IN THE MATTER OF: ***The Law Enforcement Review Act*** Complaint #5643

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

B E T W E E N:

Rev. R.P.M.,	)	Michael Capozzi, Counsel for
Complainant/Appellant	)	the Complainant/Appellant
	)	
- and –	)	
	)	
Cst. S. C.,	)	Josh Weinstein,
Cst. D. W.,	)	Counsel for the Respondents and
Respondents	)	the Winnipeg Police Association
	)	
	)	Sean D. Boyd,
	)	Counsel for L.E.R.A.
	)	
Note: These reasons are subject to a ban on publication of the Respondents' names pursuant to s.13(4.1).	)	Hearing date December 12, 2003
	)	Decision delivered February, 12, 2004
	)	

Chartier, P.J.

DECISION ON REVIEW

I. INTRODUCTION

[1] The Complainant/Appellant argues that the Commissioner erred when he found that there was insufficient evidence supporting the complaint to justify a public hearing. He argues that the Commissioner has in essence made a finding of credibility by accepting the version of the police officers over the version of the complainant. He submits that only the allegations of the Complainant/Appellant should have been considered when the Commissioner made his assessment under 13(1)(c) of **The Law Enforcement Review Act** (hereinafter called the "Act").

[2] Indeed, during the course of argument in respect of this application, all three counsel have asked me to review the approach required of the Commissioner and

the Law Enforcement Review Agency (hereinafter called the "Agency") when assessing the sufficiency test found in s. 13(1)(c) of the Act.

[3] A number of my colleagues have suggested that the question of sufficiency of evidence under s. 13(1)(c) should be approached in a fashion akin to that of a judge hearing a preliminary inquiry. In support of that position, they quote from the Supreme Court of Canada decision that I referred to in my 2000 L.E.R.A. Complaint #3597 decision: **Cooper v. Canada, [1996] 3 S.C.R. 854.** At page 14 of my 2000 L.E.R.A. decision, I quoted Justice La Forest at page 891:

> "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."

[4] Subsequent to my 2000 decision, a number of my colleagues, in accepting that the screening analysis was analogous to a judge at a preliminary hearing, chose to superimpose the s.548 **Criminal Code** sufficiency test to the question of sufficiency of evidence under s.13(1)(c). The resulting test reads as follows:

> "The Commissioner must consider whether there is evidence upon which a judge hearing the matter under the Act could conclude that a disciplinary default has occurred." (paragraph 39 of 2002 L.E.R.A. Complaint #3771)

[5] This is the approach to s.13(1)(c) that all three counsel are asking me to revisit.

II. THE ISSUES

1. Determining the Appropriate Approach to s. 13(1)(c) Assessment.

[6] The following are the respective positions of counsel who appeared before me:

The Complainant/Appellant's Position:

[7] He submits that the approach should be very similar to what is done in applications for summary judgement under **Court of Queen's Bench Rule 20**. He suggests that the Commissioner should have only looked at the allegations made

by the complainant and determined whether, if those allegations were true, they could support a finding of a disciplinary default; not whether it is likely to lead to one. He argues that the Commissioner has erred because in essence he made a finding of credibility by accepting the version of the police officers over the version of the complainant.

The Respondents' Position:

[8] The Respondents point out that the Commissioner is given wide powers to investigate under the Act and has an obligation to thoroughly investigate a complaint (s. 12(1) to (6)). Counsel submits that the Commissioner must consider all of the information before him and after making a "limited weighing" make a determination whether there is a reason or reasons to allow the matter to proceed further.

The Commissioner's Position:

[9] The Commissioner's position is somewhat like the Respondents' position in that as the Commissioner has all the relevant material before him, he is able to make certain determinations. Counsel submits that because a complaint may be dismissed on insufficient evidence, this would tend to indicate that there is room for something more than just simply referring a complaint to hearing in a situation where there is an allegation that falls within section 29.

2. Determining whether the Commissioner erred.

[10] Once I have dealt with 1. above, I will move on to review the Commissioner's decision itself so as to determine whether he was indeed correct in declining to take further action.

III. THE FACTUAL BACKGROUND

[11] The Complainant/Appellant alleges that on September 2, 2000, members of the Winnipeg Police Service abused their authority, used unnecessary violence or excessive force and/or were discourteous or uncivil when dealing with him.

[12] In a letter dated October 28, 2002, the Commissioner reported to the Complainant/Appellant the results of his investigation into his complaint. The Commissioner was of the view that there was insufficient evidence supporting this

complaint to justify a public hearing. Pursuant to s. 13(1)(c) of the Act, the Commissioner declined from taking any further action on this matter.

[13] The Complainant/Appellant has applied pursuant to s.13(2) of the Act to have a provincial judge review the Commissioner's decision to decline from taking further action on the complaint.

IV. THE LEGISLATION

[14] For the purposes of determining the issues at hand, it is helpful to be reminded of the more pertinent sections of the Act and other related legislation.

The Law Enforcement Review Act C.C.S.M. c. L75
Appointment of Commissioner
2(1) The Lieutenant Governor in Council shall appoint a Commissioner.

Powers, duties and functions
2(2) The Commissioner has such powers and shall carry out such duties and functions as conferred or imposed under this Act or as may be required for purposes of this Act by the Lieutenant Governor in Council.

Full-time appointment
2(3) The Commissioner shall devote his full time to his responsibilities under this Act, and shall not concurrently hold any full-time or part-time position of any kind

Complaint concerning police conduct
6(1) Every person who feels aggrieved by a disciplinary default allegedly committed by any member of a police department may file a complaint under this Act.

Third party complaint
6(2) The complaint may be filed notwithstanding that the alleged disciplinary default has affected some person other than the complainant, but has not affected the complainant.

Procedure for filing complaint
6(3) Every complaint shall be in writing signed by the complainant setting out the particulars of the complaint, and shall be submitted to

(a) the Commissioner; or
(b) the Chief of Police of the department involved in the complaint; or
(c) any member of the department involved in the complaint;

not later than 30 days after the date of the alleged disciplinary default.

Verbal complaint
6(4) Every member who receives a verbal complaint concerning conduct which may constitute a disciplinary default shall forthwith inform the person making the verbal complaint that a complaint under this Act must be made in writing and shall forthwith inform the person of the relevant time limits set out in this section.

Where complainant unable to write
6(5) Where the complainant is unable to reduce the complaint into writing, the person to whom the complaint is made shall

(a) take down the complaint in writing;
(b) read the complaint back to the complainant; and
(c) have the complainant sign the complaint.

Commissioner may extend time
6(6) Where the complainant has no reasonable opportunity to file a complaint within the time period set out in subsection (3), the Commissioner may extend the time for filing the complaint to a date not later than six months after the date of the alleged disciplinary default.

Where complainant faces criminal charges
6(7) Where an alleged disciplinary default occurs in the course of an investigation, arrest or other action by a member which results in a criminal charge against the complainant, the Commissioner may extend the time for filing the complaint to a date not later than one year after the date of the alleged disciplinary default or 30 days after the final disposition of the criminal charge, whichever is the sooner.

Investigation by Commissioner
12(1) Upon receiving a complaint, the Commissioner shall forthwith cause the complaint to be investigated and for this purpose, the Commissioner has all the powers of Commissioners under Part V of *The Manitoba Evidence Act.*

Delay of investigation
12(1.1) Notwithstanding subsection (1), if the Commissioner is satisfied that immediate investigation of a complaint would unreasonably interfere with an ongoing criminal investigation, the Commissioner may delay the investigation of the complaint for such period as the Commissioner considers reasonable in the circumstances.

Relevant materials forwarded to Commissioner
12(2) At the request of the Commissioner, the Chief of Police of the department involved in the complaint shall forthwith forward to the Commissioner copies of all documents, statements, and other materials relevant to the complaint which are in the possession, or under the control, of the police department involved in the complaint, including any notes or reports prepared or compiled by members of the police department.

Materials required for criminal investigation
12(3) Where any of the materials referred to in subsection (2) are required for the purpose of a criminal investigation, the Chief of Police may request, and the Commissioner may grant, an extension of time for forwarding copies of such materials.

Questions of privilege
12(4) Where the Chief of Police declines to forward copies of any of the materials referred to in subsection (2) on the ground that the materials are privileged, the Commissioner may make summary application to a judge of the Court of Queen's Bench for a ruling on the question of privilege.

Order to search and seize
12(5) Where a justice is satisfied by information upon oath of the Commissioner, or a person employed by the Commissioner, that there is reasonable ground to believe that there is in a building, receptacle or place

(a) anything upon or in respect of which a disciplinary default under this Act has been or is suspected to have been committed; or

(b) anything which there is reasonable ground to believe will afford evidence of the commission of a disciplinary default under this Act;

the justice may issue a warrant authorizing a person named therein or the Commissioner to search the building, receptacle or place for any such thing, and to seize the thing and bring it before the Commissioner for use by the Commissioner in investigating a complaint under this Act.

Utilizing necessary resources and persons
12(6) Subject to subsection (7), the Commissioner may utilize any resources and employ any persons the Commissioner deems necessary for the prompt and thorough investigation of a complaint.

No investigation by department involved in complaint
12(7) Except as otherwise provided in this section, the Commissioner shall not employ for purposes of investigation any person who is, or at the time of the occurrence complained of was, a member of the police department involved in the complaint.

Internal investigation
12(8) At the written request of the complainant, the Commissioner may refer the complaint to the respondent's Chief of Police for internal investigation.

Criminal investigation
12(9) Where the respondent's Chief of Police informs the Commissioner that the respondent's conduct is being or will be investigated by the internal investigation unit of the department for the possible laying of criminal charges against the respondent, the Commissioner may request the Chief of Police to forward the results of the investigation to the Commissioner for purposes of this Act.

Report by Chief of Police
12(10) When the internal investigation referred to in subsection (8) or (9) has been completed, the Chief of Police shall report the results of the investigation to the Commissioner, and the Commissioner shall thereafter deal with the complaint as provided in this Act.

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.

Discipline Code
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) 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.

Annual report
45 The Commissioner shall submit an annual report concerning the performance of his duties and functions to the minister and to each municipality in the province which has established a police department; and the minister shall table the report in the Legislature.

The Manitoba Evidence Act C.C.S.M. c. E150
POWER OF COMMISSIONERS

Powers to summon witnesses
88(1) The commissioners have the power of summoning any witnesses before them by a subpoena or summons under the hand of any of them, and of requiring those witnesses to give evidence on oath or affirmation, and either orally or in writing, and to produce such documents and things as the commissioners deem requisite to the full investigation of the matter into which they are appointed to inquire.

Witnesses to be examined under oath
88(2) Unless the commission otherwise provides, witnesses shall be examined under oath or affirmation before the commissioners, who shall reduce their evidence to writing either with or without the assistance of a reporter.

Commissioner may view premises
89 The commissioners may enter upon or into, and view or inspect, any land, building, works, or property, if, in their opinion, a view thereof will assist in the inquiry; and the view may be had, if deemed necessary to the inquiry, at any time by day or by night.

Warrant for non-appearance
90(1) Where a witness summoned to appear before the commissioners neglects or refuses to appear at the time and place specified in the subpoena or summons, on proof of its service, either personally or by leaving it for him at his last or most usual place of abode, the commissioners may, if the circumstances seem so to justify, issue a warrant signed by the commissioners or any of them to bring and have the witness before them, at the time and place mentioned in the warrant.

Warrant in first instance
90(2) Where the commissioners are satisfied by evidence upon oath that it is probable that a witness will not attend to give evidence without being compelled to do so, they may, in the first instance, instead of issuing a summons, issue a warrant.

Committal for refusal to testify
91 Where, on the appearance of a witness before the commissioners, either in obedience to a summons or on being brought before them by virtue of a warrant, the witness refuses to be examined upon oath concerning the premises, or refuses to take such an oath, or, having taken the oath, refuses to answer the questions concerning the premises then put to him, without lawful excuse for the refusal, the commissioners may, by warrant signed by the commissioners or any of them, commit the person so refusing to a common goal, there to remain and be imprisoned for a term not exceeding one month, unless in the meantime he consents to be examined and to answer concerning the premises.
Police to assist commissioners

Services of experts
93(1) The commissioners, if authorized by the Lieutenant Governor in Council or by statute, may engage the services of such accountants, engineers, technical advisers, or other experts, clerks, reporters, and assistants, as they deem necessary or advisable, and also the services of counsel to aid and assist them in the inquiry.

Deputies and officials
93(2) The commissioners may authorize and depute any such accountants, engineers, technical advisers, or other experts, any other qualified persons, to inquire into any matter within the scope of the commission.

Powers of deputies
93(3) The persons so deputed, when so authorized, have the same powers that the commissioners have to take evidence, issue subpoenas, enforce the attendance of witnesses, compel them to give evidence, enter upon and view property, and otherwise conduct the inquiry.

Searches free
94 For the purposes of an inquiry a commissioner may, without fee or charge, search or cause to be searched all instruments, documents, or records, relating to persons or matters within the scope of the inquiry in any public office existing under any Act of the Legislature.

V. THE LAW

1. HOW IS THE COMMISSIONER TO EVALUATE THE INFORMATION WHEN REACHING A DECISION UNDER s. 13(1)(c)?

[15] In order to answer the above question, it is helpful to examine the following points: the purpose and scope of any administrative agency; the particular role of the Agency and the powers of the Commissioner.

[16] I take it as a given that the Agency is an administrative agency. I believe this to be non-contentious and self-evident after having reviewed the Act and having considered the fact that the Agency is required to submit and cause to be tabled in the Legislature an Annual Report (see s.45 of the Act). It is to be noted as well that the Agency is described in its 2002 Annual Report as being “an independent, non-police agency”. (page 9)

A) What is the purpose and scope of an administrative agency?

[17] As a result of my finding that the Agency is an administrative agency, I must remind myself that the approach of the Commissioner (pursuant to s.13(1)) is to be

determined pursuant to principles of administrative law, not criminal law. As such the principles of natural justice and the duty to act fairly are first and foremost in my mind. In addition, as administrative agencies are creatures of statute, their powers and functions are both enumerated and limited by their enabling legislation.

[18] When reviewing the purpose and scope of an administrative agency, I have found three papers from the Law Reform Commission of Canada to be most helpful:

(i) The 1979 Study Paper entitled "*Public Participation in the Administrative Process*";

(ii) the 1980 Working Paper 25, "*Independent Administrative Agencies*", (with Mr. Gerald La Forest, as he then was, as its Project Commissioner); and

(iii) the 1982 Study Paper entitled "*Parliament and Administrative Agencies*".

[19] Each of these papers provides an insight as to why administrative agencies were created and what roles they continue to play.

a) <u>The raison d'être of administrative agencies</u>

[20] The 1979 Study Paper (at p. 87) sets out why a legislature may choose to create a separate government body to act as a complaint-resolving agency:

> "What is a government to do when it finds itself flooded with citizen complaints, in charge of a bureaucracy it can no longer effectively oversee, out of touch with the electorate, and unable to rely on designated authorities to guard the 'public interest'?"

[21] This same point is further reinforced at pages 7 and 14 respectively of the 1982 Study Paper where it is stated that:

> ". . . this century has been characterized by an exponential increase in the size and complexity of government. This growth has put strains on the traditional institutions of parliamentary government, and one response to these strains has been the creation of numerous administrative agencies."

> "They (administrative agencies) provide a middle ground between government departments and the courts where the expenditure of the prestige and time of highly paid judges is not felt justified."

b) The role of administrative agencies

[22] Clearly, administrative agencies have a place in our society. To fully understand their nature and scope one must look at the role they play. At page 7 of the 1982 Study Paper, it is stated:

> "Administrative agencies play a number of roles in the modern public sector. A clear identification and awareness of these roles is vital to an assessment of the performance of agencies, and is a prerequisite to the determination of the relationships, controls, and interactions that should exist between the agencies on the one hand, and the legislature, the executive and the courts on the other."

[23] Further, at page 7, it continues:

> "Without a clear idea of the role of the agency in the overall structure of public administration, it is not possible to say whether a particular type of executive control, a particular instance of judicial review, or a particular form of legislative scrutiny is appropriate."

[24] Pages 8 through 19 of this same paper list a number of roles administrative agencies are called upon to fulfill. This list includes the roles of investigator and determination-maker. This Study Paper warns not to try to categorize an agency under only one role and reminds the reader that oftentimes an agency may have many roles.

[25] At page 42 of the 1980 Working Paper 25, the Project Commissioner, Mr. Gerald La Forest (who would later become the Justice who wrote the 1996 Supreme Court of Canada decision in **Cooper** (supra) and which will be referred to extensively in this decision) when reviewing the administrative process states:

> "The independent agencies' legal relations with the three traditional branches of government, and the manner in which they carry out administrative proceedings with regard to the clientele or relevant publics they regulate or serve, would be a reflection of how they are structured by statute and within the organizational framework of government."

[26] To better understand the manner in which an agency is to "carry out (its) administrative proceedings" with regard to the public it serves, a review of the Act is required.

B) What are the roles of the Law Enforcement Review Agency and the powers of the Commissioner?

[27] As the Agency is a creature of statute, its role and powers can only be found in the Act. One finds that the Agency has a number of roles with associated powers. These roles are investigative, decision-making, interpretive and complaint resolving in nature.

a) Investigative role and powers:

[28] Role:
- receive complaints against police officers (s.6(1))
- investigate the complaint (s.12(1))

[29] Powers:
i) Commissioner's investigative powers under **The Manitoba Evidence Act** such as:
- to summons witnesses (s.88)
- to enter upon or into and view premises (s.89)
- to issue warrants (s.90)
- to commit to jail for refusal to testify (s.91)
- to deputize qualified persons to investigate (s.93)
- to search or cause to be searched documents (s.94)

ii) Commissioner's investigative powers under the Act such as:
- to order from police relevant materials (s.12(2))
- to apply for search warrants (s.12(5))
- to employ persons for thorough investigation (s.12(6))

b) Decision-making role and powers

[30] Role:

- prevent a complaint from proceeding further when a complaint either is frivolous or vexatious, does not fall within the scope of the Discipline Code or where there is insufficient evidence support it (s.13(1))

- refer appropriate complaints to a provincial judge for hearing on the merits (s.17(1))

- identify any organizational or administrative practices of a police department which may have caused or contributed to an alleged disciplinary default and recommend appropriate changes to the proper governing authority (s.22)

[31] Powers:

- may extend the time for the filing of a complaint (s.6(6), 6(7), 9(2))
- may require a party to provide further particulars (s.10)
- may extend the time to receive relevant materials (s.12(3))
- may make summary application to a judge for a ruling (s.12(4))
- may recommend penalties (s.16(1))
- may deny access to materials (s.18(2))
- may recommend the appointment of counsel (s.24(8))

[32] It is well to note at this point the shear scope and variety of the Commissioner's power (investigative and decision-making) and duties. Given these powers, the precise and identical application of the s.548 preliminary inquiry test to s.13(1)(c) does not seem right. Such an application of the s.548 sufficiency test would risk thwarting the Act's intended role for the Commissioner. The use of the s.548 sufficiency test would require the Commissioner to refer a complaint to a judge for hearing on its merits, the moment there is any evidence upon which a judge could find a disciplinary default. Such an approach would oblige the Commissioner to ignore most if not all of the information that may have been gathered pursuant to his investigative power. Such a situation would suggest that the Commissioner serves as a mere investigative arm for the eventual (and I say inevitable) provincial court hearing.

[33] It will be suggested later in this decision (see paras. [46] to [50]) that such a neutered role for the Commissioner runs contrary to the purpose and scope of the Act and is furthermore, inconsistent with the considerable powers given to the Commissioner. Those powers include the applicative and interpretive powers discussed below.

c) Interpretive role and powers

[34] A review of the Act also reveals that in various places, the Commissioner is given powers to interpret and apply its enabling legislation or interpretive powers. These powers however do not amount to a power to determine questions of law identical to that of a court. Instead, the powers represent an application of the

legislature's intent to ensure that the Agency is able to perform its roles. If the Agency didn't have these ancillary powers, it would be rendered almost ineffectual. As Justice La Forest stated in **Cooper** (supra) starting at page 891:

> "Every administrative body, to one degree or another, must have the power to interpret and apply its own enabling statute. If this were not the case, it would be at the mercy of the parties before it and would never be the master of its own proceedings."

[35] These interpretive powers are found at:

[36] Powers:

- where the complainant has no reasonable opportunity to file a complaint, the Commissioner may extend the time to file a complaint (s.6(6)

- if the Commissioner is satisfied that immediate investigation of a complaint would unreasonably interfere with an ongoing investigation, he may delay the investigation for such period of time he consider reasonable in the circumstances (s.12(1.1))

- where the Commissioner is satisfied that a complaint is frivolous or vexatious or that there is insufficient evidence supporting a complaint (s.13(1))

- where the Commissioner believes that a question of privilege arises or that release of information will unduly harm the interests of a third party or would be contrary to public interest (s.18(2)). (all the underlining is mine)

[37] As can be seen from the above, the Commissioner is called upon in a number of instances to interpret and apply the Act in the various situations that arise. In so interpreting and applying the Act, the Commissioner must consider carefully, assess and evaluate all the information before him before reaching a reasonable decision. Absent this capability, the Commissioner would be unable to give full scope to the potential administrative solutions and remedies available under the Act.

d) Complaint-resolving role and powers:

[38] Role:

- consult with parties for resolution (s.15(1)

[39] Powers:

- resolving complaints informally (s.15(1) and (2))

C) How is the Commissioner to evaluate the information when reaching a decision under s.13(1)(c)?

[40] To properly consider s.13(1)(c), it must be fully placed in the context of section 13. That section enables the Commissioner to not act on certain complaints. Such inaction is required when the Commissioner is satisfied that:

> a) the subject matter of the complaint is frivolous and vexatious (s.13(1)(a));
>
> b) the subject matter of the complaint does not fall within the scope of section 29 (s.13(1)(a)); or
>
> c) there is insufficient evidence supporting the complaint to justify a public hearing (s.13(1)(c)).

[41] I had a chance to consider this issue in the 2000 L.E.R.A. Complaint #3597. In that decision (at page 14), when considering s.13(1)(c) of the Act, I referred to the Supreme Court of Canada decision in **Cooper** (supra). I quoted Justice La Forest at page 891:

> "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."

[42] Subsequent to my above L.E.R.A. Complaint decision (delivered in 2000) a number of my colleagues, (in accepting that the screening analysis was analogous to a judge at a preliminary hearing) superimposed the s.548 of **The Criminal Code** sufficiency test to the question of sufficiency of evidence under s.13(1)(c). Such an application resulted in the following formulation:

> "The Commissioner must consider whether there is evidence upon which a judge hearing the matter under the Act could conclude that a disciplinary default has occurred." (paragraph 39 of 2002 L.E.R.A. Complaint #3771)

[43] I agree that the s.13(1)(c) process is analogous to the preliminary inquiry process in that they are both screening processes and they both protect a person from a needless and an improper exposure to public trial where an agency is not in possession of evidence to warrant continuation of the process. But these are similarities of function, not jurisdiction. Given the nature, purpose and scope of the Act and given the particular duties and powers that attach to a Commissioner, I do not believe that the Supreme Court of Canada in **Cooper** (supra) meant for the sufficiency test (in cases of administrative determinations) to be identical to that used in s.548. I say this for two reasons:

1. The Supreme Court of Canada has set out a test that is different than the s.548 test; and

2. It could not have been the Legislature's intent to have virtually all complaints referred to hearing before a judge.

1) The Supreme Court of Canada sets a test different than the s.548 test

[44] It is well to remind ourselves that when Justice La Forest said in **Cooper** (supra) "the Commission fulfills a screening 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 <u>having regard to all the facts</u>. 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)

[45] I believe that the above inclusion clarifies Justice La Forest's views on the applicable test. The process described in the above case is strikingly similar to the process being reviewed in the case at bar. Though the screening process to be used under s.13(1)(c) is analogous or akin to that found at the preliminary inquiry stage, the Supreme Court clearly did not intend that the test used by the administrative agency be the same. Had the Supreme Court wanted to impose an identical test, it would have described the test in a manner similar to the test used by a judge sitting at a preliminary inquiry. It did not. The test it did describe requires "the Commission to determine whether there is a reasonable basis in the evidence for proceeding to the next stage". I'm left to conclude that this rather important point was inadvertently de-emphasized by my colleagues.

2) It was not the intent of Legislature to refer virtually all complaints to judicial hearing

[46] The practical results of applying the narrow s.548 test are inconsistent with the earlier discussed purpose and scope of this and indeed of any administrative agency.

a) The scope and nature of an administrative agency.

[47] As already discussed, administrative agencies were often established to relieve governments and courts from having to handle certain matters. In its last Annual Return (2002), the Agency received 235 complaints. Only 12 were referred to a judge. If the Commissioner were to apply the recently suggested narrow test of a judge sitting at a preliminary inquiry, he would be obliged to refer almost every complaint to a hearing before a judge.

[48] In my 10 1/2 years on the Bench, I can advise that I have committed accused persons to stand trial after preliminary inquiry on all but two or three of the matters before me. It is a very rare occurrence for a judge not to commit an accused to stand trial after a preliminary inquiry. The reason for this should be clear. Seldom, if ever, does the Court hear other than the prima facie Crown case. Even if it did

hear other evidence, in most circumstances, the Court must commit where there is any evidence upon which a reasonable jury, properly instructed, could convict.

b) <u>The role of the Agency</u>.

[49] The Agency's enabling legislation gives the Commissioner not only wide investigative powers but also interpretive powers. Would the Legislature have granted such powers to the Agency had it wanted the Commissioner to apply such a narrow test? Given the possible information that can come to the Commissioner by way of his investigative powers (information which may contradict the original complaint), the position of the Commissioner and that of a preliminary judge seem incomparable. I do not believe that it was the intent of the Legislature to set up a process that would essentially have all complaints, (235 in 2002) referred to a judge for hearing.

[50] Applying the test found under 548 of **The Criminal Code** would mean, (where the complainant adduces evidence on all elements of the disciplinary default), that the Commissioner would be duty bound to reflexively refer (irrespective of opposing information that may have been gathered by the investigators) the matter to a judge for hearing. The net effect of this approach is to guarantee the referral of virtually all complaints that have been reduced to writing in a legible and coherent document.

[51] After having reviewed the two Supreme Court of Canada decisions (see para. [44]) and having taken into account the role as well as the purpose and scope of the Agency, I am of the view that the appropriate approach when considering the question of sufficiency of evidence under s.13(1)(c) is the approach set out by the Supreme Court of Canada in **S.E.P.Q.A. v. Canada** (supra) and adopted in **Cooper** (supra) (at para. [44]) and is that:

> ***The Commissioner must determine whether there is a reasonable basis in the evidence to justify a public hearing.***

D) What does "determining whether there is a reasonable basis in the evidence", mean?

[52] The Commissioner must determine "whether there is a reasonable basis in the evidence" to justify a public hearing. How does the Commission come to that decision?

a) All information/evidence to be considered by Commissioner

[53] What is the information/evidence that can be considered by the Commissioner when making the determination required of him under s.13. That section states in part "where the Commissioner is satisfied that there is insufficient evidence...". Counsel for the Complainant/Appellant suggests that the Commissioner should only consider the allegations made by the complainant. I disagree. The approach which the Supreme Court sets out states "whether there is a reasonable basis in the evidence". To give meaning to Justice Sopinka's direction to find a "reasonable basis in the evidence" for continuing, the Commissioner must, by necessity, consider all the information before him. Indeed Justice La Forest in **Cooper** (supra) stated at page 891 "having regard to all the facts". (the underlining is mine)

[54] To do otherwise would involve only an examination of the complaint. Such an approach would render meaningless not only Justice Sopinka's direction, but also the considerable investigative powers available to the Commissioner under the Act. The extensive and varied scope of the Commissioner's investigative role and powers clearly suggests that the Legislature intended for the Commissioner to have access to as much information as possible when fulfilling his duties under the Act. Those duties include the making of certain determinations like those found in s.13(1)(c).

[55] The Commissioner must therefore, to fulfill his administrative task and to be faithful to his jurisdiction under the Act, consider all of the evidence gathered by his investigators and not just the prima facie elements of the complaint.

b) Commissioner must conduct a limited weighing

[56] The availability of the investigative powers under the Act permit a more informed evaluation based upon the reasonable basis of the complaint. The reasonable basis of the complaint is by necessity evaluated through the prism of all the evidence, including the evidence gathered pursuant to the Commissioner's investigative powers.

[57] To be clear, it is not the job of the Commissioner to determine if the complaint is made out nor is he to weigh the information as in a judicial

proceeding. This means that the Commissioner cannot determine credibility, draw inferences or make definitive findings of fact.

[58] The Commissioner can however, in a limited way, weigh all the evidence to determine whether it registers on the scales as sufficient evidence (in the face of other opposing evidence or information gathered by the investigators) so as to constitute a reasonable basis to proceed further. For example, in the face of what appears to be a coherent complaint, there may be nonetheless, after a thorough investigation, an overwhelming case to either contradict or seriously weaken what at first blush appears to be a strong complaint.

[59] While one cannot weigh the evidence in the judicial sense of determining credibility or drawing inferences, in the situation above, the Commissioner quite properly examines the preponderance of proof brought forward by an objective and impartial investigator (which contradicts or seriously weakens a complaint) in his effort to determine whether the evidence is sufficient to constitute a reasonable basis for a hearing.

[60] The Commissioner must therefore, after completing the investigation, carefully consider all the information before him and determine whether there is a reasonable basis in the evidence for proceeding to the next step. The prohibition against weighing the evidence in the judicial sense of determining credibility and drawing inferences should not inhibit a Commissioner from weighing the evidence to be able to make the determinations required of him under the Act.

E) Summary

[61] Let me now recapitulate on Issue 1. which is: How is the Commissioner to evaluate the information when reaching a decision under s.13(1)(c))?

- The issue is to be determined pursuant to the principles of administrative law rather than criminal law;
- As administrative agencies are creatures of statute, their roles and powers are both enumerated and limited by their enabling legislation;
- Administrative agencies provide a middle ground between government departments and the courts where the expenditure of the prestige and time of highly paid judges is not felt justified;

- To be able to understand the manner in which the Commissioner is to evaluate the information before him, one must determine the role the Act intends the Agency to play;

- A review of the Act shows that two of the Agency's roles are investigative and decision-making;

- The Agency's investigative role and powers include the power to summons witnesses, search documents, enter upon premises and to employ investigators;

- The Agency's decision-making role and powers include the power to extend complaint filing time, to prevent a complaint from proceeding further and to identify and recommend changes to police practices;

- The Act also confers upon the Agency certain interpretive powers. Though these powers do not amount to powers to determine questions of law identical to that of a court, they are given to the Agency to ensure that it is able to perform its roles;

- One of the Agency’s roles is to protect a police officer from a needless and improper exposure to public hearing where the Commissioner is not satisfied he is in possession of evidence to warrant continuation of the process;

- To permit it to perform this role, the Act gave the Agency the power to hire investigators and to decline to take further action where satisfied that there was insufficient evidence to allow the complaint to proceed to public hearing;

- The approach to be used to consider this sufficiency of evidence under s.13(1)(c) cannot be the s.548 test of **The Criminal Code** because the Supreme Court of Canada set a different test and because such a narrow test would be contrary to the intent of the Legislature;

- The approach to be taken by the Commissioner under s.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 by his investigators and not just the prima facie elements of the complaint; and

- 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.

2. DETERMINING WHETHER THE COMMISSIONER ERRED.

a) Standard of Review

[62] Before determining whether the Commissioner erred, I must first settle on the appropriate standard of review to be applied to his decision. As this review is related to an error of law or an error of mixed facts and law and as I had previously found in L.E.R.A. Complaint #3597 decision, I find that the appropriate standard of review will be the standard of correctness. The standard of correctness is the most exacting of review standards. It results in the provincial judge affording the least amount of deference to the Commissioner's decision. When the standard is applied, the Commissioner's decision can be overturned on the basis of simple error.

b) Burden of proof

[63] Pursuant to s.13(4) of the Act, the burden of proof is on the Complainant/Appellant to show that the Commissioner erred in declining to take further action on the complaint.

VI. REVIEWING THE COMMISSIONER'S DECISION

[64] By letter dated October 28, 2002, the Commissioner informed the Complainant/Appellant that there was insufficient evidence supporting the complaint to justify a public hearing. Pursuant to s.13(1)(c) of the Act, the Commissioner declined from taking any further action on this matter.

[65] The Commissioner's letter can in effect be broken down in three parts and they are as follows:

PART I: Receipt of Complainant's Allegations and Statement

[66] On March 15, 2001, the Complainant files with the Agency a complaint alleging that on September 2, 2000, members of the Winnipeg Police Force:

- abused their authority;
- used unnecessary violence or excessive force; and
- were discourteous or uncivil when dealing with the Complainant.

[67] The Complainant states that while in the Health Sciences Centre emergency room, two police officers attend to his room. One of them is female, the other is male. He affirms that the female officer told him that as he may be charged with a criminal offence, she would advise him of his rights. A discussion ensued wherein the Complainant alleges that the officer went "ballistic" and told him that he "could be civil". The Complainant indicates that shortly after that another male officer, not the same as the one who first attended, came in and "started playing around with the I.V." that was attached to the Complainant's hand.

[68] The Complainant feels that the female officer was verbally aggressive and abusive and that she wasn't abiding by the police department policy in questioning him after he had told her of his wish to remain silent. The Complainant also states that the male officer should not have touched his intravenous needle.

PART II: Commissioner's Investigation of the Complaint

[69] Once the Agency received the Complainant's statement, it investigated the complaint by reviewing the medical records from the Health Sciences Centre, the relevant police reports and by interviewing the Respondents.

a) Medical Report

[70] The Health Sciences Centre medical report indicates that the Complainant presented himself at the hospital on September 2, 2000, at approximately 3:06 a.m. suffering from a deep laceration between his thumb and index finger. He was discharged a few hours later at 8:00 a.m.

Winnipeg Police Service Reports

[71] The police reports indicate that two officers attended the Health Sciences Centre at approximately 4:11 a.m. on September 2, 2000. The female officer advised the Complainant that he may be charged with a criminal offence and advised him of his rights under the *Charter*. The Complainant responded by saying: "I can't believe this. I get assaulted and I'm being charged. Yeah I want to call my lawyer." At 4:26 a.m. the officer attempted unsuccessfully to contact his lawyer. At 4:46 a.m., the Complainant's lawyer contacted the female officer who then arranged for the lawyer to speak with the Complainant in private. At 4:59 a.m. the Complainant completed his call with counsel. At 5:34 a.m., a second male officer attended and released the Complainant on a Promise to Appear.

Interview with the Respondent Police Officers

[72] On August 6th, 2002, the Respondents attended the office of the Agency to be interviewed. The male officer indicates that he initially entered the room but then waited outside the room while the female officer was dealing with the Complainant. He says he has no knowledge of anyone touching the Complainant's intravenous needle.

[73] The female officer confirms the information contained in the police report however indicates that it was the Complainant who became upset and started to yell when he was advised that he might be charged. The female officer states that she was not questioning him about the incident but was rather informing him of his rights, trying to determine if he understood and obtaining background information about him. She advises that he were left alone until his lawyer called the hospital and that he was then given the opportunity to speak with him in private. She also advises that at one point in time he wanted to have a cigarette so she accompanied him outside for that purpose. She states that no other officers were in the room with him other than the first male officer when they initially attended the hospital and a second male officer when he was released. She states that these officers did not touch the intravenous needle of the Complainant. She also said that at one point she did see a male nurse in the room looking at the Complainant's injury.

PART III: Commissioner's Reasons for Decision

[74] As previously indicated, the Commissioner must, after the investigation is complete, carefully consider all the information before him and determine whether there is a reasonable basis in the evidence for proceeding to the next step. In his

October 28, 2002 letter, the Commissioner simply states that "On review of this investigation, it is my view that there is insufficient evidence supporting this complaint to justify a public hearing." He does not give further explanations for his decision.

[75] It would have been helpful had the Commissioner elaborated further on his analysis by giving detailed reasons for his decision. In future decisions, the basis for the Commissioner's decision should be clearly and fully articulated. For there to be a "reasonable basis", there should be reasons provided which constitute the “reasonable basis” for the decision.

a) Reviewing the Commissioner's decision with respect to the male Respondent

[76] The Commissioner does point out a number of facts that may well form the basis for his decision. The Commissioner states that:

- the Complainant confirms that the second male officer who attended was not the same male officer that initially attended;
- the Complainant states that the second male officer attended "shortly" after the yelling incident with the officer or sometime before 4:26 a.m.
- the Police Report states that the only other male officer to attend to the Complainant's room arrived much later at 5:34 a.m. when he was given his Promise to Appear and after he had spoken to his lawyer.

[77] Based on the above, it is clear that there is no reasonable basis to find that the male Respondent officer was involved in any disciplinary default as even the Complainant says that it was not the male officer who initially attended his room that touched his intravenous needle. It is also clear from the above that the second male officer who attended to give the Promise to Appear did not attend within the time frame suggested by the Complainant (“shortly” after the yelling incident) but well over an hour later.

b) Reviewing the Commissioner's decision with respect to the female Respondent

[78] With respect to the female officer’s conduct, on the issue of being discourteous and uncivil, the Commissioner's reporting letter points out that:

- the only indication in the Complainant’s statement of discourteous or uncivil conduct on the part of the female officer is that she went “ballistic” by yelling at him: “At least you could be civil about it.”

- the female officer indicates that it is the Complainant who became upset and yelled when she informed him that he was charged. She does not deny that she told him “At least you could be civil about it.”

[79] It is certainly understandable that someone would become upset if informed of the possibility of being charged when one is lying injured in the emergency ward. The comment attributable to the female officer by the Complainant "At least you could be civil about it" can only come about if she felt the Complainant was not being civil about something. That by itself does not amount to discourteous or uncivil conduct especially when one considers that the Complainant did not raise other inappropriate conduct. To the contrary, the police report indicates that the female officer arranged for the complainant to get a hold of his lawyer, that she arranged and allowed them to speak in private and that she accompanied him outside to allow him to smoke a cigarette. This is by no means conduct that would be viewed as being a disciplinary default.

[80] With respect to the female officer’s conduct, on the issue of being aggressive or abusive, the Commissioner's reporting letter points out that:

- the Complainant states that she had no right to question him after he advised her of his wish to remain silent and that this is why he says she was verbally aggressive and abusive;

- the female officer states that she was indeed questioning him but not about the incident. She states she was informing him of his rights, trying to determine if he understood them and obtaining background information about him.

[81] Where is the reasonable basis for a disciplinary default? She was just doing her job. An officer's duty is to cease to elicit evidence from an accused until that person has had a reasonable opportunity to speak to counsel. The right to remain silent does not prevent an officer from informing him of his rights, questioning him to determine if he understands and questioning him to obtain his background information.

VII. DECISION ON THIS REVIEW

[82] As a result of having reviewed the Commissioner's decision and bearing in mind the applicable standard of review, the scope and nature of a s.13(2) review, the appropriate assessment that the Commissioner is to make under s.13(1)(c) and that the burden of proof is on the Complainant/Appellant to show that the Commissioner erred in declining to take further action on the complaint, I am of the view that the Commissioner was correct in determining that there was no reasonable basis in the evidence to justify a public hearing against the Respondents.

[83] Pursuant to s.13(4.1)(b) of the Act, I order a ban on the publication of the Respondents names.

DATED at Winnipeg, this 12th day of February 2004.

Judge Richard Chartier