IN THE MATTER OF: *The Law Enforcement Review Act*
Complaint #2005/186

AND IN THE MATTER OF: An Application pursuant to s. 13(2) of *The Law Enforcement Review Act* R.S.M. 1987, C.l75

BETWEEN:

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<tr><td>B.J.P.,
Applicant

- and -

Constable G.H.
Constable B.Z.
Sergeant G.M.,
Respondents</td><td>)
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)</td><td>In Person,
Self-represented

Mr. Paul McKenna,
for the Respondents

Mr. Denis Guenette, Counsel for L.E.R.A.
Ms Shannon Hanlin, Counsel for Winnipeg Police Service

November 14, 2008</td></tr>
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NOTE: These Reasons are subject to a ban on publication of the Respondents' names pursuant to s. 25 of *The Law Enforcement Review Act*.

PRESTON, P.J.

[1] *The Law Enforcement Review Act* provides an avenue for any citizen of our Province to complain about the way they have been treated by the police. The legislation is predicated on the principle that the police must deal with members of the public in an even-handed and professional manner. The public has a right to expect nothing less from the police.

[2] As part of the legislative scheme, complaints are investigated by the Law Enforcement Review Agency (LERA). The legislation provides for a screening mechanism, which gives the LERA Commissioner the power to dismiss certain

complaints. This screening process, which has been upheld by this Court as a valid function, exists to prevent unnecessary public hearings. The screening process is predicated on the premise that the Commissioner, as an administrative decision-maker, has the expertise to assess a complaint made by a citizen.

[3] On July 7th, 2005, Ms P. filed a written complaint with LERA about the conduct of two officers who arrested her on June 30th, 2005 and a booking sergeant who dealt with her at the police station. The complaint was investigated by LERA.

[4] In a comprehensive letter dated January 29, 2007 to Ms P., the LERA Commissioner determined that there was no basis for proceeding any further with the complaint. The LERA Commissioner's detailed assessment and ultimate decision was that there was insufficient evidence to support Ms P.'s complaint. I will refer to his reasons later.

[5] This is in fact the second time I have been asked to review the LERA Commissioner's decision relative to this complaint.

[6] As was her right under *The Law Enforcement Review Act*, Ms P. asked a Provincial Judge to review the initial dismissal of her complaint. The matter appeared before me on a review of the Commissioner's decision. In addition, a motion was filed on behalf of Ms P. for leave to admit new evidence. I heard submissions and considered the written briefs filed on behalf of the officers and the complainant. I reviewed the January, 2007 decision of the Commissioner. I did not deal with the merits of the complaint.

[7] Although Ms P.'s complaint against the police encompassed an entire arrest and detention process, I will spotlight the sequence of events as they first unfolded to understand the nature of Ms P.'s complaint. She has maintained throughout that she was the victim of a domestic assault on the night in question.

[8] The first 911 call on the evening in question came from a Mr. R., who outlined a series of events which included an allegation that Ms P. had bitten his finger and fled to the neighbours' house. A second 911 call was made to the police minutes later from the neighbours' house. Two of the respondent officers were dispatched and arrived first at the residence of Ms P.'s neighbours. When the police first encountered Ms P., the officers observed that Ms P. appeared intoxicated, was very upset and "not making any sense". The officers placed Ms P. in their cruiser car. They asked Ms P. about her injured foot and she told the officers that Mr. R. had "punched" it because he was mad at her for not bringing a book home. The officers next spoke to Mr. R. at Ms P.'s residence. He appeared

sober. Mr. R. claimed that Ms P. had bitten his finger. The police noted that Mr. R. had sustained a cut to his finger. They made a decision to arrest Ms P. for assaulting Mr. R. They did not arrest Mr. R. because they concluded at that time that Ms P. was the "dominant aggressor".

[9] I now wish to refer to the reasons articulated by the Commissioner to Ms P. in his first examination and assessment of her complaint. In an extensive analysis of the complaint, the Commissioner articulated Ms P.'s concerns as they pertained to allegations of disciplinary defaults by the three officers in question.

[10] I will quote from part of his analysis and conclusion as follows:

> One of the issues you have raised that does fall within the mandate of *The Law Enforcement Review Act*, is you feel you were arrested without reasonable and probable grounds. The officers who dealt with you observed an injury to your foot. They also felt you were intoxicated and had difficulty in explaining what had taken place that evening. After speaking with you and your boyfriend, the officers were of the view that you were the dominant aggressor in this incident.
>
> They felt from what they were told and had observed, the evidence was more consistent with what Mr. R. reported had occurred than what you said happened. For this reason, the officers felt it necessary to charge you with assault. I cannot say what did or did not happen between you and your boyfriend on June 30, 2005. This would be for a judge to determine if the matters had proceeded to court. However, even if the officers were incorrect in their assessment of what had taken place, this does not necessarily mean they did not have reasonable and probable grounds to arrest you for assault. In my view, the officers assessed the information available to them, and took the action they deemed was necessary.
>
> You also allege that the officers' actions towards you were discourteous or uncivil. The fact the officers felt you were the dominant aggressor in this matter does not in itself, indicate they were discourteous or uncivil. This is the opinion they formed after speaking with you, with Mr. R. and with the neighbours. The officers met you at the neighbour's residence, took you to the police car, attempted to find out from you what happened, brought you to the hospital for treatment, were willing to release you to your mother if you signed the Promise to Appear, and contacted legal counsel for you.
>
> I also note in your written complaint you said when you were taken out of the police station, the two younger officers grabbed you and put you in the police car. You refer to them as the two officers who had been dealing with you while the older officer was telling you to sign the papers. The police records show the two officers who were with Sergeant G.M. did not remove you from the police station. You were turned over to another unit and taken to the Winnipeg Remand Centre by two other officers, not the two officers who had initially been dealing with you.

> The only independent witnesses in this matter are the neighbours who reside at [address]. They both indicate that you had been drinking that evening and you told them you had consumed three doubles. The police service obtained statements from them and noted that you had told them you had been beaten up and that your foot was injured. You also told them Mr. R. had one hand on your throat and one over your face. You told them he had stomped on your feet so you couldn't get away. Statements were obtained from the neighbours and all this information was recorded on the police file.
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> You allege the older officer (Sergeant G.M.) yelled at you to try and force you to sign the Promise to Appear. Sergeant G.M. said he tried to explain the Promise to Appear to you and what you were being charged with. He said you kept interrupting him and would not listen to what he was saying. The officers said if you had signed the Promise to Appear, you could have been released to a sober adult. As you kept refusing to sign, even after Mr. Brodsky informed you to do so, they decided that you would be held in custody to appear before a magistrate.
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> When a person is charged with a criminal offence, an officer has the authority to hold the person in custody or to release them if certain conditions are met. It is unfortunate you did not sign the Promise to Appear, as you then could have been released. However, since you did not, it was not an abuse of authority for the officers to then have you held in custody…..
>
> The issue I must consider in this case is whether the officers abused their authority as you allege. It is not within my jurisdiction to determine whether the officers were correct in their judgement of what had taken place. The officers were receiving conflicting information from you and from Mr. R. In their view, they felt from your behaviour and from the injuries they noted, you were the dominant aggressor in this case. The officers felt it was necessary to charge you with assault and in my view, whether I agree with their assessment or not, they were not acting in an unreasonable manner.

[11] As I have said, Ms P. asked a Provincial Judge to review the decision of the LERA Commissioner. I did so.

[12] In my decision of June 6, 2007, I declined to grant a motion to admit new evidence. However, I held that the Commissioner had made an error in not obtaining and reviewing two 911 calls to the police from the night in question. Therefore, the complaint was sent back to the Commissioner for him to examine and consider the 911 calls and make a new assessment of the complaint. The Commissioner did so.

[13] On July 13, 2007, the LERA Commissioner advised Ms P. via registered mail that he had reviewed the 911 calls as directed. It was still his view that there

was insufficient evidence to support the complaint filed against the officers. I will quote part of this latter decision:

> As I indicated to you in my letter sent to you on January 29, 2007, my jurisdiction is to address the conduct of the officers. It is not within my jurisdiction to determine if a thorough or proper investigation was conducted or whether I agree with the conclusions reached by the officers.
>
> The officers involved in this matter, Constable Z. and Constable H. did not have any conversation with you on the 911 call. The information from these calls was provided to the officers by the computer aided dispatch (C.A.D.) in their patrol car. The information provided to them was that Mr. R. had called, reported that you were running outside naked, that you bit his finger, he had tried to restrain you, that you had been vomiting in the bathroom and you were intoxicated. While he was restraining you, you had been screaming at him not to kill you. He provided a description of you and said you had taken a blanket and you ran out of the house. It was then noted another call had come in and you had run to the neighbours at [address]. The officers were informed you had been spoken to by the 911 operator, that you were very intoxicated and possibly had a broken foot. They were told you were not very coherent and the neighbours would keep you there until they arrived. The officers did not have the benefit of the entire 911 call when they responded to this matter.
>
> On review of the information provided by the 911 call, it remains my view the evidence supporting your complaint against the officers is insufficient to justify sending this matter to a public hearing. The 911 calls do not have any direct contact between you and the respondent officers. The information provided in the two 911 calls does not, in my view, provide any evidence that the officers abused their authority under *The Law Enforcement Review Act*. In our previous correspondence and also when you first spoke with my investigator, Mr. Haslam, you were informed that if you were not satisfied with the quality of the investigation conducted by the officers, you could make your concerns known to the Chief of Winnipeg Police Service.

[14] Ms P. has once again applied to a Provincial Judge to review the latest decision of the Commissioner to dismiss her complaint.

[15] Let me examine the particulars of Ms P.'s complaint. This examination is somewhat complicated by the fact that Ms P. was represented by counsel at the outset, but by the time the matter was re-heard by me, Ms P. was self-represented. She filed supplementary materials on her own behalf.

[16] In her original brief dated April 26, 2007, she complained that on the night in question, the police wrongly determined that she was the dominant aggressor in their investigation of domestic violence. She alleged that the police wrongly

charged her with assaulting her boyfriend. She further alleged that the police officers did not have reasonable and probable grounds to arrest her for assault. Moreover, she alleged that the police were told by her of her history of abuse, but failed to consider the history of abuse. She also alleged that at approximately five o'clock in the early morning hours of the day in question, the booking sergeant was discourteous and uncivil to her and she was taken to the Remand Centre and spent time in a jail. She alleged that the police officers abused their authority by sending her to the Remand Centre.

[17] In her more recent March 25, 2008 reply to the brief filed on behalf of the Winnipeg Police Service, Ms P. again alleged an abuse of authority by the arresting officers when the officers handcuffed her, which she stated was not necessary in the circumstances. Nor, she alleged, when the officers entered her home to talk to Mr. R., did the officers obtain shoes or clothing for her. This, she alleged, was oppressive and abusive conduct. Ms P. alleged that the booking sergeant yelled at her when she refused to sign her appearance notice and told her she was going to jail because, he said, she "pissed" him "off". She alleged that the police abused their authority by making false statements. She alleged the police made a number of flawed and inaccurate statements and thereby diminished the severity of her condition and failed to recognize her mental state.

[18] She also asserted that the Commissioner provided "perverted" responses to her complaint in order to conceal a disciplinary default in that the officers handled this poorly, made the wrong assessment of what happened and ought to be disciplined. Moreover, she complained that the Winnipeg Police Service violated her human rights on the basis of age, sex, marital status, source of income, physical or mental disability and thus abused their authority.

[19] Section 29 of *The Law Enforcement Review Act* outlines how an officer can commit a "disciplinary default". The disciplinary defaults as alleged by Ms P. against the officers in question are an abuse of authority by making an arrest without reasonable and probable grounds, by being uncivil or discourteous, by differential treatment without reasonable cause and by using unnecessary force. She also alleged the police made a false statement.

[20] Section 13 of *The Law Enforcement Review Act* governs this process. The onus is on the Complainant to satisfy me that the Commissioner erred in declining to take further action. I have outlined the nature of the complaint and the details of the dismissal.

[21] There is now recent, binding authority from the Supreme Court of Canada, the *Dunsmuir* decision, [2008] S.C.J. No. 9, which governs how review processes such as this are to proceed. The *Dunsmuir* decision clarifies the test to be applied in these types of reviews. The Supreme Court has streamlined the implementation of a judicial review process such as this, opting for a contextual approach. Two standards of review apply. The first is the principle of "correctness" and the second is "reasonableness".

[22] This type of analysis was applied by my former colleague, Joyal P.J., as he then was, when he examined the role of a Provincial Judge in this type of review in an earlier decision, *Law Enforcement Review Act Complaint #2004/172*. He outlined that the most demanding standard of review to be imposed upon a Commissioner in a section 13 *Law Enforcement Review Act* review is the standard of "correctness". That standard is to be imposed only in cases where the Commissioner has committed an identifiable jurisdictional error.

[23] A jurisdictional error can be committed if the Commissioner failed to act as required by his jurisdiction or failed to act within the limits of his jurisdiction by applying a wrong test or by misapplying the right test in reaching his decision. None of the above jurisdictional errors has occurred in this case.

[24] Therefore, I must apply the standard of "reasonableness", as understood by the *Dunsmuir* decision. Reasonableness is a standard that recognizes that certain questions that come before an administrative tribunal such as LERA do not lend themselves to one specific or particular conclusion. Instead, the analysis of a complaint such as Ms P.'s complaint can and often does give rise to more than one, possible, reasonable conclusion. The Supreme Court in *Dunsmuir* succinctly defines reasonableness in the context of judicial review:

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. (paragraph 24)

The standard of reasonableness is not as exacting a standard as correctness. Joyal P.J. stated the following regarding the role of the reviewing judge when examining a decision of the LERA Commissioner:

> …given the limited but still necessary weighing of the evidence that must occur on the part of the Commissioner, the reviewing judge can seldom categorically say the Commissioner was right or wrong. It is for that reason that absent jurisdictional error, if the Commissioner's conclusion is based on a reasonable

> assessment of the evidence and if that conclusion is one of the rational conclusions that could be arrived at, the Commissioner's determination is entitled to deference and it ought not to be disturbed.

[25] The question to be answered is this: did the Commissioner assess the evidence reasonably? In other words, have the Commissioner's reasons been transparently, intelligibly and rationally articulated?

[26] It is important for Ms P. to know that other people, herself included, may draw an equally supportable conclusion. I may have reached another, rational conclusion. That is not my function. My function is to see if the Commissioner has made a reasonable assessment of the evidence. In other words, I must examine whether the Commissioner drew a rational conclusion, one that could reasonably be drawn on the facts of this case. I have concluded that he did.

[27] The officers were given information by the dispatcher regarding Ms P.'s 911 call to the police from her neighbours' house, which was received after Mr. R.'s 911 call. The information the officers received from the 911 operator pertaining to Ms P.'s 911 call led them to understand that Ms P. was intoxicated and not very coherent, and she had possibly broken her foot. After speaking to Ms P., whom the police noted was intoxicated, the police spoke to Mr. R., who was sober. They noted a cut to his finger consistent with his allegation of having been bitten by Ms P. The police observed no sign of physical injury to Ms P.'s face or redness on her neck consistent with her allegations. The police took Ms P. to the hospital to get her foot injury examined. In fact, the doctor who examined Ms P. at the hospital noted a small abrasion to the left side of her nose.

[28] Ms P. asserted that she was the victim, Mr. R. was the attacker and the police ought to have charged Mr. R. at the outset. She strongly maintained that the police failure to follow domestic violence protocol in their decision not to charge Mr. R. amounted to an abuse of their authority.

[29] The police may well have had tunnel vision at the outset of their approach to the arrest and detention of Ms P. It may be that they fixed on one theory of what had happened between Mr. R. and Ms P. However, there was evidence that Mr. R. may have been bitten by Ms P. There were reasonable and probable grounds for the officers to charge Ms P. with assault.

[30] Unlike a judge at the conclusion of a preliminary hearing in a criminal matter, a LERA Commissioner can and does possess a limited, but significant power to weigh evidence gathered by a LERA investigation. The Commissioner is mandated through the legislation to weigh all the evidence received through the

investigation in order to determine its sufficiency. This includes the weighing of sometimes contradictory evidence to determine if there is a reasonable basis to proceed with a public hearing. If a Commissioner were not allowed such a power, each and every time any controversial issue or any credibility issue arose, the Commissioner would be obliged to refer the matter to a Provincial Judge.

[31] For instance, Ms P. makes an allegation that the booking sergeant was discourteous. The LERA investigation revealed that Ms P had requested to speak to a lawyer. The police contacted her counsel of choice, Mr. Brodsky, who told her to sign her appearance notice so that the police could release her. Notwithstanding her lawyer's advice, Ms P. refused to sign her appearance notice. The booking sergeant denied being discourteous. He told the LERA investigators that Ms P. was not listening to reason at that point, refused to sign the appearance notice, so the police lawfully detained her in custody. The Commissioner weighed this evidence.

[32] The Commissioner correctly concluded that a breach of the Winnipeg Police Service domestic violence guidelines is a breach of Winnipeg Police Service policy and is an internal matter and not within the scope of his powers. If the police breached a policy guideline in their investigation of the incident, that issue of the "quality of their investigation" does not fall within the scope of *The Law Enforcement Review Act.* The only exception would be if that breach resulted in a disciplinary default. Disciplinary defaults fall under the scope of this legislation.

[33] The Commissioner's conclusion was one within the range of acceptable, rational conclusions that is defensible in respect of the evidence. It is a reasonable outcome, a rational conclusion the Commissioner was entitled to make. The jurisdiction of the legislation is not to conduct criminal investigations or to investigate the quality of investigations, because those are service or quality issues. The jurisdiction it does have is to investigate complaints of police conduct.

[34] As I have said, Ms P. ultimately represented herself. For the sake of completeness, I wish to deal with other assertions she made. She submitted that the Commissioner was not "independent" from the police. Other than her assertion that the Commissioner is a former police officer, there is nothing in the LERA investigation or the Commissioner's reasons to bolster that assertion. For reasons I have already stated, I cannot find any evidence of bad faith in either the investigation of the Agency or the findings of the Commissioner. The Commissioner acted in manner entirely independent from the police.

[35] Ms P. made an assertion both in her brief and during her oral submission to the Court that the arresting officers had made false statements. She pointed out

Mr. R. was, in fact, later charged for the incident that night. A preliminary hearing for his alleged assault on her that night was held last year. At Mr. R.'s preliminary hearing, the arresting officers agreed in their sworn testimony that Ms P. had told them on the night in question that she was assaulted. Also, she maintained that they were present when she was examined at the hospital, so would have known she had injuries consistent with being assaulted.

[36] Simply put, the officers had made a decision to charge her despite her repeated protestations to them that she was indeed the victim of Mr. R.'s assault on her. I have reviewed the LERA file record and find no false statements made by any of the police officers, let alone negligent statements, malicious statements or statements made with intent to mislead. The conclusions made by the officers on the night in question, though arguably filtered through one theory of what happened between Ms P. and Mr. R., were conclusions reached by both arresting officers in the midst of a domestic dispute investigation.

[37] That having been said, I have a great deal of sympathy for Ms P. The night in question was extremely disturbing to her. She has told me that the matter has taken a huge toll on her. She has clearly spent a tremendous amount of time preparing both her comprehensive materials and her eloquent submissions.

[38] I note that later and further investigation of this incident, in large measure driven by Ms P.'s efforts, resulted in a charge of assault causing bodily harm being laid against Mr. R. for an alleged assault on Ms P. on the night in question. The reason for the police follow-up investigation in August of 2005 was to pursue her allegations that she was the victim. I was told that Ms P.'s assault charge was eventually stayed. I was also told that Mr. R. has been committed to stand trial in the Queen's Bench on the allegation of assault causing bodily harm to Ms P.

[39] Be that as it may, my function is not to pass judgment on the quality of the initial police investigation, but to decide whether the Commissioner erred in his conclusion. I cannot say that he assessed the complaint unreasonably. He drew a rational conclusion on the merits of the complaint. I may not have drawn the same conclusion. That is not the test here. As long as the Commissioner has properly assessed the complaint reasonably and has drawn a rational conclusion, and I have concluded that he has done so, I will not interfere with his decision.

Original signed by Judge T. J. Preston

Timothy J. Preston, P.J.