

he entered guilty pleas to two (2) offences, namely impaired driving and resisting arrest.

[2] He brought a complaint under *The Law Enforcement Review Act*, R.S.M. 1987, c.L75 (hereinafter referred to as the “Act”) alleging that the arresting officers used excessive force against him and that they used oppressive or abusive conduct or language when dealing with him.

[3] The officers denied that their treatment of Mr. █████ amounted to excessive force or abusive conduct or language. They acknowledged that Mr. █████ may have suffered some injury in their custody but explained their use of force was necessary because Mr. █████ struck out at them and refused to follow directions.

[4] The Commissioner considered Mr. █████ complaints and advised him, by letter dated June 17, 2014, that “the evidence supporting [his] complaint is insufficient to justify taking this matter to a public hearing.”

STATUTORY TEST / LEGISLATIVE SCHEME

[5] Section 6(1) of the Act provides a process that allows “every person who feels aggrieved by a disciplinary default allegedly committed by any member of a police department or by an extra-provincial police department to file a complaint that will be considered by an independent Commissioner, appointed under the Act by the Lieutenant Governor in Council.”

[6] Once a complaint has been received by the Commissioner, the Commissioner provides a copy to the officers who are the subjects of that complaint, and to the Chief of Police for the relevant police department. The Commissioner must then cause the complaint to be investigated pursuant to s. 12(1) of the Act, and for that purpose, the Commissioner enjoys all the powers conferred under Part V of *The Manitoba Evidence Act*, R.S.M 1987, c. E150, and the Chief of Police must forward to the Commissioner all documents, statements or other materials relevant to the complaint that are in the possession or control of the relevant police department. The Commissioner may also request further particulars from the complainant, which he did in this case.

[7] Disciplinary default is defined in the Act as “any act or omission referred to in section 29” which reads:

29 A member commits a disciplinary default where he affects the complainant or any other person by means of any of the following acts or omissions arising out of or in the execution of his duties:

- (a) an abuse of authority, including
 - (i) making an arrest without reasonable or probable grounds,
 - (ii) using unnecessary violence or excessive force.
 - (iii) using oppressive or abusive conduct or language,
 - (iv) being discourteous or uncivil,
 - (v) seeking improper pecuniary or personal advantage,
 - (vi) without authorization, serving or executing documents in a civil process, and
 - (vii) differential treatment without reasonable cause on the basis of any characteristic set out in subsection 9(2) of *The Human Rights Code*;
- (b) making a false statement, or destroying, concealing or altering any official document or record;

- (c) improperly disclosing any information acquired as a member of the police department;
- (d) failing to exercise discretion or restraint in the use and care of firearms;
- (e) damaging property or failing to report the damage;
- (f) being present and failing to assist any person in circumstances where there is a clear danger to the safety of that person or the security of that person's property;
- (g) violating the privacy of any person within the meaning of *The Privacy Act*;
- (h) contravening this Act or any regulation under this Act, except where the Act or regulation provides a separate penalty for the contravention;
- (i) assisting any person in committing a disciplinary default, or counselling or procuring another person to commit a disciplinary default.

[8] If the Commissioner finds a disciplinary default took place, he must attempt informal resolution of the complaint but if not successful, the Commissioner shall make recommendation as to the appropriate penalty, considering the severity of the disciplinary default and the contents of the respondent's service record. If the respondent does not agree and accept the recommendation of the Commissioner, the Commissioner must refer the complaint to a judge for a hearing of the question of the penalty against the respondent. There is no appeal from the finding of the judge.

[9] However, the Commissioner may also decline to take further action on a complaint in specific circumstances as set out in s. 13(1) which reads:

- 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.

[10] If the Commissioner declines to take further action, the complainant may apply to have the Commissioner's decision reviewed by a judge of the Provincial Court of Manitoba, as Mr. [REDACTED] has done here.

[11] As such, the legislative scheme set out in the Act leaves all complaints of disciplinary default to the Commissioner for investigation and consideration. As stated in the Commissioner's Brief, page 3, "his role is to perform a screening function to ensure that only those complaints that merit a public hearing are referred to a hearing before a provincial court judge."

[12] If the reviewing judge is satisfied that the Commissioner erred in declining to take further action on the complaint, pursuant to s. 13(3) the judge "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." The burden of proof is on the complainant, as per s. 13(4) of the Act, and there is no appeal or review of the judge's decision.

STANDARD OF REVIEW

[13] In the instant case, there is no disagreement between counsel as to the appropriate standard of review of the Commissioner's decision, for the reviewing judge is not to simply consider the evidence anew and substitute his or her conclusion for that of the Commissioner. Counsel accept Judge Preston's summary of the appropriate standards of review as set out in LERA Complaint #2005/307:

[32] Two standards of review apply. The first is "correctness", the most demanding standard of review which can be imposed on the *L.E.R.A.* Commissioner. This standard applies only if and when the Commissioner has committed an identifiable jurisdictional error. A jurisdictional error occurs if the Commissioner has failed to act within the parameters of his jurisdiction by either applying a wrong test or misapplying a right test when coming to a decision...

[33] The second standard of review is "reasonableness" and this is the standard I must apply. The Supreme Court of Canada in *Dunsmuir* succinctly defines reasonableness in the context of judicial review:

In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[14] Counsel for the Complainant and the Respondents agree that on the facts of this case, the applicable standard of review is the reasonableness of the Commissioner's decision. The complainant does not argue that the Commissioner

committed a jurisdictional error in reaching his conclusions. He argues, rather, that the Commissioner's decision does not fall within a range of possible, acceptable outcomes. In other words, he argues that the Commissioner's decision was not based on a reasonable assessment of the evidence and is not one of the rational conclusions which could be reached. He argues the decision is therefore not entitled to deference by this Court and the matter should be set for hearing.

FACTS

[15] It is necessary to consider the Commissioner's decision in context.

[16] Mr. [REDACTED] made two (2) written complaints, one on December 10, 2013 and a second on December 12, 2013. The second came at the request of the Commissioner's investigator for further particulars from Mr. [REDACTED].

[17] In his letter to the complainant dated June 17, 2014, the Commissioner summarized the complaint as follows:

You said on October 6, 2013, you and [REDACTED] were at the Osborne Village Inn. You are a prohibited driver and were in care and control of your vehicle while impaired by alcohol. You said an officer told you, you are a pedophile homosexual and career criminal and an officer showed you your criminal record on a laptop computer as justification for the alleged remarks. You said you have never been convicted of sexual offences and you are not homosexual. Officers arresting you and [REDACTED] the officers took you both to the WPS District 2 office.

At the District 2 office, the officers removed you from the police vehicle, took you to an interview room and left you alone. After some time in the room, the officers entered and told you they were removing your handcuffs. You said the officers pushed you against a wall, you told them to settle down. You said at least two officers, maybe more, threw you to the floor and jumped on you while still handcuffed. You said an officer kicked you in the head and back while lying on the floor. You thought the altercation lasted five minutes. Eventually your handcuffs were removed and the officers took you to the Winnipeg Remand Centre. At the Winnipeg Remand Centre, you asked the police officers and Winnipeg Remand Centre staff for medical treatment, both denied you access to medical treatment. When the LERA investigator asked for further details of the incident, you said a motor vehicle collision two years ago causes memory problems and you could not remember everything about your arrest.

[18] Constable ██████ narrative report of the incident was also considered by the Commissioner and was summarized as follows:

The report states that at 8:55PM on October 6, 2013, while working with Cst. ██████ in the area of the Osborne Village Inn, he saw a 1988 Ford Escort with cancelled licence plates parked near the hotel. ██████ exited the driver's seat of the vehicle and walked towards the hotel. Cst. ██████ stopped him in the parking lot and talked with him. Cst. ██████ saw you exit the passenger seat, move to the driver's seat, start the engine and place the vehicle in reverse. Cst. ██████ approached you and directed you to stop and shut the vehicle off, you did as directed. ██████ and Cst. ██████ arrived within minutes and took custody of ██████ from Cst. ██████

As Cst. ██████ spoke to you, he smelled liquor on your breath. He continued to speak with you and noticed other signs of impairment due to alcohol consumption:

- Unsteady on your feet

- Eyes were very glossy and blood shot
- Trouble formulating sentences and focusing on questions
- You admitted to drinking a few beers earlier at a casino

At 9:05PM Cst. [REDACTED] arrested you for care and control of a motor vehicle while impaired by alcohol. You acknowledged your Charter Rights, police warning and declined to call counsel. You acknowledged the breath demand but refused to provide a sample telling Cst. [REDACTED] "I won't do shit for you." Cst. [REDACTED] read you the refusal warning and you still refused to provide a breath sample saying, "I already told you, fuck no." You refused to answer any further questions. On arrival at the District 2 office, your staggering forced the officers to assist you in walking.

Cst. [REDACTED] completed a Use of Force Report and stated that at 9:25PM he took to you an interview room to search you. Cst. [REDACTED] removed your left hand from the handcuffs and directed you to place your left hand on your head. Instead, you lowered your left hand to your waist. Cst. [REDACTED] directed you again to place your left hand on your head but you pulled your left arm into your sleeve, Cst. [REDACTED] grabbed your hand and told you to stop. You immediately swung your right hand at Cst. [REDACTED] and struck his right elbow with the open end of the handcuff. Cst. [REDACTED] and Cst. [REDACTED] forced you down to the floor. You pulled your arms into your body and refused to release your arms as directed. Cst. [REDACTED] used a shin pin to your upper back and head to hold you to the floor. You kicked your legs so Cst. [REDACTED] grabbed and held them. Cst. [REDACTED] pressed his baton into your left ankle (a pain compliance technique) and directed you to produce your hands. Eventually you complied and produced your hands, which were re-handcuffed. Cst. [REDACTED] noted you sustained an abrasion to the bridge and side of your nose from your eyeglasses and the inside of your left ankle. Cst. [REDACTED] required medical treatment for a cut to his elbow that required bandaging and first aid.

At 9:30PM, the officers re-informed you of the reasons for your arrest in addition to refusal to provide a breath sample and assaulting a peace officer. They repeated your charter rights and police warning, you indicated you understood but declined to call counsel. The officers left the room and you made no further requests.

Thirty minutes later the officers returned to your room to speak with you. You had urinated on yourself and the floor. You refused to speak further with the officers. The officers took you to the Winnipeg Remand Centre and remanded you into custody.

While in the custody of the WPS you spoke with Sergeant [REDACTED] (Badge [REDACTED]) when brought into and later leaving District 2. Sgt. [REDACTED] asked you if you had any questions or issues while in custody. Sgt. [REDACTED] recorded on the Prisoner Log Sheet that you said “no”. On the same document, other observations were noted:

- Physical condition (normal)
- Behaviour (intoxicated and uncooperative)
- Medical comments (has mental health issues)

[19] As the complainant was then taken to the Winnipeg Remand Centre, the Commissioner’s officer requested and received that Centre’s file relating to Mr. [REDACTED]. The Intake Form completed by Winnipeg Remand Centre staff on October 6, 2013 contained the following information:

Medical Problems: Back injury - altercation - no other medical problems

Medications: denied

Intoxicants used: Beer tonight / denies drug use

Injuries: Back @ precinct / rt bridge of nose / few scratches (superficial) mid upper back / lt cheek - abrasion

Seizure history (dates and aetiology): yes - can not remember

Diabetes: n/a

Orientation (3 spheres): person, place & date

Comments: good eye contact, steady gait, clear speech, appropriate responses, states “sustained altercation injuries”, incontinent of urine

Suicidality: denies past or present

[20] Mr. [REDACTED] initiated his complaint by way of a telephone call on November 1, 2013 while still in remand custody, a written complaint on December 10, 2013 and at the request of the LERA investigator, provided further particulars on December 12, 2013.

[21] In the interim, Mr. [REDACTED] sought medical attention while in custody and from his own doctor after his release. The Commissioner reviewed the medical and narrative reports received from Milner Ridge Correctional Centre and noted Mr. [REDACTED] had complained of back and chest pain but not leg pain. He received non-prescription pain medication.

[22] Upon release, he had x-rays taken of his back and left ankle. The x-rays revealed healing fractures of the 4th, 5th and 6th ribs on both the left and right side, but no ankle fracture. Mr. [REDACTED] physician, Dr. [REDACTED], reported to the Commissioner that he saw the complainant on November 26, 2013 when Mr. [REDACTED] reported that he had been injured by police approximately one (1) month earlier.

[23] Attempts were made by the Commissioner’s investigator to interview Mr. [REDACTED], Mr. [REDACTED] associate who was present on October 6, 2013. Mr. [REDACTED] left a message for the investigator indicating he knew nothing of the

complaint and did not want to become involved. Patrol Sergeant [REDACTED] reported to the investigator that Mr. [REDACTED] told him on October 6, 2013 that the complainant was not taking his psychiatric medication which was why he was belligerent. Patrol Sergeant [REDACTED] said that Mr. [REDACTED] apologized for the complainant's behaviour.

POSITION OF THE PARTIES

[24] Counsel for the Complainant argued that the Commissioner failed to consider all the available evidence, making his conclusion as to the sufficiency of the evidence unsupportable. In particular, he pointed to two (2) pieces of evidence which he says were not properly considered by the Commissioner, namely the Intake Form completed by Winnipeg Remand Centre staff, and the transcript of proceedings in the Provincial Court when Mr. [REDACTED] criminal charges were resolved. Counsel argues that without specifically dealing with those two (2) pieces of available evidence in his decision, the Commissioner did not meet the standard of reasonableness required of him and as such, his decision not to refer the complaint for hearing is not due deference of this reviewing Court.

[25] The Winnipeg Remand Centre Intake Form was requested from the Winnipeg Remand Centre and received by the investigator for the Commissioner. It was referred to by the Commissioner in his letter of decision to the complainant. He did not specifically refer to the "comments" of that form, however.

[26] The transcript of Court proceedings was not provided to the Commissioner by the complainant and nor was it ordered by the Commissioner. There is no

indication that either the Commissioner or his investigator listened to the audio recording of the criminal proceeding before Judge Stewart but the Commissioner was aware of the outcome of the proceedings, namely that the complainant entered guilty pleas to impaired driving and resisting arrest.

ANALYSIS

[27] Did the Commissioner fail to consider relevant evidence?

[28] The Winnipeg Remand Centre Intake Form does not set out the same indicia of impairment as the arresting officers, but it was noted Mr. [REDACTED] had been drinking beer that night and that he was “incontinent of urine.” These observations are not contradictory with the respondents’ evidence, and Mr. [REDACTED] does not deny he was intoxicated on October 6, 2013. He entered a guilty plea to having care and control of a motor vehicle on that date when his ability to do so was impaired by alcohol.

[29] The Commissioner considered these facts and the records of the remand centre in his assessment of the evidence. The failure to specifically point out the “comments” of the Winnipeg Remand Centre staff that counsel argues suggests a lower level of intoxication than the police accounts from the scene and District 2 station does not make the Commissioner’s decision unreasonable.

[30] With respect to the Commissioner’s failure to listen to the audio recording or review a transcript of the complainant’s sentencing, there is no requirement that

the Commissioner obtain the transcript or audio recording of criminal proceedings. The Commissioner was aware of - and considered - the complainant's guilty pleas. The facts that were the basis for the guilty pleas are not inconsistent with the accounts provided to the Commissioner and as such, he did not rely on inaccurate or faulty information. I am not satisfied that his failure to request and review either a transcript or audio recording of the criminal proceeding amounted to an unreasonable decision by the Commissioner.

[31] Given that there was evidence that the actions of the police officers could have caused the six (6) broken ribs suffered by the complainant, was it unreasonable for the commissioner to find insufficient evidence to refer the complaint for a hearing?

[32] The complainant complained of a back injury when he was detained at the Winnipeg Remand Centre and soon after his release from custody, he was x-rayed. X-rays dated November 18, 2013 confirmed that he had suffered fractures of the 4th, 5th and 6th ribs bilaterally and that these fractures were "healing". The police officers involved agree that there was an altercation with Mr. [REDACTED] that required them to use force in order to subdue him after he swung at the officers when they were in the process of removing his handcuffs. Constable [REDACTED] suffered a laceration to his elbow. The force use included a "shin pin" to his back and head to hold the complainant to the floor. It is the evidence of Constable [REDACTED] and Constable [REDACTED] that the complainant's physicality required them to respond with force in keeping with the Use of Force Policy.

[33] With respect to this evidence, the Commissioner determined the following:

It may well be the case that you received injury as a result of your arrest and detention by the officers; again there is an absence of additional evidence to support your version of events or that of the officers.

On review of all the information available, I am satisfied that the evidence supporting your complaint is insufficient to justify taking this matter to a public hearing. Therefore, pursuant to subsection 13(1)(c) of *The Law Enforcement Review Act*, I must decline from taking any further action on the matter.

[34] Counsel for the Complainant argues that in the situation in which Mr. ██████ found himself on October 6, 2013, there was no opportunity for anyone but he and the officers involved to witness what happened. He was in custody, in a locked room without any member of the public being able to observe, and it is therefore unfair to require any corroboration from him over and above the medical evidence that his injuries could have been occasioned from the actions of the officers.

[35] Counsel for the Respondents pointed to the many inconsistencies in the accounts offered by the complainant, and asks how natural justice could require the officers to proceed to hearing when there is such obvious difficulties with the complainant's own evidence. The officers are entitled to know the allegations against them and it is true that the complainant's account changed significantly over the course of the Commissioner's investigations. He entered a guilty plea to resisting arrest and in doing so, admitted his actions required a response of force from the officers. But his complaint to the Commissioner was that he was

handcuffed when the assault by the officers happened and that he had done nothing to provoke them. The officers' accounts are consistent with each other and with Mr. [REDACTED] guilty plea, and they are not inconsistent with the medical reports of injuries.

[36] The Commissioner's function is to identify complaints that merit a public hearing. He considered the totality of the evidence and ultimately determined the evidence was not sufficient to warrant a hearing under s. 17. His conclusion need not be the same that the complainant or even this Court would make; it merely needs to be a reasonable one, considering the evidence available.

[37] The degree of injury suffered by Mr. [REDACTED] is significant but not determinative of a disciplinary default as defined by s. 20 of the Act. The Commissioner must still consider all the evidence to determine whether the complaint should proceed to a hearing. In this case, he did so and his decision under s. 13(1)(c) of the Act was rationally based on a reasonable assessment of the evidence and therefore will not be disturbed by this Court.

[38] Lastly, counsel for the Respondents points to the complainant's allegations as contained in his letters to the Commissioner dated June 25 and 30, 2014. Those letters were before this Court as part of the Commissioner's file. Counsel argues that the contents of these letters is such that they will necessarily impact Mr. [REDACTED] credibility at any hearing. In these letters Mr. [REDACTED] makes a number of allegations against these and other police officers, most of them for the first time. By way of example, Mr. [REDACTED] wrote that as a result of the "beating" he received from these respondents, he was "knocked unconscious, had six broken ribs, nose

fractured, 3 broken teeth.” These assertions are inconsistent with his earlier statements and with the medical reports. He also denies that he resisted the officers at any time, and he alleges members of the Winnipeg Police Service have implanted a “neurological weapon” in his head. These letters both post-date the Commissioner’s decision, however, so I have not factored them into my consideration of the Commissioner’s decision.

“Original Signed by:”

Judge C. Roller
Provincial Court Judge