

In the matter of the Police Service Regulation, Alta. Reg. 356/1990 as amended (PSR)

And in the matter of a complaint and disciplinary proceedings against Reg. No. XXXX Det. AA (AA) and Reg. No. YYYY Sgt. BB (BB) both of the Edmonton Police Service (EPS).

## **Decision**

### **M.A. Binder - Retired Court of Queen's Bench Justice, Presiding Officer**

[1] On July 23, 2019 by Notice and Record of Disciplinary Proceedings - Exhibit 3 - AA was formally cited by the Chief of EPS (Chief) with the following Breaches:

#### Count #1

Unlawful or Unnecessary Exercise of Authority contrary to section 5(1)(i) of the Police Service Regulation as defined by section 5(2)(i)(i) of the Police Service Regulation.

#### Details of Allegation

On August 16, 2017, you attended at 114XX 94 Street in Edmonton, Alberta (the "Residence") in order to conduct a curfew, check on an individual ("EE"). You entered the Residence and then proceeded to unlawfully search it, including by searching the area where the tenant, Mr. FF, and another individual ("GG") were located within the Residence.

#### Count #2

Unlawful or Unnecessary Exercise of Authority contrary to section 5(1)(i) of the Police Service Regulation as defined by section 5(2)(i)(i) of the Police Service Regulation.

#### Details of Allegation

On August 16, 2017, you attended at 114XX 94 Street in Edmonton, Alberta (the "Residence"), in order to conduct a curfew, check on an individual ("EE"). You entered the Residence and then proceeded to unlawfully direct the movements of one or more individuals in the Residence, including by directing an individual ("GG") to stay where you could see him.

[2] On July 23, 2019 by Notice and Record of Disciplinary Proceedings - Exhibit 3 BB was formally cited by the Chief of EPS (Chief) with the following Breaches:

Count #1

Unlawful or Unnecessary Exercise of Authority contrary to section 5(1)(i) of the Police Service Regulation as defined by section 5(2)(i)(i) of the Police Service Regulation.

Details of Allegation

On August 16, 2017, you attended at 114XX 94 Street in Edmonton, Alberta (the "Residence"), in order to conduct a curfew, check on an individual ("EE"). You proceeded to enter the Residence without lawful authority; alternatively, you unlawfully remained in the Residence after the curfew check had been completed; or in the further alternative, you unlawfully remained in the Residence after consent to enter had been revoked.

Count #2

Unlawful or Unnecessary Exercise of Authority contrary to section 5(1)(i) of the Police Service Regulation as defined by section 5(2)(i)(i) of the Police Service Regulation.

Details of Allegation

On August 16, 2017, you attended at 114XX 94 Street in Edmonton, Alberta (the "Residence"), in order to conduct a curfew, check on an individual ("EE"). You entered the Residence and then unlawfully and unnecessarily directed the movements of one or more individuals in the Residence, including by asking an unknown female to come downstairs.

Count #3

Unlawful or Unnecessary Exercise of Authority contrary to section 5(1)(i) of the Police Service Regulation as defined by section 5(2)(i)(i) of the Police Service Regulation.

Details of Allegation

On August 16, 2017, you attended at 114XX 94 Street in Edmonton, Alberta (the "Residence"), in order to conduct a curfew, check on an individual ("EE"). You entered the Residence and then proceeded to unlawfully search it, including by walking through the living room, walking over to a bedroom and standing in the bedroom door, and walking up the stairs to another bedroom while observing those areas.

Count #4

Unlawful or Unnecessary Exercise of Authority contrary to section 5(1)(i) of the Police Service Regulation as defined by section 5(2)(i)(i) of the Police Service Regulation.

## Details of Allegation

On August 16, 2017, you attended at 114XX 94 Street in Edmonton, Alberta (the “Residence”), in order to conduct a curfew, check on an individual (“EE”). When EPS Cst. CC attended at the Residence to offer assistance to you and Det. AA, you directed Cst. CC to unlawfully enter the Residence and search or look for other persons in the Residence.

[4] This matter commenced by way of First Appearance on August 22, 2019 at which time Exhibits 1 - 4 (Appointment of Presiding Officer, Appointment of Presenting Officer, Notice of Record of Disciplinary Proceedings and Instructions to Counsel) were entered. A denial of the alleged charges set out in Exhibit 3 was entered by counsel for the members. January 14-17, 2020 was agreed upon to hear this matter, and accordingly this matter was adjourned to January 14, 2020 at 9 am, and subsequently adjourned peremptorily to February 24, 2020 at 9 am.

## Formal Hearing

[5] The formal hearing commenced on February 24, 2020 at which time the following exhibits were entered and subsequently entered without objection:

5. Agreed Statement of Facts
6. Summary of steps taken by Document Services to serve Mr. EE, as well as a copy of the confirmation of Mr. EE’s registration of death.
7. Letter of complaint.
8. Transcript of interview of FF.
9. Lawful entry for entering a dwelling house to effect an arrest process document.
10. EPS authorizing search and seizure procedure document.
11. EPS policy respecting the authorization of warrantless searches.

## Nature of Proceedings

[6] It is important to note at the outset that this is not a criminal proceeding, but rather administrative in nature (see *Guindon v. Canada*, 2015 SCC 41) of alleged breaches of a provincial statute. Therefore, the standard of proof or evidentiary burden borne by the Chief is on the balance of probabilities (*F.H. v. McDougall*, 2008 SCC 53), - more likely than not, that is – more than 50% - rather than the higher criminal standard or evidentiary burden of proof beyond a reasonable doubt, that is – you have to be sure.

[7] In this regard, in my view what was said in *Amery v. Young*, 07-93 at pp. 6-7 is worth repeating:

It is clear in law that police disciplinary proceedings are not criminal in nature nor do they involve penal consequences. Neither are they quasi- criminal although some of

the regulatory language such as "charge", "particulars", "punishment" and "guilty" is common to the criminal law. Proceedings are essentially civil in nature in the context of an administrative process. The intention of such proceedings is to maintain discipline, integrity and professional standards, or to regulate conduct.

[8] Accordingly, I have refrained from using such terms as "charge", "guilt", "prosecution" and the like, which are appropriate in criminal proceedings, but not in an administrative proceeding.

[9] The attached Appendixes, 1-3, form a part of this Decision.

### **Statement of Agreed Facts**

[10] The Statement of Agreed Facts entered as Exhibit 5, is attached hereto as Appendix1.

### **Summary of Evidence, including cross examination unless specifically indicated.**

#### **Preface**

- The following summary of the testimony expands upon Exhibit 5 and is focused on the Allegations, rather than the sometimes lengthy, (but in my view peripheral to the Allegations) testimony provided by some of the witnesses. Mr. EE was not available to testify as he passed away prior to this Hearing.

#### **FF**

[11] FF testified that:

- On August 16, 2017 he was residing at 114XX-94<sup>th</sup> Street, Edmonton Alberta (Residence) which he was renting monthly for \$1875. At the time of the alleged incident (Incident) approximately 11:30 pm – midnight - on that date, the other persons in the Residence were his girlfriend, his uncle EE, his aunt, HH, GG and EE's daughter.
- Prior to the Incident an officer and a probation officer attended the Residence for the purpose of a curfew check on EE who was subject to a Probation Order that required him to be at the Residence between 11pm and 7am. EE attended the Residence for his curfew checks but did not fully reside at the Residence until October of 2017. FF let them in. They asked EE some questions and then left.
- EE and FF then left the Residence but returned when they learned that police officers were again at the Residence.
- FF returned first and entered through the back door. Once inside he saw AA and BB standing inside the front door. BB then approached him and asked where he had come from. He asked BB what they were doing at the Residence and BB responded that they were there to see EE, and had witnessed illegal activity. He asked BB and AA to leave, but they did not.
- EE then entered the Residence through the back door. FF indicated that the police had no right to continue to be there as they had no warrant and should leave, but EE told him that it was okay, that they were just there to check on him. AA and EE then had a

conversation by the kitchen table.

- Two officers then arrived and entered through the front door. BB directed the two officers to search downstairs, BB would take care of upstairs and AA would stay in the living room. BB went upstairs by himself, advising FF that he wanted to make sure everyone was safe, and had a conversation with II, the mother of EE's child. When BB returned from upstairs, he and FF had a conversation at the kitchen table and BB indicated that he wanted to see who the female was in the front bedroom.
- He followed BB to the front bedroom. BB woke up FF's girlfriend and confirmed that she was okay. BB then searched the closet in the bedroom, and that's when FF phoned his lawyer, leaving a message of the situation, following which the police left.

## **GG**

[12] GG testified that:

- In the evening on the date in question he attended at the Residence. He was let in, proceeded to the living room and sat down. There was a knock on the door, he stood up, three plain cloths police officers entered the Residence, one officer grabbed him, put him in handcuffs, searched him and found an empty bag which he believed had a weed residue. The other two officers went into other areas of the Residence. After he was searched, and the other officers had searched around the Residence – he could hear them upstairs and when they – two of them - came downstairs they brought people with them. After he was searched the police took him outside, uncuffed him and told him not to come back.
- FF was not at the Residence when the police arrived. It was EE that let the police in. However later in his testimony he testified that nobody answered the door. It seemed like they just walked in.
- The police gathered those in the Residence and they witnessed him being handcuffed.
- As he exited the Residence FF entered the Residence through the front door. FF asked the police if they had a search warrant.

## **Detective AA**

[13] AA testified that:

- He has been employed with the EPS since September 14<sup>th</sup> 2009. On the day in question he and his Sergeant, Sgt. BB attended at the Residence at approximately 11:30pm for the purpose of conducting a curfew check on EE.
- When he approached the door of the Residence for the purpose of making contact with EE he noticed the curtains on a large picture were open which gave him concern.
- BB at this time was back on the lawn of the Residence. When he knocked on the door of the Residence, he again became concerned because he heard voices inside which seemed somewhat agitated to him; as well there was no immediate answer to his knock on the door to the Residence.

- Further from where he was standing, he could see into the front bedroom of the Residence and he saw someone go into the closet in the bedroom and put an oblong object wrapped in a blanket into the closet, which further added to his concern.
- At that point he advised BB of his concern and again knocked on the door and yelled out that he was there to check on EE's curfew to let the other occupants of the Residence know he was not there for them. He did this for about 45 seconds to a minute.
- GG finally opened the door. He attempted to converse with GG, without response. GG appeared out of it and appeared to check his pants as if he had forgotten something and then simply walked away without saying anything and AA remained at the door.
- He remained at the door and continued to shout because he was quite worried to enter the Residence for safety reasons until he saw EE enter through the back door. He thought BB was still on the lawn behind him but wasn't sure.
- When EE saw him, he said words to the effect of come in, let's have a chat.
- FF had entered the Residence sometime after he had started talking to EE in the living room approximately three steps in from the front door.
- After he had stepped into the Residence, BB came in behind him. BB was to his left and EE to his right. Because of what he had seen before entering the Residence – the possibility of a crime in progress -he saw his role as “engaging with EE, watch his hands, ensure his demeanor is at least somewhat predictable and deal with him should a threat present itself”.
- He believed BB had called for backup while the front door was open and before they had entered the Residence. Backup – two members arrived – at about the same time as EE invited him in, entering through the front door.
- BB became engaged in a conversation with FF and the two members that had arrived as backup “I believe were talking to other occupants – like GG who'd then came out of what I believe is the bathroom”.  
During his discussion with EE which lasted about 15 minutes he nor any of the other officers were asked to leave. When he and EE concluded their conversation, he and the other officers left the Residence.

#### IN CROSS-EXAMINATION

- “The only reason I went in the house is because I was invited in by EE.”
- The only reason he knocked on the door was to make sure EE was complying with his curfew. And the basis for entering the Residence was EE's invitation to come in.
- He did not hear FF indicate to the officer's present that it was his home and asked for the presence of a search warrant. “I know that he [FF] was animated, but I was focused again on EE. I know that at one point, when EE thought he was being interrupted, he told FF to—and from my memory it was something to the effect of ‘shut the fuck up’.
- In speaking to EE and seeing him interact with the other occupants, “it was clear to me that he was in charge, that others listened to him. When he told them to sit down or shut up, they did. When speaking to him on that day, whether he [FF] was primary renter, if I had been asked to leave, I still would not have until the invitation from EE expired.” “And I know that I was never asked to leave that day, not by EE or anyone else. But since EE invited me, even if they had, I wouldn't have left.”
- He was in the living room about 3 steps from the door, talking to EE the entire time he was in the Residence.
- When asked about his report to PSB [Professional Standards Branch] in which he stated “I recall other members in attendance searching the immediate area of control for Mr. FF and Mr. GG, but I can only guess as to their reasoning because I did not conduct a search” his

response was he wrote it that way because he was thinking about hearing the words “ get your hands out of your pocket,” which was a direction to reveal something that was concealed, as he was trying to be as full and fair and frank with PSB as he could.

- He did not give and directions to other members to do anything.

### **Sgt. BB**

[14] BB testified that:

- He has been a member of EPS since 2010. On the day in question he held the rank of Sgt. and was in charge of a 6-member unit in beats division responsible for addressing community concerns, emerging crimes trends and problems. The Residence came within in his area of responsibility, and was known to his unit at the relevant time for Red Alert street gang crime activity.
- At the relevant time EE and FF were known to him, both of whom belonged to the Red Alert street gang. On the date in question he and AA attended the Residence for the purpose of conducting a curfew check and to talk to EE. He met AA outside the Residence because he did not feel the Residence was safe.
- In approaching the Residence, AA went in front of him and walked up the front stairs of the Residence. At the door of the Residence he stood next to AA and from his position he could see into the Residence through one of the bay windows, and he observed people in the Residence and “there’s some kind of frantic activity”. He saw three people in a room inside the Residence – “a female lying face down on the bed, and there were two males, and they were sitting on the edge of the bed, facing away from me, so facing west, directly in front of an open closet...and they’re passing things between each other. And it seemed kind of frantic, what they were doing, and made me feel a little bit uneasy, to be honest with you... Something was creepy about that situation. I felt uncomfortable”.
- AA knocked on the door, making it clear that it was the police. He then saw GG going to and from the living room with something long – “I don’t know what it was. It could have been a piece of pipe, a pool cue. I have no clue”.
- He then backed up off the deck and stood on the grass. He saw GG get off the bed again, walk to and open the front door, whereupon AA said “we’re city police, here to check on EE’s [EE’s street name] curfew -is he here? And I remember GG said nothing. He appeared as a zombie. But also, he was reaching in his pocket... as if to either reassure himself that he had something or that he hadn’t got something on him at the time. I don’t know. Which again made me feel a little uneasy... He walked away from the door, which I found bizarre because there was no communication. He said nothing. He just walked away”.
- A minute later he saw EE coming towards the front door and heard AA saying “EE we’re here to check your curfew can we come and speak to you... And him being accommodating and saying, yeah sure Come in, come in. And he was very friendly”.
- When he saw EE he was relieved in terms of safety because of EE’s status as a counsel member of Red Alert.
- AA walked into the Residence first and then he walked in and stood next to AA.
- Almost Immediately after, FF emerged from the back of the Residence. He then engaged FF in

conversation. FF appeared a little agitated. He explained to FF that they were just there to check on EE's curfew and that's when EE butted in and said words to the effect of "sit down, shut up. They're just here to check my curfew". "It was clear that EE was in control there... But I'll tell you FF didn't protest that we were there".

- As he had concerns about FF's girlfriend whom he had seen in the bedroom, he asked FF if he wanted to check on her to see if she was okay. FF replied that he would go and check on her. He followed FF to the bedroom but stayed at the door and from what he observed he was satisfied she was okay and there was nothing of concern in the closet.
- About that time two additional members – Csts. DD and CC arrived. DD stood by the front door and stayed there until he and the other members departed. He had a conversation with CC the other member and told him "to keep your head on a swivel, watch out for people coming out of nooks and crannies. Essentially, just watch our backs".
- At that time a female came up from the basement to see what was going on and then went back to the basement. And then a female came down from upstairs "and then darted back upstairs". "She looked tearful as well, like there was something going on. So, I shouted out to her, hey city police. Do you mind coming down to speak to me? And she said it's okay. You can come up". He did, and spoke with her.
- He then came back downstairs and "it seemed that the conversation with AA and EE was coming to a close". "I remember EE telling GG he wasn't welcome here and he was to leave", which he did and he and the other officers left at the same time.
- And "I tell you right now, at no point did FF tell us to leave. Throughout the entirety of the event, it seemed like EE lived there, EE lived there. Not only did he live there, he was in control of that place".
- No one arrested GG. "If there was an arrest made or someone was put in handcuffs, as the Sergeant there at the time responsible for only three members that were there, I'd know about it. Absolutely I would. It did not happen".

#### IN CROSS-EXAMINATION

- They [he and AA] were at the Residence not only to confirm EE's presence but to talk to him. If they had simply confirmed EE's presence they would not have left without attempting to talk to him.
- THE PRESIDING OFFICER; "Well, Sergeant, would it be fair to say that when Mr. EE invited you in, you wanted to make sure things were okay in there? A. "I was certainly going to ask questions to make sure everything was okay, yeah, with the female, yes".
- AA did not enter the Residence until he was invited in by EE. He was about 5 or 6 feet away from the door when this happened.
- He and AA entered the Residence prior to the backup that he called for, arrived. "so, your officer safety concerns were not so prominent that you needed to wait for that backup to arrive first before you went in? "That's correct".
- At no time did FF ask for the production of a search warrant and never protested to him about the police being at the Residence.
- THE PRESIDING OFFICER "So why did Mr. EE say, shut the fuck up and sit down? A.

“Because he wanted to be in control, Sir, of that situation. FF said to me, you know, why are you guys here? And that’s when I said, oh, it’s okay. We’re just here to do conduct a curfew check. I don’t know what was going through EE’s mind at the time. But he issued out his order, just shut up and sit the fuck down – shut the fuck up. Something very similar to that”.

- He never asked EE if it was okay to walk around the house to do what he did.
- He explored two floors of the Residence “I had gone to the entrance way of the front bedroom, and to the hallway upstairs and spoke to the female who was in the bedroom”.
- THE PRESIDING OFFICER “Is it fair to say that the total conversation with Mr. EE was between him and Detective AA? A. It was very clear that was the case, yes”.

## KK

[15] KK testified that:

- At the relevant time she was EE’s probation officer and supervised his probation order [Exhibit 5]. She was responsible to ensure EE was residing at an approved address. As such she had approved the Residence.
- On the night in question she and a police officer attended the Residence at approximately 11pm and confirmed EE’s presence at the Residence. EE invited them in. There were a few people there. “He was always very compliant, polite, typically would invite me in if I was with police or if I was with my partner with probation, and there were no issues”

## **Fact Finding Determined on Reliability**

[16] Although I am not bound by the rules of law respecting evidence applicable to judicial proceedings, (s. 47(1)(e) of the Act), in my opinion in many cases where trial judges accept a witness’ testimony as fact on the basis of a finding of credibility, they in fact accept the witness’ testimony based on its reliability. If a witness’ testimony is found to be reliable, it will also be found to be credible, however the reverse is not always the case. That is, a witness’ testimony may be credible - that is what the witness believes - but it may nevertheless be unreliable when considered with other evidence.

[17] That the distinction between credibility and reliability is fundamental in arriving at a just decision was made clear in *R. v. Perrone*, 2014 MBCA 74, affirmed 2015 SCC 8 at paras 25-28:

[25] Jurisprudence recognizes that there is a difference between credibility and reliability. In *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), Doherty J.A. wrote (at p. 526):

Testimonial evidence can raise veracity and accuracy concerns. The former relates to the witness’ sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness’ testimony. The accuracy of a witness’ testimony involves considerations of the witness’ ability to accurately observe, recall and recount the events in issue. When one is

concerned with a witness' veracity, one speaks of the witness' credibility. When one is concerned with the accuracy of a witness' testimony, one speaks of the reliability of that testimony. Obviously, a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable. In this case, both the credibility of the complainants and the reliability of their evidence were attacked on cross-examination.

[18] In *R. v. H.C.*, 2009 ONCA 56, 244 O.A.C. 288, Watt J.A. described the difference between credibility and reliability (at para. 41):

Credibility and reliability are different. Credibility has to do with a witness' veracity, reliability with the accuracy of the witness' testimony. Accuracy engages consideration of the witness' ability to accurately

- i. observe;
- ii. recall; and
- iii. recount events in issue.

Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point.

Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence: *R. v. Morrissey (R.J.)* (1995), 80 O.A.C. 161; 22 O.R. (3d) 514 (C.A.), at 526 [O.R.].

[19] In short, the fact that a witness may be found to be credible does not answer the question of whether the evidence provided is reliable (see *R. v. Vickerson (W.)* (2005), 200 O.A.C. 87).

[28] The distinction is an important one and must be recognized by a trial judge in order to reach a just verdict.

[20] Furthermore, even in a case where the only evidence is "he/she said - she/he said" a trial judge is entitled to prefer the evidence of one over the other because it is found more reliable notwithstanding that it is difficult to express the reason: see the observation of Bastarache and Abella JJ delivering the majority judgement in *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621 at para. 20:

Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this Court decided, most recently in *H.L.*, that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.

[21] In sum, at the core of the evolution of the law of evidence as we know it today is: a finding of fact must be reliable.

[22] Finally, as stated by Chief Justice McLaughlin in *R. v. W.H.*, 2013 SCC 22 at para. 32

credibility **assessment** does not depend solely on objective considerations such as inconsistencies, but on the **demeanor** of the witness and the **common sense** of the trier of fact.

### **Demeanor**

[23] Although it is permissible to consider demeanor as a factor in the assessment of a witness' credibility: *R v. Bourgeois*, 2017 ABCA 32 at para. 20; *R v S(N)*, 2012 SCC 72 (CanLII) at para 25, [2012] 3 SCR 726:

... It is a settled axiom of appellate review that deference be shown to the trier of fact on issues of credibility because trial judges (and juries) have the “overwhelming advantage” of seeing and hearing the witness – an advantage that a written transcript cannot replicate : *Housen v Nikolaisen*, 2002 SCC 33 (CanLII), [2002] 2 SCR 235 at para 24; see also *R v White*, 1947 CanLII 1 (SCC), [1947] SCR 268 at p 272; *R v W(R)*, 1992 CanLII 56 (SCC), [1992] 2 SCR122 at p 131. This advantage is described as stemming from the ability to assess the demeanour of the witness, that is, to see how the witness gives her evidence and responds to cross examination.

[24] It is an error to place undue weight on demeanor: *R. v. Giroux*, 2017 ABCA at para. 7:

The line is crossed and the error occurs when a trial judge's assessment of the witness' demeanour becomes the sole or dominate basis for determining credibility, and where the trial judge appears to be unaware of the risks associated with over-reliance on demeanour.

### **Finding of Credibility and Reliability**

[25] FF: I found FF intelligent but bitter and angry, very bitter and angry against the police, whom he believed had mistreated him. In my view such bitterness clouded his evidence to the extent that much of his testimony is what he imagined or wanted to have happened but didn't. I find much of his evidence unreliable.

[26] GG: In my opinion GG was not entirely with it at the time of the curfew check. I agree with Ms. Harris that it appeared that he was describing a different incident he was involved in with the police. I find his evidence unreliable.

[27] AA: I found AA to be straight forward. When he didn't remember he said so rather than trying to arbitrarily fill in the gaps. Although there are discrepancies in his evidence, they were minor and do not affect the general reliability of his evidence. I find his evidence substantially reliable.

[28] BB: I found BB to be a clear and compelling witness. Open to questions, upfront, sincere and honest. He readily agreed to challenging questions rather than attempting to put a “spin” on them. I accept, without hesitation, his evidence as reliable.

[29] KK: I found her evidence straightforward and reliable.

### **Finding of Relevant Facts**

[30] I find the following as the relevant facts (unless otherwise indicated such facts occurred on August 16, 2017 at the Residence):

- KK and a police officer attended the Residence at approximately 11pm for the purpose of a curfew check on EE who was required pursuant to a Probation Order to be at the Residence between 11pm and 7am. EE's presence at the Residence was confirmed without incident. EE and FF then left the Residence and returned when they were advised the police were in the location of the Residence.
- AA and BB attended the Residence at approximately 11:30 pm for the dual purpose of conducting a curfew check on EE and having a conversation with him. They were unaware of the prior curfew check.
- When AA and BB first arrived at the Residence it was occupied by FF's girlfriend, GG, a male by the name of HH, and two other females.
- Before AA knocked on the front door of the Residence, he and BB were able to see through bay windows located on either side of the door. Besides AA hearing activity in the Residence which gave him concern, he observed through one of the windows one of the males carrying what appeared to be a long object in a blanket into the bedroom on the main floor of the Residence.
- About the same time, BB observed a female lying down on the bed in the bedroom on the main floor and two males sitting on the bed.
- AA then knocked on the door and it was eventually opened by GG, who then walked away without saying anything. BB then called for backup as he and AA were concerned about what they had seen and the action of GG.
- About this time EE entered from the rear of the Residence and invited AA and BB inside, as they had not yet entered the Residence.
- AA and BB then entered the Residence and around the same time FF entered the Residence from the rear and came towards AA, BB and EE asking why/what are you-AA and BB-doing here. In reply EE said words to the effect "it's okay they're here to check on me – shut up and sit the fuck down".
- Thereafter FF remained quiet concerning their – AA and BB's- presence. However, that was because of the threat from EE, otherwise FF would have asked AA and BB to leave unless they had a warrant, especially when BB began moving around the Residence.
- Around that time the backup that BB requested arrived – Csts. DD and CC
- DD remained inside the front door of the Residence, the entire time until they –all of the police left.
- AA remained inside the front door of the Residence talking to EE who was seated on the couch inside the front door of the Residence, the entire time until they - all of the police - left.
- AA did not direct anyone in the Residence nor conduct a search of the Residence.
- CC was stationed further inside the Residence with instructions from BB to "keep his head on a swivel" – "watch out for people coming out of nooks and crannies." A female in the Residence came up from the basement and went back down when she saw CC and BB.
- BB followed FF to the entrance of the main bedroom to check on the well-being of FF's girlfriend, and viewed the closet from where he was standing and was satisfied that everything was okay.
- BB then called out at the bottom of the stairs leading to the second floor, words to the effect "City Police can you come down' and instead was invited upstairs. He proceeded upstairs, had a conversation with the female upstairs, satisfied himself that she was no threat and went back downstairs, at which time he and the other officers departed as well as GG.
- At no time was GG handcuffed or arrested. He was told to leave by EE.

- FF called his lawyer regarding what he believed was the unlawful search by the police of the Residence.
- BB entered the Residence with a dual purpose - having a conversation with EE and checking the Residence to determine the well-being of its occupants.
- BB was never given express or implied permission by any occupant of the Residence to do what he did - conduct a “walk by and see”- of the inside of the Residence, request the female residing upstairs in the residence upstairs to come down or engage in conversation with her. In substance BB conducted a cursory search (Search).
- Neither DD or CC were given express or implied permission by any occupant of the Residence to enter the Residence or do what they did.
- BB’s officer safety concerns were significantly diminished when he saw EE enter the Residence, in light of EE’s status in the street gang known as Red Alert.
- Exigent circumstances did not exist to justify a safety check.

[31] Although the Search by BB was well intentioned - to ensure the safety and well-being of those in the Residence and therefore without moral culpability, a sanction, although perhaps minimal, in my opinion is nevertheless warranted because:

- The essence of s. 8 of the Charter is to protect the privacy – a cornerstone of the Charter - of all, particularly in a residence, and to make an exception in the case of suspected criminal or suspicious activity in a residence will erode the right of privacy of law-abiding persons.
- Accordingly, in my opinion an equally important principle in this case is both personal and general deterrent.

[32] The fact of the matter is that it:

- is unlawful to carry out a warrantless search under the guise of a curfew check.
- is imperative that the message to every police officer is not that you will not be sanctioned if you breach the privacy of a residence absent moral culpability ; but rather: you have a duty to use reasonable efforts to keep abreast of changes in legislation and court decisions that affect the carrying out of your duties, and more so in the case of sergeants and senior officers, because it is axiomatic that any officer - especially a sergeant in charge of a squad of 6 - purporting to enforce a law must understand and appreciate any limitations of that law.

[33] In the case of BB, in my opinion he did not appreciate such limitation because the Search by him was unreasonable as he did not have reasonable grounds to believe that there was an imminent threat to public and police safety and that the search was necessary to eliminate that threat, unlike the officer in *R. v. MacDonald* 2014 SCC 3.

[34] Absent lawful authority, whether the police require the consent of each resident of a residence to enter and/or conduct what amounts to a search of the residence has yet to be determined by the Supreme Court of Canada: *R. v. Reeves* 2018 SCC 56. In the meantime, the Sask. Court of Appeal has decided that any consent that may have been granted by one occupant to enter cannot override the Charter rights of other occupants: *R. v. Arnault*, 2019 SKCA 109

[35] Although it is arguable that the police in this case did not have the consent of FF to do what they did, I take the view that since EE was FF’s uncle and in the Residence with FF consent, and aware of EE’s reputation- “they don’t call him EE for nothing” FF consented.

## Analysis

### AA

#### Applicable Legislation

#### Regulations

5(1) A police officer shall not engage in any action that constitutes unlawful or unnecessary exercise of authority.

(2) For the purposes of subsection (1),

“unlawful or unnecessary exercise of authority” consists of one or both of the following:

- (i) exercising his authority as a police officer when it is unlawful or unnecessary to do so;
- (ii) applying inappropriate force in circumstances in which force is used.

[36] It is alleged that the breach of Section 5 of the Regulations consisted of entering the Residence and then proceeding to unlawfully search it, including searching the area where the tenant, Mr. FF, and another individual (“GG”) were located within the Residence – Count 1 and , in order to conduct a curfew check on an individual (“EE”), he entered the Residence and then proceeded to unlawfully direct the movements of one or more individuals in the Residence, including by directing an individual (“GG”) to stay where he could see him – Count 2.

### Determinative

[37] I believe it is important, particularly for the general public, to explain what is meant by “essential elements” of the Allegations that must be proven on the balance of probabilities- more likely than not, that is more than 50%.

[38] In the criminal context, it is the prosecutor in the name of the Crown that composes the Indictment, setting out the essential elements, based on the fruits or results of the investigation, charging the accused of the alleged offence, which must be proven beyond a reasonable doubt.

[39] In contrast, in the administration context - in this case an alleged breach of the Regulations - with the assistance of the PSB, the Notice of the alleged misconduct based on the results of the investigation, is issued by the Chief of the EPS, setting out the essential elements of the alleged details of the alleged misconduct that must be proven on the balance of probabilities to sustain the alleged misconduct, failing which it is dismissed.

[40] In short, the bottom line is: what is determinant of what must be proven on a balance of probabilities is/are the essential element(s) set out in the Allegation.

[41] In this case, for example, the essential element(s) of the alleged details against AA that must be proven on the balance of probabilities of:

- Count # 1 is an “unlawful search”; and
- Count # 2 “unlawfully directing the movements”.

### **Essentials Elements and Standard of Proof**

[42] To sustain Count # 1, Mr. Cranna (Presenting Officer) must prove on a balance of probabilities (F.H. v. McDougall, 2008 SCC 53 at para. 40,), that is, it is more likely than not, that AA unlawfully searched the Residence

[43] To sustain Count # 2, the Presenting Officer must prove on a balance of probabilities that AA unlawfully directed the movements of one or more individuals in the Residence.

[44] Having found that AA neither searched the Residence nor directed the movements of any individuals in the Residence, each of which being essential elements or allegations of Counts 1 and 2, each are dismissed.

### **BB**

Applicable Legislation

Canadian Charter of Rights and Freedoms – Section 8

8. Everyone has the right to be secure against unreasonable search and seizure.

### **Applicable Principles of Law**

[45] The written submissions of Mr. Cranna are attached as Appendix 2 and Ms. Harris as Appendix 3. In their briefs they have set out the applicable principles of law and EPS Polices and need not be repeated.

[46] However, it is necessary to point out that:

- para. 2.(d) of Mr. Cranna’s submission is incorrect as the Agreed Statement of Facts – Appendix 1, does not go that far.
- Para. 20 of Ms. Harris’s submission is misleading as that portion of the quoted Headnote is not the view of the majority, rather the view of one member of the Court.

[47] In my opinion, based on the authorities referred to in Counsels briefs, the law is clear that without lawful permission, or authorized by law – statute, warrant, probation order, exigent circumstances, safety search – with regards to conducting a curfew check at a residence:

- Once the presence at a residence (Residence), of the person who is subject to a curfew, is confirmed (Purpose), the Purpose is complete, and the police have no right to then check the Residence for any unreasonable purpose without lawful authority or the express informed consent of an occupant of the Residence with authority to consent.
- It is unlawful to carry out an unreasonable search or sweep of a residence under the guise of a curfew check.

- Where there are reasonable grounds to believe that there is an imminent threat to public and police safety and the search is necessary to eliminate that threat, the search will be reasonable, and will not be in breach of s.8 of the Charter, provided it is carried out in a reasonable manner.

### **Essentials Elements and Standard of Proof**

[48] To sustain Count # 1, the Presenting Officer, Mr. Cranna must prove on a balance of probabilities that BB entered the Residence unlawfully, or if he had lawful authority to enter the Residence he unlawfully remained in the Residence after the curfew check had been completed or if he had lawful authority to so remain, such consent was revoked.

[49] As I have found as a fact, that the essential elements or allegations of Count 1 - unlawfully remaining despite revoked consent did not take occur, in my opinion Mr. Cranna has failed to done so. Accordingly Count #1 is dismissed.

[50] To sustain Count # 2, the Presenting Officer Mr. Cranna must prove on a balance of probabilities, that BB unlawfully and unnecessarily directed the movements of one or individuals in the Residence, including by asking an unknown female to come downstairs

[51] As I have found as a fact that BB did so, but lacked permission to do so, in my opinion Mr. Cranna has done so. Accordingly, I find that Count #2 has been proven on a balance of probabilities.

[52] To sustain Count #3 the Presiding Officer must prove on a balance of probabilities, that BB unlawfully searched the Residence, including walking through the living room, walking over to a bedroom door, and walking up the stairs to another bedroom while observing those areas.

[53] As I have found as a fact that BB had done so, but lacked permission to do so, in my opinion the Presenting Officer has done so. Accordingly, I find that Count #3 has been proven on a balance of probabilities.

[54] To sustain Count #4 the Presiding Officer must prove on a balance of probabilities, that BB unlawfully directed Cst. CC to enter the Residence and search or look for other persons in the Residence.

[55] As I have found as a fact that BB did so without the consent of anyone in the Residence at the time, in my opinion Mr. Cranna has done so. Accordingly, I find that Count #4 has been proven on a balance of probabilities.

### **Ms. Norheim**

[56] By letter dated February 28, 2020, Ms. Norheim requested (Request) as counsel for Mr. FF, the Complainant in this matter, that she be provided with copies of the written submissions of Mr. Cranna and Ms. Harris Counsel (Counsel) in this matter, requested by me.

[57] I ordered a recorded conference call of Counsel on March 13,2020 at 8:30 am, to allow Counsel to make any submissions they considered necessary or appropriate in response to Ms. Norheim's request and invited her to attend.

[58] Having heard from Counsel (Ms. Magee appearing as agent for Mr. Cranna), both of whom opposed the Request, and Ms. Norheim relying on her letter of February 28, 2020, I declined the Request, with Reasons to follow. These are the Reasons:

- In the case of *Kozina* 2019 ABQB 355 Justice Burrows determined that a complaint such as Mr. FF has a personal interest and standing beyond that of the general public, to apply for judicial review by a Justice of the Court of Queen's Bench of Alberta, although Justice Burrow declined to consider the issue of discretion to refuse to hear the matter.
- To grant standing made sense, since a complaint has the right of appeal to the Alberta Law Enforcement Appeal Board and to the Court of Appeal of Alberta, with leave.
- However, in my opinion the decision of Justice Slatter referred to at para. 16 of Justice Burrows decision has not been altered by the subsequent amendments to the Police Act to the extent of providing a complainant standing to request and/or require the Presiding Officer at a Disciplinary Hearing to provide the complainant with copies of written briefs of the Presenting Officer and Counsel for the member(s) of the Officer(s) subject to the Complaint. This issue was not before nor considered by Justice Burrows.

### Counsel

[59] Finally, I want to thank counsel for their excellent written submissions, and their cooperation in bringing this matter to a conclusion.

M.A. Binder

Presiding Officer 

Presenting Officer: Derek Cranna, Counsel for the Chief of  
Police

Counsel for Constables: Ms. Harris

Issued in the City of Edmonton, Province of Alberta, on March 31, 2020