

arrested at gun point and charged with criminal offences. These charges were eventually dropped. A.B. felt that he was dealt with unfairly by police, so he made a complaint to the Law Enforcement Review Agency (LERA). LERA received A.B.'s complaint and eventually decided that there was insufficient justification for ordering that a hearing take place. A.B. appealed LERA's decision.

[2] The Provincial Court is responsible to review the decisions of LERA. A.B. did not file written materials but did offer three reasons why the appeal should be granted:

1. A.B. maintains that he was not contacted by the commissioner after he made the complaint.
2. The commissioner claimed that he did not have jurisdiction to weigh the evidence, but then did weigh the evidence.
3. The decision was not made in an expedient manner.

Each of A.B.'s issues must be reviewed to determine whether LERA properly fulfilled the requirements of *The Law Enforcement Review Act*.

[3] Ultimately, if the Court agrees with A.B., this matter may be referred to a hearing, or other action may be taken. Alternatively, the Court may dismiss A.B.'s appeal if it is decided that LERA acted within its jurisdiction.

Jurisdiction of the Court in LERA Matters

[4] Courts traditionally have authority to make decisions from two sources, law created through the past decisions of other judges (sometimes referred to by the Latin

term, “*stare decisis*”), and law created by statute. It is necessary to understand the role of each before examining the issues raised by A.B.

[5] A.B. suggested that the use of *stare decisis* was not appropriate in this case. While A.B. did not file any written materials supporting his argument, he seemed to suggest that *stare decisis* is not appropriate because this case has its own facts which should dictate the outcome. While A.B. was correct that the court is required to apply the law to the facts to the case at hand, courts can and should apply past legal reasoning on broad principles to the case they are deciding. This is necessary to ensure consistency in the application of the law. In this case, it is helpful to examine how courts in the past have defined how, if at all the judge should intervene in a commissioner’s decision when looking at LERA matters.

[6] As stated, law is also created by statute. *The Law Enforcement Review Act (The Act)* governs complaints by citizens against the police. *The Act* creates a structure and process whereby an arm’s length, non-police agency (LERA), has extensive powers to investigate and determine whether a police officer has acted in a manner that should attract disciplinary measures. If LERA decides that no disciplinary measures are warranted, the complaint may be dismissed without a hearing.

[7] The Provincial Court’s jurisdiction is also set out in *The Act*. A judge has a limited role in LERA matters. In other words, while the court in a criminal trial is responsible for hearing and determining cases at first instance, section 1(2) of *The Act* says that the court is *not* sitting in this function in a LERA matter. Instead, the court is required to review the decision of the LERA commissioner. This is an important distinction as it provides the Court with a framework in which to consider the matter at issue.

[8] In order to understand what is meant by “review”, it is necessary to revisit the rationale for judicial review. This was comprehensively done by Chartier, PJC as he then was, in *Rev. R.P.M., v. Cst. S.C., Cst. D.W. The Law Enforcement Review Act* Complaint #5643. In summary, the existence of *The Act* and LERA, allows for a body with specialized knowledge and specific powers to consider allegations of misconduct of police officers in a meaningful way. According to *The Act*, when a complaint is received in writing, the LERA commissioner is required to investigate the complaint. Wide discretion is afforded to the commissioner in this process. The commissioner’s roles and powers include:

- Informally resolving complaints (section 15(1));
- Delaying investigation (section 12(1.1)) and extend time for filing (section 6(6));
- Retaining the assistance of additional resources or persons (section 12(6));
- Requiring additional information to be furnished by the complainant (section 10) or the police (section 12(2));
- Investigating facts (section 12(1.1) and 12(6));
- Exercising powers under *The Manitoba Evidence Act* (section 12(1.1));
- Ordering search and seizure (section 12(5)); and
- Dismissing complaints (section 13.1).

[9] In this case, the judge’s role is only to determine whether the actions of LERA were reasonable. This standard reflects the fact that the commissioner has expansive

powers under *The Act* and there are many different ways that any investigation could be conducted. The court is not to insert its own views as to whether the outcome should have been different, only whether the actions taken were reasonable in the circumstances (see *Dunsmuir, supra*, and *B.J.P. v. Cst. G.H., Cst., B.Z. and Sgt. G.H.*, LERA Complaint #2005-186).

[10] In summary, LERA has a role that affords wide latitude to investigate and determine matters of police discipline. LERA has specialized knowledge in that regard, given that *The Act* specifically mandates police disciplinary matters as their one and only function. That being the case, the court's role in reviewing the decisions of LERA should be limited to ensuring the principles of justice have been followed, by deciding whether the actions of the commissioner were reasonable.

A.B. maintains that he was not contacted by the commissioner after he made the complaint.

[11] A.B. maintains that he was not contacted by LERA after he filed his complaint. He says that he was surprised to receive a decision in May 2020, several years after the complaint was made as he had expected to be interviewed about what had happened to him.

[12] On behalf of the respondents, Mr. McKenna noted that the entire LERA file was submitted to the court. He pointed out that the file's running records indicate that the commissioner entered notes from an interview between himself and A.B. on September 15, 2016. In other words, records show that the commissioner did contact and interview A.B. during the investigation. As such, Mr. McKenna submits that A.B.'s allegation that he was not interviewed is false. Mr. McKenna pointed out that the principle of fairness dictates that when one makes an allegation that another party has fabricated evidence, the responding party should be given an opportunity

to respond to that allegation. No such notice was given here by A.B., who filed no written materials in support of his appeal, despite acknowledging that he had been advised of a timeline to file such materials.

[13] I have concluded that A.B. has failed to demonstrate that the commissioner acted unreasonably as alleged by A.B. in respect of his investigation. There are two reasons for this.

[14] Firstly, A.B. did not provide notice to the LERA commission that he intended to make an argument that he was not contacted by the commissioner. This is problematic for several reasons. As pointed out by Mr. McKenna, the LERA file clearly indicates that an entry was made purporting to be notes of an interview between the commissioner and A.B. It follows that A.B. is suggesting that this entry must be falsified. Procedural fairness dictates that notice be given by an alleging party of such misconduct. I am left with A.B.'s bald assertion that there was no interview and a notation of an interview setting out what was discussed. There is no objective way to determine who is telling the truth in the matter.

[15] Secondly, even if I were to accept A.B.'s assertion that he was not interviewed, there is no evidence of any material point that was not investigated as a result of this alleged oversight by the commissioner. It should be noted that the commissioner *is* required to investigate a complaint pursuant to section 12(1) of *The Act*. However, *The Act* does *not* require the commissioner to investigate a complaint in any particular way, such as interviewing the complainant. Section 12 does grant several powers to the commissioner that assist an investigation, but all of those powers are discretionary powers to be used as the commissioner deems appropriate. Still, it may be unreasonable in certain circumstances to *not* interview someone. For example, where there is a material gap in the written complaint as to why the

complaint was put forward, lack of clarity as to the reason for the complaint, or a mention of unidentified potential witnesses, failure to interview the complainant may be an unreasonable action warranting intervention by the court. A.B. has not raised any area that was missed in the investigation as a result of the alleged failure to interview him.

[16] A.B. filed a lengthy written document outlining what happened and attaching the email of a witness. The basis of his complaint is clearly laid out. It is noteworthy that he did not express any concern about any part of his complaint being unaddressed by the commissioner to this court. His appeal is based upon lack of contact. Even if I accept that there was no contact from the commissioner with A.B., this in and of itself does not warrant intervention.

Did the Commissioner weigh the Evidence improperly?

[17] The LERA Commissioner wrote a letter to A.B. on May 29, 2020 setting out the steps he took in investigating A.B.'s complaint, and concluding that he declined to take any further action. In explaining his decision, the commissioner wrote:

It is not my role to make any final and binding decisions as to what events did or did not occur. If decisions of that kind need to be made, that role would belong to a provincial judge.

The commissioner then set out the authority he has pursuant to section 13(1) of *The Act*, and went on:

On review of matters, I am permitted to make my decision based upon a limited assessment of credibility and disputed evidence, but without making any definitive finding of fact or law. I must consider the information available to me and I am permitted, in a limited way, to determine if there is evidence of an abuse of authority, and if that evidence is sufficient to justify taking further action.

A.B. argues that the commissioner contradicted himself by stating he could not make findings, but proceeded to do just that by finding his complaint to be insufficient to warrant a hearing.

[18] While the commissioner does appear to say one thing and then do another, I am satisfied that he properly understood and set out his authority under *The Act*. The role of the LERA commissioner has been described as a “screening function” (see *R.P.M., v. Cst. S.C., Cst. D.W., supra*, and in principle, *Cooper v. Canada*, [1996] 3 S.C.R. 854). In other words, the commissioner has been granted the power to gather the facts through an investigation, analyse those facts, and to a limited extent, weigh the facts gathered to determine whether the matter should proceed to a hearing. As pointed out by Judge Preston in *A.M. v. Constable D.R., Constable G.P., Constable J.M. and Detective Sergeant R.L.*, Complaint #2005/307, if a commissioner could not make some limited findings, every complaint would go to a hearing. Clearly, not every complaint should go to a hearing. One purpose of the role of the commissioner is therefore to screen complaints in a comprehensive manner, so as to determine whether the complaints warrant further action. This is why the commissioner has been given the discretion to engage in a limited weighing of the evidence.

[19] In my view, the commissioner set out that he understood the degree to which he was allowed to weigh the evidence after setting out what evidence he had gathered. He concluded that based upon his review of the evidence there was no abuse of authority. He then made the decision to take no further action, as he was entitled to do. Accordingly, A.B. has not met his burden to show that the commissioner acted unreasonably in making his decision.

Does the Delay in Making a Decision warrant Action?

[20] A.B. made his complaint to LERA on July 18, 2016. LERA sent the decision in this matter on May 29, 2020. A.B. contends that this amount of time is unreasonable. It should be noted that no explanation for the lengthy delay has been put forward by LERA. However, LERA was also not given notice of the delay argument by A.B., who did not file any written materials in relation to this matter. Since A.B. did not give notice of the position that he was taking, I am left only to speculate as to why this matter was delayed. The onus is on A.B. to show that this is the case.

[21] There is little, if any cogent evidence as to delay. Leaving aside A.B.'s position that at least some of the LERA file is falsified, the file shows that an investigation proceeded relatively actively from July 18, 2016 to December 7, 2016. During that time, correspondence indicates that actions were being taken, the last of which are notes taken on December 7, 2016 on a form developed specifically for this investigation. The next documents reflect the decision given on May 29, 2020. There is no evidence explaining the gap or showing the reason why this investigation was seemingly paused. I do have the comments made by Mr. McKenna, as an officer of the court that the lead investigator was on medical leave for an extended period of time and that due to Covid-19, all files are currently moving very slowly. While I appreciated Mr. McKenna's input as to possible reasons for the delay, Mr. McKenna acts for the complainants. His assistance is not proper evidence, but more importantly, he cannot be expected to answer for the commissioner. I am left with little foundation to serve as basis for a delay, assuming that unreasonable delay can be the basis of an appeal available to the court in reviewing this decision.

[22] There is no requirement under *The Act* for the commissioner to complete an investigation within any certain period of time. There is also no provision in *The Act* that specifies a consequence for untimely investigations. Section 13(3) limits the remedies for “an error” by a commissioner to referring the matter to a hearing, or taking other action under *The Act* respecting the complainant as the judge directs.

[23] Section 12(1.1) of *The Act* does allow the commissioner to delay an investigation as the commissioner considers reasonable where the investigation would interfere with a criminal investigation. It may be that there is a legitimate reason this matter was delayed, possibly related to section 12 (1.1) of *The Act*, or something else that Mr. McKenna is not privy to. Had proper notice of this issue been given by A.B., the respective parties’ positions could have been put before the court.

[24] It is conceivable that a delayed investigation could amount to an error pursuant to section 13(3) if the evidence showed that an investigator neglected to act in a prompt and diligent manner. It is rarely, if ever in the interests of justice to have a matter like this case delayed for the better part of four years. I take judicial notice that the Covid-19 pandemic did not take hold of daily life in Manitoba until March 2020. Therefore, Co-vid does not account for much, if any delay in this matter. It should be further noted that in addition to A.B., the five officers who are subject to this complaint have also had to endure the lengthy time frame that has elapsed since this complaint was filed. Untimely justice impacts everyone, and it is generally not acceptable to have to wait years for a simple matter like this one to come to conclusion. However, without further evidence, I am not able to say whether this is one of those cases where delaying the investigation was or was not warranted. I will therefore leave the issue as to whether delay can amount to an error under section 13(3) to another day.

[25] On the face of, the better part of four years is an unreasonable time to wait for a LERA investigation. Some better communication with A.B. as to the delay may have avoided this appeal on this point and as to his concern that he was not interviewed. However, after consideration of all of the above factors, I find that A.B. has not met his burden to establish that delay in this case amounts to an error in this case that would attract a remedy under *The Act*.

Additional Comments

[26] On July 5, 2016 Police were called to an apartment block in Winnipeg. They were told that someone saw a firearm in the possession of A.B. Others said that A.B. had been causing a disturbance. As it turned out, A.B. did not ever have a gun. While people saw something in his hands that day, it seems that a big part of the police misinformation may have come from the fact that people in the apartment block knew that if they said a gun was involved, the police would prioritize the call and attend faster. When police arrived at A.B.'s residence, they had to proceed on the information they had. This meant they expected to find a man with a gun. They positioned themselves strategically to handle this dangerous and volatile situation. A.B. was neither volatile nor dangerous that day. When he unlocked his deadbolt, the police thought he racked a gun to ready for fire. He was taken down.

[27] It is understandable that A.B. felt wronged that day. While he was wronged, it appears that it was not the police who are responsible for the wrong doing. The police attended and handled the matter the way they did because it seemed like a life or death situation. It is fortunate that the police acted in the restrained and professional manner that they did. A.B. also cooperated and the incident deescalated.

[28] It is very concerning that this situation may have occurred because a caller falsely reported that a gun was seen. The entire situation may not have happened had the caller not taken liberty with the facts for very selfish reasons. Police prioritize calls for good reason. The act of trying to skip the priority line on July 5, 2016 by this caller could have had very tragic consequences. Luckily it did not. The public should be made aware that such actions are criminal in nature and those who falsify such information face serious consequences.

Conclusion

[29] A.B. sought review of the commissioner's decision to take no action in respect of his complaint of July 18, 2016. I have found that A.B. has not properly established that the commissioner did not interview him during the investigation, and that in any event the findings made on the basis of information provided by A.B. were not unreasonable. I have further found that A.B. has not established that the commissioner failed to properly exercise his screening role when he made certain findings of fact. Lastly, A.B. has failed to establish that the delay from the complaint to the decision of the commission resulted in an error pursuant to section 13(3) of *The Act*.

[30] Based upon the reasons stated, pursuant to section 13(2) of *The Law Enforcement Review Act*, the application is dismissed.

"Original signed by:"

ROLSTON P.J.