

THE PROVINCIAL COURT OF MANITOBA

IN THE MATTER OF: The Law Enforcement Review Act
Complaint No.: 2016/114

BETWEEN:) Mr. D. Johnston
) for the LERA
) Commissioner
[REDACTED],)
Complainant,) Mr. P. McKenna
- and -) for the Respondents
) Mr. [REDACTED]
) in person
CONSTABLE [REDACTED])
and [REDACTED])
DETECTIVE [REDACTED],)
) Judgment delivered
Respondents.) May 1, 2017

<p align="center">RESTRICTION ON PUBLICATION Pursuant to Section 13(4.1) of the Law Enforcement Review Act there is a ban on publication of the Respondents' names.</p>

1 GARRECK, P.J. (Orally)
2 The Law Enforcement Review Act which I'll refer
3 to as LERA is the governing legislation that sets out the
4 authority for complaints to be filed by any citizen of
5 Manitoba about the manner in which police have treated
6 them.
7 The complaints are investigated by the Law
8 Enforcement Review Agency, there's a screening mechanism

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1 which gives the Commissioner the power to dismiss certain
2 complaints which are determined to have no merit. The
3 screening process upheld by this court as a valid function
4 of the LERA Commissioner exists to prevent unnecessary
5 public hearings.

6 The screening process is based on the premise
7 that the Commissioner, as an administrative decision maker,
8 has the expertise to address a complaint made by a citizen.

9 My authority and jurisdiction as to what if any
10 action I can take sitting as a judge reviewing the
11 Commissioner's decision is under Section -- sorry,
12 reviewing the decision under Section 13(2) is limited by
13 the Act notwithstanding Mr. [REDACTED] urging me to set a
14 precedent here.

15 Further, as Judge Guy said in LERA complaint
16 2012/189 which was at tab 10 of the respondent's brief, and
17 I'm quoting:

18
19 First of all --

20
21 This is from Judge Guy's decision --

22
23 I think it is important to note
24 what the court in the context of
25 the legislation can and cannot
26 deal with. In my view it is not
27 the court's role to comment upon
28 the adequacy or inadequacy of the
29 legislation. The legislation
30 falls within the purview of the
31 legislative assembly. For
32 example, whether the legislation
33 should have more mandatory
34 procedural requirements and less

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1 discretion resting with the
2 commissioner is up to the
3 legislature.
4

5 Following up on what Judge Guy has said, that was
6 the end of the quote, following up on what Judge Guy has
7 said, for example, it is not up to me to change the fact
8 the legislation does not address appointing counsel for the
9 complainant as Mr. [REDACTED] has asked me to.

10 The Act also specifies the burden is on Mr. [REDACTED]
11 to satisfy me that the commissioner has made a mistake in
12 declining to take any further action.

13 On a review to a provincial court judge, it is
14 important to determine if a jurisdictional error is being
15 alleged on the part of the commissioner and if so the
16 standard of review is one of correctness. If there was no
17 jurisdictional error than the standard review is one of
18 reasonableness.

19 In relation to this standard of reasonableness,
20 Judge Joyal in LERA complaint 2004/172, which is at tab
21 five of the brief, filed by the Commissioner's counsel
22 said:

23
24 That absent jurisdictional error,
25 if the Commissioner's conclusion
26 is based on a reasonable
27 assessment of the evidence and if
28 that conclusion is one of the
29 rational conclusions that could be
30 arrived at, the Commissioner's
31 decision is entitled to deference
32 and it ought not to be disturbed.

33
34 End of the quote.

1 Mr. ██████ filed a written complaint dated August
2 1, 2016 with the LERA Commissioner about the conduct of
3 five officers at the 2321 Grant Service Centre. And he
4 also complained at the same time against the coordinator of
5 the vulnerable person's unit, Sergeant ██████.

6 The details of his complaint are set out at pages
7 one through nineteen of the file. I do not intend to
8 repeat all the details but I have reviewed them very
9 carefully several times along with the written submissions
10 filed by Mr. ██████ and counsel for the officers along with
11 the submissions before me today.

12 Briefly, with respect to the five officers from
13 the district two Grant Service Centre, Mr. ██████ complained
14 when he went to the service centre on July 14th, 2016 to
15 drop off a letter for the inspector. It took about 25
16 minutes for him to be able to drop off the letter and he
17 alleges disciplinary defaults under Section 29 of The Law
18 Enforcement Review Act occurred while he was trying to
19 leave the letter.

20 The specific details of his complaint regarding
21 the five officers are included in the Commissioner's file
22 that is before me on this review.

23 Mr. ██████ also complained in the same written
24 document and materials which was handled at the same time
25 by the Commissioner in his review of these matters about
26 Sergeant ██████ with whom Mr. ██████ had spoke to on the phone
27 about elder abuse and followed up with a letter requesting
28 information. Mr. ██████ says Sergeant ██████ knew that he was
29 a senior who has been in the mental health system and
30 Sergeant ██████ failed to provide him with the information
31 requested or to contact him.

32 The investigator for the Commissioner, that is
33 Mr. Kudar (phonetic) spoke to a witness, Mr. ██████
34 (phonetic) the friend with whom Mr. ██████ attended to the

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1 Grant station on July 14th, 2016 and his notes of that
2 interview formed part of the Commissioner's file.

3 The Commissioner's investigator assisted in this
4 matter and provided a recommendation to the Commissioner by
5 way of a draft letter to Mr. [REDACTED]. The Commissioner is
6 entitled by the Act to employ others to assist in the
7 investigation of a complaint. This includes drafting
8 letters and making recommendations. File note dated August
9 22nd, entered by Commissioner Churley (phonetic), makes
10 clear that he conducted his own review of the information
11 gathered by the investigator and satisfied himself before
12 signing the draft letter to Mr. [REDACTED] dismissing the
13 complaint that it was outside the scope of the Act.

14 The Commissioner's conclusion is contained in the
15 letter dated August 22nd, 2016 to Mr. [REDACTED]. The letter is
16 just over four pages long and sets out in detail the basis
17 for the conclusion that the complaint is outside the scope
18 of the Act. The Commissioner explains The Law Enforcement
19 Review Act is for disciplinary defaults as defined under
20 Section 29 of the Act. And LERA does not investigate
21 complaints involving the quality of service provided by the
22 police. Matters involving the quality of service provided
23 by the police are the responsibility of the chief of
24 police. The Commissioner's letter sets out the precise
25 details of the complaint made by Mr. [REDACTED] and includes a
26 review of all details included in Mr. [REDACTED] complaint and
27 particulars of the complaint against the five officers and
28 Sergeant [REDACTED]. He did not include the actual documents
29 Mr. [REDACTED] had filled out but the Commissioner has included
30 every point made by Mr. [REDACTED] in those documents in the
31 four-page letter.

32 The Commissioner sets out the details from Mr.
33 [REDACTED] that were given to the investigator and includes
34 all information provided. He summarized the nature of the

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1 complaint and the disciplinary defaults that are alleged
2 under Section 29 that Mr. [REDACTED] says he used Section 29 to
3 set out his complaint and why he believes the officer's
4 behaviour falls under one of the list of criteria under
5 Section 29 for a disciplinary default. However, it is the
6 job of the Law Enforcement Review Agency to interpret
7 Section 29 and decide if the alleged complaint does
8 actually rise to the level of being a disciplinary default.
9 It is not simply because someone says it is a default in
10 their complaint that it is. The Commissioner is the one
11 who has the task of interpreting and assessing whether the
12 facts alleged actually amount to a default under the
13 jurisdiction of the Act.

14 The Commissioner concluded that the complaint in
15 this case did not, in his interpretation, fall under
16 Section 29.

17 The Commissioner explains, quote:

18

19 The officers explained to you they
20 were unwilling to sign for the
21 envelope as they did not know what
22 was inside and you would not let
23 them open it as it was not meant
24 for them. You indicated the
25 officers made comments indicating
26 their concerns centered on the
27 envelope possibly containing
28 explosives. Given recent
29 developments in Winnipeg, the
30 officers are rightly being
31 cautious in accepting packages,
32 envelopes, that in fact could have
33 contained dangerous articles such
34 as explosives.

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1 You have not indicated the
2 officers spoke to you
3 unprofessionally, rudely and
4 asking you if you were threatening
5 the female officer would not be
6 considered unprofessional given
7 the circumstances.

8

9

End quote.

10

He goes on to explain, quote:

11

12

Members of the Winnipeg Police
Service often will not provide
their names but will provide their
badge numbers which you obtained
from the female officer as you
indicated it was badge number
3153.

19

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End quote.

28

And then the further quote in that letter:

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Had the officer simply signed your
receipt for the package envelope
you would have been satisfied and
departed the police station. In
examining the totality of your

1 complaint, the points you raise
2 are not defaults under the Act
3 when looking at your complaint as
4 a whole but rather would be a
5 service issue. The chief of
6 police is responsible for the
7 training of his officers and
8 ensuring that they provide a
9 professional quality of service.
10 It is not within my jurisdiction
11 to address your noted concerns
12 because they are quality of
13 service complaints.

14

15 End quote.

16 The Commissioner then concludes because of his
17 findings, the complaint is dismissed because it does not
18 fall within the parameters or scope of Section 29 of the
19 Act. He decides the behaviour complained about does not
20 amount to any of the things listed in Section 29.

21 The question before me as articulated in the --
22 by the Supreme Court of Canada in the Dunsmuir (phonetic)
23 decision at tab six of the Commissioner's brief, which is a
24 case that dealt with the law and judicial review and the
25 standard of review applicable to decision makers, sets out
26 the question that I must ask myself on this review. And
27 that is, did the Commissioner assess the evidence
28 reasonably. Is there justification, transparency and
29 intelligibility within the decision making process and does
30 it fall within a range of possible acceptable outcomes that
31 are defensible in respect of the facts in law.

32 As Judge Preston said in the case at tab six, and
33 I'm paraphrasing, I'm not necessarily directly quoting: It
34 is important to keep in mind that other people may draw an

1 equally supportable conclusion that may be different than
2 that of the Commissioner. However, my function is not to
3 say if I would have come to a different conclusion. My
4 role is to decide if the Commissioner drew a rational
5 conclusion that could reasonably be drawn from the facts.
6 It is not to pass judgment on the quality of the service
7 provided by the police or the workings of the police but to
8 decide only if the Commissioner erred in coming to the
9 conclusion he did. And further, as stated by the Supreme
10 Court, quote:

11

12 Where the question is one of fact,
13 discretion or policy, deference
14 will usually apply automatically.

15

16 And then they go on to say:

17

18 We believe that the same standard
19 must apply to the review of
20 questions where the legal and
21 factual issue are intertwined with
22 and cannot be readily separated.

23

24 End quote.

25 Not all complaints justify a public hearing.
26 That is why the Commissioner has been given the discretion
27 to screen and investigate them. So as a reviewing judge I
28 ask, did the Commissioner do his job as set out under the
29 Act and is his decision one that could reasonably be drawn
30 on the facts of this case. It is not to decide if I or
31 other people including Mr. [REDACTED] may draw a different and
32 equally supportable conclusion.

33

34 In this case, based on the investigation done by
an investigator of the Commissioner's office and gathering

1 the complaint from Mr. [REDACTED] and from the witness [REDACTED],
2 all of which was set out in detail in the letter from Mr.
3 Churley dated August 22nd, and based on the reasons he has
4 given, I cannot say he did not draw a rational conclusion
5 on the merits of the complaint. His explanation as to why
6 he finds this not to be a disciplinary default but rather a
7 service issue is well explained and makes sense rationally
8 given all the circumstances. He concludes the behaviour
9 complained of is a complaint about how the police conducted
10 themselves in providing or not providing the service that
11 day and is more about their professionalism and the conduct
12 does not rise to the level of a disciplinary default. So
13 he dismisses the complaint and refers it to the acting
14 chief to deal with as a matter of service delivery.

15 The Commissioner need not interview anyone if he
16 feels it is not necessary in his determination of whether
17 the case falls under the Act or not. If in fact he reaches
18 the conclusion the complaint does not fall within the
19 requirements or scope of the Act, given the nature of what
20 it is that is being complained about, then he is required
21 to take no further action including not to investigate it
22 any further as he would have no jurisdiction to do so given
23 his conclusion.

24 In this case the Commissioner reviewed the
25 complaint and information from the witness and arrived at
26 his decision that it did not fall within the scope of the
27 Act therefore he did not need to interview the officers.
28 It was unnecessary given the type of complaint submitted.

29 In reviewing whether he reached that conclusion
30 reasonably, I find he did. I find he reviewed all the
31 information provided from the complainant and his witness
32 and drew a rational conclusion on the merits of the
33 complaint.

34 In addressing other points raised by Mr. [REDACTED], I

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1 have no jurisdiction under the Act or to costs or damages
2 as I explained. My authority is not made up by me at the
3 request of citizens, it comes only from that given to me
4 under the statute which is the governing law in this case.
5 There is no basis to order costs or damages in any event.

6 The evidence before me does not support the
7 complaint of collusion or conflict of interest between LERA
8 and the police or the respondents and I find the complaints
9 are unfounded and have no merit.

10 The argument the Commissioner is incompetent and
11 acted inappropriately including in how he compiled the
12 file, taking documents from Mr. [REDACTED] binder and not
13 separating the two complaints has no merit.

14 The allegation of incompetence or attempt to
15 prejudice Mr. [REDACTED] in how the entire file came before the
16 court I find has no merit and did nothing to prejudice Mr.
17 [REDACTED] in any way before this court having disregarded
18 anything that was previously filed and removed by my
19 earlier ruling.

20 So in conclusion after reviewing the decision of
21 the Commissioner and the file of the Commissioner in its
22 totality under Section 13(3) of the Law Enforcement Review
23 Act, I have not been persuaded by Mr. [REDACTED] that the matter
24 should go back to the Commissioner for any further
25 investigation and I decline to take any further action with
26 respect to this matter or refer the matter for hearing.

27 That's the decision. Thank you.

28
