IN THE MATTER OF: ***The Law Enforcement Review Act***
Complaint No. 2007/86

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

BETWEEN

B. S., Complainant	)	Self-represented
- and -	)	
Cst. J.C. **Cst. C.C.** **Cst. K.H.** **Cst. J.M.**	)	Paul McKenna Counsel for the Respondents and The Winnipeg Police Association
Respondents	)	Sean Boyd Counsel for L.E.R.A.
	)	Hearing Date: December 17, 2009 Decision Date: February 23, 2010

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

T.J. LISMER, P.J.

DECISION ON REVIEW

[1] The complainant applied pursuant to s.13(2) of ***The Law Enforcement Review Act***, C.C.S.M. c.L75 to have a Provincial Judge review the Commissioner's decision to decline from taking further action on a complaint in accordance with s.13(1). This statute will hereinafter be referred to as L.E.R.A.

[2] The Commissioner declined to take further action on the complaint, after what appears to be a complete and thorough investigation, on the ground under s. 13(1)(c) of L.E.R.A., that there is insufficient evidence supporting the complaint to justify a public hearing.

[3] The Commissioner, in a reporting letter dated January 27, 2009 addressed to B.S. and forwarded to her by registered mail, informed her, as the complainant, of his reasons for declining to take further action on the complaint on the ground that there is insufficient evidence supporting the complaint to justify a public hearing.

[4] In compliance with s. 13(1) of L.E.R.A., the Commissioner forwarded a copy of this reporting letter to each of the Respondent police officers and to Keith McCaskill, their Chief of Police.

[5] The complaint is that on or about the 14th day of April 2007, each of the Respondent police officers did abuse their authority by using unnecessary violence or excessive force, contrary to s. 29(a)(ii) of L.E.R.A.

[6] Permission was granted to the Commissioner to participate in the hearing, and he did do so.

[7] The Complainant participated in the hearing without counsel. She confirmed receipt of the Commissioner's 17 page reporting letter of January 27, 2009, and had the opportunity to review the copy of the Law Enforcement Review Agency file, which set out details of the investigation commencing with the original complaint to its conclusion, ending with the said reporting letter of the Commissioner dated January 27, 2009.

[8] The Complainant at the review hearing confirmed that she knew of no persons in addition to those interviewed who could provide any information of the events that led to the complaint. She described the area of her then residence at XXXXXXXXXXXX, Winnipeg, Manitoba as a densely populated residential area. No person came forward to her with any information about the Complainant and the police activity in the early morning hours of April 15, 2007. The Complainant also confirmed that she did not, on her own initiative, canvass her neighbors herself or arrange for anyone on her behalf to do so as to any potential witnesses who should be brought to the attention of the Commissioner for the purpose of interviewing them on this event.

[9] The Commissioner conducted a thorough investigation and interviews of every known witness or person involved. Not only were the police officers who

were present at the scene interviewed, but also several independent witnesses in addition to several interviews of the Complainant herself. These were:

1. L. S., daughter;
2. C. D.
3. F.R., son
4. R.T.
5. R. D.

[10] As well, the Commissioner perused the hospital records of Concordia Hospital where the Complainant advised medical personnel of her condition, plus the medical records of the S. F. Medical Centre, Dr. C.K., which indicate that she visited this clinic 10 May 2007 with a diagnosis of "neck pain". The Emergency Department Triage Form of Concordia Hospital notes her comments on her injury:

> "Last night was outside at 0330 because nephew was having a fight with his girlfriend. All of a sudden the police came and grabbed pt by the hair. Complaining of pain to back of head and neck pain."

At the Clinic these comments by her were noted:

> "Incident April 15 police came to her house to pick up C. B. grabbed by policeman who turned her around and pulled her out of the way. Still hurts since April 15."

[11] The descriptions of the suspect officer are fraught with discrepancies and inconsistencies as to height, hair colour, length of hair and body build.

[12] There are also significant discrepancies in the details of the application of force on the complainant by a police officer, as related by the witnesses interviewed and the Complainant.

[13] Each police officer denied recollection of any physical contact with the Complainant or observing any other officer at the scene making any contact with her.

[14] In the recent landmark case of Dunsmuir v. New Brunswick, 2008 S.C.C. 9 (*Tab 5)*, the full Supreme Court of Canada has rewritten the test on judicial review, limiting the standards to correctness and reasonableness.

4.1) In doing so, the Supreme Court attempted to define reasonableness in paragraph 47 in these words:

> "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."

[15] In paragraph 48, the Supreme Court in the Dunsmuir decision, supra, cautioned Courts and Judges in reviewing administrative decisions:

> "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' (Mossop, at p. 596, per L'Heureux-Dubé J., dissenting). We agree with David Dzyenhaus 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)."

[16] Upon a thorough review of a copy of the Law Enforcement Review Agency file, including the Commissioner's reporting letter of 27 January 2009, upon hearing the Complainant B.S. and counsel for the Respondents and counsel for the Commissioner at the hearing on 17 December 2009, I am satisfied and conclude that the decision of the Commissioner that there was insufficient evidence to take

further action on the complaint was rationally based on a reasonable assessment of the evidence.

[17] I find that the Commissioner did not err in declining to take further action.

DATED and sent this 23rd day of April, 2010.

original signed by

T.J. Lismer, P.J.