

**IN THE PROVINCIAL COURT OF MANITOBA**

IN THE MATTER OF: *The Law Enforcement Review Act*  
Complaint #2015/71

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

BETWEEN:

<b>M.S.</b>	)	Alyssa B. Mymko/Daniel Booy
Complainant,	)	for the Complainant
	)	
- and -	)	
	)	
<b>P/Sgt. D.B., Cst. T.S.</b>	)	Paul R. McKenna
<b>Cst. K.P.</b>	)	for the Respondents
Respondents.	)	
	)	
	)	Devin A. Johnston, Counsel for L.E.R.A.
	)	
	)	Hearing date: November 28, 2016
	)	Decision date: June 19, 2017

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

**LERNER, P.J.**

**DECISION ON REVIEW**

**I. THE FACTUAL BACKGROUND**

[1] The Complainant alleges that on April 30, 2015, members of the Winnipeg Police Service abused their authority when dealing with him. In summary, the Complainant alleges that on the noted date he was standing in front of 139 Morier

Avenue observing the state of ongoing construction at that location, when a police car drove slowly by, turned around, and then stopped in front of that address. The Complainant and the officer looked at each other without either acknowledging the other.

[2] The Complainant alleges that the officer, now known to have been P/Sgt. D.B., exited the vehicle, walked up to the Complainant, took his left arm, and asked what the Complainant was doing and whether he had any identification. The Complainant says in his LERA statement that he produced a rent receipt with his name and address on it. P/Sgt. D.B. is said to have then taken the Complainant by the left arm to the police vehicle, where he told the Complainant to put his hands on the vehicle hood. The officer is said to have told the Complainant at this point that he would handcuff the Complainant for their mutual safety, and did. It was at this point that the Complainant advised P/Sgt. D.B. that he would be filing a LERA complaint. The officer called for backup. There was inquiry by P/Sgt. D.B. as to why the Complainant was at that location, to which the Complainant says he replied that he was simply looking at the condominium. The officer is said to have explained his presence by saying that there were many break-ins in the area.

[3] The Complainant says that some 10-20 minutes after calling for backup two constables arrived, now known to be Csts. K.P. and T.S. P/Sgt. D.B. is said to have told the constables to "do a thorough body search" of the Complainant, which the Complainant says occurred, including his arms, legs, back, front, armpits and crotch. Police also searched the Complainant's wallet and backpack.

[4] The Complainant says he was never informed of his *Charter* rights, or permitted to exercise them. The Complainant told the officers he would be filing a LERA complaint, and says he was refused the badge numbers of the officers, and was told that they would be included in a police report of the incident.

[5] The Complainant says he did not swear at, resist, or threaten police, and denies doing anything suspicious at any point during the course of the incident.

[6] The Commissioner reviewed the police report written by P/Sgt. D.B., as well as an interview of the officers involved.

[7] The summary of the police report and interview of P/Sgt. D.B. indicates that at 1:15 p.m. on April 30, 2015, P/Sgt. D.B. was in the area of Morier Avenue, as a residential break-in on Havelock Avenue had been reported at 12:51 p.m., some 24 minutes earlier. A witness to the break-in had seen two males flee the residence on foot, each with backpacks. He saw the Complainant standing near 139 Morier Avenue and looking at the condominium at that location. He thought that the Complainant's presence at that location was suspicious, given what he says was the relatively close proximity to the earlier break-in, the presence of a bicycle which could have allowed the distance between the two areas to be traversed quickly, and the Complainant's backpack. He says he believed the Complainant may have been involved in daytime residential break-ins.

[8] P/Sgt. D.B. says that at 1:17 p.m. he told the Complainant that he was detaining him for a residential break-in investigation.

[9] P/Sgt. D.B. stated that the Complainant asked why he was being detained, and became agitated and verbally confrontational.

[10] P/Sgt. D.B. says he advised the Complainant that he had the authority to detain him for the investigation, as well as to handcuff and search him and his backpack for weapons for officer safety reasons, all of which he did. He conceded that he did not advise the Complainant of his s. 10(b) *Charter* rights because the detention was very brief, some 11 minutes according to his report. He said that the Complainant would have been handcuffed for five or six minutes of that time.

[11] The assisting constables apparently adopted P/Sgt. D.B.'s report without modification. In particular, they too describe the Complainant as verbally belligerent and uncooperative.

[12] In a letter dated February 1, 2016, the Commissioner reported the results of his investigation into the complaint. The Commissioner was satisfied that the evidence supporting the complaint was insufficient to justify taking the matter to a public hearing. Pursuant to s. 13(1)(c) of *The Law Enforcement Review Act* (hereinafter called the "*Act*"), the Commissioner declined from taking any further action on the matter.

[13] The Complainant has applied, pursuant to s.13(2) of the *Act*, to have a provincial judge review the Commissioner's decision to decline from taking further action on the complaint.

## **II. STANDARD OF REVIEW**

[14] It is common ground that the standard of review in the instant case is one of reasonableness and I proceed with my analysis on that basis.

### III. BURDEN OF PROOF

[15] Pursuant to s.13 (4) of the *Act*, the burden of proof is on the Complainant to show that the Commissioner erred in declining to take further action on this complaint.

### IV. REVIEWING THE COMMISSIONER'S DECISION

#### Commissioner's Reasons for Decision

[16] As noted, the Commissioner concluded that the evidence supporting the complaint was insufficient to justify taking the matter to a public hearing.

[17] As set out by counsel for the Complainant in written and oral submission, it is clear, and I find, that in reviewing the details of the complaint, the Commissioner appears to have failed to identify and/or apply the correct legal test with respect to section nine of the *Charter*. The Commissioner did not explicitly or implicitly address the distinction between reasonable and generalized suspicion. When examined, the objectively discernible facts, in particular the lack of any commonality between the description of the suspects and the Complainant other than "a backpack", do not and cannot support P/Sgt. D.B.'s suspicion as regards the Complainant's involvement in the earlier break and enter.

[18] There are similar concerns with respect to the Commissioner's review of the incident insofar as sections eight and 10 of the *Charter* are concerned, including the impact of unlawful detention on the ability to search, the basis for the search, and the failure to provide immediate advice as to the right to counsel.

[19] I do not agree, however, that the shortcomings of the review amount to a failure by the Commissioner to apply the correct legal test with respect to the *Act*, or render his ultimate decision unreasonable.

[20] As noted in *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190 at para. 47,

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.

[21] In assessing reasonableness, it must be borne in mind that the ultimate test for the Commissioner to apply in the instant case was not a test in law to determine whether *Charter* breaches occurred, but whether the evidence supporting a complaint – in the instant case, the evidence supporting an allegation of abuse of authority – was sufficient to justify taking the matter to a public hearing.

[22] As stated in *Quebec c. Girard*, [2002] C.C.S. No. 1190, at tab 12 of the Respondents' brief, a *Charter* breach does not automatically equate to an abuse of authority; it must have an "element of excess". The actions of the police must be reprehensible or excessive.

[23] As stated by Joyal J. in *A.C. v. Cst. G.S.*, LERA complaint # 6100, at para. 52:

"police conduct which can be properly found as an "abuse of authority" is that exploitative conduct which, even after an examination of the factual context of a given case, cannot be viewed as consistent with a reasonable police officer's good faith intention to lawfully perform his duties and uphold the public trust".

[24] Similarly, in *J.W.P. and Cst. R.L.*, LERA complaint No. 3704, at tab 17 of the Respondent's brief, Chartier PJ (as he then was) draws a distinction between a

*Charter* breach that amounts to a professional error, in that case a breach of s. 10, as opposed to a *Charter* breach which constitutes an abuse of authority.

[25] In summary, the relevant precedents appear to stand for the proposition that to constitute an abuse of authority, police conduct must amount to something more than an error, or errors, committed by police; the conduct in question must be reprehensible or excessive.

[26] This interpretation is not only consistent with the thrust and intent of the *Act* as a whole, but also comports with logic and common sense: police cannot be made to be looking over their shoulder with respect to their every action, many of which involve risk and danger to the police and the public, fearful that any mistake committed in the good faith exercise of their duties will result in a public hearing and the potential finding of a disciplinary default.

[27] In the course of reaching his conclusion in the instant case, the Commissioner properly noted a number of factors, including the brevity of the detention, the lack of injury, and the absence of any allegation of violence or excessive force. There is also no suggestion of any motive to harass.

[28] The Commissioner also noted the factors which gave rise to the officer's suspicion and subsequent detention of the accused, including proximity in time and space to the earlier Break and Enter offence. While I have found that these factors and others did not constitute a basis in law for investigative detention, and that P/Sgt. D.B. was in error when he detained and ultimately searched the accused and his belongings, for the reasons previously stated this does not automatically equate to an abuse of authority.

[29] I find that it was open to the Commissioner to conclude, as he implicitly did, that the conduct in question amounted to a good faith, albeit as I have found it, flawed exercise of duty, and did not reach the standard of abuse of authority.

**V. DECISION ON THIS REVIEW**

[30] Considering that the onus of proof is on the Complainant, and after having reviewed the circumstances upon which the Commissioner reached the decision, I am of the view that the Commissioner's decision to take no further action was reasonable in the circumstances, and therefore he did not err in that regard.

[31] Pursuant to s. 13(4.1)(b) of the *Act*, I order a ban on the publication of the Respondents names.

*Original signed by:*

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LERNER, P.J.