IN THE MATTER OF: Law Enforcement Review Act Complaint #6033

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

BETWEEN:

Lisa S.,	)	**Mr. William Barnstead**
Complainant	)	**For the Complainant**
	)	
- and -	)	
	)	
Cst. G. O. #1796	)	**Mr. Paul McKenna**
Cst. G. D. #1775	)	**For the Respondents**
Respondents	)	
	)	**Mr. Sean Boyd**
	)	**For the Commissioner**
	)	
NOTE: These reasons are subject	)	
to a ban on publication of the	)	
respondents' names pursuant to	)	December 19th, 2003
s. 13(4.1).	)	
	)	

SUSAN DEVINE, P.J.

[1] Pursuant to the provisions of section 13(2) of the Law Enforcement Review Act (LERA), the complainant Lisa S seeks to have this court review the decision of the LERA Commissioner in which he declined to take further action on her complaint because he found the subject matter to be vexatious. The lawyer for the Commissioner was granted standing to participate in the December 11th hearing of the review solely on the issue of the interpretation and application of the act.

[2] Section 13(1) of the L.E.R.A. is the section of the legislation that authorizes the Commissioner to decline to take further action on a complaint on one of three grounds:

(a) that the subject matter of the complaint is frivolous or vexatious or does not fall within the scope of section 29 (the section defining disciplinary defaults)
(b) that a complaint has been abandoned; or
(c) that there is insufficient evidence supporting the complaint to justify a public hearing

[3] In his letter declining to take further action on Ms. S's complaint, the LERA Commissioner characterized it as "vexatious". He elaborated by saying:

> On review of the information obtained in this investigation, it is my view that it is obvious this proceeding cannot succeed and would lead to no possible good.

This decision by the Commissioner was based on an assessment of Ms. S's written complaint, as well as a transcript of the call history from police dispatch and the notes of a telephone interview by a commission investigator with one of the civilian witnesses to the incident.

[4] Many rules of court across this country allow matters to be dismissed summarily if they are "frivolous or vexatious". In other words, they can be dealt with peremptorily if they are trivial or without merit or brought for the purpose of harassment or some other ulterior purpose. (for example, see Manitoba Queen's Bench rule 25.11 regarding motions to strike pleadings)

[5] In fact various dictionaries make specific reference to the meaning of the term "vexatious" in a legal context, defining a vexatious suit for example as "one commenced for the purpose of giving trouble, or without cause" or "brought with the intention of annoying: put forward on insufficient grounds and with the intention of causing annoyance to the defendant". This is consistent with the ordinary meaning of the word being "annoying", "troubling", or "disturbing".

[6] Both the counsel for the respondent officers and the counsel for the Commissioner assert that the standard of review that should be applied by me in considering the Commissioner's decision is that of reasonableness simpliciter rather than correctness. The complainant's counsel took no position on the issue.

[7] The significance is of course that the correctness standard is a more rigorous standard of review, usually involving fundamental legal questions to which there will often be a definitively right legal answer, while the reasonableness standard is more deferential to the decision-maker, in effect allowing the decision-maker to be wrong. In the words of Iaccobucci, J. in **Law Society of New Brunswick v. Ryan** [2003] S.C.J. No. 17 at paragraph 55:

> A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived…….This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling….

[8] The pragmatic and functional approach to assessing the appropriate standard of review of an administrative tribunal, as articulated by the Supreme Court of Canada in **Pushpanathan v. Minister of Citizenship and Immigration for Canada** [1998] 1 S. C.R. 982, was first used in the LERA context by my colleague Judge Chartier in his decision of May 30, 2000 in **B v S and A,** unreported (LERA Complaint # 3597). In the course of his own review of the Commissioner's decision to decline to take further action on a complaint he deemed frivolous, Judge Chartier delineated his view of the appropriate standards to be used in reviewing the decisions of the LERA Commissioner.

[9] Judge Chartier considered the factors enunciated in **Pushpanathan** including the lack of any privative clause in the legislation, the degree of expertise of the tribunal, and the purpose and intent of the statute as a whole and of the particular provision in question. He concluded that the correctness standard was the appropriate standard to be used in a section 13(2) review on any questions of law or of mixed fact and law. The only exception he noted was on a pure question of fact where the standard of reasonableness simpliciter was to be applied to any factual findings of the Commissioner.

[10] The Commissioner's decision that the complaint before him was frivolous was, Judge Chartier concluded, a question of mixed law and fact. He therefore used the correctness standard in his review of the decision, upholding the Commissioner's decision to decline to take any further action.

[11] While Judge Chartier's decision involved a complaint that had been dismissed as "frivolous", in the course of giving his reasons, he specifically made reference to another portion of section 13(1)(a) in elucidating the different standards of review at p.18:

> Where the review is one which relates to the jurisdiction of the Commissioner and more specifically, does the complaint "fall within the scope of section 29 of the L.E.R.Act" as same is found in clause 13(1)(a) of the L.E.R.Act, the standard of review will tend to be "the correctness" of the decision made by the Commissioner.

[12] In her subsequent decision in **P v M and V**, unreported, issued July 31, 2002 (LERA Complaint # 3771), my colleague Judge Smith had occasion to review a decision by the Commissioner pursuant to section 13 (1)(c). He had declined to take further action on the complaint before him on the basis that "there was insufficient evidence supporting the complaint to justify a public hearing". She concluded, as Judge Chartier had, that this decision by the Commissioner was reviewable on the correctness standard as it was a question of law or of mixed fact and law rather than a question of fact.

[13] In examining the role of the Commissioner in fact-finding, Judge Smith also elaborated on the task of the Commissioner in making a section 13 (1) decision:

> The Commissioner should take care not to weigh the evidence. In a criminal case a judge can convict on the evidence of a single uncorroborated witness, if that evidence is sufficient to meet the heavy burden of proof beyond a reasonable doubt. Although the judge who ultimately hears a LERA case must be convinced on clear and convincing evidence, it is surely likewise possible for that standard to be met on the evidence of a single complainant….(paragraph 37)

[14] She compared the role of the Commissioner in making a decision on sufficiency of evidence to that of a judge hearing a preliminary inquiry:

> The Commissioner must consider whether there is evidence upon which a judge hearing the matter under the Act could conclude that a disciplinary default has occurred.

noting as well:

> …determinations of credibility should be left for a hearing before a judge. The process used by the Commissioner is ill-suited to determining credibility or making findings on contested facts. (paragraph 39)

[15] This decision of Judge Smith's about the applicability of the correctness standard in reviewing the Commissioner's decision as to "sufficiency of evidence" is consistent with the earlier decision of Judge Chartier as to the applicability of the same standard on a review of a decision that the subject matter of a complaint is "frivolous" or "not within the scope of section 29".

[16] However in the case at bar, counsel for the respondents and for the Commissioner both urge me to apply the reasonableness simpliciter standard to the Commissioner's decision dismissing Ms. S's complaint as "vexatious". Their argument is based on a decision of another colleague, Associate Chief Judge Miller in **W v L and P**, unreported, November 7, 2000 (L.E.R.A. Complaint #3208). In that decision Miller, A.C.J., like Chartier P.J. before him, was reviewing a

Commissioner's decision declining to take further action on a complaint on the basis that the subject matter of the complaint was "frivolous". In the course of his decision Judge Miller did not take issue with or attempt to distinguish the earlier decision by Judge Chartier. Yet he stated that section 13(1)(a) authorizing the Commissioner to decline to take further action on a complaint on the basis that "the subject matter of the complaint is frivolous or vexatious or does not fall within the scope of section 29" embraced two separate standards of review within the same subsection. With the greatest respect to my colleague Associate Chief Judge Miller, I cannot find in his reasons any rationale for departing from the decision of Judge Chartier noted above. He merely states at pp. 9 and 10 of his reasons:

> …I am of the view that upon due consideration of the factors previously enunciated, the standard to be applied to the review differs in respect of a complaint that has been found to be "frivolous" or "vexatious" on the one hand and "not within the scope of section 29 on the other." In respect of the former, I believe that the standard would tend to be "reasonableness simpliciter" while in the latter it would tend to be "correctness"

[17] This is clearly a departure from the view expressed by Judge Chartier that questions of law or of mixed fact and law were to be assessed on a correctness standard while purely factual questions were to be assessed on the reasonableness simpliciter standard.

[18] I agree with Judge Chartier on this point. In my view, the Commissioner's decision that the subject matter of Ms. S's complaint is "vexatious" is a question of mixed law and fact and therefore reviewable on the correctness standard. Ultimately however I do not believe that the Commissioner's decision can stand in this case, whatever standard of review is applied.

[19] A review of the Commissioner's decision necessitates some consideration of the facts before him. Ms. S's complaint was that the two police officers with whom she dealt on September 13, 2002 abused their authority by using unnecessary violence or excessive force, by using oppressive or abusive conduct or language, by being discourteous or uncivil and by discriminating against her on the basis of one of the characteristics set out in ***The Human Rights Code of Manitoba***. Each of these allegations could potentially constitute disciplinary defaults pursuant to section 29(a) of LERA.

[20] Ms. S is deaf and was assisted at the hearing of this matter by note-takers who transcribed the proceedings onto a computer screen that she could read as the hearing proceeded. Although I did not hear her speak, I was told that she is able to

communicate orally. Clearly her disability is one protected as one of the enumerated categories of discrimination in section 9 of ***The Human Rights Code***.

[21] The basis of her complaint started with a trip to her physician's office. She indicated that she had previously made arrangements with him to have her prescriptions renewed by a telephone call to the pharmacy. She telephoned two days prior to going to the pharmacy to get her drugs. However at the pharmacy, the pharmacist wrote her a note to the effect that she had to get the prescription from her doctor. She then went to the doctor's office nearby without an appointment in order to get her prescription. The waiting room was, in her words, standing room only and she told the receptionist that she should not have to wait since she had phoned two days prior to make the agreed upon arrangements for renewal.

[22] Although she says that both the doctor and his receptionist know that she is hearing impaired, and that she needs all communications directed to her to be in writing, she says that the receptionist continually spoke to her and then turned away, as did the doctor when he came out. She started sobbing in frustration and telling them that she could not understand them. The doctor at first shooed her away with hand gestures and then put up his hand to say wait. He went back into his office and did return with a note for her that read "go around the corner and get your drugs." She then did return to the pharmacy where she was told the doctor had phoned in her prescription. While she was waiting she said she was continuing to cry, feeling belittled and humiliated by her doctor and his staff. Two police officers then came into the pharmacy and spoke to the pharmacist, glancing over at her. When the pharmacist gave her the drugs he wrote her another note saying, "I wouldn't stay around". She asked him if the police had been there for her and the pharmacist shrugged his shoulders.

[23] Ms. S was indignant that her doctor had apparently called the police. She returned to his office and asked the receptionist if she had called the police on her. The receptionist pointed down the hall towards the doctor's office and Ms. S saw the two officers in an adjacent office and asked if they wanted her. They started speaking to her. She told them that she couldn't hear and that if they wanted her to understand, they would have to write down what they were saying. She said that one then took her by the elbow roughly and started pushing her towards the door. When she reiterated that they would have to communicate with her in writing, they pushed her even more roughly and led her out the door where they continued to speak to her. She got out a pen and paper herself at that point and offered it to them, asking them to write. She said that they just looked bemused and walked away. She then asked them for their badge numbers and they laughed and walked away without giving them to her. She wrote down their license plate number and

car number. She complains that they treated her with absolutely no respect and ridiculed her.

[24] The call history extract shows the following notation: “Crew attended female in question had recieved (sic) prescription by Dr. S. just so she wud (sic) go on her way….Female identified as Lisa S…female very belligerent with crew, spoken to and ordered on her way…female left on foot...female had deformity and is hard of hearing. .nfar.mdt only”.

[25] The LERA investigator conducted a telephone interview with the doctor’s receptionist on November 1, after receiving the police call history information. The receptionist told him that the police had been called because Ms. S was causing problems for the doctor and interfering with him seeing his patients. She wanted her prescription filled and would not listen or calm down. The receptionist said that the police were entirely appropriate in their dealings with Ms. S and they asked her to leave and at first she wouldn’t. They then offered to give her a ride but she still refused and wouldn’t listen to them. In the end she walked out and the officers also departed and she did not see anything after that. The police officers did nothing wrong in her view and Ms. S was the cause of the problem in the opinion of the receptionist.

[26] Was the Commissioner correct in characterizing Ms. S’s complaint as vexatious or alternatively, is his decision a reasonable one that could logically be supported on some basis on the information before him? Admittedly the alleged disciplinary defaults, particularly insofar as they allege excessive force or oppressive or abusive conduct or language would not amount to the most egregious examples of such behaviour if they were ultimately found to have occurred. However, if Ms. S’s version of events was ultimately to be believed by a trier of fact, the officers could clearly be found to have been discourteous or uncivil to her and/or to have used differential treatment towards her without reasonable cause on the basis of her hearing disability.

[27] The evidence considered by the Commissioner is set out in his two-page letter to the complainant dismissing her complaint. The letter shows that he relied on the evidence of the officers’ call history to the effect that they had spoken with the complainant and told her to be on her way and that she became belligerent. He also noted the evidence of the receptionist to the effect that the complainant would not listen to her or calm down as the reason the police were called. He commented that the receptionist said that the police asked the complainant to leave and she refused and that they then offered her a ride and she walked out. What is significant to me is that all of this evidence substantiates Ms. S’s assertion that no

one was writing things down as she requested of them. Instead they kept speaking to her. She maintains that she could not understand what they were saying to her. If true, the fact of her becoming increasingly upset and emotional is understandable.

[28] It also demonstrates to me that the Commissioner's characterization of her complaint as vexatious is unjustified. He clearly weighed the evidence, or accepted the evidence of the receptionist and the officers call history in preference to Ms. S's version of events. He did not deal at all in his reasons with the gist of her complaint about the method by which the staff and the officers persisted in communicating with her. According to his file, the commission investigators did not interview the officers. There is no indication therefore as to whether the police officers either asked, or were told, something by the medical personnel that would cause them to believe that Ms. S's could hear despite her protestations to them that she could not. There is also no evidence that the doctor was asked to provide any information to the Commissioner about whether or not Ms. S had any hearing capacity whatsoever. I note that the pharmacist did communicate with her in writing and that when the doctor did finally write her a note, she immediately left his office for the pharmacy.

[29] In the words of the **Ryan** case above, there is no line of analysis within the Commissioner's reasons that could support his conclusion that Ms. S's complaint was brought merely for the purpose of annoying or harassing the defendants and was without merit. On the contrary, if her allegations were ultimately to be believed, then certainly her insisting on her right to courteous treatment from the police in a manner sensitive to her physical disability would be entirely proper. In this case the Commissioner implicitly seemed to be drawing the inference that Ms. S could in fact understand what the officers were saying to her, without exploring the issue of the implications for her if she could not. In my view, the allegation is not one that could be characterized as vexatious on any definition of the word.

[30] The complainant has thus satisfied me that the Commissioner's decision does not meet the review standard of reasonableness simpliciter and that he erred in declining to take further action on her complaint.

[31] However I do repeat that in my view the issue of whether or not a complaint is frivolous or vexatious will almost inevitably be a question of mixed fact and law. Such a determination to screen out a complaint and end the opportunity for a complainant to have his or her matter heard by a judge is a serious decision by the Commissioner and involves his applying what are effectively legal terms of art, "frivolous" or "vexatious", to the facts alleged. As Judge Chartier noted in his decision referred to above, the LERA Commissioner is not required to be legally

trained and therefore does not have any particular expertise to bring to bear on section 13(1) considerations. As well the scheme of the LERA legislation is to provide some reasonable degree of civilian oversight or accountability of police officers. This is because police officers are those individuals in our society whom we entrust both with the heavy responsibility of enforcing our laws and with the commensurate power and authority to enable them to do so. While section 13(1) is clearly designed to allow the Commissioner to protect police officers by screening out specious complaints, the section 13(2) review by a provincial judge ensures that his discretion to do so is exercised appropriately.

[32] Pursuant to section 13 of the LERA legislation, I order the Commissioner to further explore the possibility of an informal resolution of this complaint and failing such resolution, to refer the complaint for a hearing. I also order a ban on the publication of the respondent officers' names until the complaint has been disposed of in accordance with this act.

Susan Devine, P.J.