IN THE MATTER OF: ***The Law Enforcement Review Act***
Complaint #2013/153

AND IN THE MATTER OF: **An Application pursuant to s. 17 of *The Law Enforcement Review Act,* C.C.S.M., c.L75.**

BETWEEN:

[redacted],	)	Ms. Kate Henley,
	)	
Complainant,	)	
-and -	)	
	)	
[redacted]	)	Mr. P. McKenna
	)	Counsel for the Respondent.
Respondent.	)	
	)	
-and -	)	
	)	
THE LAW ENFORCEMENT REVIEW AGENCY	)	Mr. D. Johnston
	)	Counsel for the LERA Commissioner
	)	
	)	Decision date: September 18, 2019

HEINRICHS, P.J.

INTRODUCTION

[1] In the Fall of 2013, [redacted] ("the Complainant") filed a complaint with the Law Enforcement Review Agency ("the Agency"), concerning an incident that happened with Constable [redacted] ("the Officer") of the Winnipeg Police Service on September 5, 2013 ("the Incident"). The matter is now set for a section 17 Law Enforcement Review Act ("the Act") hearing for October 29-31, 2019. Counsel on behalf of the Officer has made a preliminary application for a declaration that this

Court has no jurisdiction to deal with the complaint - due to a fundamental breach of section 7(2) of *the Act*. That section states the following:

> a. 7(2) Upon receiving a complaint, the Commissioner shall, as soon as it is practicable, provide the member or extra-provincial police officer who is the subject of the complaint with a copy of the complaint.

[2] This is my decision with respect to that application.

THE COMPLAINT PROCESS

[3] Prior to acting on this section, the LERA Commissioner needs to receive a proper complaint. Section 6 (3) requires that every complaint must be in writing signed by the complainant and must set out the particulars of the complaint. The Agency has a one page form, which can be completed, in order to fulfil this requirement. In this case, the Complainant set out his complaint in an email sent to the Agency on September 30, 2013. As this did not meet the requirements of the Act, Duane Rohne, the LERA investigator assigned to this matter, requested a signed copy of the complaint, by way of an email reply on October 7. The properly completed and signed complaint was handed in at the Agency office the following day, October 8, 2013. Duane Rohne ("the Investigator") acknowledged receipt of the properly signed complaint the same day, by way of an email to the Complainant.

WHO WAS THE POLICE OFFICER, THE SUBJECT OF THE COMPLAINT?

[4] In the original email and subsequent signed complaint, the Complainant did not identify the Officer by name, but clearly explained that the Officer had badge [redacted]. This is a unique identifier for Constable [redacted] of the Winnipeg Police Service.

The Investigator could have ascertained which officer had this badge number at any time, even though he noted the Officer's name in his Occurrence Report, dated December 2, 2013 for the first time, when he wrote, "The officer appears to be Cst. [redacted] (Badge [redacted])."

WHEN WAS THE OFFICER PROVIDED WITH A COPY OF THE COMPLAINT?

[5] The LERA Commissioner's letter to the Officer, which sets out that a complaint has been made about him - and attaching a copy of the complaint – is dated April 22, 2014. The letter is addressed to the Officer [redacted], care of a Winnipeg Police Service box number. Counsel agree that the letter was sent via inter-departmental mail. Presumably, the Officer would have picked the letter up the next time he was at work, but it is unknown what day he first saw the letter and read the complaint. However, even if he received the letter on April 22, this is 195 days – 6 ½ months - after the LERA office received the signed complaint.

WHAT HAPPENED IN BETWEEN THESE TIMES

[6] During this six month interval, the Investigator met with the Complainant and corresponded with him as the investigation progressed. He made file notes and sent out emails. Additionally, the Investigator interviewed the witnesses that the Complainant had advised were present during the Incident. It appears that there are at least 12 separate days between October 8, 2013 and February 24, 2014 when file notes were made, emails were sent, phone calls were made or interviews were conducted by the Investigator.

IS SECTION 7 (2) MANDATORY OR DIRECTORY?

[7] Counsel for the LERA Commissioner has submitted that the section of the Act which states that the Commissioner "shall" provide the officer, who is the subject of the complaint, with a copy of it "as soon as is practicable" is directory, not mandatory. Therefore, even if there is a demonstrated failure to comply with this section, it is not fatal; the complaint should only be dismissed if the officer can demonstrate actual and significant prejudice, as a result of the delayed notification.

[8] In making this argument, a number of cases were referred to, including:

1. *The Royal Newfoundland Constabulary Public Complaints Commission v. McGrath,* 2002 NL CA 74 (CanLII), where Roberts J.A. observed that:

> the question of whether a particular statutory provision containing the word 'shall' is mandatory or directory does not always have a ready reply.

He then quoted, with approval, from the *Stephenville Minor Hockey Association* case from his own court where Morgan, J. A. had stated that:

> It is impossible to lay down any general rule for determining whether a statutory provision is mandatory or directory. In each case regard must be had to the subject-matter and the importance of the provision to the general object intended to be secured by the Act.

2. *Teskey v. Law Society of British Columbia,* (1990) Can LII 8033 (BC SC), where Shaw, J. stated:

> As I read these cases, a statutory or regulatory requirement may be read as directory rather than mandatory if the enactment relates to the performance of a public duty, the failure to perform that duty would cause serious inconvenience to persons who have no control over those who are entrusted with the duty, and this would not promote the main objective of the enactment. Other considerations are whether or not there is a penalty provided for non-performance of the requirement, whether the requirement is in a regulation but not in the enabling statute, and what if any prejudice there is to persons who may be affected by the failure to fulfill the requirement. Each case must be decided on the nature of the particular requirement and the statutory and regulatory setting in which it is found.

[9] These and other cases referred to in the Commissioner's brief focus on the objectives of these legislative schemes which deal with public complaints and on the questions relating to any prejudice that may occur to the person or persons who are the subject of the complaint.

[10] Counsel for the Officer, however, argued that this is irrelevant, if the correct interpretation of the *Act* is that the section 7(2) wording is mandatory and imperative.

[11] In support of this argument, he noted the following:

1. The decision of the Supreme Court of Canada, in the Manitoba Language Rights Case, *Reference Re Language Rights under Section 23 of the Manitoba Act, 1870, and section 133 of the Constitution Act, 1867*, 1985 CarswellMan 183, 1985 CarswellMan 450, [1985] 1 S,C.R. 721, [1985] 4 W.W.R. 385, [1985] S.C.J. No. 36, 19 D.L.R. (4th) 1, 31 A.C.W.S (2d) 299, 35 Man. R. (2d) 83, 59 N.R. 321, J. E. 85-603. Paragraph 30 reads as follows:

> As used in its normal grammatical sense, the word "shall" is presumptively imperative: see Odgers' Construction of Deeds and Statutes, 5th ed. (1967), at p. 377; Interpretation Act, 1867 (Can.), c. 1 s. 6(3); Interpretation Act, R.S.C. 1970, c. 1-23, s. 28 (" 'shall' is to be construed as imperative") it is therefore incumbent upon this court to conclude that Parliament, when it used the word "shall" in s. 23 of the Manitoba Act, 1870 and s. 133 of the Constitution Act, 1867, intended that those sections be construed as mandatory or imperative, in the sense that they must be obeyed, unless such an interpretation of the word "shall" would be utterly inconsistent with the context in which it has been used and would render the sections irrational or meaningless: see, e.g. *Re Pub. Fin. Corp. and Edwards Garage Ltd.* (1957), 22 W.W.R. 312 at 317 (Alta. S.C.).

2. This is also what the legislation on definitions of words in Manitoba statutes confirms. Section 15 of the *Interpretation Act*, C.C.S.M. c. I 80 states:

> In the English version of an Act or regulation, "shall" and "must" are imperative and "may" is permissive and empowering.

3. MacInnes, J. in *Apostle v. Robson et al*, [1996] M.J. No. 543, (1996) 114 Man. R. (2d) 240, 67 A.C.W.S. (3d) 388 (Q.B.) stated the following with respect to the use of the word "shall" and time limitations in another section of the Act:

> In my opinion, the law is clear that limitation or time provisions of the kind set forth in s. 6 (3) of the Act are mandatory and that particularly where, as here, the private rights of the applicant are involved, compliance is a necessary statutory prerequisite to jurisdiction.

4. Provincial Court Judges, in a number of *Law Enforcement Review Act* cases, have ruled that the language in the Act is mandatory:

a) Rubin, J. in LERA Complaint No. 3238 (J. N. v. Sgt. J. F., Sgt. W. H., Cst. S. B. & Cst. G. M.)
b) Minuk, J. in LERA Complaint No. 5125 (W. L. v. Sgt. W. M., Cst. J. S., & Cst. B. B.)
c) Elliott, J. in LERA Complaint No. 5688 (D. N. v. Cst. D. T. & Cst. D. L.)
d) Lismer, J. in LERA Complaint No. 6374 (G. D. v. Cst. J. N., D/Sgt. D. K., Cst. B. F., Cst. P. O., Cst. T. H., & Cst. F. W.)

[12] Counsel for the Commissioner noted that I, as a Provincial Court Judge, hearing a matter under the Act is doing so as a *persona designata* and not as a court of law, pursuant to section 1(2), meaning that these decisions would not be binding on me; that I am free to come to a different conclusion. These decisions, however, have come to the correct conclusion: "shall" in this section of this Act is a mandatory and imperative directive.

WAS THIS "AS SOON AS PRACTICABLE"?

[13] Judge Lismer, in LERA Complaint No. 6374, explained why it is important that an officer be given notice of a complaint as soon as possible:

> The requirement of notice as soon as practicable provides an essential protection of police officers and it gives them an opportunity to deal with the allegations, including the right to counsel, the right to request particulars and the ability to deal with the allegations ad consult with counsel when the facts are fresh in their minds and have recollections independent of any notes made in accordance with their practice and training.

[14] The complaint against this Officer, Constable [redacted], is a good example of why this is crucial. There appear to be discrepancies between what was contained in the initial complaint, what the Officer wrote in his notes made on the date of the

Incident, what was contained in his Use of Force Report and what both he and the Complainant testified to at the traffic ticket trial in October, 2014. To learn, more than six months after the Incident – which in the Officer's mind may well have been nothing other than a routine traffic stop - that there will be other details of that stop that he will need to recall in order to respond to a formal complaint against him as a police officer, is an example of what concerned Judge Lismer. Requiring that notice be given "as soon as is practicable" is a safeguard against this.

[15] For six months - between October 8, 2013 and April 22, 2014 - the Commissioner, through his Investigator, was actively working on this complaint: emails sent back and forth, telephone calls made and received, file notes written and interviews conducted. How could it not have been "practicable", or in other words, "feasible" or "capable of being done or accomplished", in the midst of all of this activity, to send a letter with a copy of the complaint attached? Obviously, it could have been done. For some unknown reason, it was missed or overlooked.

CONCLUSION

[16] The Complainant was entitled to expect that the Commissioner would handle his complaint in a thorough, expeditious and timely manner. It appears that the Investigator did substantial work in moving this complaint along. Unfortunately for the Complainant, one of the requirements for this complaint to proceed to a hearing was not met. In this case, the Commissioner failed to provide the Officer with a copy of the complaint "as soon as is practicable". "Shall" is mandatory language in the section and it was not complied with. As a result, I declare the following:

1) The Law Enforcement Review Agency no longer has jurisdiction to deal with LERA complaint No. 2013-153 ([redacted] v. Cst. [redacted].).
2) The Law Enforcement Review Agency has no jurisdiction to refer this complaint to a Provincial Judge for a hearing on the merits, pursuant to section 17 of the Act.
3) The Provincial Court Judge has no jurisdiction to deal with the complaint or to conduct a hearing on the merits, and the hearing set for October 29 - 31, 2019 will not proceed.

Original signed by:

Judge R. Heinrichs