IN THE MATTER OF: *The Law Enforcement Review Act*
Complaint #2019-10

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

BETWEEN:

N. K.	) Mandeep Bhangu
Applicant	) For the Applicant
	)
- and -	)
	)
Constables F.D. and A.Z.	) D. Greg Bartel
Respondents	) for the Respondents
	)
	) Decision: July 31, 2020

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

KILLEEN, P.J.

Introduction

[1] The Applicant filed a complaint with the Law Enforcement Review Agency in relation to the actions of the two respondent Winnipeg Police Service constables. The officers went to the home of the Applicant on January 9, 2019. The Applicant

was concerned about threats uttered to her by others. She was also concerned that agents of a foreign country were targeting her because of her refusal to do work in the field of robotics for an official of that foreign country. She had received a product that she believed had been tampered with by agents of the foreign country. She wanted the officers to investigate the situation.

[2] The Applicant alleged that the officers did not take her concerns seriously. She alleged that the officers had insulted her by suggesting that people would think she was crazy. She alleged that the officers insulted her by suggesting a referral to an agency that helps vulnerable people. She alleged that the officers failed to follow through on her concerns about the product that she said had been making her ill. The officers refused to send it for testing. She also said that they failed to read the threatening text messages that she had received.

[3] The Commissioner provided a decision on June 25, 2019. He determined that the issues complained of did not rise to the level where a referral to a public hearing was justified. He determined that there was insufficient evidence to establish that there had been abusive conduct, an abuse of authority or any intentional insulting behaviour on the part of the officers involved.

The Relevant Legislation

Commissioner not to act on certain complaints

13(1) Where the Commissioner is satisfied

(a) that the subject matter of a complaint is frivolous or vexatious or does not fall within the scope of section 29;

(b) that a complaint has been abandoned; or

(c) that there is insufficient evidence supporting the complaint to justify a public hearing;

the Commissioner shall decline to take further action on the complaint and shall in writing inform the complainant, the respondent, and the respondent's Chief of Police of his or her reasons for declining to take further action.

Application to provincial judge

13(2) 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 reviewed by a provincial judge.

Procedure on application

13(3) On receiving an application under subsection (2), the Commissioner shall refer the complaint to a provincial judge who, after hearing any submissions from the parties in support of or in opposition to the application, and if satisfied that the Commissioner erred in declining to take further action on the complaint, shall order the Commissioner

(a) to refer the complaint for a hearing; or

(b) to take such other action under this Act respecting the complaint as the provincial judge directs.

Burden of proof on complainant

13(4) Where an application is brought under subsection (2), the burden of proof is on the complainant to show that the Commissioner erred in declining to take further action on the complaint.

Discipline Code

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

(i) making an arrest without reasonable or probable grounds,

(ii) using unnecessary violence or excessive force,

(iii) using oppressive or abusive conduct or language,

(iv) being discourteous or uncivil,

(v) seeking improper pecuniary or personal advantage,

(vi) without authorization, serving or executing documents in a civil process, and

(vii) differential treatment without reasonable cause on the basis of any characteristic set out in subsection 9(2) of *The Human Rights Code*;

(b) making a false statement, or destroying, concealing, or altering any official document or record;

(c) improperly disclosing any information acquired as a member of the police service;

(d) failing to exercise discretion or restraint in the use and care of firearms;

> (e) damaging property or failing to report the damage;
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> (f) being present and failing to assist any person in circumstances where there is a clear danger to the safety of that person or the security of that person's property;
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> (g) violating the privacy of any person within the meaning of *The Privacy Act*;
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> (h) contravening this Act or any regulation under this Act, except where the Act or regulation provides a separate penalty for the contravention;
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> (i) assisting any person in committing a disciplinary default, or counselling or procuring another person to commit a disciplinary default.

The Original Complaint

[4] The police attended the residence of the Applicant to deal with a call about the well-being of the Applicant. They were aware that earlier that day, she had refused treatment from the Winnipeg Fire and Paramedic Service. The two Respondent officers interacted with her in that context.

[5] The Applicant alleges that the officers refused to investigate her concerns. She was concerned that she had been threatened by someone. That person or someone acting in concert with that person may have tried to harm her by running her down with a vehicle. She also alleges that the officers failed to investigate her concern that there may have been an attempt to poison her. The attempt related to an oil product which she had ordered, but which she believed to be adulterated with a toxic substance. She complained that the officers failed to take a sample of the product for analysis. She alleges that the officers insulted her by their comments. The comments included providing her with some information about a resource that existed in the community. There were additional allegations in the same vein.

[6] The officers responded that the circumstances had caused them to be concerned about her health. Her apartment was in disarray, including having garbage and clothing on the floor and insects in the air. They responded that they had

determined that the messages did not qualify as threats. The Applicant was unable to explain why she had rejected medical attention if she thought she was poisoned. There would not have been any reason to seize a sample of the oil. The officers had suggested that she might seek some help from a social service type of agency. The officers denied any abusive conduct.

The Decision of the Commissioner

[7] The Commissioner reviewed the original complaint and investigation with respect to whether there was evidence of an abuse of authority and, if so, whether further action was warranted. In that respect, the Commissioner was acting correctly, as the powers under the legislation allow a determination as to whether there was a breach of section 29 of the *Act*.

[8] The heading "abuse of authority" is followed by a number of included activities that can constitute an abuse of authority. The complaint of the Applicant does not fall into any other basis for a determination under section 29 of the *Act*.

[9] Ultimately, the Commissioner concluded that there was no evidence that would support an allegation of a breach of authority. The Commissioner declined to take any further action.

The Proceedings on the Section 13 Application

[10] The Applicant was initially self-represented. On the appearance date, she filed a considerable amount of material. Some of the material was from Iran and was presumably in Farsi. It also included translations of some of the material. The Applicant asked to be able to explain the material and describe why it was significant to the process.

[11] Counsel for the Respondents objected to the material being filed. It was pointed out, correctly, that the review of the Commissioner's decision could only be

made on the basis of the material before him. This was not an appeal de novo, where the process would start again. Any determination about whether the decision of the Commissioner was reasonable would necessarily be based only on the material before him.

[12] Notwithstanding the submission of counsel for the Respondents, I allowed the Applicant to file the material. In part, this was a reflection of the fact that she was self-represented. The legal process is complicated. Some latitude may be afforded to the self-represented litigant, as long as the determination is based on the proper application of legal principles. In part, it was based on the nature of the complaint. At the heart of her concern was that officers did not take her concerns seriously.

[13] The Respondent officers, through counsel, took the position that any review should be limited to only the material before the Commissioner. In my view, the proper approach is to limit my decision to the material before the Commissioner, but not immediately cut off a self-represented person who was acting in good faith and trying to explain herself. It was important to let her present her material to explain herself. There is always a balance needed, as we cannot be expected to give unlimited time to irrelevant matters. Listening can be more valuable than thinking of reasons why we should not have to listen.

[14] Later, after the material had been received, the Applicant was able to retain counsel. Mr. Bhangu was able to advance her position with sensitivity to the Applicant and a clear understanding of the law.

[15] The additional material demonstrated that the Applicant had a degree in computer software. She had experience in robotics. She was concerned that her refusal to do some work in robotics for the regime in her home country had led to possible retaliation. The information is not relevant to the determination of this

application. It was not before the Commissioner. However, it provides a context for her concern.

[16] At this stage, it is impossible to determine whether what she said to the officers was based on fact or on paranoia. Her educational background and the nature of the regime in her home country are both factors in the concerns that she raised with police. It is unclear what information about her background she provided to the officers at the time of the complaint. The observations made by the two officers lead them to assume that she may have been suffering from an illness. The other observations that they made, dealing with cleanliness and insects in her suite must have played a part in their assumption. Again, with the passage of time, that assumption cannot be verified.

[17] In these circumstances, it was appropriate to allow her to present her side of the story. The additional information cannot change the determination of whether the decision of the Commissioner was reasonable, based upon the information before him. However, sometimes people need to have their day in court. The additional material provided a context for her concerns for her safety. Whether those concerns are based on fact is not for this court to say. Whether the officers should have acted differently is not for the court to say.

[18] None of that material was before the Commissioner. He was unable to assess it. Even if he had had the material, the decision that he had to make was about a breach of authority. The quality of the service provided by the officers was not an issue that he could decide. At this stage, it is impossible to comment on the quality of the service. Difficult situations may result in a variety of responses. The function now is not to hear evidence about whether the Applicant was actually threatened in some way. The issue is only to consider whether the decision of the Commissioner was reasonable. If so, it must be upheld.

[19] The Supreme Court of Canada dealt with the standard of review of a decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9:

> [45] We therefore conclude that the two variants of reasonableness review should be collapsed into a single form of "reasonableness" review. The result is a system of judicial review comprising two standards _ correctness and reasonableness. But the revised system cannot be expected to be simpler and more workable unless the concepts it employs are clearly defined.
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> [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?
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> [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.
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> [48] The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at p. 596, *per* L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The*

> *Province of Administrative Law* (1997), 279, at p. 286 (quoted with approval in *Baker*, at para. 65, *per* L'Heureux-Dubé J.; *Ryan*, at para. 49).
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> [49] Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

[20] Subsequent decisions from the Supreme Court such as *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 have confirmed and expanded upon the test. The reviewing authority is not to assess the earlier decision against a standard of perfection.

[21] When consideration is given to the decision of the Commissioner in the context of the material before him, it is clear that his decision was reasonable. Accordingly, no further action should take place. The appeal from his decision is dismissed.

[22] The names of the Respondent officers are subject to a ban on publication pursuant to section 13(4.1) of the *Act*. No such provision applies to the name of the Applicant. The legislation is silent on the reasons for the non-publication of the names of the Respondents, but that is consistent with a desire to protect Respondents from unnecessary embarrassment. They will be Respondents if the Commissioner has declined to take action on the complaint. It is similar to a decision not to identify those who have been found not guilty. There is no provision to allow non-publication of the name of the Applicant. There is no public benefit to identifying a person by name in these circumstances. While openness is a central component of our justice

system, the release of the name of this Applicant does not advance any interest. Accordingly, she is referred to by her initials in this judgment. There is no ban on publication of her name. Any person who wished to do so is entitled to see her name in this pocket and publish it if they wish.

"Original signed by:"

Killeen, P.J.