IN THE MATTER OF: ***The Law Enforcement Review Act*** Complaint #2010-114

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

B E T W E E N:

S.P.	)	Self-represented
Applicant	)	
	)	
- and –	)	
	)	
Cst. S. B.	)	Paul McKenna
Respondent	)	Counsel for the Respondents and.
	)	the Winnipeg Police Association
	)	
	)	Devon Johnston, Counsel for L.E.R.A.
Note: These reasons are subject to a ban	)	
on publication of the Respondents' names	)	Hearing date: October 31, 2012
pursuant to s.13(4.1).	)	Decision delivered: April 15, 2013

Chartier, A.C.J.

A. OVERVIEW

[1] The *Law Enforcement Review Act* (the "Act") provides an avenue for any citizen in Manitoba to complain about the way they have been treated by the police.

[2] In accordance with the Act, complaints are investigated by the Law Enforcement Review Agency (LERA). The Act stipulates the triggering of a screening mechanism when such a complaint is received, which gives the LERA Commissioner the power to dismiss certain complaints. This screening process, which has been upheld by this Court as a valid function, exists to prevent unnecessary public hearings. The screening process is predicated on the premise that the Commissioner, as an administrative decision maker, has the expertise to address a complaint made by a citizen.

[3] On June 22, 2010, Ms P. filed a written complaint with the LERA about the conduct of an officer who was involved in an incident which occurred in the City of Winnipeg on June 21, 2010. The complaint was investigated by the LERA.

[4] In a letter bearing date April 2, 2012 to Ms P., the LERA Commissioner determined that there was no basis for proceeding any further with the complaint. The LERA Commissioner decided that there was insufficient evidence to support the complaint and have the matter proceed to a public hearing.

[5] As was her right under the Act, Ms P. asked a judge of the Provincial Court of Manitoba to review the initial dismissal of her complaint. I heard submissions from Ms P. and counsel for the respondents and considered the written briefs filed on behalf of the officers together with the material filed by the LERA and by Ms P. (photographs) at the hearing. I am tasked with reviewing the April 2, 2012 decision of the Commissioner. I did not deal with the merits of the complaint.

B. NATURE OF COMPLAINT AND DETAILS OF DISMISSAL

1. Summary of the Evidence of S.P.

[6] Early on June 21, 2010, Ms P. left her home to drive her young daughter to school. Upon her return she entered the house through the back door. Almost immediately thereafter a uniformed police officer kicked in her back door and demanded that she get out of the house. Angry, he grabbed her by the arm and threw her onto the ground on her stomach. Ms P. screamed that she was pregnant and the officer was heard saying that he "hates natives".

[7] The officer then grabbed Ms P. by her shoulder and hair and escorted her to his unmarked cruiser, had a female officer conduct a "pat down" and then took Ms P. directly to a holding cell.

[8] Ms P. was left in the holding cell for approximately one hour without knowing anything regarding her predicament. Ultimately, and only after asking, she was given an opportunity to speak with a lawyer.

[9] Ms P. was ultimately released at 11:00 a.m. on said morning.

2. Summary of the Evidence of the Officers

[10] The officer's version of the events was, for the most part, diametrically opposed to the series of events as described in Ms P.'s complaint.

[11] The arresting officer communicated to the LERA that he was driving a grey unmarked cruiser, with emergency equipment.

[12] He states that Ms P.'s car had dark tinted windows. As a result of this observation, the officer activated his lights and siren. Ms P. continued driving at approximately 40 kms/hr, slowing for the two way stop sign, going through it at approximately 20 kms hr and making no attempt to stop. Ms P. then made a right hand turn to go east. As the officer reached for his radio, Ms P. pulled into the rear of 229 Perth, and came to a stop.

[13] The officer pulled in behind Ms P.'s vehicle as she was getting out of the car; his lights and siren were still activated. He deactivated the siren, and yelled at Ms P. to stop. She looked at the officer and ran into the rear of the house. As the officer ran up to the back door, he heard it lock. He tried the door, confirmed it was locked, and forced the door, shattering the frame. He entered the house, to see Ms P. standing in the kitchen looking about the counter. Concerned about weapons he grabbed Ms P. by her left arm and attempted to pull her from the house, at which time she grabbed onto something and resisted. He pulled hard, forcing her out the door, and pushed her to the ground face first by locking her left arm and shoulder. Ms P. continued to resist, until handcuffed. While being handcuffed, she stated, "YOU CAN'T DO THIS, I AM

FIVE MONTHS PREGNANT". He escorted Ms P. to the back alley and observed that Sgt. I. was out back of the District 3 Police station, and decided that the best course of action was to escort her to the station by walking her the 150 meters. She was placed in a holding room and medical attention was declined.

[14] The arresting officer denies that anything was said about natives prior to Ms P. bringing it up at the police station when she said, "You must hate natives." He responded, "No, as a matter of fact my wife is aboriginal."

[15] Once Ms P. was at the police station Cst. B. returned to her car where the tint on her windows was measured and he ensured that the back door of her house was secured. Her vehicle registration was found to have expired on June 10, 2010.

[16] He then returned to the District 2 Station where he gave her the opportunity to contact legal counsel.

[17] Offence Notices under the Highway Traffic Act were prepared, served and Ms P. was released.

[18] Ultimately, on review of the matter, the Commissioner was of the view that the evidence supporting the complaint was insufficient to justify taking the matter to a public hearing. The commissioner concluded that, in light of all of the circumstances, "…..the use of violence or force was neither unnecessary nor excessive."

C. THE LEGAL FRAMEWORK OF A REVIEW

[19] Section 29 of the *Law Enforcement Review Act* outlines how an officer can commit a "disciplinary default". The disciplinary defaults as alleged by Ms P. against the officer in question are:

- Kicked her door in;
- Used excessive force;
- Was racist;
- Would not her call a lawyer for more than an hour;
- Cuffed her, injured her;
- Did not read my rights;
- Threw the summons at her and told her to go home.

[20] Section 13 of the *Law Enforcement Review Act* governs this process. The onus is on Ms P. to satisfy me that the Commissioner erred in declining to take further action. I have outlined the nature of the complaint and the details of the Commissioner's dismissal.

[21] The Supreme Court of Canada case in *Dunsmuir v. New Brunswick,* [2008] S.C.J. 9, governs how review processes such as this are to proceed. The *Dunsmuir* decision sets out the test to be applied in these types of matters. The Supreme Court of Canada has streamlined the implementation of a judicial review process opting for what it refers to as a contextual approach. Two standards of review apply. The first is the principle of "correctness" and the second is "reasonableness".

[22] This type of analysis was applied by Judge Joyal (Manitoba), as he then was, when he examined the role of the Provincial Judge in this type of review in an earlier decision in *Law Enforcement Review Act* Complaint No. 2004/172. He outlined that the most demanding standard of review to be imposed upon a Commissioner in a s.13 Review, is the standard of "correctness". That standard is to be imposed only in cases where the Commissioner has committed an identifiable jurisdictional error.

[23] A jurisdictional error can be committed if the Commissioner failed to act as required by his jurisdiction or failed to act within the limits of his jurisdiction by applying an incorrect test or by misapplying the right test in reaching his decision. I am of the view that no jurisdictional errors have occurred in this case.

[24] That having been concluded, I must now apply the standard of "reasonableness", as understood by the *Dunsmuir* decision. Reasonableness is a standard that recognizes that certain questions that come before an administrative tribunal such as the LERA do not lend themselves to one specific or particular conclusion. Instead, the analysis of a complaint such as Ms P.'s complaint can, and often does, give rise to more than one, possible, reasonable conclusion.

[25] The Supreme Court in *Dunsmuir* succinctly defines reasonableness in the context of a judicial review:

> 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.

[26] The standard of reasonableness is not as exacting a standard as correctness. Joyal P.J., in his decision referenced above, stated the following regarding the role of the reviewing judge when examining a decision of the LERA Commissioner:

> ... given the limited but still necessary weighing of the evidence that must occur on the part of the Commissioner, the reviewing judge can seldom categorically say the Commissioner was right or wrong. It is for that reason that absent jurisdictional error, <u>if</u> the Commissioner's conclusion is based on a <u>reasonable assessment</u> of the evidence and if that conclusion is <u>one</u> of the <u>rational</u> conclusions that could be arrived at, the Commissioner's determination is entitled to deference and it ought not to be disturbed.

D. DECISION ON REVIEW

[27] I must now answer the following question: Did the Commissioner assess the evidence reasonably? In other words, did the Commissioner articulate his reasons in a transparent, intelligible and rational manner?

[28] It is important for Ms P. to know that other people, herself included, may draw an equally supportable conclusion from the facts and circumstances in question. I may have reached another, rational conclusion. That is not my function. 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. I have concluded that he did.

[29] I agree with Judge Preston's comment, in his decision in the LERA complaint no. 2005/186: Unlike a judge at the conclusion of a preliminary hearing in a criminal matter, a LERA Commissioner can and does possess a limited, but significant power to weigh evidence gathered by a LERA investigation. The Commissioner is mandated through the legislation to weigh all of the evidence received through the investigation in order to determine its sufficiency. This includes the weighing of sometimes contradictory evidence to determine if there is a reasonable basis to proceed with a public hearing. If the Commissioner was not allowed such a power, each and every time any controversial issue or any credibility issue arose, the Commissioner would be obliged to refer this matter to a Provincial Court Judge.

[30] The Commissioner's conclusion was, in my view, one that is within the range of acceptable, rational conclusions that is defensible in respect of the evidence. It is a reasonable outcome, a rational conclusion the Commissioner was entitled to make. The jurisdiction of the legislation is not to conduct criminal investigations or to investigate the quality of investigations, because those are service or quality issues. The jurisdiction it does have is to investigate complaints of police conduct.

[31] As indicated above, my function is not to pass judgment on the quality of the initial police investigation, but to decide whether the Commissioner erred in his conclusion. I cannot say that he assessed the complaint unreasonably. He drew a rational conclusion on the merits of the complaint. I may not have drawn the same conclusion. That, however, is not my role in the context of this review. As long as I conclude that the Commissioner has properly assessed the complaint, has done so reasonably, and has drawn a rational conclusion, I must not interfere. I will not, therefore interfere with his decision.

"Original signed by:"
Michel L. J. Chartier, A.C.J.