IN THE MATTER OF: *The Law Enforcement Review Act*
Complaint #2020-82

AND IN THE MATTER OF: An Application pursuant to s. 13(2) of *The Law Enforcement Review Act*, C.C.S.M. 1987, c.L75

THE PROVINCIAL COURT OF MANITOBA
Winnipeg Centre

P. S.	)	Complainant
	)	Self-represented
- and -	)	
	)	
Constable S.T.	)	Paul McKenna
	)	for the Respondent
	)	
	)	Devin Johnston and Tamara Edkins
	)	for the Commissioner
	)	
	)	Hearing: October 20, 2021, and
	)	January 12, 2022
	)	Decision: January 28, 2022
	)	

Restriction on Publication:
This Decision is subject to a ban on publication of the Respondent's name pursuant to section 13(4.1)(b) of *The Law Enforcement Review Act*.

L. CHOY, P.J.

[1] This is an application for review under subsection 13(2) of *The Law Enforcement Review Act* (the "Act"). These reasons review the Law Enforcement Review Agency ("LERA") Commissioner's decision to decline to refer a complaint

to full public hearing or take other further action. These reasons also consider the standard of review applicable to subsection 13(2) applications in light of the Supreme Court of Canada decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

Background

[2] The complainant P.S. (the "Complainant") recalls being victimized by a relative in the 1970s when she was a young child. In October 2020, she contacted the Winnipeg Police Service ("WPS") to make a report of historical sexual abuse. On October 13, 2020, Cst. S.T. (the "Respondent") and his partner met with the Complainant to take her statement. The interaction did not go well. First, there was some back and forth about where the meeting should take place. Then when they met, the Complainant felt that the Respondent was trying to discourage her from making a report and was questioning her motives. During their conversation, the Respondent provided erroneous information about the limitation period. The Complainant became upset and before the statement was taken, she refused to deal with the Respondent any further. Two female officers were called to come and take the statement, which was ultimately forwarded to the applicable police organisation.

The Law Enforcement Review Agency

[3] If a member of the public feels aggrieved about the way they have been treated by police, they can file a complaint under the Act. LERA is the administrative agency responsible for dealing with such complaints. When a complaint is received, the LERA Commissioner investigates the complaint and determines whether there is sufficient evidence to warrant taking further action, which may take the form of informal resolution, admission of default, or proceeding to a public hearing. As stated by Judge Preston in *B.J.P. v Cst. G.H., Cst. B.Z. and Sgt. G.M.*, LERA Complaint #2005-186 (November 14, 2008):

> The legislation provides for a screening mechanism, which gives the LERA Commissioner the power to dismiss certain complaints. This screening process, which has been upheld by this Court as a valid function, exists to prevent unnecessary public hearings. The screening process is predicated on the premise that the Commissioner, as an administrative decision-maker, has the expertise to assess a complaint made by a citizen.

The Complaint

[4] On October 30, 2020, the Complainant filed LERA Complaint No. 2020-82. The complaint outlines the following concerns:

1. WPS officers should not question a victim's choice of venue for the purposes of making a report. The Complainant should not have been pressured to meet in her home.
2. The Respondent seemed intent on discouraging the Complainant from making a report. He questioned her motives and implied that she may be lying as a result of a grudge.
3. The Respondent provided incorrect information about the law to discourage the Complainant from making a report.
4. The two female officers went out of their way to defend and excuse the Respondent. This was unnecessary and inappropriate.

[5] The overall complaint was that the behaviour of the Respondent was substandard and left the Complainant feeling disrespected, belittled and criticized.

The LERA Commissioner's Decision

[6] After receiving the complaint, the LERA Commissioner arranged for investigation of the complaint. This included discussing the complaint with the Complainant, reviewing WPS file materials including the narrative police reports, officer notes, and dispatch records, and conducting an interview of the Respondent and his partner P.M.

[7] After conducting a review of the complaint investigation, the Commissioner decided that there was insufficient evidence to justify referral of the matter to a public hearing. The Complainant was notified of the decision to take no further action by letter dated June 14, 2021.

[8] In the decision letter, the LERA Commissioner identified that it was not his role to make any final and binding decisions as to what events did or did not occur. Any decisions of that nature would be made by a Provincial Court judge. The Commissioner cited that his role was to apply subsection 13(1) of the *Act* which reads as follows:

> 13(1) Where the Commissioner is satisfied
>
> (a) that the subject matter of the 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.

[9] He identified that the complaint alleged two disciplinary defaults in accordance with the *Act*: Section 29(a)(iii) using oppressive or abusive conduct or language and section 29(a)(iv) being discourteous or uncivil. After a review of the information obtained through investigation, he wrote:

> On review of matters, I am permitted to make my decision based on a limited assessment of credibility and disputed evidence, but without 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 there is evidence of an abuse of authority, and if that evidence is sufficient to justify taking further action.

> Following a close review of all the information available, I am satisfied, that the evidence required to justify referral of this complaint to a public hearing, is insufficient and as such, pursuant to section 13(1)(c) of *The Law Enforcement Review Act* I must decline taking further action and the file is closed.

Review of a Decision under s. 13(2) of the *Act*

[10] When a person is dissatisfied with the Commissioner's decision, they may, as the Complainant has done here, make an application to the Provincial Court under section 13(2) to have a judge review the decision. Section 13(2) provides as follows:

> 13(2) 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.

[11] Before I deal with review of the June 14, 2021 decision, I will first address the applicable standard of review.

Standard of Review

[12] The law regarding judicial review of administrative decisions is complex and has undergone many changes. There are several Manitoba Provincial Court decisions which explain how the court should approach a review under subsection 13(2) of the *Act* (see *R.P.M v. Cst. C. and Cst. W.*, LERA Complaint #5643 (February 12, 2004)(Judge R. Chartier, as he then was) and *M.S. v. Cst. B. and Cst. D.*, LERA Complaint #2004-172 (June 21, 2006)(Judge G. Joyal, as he then was).

[13] In 2008, the Supreme Court of Canada in the case *Dunsmuir v. New Brunswick*, 2008 SCC 9 re-examined the law of judicial review and clarified the test to be applied. 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)(Judge T. Preston) summarized the *Dunsmuir* standard of review as it applies to subsection 13(2) LERA reviews as

follows:

> [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 LERA 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. Such is not the case here.
> [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.

[14] This is the standard which has consistently been applied by Manitoba Provincial Court judges conducting subsection 13(2) reviews since 2009.

[15] In 2019 the Supreme Court of Canada again revisited the test to be applied on judicial review in *Minister of Citizenship and Immigration v. Vavilov*. At the initial hearing on October 20, 2021, I asked the parties to address the impact of *Vavilov* on how this court should conduct a subsection 13(2) review. The matter was adjourned for submissions. In the interim, the Commissioner requested permission to make

submissions related to the fair and proper interpretation and application of the *Act*. That permission was granted and the Commissioner also made submission on the issue.

[16] In *Vavilov*, the Supreme Court of Canada revised the framework for determining the standard of review where a court reviews the merits of an administrative decision. The starting point is a presumption that reasonableness is the applicable standard in all cases. This presumption, however, can be rebutted in two instances:

i) Where the legislature has indicated it intends a different standard of review; and

ii) Where the rule of law requires the standard of correctness, namely, constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding the jurisdictional boundaries between administrative bodies.

[17] The first exception is engaged when the governing statute has wording which specifically signals the legislature's intent that appellate standards are to apply to the court's review of the decision. Typically, this occurs when the statute provides for an appeal process from the administrative decision to the court.

[18] The statutory mechanism applicable in the present case is subsection 13(2). I have considered whether the language of subsection 13(2) discloses a legislative intent to create a statutory appeal mechanism from the Commissioner's decision. I have concluded that it does not. Subsection 13(2) does not specifically use the word "appeal." Instead, it describes the process as a "review." It is notable that elsewhere in the *Act*, the word "appeal" is used (see for example sections 13(5) and 31). This suggests that the Legislature purposely used the terms "appeal" and "review" to delineate separate and distinct processes under the *Act*.

[19] In my view, subsection 13(2) provides a mechanism by which the decision of the LERA Commissioner may be judicially reviewed by a Provincial Court judge as a *persona designata*. It falls within the situation described by the Supreme Court of Canada in *Vavilov* at paragraph 51:

> Second, we note that not all legislative provisions that contemplate a court reviewing an administrative decision actually provide a right of appeal. Some provisions simply recognize that all administrative decisions are subject to judicial review and address procedural or other similar aspects of judicial review in a particular context. Since these provisions do not give courts an appellate function, they do not authorize the application of appellate standards.

[20] Finally, I note that the role of a Provincial Court judge under subsection 31(2) has previously been described in Manitoba jurisprudence as a judicial review (see *Brandon (City) Police Service v. Nichol*, 2004 MBQB 259 at paragraph 5; and *Palmer v. Winnipeg (City)(Police Department)*, [1999] M.J. No. 51, 85 A.C.W.S. (3d) 977 at paragraph 29.

[21] I therefore conclude that the language of subsection 13(2) does not suggest that the legislature intended a different standard of review and therefore the presumption of reasonableness is not rebutted under the first exception.

[22] The second instance where the presumption of reasonableness may be rebutted is if a complaint raises a certain category of question where the rule of law requires that the standard of correctness be applied. The categories outlined in *Vavilov* were:

1. Constitutional questions;
2. General questions of law of central importance to the legal system as a whole; and
3. Questions regarding the jurisdictional boundaries between two or more administrative bodies.

[23] The Commissioner's decision in this case, namely, that there was insufficient

evidence of an abuse of authority to justify referral of the complaint to a public hearing, is not a question which falls into any of these categories. Accordingly, the second exception to the presumption of reasonableness does not apply.

[24] Applying the new framework established in *Vavilov*, I conclude that the presumption has not been rebutted by either of the exceptions, and that the standard of review which I must apply when conducting this review under subsection 13(2) is the standard of reasonableness.

What does "Reasonable" mean?

[25] When considering whether the reasonableness standard has been met, the following principles from *Vavilov* were summarized by Grammond J. in *The Portage la Prairie Teacher's Association v. The Portage la Prairie School Division*, 2020 MBQB 93.

[26] I note the following additional principles set out in *Vavilov:*

a) A reasonableness review is meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It remains, however, a robust form of review;

b) The reviewing court must consider an award in light of its underlying rationale. The focus is on the award and the justification for it, not on the conclusion that the court would have reached;

c) Once the decision maker's reasoning is understood, the court can assess whether the decision as a whole is reasonable and based upon an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain the decision maker. If it is, the reviewing court must defer to the decision;

d) To determine whether the decision is reasonable, the reviewing court must ask whether it bears the hallmarks of reasonableness: justification, transparency and intelligibility;

e) The internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning;

f) A decision must be justified in relation to the constellation of law and facts that are relevant to the decision, including the common law, evidence, facts, past practices, and potential impact of the decision;

g) A reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker" (at para 125); and

h) The burden is on the party challenging the award, in this case the applicant, to show that it is unreasonable.

[27] It is important to note that *Vavilov* did not significantly alter the jurisprudence on what constitutes a reasonable decision, but in Part III, the majority provides guidance on how to conduct a reasonableness review in practice.

Analysis

[28] In his decision, the Commissioner listed the evidence relied upon by the Complainant and highlighted the discrepancies between the Complainant's account and that provided by the officers. He did not make specific findings of credibility, but stated that he was permitted to make his decision based on a limited assessment of credibility and disputed evidence. He reiterated that he was to determine whether there was evidence of an abuse of authority and if that evidence was sufficient to justify taking further action.

[29] What constitutes an abuse of authority under the *Act* is described in section 29 as follows:

> 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) 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*;

[30] In the case *A.C. v. Cst. G.S*, LERA Complaint #6100 (February 20, 2007), Judge Joyal (as he then was) was conducting a LERA complaint hearing. On the question of "abuse of authority", he wrote that not all of the conduct enumerated in section 29(a) of the *Act* gives rise to an automatic finding of abuse of authority. Default is not found for absolutely any and all manifestations of the impugnable behaviour set out in section 29(a)(i)-(vii). Each case will depend on its own facts. Abuse of authority connotes conduct of an exploitative character which, because of the officer's position of authority, has an inappropriately and unjustifiably controlling, intimidating or inhibiting effect on a given complainant. Police conduct which rises to the level of abuse of authority is that exploitative conduct which, even after 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.

[31] In other words, this means is that not all substandard behaviour by a police officer will amount to abuse of authority warranting further action under the *Act*. There must be something more to raise the substandard behaviour to the level of abuse of authority.

[32] Accordingly, when the Commissioner made his decision under subsection 13(1)(c) to decline to take further action, he had to:

a) consider whether there was evidence of the types of behaviour set out in section 29(a)(i)-(vii),

b) consider whether there was evidence that the behaviour was exploitative, lacked good faith, or otherwise could rise to the level of abuse of authority, and then

c) assess whether that evidence may be sufficient to justify a public hearing.

[33] In her written material, the Complainant submits that the sole basis for the Commissioner's decision to decline to act was because there were some discrepancies between her account and the one that was provided by officers. She notes that in his decision, the Commissioner only refers to the Respondent's account of events. She argues that the Commissioner did not refer to or seek out any evidence which would either corroborate the Respondent's assertions, or contradict her allegations. Only the Respondent was interviewed. It is clear that the Complainant is aggrieved by what she perceives to be an unfair assessment of credibility by the Commissioner in making his decision. She questions how he could have reached his decision without interviewing the other officers on scene or receiving and assessing evidence under oath.

[34] I agree that the Commissioner's reasons do not provide much explanation as to how he concluded that there was insufficient evidence of abuse of authority to justify referral of the complaint to public hearing. He referred to the fact that there were discrepancies in accounts, but did not address how he assessed those discrepancies in making his determination. I am nevertheless satisfied that the Commissioner's decision meets the standard of reasonableness because it is clear from his reasons that he took into account all of the facts which were relayed to him by the Complainant and which were discovered through investigation. Ideally, further elaboration as to where and in what respects the evidence was lacking would have been helpful, however the Commissioner is entitled to rely on his expertise in making a decision and reviewing courts should defer to that expertise.

[35] When assessing the justification, transparency and intelligibility of reasons, the reviewing court should read the reasons together with the outcome and consider whether the result falls within a range of possible outcomes. 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 reasonableness criteria is met (see *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62).

[36] In this case I am satisfied that the Commissioner's reasons reflect that he engaged in a limited weighing of the evidence before him and determined that the evidence was insufficient to justify a public hearing. It was available to the Commissioner to decide, even if no credibility assessments were made, that the evidence disclosed by the complaint was insufficient to amount to abuse of authority, and therefore decline to take any further action on the complaint on those grounds. The decision falls within the range of possible outcomes that could reasonably be drawn on the facts of the case. I may not have reached the same conclusion, but that is not the issue before me. The issue is whether the Commissioner's decision meets the reasonableness standard, and I find that it does.

Conclusion

[37] As a result, I am dismissing the Complainant's application. Pursuant to section 13(4.1)(b) of the *Act*, the ban on publication of the Respondent's name shall remain in place.

"Original signed by:"

L. CHOY, P.J.