

[2] The application is brought by the Complainant/Applicant (the "Complainant") for a review of the decision of the Commissioner by which the Commissioner declined to take further action on L.E.R.A. Complaint No. 6253 (the "Complaint").

[3] The Complaint was made to the Law Enforcement Review Agency, on June 5, 2003.

[4] On March 22, 2005, the Commissioner declined to take further action on the Complaint, pursuant to section 13(1)(c) of the Act, on the basis there was insufficient evidence supporting the Complaint to justify a public hearing.

[5] The Complainant requested a review of that decision on April 20, 2005 pursuant to section 13(2) of the Act. That review proceeded before Judge Joyal (as he then was) on April 20, 2006.

[6] Judge Joyal ordered, pursuant to section 13(3)(b) of the Act, that the Commissioner conduct an interview of Ms. S.P. and that, upon the completion of that interview and a review of the totality of the evidence gathered, the Commissioner make whatever determinations he deemed appropriate.

[7] On January 8, 2007, the Commissioner advised the Complainant by letter that, after interviewing Ms. P., it was still his view that the evidence supporting the Complaint was insufficient to justify a public hearing and he declined to take any further action on the Complaint pursuant to section 13(1)(c) of the Act .

[8] On February 4, 2007, the Complainant requested a review of that decision of the Commissioner pursuant to section 13(2) of the Act.

[9] It is that review that came on for hearing before me on October 15, 2008. At that time, I heard submissions from the Complainant and from counsel for the Respondents. Counsel for the Commissioner also made submissions, which were limited to issues of jurisdiction and statutory interpretation under the Act.

ISSUES TO BE DETERMINED

[10] The issues on this review are whether the Commissioner erred in his decision to decline to take further action on the Complaint and, if so, what action the Commissioner should be directed to take.

DID THE COMMISSIONER ERR?

The Commissioner's Jurisdiction

[11] Section 13(1) of the Act mandates that the Commissioner must decline to take further action on a Complaint if he is satisfied that any of the following circumstances apply:

- (a) the subject matter of a Complaint is frivolous or vexatious or does not fall within the scope of section 29;
- (b) a complaint has been abandoned; or
- (c) there is insufficient evidence supporting the complaint to justify a public hearing.

[12] The Commissioner derives his jurisdiction from the Act. He has no jurisdiction to decide the merits of a complaint. If the Commissioner is satisfied that there is insufficient evidence supporting a complaint to justify a public hearing, he has no discretion to do anything other than to decline to take further action. On the other hand, if a complaint does not fall into one of the circumstances set out in section 13(1), the Commissioner must take further action on such complaint, barring resolution pursuant to sections 15 or 16 of the Act.

Burden and Standard of Proof

[13] Section 13(4) of the Act puts the burden of proof on a complainant to show that the Commissioner erred in declining to take further action on a complaint.

[14] The standard of proof is a civil standard – on a balance of probabilities.

Scope of Review

[15] A review by a provincial court judge under section 13(3) of the Act is limited in its scope. It is not an appeal on the merits of a complaint. The judge hearing the review must only decide whether the Commissioner, in deciding to decline to take further action on a complaint, acted within the jurisdiction given to him by the Act.

Section 13(1)(c) - Dismissing a Complaint for Insufficient Evidence: the Legal Test

[16] The Commissioner is bound to dismiss a complaint if, at the conclusion of an investigation, there is insufficient evidence supporting such complaint to justify a public hearing.

[17] Section 13(1) of the Act states:

“Commissioner not to act on certain complaints

13(1) Where the Commissioner is satisfied 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.”

[18] What is the legal test the Commissioner is to use in determining if a complaint should be dismissed for insufficient evidence?

[19] Judge Chartier (as he then was), in his decision respecting L.E.R.A. Complaint No. 5643, delivered on February 12, 2004, rejected the notion that the “sufficiency” test to be used in administrative determinations is the same as the test set out in section 548 of the *Criminal Code* applicable to preliminary inquiries. Judge Chartier analyzed the Supreme Court of Canada decision in *Cooper v. Canada (Canadian Human Rights Commission)* [1966] S.C.J. 115 (S.C.C.), and, in paragraph 61 of his decision, described the applicable test as follows:

“The approach to be taken by the commissioner under section 13(1)(c) is the one described in *Cooper* (supra) where the Commissioner is to “determine whether there is a reasonable basis in the evidence for proceeding to the next stage”.

When making this determination the Commissioner;

- Must consider all of the evidence gather [sic] by his investigators and not just the prima facie elements of the complaint;
- Cannot determine credibility, draw inferences or make definitive findings of fact;

- Can in a limited way, weigh all the evidence to determine whether it registers on the scales as sufficient evidence so as to constitute a reasonable basis to proceed further.”

Standard of Review

[20] The nature of the alleged errors made by the Commissioner in his decision not to take further action on the Complaint is critical because it determines what standard of review will be applied to the Commissioner’s decision.

[21] Judge Joyal, in his decision as to L.E.R.A. Complaint #2004/172, delivered on June 21, 2006, refined the standard of review to be applied by a provincial judge conducting a section 13(2) review under the Act of the Commissioner’s decision not to take further action on a complaint on the basis that there is insufficient evidence to justify a public hearing.

[22] In that decision, Judge Joyal stated the following at paragraph 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”.

[24] Judge Joyal, in that decision, confirmed that the standard of correctness applies to jurisdictional errors and points out that the standard of correctness is the most demanding of the review standards on the basis that the issue to which the facts apply in a particular case allow only one right answer in law.

[25] An alleged error in the Commissioner’s decision that the evidence was not sufficient to justify a public hearing is not purely jurisdictional. Such decision necessarily requires an application by the Commissioner of evidence, gathered in an investigation into a complaint, to a legal test, namely whether there is a reasonable basis in the evidence for proceeding to the next stage.

[26] As Judge Joyal stated in his decision as to L.E.R.A. Complaint #2004/172 at para 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).”

[27] Judge Joyal in that case further stated:

“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. “

[28] The decision by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, is the most recent and authoritative pronouncement as to standards of review. That decision confirms that there are only two standards in the system of judicial review, namely correctness and reasonableness. At paragraph 47 of that decision is stated the following:

“47. Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. 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 law.”

[29] In the case now before me, it is necessary to examine whether or not the Commissioner’s assessment and evaluation of the evidence was “reasonable”. If it was, then it is necessary for me to decide whether or not the Commissioner’s conclusion that there is insufficient evidence to justify a public hearing is one of the rational conclusions available to the Commissioner. If it was, then I must uphold the Commissioner’s decision.

The Complaint

[30] The Complaint arises from the Complainant's contact with the Respondents on May 8, 2003, in Winnipeg, Manitoba.

[31] The Complainant stated in his Complaint that he and his wife witnessed the aftermath of a motor vehicle collision involving, as the Complainant says, "an alcohol impaired driver". The Complainant said in his Complaint that they remained at the scene of the collision, protected the female driver of one of the vehicles involved in the collision from the rage and intimidation of the male impaired driver, made sure police were called as soon as possible and ensured that the impaired driver did not leave the scene before police arrived. The Complainant also said in his Complaint that he and his wife secured material evidence related to the collision and wanted to provide pertinent information pertaining to the incident.

[32] The allegations in the Complaint are that the Respondent members of the Winnipeg Police Service used oppressive or abusive conduct or language and were discourteous or uncivil when dealing with the Complainant and his wife on May 8, 2003. The allegations made in the Complaint are that:

- When police conducted the investigation, the Complainant and his wife were treated extremely rudely;
- This included verbal threats, insults and an obscene gesture being made;
- One officer threatened to charge the Complainant with obstruction of justice and said the Complainant was the most ignorant person he had ever met;
- Another officer showed the Complainant a "middle finger salute";
- No statements were taken from the Complainant or his wife;
- The Complainant's wife offered to leave her business card but this was refused by the officers, even though the Complainant and his wife could both attest to who the driver of each vehicle was and could provide other details of the incident; and
- One of the Respondent officers was uncooperative in showing her badge number.

[33] The Complainant said the incident calls into question the professionalism of the Respondent officers and their ability to carry out their duties.

[34] The Complainant stated in his Complaint that the Respondents' behaviour would antagonize many citizens and make them cynical about whether they should waste their own time and risk their safety, only to be treated in such an offensive manner.

The Evidence Gathered During the Investigation

[35] The Commissioner's file sets out the details of the investigation. The investigation was conducted in two phases.

[36] The first phase was after the Complaint was made. The investigation was reported on to the Complainant in the letter to the Complainant from the Commissioner dated March 22, 2005.

[37] After the Complaint was filed, the Commissioner's investigator contacted the Complainant and they had some discussion about the Complaint. The Complainant, at the October 15, 2008 hearing, said that the investigator asked whether there were any more serious matters that the Complainant alleged than those listed in his written complaint. The Complainant stated that the conduct complained of was limited to the matters set out in the written Complaint. The Complainant said at the hearing that he told the investigator that the matter was very complex and that if he needed more information, he should contact him and his wife. It does not appear that the investigator spoke to the Complainant's wife.

[38] The Commissioner indicated in the letter of March 22, 2005, that his office had reviewed the relevant police reports and interviewed the Respondent officers. All three Respondent officers provided detailed statements and described a situation in which they could not take a statement from the Complainant at the scene of the motor vehicle collision on May 8, 2003 due to his behaviour, which they described as obstructionist. One of the Respondent officers reported that he tried to obtain a statement from the Complainant about the accident, but could not as the Complainant ignored questions that were asked and began giving a broken, rambling account of what occurred and wandered away to speak to the other officers. That Respondent officer advised the investigator that the Complainant was intent on showing police how to conduct the investigation, interrupted them and argued with them while they were attempting to interview other witnesses. Another of the Respondent officers described the Complainant hanging by the window while he was in his police car taking a statement from another witness and banging on the window of the police car in which the accused person was sitting. One of the Respondent officers asked the Complainant to leave as he was

obstructing their investigation. The Complainant advised that he had seen the accused person driving and had seen him remove an open case of beer from his car and try to hide it. The beer was seized, the allegedly impaired driver was taken to the Public Safety Building and his car was impounded. The Respondent officers all stated that the Complainant was interfering in their investigation. A Respondent officer suggested to the Complainant that he would be interviewed later, once the Complainant had calmed down. They interviewed other witnesses at the scene and took the Complainant's contact information, so that he could provide a statement at a later date. Constable D. contacted the Complainant by phone at a later date and the Complainant declined to provide a statement.

[39] The Commissioner correctly advised the Complainant in his letter of March 22, 2005, that he could not make any binding decision about what did or did not happen, nor could he make any decisions on credibility. The Commissioner acknowledged that the Complainant would feel frustrated if he felt the Respondent officers were not listening to him, but that the situation was one in which the impaired driver was in custody and it was not necessary that the officers interview the Complainant at the scene. The Commissioner stated that the information available to him led him to believe the police officers were taking the action they deemed necessary under the circumstances. The Commissioner concluded that there was insufficient evidence supporting the Complaint to justify a public hearing, and accordingly declined to take further action on the matter.

[40] The second phase of the investigation began after the decision of Judge Joyal on the review of that decision of the Commissioner. Judge Joyal, after hearing initial submissions on the review on April 20, 2006, by letter dated June 8, 2006 to the Commissioner, directed that, pursuant to section 13(3)(b) of the Act, the Commissioner conduct an interview of S.P. Judge Joyal further requested, in that letter, that upon completion of that interview and a review of the totality of the evidence gathered, the Commissioner make whatever determinations the Commissioner felt was appropriate. Ms. P. was identified by the Complainant, at the April 20, 2006 review hearing, to be a witness who was never interviewed by the Commissioner as part of the investigation.

[41] By letter dated January 8, 2007 to the Complainant, the Commissioner advised the Complainant that on July 11, 2006, his investigator had met with Ms. P. In the letter, the Commissioner provided a synopsis as to what Ms. P. told the investigator she was able to recall of the incident. Essentially, although Ms. P. recalled that, at the scene of the incident on May 8, 2003, the Complainant was upset and related to her that an officer had made some sort of gesture toward him and had said something that he felt was a threat, as far as she could recall, she did

not observe any officer conduct toward the Complainant directly. The Commissioner stated in his January 8, 2007 letter to the Complainant:

“It is regrettable that Ms. P. was not interviewed when this matter was initially brought to our attention. Mr. Haslam should have contacted her and spoke with her, however, this was not done. Although Ms. P. does recall the incident, she does not recall seeing anything that would be considered a disciplinary default being committed by any officer. She does recall you being upset and felt you were a sincere person genuinely concerned by what had happened.”

[42] The Commissioner stated that, as Ms. P. could not give any direct evidence concerning officer misconduct, he was of the view that the Complaint could not proceed to a hearing as there was insufficient evidence to justify same.

Application of Legal Sufficiency Test to Evidence Gathered: Was the Commissioner’s assessment of the evidence reasonable? If so, was the Commissioner’s decision that there was insufficient evidence to justify a public hearing one of the rational conclusions available to the Commissioner?

[43] To make a decision as to whether the Commissioner erred in his application of the legal test of sufficiency to the evidence procured on the investigation, I must consider what the Complainant specifically alleges were the Commissioner’s errors.

[44] The Complainant made extensive submissions at the hearing on October 15, 2008. The Complainant did not specifically articulate the errors he alleged had been made by the Commissioner in coming to his conclusion that there was insufficient evidence to proceed to hearing. However, based on the totality of the Complainant’s submissions, the errors the Complainant alleged may be summarized as follows:

1. That the Commissioner erred in failing to recognize and/or address a conflict of interest in the investigation.
2. That the Commissioner erred by not recognizing that the Respondent police officers were lying in the statements they gave to the investigator when it should have been obvious that they were lying.

3. That the Commissioner erred by failing to interview other witnesses, including him (the Complainant) and his wife as part of the investigation of the Complaint.

[45] With respect to an alleged conflict of interest in the investigation, the Complainant did not articulate the nature of such alleged conflict, nor explain his position as to how such alleged conflict could have caused the Commissioner to err in reaching the conclusion he did. The Complainant suggested a conflict on the basis that counsel for the Respondents and counsel for the Commissioner were sitting at the same counsel table during the hearing. The Complainant also stated that there was a conflict of interest inherent in the Commissioner's investigation, and he spoke of the police interviewing themselves. I did try, during the hearing, to have the Complainant articulate his concern more fully. However, he did not do so in a way that could satisfy his onus to establish that a conflict of interest was the subject of an error made by the Commissioner in reaching his decision.

[46] As to the alleged error that the Commissioner should have recognized it was obvious that the Respondent officers were lying (according to the Complainant) in the statements that they gave to the investigator, I am not persuaded that the Commissioner so erred. The Complainant argued that the statements given by the Respondents were self serving, and accordingly should not have been relied on by the Commissioner. The Commissioner cannot make findings of credibility, but there is no evidence gathered in the investigation that suggests any of the three Respondent officers was not telling the truth in his/her statement to the investigator. The statements of all three are, in fact, consistent in the way they describe what was happening at the scene on May 8, 2003, namely that the Complainant was interfering with their investigation and interviews of other witnesses, that it was not imperative for them to interview him at that time, and that they thought it best he be interviewed later. There was nothing in the evidence gathered in the course of the investigation to suggest to the Commissioner that any of the statements made by the Respondent officers during their interviews were not truthful.

[47] The Complainant made many comments during the hearing to suggest his position was that it was an error for the Commissioner's investigator to take statements from each of the Respondent officers, but not to take statements from him and/or his wife. However, when I specifically asked him if that was one of the errors he alleged the Commissioner made, he said that I was not correct. He stated that the officers' statements could only be expected to be self serving, and that for that reason, he would not have thought that such statements could be relied on. It

seems he assumed that for he or his wife to give a statement would be considered self serving and that that is why they did not give such statements. The Complainant seemed to be suggesting that a more thorough investigation should have been done, not just by taking statements from him and his wife, but by looking for evidence from other witnesses, and from other sources.

[48] At the initial hearing before Judge Joyal, the Complainant did not raise as an alleged error that the investigator should have interviewed him and/or his wife, nor anyone other than Ms. P. Ms. P. was interviewed and the Commissioner concluded that, because she was not an eyewitness to any officer conduct toward the Complainant, her evidence did not add anything to the investigation. The Complainant initiated and submitted his Complaint. The investigator did call the Complainant following the filing of the Complaint and have discussion with him about the Complaint. At the last hearing, the Complainant said that Ms. P. would have valuable information to provide. Judge Joyal directed that investigation.

[49] As counsel for the Respondents points out, it is not desirable to keep coming back on reviews under section 13(2) of the Act and ordering further investigations, time and time again. Respondent officers are entitled to expect some closure and final determination of matters within a reasonable time. However, a Complainant is entitled to have his or her Complaint properly investigated and if an incomplete investigation has been done, then that needs to be remedied. The fact a complaint has taken a long time to investigate is not reason to decline to direct further investigation if such further investigation is warranted. If the Complainant had persuaded me that indeed there were witnesses (or even one witness) who had not been interviewed during the course of the investigation who could provide evidence that could impact upon the reasonableness of the Commissioner's decision that there was insufficient evidence to support the Complaint to justify a public hearing, I would do what Judge Joyal did and direct the matter back to the Commissioner for a further interview or interviews to take place, and for the Commissioner to make a decision after that. But, I am not so persuaded. The Complainant did not name any specific individuals who observed, firsthand, the police conduct toward him that he alleges. Neither the Complainant nor his wife took any steps in the time since he filed the Complaint in May, 2003 to participate in the investigation or provide any further information to the investigator, even though the Complainant was called by the investigator.

[50] I am not persuaded that the Commissioner made any of the errors alleged by the Complainant.

[51] Further, the Complainant has not persuaded me that the Commissioner's assessment and /or evaluation of the evidence was not "reasonable".

[52] I find the Commissioner's conclusion that there is insufficient evidence to justify a public hearing is indeed one of the rational conclusions that was available to the Commissioner, based on the evidence gathered during the investigation. Based on the content of the written Complaint by the Complainant and the interviews with the Respondent officers, one rational conclusion available to the Commissioner to reach (and the one he did reach) is that, although the Complainant construed the Respondent officers as rude, in fact, the Respondents were trying to proceed with their investigation at the scene of the accident, by dealing with an allegedly impaired driver and interviewing other witnesses. They assessed the Complainant's conduct at the scene as obstructionist and unhelpful, such that they did not take a statement from him at the scene nor accept his advice as to what they should be doing in their investigation. The interview of Ms. P. did not add any information to the evidence before the Commissioner. Specifically, Ms. P. did not provide any sort of corroboration for the Complainant's version of events in terms of what was said, or as to any gestures made by any of the Respondents to the Complainant. Given that the Commissioner came to one of the rational conclusions available to him on an assessment of the evidence gathered, I must defer to the Commissioner's decision and uphold that decision.

DECISION ON REVIEW

[53] For the reasons stated above, I find that the Commissioner did not err in declining to take further action on the Complaint.

[54] Accordingly, it is not necessary to address the issue as to further action to be taken by the Commissioner, as no such action is warranted.

[55] In compliance with section 13(14.1)(b) of the Act, I order a continuation of the ban on publication of the Respondents' names.

Dated at the City of Winnipeg, in Manitoba, this 27day of March, 2009.

Provincial Judge Catherine Carlson