

1 IN THE MATTER OF: Law Enforcement Review Act,
 2 Complaint No. 2007/1
 3
 4 BETWEEN:) Mr. G. Robinson,
 5) for the complainant
 6 R.K.,)
 7) Mr. M. Stonyk,
 8 Complainant,) for the Commissioner
 9)
 10 - and -)
 11)
 12 S.B.,)
 13 J.E.,) Mr. J. Weinstein,
 14 J.D., and) for the Winnipeg Police
 15 K.A.,) Association
 16)
 17) Reasons delivered
 18 Respondents.) January 25, 2010
 19
 20

21 GUY, P.J. (Orally)

22 Pursuant to Section 13(2) of the Law Enforcement
 23 Review Act there is power to review the Commissioner's
 24 decision. Materials have been filed, as I indicated. The
 25 LERA file, the respondents' argument, the Commissioner's
 26 brief and the appellant's brief and in this particular case
 27 the Commissioner, pursuant to Section 13(1)(c) found that
 28 there was insufficient evidence to support the complainant
 29 to justify a public hearing, and under Section 13(3) to
 30 determine whether the Commissioner erred in declining to
 31 take further action in justifying a public hearing, and
 32 under Section 13(4) the burden of proof is on the
 33 complainant.

Reviewed - Release authorized by Guy, P.J.

NOTE: For the purposes of distribution, personal information has been removed by the Commissioner.

1 Counsel have argued, and it is a very important
2 point, and I have heard it before in a number of things, is
3 trying to understand the Law Enforcement Review Act, and the
4 purposes for which it has been put forward, and obviously if
5 a citizen makes a complaint about a police officer this Act
6 comes into effect, and provisions have to be followed with
7 respect to what the role of the Commissioner is in the
8 investigation, and we all see the kind of work that's gone
9 into this matter, but obviously in my view there has to be
10 some sort of system whether this is the right one or not,
11 some sort of screening function that the Commissioner is
12 allowed to do.

13 If that was not the case then everyone who made a
14 complainant against a police officer would have a full
15 public hearing to determine whether or not his allegations
16 are correct or not correct, and so the case law has reviewed
17 this Act, and what the role of the Commissioner is, and what
18 the standard of review is determined under this particular
19 section, under Section 13 is what his role is, and what he
20 has to do in order to meet the provisions of the Act.

21 And, obviously, with respect to these provisions
22 there is a screening function that is built into the Act, as
23 I say, so that every complaint made presents a full hearing,
24 and so his function is to assess the sufficiency of the
25 evidence that he has before him, after his investigation
26 takes place, and he gathers all that material, and as
27 indicated in argument Judge Chartier revisited the
28 sufficiency of evidence under the test of Section 13(1)(c),
29 and indicates in the brief filed by the Commissioner's
30 report the following:

31 The approach to be taken by the Commissioner under
32 Section 13(1)(c) is one described in Cooper, the Cooper
33 case, where the Commissioner is to determine where there is

Reviewed - Release authorized by Guy, P.J.

NOTE: For the purposes of distribution, personal information has been removed by the Commissioner.

1 a reasonable basis in the evidence for proceeding to the
2 next stage. On making this determination the Commissioner:

3 Must consider all the evidence gathered by his
4 investigators and not just the prima facie elements of the
5 complaint; and

6 Cannot determine credibility, draw inferences,
7 or make definitive findings of fact. Can in a limited way
8 weigh all the evidence to determine whether it registers on
9 the scale as sufficient evidence, so as to constitute a
10 reasonable basis to proceed.

11 The issue apparently before us today is that
12 aspect of credibility, and the weighing, and the equation of
13 sufficiency of evidence.

14 The case law does say that he is allowed to do
15 limited weighing to determine the sufficiency. As one might
16 imagine in cases such as this there is bound to be
17 contradictions. If the officer does not admit a default then
18 his position will be (1) the complainant's position is there
19 was a default, in this case unnecessary excessive force.

20 There is bound to be a contradiction between the
21 two unless there is an admission of that default.

22 So one might say, well, if, if one says this, and
23 one says that, and they are directly in conflict there has
24 to be some weighing as to credibility. Do you believe this
25 or do you believe that, and that partly is the argument that
26 Mr. Robinson has put forward.

27 The Commissioner cannot say, I believe the police
28 officer, or I believe the complainant, he is not allowed to
29 find that, but he can say that he finds the complainant's
30 evidence, in this particular case after his investigation
31 and after his review, he can weigh that with respect to
32 whether or not there is sufficient evidence for the matter
33 to proceed to the next stage on a reasonable basis.

Reviewed - Release authorized by Guy, P.J.

NOTE: For the purposes of distribution, personal information has been removed by the Commissioner.

1 So that is the kind of weighing in my
2 understanding of the law from our court, and from Dinsmere
3 (phonetic), and Power, dealing with broader issues with
4 respect to standard views of administrative tribunals,
5 allows to be done in that case.

6 Now, I understand your point, Mr. Robinson, that
7 if you say you find this evidence insufficient then you must
8 be accepting the other, but it is not necessarily so. You
9 may not find this evidence sufficient to have the matter
10 proceed to a hearing. It does not mean that the
11 Commissioner has made -- he finds that evidence to be not
12 true, or a lie, or on the other hand of that same coin that
13 he believes the other evidence as being correct. All he is
14 saying is this person's testimony, in light of everything,
15 does not reach that level of sufficiency for the matter to
16 proceed to a hearing.

17 I do not find there to be any jurisdictional error
18 here because I do not find that that limited weighing, and
19 my explanation is it is not on credibility, it is simply
20 saying this evidence here. The other evidence is there
21 saying it did not happen that way, but on his evidence there
22 is not the kind of sufficiency that allows the matter to
23 proceed to a public hearing.

24 So on the test of reasonableness there is
25 assessment of the evidence and the rationality of the
26 decision is made, was it a reasonable assessment, was it a
27 rational conclusion that the Commissioner reached, and some
28 of the factors indicated by counsel, the existence of
29 justification and transparency, and intelligibility. Is
30 this a range of possible, acceptable outcomes. Not saying
31 that X is right, and Y is wrong, but saying, has my
32 assessment -- is this one of the conclusions that I reached
33 that it is not -- in the sense of reasonableness has he

Reviewed - Release authorized by Guy, P.J.

NOTE: For the purposes of distribution, personal information has been removed by the Commissioner.

1 properly assessed this evidence, and has he drawn a rational
2 conclusion? And if he has then in my view the
3 reasonableness standard has been met.

4 And as the Commissioner says in his letter to Mr.
5 Kemash, when he wrote and said what he did, he told him what
6 he did not do because he is not allowed to -- by his
7 interpretation of the Act, which I believe is following the
8 case law as I understand it. He has told him, I am not
9 saying it did not happen the way you describe it. I am not
10 saying it did, I am just saying my assessment of it is that
11 I cannot find sufficiency in order for this matter to
12 proceed, and he points out some of the aspects that are
13 factors in his view, such as 20 to 25 blows struck, some
14 with a flashlight, and trying to put that evidence to reach
15 the sufficiency in light of the kind of medical evidence
16 that he in this case did not receive, that would be
17 supportive of the complainant's testimony with respect to
18 the number of blows and where they took place, and there was
19 no medical evidence, that one would think would in the sense
20 of the nature of the blows that were struck by the testimony
21 or the complainant's statement, would indicate -- you see
22 the kind of injuries, and so he was of the view that there
23 was not that kind of sufficiency to come to the conclusion
24 there was unnecessary or excessive force in the
25 circumstances.

26 Now, I agree, Mr. Robinson, one might argue
27 semantically and I am trying to explain it, that with
28 respect to the credibility, there is an issue of
29 credibility, it is whether or not that testimony when
30 weighed and the limits that reaches the aspect of
31 sufficiency, and I can indicate that these are difficult
32 cases because quite often they are a direct conflict between
33 what happened here, and -- one might say maybe not a direct

Reviewed - Release authorized by Guy, P.J.

NOTE: For the purposes of distribution, personal information has been removed by the Commissioner.

1 conflict because there was statements by the officers
2 indicating the kind of force that was necessary in the
3 circumstances, and why they thought they had to use that
4 kind of force, and what they did in that particular case,
5 and I do not want to -- I hate adding facts to a matter, but
6 I guess one could argue that if there was some supporting
7 evidence such as pieces of the flashlight, and his clothing,
8 or something along that line, then the Commissioner may say,
9 well, there is sufficient evidence here to have a public
10 hearing on the matter, and therefore I am ordering it. I am
11 weighing this evidence and the supportive thing to reach
12 that level of sufficiency, and -- but his assessment of all
13 the evidence that he had before him, and as I say it is an
14 extensive review, and he went to places one would think he
15 would go to for medical reports and, and whether there is a
16 complaint made, or whatever, and I know your point well, but
17 he didn't know there was LERA, but one would think that if
18 one was assaulted there would have been a complaint to the
19 -- when he comes before the arresting sergeant, or medical
20 reports, or whatever. Anyway there was nothing there that
21 the Commissioner could conclude that reached that level of
22 sufficiency that was of such a nature that he was prepared
23 to have this matter put on for a public hearing.

24 I cannot say that -- and quite often as I say in
25 cases whether I disagree with them or not it is not my role
26 in the function that I have in a limited sense with respect
27 to the case law I just have to determine whether or not
28 under the framework, legislative framework, the Commissioner
29 has to work with, whether or not his assessment was a
30 reasonable one in the circumstances, and whether the
31 conclusion he reached in the circumstances was a rational
32 one, in light of that assessment that he makes.

33 I find that it was a reasonable assessment, and it

Reviewed - Release authorized by Guy, P.J.

NOTE: For the purposes of distribution, personal information has been removed by the Commissioner.

1 was a rational conclusion, a possible outcome that he could
2 have reached and therefore I decline to interfere with his
3 decision in this matter.

4 The order will go with respect to non-publication
5 with respect to the officers' names.

6

Reviewed - Release authorized by Guy, P.J.

NOTE: For the purposes of distribution, personal information has been removed by the Commissioner.