

IN THE MATTER OF:

THE LAW ENFORCEMENT REVIEW ACT  
COMPLAINT NO: 2008/251

BETWEEN:

██████████,

Complainant,

- and -

CONSTABLE ██████████,

Respondent.

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TRANSCRIPT OF PROCEEDINGS before The Honourable  
Judge Garreck, held at the Law Courts Complex, 408 York  
Avenue, in the City of Winnipeg, Province of Manitoba, on  
the 21st day of October, 2009.

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APPEARANCES:

██████████ ██████████, in person  
MR. P. MCKENNA, for the Respondent  
MR. S. BOYD, for the Commissioner

BAN ON PUBLICATION

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1 OCTOBER 21, 2009

2

3 THE JUDGE: Good afternoon.

4 MR. MCKENNA: Good afternoon, Your Honour.

5 MR. BOYD: Good afternoon, Your Honour.

6 THE JUDGE: Have a seat, sir. Go ahead.

7 MR. MCKENNA: Paul McKenna for the respondent  
8 officer, Your Honour.

9 THE JUDGE: Yes.

10 MR. BOYD: Sean Boyd for the LERA commissioner.  
11 And Mr. Haslam, an investigator with the LERA office is  
12 present.

13 THE JUDGE: Okay. Now, I don't see [REDACTED] [REDACTED]  
14 here. I understand she has been paged before I came in. Am  
15 I right, counsel, that when the matter appeared in June she  
16 was present and asked for the matter to be adjourned for  
17 counsel, or it was adjourned for a hearing to be set and she  
18 indicated she wanted counsel; is that correct?

19 MR. MCKENNA: She said that she was intending on  
20 speaking to counsel and she was asked at the time if, like  
21 setting the date in October would give her enough time, and  
22 she said yes.

23 THE JUDGE: Okay. It's only about seven minutes  
24 after two now. I don't know what the lineup might be like  
25 downstairs. I'm just wondering if we maybe should stand the  
26 matter down for a short period of time, come back and if  
27 she's not here again we'll page her and see. I don't know  
28 if there's any way of -- on my file of contacting her or if  
29 counsel have any contact numbers for her or anything like  
30 that. But in any event I'm not -- I'll see if madam clerk  
31 maybe can assist me in that regard too just to see if we're  
32 able to make some contact, see if she intends to be here.  
33 But --

34 MR. BOYD: Your Honour -- oh.

1 THE JUDGE: Oh, go ahead.

2 MR. BOYD: I'd just like to note, Your Honour,  
3 that there was a mistake made on the cover page of the brief  
4 that we filed and it did indicate the hearing was at 2:30.

5 THE JUDGE: Oh, yes, I did see that too.

6 MR. BOYD: I believe it's because sometimes LERA  
7 hearings are at 9:30 and --

8 THE JUDGE: That's right.

9 MR. BOYD: -- the two was changed but the zero was  
10 not.

11 THE JUDGE: Yes, I did see that actually. Okay.

12 MR. BOYD: So, I mean, I think [REDACTED] [REDACTED] was in  
13 court when the date was said, but for what it's worth --

14 THE JUDGE: Yeah.

15 MR. BOYD: -- it may be slightly confusing for  
16 her.

17 THE JUDGE: And I, I believe the letter that she  
18 received indicated -- it did indicate two o'clock, but, but  
19 she would have received these materials subsequent to that  
20 letter, I expect. So maybe what we'll do then is just stand  
21 the matter down till 2:30 and then we'll come back and see  
22 where things are at, okay?

23 THE CLERK: Order, all rise. Court is in recess  
24 till 2:30.

25

26 (BRIEF RECESS)

27

28 THE CLERK: Court is reopened.

29 THE JUDGE: All right. Good afternoon. [REDACTED]

30 [REDACTED], you're here.

31 [REDACTED]: Yes.

32 THE JUDGE: All right. Just give me a moment to  
33 get my things out. And you're representing yourself?

34 [REDACTED]: Correct.

1 THE JUDGE: Okay. And just again, Mr. McKenna,  
2 you're here on behalf of the respondent?

3 MR. MCKENNA: That's correct, Your Honour.

4 THE JUDGE: And Mr. Boyd, you're here on behalf of  
5 the commissioner?

6 MR. BOYD: Yes, Your Honour.

7 THE JUDGE: Okay. Now, this is a review under  
8 Section 13 of the Act, so as I understand it [REDACTED] [REDACTED]  
9 would speak first, but Mr. Boyd, do we need to deal with the  
10 issue of standing here for you at the outset or do we deal  
11 with that after we hear from the parties?

12 MR. BOYD: I suppose either/or is fine. Typically  
13 in these matters we've been grandstanding just to make a  
14 limited submission. More or less file a brief and add any  
15 comments with respect to legal tests. So I'm prepared to  
16 deal with it now or, or after. In these matters we've  
17 never, I think, been denied standing. It's pretty usual  
18 that we just make our presentations on the very limited  
19 issues that the brief sets out.

20 THE JUDGE: All right. Do either party have  
21 anything to say with respect to that issue? Mr. Boyd is  
22 here on behalf of the commissioner asking for standing, and  
23 I think you would have received his materials, did you, [REDACTED]  
24 [REDACTED]?

25 [REDACTED] [REDACTED]: Yes, I did.

26 THE JUDGE: Okay. So he's asking for standing to  
27 make submissions on the very limited issue only with respect  
28 to whether any jurisdictional issues were made or any errors  
29 in that regard, not on the merits of the case itself. So I  
30 would be prepared to grant him that limited standing to make  
31 submissions, if it becomes necessary. Do either -- Mr.  
32 McKenna, do you have anything to say in that regard?

33 MR. MCKENNA: I have no objection to his request  
34 for standing.

1 THE JUDGE: All right. [REDACTED], do you have  
2 any difficulty with that request?

3 [REDACTED]: I don't fully understand the request.

4 THE JUDGE: Okay. Well, the parties to this  
5 matter are yourself and then the respondent who has counsel  
6 here. And the purpose of this is to review the decision of  
7 the commissioner. So counsel is here on behalf of the  
8 commissioner, but he's not here to argue whether the  
9 commissioner was correct or not correct in coming to the  
10 decision that he did. He's only here if arguments are  
11 raised with respect to how the commissioner may have applied  
12 the Act and whether he did his job correctly, if I can  
13 summarize it that way. So it's just for that very limited  
14 issue. If you were making an argument against a section of  
15 the Act itself or challenging the legislation itself, then  
16 he would ask to make submissions in that regard. So it's  
17 just for that very limited purpose that he's asking for  
18 standing and that I'm prepared to give him standing to do  
19 that.

20 [REDACTED]: Um-hum.

21 THE JUDGE: Okay?

22 [REDACTED]: Okay.

23 THE JUDGE: All right. And then we'll just -- you  
24 did receive all those materials; there were two briefs as  
25 well as the file itself that was valid and sent forward?

26 [REDACTED]: Yes, Your Honour.

27 THE JUDGE: Okay. And you're ready then to make  
28 your submission?

29 [REDACTED]: Yes.

30 THE JUDGE: Okay. Go ahead.

31 [REDACTED]: Well, I haven't done this before  
32 so --

33 THE JUDGE: No. Take your time and --

34 [REDACTED]: I, I -- what's expected --



1 THE JUDGE: -- go ahead.

2 [REDACTED]: -- is just my, my side of the story  
3 or what I, what I believe the officer done wrong. I mean,  
4 I, I'm just --

5 THE JUDGE: Okay. Just -- I don't know, I think  
6 you would have received as well the sections, relevant  
7 sections of the Act along with the materials, and this is  
8 under Section 13. And basically the commissioner has made a  
9 decision and sent that decision to you notifying you of the  
10 decision and you have asked that that decision be reviewed  
11 by myself. So what we're here this afternoon to do is to  
12 review the decision of the commissioner, not to take any  
13 further action or not to refer the matter for a full hearing  
14 on the complaint itself. So that's what the purpose of this  
15 is. And I'll just read the section to you because it says:

16  
17 "Where an application is  
18 brought ..."

19  
20 Under this section, and that's the -- an application for a  
21 review of the commissioner's decision, where, where you've  
22 come to court asking for a review of that decision:

23  
24 "... the burden of proof is on the  
25 complainant ..."

26  
27 Which is yourself:

28  
29 "...to show that the Commissioner  
30 erred in declining to take further  
31 action on the complaint."

32  
33 So what that means is that you have the responsibility or  
34 the onus or the burden of establishing that the commissioner

1 in making his decision was in error, okay?

2 [REDACTED]: Okay.

3 Well, when I went in to speak with the  
4 commissioner on my incident, I gave my full story to him.  
5 And he, he then told me that what I have said to him was  
6 good reason to have, to have this officer brought forward on  
7 my complaint. And at that point I had trusted him, I put my  
8 trust in him.

9 I, I had my, my -- I had a witness, [REDACTED]  
10 (phonetic), who was there when I was put under arrest, and  
11 he wanted to -- he wished to speak with her. He was going  
12 to go down to her work to speak with her, but he never did.  
13 He never contacted her. He had her information. He avoided  
14 her completely, 100 percent completely avoided to speak with  
15 her. So that's why I feel very upset about this because I  
16 believe she was a very important factor in this whole  
17 incident.

18 The papers I reviewed, the whole -- the matter, it  
19 doesn't, it doesn't add up. I feel I was a victim. I look  
20 at the, the recordings and they tried -- it's just -- it, it  
21 just doesn't add up. I've been interrogated for nearly  
22 three hours and the reports are saying that I was only being  
23 spoken to for just a little over an hour on and off with  
24 recordings going on and off. I have recording on, recording  
25 off, the times and everything that I have been through when  
26 I was interrogated. I, I was put under unnecessary  
27 treatment. I had to speak on the phone twice with a lawyer.  
28 I was given a right to remain silent and I was declined that  
29 right. He had sat in front of me and drilled me and  
30 demanded me to speak to the point where I was shaking. I  
31 feel if I have a right to remain silent, I should be given  
32 that right to remain silent, but I wasn't.

33 I have explained this to the commissioner and I'm  
34 sure he received all the particulars on it, but it's still



1 ignored, it's just completely ignored.

2 I have papers here on his -- on the statement from  
3 -- for Winnipeg Police Service on the times and what had  
4 happened there that night, and it says here: At 6:56 [REDACTED]  
5 spoke to legal counsel. Accused was interviewed on  
6 continuous video and declined to comment on the matter.

7 Continuous video. Well, it says continuous video  
8 here and then over here it doesn't -- it has recording has  
9 started and then over here the recording is stopped because  
10 on the phone with [REDACTED]. Recording started and then  
11 it's -- I don't know. It's -- it says one thing from the  
12 Winnipeg Police Service and then my information it's what  
13 actually happened. It's just different. Nothing adds up.

14 I was, I was in there for a total of three hours  
15 and nobody acknowledges it in here. It's not acknowledged,  
16 it's just put aside. And these things I want addressed. I  
17 want it addressed on why [REDACTED] wasn't contacted. I  
18 want, I want them to acknowledge that the videos that --  
19 towards the end of the videotaping that I was shaking. And  
20 in here, in, in the documents the police officer had stated  
21 that I wasn't, that I seemed fine and calm, and I was not.  
22 If we need to go through these videos and point out what  
23 happened, I'm willing to do so.

24 To me it's very obvious he abused his authority  
25 when he had called me down to the police station and put me  
26 under arrest immediately. I believe that is just being  
27 swept away and that's it's okay for him to do things like  
28 that. It's not. My -- I had, I had been assaulted and it's  
29 been ignored and I was put under arrest under the other  
30 person's word against mine. I don't understand how that  
31 could happen either.

32 It's, it's just why would the commissioner ignore  
33 all these facts? It doesn't seem fair to me and I, I don't  
34 approve of his decision at all.

1 THE JUDGE: [REDACTED], if I can just interrupt  
2 you for a moment to make sure that I understand and I'm not  
3 missing anything. You just said that you -- you said why  
4 would the commissioner have ignored all these facts, and I  
5 want to make sure that I understand which facts you're  
6 referring to when you say that.

7 You have just said that -- your submission was  
8 that the officer had abused his authority when he called you  
9 down to the station and then put you under arrest. That's  
10 one of the facts that you're suggesting the commissioner  
11 ignored?

12 [REDACTED]: Yes.

13 THE JUDGE: Okay. And then you said that you  
14 were, and I'm paraphrasing what you said, but you said that  
15 you were assaulted and it was ignored, and that's another  
16 fact that you say the commissioner ignored?

17 [REDACTED]: Yes.

18 THE JUDGE: Okay. And then you said it was your  
19 word against this other individual's, and is that another  
20 fact that you say the commissioner ignored?

21 [REDACTED]: Well, he definitely should have  
22 questioned it more on why I was being treated this way and  
23 the other person not.

24 THE JUDGE: Okay. And just -- so that's what I  
25 have for the facts. Were there any other specific --

26 [REDACTED]: And the fact that he told me that my,  
27 my story was -- I had -- he had good reason to believe, to  
28 believe that everything I have told him to be good reason  
29 for me to continue on with my LERA complaint and that, and  
30 that speaking with [REDACTED] would be very important to my  
31 complaint. He had stated that to me and he decided not --  
32 he neglected to speak with her.

33 THE JUDGE: Okay. Anything else?

34 [REDACTED]: I think --

1 THE JUDGE: You can take some time if you want to  
2 just review what you've got and if you've got anything else  
3 to add.

4 [REDACTED]: I think that's all, Your Honour.

5 THE JUDGE: Okay. Thank you. Mr. McKenna.

6 MR. MCKENNA: Your Honour, just before addressing  
7 the points that [REDACTED] has raised. Just by way of  
8 historical background, we did give you our brief and I don't  
9 intend to go through it in, in great detail because we, we  
10 indicated in our brief to you historically how the test that  
11 you are to apply has developed over the course of several  
12 years.

13 THE JUDGE: If I can just interrupt you for one  
14 moment.

15 MR. MCKENNA: Yes.

16 THE JUDGE: [REDACTED], you can sit down if you  
17 wish.

18 [REDACTED]: Thank you.

19 THE JUDGE: Okay. Go ahead.

20 MR. MCKENNA: And I, I think the, the, the, the  
21 genesis of, of that test, if you look at page 5 of our  
22 brief, starts with the decision of Judge Joyal, as he was at  
23 the time, and that's at paragraph 3.7. And simply put, Your  
24 Honour, Judge Joyal was quite correct in saying that the  
25 reviewing judge can seldom categorically say the  
26 commissioner was right or wrong, because there are just so  
27 many different variables in here. And then he went on to  
28 say it's for that reason that absent jurisdictional error,  
29 if the commissioner's conclusion is based on a reasonable  
30 assessment of the evidence and if that conclusion is one of  
31 the rational conclusions that could be arrived at, the  
32 commissioner's determination is entitled to deference and  
33 ought not to be disturbed. That's very significant. That's  
34 a 2006 case.

1           And then the Supreme Court of Canada came out with  
2 a decision which you would think they almost read and  
3 paraphrased Judge Joyal, because that's exactly what they  
4 said in 2008 in the Dunsmuir case and you'll see that at  
5 paragraph 4.1, and, and, and that's exactly what Judge Joyal  
6 was talking about where -- and, and the Supreme Court in  
7 paragraph 4.1 says:

8  
9           "Reasonableness is a deferential  
10 standard animated by the principle  
11 that underlies the development of  
12 the two previous standards of  
13 reasonableness: certain questions  
14 that come before administrative  
15 tribunals do not lend themselves to  
16 one specific, particular result."  
17

18 That's exactly what Judge Joyal said, because he was  
19 scratching his head, if you will, over well, how do you, how  
20 do you put a decision like this under a microscope when  
21 there are so many factors to be considered and how do you  
22 say, well, it's right or it's wrong? And, you know, it's  
23 very clearly right or very clearly wrong is not an easy  
24 thing to do.

25           And if you look at the, the last sentence of that  
26 quote in paragraph 4.1, again it, it almost reiterates what  
27 Judge Joyal said:

28  
29           "But it is also concerned with  
30 whether the decision falls within a  
31 range of possible, acceptable  
32 outcomes which are defensible in  
33 respect of the facts and law."  
34



1 So they talk about possible outcomes.

2 Then you have two cases decided by Judge Preston  
3 who takes the Judge Joyal decision, takes the Supreme Court  
4 decision and puts them together and I think comes up with  
5 the, the most accurate and best summary of, of the, the test  
6 that you should apply. And it starts at paragraph 4.5 and  
7 says:

8  
9 The question to be answered is  
10 this: Did the commissioner assess  
11 the evidence reasonably; in other  
12 words, have the commissioner's  
13 reasons been transparently,  
14 intelligibly and rationally  
15 articulated?  
16

17 When, when you're asking yourself that question you, you,  
18 you, you can't help but note that -- and I -- Your Honour,  
19 just for ease of reference, and I'm not going to ask you to  
20 go to it, but when you, when you look at the LERA file, the  
21 commissioner's file, they take the time to mark in  
22 handwritten (sic) the numbers on the top right-hand corner  
23 so that we can refer you to it. I'm not asking you to read  
24 it right now, but I will tell you that when you talk about  
25 have they been transparently, intelligibly and rationally  
26 articulated, the commissioner gives a very lengthy summary  
27 at pages 75 through 81. I'm not asking you to go to it  
28 right now and I'm not going to read from it to you, but if  
29 you, if you need something, you just need to refer to pages  
30 75 to 81. That's what we call the Section 13 letter. It's  
31 very lengthy and very detailed. It summaries the entire  
32 investigation and the reasons for using 13(1)(c) to close  
33 the file.

34 Then Judge Preston takes you one step further in

1 your role as the reviewing judge at paragraph 4.6 and when  
2 it says:

3

4           It is important for Ms. P. to  
5           know ...

6

7 And just coincidence that that's the same last name:

8

9           ... to know that other people,  
10          herself included, may draw an  
11          equally supportable conclusion. I  
12          may have reached another rational  
13          conclusion, but that's not my  
14          function. My function is to see if  
15          the commissioner has made a  
16          reasonable assessment of the  
17          evidence. In other words, I must  
18          examine whether the commissioner  
19          drew a rational conclusion, one  
20          that could reasonably be drawn on  
21          the facts of the case, and I have  
22          concluded he did.

23

24 And that's the test. And the test is also he, he reiterates  
25 it in a different fashion at paragraph 4.7 of our brief and  
26 talks about the, the weighing of evidence at paragraph 4.8,  
27 because there is a limited weighing of evidence. And, and  
28 he says that if that were not the case, each time there was  
29 a contradiction on any fact in issue, the matter would have  
30 to proceed to a hearing before a provincial judge. So he  
31 says it's natural and it's normal and of course there has to  
32 be a limited weighing of the evidence.

33

34           Now, the commissioner didn't ignore the  
information that [REDACTED] claims that he ignores; in fact



1 analyzed the information. It's clear from the, from the  
2 Section 13 letter, the one I referred to you at pages 75 to  
3 81, that the commissioner looked at the, the tape, looked at  
4 the video of the entire interview. And yes, these are  
5 continuous tapes and of course you will well appreciate that  
6 the word "continuous" is referring to when the police  
7 officer and the subject are having dealings. And you can  
8 well appreciate that they do not run the tape when the  
9 person is being allowed the privacy of a, a call to legal  
10 counsel. So it is considered a continuous tape on the basis  
11 of it will run continuously while they are dealing -- while  
12 they're dealing with the suspect, but they will shut it off  
13 to allow the person the privacy of the phone call.

14 The, the commissioner met with -- over and above  
15 taking down the complaint, met with the complainant. My  
16 understanding from the file is that the witness was to call  
17 the, the investigator, and never did, and there's a notation  
18 in the file from the investigator that his person never did  
19 contact him.

20 The commissioner reviewed the videotape, met with  
21 the police officer, reviewed the letter that I sent him with  
22 authorities on interrogation techniques. And you will note  
23 at page 79 of the Section 13 letter that the commissioner  
24 indicates that the -- he's also relying on many past files  
25 that the Law Enforcement Review Agency has had with regard  
26 to interrogation techniques. They -- this is not the first  
27 time that an issue comes up as to, you know, how far police  
28 officers can go in interviews. And so they, they, they do  
29 have an expertise in this area and have developed that over  
30 a number of years of dealing with these files. And of  
31 course that expertise, as you know, gives them a certain  
32 amount of deference when their decisions are being subject  
33 to judicial review.

34 Probably the best quote with regard to the

1 interrogation techniques is to be found at page 80 of the  
2 Section 13 letter and the commissioner says:

3

4                   Once again, it is not an abuse of  
5                   authority ...

6

7 Because that -- those are the words in the legislation.  
8 Every disciplinary default is, is headed off by the words  
9 "abuse of authority":

10

11                   ... it is not an abuse of authority  
12                   for the officer to continue to ask  
13                   questions of you, even though you  
14                   have been advised not to say  
15                   anything.

16

17 And then he goes on to say:

18

19                   If you've made any culpatory or  
20                   exculpatory statements to the  
21                   officer it would be then up to the  
22                   courts to determine if the  
23                   statement was obtained properly  
24                   before it could be used as  
25                   evidence. While I may or may not  
26                   agree with the manner in which the  
27                   officer dealt with you, I must be  
28                   satisfied that his conduct amounted  
29                   to an abuse of authority before I  
30                   am permitted to take any further  
31                   action.

32

33                   So there are a number of different techniques of  
34 interrogation and this case does not come down to a

1 credibility finding because this is a taped interview, so  
2 you don't need to weigh the credibility of one versus the  
3 other, you can simply watch the tape yourself, and that's  
4 exactly what the commissioner did and ruled that he did not  
5 see an abuse of authority. And I would submit to you that  
6 that is a rational conclusion. You yourself, Your Honour,  
7 don't need to come to that conclusion. You just need to  
8 find that it is one of the rational conclusions that could  
9 be arrived at from reviewing the tape.

10 The commissioner, quite properly, I think,  
11 dismissed the suggestion that phoning ██████████ to come  
12 down to the, the station is a form of entrapment, because of  
13 course, as you know, entrapment involves setting a person up  
14 to commit a criminal offence.

15 Your Honour, one thing, if I may backtrack on  
16 something that I, I meant to say when I was talking about  
17 the witness, I believe her name is ██████████, Ms. ██████████.  
18 I forgot to add one further thing with regard to that. Over  
19 and above the fact that it is my understanding from the file  
20 that she was supposed to contact the investigator, and  
21 didn't, the other thing that I would, I would say about that  
22 is that ██████████ would not have been present during the  
23 interview and so at the end of the day I don't see what her  
24 evidence would add to it in any event.

25 I think -- if I can add one more thing before I  
26 finish off, is when, when ██████████ refers the fact that  
27 one person is arrested and the other person is not, there  
28 are a couple of things to remember is that -- and, and when  
29 it comes to whether it's one person's word or not. Firstly,  
30 that the other person had two witnesses who were interviewed  
31 and statements were taken. So that, that's one thing that  
32 the officers had to go on.

33 But the other thing, and it's probably more  
34 important than that, is that the Law Enforcement Review

1 Agency has historically not gone into what they call service  
2 issues as to why one person was arrested and the other  
3 person was not, why one person is charged on one occasion  
4 and why in another occasion a person is perhaps just warned  
5 or not. They have typically, historically, as long as I've  
6 been doing this, not gone into that. They don't delve into  
7 service issues, decisions about why -- and it comes up often  
8 in domestics, why one of the two is arrested and not the  
9 other one, or in some cases why both are arrested. They  
10 typically don't get into that. They get in -- they deal  
11 more with how the person was treated by the police officer.

12 So those are my comments, unless you have any  
13 questions, Your Honour.

14 THE JUDGE: I just have one area that I wanted you  
15 to address. On the video, which I have watched because I  
16 received the materials in advance --

17 MR. MCKENNA: Yes.

18 THE JUDGE: -- the commissioner upon reviewing the  
19 video makes reference, I believe in his letter -- I'm just  
20 not finding it at the tips here, but it's the reference to  
21 the fact that upon his review of the videotape he does not  
22 -- or he determines that [REDACTED] was not crying or  
23 shaking on the videotape. And I believe that was what he  
24 concluded, that she was not crying or shaking on the  
25 videotape. And I wanted you to comment on the videotape  
26 because we haven't played it here in court, but from my  
27 review of that videotape it appeared at the end of -- toward  
28 the end of the videotape when the second officer, I believe  
29 it was [REDACTED] was asking her questions, she appeared to  
30 be making motions toward her face and had asked for a  
31 Kleenex. And some might find that that -- it looked like  
32 she was crying at that point.

33 MR. MCKENNA: Right.

34 THE JUDGE: And I wonder if you wanted to make any



1 submission in that regard with respect to that particular  
2 conclusion of the commissioner.

3 MR. MCKENNA: Well, it -- I think at the end of  
4 the day it, it -- assume for the moment that, that she was,  
5 she was crying. The, the -- there, there is a certain  
6 amount of stress that will always be present in any, any of  
7 these types of incidents. And if, if, if the test were for  
8 police officers that, you know, when you're dealing with,  
9 with individuals, if they start crying you've gone too far,  
10 then I think that that's a test that, that would be just too  
11 much to bear and I don't think it would be a reasonable  
12 test. You know, a person can be crying for a lot of  
13 different reasons. One of them may be the actions of the  
14 officer, or for that matter it may be the fact that they are  
15 finding themselves in a very unpleasant situation, a very  
16 unfortunate situation, they've been caught, they've been  
17 arrested, they're being charged. There are a number of  
18 reasons for which the person can be crying.

19 And I, I think at the end of the day that, that  
20 that is just a very small part of it and at the end of the  
21 day the, the commissioner had an opportunity to see all of  
22 Constable [REDACTED] actions, to hear all of his words. So  
23 there was nothing hidden, it was all there for the  
24 commissioner to see. The commissioner at the end of the day  
25 said although it's persistent, there isn't an abuse of  
26 authority.

27 And so what I would say about that is that --  
28 because, because you're not asking me now to, to say, well,  
29 is there perhaps something that the commissioner missed?  
30 It's not a question of whether the commissioner missed or  
31 not. The commissioner saw the actions of the officer and  
32 those are the actions of the officer that he has to make the  
33 ruling about. And what I would say to you is that one of  
34 the rational conclusions is that that was not an abuse of

1 authority.

2 Now, you may come to a conclusion that, well,  
3 maybe it is.

4 THE JUDGE: I guess what I was asking --

5 MR. MCKENNA: Yes.

6 THE JUDGE: -- Mr. McKenna, if you want to make a  
7 submission on is if, if the commissioner did make an error  
8 in that finding, based on a review of the videotape, what  
9 impact would that have on this review?

10 MR. MCKENNA: Yes. Well, I think it, it only is a  
11 very small part of, of the interview process. I mean, the  
12 -- you know, it runs for many minutes and I, I don't think  
13 that that would be enough that you would set aside the  
14 decision and say under the circumstances that, that the  
15 decision was an irrational decision.

16 Unless you have any further comments, Your Honour,  
17 those are my -- that's my submission.

18 THE JUDGE: The only other question I have is you  
19 had referred to the, the file indicating that the witness  
20 [REDACTED] was to contact the commissioner.

21 MR. MCKENNA: Yes.

22 THE JUDGE: I know that I reviewed that in here.  
23 I wonder if you have that handy --

24 MR. MCKENNA: Yes, I do.

25 THE JUDGE: -- where that information is.

26 MR. MCKENNA: Yes. If you look at page 77, and I  
27 believe there's a note in the file somewhere, I'm just not  
28 sure where.

29 THE JUDGE: Yes, it's the note that I was actually  
30 wondering about --

31 MR. MCKENNA: Oh, okay.

32 THE JUDGE: -- where -- if he made a note on that.

33 MR. MCKENNA: Yes. Your Honour, it's at page 15.

34 Do you have page 15?



1 THE JUDGE: Yes, yes.

2 MR. MCKENNA: If you look on the left-hand side  
3 where the dates are --

4 THE JUDGE: Yes.

5 MR. MCKENNA: -- 2009/01/08 --

6 THE JUDGE: Yes.

7 MR. MCKENNA: -- and if you look four lines down:  
8 She will have her friend [REDACTED] contact me.

9 THE JUDGE: All right.

10 MR. MCKENNA: And I believe there's a note further  
11 on down about that fact that, that he never does get  
12 contacted. And of course my, my, my point on, on that would  
13 be again, you know, you, you may, you may, if, if somebody  
14 is a material witness, for instance, if the person sat  
15 through the whole interview, you may say then that making a  
16 decision without that person is a -- would be irrational to  
17 do. But in this particular case you have two things going  
18 in favour of the decision of the commissioner, one being  
19 that, that it was the -- the onus was on them to contact the  
20 investigator, and secondly, that, that she really was not in  
21 on the interview itself.

22 THE JUDGE: Okay. I don't have any other  
23 questions. Mr. Boyd, is there anything that you wish to  
24 say?

25 MR. BOYD: I just wanted to add a very brief  
26 comment, Your Honour, just on the test to be applied by the  
27 commissioner and by yourself in reviewing matters.

28 I think I'm more or less just echoing what my  
29 learned friend has said in the first part of his  
30 presentation before he was dealing with the substance of the  
31 issue, about what the standard of review is.

32 Just to, to be -- to go through, I guess, the  
33 first step the commissioner had to take, it's under Section  
34 13(1)(c), the commissioner determines whether there's a

1 reasonable basis in the evidence to proceed to the next  
2 stage, more or less. The commissioner determines whether  
3 there is sufficient evidence to justify proceeding to a  
4 public hearing.

5 And then when that's appealed the standard of  
6 review, as discussed in the case law, is reasonableness. So  
7 all those things that my learned friend said about  
8 reasonableness in terms of is it supportable based on the  
9 information that the commissioner had, there may be other  
10 decisions or opinions other people can come to, but as long  
11 as the decision made is supportable and reasonable on the  
12 face of it, then that's fine.

13 So in doing the review of the commissioner's  
14 decision that there was insufficient evidence, that is done  
15 on the basis of an assessment of whether the commissioner's  
16 decision was reasonable.

17 Those are my only comments and I think the case  
18 law in the briefs speak to that fairly extensively.

19 THE JUDGE: All right. Thank you. [REDACTED]  
20 was there anything that you wanted to say in reply to either  
21 of the lawyers?

22 [REDACTED]: Just that still I'd like to point out  
23 that they, they want to claim that even [REDACTED] is not a  
24 witness that would benefit this, I believe is wrong. Me  
25 going down to the station to speak with the constable with  
26 the understanding that I -- we're, we're going to discuss a  
27 couple of incidences is what I was aware of when I went down  
28 there. And [REDACTED] accompanying me down there was, was proof  
29 of, proof of me being put under arrest which she had  
30 witnessed upon our arrival when we understood I was going to  
31 be just spoken with about things. And she seen that  
32 immediate arrest. Before my arrest she looked at the  
33 constable and commented that, why do you look scared? And  
34 he just was like, no, no, I'm not, and just put me under

1 arrest and asked her to leave. So at that time she was a  
2 witness to the time I was dropped off and picked up.

3 I think that's all I wanted to add. Thank you.

4 THE JUDGE: Okay. Thank you.

5 What I'd like to do is take about half an hour and  
6 see if I am able to give a decision at that time, so at  
7 about quarter to four. And if I am not able to, if I need  
8 more time, then I'll come back and let all of the parties  
9 know, okay?

10 THE CLERK: Order, all rise. This court is in  
11 recess till 3:45.

12

13 (BRIEF RECESS)

14

15 THE CLERK: This court is reopened. Please be  
16 seated.

17 THE JUDGE: [REDACTED], you can remain there if  
18 you like or you can come forward. I am ready to give my  
19 decision so -- if you're more comfortable there, sure.

20

21 (REASONS FOR JUDGMENT DELIVERED)

22

23 THE JUDGE: Is there anything else?

24 MR. MCKENNA: That's it.

25 THE JUDGE: Okay. All right. Thank you, [REDACTED]  
26 [REDACTED], for your submissions.

27 THE CLERK: Order, all rise. This court now  
28 stands closed.

29

(PROCEEDINGS CONCLUDED)

**CERTIFICATE OF TRANSCRIPT**

I hereby certify that the foregoing pages of printed matter, numbered 1 to 21, are a true and accurate transcript of the proceedings, transcribed by me to the best of my skill and ability.



CHRISTINE JONES  
COURT TRANSCRIBER

CERTIFIED COURT TRANSCRIPT  
FROM THE OFFICE OF  
TRANSCRIPTION SERVICES UNIT



TRANSCRIPTION SERVICES UNIT

1 IN THE MATTER OF: THE LAW ENFORCEMENT REVIEW ACT  
2 COMPLAINT NO: 2008/251

3  
4  
5 BETWEEN: ) Ms. [REDACTED]  
6 ) in person  
7 [REDACTED] )  
8 Complainant, ) Mr. P. McKenna  
9 ) for the Respondent  
10 - and - )  
11 ) Mr. S. Boyd  
12 CONSTABLE [REDACTED] ) for the LERA  
13 Respondent. ) Commissioner  
14 )  
15 )  
16 ) Judgment delivered  
17 ) October 21, 2009  
18

19  
20 GARRECK, P.J. (Orally)

21 As I said at the outset, this is a review under  
22 Section 13 of the Law Enforcement Review Act, and that is  
23 the review of a commissioner's decision not to proceed any  
24 further with the complaint because of insufficient evidence  
25 to justify proceeding to hearing.

26 First of all, I have determined that no  
27 jurisdictional issues have been raised here, so the standard  
28 of review that I have to apply is one of reasonableness.  
29 What that means is I have to determine in my review of the  
30 commissioner's decision if he acted reasonably in coming to  
31 that decision. So the question is, did the commissioner  
32 assess and evaluate the evidence that he gathered reasonably  
33 in order to reach a rational conclusion? To put it another  
34 way, is it rationally consistent or coherent with the

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1 reasonable assessment of the evidence?

2           The case law is that the commissioner's  
3 determination is one which may permit different but equally  
4 justifiable conclusions, so what that means is absent an  
5 error, I as the reviewing judge, ought not and cannot  
6 substitute my own conclusion here. It is a review of the  
7 commissioner's decision.

8           In looking at that decision, I note that the  
9 commissioner interviewed the complainant, [REDACTED], and  
10 the officer. He viewed the video of the interview with the  
11 officer and he was of the view, as he said in his letter,  
12 that while he may not have conducted the interview in the  
13 same way, that the officer had not engaged in any abuse of  
14 authority, uncivilized behaviour or discourteous conduct.

15           I noted on my review of the videotape, it appears  
16 that the commissioner either was unable to determine that  
17 there was crying at the end of that videotape or was  
18 mistaken when he did not see that, because it certainly  
19 could be concluded from the videotape at the end that [REDACTED]  
20 [REDACTED] was crying. I noted that it was the one piece of  
21 information in the commissioner's report where he indicated  
22 that there was no crying at the end of the -- or during the  
23 course of the video. My review of his decision,  
24 notwithstanding that one piece of information, he was of the  
25 view after reviewing the officer's conduct and after being  
26 able to view the entirety of the officer's conduct, that it  
27 did not amount to an abuse of authority.

28           Based on his assessment, I am of the view that  
29 that is a reasonable conclusion that he could have reached  
30 from his review of the evidence, even if he was mistaken  
31 about the fact that [REDACTED] was crying at the end of it.

32           I also then am satisfied that the commissioner's  
33 reasoning was what the case law refers to as rational,  
34 intelligible and transparent. He, firstly, considered the

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1 allegation in respect of the abuse of authority as it  
2 related to the request that [REDACTED] attend to the  
3 station. The complaint that [REDACTED] was not advised that  
4 she would be arrested when she attended to the station and  
5 the complaint was that she was entrapped by having to go  
6 down there and then immediately upon coming into contact  
7 with the officer she was then placed under arrest.

8 The commissioner reviewed that complaint in light  
9 of the fact that there really was no contradiction between  
10 [REDACTED] and the officer on that point. He acknowledged  
11 in his interview with the commissioner that he had asked [REDACTED]  
12 [REDACTED] to come down. He did not advise her that she would  
13 be arrested when she attended, and his explanation for doing  
14 that was given and his explanation was that he wanted to be  
15 sure that he was speaking to the correct person before he  
16 told them that there was going to be an arrest, and he  
17 couldn't be certain of that over the phone. The  
18 commissioner reviewed that complaint in light of all of the  
19 facts as he knew them, which were really not contradicted by  
20 the two parties, and came to the conclusion that the officer  
21 is not required to advise of pending arrest over the  
22 telephone and in fact had not abused his authority by not  
23 doing so. He also considered it in light of the fact that  
24 as soon as there was contact at the station the officer did  
25 in fact advise of the arrest and the rights pursuant to that  
26 arrest were then given immediately.

27 I have considered the submission of [REDACTED] in  
28 relation to the witness, [REDACTED] (phonetic) not being  
29 interviewed and when I look at that in light of the  
30 commissioner's decision, it would appear that [REDACTED]  
31 information would have confirmed what [REDACTED] says  
32 occurred and which doesn't appear really to be disputed at  
33 all by the officer, and that is that she was asked to go  
34 down there not knowing that she would be arrested and that

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1 she was then in fact arrested immediately. The commissioner  
2 accepted that as the evidence and made his decision based on  
3 those findings of evidence with respect to this matter.  
4 Even if he had spoken with [REDACTED], it would not have  
5 changed whether his decision in that regard was reasonable.

6 [REDACTED] also referred to the fact that the  
7 interrogation lasted for some three hours and she argued  
8 that the commissioner did not acknowledge that. When I  
9 reviewed the commissioner's decision he does indicate that  
10 the time noted for attendance to the station was 6:30 and  
11 the time ultimately picked up, I believe, was 9:20 p.m., so  
12 almost three hours was acknowledged as her total time at the  
13 police station, although the interview portion with the  
14 police on the video was about 42 minutes. The commissioner  
15 was aware of the total amount of time that [REDACTED] was at  
16 the station and he was also aware that a portion of that,  
17 that being the time that she was with the officers during  
18 the interview, was 42 minutes and that was on the video.

19 Now, [REDACTED] also referred to the fact that  
20 some of the material calls it a continuous video and then it  
21 appears that the video was turned off at certain points. In  
22 fact as Mr. McKenna pointed out, the continuous video  
23 portion refers to the time that she was with the police  
24 being interviewed, not the total time that she was in the  
25 custody of the police, and the points where the video was  
26 turned off are in compliance with what the officers are  
27 required to do when she is consulting her lawyer. They are  
28 not allowed to hear that or watch that, so the video was  
29 turned off for those portions. That is something that the  
30 commissioner was also made aware of in a review of the file.

31 [REDACTED] submits that the, and submitted to the  
32 commissioner, that the manner of questioning by the officer  
33 was an abuse of authority. As I said earlier, the  
34 commissioner reviewed the tape. He acknowledged that the

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1 officer appeared to be, I'm not sure if he used the word  
2 "persistent" but he certainly did acknowledge and even made  
3 reference in his decision that while he may not have  
4 conducted it in the same manner as the officer did, after  
5 reviewing everything he reached the conclusion that it was  
6 not an abuse of authority. He did that after reviewing the  
7 case law, which allows the officer to continue to question  
8 an individual under arrest after they have been notified of  
9 their rights and that includes their right to remain silent.  
10 He reviewed it and explained in his decision that according  
11 to the case law and the authorities, that the police are  
12 entitled to conduct the interview and allow the individual  
13 to continue to exercise their right to remain silent by  
14 saying that they continue to exercise that right. That  
15 doesn't preclude or stop the officers from continuing to do  
16 their job in interviewing. Unless the officer goes so far  
17 as to overcome the will of the person so that they are no  
18 longer able to make a free and voluntary choice to stay  
19 silent, then the conduct is acceptable according to the case  
20 law. So the commissioner reviewed it in the context of that  
21 case law and he also reviewed it in the context of whether  
22 it amounted to an abuse of authority.

23 I have to keep in mind, as Mr. McKenna argued and  
24 the case law certainly tells me, that the commissioner is  
25 experienced in reviewing these complaints and has reviewed a  
26 number of them in terms of what amounts to an abuse of  
27 authority and as such has developed a certain level of  
28 expertise in making those determinations. I as a reviewing  
29 judge am required to give some deference then to that  
30 decision. It means that I can't simply interfere with that  
31 decision if he has a particular level of experience in  
32 coming to that decision, so long as it's one that is  
33 reasonable on the facts as he determined them.

34 I think I've covered all of the points that were

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1 raised by [REDACTED] as I specifically recall with respect  
2 to the length of the interview, and that was acknowledged by  
3 the commissioner, and the issue of whether she was crying or  
4 shaking on the video as well and the issue of the witness  
5 [REDACTED] not being interviewed. I believe those were some,  
6 not all, of the issues that [REDACTED] raised in her  
7 submission before me.

8 So to conclude, after reviewing the commissioner's  
9 decision, in light of all of the information available to  
10 the commissioner, I am satisfied that he made the decision  
11 reasonably after consideration of all of the facts as he  
12 found them and that his decision was one that was rationally  
13 connected to that assessment of the evidence. As I said at  
14 the outset, it's not a question of whether it's the only  
15 conclusion that could have been drawn. The question is  
16 whether it is a reasonable conclusion in the circumstances.  
17 I have not been satisfied then that the commissioner made an  
18 error in declining to take further action on the complaint.  
19 As I said, I have concluded that his review of the  
20 investigation and the conclusion reached was reasonable  
21 based on consideration of the complaint. His decision does  
22 in fact articulate rationally, intelligibly and  
23 transparently how he arrived at that decision.

24 So that is my conclusion, to sum it up, is  
25 basically I have concluded that the commissioner's decision  
26 was not in error.

27 MR. MCKENNA: Your Honour, just one last thing, if  
28 we might have a ban on publication pursuant to Section  
29 13(4.1) of the Act.

30 THE JUDGE: And that is under sub (b)?

31 MR. MCKENNA: I'm sorry?

32 THE JUDGE: Under sub (b), if the application is  
33 dismissed --

34 MR. MCKENNA: Yes.

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**BAN ON PUBLICATION**



1 THE JUDGE: -- order that the ban on publication  
2 of the respondent's name continue?


3 MR. MCKENNA: Yes.

4 THE JUDGE: Yes. That ban will continue. That's  
5 a requirement under the legislation itself, that if I  
6 dismiss the application, which I am doing, based on my  
7 review, I am ordering then that the ban on publication of  
8 the respondent's name will continue.

9

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