

Date: 2016 02 16

IN THE PROVINCIAL COURT OF MANITOBA

IN THE MATTER OF: *The Law Enforcement Review Act*
Complaint no. 2013/134

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

BETWEEN:

██████████)	Ms. Zilla Jones
Complainant/Appellant)	For the Complainant/Appellant
)	
and)	Mr. Devin Johnston
)	For the Commissioner
)	
██████████ #2116))	Mr. Paul McKenna
)	and Mr. Greg Bartel
██████████ #2258)	For the Respondents
Respondents)	
)	Reasons for Decision delivered:
)	February 16, 2016

Note: These reasons are subject to a ban on publication of the Respondents' names pursuant to s. 25 of The Law Enforcement Review Act

ROLLER P.J.

INTRODUCTION

[1] ██████████ made a complaint to the Commissioner of *The Law Enforcement Review Agency* (hereinafter referred to as *L.E.R.A.*) on August 28, 2013. The Commissioner investigated that complaint and ultimately decided not to

refer the complaint on to this Court for a hearing. The complainant is now before this Court seeking a review of the Commissioner's decision.

LEGISLATION

[2] *The Law Enforcement Review Act*, R.S.M. 1987, c.L75 ("the Act"), provides a process that allows "every person who feels aggrieved by a disciplinary default allegedly committed by any member of a police department or by an extra-provincial police department"¹ to file a complaint that will be considered by an independent Commissioner.

[3] Once a complaint has been received by the Commissioner, the Commissioner provides a copy of the complaint to the officer who is the subject of that complaint, and to the Chief of Police for the relevant police department. The Commissioner must then cause the complaint to be investigated pursuant to s. 12(1) of the Act, and for that purpose, the Commissioner enjoys all the powers conferred under Part V of *The Manitoba Evidence Act*, R.S.M. 1987, c.E150, as well as the power to request further particulars of the complaint from the complainant, and the Chief of Police must forward to the Commissioner all documents, statements or other materials relevant to the complaint which are in the possession or control of the relevant police department. In addition, the Commissioner may request and receive judicial authorization to search a building or place for "(a) anything upon or in respect of which a disciplinary default under this Act has been or is suspected to have been committed, or (b) anything which there is a reasonable ground to believe will afford evidence of the commission of a disciplinary default under this Act."

¹ S. 6(1) *The Law Enforcement Review Act*.

[4] If the Commissioner finds a disciplinary default took place, he is to attempt informal resolution of the complaint but if not successful, the Commissioner shall make recommendation as to the appropriate penalty, considering the severity of the disciplinary default and the contents of the respondent's service record. If the respondent does not agree and accept the recommendation of the Commissioner, the Commissioner must refer the complaint to a judge for a hearing of the question of the penalty against the respondent. There is no appeal from the finding of the judge.

[5] However, if the Commissioner does not find the acts complained of constitute a disciplinary default, he may decline to take further action. Section 13(1) of the Act reads:

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.

[6] If the Commissioner declines to take further action, the complainant may apply to have the Commissioner’s decision reviewed by a judge of the Provincial Court of Manitoba.

[7] As such, the legislative scheme set out in the Act leaves all complaints of disciplinary default² to the Commissioner for investigation and consideration. The Commissioner’s role is that of a screening function. As stated in the Commissioner’s brief, page 7, “his role is to perform a screening function to ensure that only those complaints that merit a public hearing are referred to a hearing before a provincial court judge.”

[8] If the reviewing judge is satisfied that the Commissioner erred, the judge “shall order the Commissioner (a) to refer the complaint for a hearing; or (b) to take such other action under this Act respecting the complaint as the provincial

²Disciplinary default is defined in the Act as “any act or omission referred to in section 29” and s. 29 of the Act reads:

- 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) an 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 department;
 - (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.

judge directs.”³ The burden of proof is on the complainant, as per s. 13(4) of the Act, and there is no appeal or review of the judge’s decision.⁴

FACTUAL BACKGROUND

[9] In an undated letter to *L.E.R.A.* from the complainant, received by *L.E.R.A.* on August 28, 2013, Mr. [REDACTED] complained that during the course of his arrest on August 27, one member of the Winnipeg Police Service punched him in the chest so hard it almost made him stop breathing. He also reported that later, while awaiting fingerprinting, an officer held his hand so hard there was no circulation of blood to his fingers, slammed his head into the wall, kicked him with a knee, stomped on his foot and toes, and tried to break the complainant’s leg by kicking. Ms. [REDACTED] also said a threat was made to burn down his mother’s house. The complainant reported being handcuffed during this entire incident and that he went to the Misericordia Hospital in Winnipeg “for treatment of a concussion [*sic*], sore ribs and bruising all over [his] ankle.”

[10] The complaint received by the Commissioner contained allegations of unnecessary violence or excessive force, and using oppressive or abusive conduct or language.

[11] In a follow up letter to the Agency dated September 4, 2013, the complainant wrote:

³ S. 13(3) *The Law Enforcement Review Act*.

⁴ S. 13(5) *The Law Enforcement Review Act*.

I received a call from a nurse on Sunday Sept 1 2013 telling me that I need to go for a CT scane [sic]. Because they found a black circle on my lung. I think it's a bruise [sic] from when the cops were hitten [sic] me. I'll stay in touch to let you no [sic] what's going on.

[12] By letter dated June 10, 2014, the Commissioner advised the complainant of his decision. The Commissioner determined that the evidence supporting the complaint was insufficient to justify taking the matter to a public hearing. In that five page letter, the Commissioner set out the allegations made by the complainant, referenced the photos of the complainant that were taken by the Agency's investigator, and summarized the medical records of the complainant's attendance to hospital, the notes and reports of the respondent officers, and the reports of the interviews of these same officers. The Commissioner then set out the basis for his conclusions:

Your allegation is that Cst. [REDACTED] and Cst. [REDACTED] abused their authority by using unnecessary violence or excessive force and using oppressive or abusive conduct or language. The officers denied each of your allegations. You were in the custody of the officers for three hours. During that time, you spoke with the officers' supervisor, Sgt [REDACTED], twice. Both times Sgt. [REDACTED] asked you if you had any questions or issues while in custody. Each time you replied, no.

You alleged that in your statement to *L.E.R.A.* you sustained a concussion. The medical reports do not indicate that you

complained of or suffered the symptoms of a concussion. You told medical staff you had pain on the left side of your chest. Your chest had no bruising or hematoma of your chest. The x-rays indicated a 2.5 cm discrete nodule of the right upper lung lobe, which might be partially calcified. There is no indication in the x-rays or physical examination of any deformity or injury of your ribs. After being told of this nodule, you thought the abnormality was attributable to the officers; however, the medical report does not make that association.

The medical evidence confirms bruising of your left lower leg, but does not confirm or attribute any of the other injuries you mentioned in your complaint to the actions of the officers. There are no independent witnesses of the alleged defaults; I have no ability to assess the veracity of your allegations or the officers' denials.

On review of all the information available, I am satisfied that the evidence supporting your complaint is insufficient 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.

[13] The complainant seeks to have the Commissioner's decision reviewed in this Court. The burden of proof lies on him.

STANDARD OF REVIEW

[14] Contrary to the position of the complainant articulated in the Brief filed by counsel, at the hearing of this matter counsel agreed that the standard of review in administrative reviews such as this one was properly summarized by Judge Preston in *L.E.R.A.* Complaint #2005/307:

[31] The law in this area of judicial review has quite recently been clarified by the Supreme Court of Canada in the seminal *Dunsmuir* decision, [2008] S.C.J. No. 9. The decision governs me as to how this type of review must proceed. The *Dunsmuir* decision clarifies the test to be applied in this type of judicial review. The approach is contextual.

[32] Two standards of review apply. The first is “correctness”, the most demanding standard of review which can be imposed on the *L.E.R.A.* Commissioner. This standard applies only if and when the Commissioner has committed an identifiable jurisdictional error. A jurisdictional error occurs if the Commissioner has failed to act within the parameters of his jurisdiction by either applying a wrong test or misapplying a right test when coming to a decision...

[33] The second standard of review is “reasonableness” and this is the standard I must apply. The Supreme Court of

Canada in *Dunsmuir* succinctly defines reasonableness in the context of 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 the law.

[15] In the review before me, the complainant argued that the Commissioner made a jurisdictional error and therefore the proper standard of review ought to be one of correctness. In the alternative, she argued that the decision of the Commissioner was unreasonable.

[16] Counsel for the Respondents disagreed and argued the Commissioner made no such jurisdictional error. He also argued that the Commissioner properly and reasonably assessed the evidence, and that his reasons for not taking further action were transparently, intelligently and rationally articulated and are therefore due deference from this Court.

ANALYSIS

[17] The complainant argued that the Commissioner exceeded his jurisdiction when he engaged in a weighing of the evidence before him, in drawing inferences and making assessments of credibility. Relying on case law that predates the Supreme Court decision in *Dunsmuir*, counsel argued:

Once there are material facts in dispute arising out of the allegations of disciplinary default pursuant to s. 29 of the Act, the Commissioner must refer the complaint for a hearing regardless as to his or her opinion as to who is being truthful, subject only to a finding that the subject matter of a complaint is frivolous or vexatious or does not fall within the scope of section 29, a finding that the complaint has been abandoned, or a finding that there is insufficient evidence supporting the complaint to justify a public hearing.⁵

[18] In fact, the Commissioner is required to engage in a limited weighing of the evidence in order to fulfil his role. As stated by Judge Chapman in *B.L. v. P/Sgt. E.R., Cst. W.C. and Cst. J.B.* (2011), the legislation provides the Commissioner with the discretion to “screen complaints and investigate them to determine if they warrant a public hearing. Not all complaints justify a public hearing so the government enacted the screening provision to allow the commissioner to do just that. Because of that, the law has developed this deferential role courts must pay to the tribunals when matters appear before them on reviews.”

[19] Judge R. Chartier, when a member of this Court, properly set the Commissioner’s duties within the context of the role of *L.E.R.A.* in Complaint #5643 at page 14:

[32]...The use of the s. 548 sufficiency test would require the Commissioner to refer a complaint to a judge for hearing on its

⁵ Complainant’s Brief, para. 4

merits, the moment there is any evidence upon which a judge could find a disciplinary default. Such an approach would oblige the Commissioner to ignore most if not all of the information that may have been gathered pursuant to his investigative power. Such a situation would suggest that the Commissioner serves as a mere investigative arm for the eventual (and I say inevitable) provincial court hearing.

[20] The Commissioner is not restricted to act as a mere investigator for the purposes of an inevitable provincial court hearing. The “screening function” of the Commissioner is integral to the legislative scheme of the Act.

[21] In the instant case, the Commissioner properly and clearly set out the limitations of his assessment of the evidence at page 4 of his report to the complainant:

On review of matters, I am not permitted to make my decision by assessing credibility or making any definitive finding of fact or law. I must consider the information available to me and I am permitted, in a limited way, to determine if the evidence is sufficient to justify taking further action.

[22] The Commissioner then summarized the evidence and the lack of corroboration before concluding there was insufficient evidence to proceed further. He concluded that the medical evidence received did not “confirm or attribute” any of the injuries complained of - except for a bruise on the left shin - to the actions of the respondents. No medical report linked the nodule to an act of violence, much

less the violence alleged to have happened on August 27, 2013. There was no independent witness to any of the alleged assaults and the complainant did not report any concerns to the officers' supervisor although he twice had the opportunity to do so.

[23] The Commissioner did not make credibility findings and specifically noted that he was unable to assess the veracity of the allegations or denials before he considered the evidence was available to support the allegations. He ultimately determined it was insufficient. That is the mandate of the Commissioner. I am not satisfied that the Commissioner made a jurisdictional error when he engaged in a limited weighing of the evidence for that purpose.

[24] I turn next to consider the reasonableness of his decision.

[25] Counsel for the complainant argued that the Commissioner had an obligation to seek further and better medical reports if those provided by the hospital were insufficient. She points to the "nodule" that was seen on the complainant's x-rays and argued that if the Commissioner was not able to determine whether the partially calcified nodule was associated with actions of the officers, he should have requested a medical opinion from the complainant's physician.

[26] The Commissioner's investigative powers are set out in the Act. The Commissioner could – and did – request the complainant's hospital records, with the consent of the complainant. The complainant advised on September 4, 2013 that he was advised to follow up with his doctor regarding the nodule seen on the x-ray. No further medical information or information as to where he went for that

follow up, if any, was provided by the complainant. The Commissioner cannot make medical findings on his own and he requested, received and review all medical records of which his office was aware.

[27] Counsel for the complainant also argued that the Commissioner erred when he concluded that the “medical reports do not indicate that [the complainant] complained of or suffered symptoms of a concussion.” Counsel argued that the complainant reported a headache, dizziness and blurred vision upon presentation to hospital and that the Commissioner should have considered this to be evidence that the complainant complained of and suffered symptoms of a concussion. I cannot agree that the Commissioner was unreasonable when he declined to make a diagnosis of concussion. The Commissioner is without the expertise to make such a conclusion and reasonably restricted himself to the findings and diagnosis as contained in the medical records. Nowhere in the medical records received by the Commissioner did a doctor or medical professional diagnose the complainant with a concussion.

[28] The Commissioner considered all evidence presented and concluded it was insufficient to warrant the matter proceeding. He is entitled to reach this conclusion. His investigations and conclusions were set out in a detailed letter to the complainant, and were articulated in a transparent, intelligent and rational matter. As Judge Chapman noted in *B.L. v. P/Sgt. E.R., Cst. W.C. and Cst. J.B* (2011) “other people may draw an equally supportable conclusion” but the role of the reviewing judge is not to pass judgment on the quality of the initial investigation, but only to determine if the Commissioner erred.

[29] Given the medical evidence he obtained from the complainant and hospital, and summarized in his letter, the Commissioner's determinations were reasonable. The Commissioner need not reach the same conclusion that the complainant or reviewing judge might make. The conclusion need only to be a reasonable one, articulated in a transparent and intelligent manner.

[30] The complainant has not met his onus of satisfying this Court. After considering the written and oral arguments, the cases provided and complainant's *L.E.R.A.* file, I cannot conclude that the Commissioner's investigation or conclusions were unreasonable. He cited the lack of medical confirmation of the injuries reported by the complainant, coupled with the lack of any other corroborating evidence, and determined the evidence was insufficient to justify a hearing. The Commissioner's conclusion was reasonable and supported by the evidence reasonably available, and it was communicated to the complainant in a transparent and intelligent manner. I will not interfere with that decision.

"Original signed by:"

Judge C. Roller
Provincial Court Judge