

IN THE MATTER OF:

Law Enforcement Review Act
Complaint No. 5649

BETWEEN:

D G ,

Complainant,

- and -

CONSTABLE R S # AND
CONSTABLE K L #

Respondents.

TRANSCRIPT OF PROCEEDINGS had and taken before
The Honourable Judge Swail, held at The Law Courts Complex,
408 York Avenue, in the City of Winnipeg, Province of
Manitoba, on the 31st day of October, 2002.

APPEARANCES:

MR. D. GUÉNETTE, for the Commissioner.

MR. P. MCKENNA, for the Winnipeg Police Association.

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

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1 OCTOBER 31, 2002

2

3 THE JUDGE: Is everyone here?

4 MR. MCKENNA: Your Honour, my name is McKenna for
5 the respondent officer and Mr. Guénette is for the
6 Commissioner.

7 THE JUDGE: Yes.

8 Mr. MCKENNA: And we understand that the
9 complainant is on his way and just running a few minutes
10 late.

11 THE JUDGE: All right. We'll simply recess, then,
12 and reconvene when he gets here. He indicated he'd be about
13 20 minutes or so, is that it?

14 MR. GUÉNETTE: That's what my assistant said, Your
15 Honour. She took the phone call today. She said it was a
16 little unclear. I gather he was on the road somewhere.

17 THE JUDGE: Right.

18 MR. GUÉNETTE: But he said it would be about 20
19 minutes. How, how accurate of a prediction that is, I, I
20 don't know, but that's what he said.

21 THE JUDGE: All right. Well, what I'll suggest,
22 then, is that we can recess till 2:30. If he arrives
23 earlier than that, just let me know and I'll come down.
24 Otherwise, I'll be back to see you about 2:30.

25 MR. GUÉNETTE: Okay.

26 MR. MCKENNA: All right. Thank you.

27 MR. GUÉNETTE: Thank you, Your Honour.

28

29

(RECESS)

30

31 THE JUDGE: I see -- is this Mr. G here now?

32 MR. G: Yes, sir.

33 THE JUDGE: Yes, if you could speak out, sir.

34 Everything's being recorded so if you could just

1 acknowledge, yes, that --

2 MR. G : Yes, sir.

3 THE JUDGE: -- you are Mr. G . Are you ready
4 to proceed now with your application?

5 MR. G : Yes, sir.

6 THE JUDGE: And I, I take it that Mr. McKenna on
7 behalf of the police officers, and Mr. Guénette on behalf of
8 the Commissioner, you're ready to proceed?

9 MR. MCKENNA: Yes, Your Honour.

10 MR. GUÉNETTE: Yes, Your Honour.

11 THE JUDGE: All right. I'd, I'd like to just
12 inquire of counsel, I take it the usual practice is simply
13 to hear submissions from both sides. I don't know whether
14 the Commissioner's going to wish to make any sort of
15 submission other than the brief that has been filed.

16 MR. GUÉNETTE: That's right, Your Honour. Usually
17 the submissions -- usually the applicant starts and then
18 counsel for the respondent continues -- replies, and then if
19 we have anything to add based on the submissions, then we'll
20 be speaking up at that time.

21 THE JUDGE: All right. I should just inquire to
22 start off with, the brief that has been submitted,
23 Mr. Guénette, I take it that that has been provided to
24 Mr. G ?

25 MR. GUÉNETTE: It has. He has a copy right here,
26 Your Honour.

27 THE JUDGE: Right. I want to thank you for that.
28 It's a helpful submission, I believe, in, in the
29 circumstances.

30 All right. If there is nothing further of a
31 preliminary nature, then, Mr. G , I'm, I'm going to ask
32 you to let me have your submission.

33 MR. G : Okay. Basically, I'll just give you
34 the story, like basically what happened that night.

1 THE JUDGE: All right. I'm sorry, it strikes me
2 there's just one other issue here and that's the question of
3 an order of non-publication pursuant to the terms of the
4 LERA Act. I'm, I'm going to make that order and we'll deal
5 with it appropriately at the end of the hearing also.

6 Sorry, go ahead, sir.

7 MR. G : Okay. On December 23rd of 2000, me
8 and I believe two of my friends came into Winnipeg at
9 approximately I would say between 5:00 and 9:00 p.m. I
10 can't remember the exact time because I have no notes with
11 me but ... So we came into Winnipeg, we went to X Address
12 . There one of my friends made a phone call to his
13 girlfriend which asked us to come to her house. So we all
14 went to her house and, yes, there was some alcohol consumed.
15 I was already went on for trial for this. And basically
16 what happened was we left the party, I got into an accident
17 at -- basically I lost control of my vehicle, hit a street
18 lamp, and that's basically why the fire department and
19 police officers were called. And from there on -- the fire
20 department arrived first and basically put -- asked everyone
21 to enter into their truck to warm up and I stood outside
22 waiting for the cops to come.

23 And when the officers came it was Constable
24 S and Constable L Those were the two
25 officers came -- that came to the scene. And basically
26 Constable S asked me to come sit into his car, so I
27 went to his car. They put me in the back seat. Mr. L
28 was sitting in the front seat in the passenger side.
29 Mr. S then entered his door, sat inside. They
30 talked for about a minute or so. Mr. L left his
31 vehicle to go and question my friends which were in the fire
32 truck. What was said or asked, I have no idea.

33 About five minutes later, Mr. L came back to
34 the police car, opened up the door of the back of the car

1 where I was, told me to get out. He then told me to lay on
2 the ground, where he proceeded to put handcuffs on me
3 extremely tight. He stood me up, put me back into the cop
4 car, then read me that I was under arrest for being drunk
5 and for lying.

6 So after that happened, Mr. S was asking
7 me questions and I was repeating the -- I just didn't answer
8 anything he asked me. So Mr. S then -- in his own
9 words, he said he was sick of this shit, got out of the car,
10 came to the back seat, opened my door, put his knee on my
11 groin. With his maglite flashlight, pressed it against my
12 throat extremely hard. To this day I still cannot swallow
13 food properly. I can't eat a meal without having a glass of
14 water. I did go and get it checked out and it -- from the
15 Selkirk General Hospital. They gave me a report or a piece
16 of paper which I, I assume -- I gave it to my lawyer and he
17 forwarded to the proper people. I don't know if you guys
18 would have that in your notes or whatever, the report from
19 the hospital.

20 THE JUDGE: I'm sorry, you gave it to who?

21 MR. G My lawyer, which at the time was
22 Sinclair and Associates. Not quite sure of his first name
23 right now. But my counsel did change to Mr. David Joycey.

24 And basically the reason Mr. S gave, he
25 said -- well, he did not actually admit to doing this under
26 oath at a different time, but Mr. L said that he didn't
27 see nothing because his back was towards us, and the reason
28 why he -- Mr. S did this was because I kept asking
29 the officers to loosen my handcuffs, basically begged them
30 to loosen my handcuffs, and that is basically the reason why
31 Mr. S snapped. And I don't know what the reason
32 for it is and all I'm, all I'm asking, basically, is for an
33 apology and for something just to make sure that he doesn't
34 do this to someone else.

1 THE JUDGE: All right. Anything further you
2 wanted to say, sir?

3 MR. G : Yes, sir. At the time I was not
4 violent or belligerent. There was no reason for handcuffs
5 to be put on me before I was -- before they arrested me,
6 anyways, 'cause they put the cuffs on and they didn't
7 actually arrest me and read me my rights until about two
8 minutes after. And then there was -- basically, I was, I
9 was belligerent after the fact that Mr. S had
10 assaulted me in the back seat of the cruiser with handcuffs
11 on, which were never loosened until basically about ten
12 minutes before we left the scene to go to the District 4
13 Police Station.

14 And what I found kind of funny was, is -- this was
15 brought up, too. It's, it's a fact that no officer has ever
16 driven a person they have just placed under arrest for being
17 so belligerent and, and -- I don't know the word, but
18 basically threatening. Basically they said I was
19 threatening and belligerent so that's why I was under
20 arrest, basically put in handcuffs, but for a -- it is a
21 fact that under no records has two officers did this,
22 assaulted a person and then actually drove them, made hotel
23 arrangements for this person's stay at a hotel, instead of
24 putting him into a Remand Centre or -- so I found that kind
25 of funny and so did my lawyer. So basically I don't -- like
26 I'm not really good at this or whatever, but I'm just saying
27 what I, what I expect is an apology, if, when or how they
28 can be proven guilty or whatever, and basically an assurance
29 that they won't do it to someone else. That's what I want
30 and that's -- if that's -- if I can't get it, then too bad,
31 but that's why I'm here today. I'm not here because I want
32 anything special, just an apology, and that's basically all
33 I have to say.

34 THE JUDGE: All right. Anything further, sir, or

1 is that, is that it?

2 MR. G : That's basically all. Like if I had
3 my notes, I would probably have some more, but I don't.
4 That's my fault, so I've basically spoken. That's all I've
5 got to say.

6 THE JUDGE: All right. If you think of something
7 further you want to say, let me know about that --

8 MR. G : Okay.

9 THE JUDGE: -- in due course.

10 MR. G : Thank you, sir.

11 THE JUDGE: Yes, Mr. McKenna.

12 MR. MCKENNA: Thank you, Your Honour. What we,
13 what we heard this afternoon is just nothing more than a
14 recital of the facts which would have been presented to the
15 Law Enforcement Review Agency, and what it appears is that
16 Mr. G is asking you to sit in place of the
17 Commissioner and second-guess the Commissioner and do the
18 job of the Commissioner yourself now as sort of an alternate
19 Commissioner of some sort. With respect, I don't think that
20 that's your role and I don't think that that's what's
21 contemplated by the legislation. What is incumbent on
22 Mr. G to do is to show you where the Commissioner
23 erred, not to just repeat to you what he told the
24 Commissioner and hope to have from you a different outcome,
25 Your Honour.

26 Keep in mind, Your Honour, in -- and, I, I -- as I
27 understand, you've had the file to, to review; is that
28 correct?

29 THE JUDGE: That is correct, yes.

30 MR. MCKENNA: Okay.

31 THE JUDGE: And I have reviewed it.

32 MR. MCKENNA: All right. You must keep in mind,
33 Your Honour, when, when you are examining this matter, that
34 the Law Enforcement Review Agency had before them a file

1 with a tremendous number of inconsistencies from the
2 complainant. You must keep that in mind.

3 This is an individual who here today tells you
4 that he lost control of his vehicle and freely admits that
5 to you and, in fact, said that he lost control of his
6 vehicle in the Law Enforcement Review complaint. The
7 Commissioner had access to, to material indicating that he
8 was denying having driven the car and when asked by the
9 officers who was driving, Some kid, and it's 2:30 in the
10 morning and all he can say is he's the registered owner, but
11 some kid was driving his car.

12 And what's the kid's name?

13 I don't know.

14 Where is he?

15 He ran through a field.

16 And when the officers go talk to the passengers,
17 they find that the passengers have been told by Mr. G
18 You know, if we get caught someone's going to have to take
19 the charge. Make sure that you say it's a kid by the name
20 of J that was driving the vehicle.

21 And, and this is told to these witnesses who are
22 friends of his, on a number of occasions before the police
23 arrive.

24 And he denies driving not only to the police
25 officers, but to the officers that do the breathalyser check
26 sheet. And you can see from the breathalyser check sheet,
27 if you look at that, as well -- the, the witness statement
28 in particular is at page 20, the one I was telling you about
29 where the, the young girl says, I was told to say it was a
30 guy by the name of J .

31 Maybe I should, I should have pointed that out to
32 you to, to focus you to the exact page. I apologise for --

33 THE JUDGE: That, that's all right.

34 MR. MCKENNA: -- for not doing that. I'll give

1 you a moment. I think yours, as well, have a handwritten
2 number on the top right-hand corner?

3 THE JUDGE: Yes.

4 MR. MCKENNA: All right.

5 THE JUDGE: Those, those are the numbers that
6 you're referring to, the page numbers?

7 MR. MCKENNA: Yes, that's correct. Page 20 is
8 the, is the statement of J T (phonetic), is the
9 young girl who's in the vehicle and, and this, this is all
10 information that LERA would have had in processing this
11 complaint. And you'll see in, in her statement at page 20:

12

13 He told us we were supposed to
14 cover for him because he'd been
15 charged with drunk driving before.

16

17 That's at page 20. And then if you go to page 21, at the --
18 about a quarter of the way down the page:

19

20 When the car stopped, D told us
21 we should say that we had picked up
22 a guy named J and that D had
23 let him drive.

24

25 THE JUDGE: Perhaps I've got a problem here ...

26 MR. MCKENNA: Oh, I'm sorry, Your Honour. You
27 know what? The numbering is backwards because it goes by
28 order that they appear on -- it's -- I should have focused
29 you on page 19.

30 THE JUDGE: Oh, all right. And you say about a
31 quarter of the way down?

32 MR. MCKENNA: About a quarter of the way down,
33 Your Honour, where it says:

34

1 When the car stopped, D told us
2 that we should say that we picked
3 up a guy named J and that D
4 had let him drive.

5

6 This is one of his passengers saying, saying that.

7 And if you look at page 18, Your Honour, that's
8 another passenger in the vehicle, and if you look about
9 halfway down, just about halfway down, it said -- on page
10 18, D said if I get pulled over, someone take the
11 charge.

12 And then if you look at the breathalyser check
13 sheet, Your Honour, at page 23 -- apologise for jumping you
14 around from page to page here.

15 THE JUDGE: No problem.

16 Yes.

17 MR. MCKENNA: When the breathalyser demand is made
18 of him, if you look on page 23 towards the bottom,
19 breathalyser demand, I wasn't driving, is the answer, and
20 the refusal, same answer, I wasn't driving.

21 This is all information that the Law Enforcement
22 Review Agency had with them, that, that this individual had
23 denied it at the scene, had concocted -- or attempted to
24 concoct a story with his friends who were in the vehicle,
25 and thankfully they didn't go along with that and told the
26 truth, that, in fact, he was driving, and not only driving
27 and drinking from a Crown Royal bottle while he was driving.
28 And then when they receive the complaint from him and they
29 match it up with everything that they have on the file and
30 they see where he says, I was driving and I lost control,
31 well, none of it fits. So this is the kind of file that
32 they had to deal with, Your Honour, and, with the greatest
33 of respect, credibility is always in issue, and credibility
34 on such an absolutely serious and critical matter, Your

1 Honour.

2 Now, I know that there is a different test for a
3 Commissioner reviewing a file and that there are certain
4 ways in which to process the evidence, but nevertheless at
5 the end of the day the Commissioner must rule, Your Honour,
6 on the sufficiency of the evidence because the Act
7 specifically says under Section 13(1)(c) -- and that is the
8 section that was used to close the file, if you will:

9

10 "Where the Commissioner is
11 satisfied" --

12

13 Under (c):

14

15 "that there is insufficient
16 evidence supporting the complaint
17 to justify a public hearing;"

18

19 he shall take no further action.

20

21 And, Your Honour, you are not being asked by the
22 legislation -- when you, when you are being asked to see
23 whether or not the Commissioner erred, you're not being
24 asked to be the alternate Commissioner, and, and let me
25 explain what I mean by that, Your Honour. I know my learned
26 friend has come up with a test of correctness and I, and I
27 want to comment on that because the most common form of
28 application of the correctness test that is developed over
29 the years in administrative law is when a tribunal -- or for
30 that matter, a lower court judge -- makes a ruling as to
31 what a piece of legislation means, what a section means out
32 of a statute, they make a ruling and they say, I find that
33 this particular section means this, that's a ruling at law.

33

34 And when the higher court reviews that, they are
in just as good a position as that tribunal or the lower

1 court to, to determine what that section ought to mean at
2 law and therefore what has developed over the years from
3 these types of reviews is a correctness standard. It's the
4 most recent type of standard to come out and, and from a
5 practical standpoint, it makes sense because the, the, the
6 judge who looks at it the second time is in just as good a
7 position as the one who looked at it the first time, so why
8 not have the test of correctness from a practical
9 standpoint?

10 From a practical standpoint in this particular
11 case, Your Honour, the correctness test, if you applied it
12 literally, would make no sense and I'll, and I'll explain
13 that. It would make no sense because in order to truly see
14 whether or not the Commissioner was correct, truly see if he
15 was correct, you would have to do the investigation again
16 yourself. You would have to sit there and go through the
17 evidence and meet with the witnesses, phone witnesses, you
18 know. It doesn't only apply to this case. You can think of
19 other cases where Commissioners have gone -- or their
20 investigators have gone to take a view, take measurements,
21 take photographs, listen to transcripts, read reports.
22 These are all the things that are done as part of an
23 investigation. You are not expected to give a stamp of
24 correctness, of absolute correctness on every step of that,
25 because the only way you could do that is if you did exactly
26 what they did.

27 And in the correctness law that's developed over
28 the years -- and if you, if you picture it as a box of the,
29 of the, of the typical type of correctness issues that have
30 come along, this, Your Honour, is outside that box, because
31 what's in the box was where people made rulings based on a
32 particular section of a statute and they are reviewed under
33 correctness. That's what's in that little box that's
34 developed in case law over the years.

1 What you have here is something that's relatively
2 unique, I don't know of anything in the Province of Manitoba
3 that is like this, and so when you are being asked to see
4 whether or not the Commissioner erred, your -- with the
5 greatest of respect, you must apply a component of
6 reasonableness to it and you must defer to the fact that the
7 Commissioner and his investigator are the ones who go about
8 doing the investigation, listening to the people,
9 interviewing the people, and uncovering the evidence,
10 because, at the end of the day, the Commissioner has to
11 determine the sufficiency of the evidence and, and he and
12 his staff uncover that evidence, go and find it. And you
13 don't, and you're not in a good position to and I don't
14 think you want to do that.

15 So I'm going to now draw your attention to a
16 particular case and tie this all together, Your Honour, and
17 that is found at tab 5 of my learned friend's material. And
18 in particular, I want to draw your attention to page 891 of
19 tab 5.

20 THE JUDGE: All right. Where -- is this the
21 Cooper case?

22 MR. MCKENNA: That's correct, at page 891.

23 THE JUDGE: Eight, nine, one.

24 MR. MCKENNA: Yes.

25 THE JUDGE: Just one moment.

26 Yes, go ahead.

27 MR. MCKENNA: If you look at the middle of the
28 page, you will see that Justice La Forest quotes from
29 Justice Sopinka from the Acadia case and he talks about this
30 very concept:

31

32 "The other course of action is to
33 dismiss the complaint. In my
34 opinion, it is the intention of s.

1 36(3)(b) that this occur where
2 there is insufficient evidence to
3 warrant appointment of a tribunal
4 under s. 39.'"

5
6 That's exactly what we have here.

7
8 "'It is not intended that this be a
9 determination where the evidence is
10 weighed as in a judicial proceeding
11 but rather the Commission must
12 determine whether there is a
13 reasonable basis in the evidence
14 for proceeding to the next stage.'"

15
16 So there is a component of reasonableness that must be put
17 into play here. You're not expected to, to rule with the
18 same kind of accuracy you would be able to rule if you able
19 to be interpreting a piece of legislation that had been
20 interpreted by somebody in a, in a lower tribunal. You're
21 being asked to rule on an investigation that encompassed
22 many things and, from a practical standpoint, we can -- you
23 know, as they say, we can dance on the head of a pin over
24 this forever. But what you really do at the end of the day
25 is you must look at what the Commissioner did and ask
26 yourself whether you think that that investigation was
27 reasonable. It's all you can do, unless you want to do it
28 over again yourself. I think that's all that was expected.

29 This morning, in front of Her Honour Judge Pullan
30 the, the ruling that she gave from the Bench was that when
31 it came to examining the nature of the investigation, that
32 the test ought to be reasonableness. And then she said that
33 when it came to the final application of Section 13(1)(c),
34 that it was correctness. Now, you're being asked to examine

1 whether the Commissioner erred and nowhere in Mr. G 's
2 presentation does he tell you where the Commissioner erred.
3 Nowhere. The onus and burden of proof is under Section
4 13(4) and if you were to examine the record right now, Your
5 Honour, if you were to read it, literally sit and read it,
6 you would not be able to tell me, just as I cannot tell you,
7 where Mr. G says the Commissioner erred. That
8 evidence is not in front of you.

9 With the greatest of respect, he didn't err. He
10 conducted a full and reasonable investigation. He and his
11 investigators were faced with a file that had tremendous
12 credibility problems, tremendous credibility problems, on
13 the most significant of issues. And they made the ruling
14 that they made.

15 Unless you have any questions, Your Honour, my
16 position is, of course, that this application ought to be
17 dismissed, that the ban on publication continue, and I thank
18 you for your time.

19 THE JUDGE: All right. I do have some, some
20 questions for you. Was there a formal interview with M
21 S ?

22 MR. MCKENNA: There was an interview with, an
23 interview with M S on June 18, 2001.

24 THE JUDGE: All right. You're referring to the
25 bottom of page 39?

26 MR. MCKENNA: I, I was going by some notes. It
27 may be that it's on page 39; I didn't, I didn't write that
28 down on there.

29 THE JUDGE: I guess my point is the only reference
30 that I think I could find to S was there --

31 MR. MCKENNA: Yes.

32 THE JUDGE: -- as far as what he had to say.

33 MR. MCKENNA: Yes.

34 THE JUDGE: As opposed to the formal statement or

1 more or less formal statement that appears to have been
2 taken from T and some of the others.

3 MR. MCKENNA: Bear with me one moment, Your
4 Honour. I just want to find page 39 and see if that's
5 indeed what I'm referring to.

6 THE JUDGE: The last paragraph there, Received a
7 call from -- and I don't know what that name is --

8 MR. MCKENNA: Selkirk?

9 THE JUDGE: What is it?

10 MR. MCKENNA: Selkirk.

11 THE JUDGE: Oh, Selkirk.

12 MR. MCKENNA: Spoke to M S .

13 THE JUDGE: Oh, right.

14 MR. MCKENNA: Yes, Your Honour, that's what I was
15 referring to, that interview which is, yes, June 18, 2001.
16 I can, I can tell you, Your Honour, that, that telephone
17 interviews are, are very common. They happen all the time
18 on files. I've been involved in a number of files where,
19 where this has happened, and I suppose, you know, it's --
20 I'm not sure what to say. It's, it's definitely one of the
21 methods that they use to ascertain from the different sides
22 what happened. Now, you must bear in mind when, when you,
23 when you talk about interviewing witnesses, that the, the
24 evidence from the passengers themselves was that somebody's
25 got to take the fall here. We're going to --

26 THE JUDGE: S was one of those passengers, was
27 he not?

28 MR. MCKENNA: S was one of the passengers.

29 THE JUDGE: Yes.

30 MR. MCKENNA: Yes. And so I can't speak for the
31 investigators, I -- and I'm not going to, I'm not going to
32 enter evidence that's not before you, Your Honour. But I
33 can well imagine the trepidation of, of the investigators of
34 the Law Enforcement Review Agency to go and place stock in

1 what these witnesses would say, given the attempts to -- you
2 know, to fabricate evidence. And now, Your Honour, you
3 don't have to --

4 THE JUDGE: The, the attempt to fabricate evidence
5 on -- by the complainant himself.

6 MR. MCKENNA: Attempts to get them to fabricate
7 evidence.

8 THE JUDGE: Yes.

9 MR. MCKENNA: Yes. Now, Your Honour, you don't
10 have to find that, that an investigation was done the way
11 you would want it to be done. That's not the test here.
12 The investigation is -- was -- rather, the test is, was the
13 investigation reasonable in the circumstances. And in the
14 circumstances means --

15 THE JUDGE: Well, I don't know that I'm
16 necessarily concerned about the manner of the investigation
17 so much.

18 MR. MCKENNA: All right.

19 THE JUDGE: But I'm correct, am I not, in
20 understanding that S was one of the four passengers who
21 said the complainant was driving the vehicle?

22 MR. MCKENNA: Yes.

23 THE JUDGE: Refused to fabricate evidence and said
24 that he was driving the vehicle; is that ...

25 MR. MCKENNA: He, he -- that's right.

26 THE JUDGE: All right, then. The, the other
27 concern I have in this area is if you go from the comments
28 attributed to S on June 18 --

29 MR. MCKENNA: Um-hum.

30 THE JUDGE: -- at the bottom of page 39, and I'd,
31 and I'd like to just read it into the record:

32

33 Received a call from Selkirk --

34

1 And thank you for the interpretation of that; I wasn't sure
2 what that word was.

3

4 Spoke to M S . He said he
5 remembers seeing one officer put
6 his flashlight to G 's throat
7 and push it against him. Said he
8 asked a fireman present if this was
9 right. The fireman just replied it
10 wasn't his job. He said the
11 others, K (phonetic), J , and
12 also ...

13

14 MR. MCKENNA: R S. (phonetic).

15 THE JUDGE: R , is it?

16 MR. MCKENNA: Yeah.

17 THE JUDGE:

18

19 ... may have seen this as well. He
20 feels they did.

21

22 Now, then if you go to the letter from the
23 Commissioner to D G of February 1st, 2002, at page
24 2, which is number 64 in these handwritten numbers that have
25 been put on the pages, third paragraph down.

26

27 Mr. H (phonetic) also spoke to
28 M S Mr. S said he did
29 recall seeing the officer with his
30 flashlight near your throat. He
31 felt the other witnesses would have
32 also seen this, however, as noted,
33 Mr. W (phonetic) said he did not
34 see this happen.

1 Regardless of the question of whether or not
2 others may have seen this also --

3 MR. MCKENNA: Um-hum.

4 THE JUDGE: -- is there not a mis-statement of the
5 information from S from June 18th that he says he
6 remembers seeing one officer put his flashlight to G s
7 throat and push it against him, and the statement in the
8 letter saying Mr. S said he did recall seeing the
9 officer with his flashlight near your throat? Aren't those
10 two different things?

11 MR. MCKENNA: I don't know. I mean, it's not a
12 quote. He's not quoting, he doesn't have it in quotes.
13 He's -- I guess it's a synopsis.

14 THE JUDGE: Well, if it's a synopsis, is it
15 correct synopsis of the evidence, assuming that the
16 telephone call is evidence or information at least? Would
17 this not indicate an error on the part of the Commissioner?

18 MR. MCKENNA: Well, it definitely is not a quote.
19 I mean, when I look at that, I don't know what, what turns
20 on that. If the Commissioner has --

21 THE JUDGE: What turns on it in, in my mind, is
22 here as an individual who has apparently been asked to
23 fabricate evidence on behalf of the complainant, refused to
24 do so by saying, No, he was the one that was driving, who
25 gives what I think could probably be termed corroborative
26 evidence about as assault, as it were, of the complainant by
27 a police officer in a situation where, as you've observed
28 yourself, credibility is critical.

29 Now, I, I think for the purposes of this hearing
30 perhaps your position would be that I, I should assume that
31 the complainant lied about not driving the vehicle. I don't
32 know whether the trial of the charges against him has taken
33 place and what the disposition of those charges has been,
34 but assuming he's been convicted, that he was the driver of

1 the vehicle and he lied about that, certainly, if he gave
2 evidence about assaultive behaviour about the police
3 officers, there'd be a very distinct cloud on that by virtue
4 of the fact that he's lied about something else relevant to
5 the particular situation. But then if you have what appears
6 to be a credible witness, say, Yeah, I saw it happen, isn't
7 there -- doesn't that make it a much stronger case in
8 support of his allegation?

9 MR. MCKENNA: Well, Your Honour, if, if you didn't
10 take into account that the -- these individuals have been
11 encouraged to lie on behalf of the complainant, and if you
12 didn't take into account the fact that they were coming from
13 a drinking party, and that we don't know what sort of
14 vantage point Mr. S had -- I mean I don't know it from,
15 from this -- that, you know, I mean, these are notes. You
16 have to appreciate that they're notes. These are not a
17 recorded statement. So I don't know how much of a, of a
18 telephone call was had between Mr. S and, and
19 Mr. H, the investigator. I don't know how much was
20 said in, in there, you know. It may very well be that at
21 the end of the day they choose not to believe Mr. S on
22 the basis of the fact that there has been attempts to
23 fabricate evidence and on the basis that these individuals
24 were coming back from a drinking party. I mean, there are a
25 lot of different factors here, you know, that, that come
26 into, come into play here.

27 THE JUDGE: All right. All right. Unless there's
28 any further submission you wanted to make, I -- those are
29 the questions that I had.

30 MR. MCKENNA: Thank you, Your Honour.

31 THE JUDGE: Mr. Guénette, did you wish to make any
32 submission or, or not?

33 MR. GUÉNETTE: I don't think so, Your Honour. I
34 gather Your Honour has read the brief.

1 THE JUDGE: Yes, oh yes.

2 MR. GUÉNETTE: What we've said stands on that. I
3 guess maybe I'd add simply one point and it's a point that
4 did come up from this morning's proceeding. When we're
5 talking about the steps that the office takes, that the
6 Commissioner's office takes with respect to conducting the
7 investigation, we would suggest that that's an issue that
8 falls within the Commissioner's area of expertise and
9 therefore the determinations as to which leads to follow and
10 what questions to ask and all that of witnesses and
11 prospective witnesses, that would be a question of
12 reasonableness. But as far as once you have the file and
13 you're looking at the file and all of the evidence that has
14 been uncovered in determining whether Section 13(1) applies
15 to it, particularly the test in clause (c), that's where we
16 say that the correctness, correctness test lies. So I just
17 wanted to make that one clarification.

18 THE JUDGE: It, it isn't my function to say,
19 Commissioner, you did this wrong, you've got to do something
20 else, or something of that nature.

21 MR. GUÉNETTE: Well, the Act would allow Your
22 Honour to do that, but we would say the test before you get
23 to that stage would be, Was that a reasonable investigation,
24 rather than was it simply correct? "Reasonable," of course,
25 being reasonable people might disagree as to how something
26 could be done, as long as it falls within that scheme of
27 reasonableness, whereas correctness is a little bit more of
28 an exacting test.

29 THE JUDGE: All right, thank you.

30 Mr. G you're standing. I take it you want
31 to --

32 MR. G : Yes.

33 THE JUDGE: -- say something?

34 MR. G : Yes, sir. With regards to, sir,

1 here as about the breathalyser check sheet, I believe that
2 it was -- actually, the questions were asked to me by
3 Mr. L and it was filled out by Mr. S , but the,
4 the thing is the breathalyser sheet wasn't filled out until
5 after we got to the police station because they were too
6 busy. And the thing is, is this -- while I was on trial
7 already, this breath check sheet was proven to be very
8 improper and it was basically thrown out the window because
9 of that. And Mr. W and Mrs. J T the -- take
10 the charge because -- take the charge was because
11 Mrs. T had marihuana on her. Yes, I did say take --
12 you guys are taking these charges because she had marihuana
13 on her and Mr. W had a half-open -- or a half-drunk
14 (sic) bottle of Crown Royal, that is true. And to regards
15 of being drunk --

16 THE JUDGE: Why, why would he take, why would he
17 take a charge on that? Hadn't he thrown it out?

18 MR. G : No, he didn't. They took -- they
19 brang (phonetic) it in my car and I didn't know anything
20 about it until after the accident had happened 'cause he
21 goes, Man, what should I do with this?

22 And like that's what Mr. W asked me, and I
23 said, Get rid of it. You guys are taking the charges for
24 that.

25 I did not at any point ask any of them to tell the
26 cops that I was not driving, that some other kid was
27 driving. (Inaudible) had nothing to do with that. And
28 Mrs. T , I was just curious of why her statement that
29 she made against me wasn't brought up in my trial, which --
30 my trial has already passed. I was charged with a refusal
31 of a breathalyser. For the impaired drinking or impaired --
32 I was basically -- they didn't charge me with that because
33 there was no substantial evidence or proper evidence to
34 prove that I was impaired at any point, and I have two

1 witnesses to the assault of the officer assaulting me.

2 And if you go through the statements made by the
3 two officers in my previous trial, you will find that they
4 were both inconclusive with each other, meaning that
5 Mr. L says one thing and Mr. S says another at
6 the same time. If they'd read the statement they did make
7 from that night, it was totally different from the two they
8 brought to court and that's all I have to say. And they did
9 say under oath that they didn't fill out that breath check
10 sheet until after they got to the police station, which
11 would have been approximately an hour after this happened.
12 So that's --

13 THE JUDGE: I take it, sir, you were convicted of
14 a charge?

15 MR. G : I was convicted of a refusal of a
16 breathalyser. That's what I was convicted of because of my
17 -- I was -- I didn't have my, my evidence proper, basically
18 is what was told to me.

19 MR. MCKENNA: Your Honour, if I may, you know, I
20 don't know where, where this is all going or where it ends
21 but when it comes to the, the, the rye in the car, both of
22 his friends who provided statements to the officer said that
23 he was drinking the rye while driving the car.

24 MR. G : Yes, but Your Honour, if you -- the
25 statements, those were taken from Mrs. T and
26 Mr. W Where, where's Mr. S 's statement and
27 Mr. S 's statement? I don't get it. And those
28 statements, neither Mr. W 's or Mrs. T 's was
29 brought up in my trial because they're both inconclusive.

30 THE JUDGE: All right. Thank you.

31 MR. G : Thank you, Your Honour.

32 THE JUDGE: Now, I, I made reference earlier to
33 the brief provided by Mr. Guénette on behalf of the
34 Commissioner and, again, I want to thank you for that. It's

1 a very helpful document. I note that in the brief itself,
2 from pages 7 to 9 there is a reference to the standard of
3 the review, there, there's reference to the decision of
4 Judge Chartier in LERA complaint number 3208, and then in
5 paragraph 21 the statement:

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"Most recently, Provincial Judge Smith has also agreed with the general line of reasoning used by Judge Chartier and Associate Chief Judge Miller. In LERA Complaint #3771, starting at page 6, Judge Smith noted her agreement with the above-reasons of Judge Chartier:"

"Standard of Review" is the heading, paragraph number 22:

"As noted above, pursuant to s. 13(2) of the Act, Mr. P requested a review of the Commissioner's decision. I must determine whether the Commissioner erred in declining to take further action on the complaint. The Applicant bears the burden to convince me that the Commissioner erred: s. 13(4)."

And, of course, that's the situation here.

Section -- and then the next paragraph, 23:

"In B v. S.(C.), unrep. May 30, 2002 (Man. P. C.) my colleague Chartier ... extensively analyzed

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the standards applicable to a s. 13(2) review of a Commissioner's decision to decline further action. He summarized his conclusions at p. 18 - 19 [as follows]:

"1. Where the review is one which relates to the jurisdiction of the Commissioner and more specifically, does the complaint 'fall within the scope of section 29' of the [Law Enforcement Review] Act as same is found in [Section] 13(1)(a) of the [Law Enforcement Review] Act the standard of review will tend to be 'the correctness' of the decision made [by] the Commissioner.

"2. Where the review is related to an error of law or an error of mixed facts and law within the jurisdiction of the Commissioner and more specifically, when the Commissioner has to decide whether or not 'there is insufficient evidence supporting the complaint to justify a public hearing' as same is found in clause 13(1)(c) of the [Law Enforcement Review] Act, the standard of review" --

And there's an error in the, in the quote here, but I'm sure the word is:

1 "'"... [will] tend to be 'the
2 correctness' of the decision made
3 by the commissioner.

4 "'"3. Where the review is
5 related to a finding of fact within
6 the jurisdiction of the
7 Commissioner, the standard of
8 review applied to the decision of
9 the Commissioner will be closer to
10 'reasonableness *simpliciter*'."'"

11
12 In paragraph 24:

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14 "'"When considering whether a given
15 issue involves a question of law or
16 fact the following guidance by
17 Iacobucci in *Southam Inc. v.*
18 *Director of Investigation and*
19 *Research*, [1977] 1 S.C.R. 748 at
20 [pages] 766-767, referred to by
21 Chartier ... in *Bartel* [above] is
22 helpful:"'"

23
24 And the quote is as follows:

25 "'"Briefly stated, questions of law
 are questions about what the
 correct legal test is; questions of
 fact are questions about what
 actually took place between the
 parties; and questions of mixed law
 and fact are questions about
 whether the facts satisfy the legal
 tests."'"

1 Judgment goes on to say in paragraph 25:
2

3 "As Chartier [Provincial Court
4 Judge] observed in *B*, *supra* at p.
5 16, the problem in most cases will
6 be a question of mixed fact and law
7 as the issue will be whether the
8 Commissioner applied the
9 appropriate "sufficiency of
10 evidence test" -- a legal test --
11 to the available evidence -- the
12 facts."

13
14 And this is noted as from LERA complaint number
15 3771 delivered July 3rd, 2002, Smith, P.C.J., sitting as
16 *persona designata*.

17 Then there's just a couple more paragraphs from
18 the brief itself then that I'll continue to read here;
19 they're fairly brief.

20
21 "Judge Smith went on to use the
22 correctness standard (see parag.
23 33), because the issue under review
24 was whether the Commissioner had
25 properly determined that there was
26 insufficient evidence to justify a
27 public hearing [re: clause
28 13(1)(c)]."

29
30 Twenty-three:

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32 "It is submitted that the
33 principles and line of reasoning
34 developed and applied by the three

1 provincial judges in the
2 above-discussed cases are
3 appropriate to consider and follow
4 in this instance."
5

6 The Commissioner then would appear to agree with
7 the contention that the -- that this is a, a question of
8 mixed law, in fact, and whether the Commissioner applied the
9 appropriate sufficiency of evidence test and then, in turn,
10 goes back to the correctness test.

11 In paragraph 26 of the Commissioner's brief, it
12 reads as follows:

13
14 "It is submitted that the
15 discussion by Provincial Judges on
16 the point of what it means for the
17 Commissioner to make a 'finding of
18 fact' has recently been
19 [stated]" --
20

21 "Recently been started by Judge Smith"; must be "stated."
22

23 "... by Judge Smith, in her
24 aforementioned written decision ...
25 in which she makes the comments
26 that follow. While it is to be
27 noted that the discussion
28 specifically focuses on this issue
29 of making findings of fact for the
30 purposes of the application of the
31 'sufficiency of evidence' test in
32 clause 13(1)(c), it is submitted
33 that this discussion is relevant in
34 a more general sense of

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understanding Judge Chartier's break-down of issues into the three different categories. Judge Smith's comments are as follows:"

And then this is from her paragraph 37:

"The Commissioner should take care not to weigh the evidence. In a criminal case a judge can convict on the evidence of a single uncorroborated witness, if that evidence is sufficient to meet the heavy burden of proof beyond a reasonable doubt. Although the judge who ultimately hears a LERA case must be convinced on clear and convincing evidence, it is surely likewise possible for that standard to be met on the evidence of a single complainant. The Commissioner's role in the screening process is not to apply the standard of proof set out in the Act, or to attempt to forecast how a judge would apply it to the information uncovered in the investigation.

"The questions of sufficiency of evidence under s. 13(1)(c) should, in my view, be approached in a fashion akin to that of a judge hearing a preliminary enquiry and considering whether there is

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

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sufficient evidence to commit an accused for trial.'"

And she refers to Section 548 of the Criminal Code of Canada, and the Arcuri case (2001) 2 S.C.R. 828.

"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. As in the case of the preliminary hearing, to the extent evidence is circumstantial, the Commissioner will have to engage in a limited weighing of it to determine if the evidence is capable of supporting the necessary inferences. Whether those inferences should be drawn should be left for the judge to determine in a public hearing. Likewise, determinations of credibility should be left for a hearing before a judge. The process used by the Commissioner is ill suited to determining credibility or making findings on contested facts, as the Commissioner readily acknowledged. One exception might be the ability to make findings about what has occurred in LERA's internal processes.'"

1 Again, there's a reference to LERA complaint
2 number 3771 delivered July 3rd, 2002, Smith, P.C.J., sitting
3 as *persona designata*.

4 Then the, the next portion of this brief that I
5 would like to refer to -- and I, I'm sorry for having to
6 quote so much of it, but I, I do think it is applicable in
7 this instance -- is paragraph 28, which reads as follows:

8
9 " In a broader sense, Judge Smith's
10 comments are largely in line with
11 the following passage written by
12 [Mr. Justice] La Forest for a
13 majority of the Supreme Court of
14 Canada in *Cooper v. Canada*, a human
15 rights case, where the following
16 was noted about the role of a human
17 right commission:

18 "... When deciding whether a
19 complaint should proceed to be
20 inquired into by a tribunal, the
21 Commission fulfils a screening
22 analysis somewhat analogous to that
23 of a judge at a preliminary
24 inquiry. It is not the job of the
25 Commission to determine if the
26 complaint is made out. Rather its
27 duty is to decide if, under the
28 provisions of the Act, an inquiry
29 is warranted having regard to all
30 the facts. The central component
31 of the Commission's role, then, is
32 that of assessing the sufficiency
33 of the evidence before it."

34

1 And then there's the citation of the, the Cooper case.

2 There's been reference to it, but the standard
3 under Section 27(2), that is, on a hearing of the matter by
4 a provincial judge, is clear and convincing evidence.
5 Specifically, Section 27(2) reads:

6
7 "The provincial judge hearing the
8 matter shall dismiss a complaint in
9 respect of an alleged disciplinary
10 default unless he or she is
11 satisfied on clear and convincing
12 evidence that the respondent has
13 committed the disciplinary
14 default."

15
16 In another LERA matter, this being a decision of
17 Judge Thompson in Brandon -- this is Law Enforcement Review
18 Act, LERA complaint number 2895. At page 6, Judge Thompson
19 says:

20
21 "The issue in this case is the
22 evidentiary effect of the
23 combination of s. 24(9) and 24(10)
24 of the Act and the ultimate
25 application of s. 27(2) of the
26 Act."

27
28 The reference is to Section 24, not pertinent
29 here, but I think what follows is applicable, and he says
30 this:

31
32 "This tribunal must be satisfied on
33 clear and convincing evidence that
34 the Respondent has committed the

1 disciplinary default.

2 "The meaning of clear and
3 convincing evidence was considered
4 at length by my learned colleague
5 the Honourable [Judge, as he was
6 then, Wyant, now Chief Judge] in
7 the decision of *Graham and*
8 *Gillespie & Baker* dated August 14,
9 2000. Judge Wyant notes at page 3
10 of his decision:

11 "'Because these are civil
12 proceedings the standard of proof
13 on the Applicant is that of the
14 balance of probabilities. But
15 "clear and convincing evidence"
16 speaks to the quality of the
17 evidence necessary to meet that
18 standard of proof on a balance of
19 probabilities.'

20 "Judge Wyant goes on to cite
21 the case of *Huard & Romualdi* 1 PLR
22 1993 page 217 wherein the phrase
23 clear and convincing evidence is
24 discussed.

25 "'It means that the proof must
26 be clear and convincing and based
27 on cogent evidence because the
28 consequences to a police officer's
29 career flowing from an adverse
30 decision were very serious.'

31 "The phrase clear" --

32
33 And this is going back then to Judge Thompson's
34 decision:

1 "The phrase clear and convincing
2 evidence appears to be often used
3 in statutes governing professional
4 conduct. Indeed this standard of
5 proof was considered in the Law
6 Enforcement Review Act decision
7 between **Weselake & Kentziger** a
8 decision of the Honourable [Judge]
9 Cohen delivered June 21, 1996.

10 "In that decision at pages 10
11 and 11 the term clear and
12 convincing evidence is discussed
13 and references made to two cases
14 involving the College of Physicians
15 and Surgeons of British Columbia.

16 "Based on all of the above, I
17 conclude that the Complainant must
18 satisfy a relatively high standard
19 of proof. This standard is higher
20 than mere probability. I need not
21 be satisfied beyond a reasonable
22 doubt, but must be convinced on
23 clear evidence."

24
25 Judge Thompson's conclusion is that it's a
26 relatively high standard of proof that's required on a
27 hearing of a complaint under the Law Enforcement Review Act.

28 Here, the -- here, here, it, it seems to me then
29 that the ...

30 The question of what evidence there has to be
31 established in the investigation by the Commissioner for him
32 to refer it for a hearing would seem to me to appropriately
33 be the test from a preliminary hearing. In the case of a
34 preliminary hearing under the Criminal Code, ultimately the

1 standard that's going to have to be met is proof beyond
2 reasonable doubt. Here I think Judge Thompson is correct
3 that it's balance of probabilities, but a higher level of
4 proof not, not quite reaching, apparently, proof beyond a
5 reasonable doubt. So it would seem to me that in dealing
6 with the evidence before the Commissioner, for him to refer
7 it for a hearing, it would be eminently fair to the police
8 officers to use the standard from a preliminary hearing.
9 The standard in that instance has traditionally been
10 referred to as the standard in The United States v. Shephard
11 (1977) 2 S.C.R. 1067, where there's a, a, a quote from
12 Mr. Justice Ritchie who said:

13
14 "I agree that the duty imposed upon
15 a 'justice' under s. 475(1)" --
16

17 And that's noted as now Section 548(1).
18

19 "... is the same as that which
20 governs a trial judge sitting with
21 a jury in deciding whether the
22 evidence is 'sufficient' to justify
23 him in withdrawing the case from
24 the jury and this is to be
25 determined according to whether or
26 not there is any evidence upon
27 which a reasonable jury properly
28 instructed could return a verdict
29 of guilty. The 'justice', in
30 accordance with this principle, is,
31 in my opinion, required to commit
32 an accused person for trial in any
33 case in which there is admissible
34 evidence which could, if it were

1 believed, result in a conviction."

2

3 In, in this particular instance, there are the
4 allegations of the complainant himself as to the assaultive
5 behaviour inflicted on him by a police officer. There is
6 corroborative evidence indicated in the investigative report
7 or notes, which are, are filed here. The reference to a
8 telephone call to M S , who was one of the passengers
9 in the vehicle, who said he remembers seeing an officer put
10 his flashlight at G 's throat and push it against him.
11 When one looks at that and then goes to the paragraph I
12 referred to earlier in the Commissioner's letter of February
13 1st, 2002, to Mr. G , where the Commissioner says:

14

15 Mr. S said he did recall seeing
16 the officer with his flashlight
17 near your throat. He felt other
18 witnesses present would also have
19 seen this. However, it is noted
20 Mr. W said he did not see this
21 happen,

22

23 there is a definite gap between what's been recorded as what
24 Mr. S said over the telephone to the investigator and
25 what's quoted in that, that letter. It seems to me even if
26 one takes the position, as it would seem legitimately can be
27 done, that the complainant is a liar insofar as he lied
28 about driving the motor vehicle and perhaps about other
29 things, when his complaint about being assaulted with a
30 flashlight is combined with the evidence of another witness,
31 without weighing that evidence, I, I think one has to
32 conclude that there is some evidence upon which a reasonable
33 jury properly charged could convict. That's not to say that
34 is going to happen, but it seems to me that it does come to

1 that point.

2 My conclusion is that the Commissioner erred in
3 declining to take further action on the complaint.

4 I, I would invite submissions from counsel on what
5 order the Court should make at this point and, of course,
6 I'm referring to Section 13(3). And what I might say I have
7 in my mind is the initial comments of the complainant to the
8 effect that what he wants is an apology and some assurance
9 that it's not going to happen to someone else. I'm not
10 jumping to a conclusion that a case has been proven. I'm
11 simply throwing out to counsel a request for whatever
12 observations they might have about what the appropriate next
13 step is here.

14 MR. MCKENNA: Your Honour, if, if I understand
15 your suggestion -- and I believe I do -- the, the most
16 common way to do that and the way to, to, to do it is to
17 refer it back -- to give the jurisdiction back to the
18 Commissioner to continue on with the file. Part of that
19 jurisdiction, then, is that the Commissioner can continue on
20 with the investigation. If you think there was a, a gap,
21 they can explore that, they can talk to Mr. S , they can
22 talk to anyone else who may have seen it, and they also --
23 because you have conferred the jurisdiction back to them,
24 they can also, as part of their investigation, at a certain
25 point come to the parties and say, This is what we have; are
26 you interested in informal resolution under Section 15?

27 Now, when you're talking about an apology, the
28 apologies come under Section 15. In order to do that, you
29 have to confer the jurisdiction back to the Commissioner and
30 there is precedent for that on, on several occasions, Your
31 Honour, where provincial judges have referred it back, and
32 you can, and, and you can make suggestions as part of it.
33 Judge Garfinkel did that when he wanted a certain witness to
34 be interviewed. He referred it back and gave the

1 jurisdiction back to the Commissioner with a direction to go
2 and interview a certain witness. And so there is definitely
3 the power there and that power comes to you under 13(3)(b)
4 and there is more than Judge Garfinkel that have sent it
5 back in that, in that fashion.

6 THE JUDGE: Right. Did you wish to comment on
7 that, Mr. Guénette?

8 MR. GUÉNETTE: We would generally agree with that
9 as being a possibility, Your Honour. The implications would
10 be to try to use -- well, to put terminology around it, the
11 Commissioner would then get back what we'd consider full
12 jurisdiction, I guess, is what it would be, but with --
13 instead of having it dealt with under clause (a), which says
14 "to refer the complaint for a hearing," we would see it as
15 being under clause (b), for the Commissioner to continue on
16 and take such other steps, I gather, such as attempting
17 informal resolution under Section 15, but then there would
18 have to be some level of closure after that. If the Section
19 15 resolution is successful, then great, everybody's happy
20 in any event. If it doesn't work out, then the Commissioner
21 would, of course, be faced with, well, what do I do with
22 this complaint now, and it's possible that he might have to
23 refer to, to a hearing in any event. Just -- I thought I'd
24 point that out as being what would happen in that case.

25 THE JUDGE: Well, it, it -- the Commissioner
26 would have to decide, and, and presumably at that point
27 after whatever further action is taken, he would -- we'd be
28 back to square one, would we not? That is, he could make a
29 decision to take no further action and advise the
30 complainant about that --

31 MR. GUÉNETTE: That's exactly right.

32 THE JUDGE: -- or, or he could refer it for
33 hearing.

34 MR. GUÉNETTE: That's right. There's three, three

1 options. If it goes to an informal resolution and the
2 informal resolution succeeds, end of story, nothing more to
3 be done. Or the Commissioner again weighs the tests in, in
4 Section 13(1), decides to take no further action; we could
5 be back at another 13(2) hearing. Or the Commissioner
6 simply decides that this matter should be referred to a
7 hearing.

8 THE JUDGE: All right. Mr. G , I hope you
9 understand what's going on here.

10 MR. G : I got a general idea.

11 THE JUDGE: What, what, if anything, would you
12 like to say about all this?

13 MR. G : Well, I would like to just say I
14 tried. I know that the evidence that I got isn't that great
15 or whatever, but the fact is it did happen. I can't swallow
16 food properly no more and that's basically the reason why I
17 pursued this. If I -- if there was no problems with my
18 throat, I wouldn't have pursued this. I would have just
19 looked at it and said --

20 THE JUDGE: Well, what, what -- I guess what I
21 wanted to ask you, Mr. G , is, at this point,
22 effectively, I have satisfied myself that the Commissioner
23 erred in declining to take further action. And then
24 pursuant to Section 13(3) of the Law Enforcement Review Act,
25 I am to order the Commissioner:

26

27 "(a) to refer the complaint for a
28 hearing,"

29

30 which would mean a trial effectively in, in front of a
31 provincial court judge, or:

32

33 "(b) to take such other action
34 under this Act respecting the

1 complaint as the provincial judge
2 directs."

3
4 And what we've just been discussing here -- and that's
5 really what I wanted to direct your mind to --

6 MR. G : Yes, sir.

7 THE JUDGE: -- was the question of whether it
8 should be referred back to the Commissioner for him to see
9 if there can be --

10 MR. G : Anything else further taken, like --

11 THE JUDGE: Well, to perhaps do further interviews
12 if he, if he chooses to do so --

13 MR. G : Okay.

14 THE JUDGE: -- but also, presumably, to see if
15 there can be an informal resolution. And, frankly, it
16 seemed to me at the outset of this hearing today you
17 indicated that what you're looking for is an apology --

18 MR. G : Yes, sir.

19 THE JUDGE: -- and some sort of assurance that it
20 won't happen to someone else --

21 MR. G : Yes, sir.

22 THE JUDGE: -- which in my mind seems to fit with
23 the idea of an informal resolution. Are you happy to have
24 it proceed in, in that way, that is, to have it referred
25 back to the Commissioner to see if this is possible?

26 MR. G : Yes, sir. I'd be -- I'll be happy
27 with any decision made because -- I have to be happy with
28 any decision made. So basically what I'm saying is if they
29 decide to take -- to go to a trial, then yes, I'm happy with
30 that. If they decide to send me an apology and whatever,
31 I'll be happy with that. If they decide that there's not
32 enough evidence to take it any further, then I'll be happy
33 with that.

34 THE JUDGE: Well, do you understand that there's

1 still a prospect that after doing further interviews or
2 whatever other action the Commissioner decides to take, that
3 he may again say there's insufficient evidence?

4 MR. G : Yes, sir.

5 THE JUDGE: You understand that.

6 MR. G : Yes, sir.

7 THE JUDGE: All right. Having gone through this,
8 I believe that what I should do and what I am now going to
9 do then is to refer this complaint back to the Commissioner
10 for such further action as he deems appropriate in the
11 circumstances. The comments of the complainant and everyone
12 else are on the record here and hopefully they may be of
13 some assistance to the Commissioner.

14 All right, unless there's anything else, then that
15 would appear to complete the matter.

16 MR. GUÉNETTE: No, thank you, Your Honour.

17 MR. MCKENNA: Thank you, Your Honour.

18 (PROCEEDINGS CONCLUDED)

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I, VELMA DOERKSEN, hereby certify that the foregoing pages of printed matter, numbered 1 to 40, are a true and accurate transcript of the proceedings recorded by a sound recording device that has been approved by the Attorney-General and operated by court clerk/monitor, Louise Trudeau, and have been transcribed by me to the best of my skill and ability.

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