In addressing the question of “rationality”, the Court is required to determine whether the Commissioner’s decision to not proceed further, is a decision that can be seen as rationally consistent or coherent vis-à-vis the Commissioner’s presumably reasonable assessment of the evidence. If such rationality does exist, the Commissioner’s decision should not be disturbed.

12. Although I will return to the issues of standard of review and sufficiency later in this judgement, it should be noted that various decisions have been written in the course of the last number of years respecting those subjects. Although the two subjects cannot be artificially separated, many of the cases have understandably had as their focus one or the other of the two issues. In this regard I note two particularly useful cases authored by Chartier PJ wherein those two issues were explored rather thoroughly. In 2000, Judge Chartier addressed the issue of standard of review (LERA Complaint # 3597) and later in 2004 (LERA Complaint # 5643) he addressed the question of sufficiency. I accept and adopt Judge Chartier’s analysis in both cases. Insofar as my judgement in the case at bar revisits the analysis and discussion of those two issues, it is for the purpose of clarifying and reconciling the manner in which standards of review associated with the principles of administrative law need be applied in a judicial review of the s.13(1)(c) screening process respecting the “sufficiency” or “insufficiency” of evidence to proceed further.

### **III. SECTION 13 OF THE ACT**

13. The case at bar involves a review of the Commissioner's decision taken pursuant to s.13 of the Act. That section reads:

#### **Commissioner not to act on certain complaints**

13(1) 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 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.

#### **Notice to complainant**

13(1.1) A complainant may be informed of a decision not to take further action under subsection (1) by the Commissioner's sending a notice, by registered mail, to the complainant at the complainant's last address contained in the Commissioner's records.

#### **Application to provincial judge**

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 (1.1), apply to the Commissioner to have the decision reviewed by a provincial judge.

#### **Procedure on application**

13(3) On receiving an application under subsection (2), the Commissioner shall refer the complaint to a provincial judge who, after hearing any submissions from the parties in support of or in opposition to the application, and if satisfied that the Commissioner erred in declining to take further action on the complaint, shall order the Commissioner

- (a) to refer the complaint for a hearing; or

(b) to take such other action under this Act respecting the complaint as the provincial judge directs.

### **Burden of proof on complainant**

13(4) Where an application is brought under subsection (2), the burden of proof is on the complainant to show that the Commissioner erred in declining to take further action on the complaint.

### **Ban on publication**

13(4.1) Notwithstanding that all or part of a hearing under this section is public, the provincial judge hearing the matter shall, unless satisfied that such an order would be ineffectual,

(a) order that no person shall cause the respondent's name to be published in a newspaper or other periodical publication, or broadcast on radio or television, until the judge has determined the merits of the application;

(b) if the application is dismissed, order that the ban on publication of the respondent's name continue; and

(c) if the application is successful, order that the ban on publication of the respondent's name continue until the complaint has been disposed of in accordance with this Act.

### **Decision of provincial judge final**

13(5) The decision of the provincial judge on an application under subsection (2) is final and shall not be subject to appeal or review of any kind.

## **IV. FACTUAL BACKGROUND**

14. The Applicant filed his complaint to the Commissioner on July 22, 2004. In that complaint, the Applicant expresses dissatisfaction with the failure on the part of the officers to proceed with an investigation against the security staff at the St. Regis Hotel. In the same complaint, the Applicant complains of conduct on the part of the police at the time of their discussion with him subsequent to their initial attendance at the St. Regis Hotel, on May 30<sup>th</sup>, 2004.

15. In a letter dated January 26, 2005, the Commissioner reported to the Applicant that after an examination of the information available to him,

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there was insufficient evidence supporting the Applicant's complaint sufficient so as to bring this matter to a public hearing. In making that determination, the Commissioner stated the following:

Although the events of May 30, 2004 do not form part of your complaint against the police, the events are relevant to a certain degree. Firstly, it is my view, your recollection of what took place on that date is completely accurate. The officers dealt with you, observed that you were intoxicated, belligerent, and combative. They initially were only going to detain you for being intoxicated and only charged you after they discovered you were breaching your recognizance by drinking. When Cst. D. met with you on June 23, 2004, what you report taking place and what he reports are very different. You did say you felt the officer spoke loudly so the landlord would overhear what was being said. The landlord said this is not the case, he did not overhear any conversation and the officer at no time disclosed information to him about you.

Also, Cst. D. must take responsibility in the taking of complaints. If he knows that the incident that is about to be reported did not occur the way the complainant believes it did, he has a responsibility to not needlessly or abusively conduct an investigation. If Cst. D. had not had any contact with you on May 30<sup>th</sup>, then he may have had some responsibility to obtain a statement from you. In this case, he had direct knowledge that the complaint you wished to make against the security staff was not accurate. Under the circumstances it is my view the officers did not commit any defaults under *The Law Enforcement Review Act* by refusing to investigate this complaint.

The comments you allege Cst. D. made to you are disturbing. He maintains that he did not make the comments you have reported. He did say that some of the things you reported being said were taken out of context. By this, he means he told you that he didn't want to see you make yourself look foolish by filing this complaint, that you could end up with "egg on your face".

There are no independent witnesses to what was said during this conversation. Given all the information available to me, it is my view there is insufficient evidence supporting your complaint to justify bringing this matter to a public hearing. Therefore, pursuant to Section 13(1)(c) of *The Law Enforcement Review Act*, I must decline from taking any further action on this matter.

## V. THE STANDARD OF REVIEW TO BE APPLIED IN THIS DECISION

16. In his decision of the Law Enforcement Review Act Complaint No. 5643 (decision delivered February 12, 2004), Chartier PJ appropriately identifies the Supreme Court of Canada decision in **Cooper** as an important point of departure for confirming the screening function of the Commissioner pursuant to s.13(1)(c).

17. At paragraph 44 of his decision (LERA 5643 supra), Judge Chartier attaches the appropriate nuance to the **Cooper** decision by including Justice La Forest's comments from an earlier Supreme Court of Canada decision (Canadian Humans Right Commission, [1989] 2S.C.R. 879). Chartier PJ stated the following at paragraph 44:

[44] It is well to remind ourselves that when Justice La Forest said in Cooper (supra) "the Commission fulfills a screening analysis analogous to that of a judge at a preliminary hearing" he also included (at page 891) the following reference to another Supreme Court of Canada decision:

“When deciding whether a complaint should proceed to be inquired into by a tribunal, the Commission fulfills a screening analysis analogous to that of a judge at a preliminary inquiry. It is not the job of the Commission to determine if the complaint is made out. Rather its duty is to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts. The central component of the Commission's role then, is that of assessing the sufficiency of the evidence before it. Justice Sopinka emphasized this point in *Syndicat des employés de production du Québec et de L'Acadie v. Canada* (Canadian Humans Rights Commission), [1989] 2 S.C.R. 879 at 899

“The other course of action is to dismiss the complaint. In my opinion, it is the intention of s.36(3)(b) that this occur where there is insufficient evidence to warrant appointment of a tribunal under s.39. It is not intended that this be a determination where the evidence is weighed as in a judicial proceeding but rather the Commission must determine whether there is a reasonable basis in the evidence for proceeding to the next stage.” (the underlining is mine)

18. The LERA Commissioner's required section 13 determination respecting sufficiency (made pursuant to the Commissioner's screening function) is a determination which may sometimes permit of different but equally justifiable conclusions respecting what constitutes a "reasonable basis for proceeding to the next stage". Absent an error (identified with the appropriate standard of review), a reviewing judge ought not to substitute its preferred conclusion for that of the equally supportable conclusion arrived at by the Commissioner. It is for that reason that in the context of s.13 *Law Enforcement Review Act* applications, it is important to remain mindful of Justice La Forest's comments so as to not inadvertently impose upon each and every determination made by the Commissioner, the "standard of correctness".

19. If the standard of correctness was not limited to only those decisions by the Commissioner involving jurisdictional error, the resulting reviews by provincial judges could neuter the Commissioner's administrative task (to screen). Such reviews could also render meaningless what Chartier PJ correctly characterizes as "the considerable investigative powers available to the Commissioner under the Act." (LERA 5643 supra)

20. As has been stated many times, the standard of correctness is the most demanding of review standards. Its exacting standard derives from the assumption that the issues to which it applies, permit of a clear, single right answer in law. Accordingly, the application of this standard results in the reviewing provincial judge according the least amount of deference to the Commissioner's decision. When the standard of correctness is applied, the Commissioner's decision can be overturned on the basis of simple error.

21. Unlike an identifiable jurisdictional error (to which I've already indicated the standard of correctness does apply), an alleged error in the Commissioner's evaluation of the evidence (and his or her resulting conclusion respecting sufficiency), seldom permit of a similarly stark review. In other words, given the limited but still necessary weighing of the evidence that must occur on the part of the Commissioner, the reviewing judge can seldom categorically say the Commissioner was right or wrong. It is for that reason that absent jurisdictional error, if the Commissioner's conclusion is based on a reasonable assessment of the evidence and if that conclusion is one of the rational conclusions that could be arrived at, the



Commissioner's determination is entitled to deference and it ought not to be disturbed.

22. There is nothing in the Commissioner's decision of January 26, 2005 that would support an argument alleging any of the three jurisdictional errors outlined earlier in this judgment. As a consequence, the standard of review to be used in reviewing the Commissioner's decision ought not to be one of correctness. Instead, mindful of the burden of proof on the Applicant (s.13(4) **of the Act**) to show that the Commissioner erred in declining to take further action, the court must examine whether or not the Commissioner's assessment and evaluation of the evidence was "reasonable". If that question can be answered in the affirmative, the court's task is to then determine whether or not the Commissioner's conclusion with respect to that assessment of the evidence constitutes one of the "rational" conclusions available to the Commissioner.

## **VI. DECISION ON THIS REVIEW**

23. Insofar as the Commissioner seems to accept the police officer's view (for the reasons given) that there was no reasonable basis for charges as against the security staff at the St. Regis Hotel, the Commissioner's analysis and decision properly reaffirms the reality that complaints in respect of the utilization of police discretion, are usually cases more appropriately described as "service issues" rather than LERA issues. Moreover, the specifics of the Commissioner's decision recognize that the police officers in question, acted reasonably and within their discretion in choosing to not begin a formal investigation or prosecution as against the security staff at the St. Regis Hotel. As the Commissioner stated, one of the police officers in question had direct knowledge that the complaint the Applicant wished to make was not accurate.

24. Insofar as the Applicant raised the issue of inappropriate comments by Constable D., the Commissioner appears to have examined and assessed the totality of the evidence. From his letter of January 26, 2005, he obviously took into consideration Constable D.'s explanation and the fact that the alleged comments were taken out of context. The Commissioner also noted that the Applicant was "intoxicated, belligerent and combative" and that there was an absence of independent witnesses.

25. In reviewing the information in the report and the Commissioner's decision that there was insufficient evidence to take further action, I am of the view that the Commissioner came to a decision that was indeed rationally based upon a reasonable assessment of the evidence. Accordingly, I find that the Commissioner did not err in declining to take further action.

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"original signed by:"

Glenn D. Joyal, PJ