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| IN THE MATTER OF: | *The Law Enforcement Review Act*<br>Complaint # 2020-47 |
| AND IN THE MATTER OF: | A Hearing pursuant to section 13(2) of *The Law Enforcement Review Act,* C.C.S.M. 1987, c. L75 |

**THE PROVINCIAL COURT OF MANITOBA**

BETWEEN:

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| **C. B.,** | ) | Complainant, |
| | ) | |
| | ) | |
| - and - | ) | |
| | ) | |
| **Cst. D. D. and P/Sgt. C. W.,** | ) | |
| | ) | Paul McKenna |
| | ) | for the Respondents. |
| | ) | |
| | ) | |
| | ) | |
| | ) | Hearing date: January 26, 2022 |
| | ) | Decision date: February 28, 2022 |

***Note: These reasons are subject to a ban on publication of the Respondents' names pursuant to section 13(4.1) of The Law Enforcement Review Act***

**ROLSTON, P.J.**

[1] This is a review of a decision made by the Commissioner of the Law Enforcement Review Agency (LERA) to dismiss a complaint made by C.B. without

a formal hearing. C.B. owns a company who contracted with a third party to move household goods from Saskatchewan to Manitoba. When C.B.'s employee arrived in Manitoba with the goods, a dispute arose with the third party over payment. The employee refused to unload the goods, then phoned the police because he became concerned with the threatening conduct of the third party. The respondent police officers ("the officers") intervened and eventually the household goods were turned over to the third party against the wishes of C.B. C.B. complained to LERA that the police became involved in this property dispute when they should not have.

[2] The officers point out that the LERA Commissioner receives and investigates complaints and has wide discretion to choose to not refer matters for a hearing. The officers argue that this is not a matter where I should interfere with that discretion.

[3] C.B. argues that the officers violated his rights pursuant to *The Canadian Charter of Rights and Freedoms* by seizing his property without consent and denying him due process. C.B. says that I should order that a hearing be held to determine whether the seizure that took place was justified in law.

[4] There are several questions to be answered in order to properly determine the issue before me.

- What is the extent of the authority of the Provincial Court in reviewing LERA matters?
- How does the standard of review apply to the factual findings made by LERA?
- Was the decision of the Commissioner reasonable?

The answer to this series of questions allows for a determination as to whether the Commissioner erred in declining to take further action.

**What is the extent of the authority of the Provincial Court in reviewing LERA matters?**

[5] *The Law Enforcement Review Act* (*The Act*) governs complaints by citizens against the police. *The Act* creates a structure and process whereby an arm's length, non-police agency is empowered to investigate and determine the extent to which, if at all, a police officer has acted in a manner that should attract disciplinary measures. This allows for a body with specialized knowledge and specific powers to attend to allegations of misconduct of police officers in a meaningful way.

[6] The role of the LERA Commissioner has been described as a "screening function" (see *R.P.M., v. Cst. S.C., Cst. D.W., supra*, and in principle, *Cooper v. Canada*, [1996] 3 S.C.R. 854) which allows LERA to screen complaints in a comprehensive manner, so as to determine whether the complaints warrant a hearing pursuant to section 17 of *The Act*. Judge Garreck observed that not all complaints justify a public hearing which is why the Commissioner has been given the discretion to screen and investigate each complaint and determine which ones should proceed further (see *The Law Enforcement Review Act* Complaint No. 2016/114, at page 9, line 25).

[7] The Provincial Court has a limited role in LERA matters when reviewing the Commissioner's decision. This court does not sit in the role that it most often does on criminal matters. In other words, while the court in a criminal trial is responsible for hearing and determining cases at first instance, section 1(2) of *The Act* stipulates that the court is *not* sitting in this function in a LERA matter. Instead, the court is required to *review* the decision of the LERA Commissioner. This is an important distinction as it provides the Court with a framework in which to consider the matter at issue.

[8] In order to understand what is meant by "review", it is necessary to revisit the rationale for judicial review. This was comprehensively done by Chartier, PCJ as he then was, in *Rev. R.P.M.,* v. *Cst. S.C., Cst. D.W. The Law Enforcement Review Act* Complaint #5643.

[9] In summary, LERA has a role that affords wide latitude to investigate and determine matters of police discipline. LERA has specialized knowledge in that regard, given that *The Act* specifically mandates police disciplinary matters as their one and only function. That being the case, the court's role in reviewing the decisions of LERA should be limited to ensuring the principles of justice have been followed, as opposed to inserting its own views in the place of the Commissioner's.

[10] The term "standard of review" refers to the level of scrutiny that this court is to apply to the Commissioner's decision. The courts have attempted to simplify the concept of standard of review over the past two decades. Most recently, the Supreme Court of Canada revisited how courts apply the standard of review in *Canada (Minister of Citizenship and Immigration)* v. *Vavilov,* 2019 SCC 65. Judge Choy applied *Vavilov* to Manitoba LERA matters recently in *P.S.* v. *Constable S.T.*, LERA Complaint #2020-82 (Choy, J. January 28, 2022). I agree with Judge Choy's interpretation of the application of *Vavilov* set out in paragraphs 15 to 24. For the purpose of this decision there are several concepts set out that are relevant:

- There is a rebuttable presumption that the applicable standard of review is reasonableness;
- The standard of correctness should only be applied where the rule of law requires such a standard, such as where there are constitutional questions or general questions of law that are of central importance to the case, or where there are issues regarding jurisdictional boundaries between two or more administrative bodies; and

- The language of section 13(2) of *The Act* describes that the Court's function is a review, and that no appellate function is specifically granted to the Provincial court for LERA matters.

Based upon these underlying legal principles, Judge Choy concluded that the standard of reasonableness applies to findings made by LERA under section 13(2) of the Act. I agree with her conclusion.

[11] What is meant by the "standard of reasonableness"? I have to decide whether the overall decision of LERA was transparent, intelligent and justified (*Vavilov* at paragraph 15). This standard reflects the fact that the Commissioner has expansive powers under *The Act* and there are many different ways that any investigation could be conducted. When the standard of reasonableness is applied, my task is not to consider whether the decision is the decision I would have made, but I must consider whether the conclusion reached by the Commissioner is a decision that *could* have been rationally made based upon the facts uncovered in the investigation. Therefore, the relevant question to ask is, "Was that decision reasonable?"

[12] C.B. filed a document setting out his argument on appeal. He alleges, "I believe the Winnipeg Police Violated my Charter of Rights and Freedoms". The document sets out why C.B. believes his rights were violated.

[13] It may seem like the issues raised above deal with "constitutional and legal issues that are of central importance to the legal system as a whole", as contemplated by *Vavilov*, given that they invoke the *Charter of Rights and Freedoms*, which is a constitutional document. However, in *Vavilov* at paragraph 55, the court specifically noted that constitutional issues pertain to,

> Questions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under s.35 of the *Constitution Act, 1982*, and other constitutional matters [that] require a final and determinate answer from the courts.

The present case does not involve division of powers or Aboriginal or Treaty rights. Furthermore, the court references *Doré v. Barreau du Québec*, 2012 SCC 12, in support of the notion that the reasonableness standard should be applied to instances where "the effect of the administrative decision being reviewed is to unjustifiably limit rights under the *Canadian Charter of Rights and Freedoms*."

[14] The other potential application of the standard of correctness arising from *Vavilov* are situations involving legal issues of central importance to the functioning of the legal system as a whole. The Supreme Court defined these as scenarios where "correctness review is necessary to resolve general questions of law that are of "fundamental importance and broad applicability" (paragraph 59). As will be seen, the present case is really about whether the facts as found by the Commissioner amount to breaches of *Charter* values. The baseline concepts of detention, and search and seizure are not controversial such that they rise to the level of "legal issues of central importance to the functioning of the legal system as a whole".

**How does the standard of review apply to the factual findings made by LERA?**

[15] LERA's findings were set out in a letter to C.B. dated July 26, 2021. The Commissioner identified many factual aspects of the complaint which were broken down and itemized by letters a through to u. Several of the findings relate to the issue raised by C.B. in his appeal:

- **Finding b**. You had the contents of your truck seized by the Winnipeg Police.

The Commissioner found that the WPS did not seize the property. The truck and contents were temporarily detained while the investigation of the threat occurred.

- **Findings e, f, o, and p**. These complaints deal with whether the police are obligated to call a Justice of the Peace to review whether the detainment was lawful pursuant to section 10(c) of the "Canadian Constitution Act Charter of Rights and Freedoms".

The Commissioner dealt with these factual complaints by finding that section 10(c) of the *Charter of Rights and Freedoms* deals with only arrested persons and that no one was arrested in this instance, and that there was no mechanism for a Justice of the Peace to deal with seizure of property. In any event, according to the police, the property was not seized, it was detained. Lastly, the reference to the officer's comments were in regards to identifying himself as a police officer.

- **Findings g, i, and n.** These points all deal with whether the vehicle and driver were detained.

The Commissioner found that the evidence supported the police contention that the driver was not detained, but the contents of the truck were detained and were subject of the investigation.

- **Findings h, r, l, and m**. These points deal with whether the police had authority to enter the truck and allow the removal of the contents, and specifically whether the driver consented to property being removed.

Each of the above findings are the subject of C.B.'s written appeal material.

[16] Before determining whether the Commissioner's decision that a seizure did not take place is reasonable, it is necessary to set out the legal parameters surrounding interactions between police and citizens. The Supreme Court of Canada revisited this issue most recently in the companion cases of *R.* v. *Suberu,* 2009 SCC 33 and *R.* v. *Grant,* 2009 SCC 32. In *Suberu,* the court reaffirmed the notion that not every interaction between police and a citizen amounts to a detention. The court

explained that while a person interacting with police may be detained in the sense that they are kept waiting or delayed, that person is not legally detained until they are constrained either physically or psychologically by the police (see paragraph 23). In *Suberu*, the subject was told to wait by the police while the officer sorted out whether he was relevant to an investigation the officer was undertaking. This "investigative detention" was determined to not be a breach Mr. Suberu's *Charter* rights.

[17] The circumstances here are not unlike Mr. Suberu's. The driver of C.B's truck was the one who called the police to deal with behaviour he felt was threatening. When the police arrived, they needed to get their bearings as to what was going on. Ultimately, no one forced the driver to stay at the scene. The truck, which was property of C.B.'s company was temporarily detained for the purposes of conducting an investigation as to what was going on, but no person was legally detained or arrested. This is important because the arrest or detention of a person triggers that person's rights pursuant to section 10 of the *Charter of Rights and Freedoms*. C.B. argues that section 10(c) mandates that he had the right to have a Justice of the Peace attend to the scene to determine whether the detention of the vehicle was lawful. Since no detention of a person occurred, no right to *habeus corpus* as contemplated by 10(c) was triggered. It should also be noted that such an application is not facilitated by the police or by a justice of the peace at the scene of a detention, and that any *habeus corpus* application would relate to a detention of a person, not property. In any event, while the LERA decision was not precise as to the distinction between arrest and detention, the finding was not unreasonable in light of the facts as they were found.

[18] C.B. premised his legal argument on the fact that a seizure took place at the hands of the officers. In advancing this argument, C.B. cited several Supreme Court

of Canada authorities which define a seizure as, “the taking of a thing from a person by a public authority without that person’s consent” (*R.* v. *Dyment*, [1988] 2 S.C.R. 417 at 431). There is no question that this definition is correct.

[19] The Commissioner found that there was not a seizure by the police, but that the truck and contents were “temporarily detained while the investigation of the threat occurred”. My early comments have dealt with the reasonableness of this finding of investigative detention. Based upon the interviews he conducted, the Commissioner found:

- C.B. conceded that the property did not belong to him,
- C.B. refused to provide any documentation to the officers supporting the move,
- There was no mechanism to provide a receipt for the service provided, and
- The driver agreed in the moment to release the property to the third party.

It follows from these conclusions that the Commissioner decided there was no seizure because there was no taking of a thing *by a public authority*. While C.B. is correct as to the legal definition of seizure, the facts as found do not support that there was a seizure.

**Was the Commissioner’s decision reasonable?**

[20] As to the findings of fact, the Commissioner spoke to all parties involved, he engaged in a limited weighing of the evidence as he is entitled to do, and he concluded that the officers brokered an arrangement to return the property to the rightful owner and allow any financial dispute to be resolved in court. The Commissioner concluded,

> Constable D. stated that driver R. did not dispute the property was Ms. H's. Discussions occurred between R, H, and the police regarding the unloading. The resolution of that dispute was that Ms. H's family would unload the property. Driver R. had no dispute with that.

C.B. argued that the driver was not given a choice as to whether the truck would be unloaded. Although the driver later retracted his position that he consented to the turn over of property to the third party, the Commissioner engaged in a limited weighing of the evidence, as he is entitled to do. While it is clear that other conclusions as to the driver's frame of mind were open to the Commissioner, the conclusion he reached was supported by the facts. I am therefore satisfied that the factual finding that the driver consented to the release of the third party's property was reasonable.

[21] C.B. raised several additional arguments as to why the police were guilty of misconduct.

[22] Firstly, he says that the driver of the truck was not authorized to provide consent to allow the truck to be unloaded. That may be the case. However, it was not up to the officers on the scene to get involved in the chain of command at the moving company. What started out as a threat complaint became a dispute as to ownership of goods. The officers assisted the parties at the scene in resolving that dispute. If the driver acted outside of his authority, C.B. may have recourse with the driver. That is not for LERA or me to decide. Any conclusion reached by LERA as to this issue was reasonable.

[23] Secondly, C.B. asserts that there were goods within the truck that belonged to multiple customers. The officers asked him to provide a list of items that belonged to other customers. He refused to do so. There was no evidence before the Commissioner as to what, if anything belonged to other customers. The fact that this did not factor into the Commissioner's decision was reasonable.

**Conclusion**

[24] It is up to C.B. to demonstrate that the Commissioner erred in declining to take further action on his complaint.

[25] I have considered the issues raised by C.B. alleging that his and/or his company's rights were breached pursuant to the *Canadian Charter of Rights and Freedoms*. I have concluded that the factual decisions made by the Commissioner as to how C.B.'s rights were breached were reasonable. Also, the Commissioner applied the law in a reasonable manner in concluding that C.B.'s rights and his company's rights were not breached.

[26] I have further assessed his reasons for declining to take further action and I have concluded that the reasons for not taking further action are reasonable.

[27] Based upon the reasons I have outlined above, pursuant to section 13(2) of *The Law Enforcement Review Act*, the application is dismissed.

*"Original signed by:"*

ROLSTON P.J.