

IN THE MATTER OF: *The Law Enforcement Review Act* Complaint  
#2006-233

AND IN THE MATTER OF: An Application pursuant to s.13(2) of *The Law  
Enforcement Review Act* R.S.M. 1987, c.L75

B E T W E E N:

**K. A.** ) Self-represented  
**S. J.** )  
**Applicants** )

- and - )

**Cst. C. P.** ) Paul McKenna  
**Cst. P. B.** ) Counsel for the Respondents and  
**Respondents** ) the Winnipeg Police Association

*Note: These reasons are subject to a ban  
on publication of the Respondents' names  
pursuant to s.13(4.1).*

) Sean D. Boyd, Counsel for L.E.R.A.

) Hearing date: November 2, 2009

) Decision delivered: March 8, 2010

**Chartier, A.C.J.**

## **OVERVIEW**

[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 is 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 access a complaint made by a citizen.

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

[3] On July 9, 2006, Mr. A. and Ms J. filed written complaints with LERA about the conduct of two officers who were involved in an investigation on June 9, 2006. The complaint was investigated by LERA.

[4] In a comprehensive letter dated February 6, 2007 to Mr. A., 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 the complaint and have the matter proceed to a public hearing. I will refer to his reasons later.

[5] As was their right under *The Law Enforcement Review Act*, both Mr. A. and Ms J. asked a Provincial Judge to review the initial dismissal of their complaint. The matter appeared before me on a review of the Commissioner's decision. I heard submissions from Mr. A. and counsel for the respondents and considered the written briefs filed on behalf of the officers. I reviewed the February 6, 2007 decision of the Commissioner. I did not deal with the merits of the complaint.

[6] It is important to note that Ms J. did not attend the hearing. Mr. A. confirmed that his complaint was independent of Ms J.'s and that he was not purporting to speak on her behalf.

### **NATURE OF COMPLAINT AND DETAILS OF DISMISSAL**

[7] The complainants were parked near the Winnipeg International Airport fence on June 9, 2006 at approximately 11:50 p.m. The respondents, who had been informed of a possible impaired driver on Brookside Avenue a short while earlier, approached the complainants' vehicle and a spot light was turned on. One of the two officers inquired as to what the complainants were doing. Mr. A. indicated that they were enjoying their evening, and simply having a cup of coffee. Mr. A. further communicated to the police that he and Ms J. were doing nothing wrong and that they just wanted to be left alone. The female officer then raised her voice at this point and insisted that both Mr. A. and Ms J. were on private property. The male officer then inquired of Mr. A. as to what his name was. The response was "Joe Smith". He then immediately added that they must already know who he was inasmuch as they punched in the vehicle plate number into their computer. It was at that time that the male officer then exited the police vehicle and approached the driver side of Mr. A.'s vehicle.

[8] Mr. A. decided to record the remaining conversation on his cellular telephone. The female officer began asking about Mr. A.'s upcoming court dates and Mr. A. responded that there were no court dates and to simply check their records. The female officer then told Mr. A. not to be such an "asshole". The

conversation between the two continued with Mr. A. telling the officer that he did not like to be harassed by the police and that he was not with a prostitute. Mr. A. then told the police officers to “piss off”. The female police officer responded by telling Mr. A. that he was over-reacting. Mr. A. then called the police officers “imbeciles”. Mr. A. then told the police officers to help someone who actually needed help at which point the male officer told Mr. A. to “hold on for a minute”. Mr. A. then tells the police to go to hell and that he had done nothing wrong. The female officer then tells Mr. A. that he is causing a disturbance at which point Mr. A. tells her to “blow him”. This was repeated a second time immediately thereafter. The female officer then asked if that is what Mr. A. was paying Ms J. for. Mr. A. told the police officer that her comments were insulting at which point the female officer replied that she said this because Mr. A. was being so “fucking disrespectful”.

[9] The Commissioner concluded that the police officers were, in his view, in the lawful execution of their duties when they checked Mr. A.’s motor vehicle. The Commissioner was not satisfied that the police officers were harassing Mr. A. and concluded, in all of the circumstances, that they were simply making observations and inquiries.

[10] Although the Commissioner concluded that the female officer could have dealt with the matter in a more professional manner, he was not satisfied that her actions were such which should warrant a formal hearing. This conclusion was, in part, based on Mr. A.’s provocative and discourteous demeanour. Ultimately, on review of the matter, the Commissioner was of the view that the evidence supporting the complaint was insufficient to justify taking the matter to a public hearing.

### **THE LEGAL FRAMEWORK OF A REVIEW**

[11] Section 29 of *The Law Enforcement Review Act* outlines how an officer can commit a “disciplinary default”. The disciplinary defaults as alleged by Mr. A. and Ms J. against the officers in question are: an abuse of authority, by being uncivil or discourteous and by using oppressive or abusive conduct or language.

[12] 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 Commissioner’s dismissal.

[13] There is now recent, binding authority from the Supreme Court of Canada in *Dunsmuir v. New Brunswick* [2008] S.C.J. 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 of Canada 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”.

[14] This type of analysis was applied by Joyal P.J. (Manitoba), as he then was, when he examined the role of the Provincial Judge in this type of review in an earlier decision, *Law Enforcement Review Act* Complaint No. 2004/172. He outlined that the most demanding standard of review to be imposed upon a Commissioner in a s.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.

[15] 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. I am of the view that none of the above jurisdictional errors has occurred in this case.

[16] 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 Mr. A. and Ms J.’s complaint can, and often does, give rise to more than one, possible, reasonable conclusion.

[17] A Supreme Court in *Dunsmuir* succinctly defines reasonableness in the context of a 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 law.

[18] 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.

### **DECISION ON REVIEW**

[19] 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?

[20] It is important for Mr. A. and Ms J. to know that other people, themselves included, may draw an equally supportable conclusion from the facts and circumstances in question. 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.

[21] 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 weight evidence gathered by a LERA investigation. The Commissioner is mandated through the legislation to weigh all of 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 the Commissioner was not allowed such a power, each and every time any controversial issue or any credibility issue arose, the Commissioner would be obliged to refer this matter to a Provincial Judge.

[22] It was not unreasonable for the Commissioner to conclude that the actions of the officers had to be analysed and assessed given the prevailing atmosphere at the time of the incident. The conduct of the female officer was perhaps an error in judgment but the conclusion drawn that it did not constitute an abuse of authority is certainly one which is rational and flows from a reasonable assessment.

[23] 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.

[24] As indicated above, 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:"*

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**Michel L. J. Chartier, A.C.J.**