



*Act* is rooted in the principle that citizens are entitled to be treated fairly, respectfully and professionally by police officers. When a citizen makes a complaint pursuant to the *Act*, and an officer is found to have acted contrary to the legislated standard, that officer will be sanctioned.

[2] The *Act* provides for complaints by citizens about police conduct to be investigated by the Law Enforcement Review Agency (“LERA”). The *Act* requires the LERA Commissioner (the “Commissioner”) to investigate complaints, to refer certain matters for hearings on the merits by a provincial court judge, and to decline to take action on certain other matters. This screening of complaints by the Commissioner effectively prevents unnecessary public hearings.

[3] In cases in which the Commissioner declines to take further action, a complainant may have his or her complaint reviewed by a provincial court judge in accordance with the *Act*.

[4] This is such an application for review.

### **The Complaint of M.B.**

[5] M.B. filed a written complaint under the *Act* with the Commissioner as to the conduct of the Respondent officers (the “officers”) on March 15, 2017 (the “Complaint”).

[6] The Complaint alleged that the officers abused their authority on February 19, 2017 when dealing with M.B., by being discourteous and/or uncivil.

[7] Discourteous and/or uncivil behaviour by an officer, when it amounts to an abuse of authority, amounts to a disciplinary default under s. 29(a)(iv) of the *Act*.

[8] The Commissioner conducted an investigation of the Complaint pursuant to s. 12(1) of the *Act*.

[9] On June 2, 2017, the Commissioner wrote to M.B. advising that, after completing the investigation into her Complaint, he was satisfied that the evidence

supporting the Complaint of abuse of authority was insufficient to justify taking the matter to a public hearing, and accordingly, pursuant to s. 13(1)(c) of the *Act*, he must decline from taking any further action on the Complaint.

[10] On or about June 8, 2017, M.B. requested, as she is entitled to, a review of the Commissioner's decision pursuant to section 13(2) of the *Act*.

[11] The Commissioner referred the Complaint for a review of his decision, pursuant to section 13(3) of the *Act*, to a judge of the Provincial Court of Manitoba.

[12] The review came on for hearing before this Court on December 14, 2017.

[13] Present at the review hearing were M.B. and her counsel, Mr. C. Gray; Mr. P. McKenna, counsel for the officers; and Mr. J. Koch, counsel for the Commissioner. Briefs were filed by all counsel.

[14] Mr. Koch requested leave to make submissions at the review hearing on behalf of the Commissioner, if required. The Court granted that leave.

### **Issue to be decided on this review**

[15] The ultimate issue to be decided on this review is whether the Commissioner erred in his decision to decline to take further action on the Complaint.

### **The Commissioner's Jurisdiction**

[16] By s. 13(1) of the *Act*, the Commissioner must decline to take further action on a complaint if he is satisfied that any of the following circumstances apply:

- (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.

[17] The Commissioner declined to take further action on the Complaint on the basis that the evidence supporting the Complaint of abuse of authority was insufficient to justify taking the matter to a public hearing.

[18] The Commissioner's jurisdiction comes from the *Act* only. He has no authority or jurisdiction to decide the merits of a complaint. If he is satisfied that there is insufficient evidence supporting a complaint to justify a public hearing, he has no discretion to do anything other than to decline to take further action. On the other hand, if the situation does not fall into one of the circumstances set out in s. 13(1), then the Commissioner must take further action on a complaint, unless there is resolution pursuant to sections 15 or 16 of the *Act*.

### **Burden and Standard of Proof**

[19] Section 13(4) of the *Act* places the burden of proof on a complainant to show that the Commissioner erred in declining to take further action on a complaint.

[20] The standard of proof is a civil standard, that is, on a balance of probabilities.

### **Scope of the Judicial Review**

[21] A Provincial Court Judge, on an application pursuant to s. 13(2) of the *Act*, is to conduct a judicial review of the Commissioner's decision not to take further action on a complaint.

[22] Section 13(2) of the *Act* provides:

“Where the Commissioner has declined to take further action on a complaint under subsection (1), the complainant may, within 30 days after the sending of the notice to the complainant under subsection (1.1), apply to the Commissioner to have the decision reviewed by a provincial judge.”

[23] A review by a Provincial Court Judge under s. 13(3) of the *Act* is limited in scope. It is not a hearing nor an appeal on the merits of a complaint. A review is limited to the judge determining whether the Commissioner, in deciding to decline to take further action on a complaint, acted within the jurisdiction provided to him by the *Act*.

### **Standard of Review**

[24] The standard of review to be applied to the Commissioner's decision depends upon the nature of the alleged error.

[25] The Supreme Court of Canada determined in the case of *R. v. Dunsmuir*, [2008] S.C.J. 9, that there are two standards of review to be applied in judicial reviews. When it is an error of jurisdiction that is alleged, the standard of review is one of "correctness". In the case of an alleged error that is not jurisdictional in nature, the standard of review is one of "reasonableness".

[26] A jurisdictional error is made if the Commissioner failed to act within the limits of his jurisdiction or as required by his jurisdiction, by using an incorrect test to reach his decision. Counsel for M.B. confirmed that no jurisdictional error is alleged in this case.

[27] Accordingly, it is the standard of "reasonableness" that must be applied to the Commissioner's decision declining to take further action on the Complaint.

[28] The Supreme Court of Canada in *Dunsmuir*, defined the standard of reasonableness within the context of juridical review, at paragraph 24 as follows:

"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."

[29] The standard of reasonableness has been applied by Manitoba provincial court judges on reviews of decisions of the Commissioner declining to take further action

on complaints on the basis of insufficient evidence, even prior to the *Dunsmuir* decision (including Judge R. Chartier, as he then was, in *R.P.M. v. Cst. C. and Cst. W.*, LERA Complaint #564 (February 12, 2004); and Judge Joyal, as he then was in *M.S. v. Cst. P. B. and Cst. G.D.*, LERA Complaint #2004/172 (June 21, 2006). After the *Dunsmuir* decision, the reasonableness test has been consistently applied to judicial reviews addressing sufficiency of the evidence. In this Court, such cases include Judge Preston’s decision in *B.J.P. v. Sgt. G.H., Cst. B.Z., and Sgt. G.M.*, LERA Complaint #2005/186 (November 14, 2008); A.C.J. Chartier’s decision in *K.A. and S.J. and Cst. C.P. and Cst. P.B.*, LERA Complaint #2006-233 (March 8, 2010); Judge Chapman’s decision in *B.L., and P/Sgt E.R., Cst. W.C., and Cst. J.B.* (October 11, 2011); A.C. Judge Guy’s decision in *O.O., and Cst. R.M. and Cst. R.C.*, LERA Complaint 2012/189 (December 29, 2013); and Judge Roller’s decision in *C.B. v. Cst. C.E. and Cst. J.N.*, LERA Complaint #2013/134 (February 16, 2016)

[30] Judge Preston in *B.J.P. v. Cst. G.H., Cst. B.Z., and Sgt. G.M.*, LERA Complaint#2005-186 (November 14, 2008), used and applied the test set out in *Dunsmuir* and the reasoning of Judge Joyal in *M.S. v. Cst. P.B. and Cst. G.D.* Judge Preston described the judge’s role in a s. 13 review case, as follows, at paragraph 39:

“Be that as it may, my function is not to pass judgment on the quality of the initial police investigation, but to decide whether the Commissioner erred in his conclusion. I cannot say that he assessed the complaint unreasonably. He drew a rational conclusion on the merits of the complaint. I may not have drawn the same conclusion. That is not the test here. As long as the Commissioner has properly assessed the complaint reasonably and has drawn a rational conclusion, and I have concluded that he has done so, I will not interfere with his decision.”

[31] Judge Preston stated the following in the *B.J.P.* decision at paragraphs 25 and 26:

“The question to be answered is this: did the Commissioner assess the evidence reasonably? In other words, have the Commissioner’s reasons been transparently, intelligibly and rationally articulated?”

...My function is to see if the Commissioner has made a reasonable assessment of the evidence. In other words, I must examine whether the Commissioner drew a rational conclusion, one that could reasonably be drawn on the facts of this case. “

[32] Judge Preston in *A.M. v. Cst. D.R., Cst. G.P., Cst. J.M. and D/Sgt. R.L.*, LERA Complaint #2005-307 (July 17, 2009), considered the matter of weighing of evidence by the Commissioner. Judge Preston said at paragraph 35:

“*The Law Enforcement Review Act* mandates the Commissioner to weigh all the evidence and to draw a conclusion on its sufficiency. This includes the weighing of disputed evidence in order to determine its sufficiency. If that were not the case, each time there was a contradiction on any fact in issue, the matter would have to proceed to hearing before a provincial judge.”

[33] To be absolutely clear, this Court’s role on this review is not to review the evidence and decide what conclusion this Court would come to on the merits of the Complaint. Rather, in reviewing the Commissioner’s decision not to refer the Complaint to a hearing on the merits due to insufficiency of evidence, this Court’s role is limited to deciding whether that conclusion of the Commissioner is one of the rational conclusions that could be arrived at, based on a reasonable assessment of the evidence, and falls within a range of possible legally defensible outcomes, taking into account the Commissioner’s entitlement to weigh all the evidence.

[34] Application of the standard of reasonableness means the Court, on this review, must determine whether the Commissioner assessed the evidence *reasonably* (that is, in a transparent, intelligible, and rational way), and whether the conclusion he reached that there was insufficient evidence to justify a public hearing, is one that could *reasonably* be drawn on the facts of the case. Even if others might have reached a different conclusion than the Commissioner reached, and even if this Court might have reached a different conclusion than the Commissioner did, based on the evidence provided in the investigation, as long as the decision the Commissioner

reached is a conclusion that it was reasonable for him to reach, the Court must uphold that decision.

### **The Position of M.B.**

[35] M.B.'s position on this review is twofold. First, M.B. says that the Commissioner's assessment of the evidence was not done reasonably – that is, the Commissioner's report does not make it clear that the assessment was done in a transparent, intelligible and rational way. Second, M.B. says the Commissioner's ultimate conclusion that there was insufficient evidence to justify a public hearing was not a rational conclusion in light of the facts of the Complaint. In other words, M.B. says that the conclusion reached by the Commissioner that there was insufficient evidence to justify a public hearing was not a reasonable one.

[36] M.B. argues that the Commissioner's decision to decline to take further action on the Complaint was unreasonable because the Commissioner failed to adequately consider M.B.'s mental and emotional health at the time of the interaction with the officers. M.B. says that a consideration of her state is critical to an assessment of the officers' alleged conduct, and may create doubt as to the officers' characterization as to the nature of their conversation with M.B.

[37] M.B. says this error is evident by looking at the Commissioner's report, and in particular:

- the Analysis and Conclusion part of the Commissioner's report does not refer to the mental health of M.B. that was identified during the investigation;
- The Analysis and Conclusion part of the Commissioner's report does not refer to M.B.'s feelings of intimidation that she told the LERA investigator she had;

- The Analysis and Conclusion part of the Commissioner’s report does not reference that M.B. felt upset as she stated in her Complaint; and
- The characterization of M.B. being intimidated, upset, having mental health issues and the officers attending to check on her well-being, is at odds with the characterization of the officers that the conversation was “jovial”.

### **Respondent Officers’ Position**

[38] The officers do not deny that their actions must be considered in the context of the mental and emotional state of citizens they deal with, but say that the question as to whether their words or actions constituted an “abuse of authority” is to be judged against a standard established by jurisprudence.

[39] Further, the officers’ position is that the Commissioner did in fact consider the mental and emotional state of M.B. in the context of the evidence about the officers’ words and actions, that he did so is clear on a reading of his report as a whole, and the fact the “Analysis and Conclusion” section of the Commissioner’s written decision does not specifically reference M.B.’s mental or emotional state, or specifically mention that M.B. felt intimidated or upset, does not make the decision an unreasonable one.

### **The Commissioner’s Decision**

[40] The Commissioner’s decision set out in his letter of June 2, 2017 is divided into three parts, as follows:

#### **Part 1: The Complaint and Statement**

[41] M.B. filed a written complaint on March 15, 2017.

[42] That Complaint alleges that:

- On February 19, 2017, two Winnipeg Police Services (“WPS”) officers arrived at M.B.’s apartment at 11:11 p.m. and left at 11:27 p.m.
- M.B. arrived home at 11:05 p.m. and saw a WPS police car parked outside her apartment complex
- M.B. had just entered her apartment when her buzzer rang and the person(s) identified themselves as police officers
- The two officers who attended were badge #3041 and 2648
- The dark haired officer did most of the talking
- The officer said to M.B. “I hear you can read people real well, what can you tell me about me”. M.B. felt the officer said this mockingly
- M.B. advised the officer that B.P. (a friend/neighbour) must have sent them. M.B. does not recall if the officer said B.P. had called or if the officer asked her why she thought it was B.P.
- M.B. told the officer it was because B.P. had helped her make a sexual assault complaint in the past and was helping her with her resume
- The officer asked M.B. what happened and she told him about being sexually assaulted while at church
- M.B. described speaking with the Monsignor and how she felt about the incident
- M.B. was getting upset as she felt she could not convey what she wanted to say properly
- M.B. had told B.P. she did not want to talk about this incident that that is perhaps why B.P. had called police
- On Friday, February 17, 2017 she had called B.P. as she could not get her car started and B.P.’s boyfriend came and helped M.B.
- M.B. had told B.P. that she was causing M.B. unnecessary suffering

- The officer told M.B. that she (M.B.) had been calling B.P. and harassing her
- B.P. was making it out to the police that she and M.B. really didn't know each other
- The officer told M.B. he did not think B.P. was her friend
- The officer told M.B. she should go back to her church and M.B. felt this was an inappropriate comment as it was none of his business if she went back to the church
- The officer asked M.B. if she had any religious items from the archangel Michael as he is supposed to protect police
- M.B. felt the officer said this because he could see that she had numerous religious items throughout her apartment
- M.B. had a rosary hanging near the doorway and the officer took his hand and was running it down the rosary and asking her if this was where she does her rosary. M.B. felt that question was inappropriate and disrespectful
- M.B. told the officer she has a number of rosaries
- M.B. and the officers then started talking about the Monsignor doing exorcisms
- The officers said the more you know spiritually the more you know
- The officer told M.B. "You seem to be okay"
- M.B. has had mental health issues
- When the officers said to M.B. that she seemed okay, M.B. assumed they were at her apartment for a mental health assessment
- The officers told M.B. not to contact B.P.

- The officers would not look at any of the email exchanges M.B. had between herself and B.P.
- M.B. thanked the officers for coming
- M.B. felt the officers were mocking her because she is gifted and knows things that would freak B.P. out
- M.B. felt the officers did not show any sympathy or empathy towards her
- M.B. was alone with the officers in her apartment
- M.B. indicated that if she did have mental health issues, she felt the way the officer was speaking to her was inappropriate
- The officers did not take M.B. for a mental health assessment and left her in her apartment
- M.B. felt that the officers were speaking inappropriately toward her about her being able to see things and read people and also handing her rosary and asking her about her practice using her rosary
- M.B. did not feel it appropriate for the officers to ask her about having any religious items for the Archangel Michael who protects the police
- M.B. felt the officers were not there to help her but were being jokesters and she felt intimidated and like she had to watch what she said

### **Part 11: The Investigation**

[43] The Law Enforcement Review Agency reviewed the police report, which contained minimal information, since the incident was handled at first as a paperless file. The police file relates to the WPS officers attending to M.B.'s residence to check on her well-being following a report from B.P., as B.P. was concerned for M.B.'s safety and mental health. The file also indicated that M.B. repeatedly harassed B.P. The file indicates the officers attended and in speaking with M.B., found her in good spirits and they did not have any concerns.

[44] Constables K.T. and N.B. were interviewed by the LERA investigator as to M.B.'s allegations. They said:

- B.P. had contacted WPS because she was concerned for M.B.'s well being and mental health
- M.B. informed the officers about being spiritually assaulted by her Monsignor from the church and that no one takes her seriously
- The officers said M.B. did not state that she had been sexually assaulted at the church, and only spiritually assaulted
- The officers said they were only standing at the entrance to M.B.'s apartment on the floor mat and did not go into her apartment
- M.B. was wondering why the officers were there as she indicated she had been to the to the police station in the past and the officers she spoke with did not take her seriously
- Cst N.B. said he asked her questions to make conversation with her
- M.B. went into her history involving the monsignor and the church
- M.B. told them that she could read people by looking into their eyes
- Cst N.B. admitted he said to M.B. "What do you read from my partner's eyes?"
- Cst. N.B. said he said this to keep the conversation going in a jovial manner and did not mean any disrespect toward her
- Cst N.B. further admits he observed her rosary hanging on the wall by her front entrance and did place his hand on the rosary and asked her if she said her rosary in her apartment. M.B. seemed to get insulted when Cst N.B. touched her rosary
- The officers said they could see into her apartment and did see religious figures

- Cst N.B. said he is a religious person and agreed he asked M.B. if she had any figures of the Archangel Michael, as he is the protector of the police. Cst. N.B. said this was said simply to make conversation
- The officers said they were able to determine that M.B. was not in any danger and they left after approximately 10 to 15 minutes

### **Part 111: Commissioner's Analysis and Conclusion**

[45] The Commissioner's responsibility, after the investigation is complete, is to consider all of the information and decide whether he is satisfied that there is sufficient evidence supporting the Complaint to justify a public hearing. If he is not so satisfied, then s. 13(1)(c) of the *Act* requires him to decline to take further action on the Complaint and to inform the complainant, the respondent officers and the respondents' Chief of Police of his reasons for declining to take further action.

[46] In his letter of June 2, 2017, the Commissioner so informed M.B. By letter of that same date, he provided a copy to the Chief of Police of the WPS, and copied the officers, Constables K.T. and N.B., and their counsel Mr. McKenna.

[47] As pointed out in his conclusion, it is not the Commissioner's role to make any final or binding decisions as to what did or did not happen. Any such decisions would be made by a provincial court judge, and only if the matter proceeded to a hearing on its merits.

[48] The Commissioner reviewed M.B.'s version of her interaction with the officers, the responding information provided by the officers and the police file, including information about B.P.'s request that the officers attend to do a well-being check on M.B.

[49] The Commissioner was satisfied, based on all the evidence before him, that the evidence supporting the Complaint was insufficient to justify referring the matter to a public hearing.

## **Analysis of the Commissioner’s Decision**

### **M.B.’s argument**

[50] M.B.’s allegation in her Complaint is that the officers’ conduct amounted to an abuse of their authority, on the basis such conduct was discourteous and/or uncivil, and amounted to a “disciplinary default” pursuant to s. 29(a)(iv) *Act*.

[51] M.B.’s Complaint raised two issues. First, did the officers’ comments and interaction with her constitute discourteous and/or uncivil behaviour? Second, if it did, did it amount to abuse of authority so as to constitute a disciplinary default?

[52] The Commissioner did not need to reach a conclusion on either of those two issues. He had to consider whether there was sufficient evidence to take the matter to a public hearing. Ultimately, as communicated in his letter to M.B., the Commissioner concluded, based on the LERA investigation, that the evidence was insufficient to justify taking the matter to a public hearing. This Court is reviewing that conclusion of the Commissioner to determine if it was a reasonable conclusion.

[53] M.B. says that the context of her interaction with the officers, including her mental and emotional state, of which the officers were aware, is of paramount importance in a determination as to whether the officers’ conduct and comments were discourteous and/or uncivil and constituted an abuse of authority, and that the Commissioner’s decision not to take action on the Complaint cannot be a reasonable one unless he took her mental and emotional state into account in his assessment, and unless his written reasons for decision make it clear that he did.

[54] M.B. says that the Commissioner’s reasons for decision reflected in his letter to her do not make it clear that he considered the context within which the officers’ conduct took place, specifically her mental and emotional state, and that that error means his ultimate conclusion that there was not sufficient evidence to send the matter to a public hearing on its merits, is not a reasonable one.

### Considerations for analysis

[55] In order to appropriately review the Commissioner's decision on this review, bearing in mind M.B.'s specific argument, this Court has to consider:

- What is the law as to “discourteous and/or uncivil conduct” and when such conduct amounts to “abuse of authority”?
- What evidence did the Commissioner have and consider as to the context within which the officers' conduct occurred, specifically M.B.'s emotional and mental state?
- Do the Commissioner's reasons for decision, set out in his letter to M.B. on June 2, 2017, make it clear that he considered her mental and emotional state in reaching his decision, so that he was assessing the officers' conduct in the context of those circumstances?
- Based on an assessment of the evidence the Commissioner had, including evidence of M.B.'s emotional and mental state, was the Commissioner's decision a reasonable one?
- If the Commissioner's decision, in its conclusion, does not sufficiently specifically address the context of M.B.'s emotional and mental health state, does that make an assessment of the evidence and/or his conclusion an unreasonable one?

What is the law as to “discourteous and/or uncivil conduct” and when such conduct amounts to “abuse of authority”?

[56] Even if the conduct of the officers in this case was discourteous and/or uncivil, which was not a finding that was made, that does not necessarily mean that it amounted to an abuse of authority.

[57] The jurisprudence that has considered what conduct amounts to an abuse of authority has established that for discourteous and/or uncivil conduct to amount to an abuse of authority, there has to be something more – something that is exploitative, or reflects the officers acting in bad faith. To determine whether discourteous and/or uncivil conduct will amount to an abuse of authority requires a consideration of the specific facts of a particular case and of the context within which the interaction occurred.

[58] Judge Joyal (as he then was) held in *A.C. v. Cst. G.S.* LERA Complaint #6100 (February 20, 2007), that even if conduct set out in one of the enumerated clauses of s. 29(1) of the *Act* is found to have occurred, that does not lead to an automatic finding that such conduct is an “abuse of authority”. Whether or not it does is dependent on the facts of a particular case. Judge Joyal stated at paragraph 52 as follows:

“Police conduct which can be properly found as an “abuse of authority” is that exploitative conduct which, even after an examination of the factual context of a given case, cannot be viewed as consistent with a reasonable police officer’s good faith intention to lawfully perform his duties and uphold the public trust.”

[59] And at paragraph 69 of the *A.C. v. Cst. G.S.* decision, Judge Joyal stated:

“Even recognizing the important public trust placed in police officers, not all discourteous and uncivil statements made by a police officer to a citizen will rise to the level of an abuse of authority. Context will, in most circumstances, provide the necessary assistance in determining the sensible parameters by which to evaluate discourteous and uncivil statements for possible abuse of authority.”

[60] Judges of this Court have cautioned against rulings that “...encourage hearings pursuant to section 29(a) for every example of sub-par police behaviour”. (paragraph 53 of *A.C. v. Cst. G.S.*). Even police conduct that is found that have constituted a *Charter* breach, while amounting to a professional mistake with potentially significant legal consequences, is not necessarily an abuse of authority.

(see *F.D. v. Cst. E.D. and Cst. M.C.*, LERA Complaint #5951 (December 12, 2005) and *J.W.P and Cst. R.L.* LERA Complaint #3704 (November 14, 2004).

[61] Judge Coté, of the Quebec Court (Civil Division), in Québec (Comité de déontologie policière) c. Girard, [2002] C.C.S. No. 1190, held that the totality of the circumstances must be examined in order to find a disciplinary default and that an “abuse of authority” must have an “element of excess” (paragraphs 24 and 25). Judge Coté said that the actions of the police, in order to constitute a disciplinary default, must be “reprehensible or excessive” (paragraph 25).

[62] M.B. relies on Judge Smith’s decision in *S.H. and Det. Sgt. R.H. et al* LERA Complaint #6180 (August 18, 2006), to highlight that the officers’ conduct has to be assessed within the context of the interaction and the unique circumstances of the complainant. In that case, Judge Smith found an officer’s conduct to be discourteous and amount to an abuse of authority by having a complainant and her 9 year old child wait in a police car for a couple of hours without food, drink or washroom opportunities. Judge Smith’s decision was overturned on judicial review by Justice Menzies of the Court of Queen’s Bench of Manitoba in *S.B. v. Horyski*, [2008] M.J. No. 476. Justice Menzies did not disagree with the statement by Judge Smith that context was important in assessing officers’ actions, but stated at paragraphs 10 and 11:

“In interpreting this section I think that the courts should be slow to find that the mere discourteous conduct is sufficient to constitute disciplinary default. Police officers work in high-pressure situations with potentially dangerous work and much of the time the people they are dealing with do not want to be dealt with by police officers. And to make a finding that merely being discourteous in some way or another should constitute disciplinary default leaves officers at a standard that cannot be met.

Discourteous conduct in order to constitute a disciplinary default must reach a level equal to an abuse of authority. It must be more than merely being discourteous. That did not happen here.”

[63] Justice Menzies found that although the officer admitted he could have been more accommodating and could have made better inquiries of the complainant and her child, the officer's behaviour did not amount to an abuse of authority.

What evidence did the Commissioner have and consider as to the context within which the officers' conduct occurred, specifically M.B.'s emotional and mental state?

[64] The Commissioner had all of the evidence set out in the LERA investigation. This included information that:

- P.B., a neighbour/friend of M.B.'s had called police and requested a well being check on M.B. due to concerns for M.B.'s mental health
- M.B. got upset during her interaction with officers because she felt she could not convey what she wanted to say properly
- M.B. has had mental health issues
- M.B. assumed the officers were there for a mental health assessment
- M.B. was alone with the officers in her apartment
- M.B. felt intimidated and that she had to watch what she said

In reaching his decision that there was not sufficient evidence to justify a public hearing, did the Commissioner in fact, specifically consider and take into account M.B.'s emotional and mental state at the time of her interaction with the officers?

[65] All of the points set out above as to M.B.'s emotional and mental state during her interaction with officers, are specifically set out by the Commissioner in the letter he sent to M.B. on June 2, 2017, in Part 1 under "The Complaint and Statement". If the Commissioner had not included in his letter any reference to M.B.'s mental health or emotional status, or the fact that the call was specifically for the purpose of checking on the well being of M.B., the Court would be concerned that the

Commissioner had not considered this specific context and particular circumstances of this case, namely that the officers were dealing with someone who was possibly in a fragile mental or emotional state and might be particularly vulnerable. That is not the case here. The Commissioner clearly had evidence of, and was clearly well aware of, M.B.'s circumstances as he lists a number of points to that effect in his letter.

*Do the Commissioner's reasons for decision, set out in his letter to M.B. on June 2, 2017, make it clear that he considered her mental and emotional state in reaching his decision, so that he was assessing the officers' conduct in the context of those circumstances?*

[66] Specific statements made by the Commissioner as to two particular areas, in the "Analysis and Conclusion" portion of his letter from to M.B. dated June 2, 2017, make it clear that he did consider M.B.'s mental and emotional state in assessing the evidence about the officers' conduct.

[67] First, the Commissioner specifically references the reason for the officers' attendance at M.B.'s residence being in response to the call from B.P., who expressed that she was concerned for M.B.'s well being and mental health, and that the officers' sole purpose in attending was to assess whether or not M.B. was safe, and if she was possibly a danger to herself.

[68] Second, the Commissioner sets out some of the details of conversation between M.B. and the officers, which make it clear that the officers were asking questions and encouraging conversation with M.B. for the purpose of checking if M.B. was safe or if she was possibly a danger to herself, and only once satisfied that she was safe, did they leave.

[69] In the Court's view, the Commissioner adequately made it clear in his reasons, that he considered M.B.'s emotional and mental health concerns in assessing the

officers' comments and conduct. It is clear from a reading of the decision that M.B.'s mental health status was the backdrop to the interaction with the officers.

Based on an assessment of the evidence the Commissioner had, including evidence of M.B.'s emotional and mental state, was the Commissioner's decision a reasonable one?

[70] The Commissioner was entitled to engage in weighing the evidence in order to determine its sufficiency, and to rely upon his expertise in making a decision.

[71] There were some differences in the version of what M.B. said the officers said to her, and the version given by the officers. As to certain comments that officers agreed they made, they said such comments were not made in a mocking way, or intended in any way to be insulting, but were made solely for the purpose of engaging M.B. in conversation so they could assess whether she was alright.

[72] The Commissioner was entitled to consider both the version given by M.B., on the one hand, and by the officers on the other, and accept that the officers did not make comments in a disrespectful, insulting or mocking way, or in a way that would make such comments amount to uncivil or discourteous behaviour that would constitute a disciplinary default under s. 29(1)(iv) of the *Act*. Even if M.B.'s characterization of the officer's comments were to be accepted as being entirely accurate, the Commissioner was entitled, upon considering all of the evidence, to determine there was insufficient evidence to have a hearing as to whether such comments were of a nature that constitute discourteous and/or uncivil conduct, and if they did, whether they would amount to an abuse of authority so as to constitute a disciplinary default. The evidence before the Commissioner, even M.B.'s version, really does not suggest any bad faith by the officers, nor that such comments were reprehensible or demonstrate any sort of excess.

[73] This Court finds that the Commissioner's reasons in this case contain:

- A summary of the situation, the background and facts put forward by both M.B. and by the officers; and
- Sufficient analysis to permit the Court to understand why the Commissioner decided the way he did, and for the Court to determine if the outcome the Commissioner reached was a reasonable one.

[74] This Court finds that based on the evidence considered by the Commissioner, including evidence of M.B.'s mental and emotional state, one of the conclusions it was reasonable for the Commissioner to reach was that there was insufficient evidence to justify sending the Complaint to a public hearing.

*If the Commissioner's decision, in its conclusion, does not sufficiently specifically address the context of M.B.'s emotional and mental health state, does that make an assessment of the evidence and/or his conclusion an unreasonable one?*

[75] The Court goes on to consider whether, if in fact what is contained in the Commissioner's conclusion portion of his report does not in fact, sufficiently address the fact of M.B.'s emotional and mental status at the time of her interaction with the officers, whether that necessarily means that the Commissioner did not reasonably assess the evidence and/or that the conclusion he came to is not a reasonable one.

[76] In the Court's view, to not specifically reference the mental and emotional state of M.B. in the conclusion section of the report, is not fatal to the reasonableness of the Commissioner's conclusion. The Supreme Court of Canada decision in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, is the leading case on challenges in judicial reviews to the "sufficiency of reasons" of an administrative agency. Justice Abella explained what the terms "justification, transparency and intelligibility" in the *Dunsmuir* case, mean. Justice Abella stated at paragraph 16:

“...In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the Dunsmuir criteria are met.”

[77] In other words, the Court’s role on a review is to assess whether the tribunal’s reasons support the conclusion reached. The tribunal’s reasons are to be read together with the outcome to determine if the result falls within a range of acceptable possible outcomes that are defensible as to the facts and law (paragraphs 12 and 15 of *Newfoundland and Labrador Nurses’ Union* decision).

### **Conclusion and Decision**

[78] As previously indicated, this Court’s role is limited to deciding whether the Commissioner’s decision not to take further action on the Complaint was a reasonable decision. That is, did the Commissioner make a reasonable assessment of the evidence (one that is transparent, intelligible and rational), and draw a rational conclusion, being one that could reasonably be drawn on the facts of the case?

[79] M.B. argues that the Commissioner’s conclusion was not a reasonable one because since the conclusion section of his written decision did not specifically refer to M.B.’s mental or emotional state, the assessment of the evidence was not transparent, intelligible or rational, and accordingly, the Commissioner’s conclusion was not a reasonable one. This Court does not agree. The mental and emotional state of M.B. was the backdrop to the entire interaction between M.B. and the officers. The Commissioner’s decision makes it clear that the sole reason for the officers’ attendance at M.B.’s residence was to check on her well being, in response to a call from a concerned neighbour. The Commissioner’s conclusion included reference to the fact the officers engaged M.B. in conversation solely to see if M.B. was indeed all right or needed assistance. The conclusion of the Commissioner specifically references that the officers denied mocking her, intending to be insulting or joking

and made it clear they were just trying to keep conversation going so they could assess if she was safe. Based on the evidence, the Commissioner decided there was not sufficient evidence to send the matter to a public hearing. In the Court's view, the Commissioner's reasons are sufficiently transparent, intelligible and rational, and one of the reasonable conclusions they lead to is the one the Commissioner reached and communicated to M.B. in his letter dated June 2, 2017.

[80] Whether or not this Court would have come to the same conclusion as the Commissioner on a fresh look at the evidence is not the issue. If the conclusion the Commissioner came to was a reasonable one, and one of the rational determinations based on the facts and evidence before him, then this Court must not interfere with that decision.

[81] This Court concludes that the Commissioner assessed the evidence reasonably and drew a rational conclusion on the merits of M.B.'s complaint. The Commissioner's reasons were set out transparently, intelligently and rationally in his letter to M.B. advising of his decision. This Court finds that M.B. has not met her onus. This Court is not prepared to interfere with the decision of the LERA Commissioner.

[82] The Court wishes to thank counsel for their comprehensive briefs and oral submissions.

Original signed by:  
Judge C. Carlson  
Provincial Court Judge