IN THE MATTER OF:	*The Law Enforcement Review Act* Complaint #2007-252
AND IN THE MATTER OF:	An Application pursuant to s. 13 of *The Law Enforcement Review* Act, R.S.M. 1987, c.L75

BETWEEN:

E.P. and E.P. Complainants/Appellants	) Self-represented))
- and -	))
Constable M.V. Respondent	) Mr. Paul McKenna) for the Respondent)) Mr. Sean Boyd, Counsel for) Law Enforcement Review Agency)) Hearing: November 2, 2009) Decision: February 2, 2010

NOTE: These Reasons are subject to a ban on publication of the Respondent's name pursuant to s. 13 (4.1)(b) of *The Law Enforcement Review Act,* R.S.M. 1987, c. L75.

MARTIN, P.J.

1. INTRODUCTION

[1] This is a review of *The Law Enforcement Review Act* ("L.E.R.A.") Commissioner's May 23, 2008 decision not to take any further action on a complaint filed by Mr. and Mrs. P. (the "Ps.") pursuant to section 13 of *The Law Enforcement Review Act,* R.S.M. 1987, c. L75 (the "*Act*").

2. BACKGROUND

[2] On October 7, 2007, the Ps. filed a complaint against Constable M.V. in accordance with the *Act*. That complaint is just over two pages long. It references

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an incident with a neighbour in September 2007 after which the Ps. attended a police station to file a complaint. It also references their interaction with Constable M.V. who dealt with them at the police station. Though the Ps.' written complaint is lengthy and quite detailed, it essentially relates their discontentment with the manner in which Constable M.V. questioned them about their complaint, his apparent bias in favour of the neighbour they were complaining about and his refusal to allow them to file the complaint. They described Constable M.V.'s manner in dealing with them as "rude, insulting, confrontational and biased". They then reiterated their concerns about their neighbour and enquired as to where they should go to file their complaint against that neighbour.

[3] The Ps.' complaint file indicates that after some time, the Commission was ultimately able to speak to Constable M.V. in the presence of his lawyer. The file contains a written summary of that meeting. While Constable M.V. agreed with some of the allegations made by the Ps. as to his comments or actions, he denied others and portrayed the events of the interaction in a different light, casting the Ps. as difficult to keep focused and get a straight story out of. He indicated that after much discussion and effort he came to the conclusion that the Ps.' complaint was not a police matter and sent them on their way.

[4] Further to the investigation of the Ps.' complaint, Commissioner Wright declined to take any further action under section 13(1)(c) of the *Act.* In his opinion, there was insufficient evidence supporting the complaint to justify a public hearing. His reasons are set out in a May 23, 2008 decision (the "Decision").

[5] On June 11, 2008, the Ps. applied to have the Decision reviewed by a Provincial Judge. The hearing of that application took place on November 2, 2009.

3. **<u>STANDARD OF REVIEW</u>**

[6] As indicated earlier, the Ps.' application before me is an application for a review of the Decision.

[7] Section 13(2) of the *Act* clearly provides for such a review:

> Where the Commissioner has declined to take further action on a complaint under subsection (1), the complainant may, within 30 days after the sending of the notice to the complainant under subsection (1.1), apply to the Commissioner to have the decision ***<u>reviewed</u>*** by a provincial judge. [Emphasis mine]

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[8] The onus is on the appellants on a balance of probabilities to show the reviewing judge that the Commissioner erred in declining to take further action on the complaint.

[9] The standard of review, or in layman's terms, the way a Court should assess a decision by an administrative agency acting in a decision-making capacity, is one of "reasonableness" as it has recently been redefined by the Supreme Court of Canada in *Dunsmuir v. New Brunswick,* 2008 SCC 9. The reasonableness standard is defined as follows:

> [46] What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?
>
> [47] Reasonableness is a ***deferential standard*** animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. ***A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes***. ***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.*** [Emphasis mine]

[10] In other words, when reviewing a decision of an administrative agency acting in a decision-making capacity, a court must look at whether the decision itself is clear and transparent as to the reasons behind the ultimate decision and whether the outcome or ultimate decision is tenable based on those articulated reasons. If an administrative decision contains articulated reasons and a tenable outcome, then the decision will be reasonable, regardless of whether the reviewing court disagrees or would have come to a different conclusion. As indicated by the Supreme Court of Canada, a reviewing court needs to pay a certain degree of deference to the administrative agency if its decision is both transparent and tenable.

[11] As stated by my brother, Preston, P.J. in *B.J.P. v. Constable G.H., Constable B.Z. and Sergeant G.M.,* LERA Complaint #2005-186 (November 14, 2008):

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> [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, intelligently and rationally articulated?
>
> [26]….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.

4. POSITION OF THE PARTIES

[12] The Ps.' position is that the Decision is both incomplete and inaccurate as to what transpired in their dealings with Constable M.V. and was incorrect in its ultimate finding. That said, they did not really want a hearing. They simply wished for an apology.

[13] Counsel for Constable M.V. disagrees with that position but says that given the standard of review and the sufficiency of the Decision, I should dismiss the application. Counsel for L.E.R.A. echoed this position.

5. ANALYSIS

[14] In reviewing the Decision I find that it is reasonable. Not only did Commissioner Wright articulate his reasons in a reasonable manner such that they are explained in a transparent and intelligible manner, but the outcome is also reasonable in that it falls within a range of possible acceptable outcomes which are defensible in respect of the facts and the law.

a. The Articulation of Commissioner Wright's Reasons

[15] Commissioner Wright's Decision is divided into three sections – (I.) The Complaint and Statement; (II.) The Investigation; and (III.) Analysis and Conclusion.

[16] As is apparent by their title, sections I and II deal with the Ps.' complaint and Constable M.V.'s response to that complaint. These sections appear to be a fair summary of the information that was available to the Commissioner. Though they do not reproduce word for word what that information was, there is certainly no legal requirement to do so and in fact, it may be unnecessarily cumbersome to even attempt to do so.

[17] As for section III, Commissioner Wright clearly and correctly sets out his mandate, which is not to make any final and binding decisions as to what events

did or did not occur but to determine whether there are grounds under the *Act* to go forward and attempt to resolve the matter or have it heard by a Provincial Judge. He then goes on to explain that in accordance with section 13(1) of the *Act* the Ps.' complaint was one where he felt there was insufficient evidence supporting the complaint to justify a public hearing.

[18] His reasons for this finding are then expressed within the next three paragraphs, where he concludes that although he cannot know what exactly was said by whom, the essence of the Ps.' initial complaint to the police may not in fact have been a police matter and there was no evidence before him that Constable M.V. would have any motive to ignore a legitimate complaint, and certainly no evidence of an abuse of authority in refusing to investigate their complaint.

[19] Though these reasons deal with both aspects of the Ps.' complaint – Constable M.V.'s behaviour and his refusal to file their complaint – I find that the Commissioner might have explained his reasons on the Ps.' first issue more fully. At the hearing, it was apparent that the Ps. felt that they had not been believed and Constable M.V. had. A more complete explanation by the Commissioner as to how he assessed the information before him would have been helpful in this regard.

[20] That said, the Commissioner's reasons are nevertheless transparent and intelligible and therefore meet the first part of the Dunsmuir test.

b. <u>The Reasonableness of the Outcome</u>

[21] As previously indicated, Commissioner Wright found that there was insufficient evidence to proceed to a hearing before a Provincial Judge. Based on a review of the evidence that was before Commissioner Wright and the provisions of the *Act*, I find that that conclusion was reasonable.

[22] Indeed, although the handling of the Ps.' complaint by Constable M.V. could have been done with a greater display of patience, the issue from the perspective of the *Act* is whether his behaviour could constitute a disciplinary default in accordance with section 29.

[23] The relevant subsections of Section 29 of the *Act* define what is meant by a disciplinary default in this context:

> **29** A member commits a disciplinary default where he affects the complainant or any other person by means of any of the following acts or omissions arising out of or in the execution of his duties:
>
> (a) abuse of authority, including

. . .

(iii) using oppressive or abusive conduct or language,

(iv) being discourteous or uncivil,

. . .

[24] Based on the allegations made by the Ps. and Constable M.V.'s response, as well as the provisions of the *Act*, I find that Commissioner Wright's decision to decline to take further action is a reasonable one insofar as it can be supported by the evidence and the law and is within a range of possible acceptable outcomes. While I am sympathetic to the Ps.' sense of discontentment in this whole affair, they themselves quite aptly recognized that this is not a case that merits a public hearing. That said, it is a shame that the Ps. were left feeling the way they did after their encounter with Constable M.V, and that a form of apology without any admission of liability was not proffered.

[25] Based on the foregoing the application is dismissed and a ban on publication of the Respondent's name is hereby ordered pursuant to section 13(4.1)(b) of the *Act*.

original signed by

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L. M. Martin, P.J.

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