IN THE MATTER OF: *The Law Enforcement Review Act*, Complaint #2010-154

AND IN THE MATTER OF: An Application pursuant to s. 13 of *The Law Enforcement Review Act*, R.S.M. 1987, c. 175

BETWEEN:

F.J.,	)	In Person,
Complainant	)	Self-Represented
	)	
	)	
- and -	)	
	)	
	)	
Cst. C.K. and Cst. B.F.,	)	Paul McKenna,
Respondents	)	Counsel for the Respondents
	)	
	)	Devin Johnston,
	)	Counsel for L.E.R.A.
	)	
	)	February 6, 2013
	)	

NOTE: These Reasons are subject to a ban on publication of the Respondents' names pursuant to s. 13(4.1)(a) of *The Law Enforcement Review Act.*

Curtis P.J.

[1] Mr. J. made a complaint pursuant to *The Law Enforcement Review Act* (the Act), C.C.S.M. c. L75 regarding his interaction with officers of the Winnipeg Police Service. The Commissioner, who receives and reviews such complaints, had the matter investigated. In the end he advised Mr. J. that a number of issues contained in his complaint were quality of service issues that are not within his

jurisdiction to deal with under the Act. He confined his assessment as to whether or not there had been an abuse of authority and/or excessive use of force by one of the officers during Mr. J.'s contact with two officers on August 13, 2010 at the Public Safety Building. He wrote to Mr. J:

> On review of all the information available, I am not satisfied that the evidence supporting your complaint is sufficient to justify taking this matter to a public hearing. Therefore, pursuant to subsection 13(1)(c) of the Law Enforcement Review Act, I must decline from taking any further action on the matter.

[2] Mr. J. applied to have the Commissioner's decision reviewed by a provincial judge pursuant to s. 13(2) which reads:

> **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.

[3] The matter came on for review before me. Section 13(4) of the Act puts the onus on the complainant to establish that the Commissioner erred in not referring the matter to a public hearing:

> **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***. (emphasis added).

[4] Mr. J. represented himself at the review. He initially asked for an adjournment so he could have the opportunity to read and understand the briefs submitted by counsel for the respondent officers and the Commissioner. The Court noted those briefs were submitted by counsel *in anticipation* of what they thought he would argue in his submission (Mr. J. did not file a legal brief one month in advance of the review as he had been instructed by the judge who had set the review hearing date). He also wanted to research *Charter* issues. The request for adjournment was denied in view of the fact a year had passed from his initial request for time to prepare, as well he had made no written submissions as directed. (The original date for review had been set for January of 2012, but was adjourned by consent to August 2012 due to medical issues for counsel.) I heard oral submissions from Mr. J. and counsel.

[5] As noted above, it is up to the complainant, in this case Mr. J., to point to where the Commissioner erred in declining to put the complaint to a public hearing.

[6] Section 13(1) of the Act provides:

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.

[7] Section 29 identifies disciplinary defaults which are within his jurisdiction to address and the Act sets them out as follows:

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;

> (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;
>
> (g) violating the privacy of any person within the meaning of *The Privacy Act*;
>
> (h) contravening this Act or any regulation under this Act, except where the Act or regulation provides a separate penalty for the contravention;
>
> (i) assisting any person in committing a disciplinary default, or counselling or procuring another person to commit a disciplinary default.

[8] I reproduce s. 29 of the Act primarily to reinforce that these are the areas to which the Commissioner's jurisdiction and action is limited. Mr. J. provided a 22-page handwritten letter of complaint (including attachments). After reviewing it I agree with the Commissioner that many of the concerns Mr. J. raises are quality of service issues rather than s. 29 issues, and are therefore outside of his jurisdiction. The concerns expressed, among others, revolve around the nature of police investigation and response to his complaint of assault by his neighbour with whom there appears to have been a longstanding dispute about a fence in relation to their properties.

[9] The Commissioner identified potential s. 29 concerns in Mr. J.'s complaint arising from his interaction with police at the Public Safety Building on August 13, 2010. Based on the information provided in the complaint, he completed an investigation which included medical information with respect to an injury described by Mr. J. His analysis and conclusion were communicated to Mr. J. in a thorough and detailed seven-page letter on April 12, 2011. His assessment was that there is insufficient evidence to support a public hearing.

[10] Mr. J. disagrees with the Commissioner's conclusion. At the hearing of the review of the Commissioner's decision, Mr. J. was asked to identify where the Commissioner had made a mistake in coming to the conclusion he had. Mr. J. reiterated a number of things which had been in his original letter of complaint and referenced the Constitution, the Bill of Rights and the *Charter* (of Rights and Freedoms). He did not identify anything in particular that was inaccurate or in error in the Commissioner's decision, or how he came to it, other than he was wrong.

[11] The standard I must deal with when reviewing a decision of the Commissioner's under s. 13 is that of reasonableness. In other words, was the

Commissioner's conclusion, based on the information he had, one which is rationally supported by the evidence available to him? It does not necessarily mean it was the *only* conclusion which could be reached in the circumstances, or matter whether it was the conclusion I might have drawn. But if it was a conclusion which could reasonably be made, that decision is owed deference on this type of review.

[12] There has been an evolving body of case law in Manitoba with respect to *The Law Enforcement Review Act* vis-a-vis the standard of review. (see: R.P.M. v. Cst. C. and Cst. W., LERA Complaint #5643 (Chartier, J. – February 12, 2004); M.S. v. Cst. B. and Cst. D., LERA Complaint #2004-172 (Joyal, J. – June 21, 2006); B.J.P. v. Cst. G.H., Cst. B.Z. and Sgt. G.M., LERA Complaint #2005-186 (Preston, J. – November 14, 2008); A.M. v. Cst. D.R., Cst. G.P., Cst. J.M. and D/Sgt. R.L., LERA Complaint #2005-307 (Preston, J. – July 17, 2009); K.A., S.J. v. Cst. C.P. and Cst. P.B., LERA Complaint #2006-233 (Chartier, A.C.J. – March 8, 2010); B.L. v. P/Sgt. E.R., Cst. W.C. and Cst. J.B., LERA Complaint #2011-26 (Chapman, J. – October 11, 2011)). The Supreme Court of Canada looked at the definition of reasonableness in *Dunsmuir v. New Brunswick*, 2008 SCC 9, where they observed at paragraphs 47-48:

> [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.
>
> [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 CanLII 164 (SCC), [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).

[13] The Legislature, in passing *The Law Enforcement Review Act*, created an administrative body with a commissioner whose mandate is to receive and screen complaints. Section 13(1)(c) provides if he is satisfied "that there is insufficient evidence supporting the complaint to justify a public hearing", he must decline to take further action (i.e., send it to a hearing).

In order to carry out this function, as Preston J. wrote in A.M. v. D.R. (et al) July 17, 2009 at paragraph 35:

> It is also important for... the public to know that the LERA Commissioner does possess a limited but significant power to weigh the evidence gathered during the course of the LERA investigation. *The Law Enforcement Review Act* mandates the Commissioner to weigh all the evidence and to draw a conclusion on its sufficiency. This includes the [limited] weighing of disputed evidence in order to determine its sufficiency. If that were not the case, each time there was a contradiction on any fact in issue, the matter would have to proceed to hearing before a provincial judge.

[14] An example of that limited weighing of evidence here is that one of the complaints made is the officers failed to/refused to give their badge numbers. The officers denied this kind of refusal, noting they were in full uniform, their badges not hidden. The written complaint identifies the officers by badge numbers.

[15] The Supreme Court in *Dunsmuir*, *supra*, stated at paragraph 49:

> [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.

[16] The Commissioner gave a detailed response to Mr. J. His decision was one he was entitled to reach on the evidence he had. Mr. J. failed to discharge the onus (which was on him), to show where and how the Commissioner erred in coming to his decision. I am therefore not prepared to interfere with the Commissioner's decision.

[17] Having made the decision I have, I note that Mr. J. filed a Notice of Motion objecting to the publication ban on his way to the courtroom for the hearing of this matter on August 22, 2012 (The ban was imposed by Judge Sandhu July 27, 2011 pursuant to s. 13(4.1). In fact he was late for court because he was doing so. The Notice of Motion is entitled "Notice of Application and Charter/Constitutional issue" (with respect to this L.E.R.A. application). At that time he had given/served no notice to anyone as required by the *Constitutional Questions Act*, and the motion was not "before the court". The Court could not deal with a motion which was not before it.

[18] As indicated above, the Court will not interfere with the Commissioner's decision. The application is dismissed.

[19] Section 13(4.1)(b) of the Act provides:

> If the application is dismissed, order that the ban on publication of the respondent's name continue.

[20] It is therefore ordered that the ban on publication of the Respondents' names shall continue to be in full force and effect.

Original signed by Judge K. M. Curtis

P.J.