In the matter of the *Police Act*, R.S.A. 2000, c. P-17 and
In the matter of the *Police Service Regulation*, Alta. Reg. 356/1990

And in the matter of complaints made by Mr .E.F. and disciplinary proceedings taken against Reg. No.xxxx, Constable A.B. and Reg. No. xxxx, Constable C.D. of the Edmonton Police Service

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DECISION

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In the matter of the *Police Act*, R.S.A. 2000, c. P-17 and
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DECISION

Superintendent Thomas Grue
Presiding Officer

(Part II)

I. Introduction

A. Disciplinary Charges

Constable A.B. and Constable C.D. were each charged with multiple counts of disciplinary misconduct arising from their interaction with the complainant, Mr. E.F.. The jurisdiction of this tribunal to conduct a hearing with respect to all of the disciplinary charges, save one, was brought into question. It was agreed by all parties that evidence for the prosecution concerning all counts alleged against both officers would be heard with the caveats that:

1. A decision would only be rendered with respect to one count alleged against Constable A.B. over which jurisdiction was not contested; and

2. Should it be determined at a later date that this tribunal does in fact have jurisdiction over the remaining charges, the defence would then be permitted to present evidence and argument for the purpose of answering the prosecution's case.

A decision with respect to the aforementioned count against Constable A.B. in relation to which jurisdiction was not contested has been rendered and may be referred to as Part I of a two Part decision. Since that time, the defence reconsidered its position concerning the remaining counts against both officers and no longer questions this tribunal's jurisdiction to make a decision regarding these charges. These remaining counts, which are the subject of this decision (Part II), are identical vis-à-vis the cited officers:

Count #1

Discreditable Conduct pursuant to Section 5(2)(e)(viii) of the *Police Service Regulation* by doing anything prejudicial to discipline or likely to bring discredit on the reputation of the police service, the particulars of which are the conduct of the Respondents from the time they apprehended the Appellant on the street until they left his apartment on February 7, 2004;

Count #2

Unlawful of [sic] Unnecessary Exercise of Authority pursuant to Section 5(2)(i)(i) of the *Police Service Regulation* by exercising his authority as a police officer when it is unlawful or unnecessary to do so, the particulars of which are whether or not the Respondents entered the Appellant's apartment without the consent of the Appellant;

Count #3

Insubordination pursuant to Section 5(2)(g)(ii) of the *Police Service Regulation* by omitting or neglecting, without adequate reason, to carry out a lawful order, directive, rule or policy of the Commission, the Chief of Police or other person who has the authority to issue or make that order, direction or policy, the particulars of which are whether the EPS Policy in relation to a search conducted without consent was applicable in the circumstances in this case, and if so, was it followed by the Respondents.

B. Agreed Statement of Facts

Besides witness testimony taken during these proceedings, an Agreed Statement of Facts was tendered as an Exhibit (Exhibit #5):

1. In February, 2004, Mr. E.F. was evicted from his apartment. On February 5, 2004, Mr. E.F. contacted Mr. G.H., owner of an apartment building at 10711 - 104 Street in Edmonton, Alberta to inquire about renting an apartment in the building.

2. On February 6, 2004 Mr. G.H. met with Mr. E.F. and Mr. E.F. arranged to rent apartment #2 at 10711 – 104 Street. Mr. G.H. gave Mr. E.F. the keys to apartment #2 on February 6, 2004.

3. On February 7, 2004, Mr. E.F. and a companion Ms. I.J. were using a payphone across the street from 10711 – 104 Street when they were

approached by three Edmonton Police Service Constables: Cst. A.B., Reg. No.xxxx, Cst.C.D., Reg. No. xxxx and Cst. K.L., Reg. No. 2052.

4. Cst. A.B. has been a member of the Edmonton Police Service since September 29, 1997.

5. Cst. C.D. has been a member of the Edmonton Police Service since May 20, 1997.

6. Cst. K.L. arrested Ms. I.J. on an outstanding warrant while Cst. A.B. and Cst. C.D. spoke with Mr. E.F..

7. Following their discussions with Mr. E.F., Cst. A.B. and Cst .C.D. accompanied Mr. E.F. to his apartment.

8. Attached as Schedule "A" is a copy of the Edmonton Police Service policy 16-A-12 "Other Inquiries" in effect in February, 2004.

9. Attached as Schedule "B" is a copy of the Edmonton Police Service policy 1-D "Authority and Responsibilities" in effect in February, 2004.

II Witness Testimony

The complainant, Mr. E.F. and the cited officers, Constable A.B. and Constable C.D. , all gave sworn evidence respecting Counts #1, #2, and #3.

A. Summary of Mr. E.F.'s Evidence

Mr. E.F. testified that Constables A.B. and C.D. wanted to know where he lived and told him that they were looking for two people, both of whom happened to be good friends of his at one time[1] (although he was unsure of one individual's name and could not remember the other's name). He asserted that the two officers "...demanded that I let them have a look in my apartment to make sure they're not there."[2] He told the Constables that the place was empty. They went to the apartment in question and, just before entering the suite, the officers drew their weapons. Mr. E.F. testified that he was chuckling at this point as he knew there was nothing inside but a green couch and a green backpack. Mr. E.F. made it clear in his evidence that Constable A.B. and Constable C.D. attended his suite not just for the purpose of verifying where he was living, but because "...they were looking for those two individuals"[3].

[1] Transcript page 61, lines 5 - 12.
[2] *Ibid.*, page 46, lines 16 - 18.
[3] *Ibid.*, page 47, line 21.

When asked by the Presenting Officer whether he offered to show the officers his apartment, he responded by saying[4]:

> "No, I don't think so. There was nothing there. But they insisted that they were going to have a look. Like I said, before I even got the key in the lock on the door, they had their weapons out and loaded, and I just chuckled, shook my head and I opened the door and they were going down and looking into all the nooks and crannies. And it turned out there was a green backpack in my bedroom and a green couch in my living room. The rest of the place was empty,"

Mr. E.F. testified that he "... did not willingly go with them to let them in my apartment because I know I – I had no reason or no right to let them in there anyway."[5] He added that the officers "...may or may not said [sic] that they had warrants".[6] When asked by the Presenting Officer whether he ever advised the cited members that he did not want to go with them to the apartment, Mr. E.F. replied saying, "I may, and I believe I did tell them, like, there's nobody there."[7] Seeking clarification, the Presenting Officer asked the following questions and received the following answers[8]:

Q. Okay, but did you ever refuse to take them to your apartment?

A. I believe - - yeah, I believe I did. Like, I did - - wouldn't do it - - I don't believe I did it out of the good of my heart.

Q. Did you ask them why they wanted to see?

A. That's when they said that they had warrants for - - I almost had their names - - for these two individuals and they were going to search my apartment to see if those guys were there.

Q. So sorry, you said they did tell you they had warrants?

A. I 'm pretty sure they said that they had warrants and they were going to search my apartment because they were looking for - - and like I said, as it turned out, the one guy was already in Remand and E.F. - - I can't remember his last name - - but anyway, I hadn't seen him in about four months.

Q. Did you ever ask to see the warrants?

A. I don't believe I did.

17. So did you just take them at face value that they had warrants?

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[4] *Ibid.*, page 47, line 24 – page 48, line 6.
[5] *Ibid.*, page 48, lines 12 – 15.
[6] *Ibid.*, page 48, lines 17 and 18.
[7] *Ibid.*, page 48, lines 23 and 24.
[8] *Ibid.*, page 48, line 25 – page 49, line 20.

A. Yes, I did.

As for the warrant issue, the Presenting Officer asked for clarification from Mr. E.F.[9]:

Q. I just want to circle back to this warrant issue. It's not clear to me whether they told you they had a warrant or not?

A. Well, I'm not exactly sure if they said they had it or not, you know, but they were looking for those two individuals and I had told them that I was moving into that apartment across the street and they demanded to have a look to see if those two guys were there because we were friends.

Mr. E.F.'s position on whether or not he was told the officers possessed warrants became murkier in cross-examination as illustrated in the following exchange with defence counsel[10]:

Q Now, let's talk about the issue of the warrant. Today, as you testify -- I don't want you to look at that statement just yet, sir. I'll get you to look at some statements in a minute. I want you to tell Superintendent Grue, did they tell you they had a warrant for the arrest of these two people, whose names you can't be certain of, yes or no?

A To the best. -- like, I would say -- how can I – I can't say yes or no because --

Q Well, you remember the day vividly, right?

A Because I -- I would say okay, yes, to the best of my recollection, that they did say or -- in the way they, their mannerisms and whatnot, made me believe that they, yes, had a warrant to look for those two guys.

Q Not believe, sir. Did they tell you that or not, yes or no?

THE PRESIDING OFFICER: Mr. Danyluik, I don't think you can confine a witness to those two specific answers. I see what you're getting at, but -- can you ask it a different way, please.

Q MR. DANYLUIK: Did either officer tell you that they had a warrant for the arrest of one or both of the individuals they claimed to be searching for? Is that better, sir?

THE PRESIDING OFFICER: It sounds better. Go ahead with that.

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[9] *Ibid.*, page 52, line 23 – page 53, line 4,

[10] *Ibid.*, page 65, line 2 – page 66, line 3.

A One of them did say, but I'm not sure if it was Constable A.B. or Constable C.D. .

This last response by Mr. E.F. was in direct contradiction to his response on this issue in direct examination. It should also be noted that Mr. E.F. conceded that he did not claim that the cited officers told him they had warrants in his initial letter of complaint.[11]

When asked by the Presenting Officer whether he ever offered to show the officers his apartment, the following response was given by the complainant:[12]

Q Mr. E.F., did you offer to show them your apartment?

A No, I don't think so. There was nothing there. But they insisted that they were going to have a look. Like I said, before I even got the key in the lock on the door, they had their weapons out and loaded, and I just chuckled, shook my head and I opened the door and they were going down and looking into all the nooks and crannies. And it turned out there was a green backpack in my bedroom and a green couch in my living room. The rest of the place was empty.

When asked by the Presenting Officer whether the officers advised him that he was not required to take them to his apartment, Mr. E.F. replied as follows[13]:

Q. Did either of the police officers tell you that you weren't required to take them to your apartment?

A. Maybe not in so many words, but they did imply it.

Q. They implied that you weren't required?

A. That's what I'm saying. I believe that's what I said at the LERB.

Q. Can you remember what they said or something along the lines of what they said?

A Well, like I said, I may or may not have said that they had warrants, but they were going to go search my apartment because they were looking for those two individuals. And like I said before, I even had the key in the door of my apartment. They had their weapons out, loaded, and they were – when they went in, they were crouching and looking in all the nooks and crannies, and I told them, you know, the green backpack was in my bedroom and the couch was in the living room.

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[11] *Ibid.*, page 66, line 26 – page 68, line 10.
[12] *Ibid.*, page 47, line 22 to page 48, line 6.
[13] *Ibid.*, page 49, line 21 – page 50 – 11.

Q. I understand. I'm asking you about your interaction with them on the street and whether they told you it was optional or not that you go in --

A. No, they did not say there was an option to it.

While Mr. E.F.'s responses are confusing when read literally, I took him to actually mean that the officers implied he was required to take them to his apartment. This is the charitable and I believe accurate rendering of his testimony contrary to his verbatim answers. If I am wrong in this conclusion, then his responses are not only confusing, they are ultimately contradictory.

In summary, Mr. E.F. suggested he did not offer or agree to show Constable A.B. and Constable C.D. his apartment. Rather, he refused to do so, and thought he had no choice but to comply with their demand to allow them entry so they could look for two former friends of his who may or may not have had warrants out for their arrest. Additionally, Mr. E.F. seemed quite focused on the fact the officers drew their weapons before going into his suite, mentioning this several times throughout his testimony. He also indicated that this was unnecessary as no one was in the suite.[14]

In cross-examination he acknowledged that, around the time of the events in question, he was taking 16 different prescription medications[15], none of which he said affected his mind, and was consuming crack cocaine and marijuana.[16] He also testified that he didn't trust or like the police, while at the same time accepting they had a tough job[17].

B. Summary of Constable A.B. 's Evidence

Constable A.B. testified that, at the time of the events in question, he was in his second or third year as a Downtown Beat officer. His assignment was the 107 Avenue Beat and his regular partner was Constable C.D. .

On February 7, 2004 he, Constable C.D. and Constable K.L. (an officer who worked the 118 Avenue Beat) were driving westbound on 107 Avenue when he saw a woman by the name of I.J. at a pay phone located by the north curb between 104 Street and 105 Street. Constable A.B. was very familiar with Ms.I.J., having had numerous dealings with her. They stopped to speak with Ms.I.J. when he noticed Mr. E.F. inside the telephone booth.

Constable A.B. testified that his encounter with Mr. E.F. on February 7, 2004 was entirely by chance and that he had not anticipated running into the complainant.[18]

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[14] *Ibid.*, page 50, line 25 - page 51, line 1.
[15] *Ibid.*, page 62, lines 1 – 10.
[16] *Ibid.* page 63, lines 8 – 18.
[17] *Ibid.*, page 64, lines 13 – 23.
[18] *Ibid.*, page 126, lines 15 – 19.

He gave evidence that he had one previous encounter with Mr. E.F.. This had been approximately six to twelve months previous to this occasion when Constable A.B. assisted the Downtown Division Criminal Investigation Section in the execution of a search warrant at Mr. E.F.'s former residence on 118 Avenue. Mr. E.F. had been the subject of this search warrant and the item being sought was an AK 47 firearm.[19]

Constable K.L. ended up dealing with Ms.I.J., while Constable A.B. and Constable C.D. engaged Mr. E.F. in conversation. Constable A.B. learned from Mr. E.F. that he was now residing (as in renting a suite[20]) within the confines of the 107 Avenue Beat. This was news to Constable A.B. as he thought Mr. E.F. was still living on 118 Avenue (where the aforementioned warrant had been executed). Constable A.B. asked Mr. E.F. where he lived, whereupon Mr. E.F. pointed to an apartment building approximately 100 meters east of their location. Constable A.B. then asked Mr. E.F. if he was able to verify his residency in that building. Mr. E.F. responded to this request to verify his tenancy by inviting the officers to his suite.[21] The officers decided to go with him to the apartment so as to ensure he was not bluffing.[22]

Mr. E.F., Constable A.B., and Constable C.D. then walked the short distance to the apartment building in question. During this walk, Constable A.B. engaged Mr. E.F. in a general conversation about the complainant's past associates. In this regard, the officer had previously been made aware of Mr. E.F.'s prior association with two native gangs, that he frequented prostitutes, was a user of illegal street drugs, and at times had harbored prostitutes and gang members at his residence.[23] Constable A.B. specifically remembers asking Mr. E.F. the whereabouts of two individuals associated with the aforementioned AK 47 investigation. The officer testified that one of these individuals was a member of the Red Alert gang and was known to carry weapons, to be violent, and to be involved in the cultures of drugs and violence.[24]

When the two officers and Mr. E.F. arrived at the door of the suite in question, Mr. E.F. unlocked it. Constable A.B. testified that, because of Mr. E.F.'s associations with the criminal element as described above, he and Constable C.D. decided to take extra safety precautions.[25] The two officers first completed a "listening halt" to determine if they could hear if anybody was inside of the suite. They then looked inside from the open door to ascertain whether anyone was inside. They then entered the suite, service pistols drawn, and checked to make certain no one was inside.

Constable A.B. made it clear that the purpose for looking throughout the entire suite was to ensure no weapons or persons were present that could pose a threat to safety.[26] Once the officers were satisfied that Mr. E.F. "... had some form of residency or access

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[19] *Ibid.*, page 127, lines 5 – 16.
[20] *Ibid.*, page 146, line 21 to page 147, line 14.
[21] *Ibid.*, page 128, lines 10 – 17.
[22] *Ibid.*, page 161, line 18 to page 162, line 9.
[23] *Ibid.*, page 131, lines 5 – 16.
[24] *Ibid.*, page 131, line 17 to page 132, line 6.
[25] *Ibid.*, page 133, line 15 to page 134, line 19. See also page 154, lines 5 to 21 and page 156, lines 16 to 20.
[26] *Ibid.* page 134, line 26 – page 135, line 7.

to a residence and that there were no immediate concerns ..."[27] , they left to assist Constable K.L. with Ms.I.J. who, as it turned out, had a warrant for her arrest. Prior to leaving Mr. E.F., Constable A.B. advised him that his landlord might have to be contacted to confirm the tenancy[28] and that the activities he had been involved in on 118 Avenue would not be condoned in the Division.[29] Constable A.B. estimated the total amount of time he and Constable C.D. spent in their dealings with Mr. E.F. was no longer than thirty minutes and more likely around twenty minutes.

When asked whether Mr. E.F. objected in any manner to the presence of the officers at his suite, Constable A.B. answered the question as follows[30]:

> Q Did Mr. E.F. ever, ever, in any fashion, verbally or by gesture or body language convey to you that you were not welcome to his apartment?
>
> A Not at all. As a matter of fact, he seemed rather eager to, I guess, validate the tenancy and the fact that things were not of a criminal nature during our dealings, so he was quite cooperative, probably more so than he would have been at any other point, based on my dealings and my understanding of other members who have dealt with Mr. E.F..

Constable A.B. testified that he neither advised Mr. E.F. that he had a warrant to search the suite in question, nor that he possessed arrest warrants for the two aforementioned former associates of Mr. E.F..[31]

In cross-examination the officer testified that he had not observed Mr. E.F. do anything wrong on the day in question. He testified that he was not conducting an investigation with respect to Mr. E.F., but was rather engaged in "... an interaction with Mr. E.F., not unlike 20 other interactions I had every day in that area ..."[32]. The following exchange between the Presenting Officer and Constable A.B. highlights the officer's evidence on this point:[33]

> Q THE PRESENTING OFFICER: Constable, you mentioned that, you know, you didn't have a formal investigation under way?
>
> A Not into Mr. E.F.. Ms.I.J., yes, but not him.
>
> Q Okay. But as far as Mr. E.F. knew at the time, and he didn't know or not whether you had an investigation underway?

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[27] *Ibid.*, page 136, lines 1 – 5.
[28] *Ibid.*, page 137, lines 13 – 16.
[29] *Ibid.*, page 137, lines 16 – 20.
[30] *Ibid.*, page 137 line 25 to page 138, line 8.
[31] *Ibid.*, page 138, line 24 to page 139, line 3.
[32] *Ibid.*, page 144, line 25 to page 145, line 3. See also, page 149, line 21 to page 150, line 24, and page 153, line 3 to page 154, line 4..
[33] *Ibid.*, page 163, lines 17 – 27.

A But if we did, he would have been informed of such.

Q Okay. But there was no discussion with him about we are initiating an investigation or not?

A No. No, because there wasn't. But no, we didn't.

In further cross-examination, Constable A.B. was questioned concerning alternative steps he could have taken to verify Mr. E.F.'s tenancy. The officer testified that asking for a driver's license would not have been fruitful given the recency of Mr. E.F.'s move to the 107 Avenue residence.[34] It was also suggested to Constable A.B. that the fact Mr. E.F. possessed keys to the apartment was sufficient evidence of his residency. However, the officer responded by stating that it was common for friends to loan out keys to people who needed a place to stay. He added that, while Mr. E.F.'s showing them his apartment and his personal duffle bag in the suite did satisfy the tenancy issue to a point, he still believed it was necessary to later speak with the landlord. [35]

When questioned by the Presenting Officer, Constable A.B. indicated that he did not explain to Mr. E.F. that if the officers saw anything inside his suite that would afford evidence of an offence that it could be used against him.[36] He also admitted that, had he seen some kind of contraband in Mr. E.F.'s suite, he could have used it as the basis for a warrant to search.[37]

Constable A.B. was asked whether he had told Mr. E.F. that he would not tolerate the kind of past criminal behaviour the complainant had been involved in. The officer acknowledged he had made such a statement.[38] Constable A.B. also testified that Mr. E.F. was never detained, or placed under arrest and that Mr. E.F. responded "I live over there, would you like to see?" when he was asked to verify his tenancy.[39] He stated that Mr. E.F. was cooperative throughout their interaction which he described as cordial and positive.[40]

When questioned about the kind of reporting that would be undertaken with respect to an incident such as the one involving Mr. E.F., Constable A.B. explained the major difference between a Patrol officer and a Beat officer when it comes to note taking. He advised that Patrol officers are dispatched to calls for service. They typically take notes and write reports because they are involved in investigations vis-à-vis these calls for service. On the other hand, a Beat officer usually has far more contact each day with various members of the public (up to 50 – 100 contacts). Most of these interactions never lead to an investigation and there is no need or requirement to document them.[41]

[34] *Ibid.*, page 142, line 18 to page 143, line 2.
[35] *Ibid.*, page 146, lines 4 – 20.
[36] *Ibid.*, page 148, lines 5 – 9.
[37] *Ibid.*, page 151, lines 3 to 6.
[38] *Ibid.*, page 155, line 10 to page 156, line 6.
[39] *Ibid.*, page 158, lines 1 – 16, particularly lines 13 and 14.
[40] *Ibid.*, page 162, lines 10 – 23.
[41] *Ibid.*, page 158, line 22 to page 159, line 21.

This contact is a form of community policing and social control.[42] Given that the interaction with Mr. E.F. was not an investigation, there were no notes or reports generated. This fact impacted on the officer's ability to respond to the Professional Standards investigation into the complaints made against him by Mr. E.F..[43] Constable A.B. further indicated that the vagueness of the complaints made it difficult to answer them.[44]

C. Summary of Constable C.D. 's Evidence

Constable C.D. testified that Constable K.L. was giving him and Constable A.B. a ride to their Beat (specifically McDougall station) when Ms.I.J. and Mr. E.F. were spotted. Constable C.D. knew Ms.I.J. by sight. This was not the case with respect to Mr. E.F., whom he had never before met. The officer knew I.J. as a member of the Red Alert street gang. He had heard of Mr. E.F. through other officers who had informed him that Mr. E.F. had strong criminal associations with aboriginal street gangs and "biker wannabes."[45]

The officers conducted a subject stop to determine if Mr. E.F. and Ms.I.J. had warrants out for their arrest. While Constable K.L.. dealt with Ms.I.J., he and Constable A.B. spoke with Mr. E.F.. During this interaction with Mr. E.F., Constable A.B. acted as the contact officer (who primarily engaged the subject in conversation), while he acted as the cover officer (making sure things were safe for the contact officer).[46]

Constable C.D. testified that he accompanied Constable A.B. to Mr. E.F.'s apartment. He does not recall speaking with Mr. E.F. from the time he and Constable A.B. first met him on the day in question until he resumed his duties after the officers' interaction with the complainant[47], except possibly for some minor conversation that did not involve the tenancy issue.[48]

As he listened to the conversation between Constable A.B. and Mr. E.F. he noted that Mr. E.F. "...seemed to be so proud of the fact that he had an apartment of his own nearby that wasn't on 118th Ave. The impression that I got from him wanting to demonstrate where he lived was as if he was trying to demonstrate that he had left that life behind and he had moved to a different part of the city in order for -- I don't know if you want to call it a fresh start ... ".[49] Constable C.D. recalls he and Constable A.B. were surprised by Mr. E.F.'s claim of the location of his residency, although they made sense of it on the basis that the move had been recent. Mr. E.F. was willing to prove his residency and so, given Mr. E.F.'s background and the reality that an important aspect

42 *Ibid.*, page 160, line 20 to page 161, line 3.
43 *Ibid.*, page 161, lines 4 – 9.
44 *Ibid.*, page 161, lines 10 – 17.
45 *Ibid.*, page 162, lines 18 -22.
46 *Ibid.*, page 175, line 24 to page 177, line 8.
47 *Ibid.*, page 177, lines 13 – 24.
48 *Ibid.*, page 187, line 14 to page 188, line 1.
49 *Ibid.*, page 178, lines 8 – 15.

of a Beat officer's job is intelligence gathering, the officers took the opportunity to confirm his claim.[50]

Constable C.D. testified that he never made any comments about having arrest warrants for certain individuals or a warrant to search Mr. E.F.'s suite.[51] Constable K.L. left the scene with Ms.I.J. who he had placed in custody after determining she had a warrant out for her arrest.

When asked in cross-examination whether he had obtained Mr. E.F.'s informed consent to enter the complainant's suite, Constable C.D. stated he did not, explaining this was because it was Mr. E.F. who invited the officers to his suite, being eager to prove he had his own place and it did not contain drug paraphernalia or was occupied by members of the criminal element.[52]

During cross-examination, Constable C.D. 's characterization of Mr. E.F.'s purported invitation was challenged on the basis that Mr. E.F. might have thought the officers were involved in an investigation. The officer responded by saying that no investigation was being conducted into Mr. E.F., but conceded the complainant might have believed this was the case, although he was never asked.[53] Having said that, it is clear from the officer's testimony that it never occurred to him that Mr. E.F.'s action in showing the officers his suite was in any way coerced or that it was taken other than on the basis of the complainant's own volition.

The Presenting Officer questioned Constable C.D. as to why he did not verify that Mr. E.F. understood he was giving the officers permission go into his suite just prior to entering. The officer's cumulative evidence was that Mr. E.F.'s invitation was made on the street and that, once at the door of the suite, he unlocked it, stood back and looked at the officers so as to convey his expectation that they enter the residence.[54] Therefore, Mr. E.F.'s actions at the door confirmed the verbal invitation he made on the street.

Constable C.D. confirmed that neither he nor Constable A.B. advised Mr. E.F. that the complainant didn't have to let the officers into the suite in question. Constable C.D. testified that this was because they were not conducting a criminal investigation and they were not seeking any evidence inside of the suite. He did concede that, had they seen any contraband inside Mr. E.F.'s residence, this evidence could have been used to obtain a search warrant and used against the complainant. He also indicated that he and Constable A.B. had lawfully entered the suite in question based on Mr. E.F.'s invitation.

[50] *Ibid.*, page 178, line 25 to page 179, line 14.
[51] *Ibid.*, page 179, lines 15 – 27.
[52] *Ibid.*, page 180, line 23 to page 181, line 24.
[53] *Ibid.*, page 182, lines 5 – 22.
[54] *Ibid.*, page 184, line 3 -22.

Finally, during cross-examination, Constable C.D. explained (as did Constable A.B.) that notes were not taken with respect to subject stops, that the explanatory statement he offered in response to Mr. E.F.'s complaint was made approximately three months after the fact, and he was not provided with specific allegations relating to the complaint. For these reasons, there may have been some things he could not remember and some details that were not included in the aforementioned statement.[55]

III Argument

A. Verbal Argument

It should be noted that all three charges are tightly woven around the issue of consent. This will become evident as the various arguments in support of and against each count are addressed.

The Presenting Officer asserted that the impugned conduct in question that relates primarily to count #1 concerns the alleged improper detention of Mr. E.F. by these officers.[56] He further stated that the test for whether or not the conduct was discreditable was primarily objective in nature, based on the reasonable expectations of the community.[57]

As authority for this position, the Presenting Officer offered the case of *Silverman v. O.P.P.* in which the Presiding Members stated as follows:[58]

> "The measure used to determine whether conduct has been discreditable is the extent of the potential damage to the reputation and image of the Service should the action become public knowledge"

The Presenting Officer indicated that the theory of the prosecution's case with respect to count #1 was based on the actions of Constables A.B. and C.D. in detaining Mr. E.F. and walking him over to his apartment building for the purpose of verifying the location of his residence. It was argued that the law respecting investigative detention[59] applied to this case (although, as it will be demonstrated *infra*, the prosecution referenced the early state of the law respecting investigative detention). Specifically, it was suggested that the officers over-stepped their legal authority by detaining the complainant and compelling him to show them where he lived when there was no articulable reason to believe he was possibly engaged in criminal activity, when there was no statutory or common law authority to do so, and when it was not reasonably necessary to take such action.

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[55] *Ibid.*, page 188, line 2 to page 189, line 7.
[56] *Ibid.*, page 194, lines 15 – 22.
[57] *Ibid.*, page 195, lines 3 – 7.
[58] *Silverman v. O.P.P.* (September 5, 1997, OCCPS, page 8.
[59] *Hnatiuk v. Constable Bentley* (June 8, 2000) Alberta Law Enforcement Review Board No. 015-2000, pp. 6 – 8.

The Presenting Officer further posited that the police are obliged to ensure a citizen understands the potential consequences to waiving a right. It was suggested that, even if the officers believed that Mr. E.F. had consented to going with them to his apartment, they should have ensured his consent was genuine.

The defence contended that the officers did not detain Mr. E.F. and never gave any indication to him that he was being detained. Rather, the members engaged Mr. E.F. in a conversation, similar to many contacts these officers had every day during the course of their duties as Beat officers. The officers made no demands of the complainant and never asked to go to his residence. In fact, it was Mr. E.F. who invited the Constables to his residence for the purpose of showing the officers he had changed his lifestyle. The defence disputed the prosecution's position that the officers should have re-confirmed Mr. E.F.'s invitation just before entering the residence given the short time it took to get there after the invitation was extended.

As for count #2, the prosecution contended that the cited officers committed the disciplinary offence of an unlawful or unnecessary exercise of authority by entering the complainant's residence without his consent. The Presenting Officer referred to the Supreme Court of Canada case of *R. v. Godoy*[60] in which it was held that the police may forcibly enter a private dwelling in the context of a 911 call when it is reasonably necessary to protect life. He also offered the L.E.R.B. decision in *Kadri v. Constable Anstey*[61], tendering the following quotation from the Board with respect to the issue of consent:[62]

> "If a police officer intends to rely on consent, it must arise from a solid foundation where the holder of the right has provided a true relinquishment."

It should be noted that this case involved the reliance of a police officer on the invitation of a child of tender years to enter a private dwelling.

The Presenting Officer referred to the decision of the Supreme Court of Canada in *R. v. Borden*[63] and highlighted the following quotation from that case:[64]

> "In order for a waiver of the right to be secure against an unreasonable seizure to be effective, the person purporting to consent must be possessed of the requisite informational foundation for a true relinquishment of the right. A right to choose requires not only the volition to prefer one option over another, but also sufficient available information to make the preference meaningful."

He argued that Mr. E.F. did not have a sufficient informational basis on which to base the relinquishment of his rights. While the prosecution did not specify which right was

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[60] (1998) 131 C.C.C. (3d) 129
[61] Alberta Law Enforcement Review Board, No. 009-96.
[62] *Ibid.*, page 11.
[63] (1994) CanLII 63
[64] *Ibid.*, page 22 (in PDF format). Note: this case concerned informed consent in the context of the seizure of evidence rather than a consent to search.

relinquished in this case, it was implied that it pertained to the section 8 *Charter* right to be secure against an unreasonable entry into and search of Mr. E.F.'s residence.

The prosecution submitted that when the police seek consent to enter a private residence, the law requires the consent to be informed.[65] That is to say that the person from whom consent is sought must be advised of their right to refuse and the consequences of waiving that right.

The defence responded by stating the officers never considered Mr. E.F. to be a suspect and there is no evidence that he believed he was being investigated. The complainant may have erroneously believed two of his former criminal associates were being sought by the police, but it is clear he was not a suspect. Defence counsel contended that the constant theme of the cases pertaining to consent was the presence of a police investigation. He further argued that the officers were acting in good faith in that they honestly believed Mr. E.F. voluntarily showed them his suite.

In essence, Count #3 alleges the two officers were insubordinate by failing to comply with EPS Policy and Procedure as it relates to obtaining an informed consent to search. The policy in question (Part 1, Chapter D, Section 11 (A), (B), and (C) which is included as an attachment in Exhibit #5) is entitled "Search Conducted with Informed Consent". The substance of the prosecution's argument on this point is that the actions of the cited officers constituted a search of the complainant's residence and that the members failed to obtain an informed consent before taking this action. In regard to this latter point, the prosecution contended that, even though the Constables may not have believed they were conducting an investigation, Mr. E.F. did not appreciate this and believed he had no choice but to allow the officers into his residence. Therefore, it was incumbent on the members to have first explained to Mr. E.F. his right to refuse them entry and the possible consequences of them finding contraband on the premises.

Defence counsel maintained that the policy in question did not apply to the circumstances of this case as, again, the complainant was not a suspect, the officers were not engaged in an investigation of any kind, and did not conduct a search. As for the latter point, the defence stated the officers checked the premises for the presence of other persons for safety reasons only.

B. Written Argument

The written argument submitted by the prosecution related to count #3 which, as stated above, alleges that the cited officers were insubordinate by breaching Part 1, Chapter D, Section 11 of the EPS Policy and Procedure manual (informed consent to search and seize). In this regard, during verbal argument it was pointed out that the policy in question appeared to be predicated on circumstances involving the investigation of a suspect and that the officers testified they were not involved in any kind of investigation.

[65] *Ibid.*, page 207, line 24 to page 208, line 3?

The Presenting Officer responded (in writing) that the policy in question applies more broadly than to suspects:[66]

> "Section 11(C) says that in respect of searches that may not be contemplated or authorized by statute, members must always seek to obtain the informed consent of the "individual or subject" whenever possible. Clearly, section 11 applies to an "individual", to a "subject" as well as to a "suspect"."

When asked whether or not the policy and procedure applicable to searches applies to any circumstance in which an officer seeks entry into premises in relation to which there is a reasonable expectation of privacy, the Presenting Officer responded (in writing) by saying that:[67]

> "The Search Policy can and should apply in circumstances where police officers acting without specific statutory authorization seek to enter spaces where the occupants have a reasonable expectation of privacy and the officer's purposes could result in jeopardy for one or more occupants."

He added that the search policy was not directed at circumstances where police officers were merely meeting with members of the community, identifying potential witnesses or taking witness statements. However, he asserted that Mr. E.F. gave evidence that the reason the officers wanted to look in his residence was to determine if certain people they were looking for were present therein. He contended that, if I accepted Mr. E.F.'s testimony, then the aforementioned policy provision was applicable to the circumstances of this case. He reasoned that, since the people the officers were looking for in the complainant's residence faced jeopardy (i.e., questioning and possible arrest) and Mr. E.F. did not provide an informed consent for the members to enter, the policy was breached, even if only in a technical sense.

The Presenting Officer conceded that whether or not the search policy applied to this case depended on my findings of fact. In this regard, he granted that if I accepted the officers' version of events (their purpose in entering Mr. E.F.'s apartment was to verify his tenancy and to conduct a safety sweep for officer safety reasons), then the search policy did not apply and only simple consent was needed for the members to have lawfully entered the suite. He added that, if I did not accept the members' version of events, then the officers committed a technical violation of the policy in question and it would have to be determined whether, in light of *Sussman v. College of Alberta Psychologists*[68] such a nominal breach should automatically constitute a disciplinary offence.

In reply to the Presiding Officer's written argument, defence counsel wrote that the policy in question was clearly intended to apply to suspects only. He further rejected the suggestion by the prosecution that the policy applied in this case because of the

[66] Letter to Superintendent Grue from Mr. Sim dated November 18, 2011, page 2.
[67] *Supra*, page 3.
[68] CanLII (2010) A.B.C.A. 300

potential presence of other people who could face jeopardy, thus giving Mr. E.F. the right of informed consent. The defence proffered the Supreme Court of Canada case of *R. v. Edwards*[69] which held, *inter alia,* that the right to allege a breach of section 8 of the *Charter* is largely dependent upon whether a person has a reasonable expectation of privacy. People who are mere visitors (no authority to regulate access) on private property (as would be the case of anyone found inside Mr. E.F.'s suite) do not have a reasonable expectation of privacy. The defence further contended that the complainant stated that he knew no one else was inside his residence and so any proxy standing with respect to the issue of consent would not apply as there was no one present to assert it.

IV Assessment of the Witnesses' Credibility and Reliability

Credibility relates to the truthfulness of a witness, while reliability relates to the ability of a witness to provide accurate testimony[70]. An untruthful or insincere witness may be able to tell a compelling and coherent story. On the other hand, a sincere witness may have a poor memory, may have poor observation skills, or may not have had the opportunity to accurately observe the events in issue.

The issues of credibility and reliability are of paramount concern in this case. This is because the complainant and cited officers paint a very different picture with respect to the nature of the contact that took place between them on the day in question.

A. Mr. E.F.

As to the evidence provided by Mr. E.F. concerning this interaction, the Presenting Officer admitted that Mr. E.F.'s evidence was challenging given the inconsistencies in his stories over time (as also pointed out by the defence). The prosecution further conceded that, contrary to Mr. E.F.'s somewhat equivocal testimony on this point, the officers never told the complainant that they possessed a warrant.[71] However, the Presenting Officer submitted that the complainant did not waiver in his evidence that he did not consent to going with the officers to his apartment. [72] The defence contended that Mr. E.F.'s steadfastness with respect to the consent issue was self-serving and unreliable given his contradictory statements, his past drug use, and the evidence of the two officers.

I found Mr. E.F. to be generally credible in that he appeared to believe what he was saying was true. However, I found the reliability of his testimony was often questionable based on issues relating to a poor memory. In this regard, he was sometimes unnecessarily combative and reluctant to admit any difficulties recalling events accurately in spite of evidence to the contrary. For example, the prosecution conceded

[69] 1996 CanLII 255 (SCC)
[70] *R. v. Morrissey* (1995) 97 C.C.C. (3d) 193 (Ont. C.A.) at 205.
[71] Transcript., page 202, lines 14 – 19.
[72] *Ibid.*, page 200, line 17 to page 201, line 1.

that Mr. E.F. participated in a twenty minute recorded interview with Detective Mills with respect to his complaint against Constable A.B. and Constable C.D., even though the complainant claimed his only interview with Detective Mills related to a homicide investigation.[73]

I also noted that on several occasions Mr. E.F. expressed his belief of the truth of certain facts as opposed to his actual recollection. Numerous times he testified using such words as "I believe", "I don't believe", "I may", "I don't think so", "I'm pretty sure" in relation to significant facts in issue. His evidence concerning whether or not he invited the officers to his residence was ambiguous.[74] Further, his evidence as to whether or not the members told him they possessed warrants was equivocal and contradictory.[75] In this regard, I am of the view that the cautionary measures the members used when entering into the suite did not sit well with the complainant and lead him to an erroneous conclusion that the true purpose for entering the suite was to look for certain persons who had warrants out for their arrest. It is likely that Mr. E.F. conflated the discussion he had with the officers concerning his two former associates with the officer safety steps taken by the members in entering the suite which led him to the mistaken conclusion that the members came to his place to execute arrest warrants or at least search for wanted individuals.

The defence suggested that Mr. E.F.'s memory might have been deleteriously impacted by virtue of the numerous prescription medications he was taking as well as the admitted fact he was smoking crack cocaine and marijuana around the time of this incident. However, besides Mr. E.F.'s denial on this point, there is no evidence as to whether any of the prescription medications he had been taking could have distorted or otherwise impaired his memory. Likewise, there is no evidence that Mr. E.F. was impaired by virtue of his consumption of illegal drugs at the time in question. I am compelled, therefore, to disregard the insinuation by the defence as amounting to mere conjecture.

Nevertheless, there is no doubt in my mind that Mr. E.F. struggled in his attempt to accurately recall essential details relating to his interaction with the cited officers. His responses at times were discursive, confusing, inconsistent and seemed to be a product of conflating or reconstructing events as opposed to a clear recollection.

B. Constable A.B.

Overall, I found Constable A.B. testified in an open and matter of fact fashion and that his evidence was both coherent and consistent. He readily admitted he could not remember some details of his encounter with Mr. E.F..

The prosecution attempted to impeach Constable A.B. 's credibility by suggesting certain details were missing from his explanatory memorandum (Exhibit 8) provided to

[73] *Ibid.*, page, 66, lines 21 – 25, page, 69, lines 26 – page 71, line 7, and page 82, lines 1 – 17.
[74] *Supra*, notes 4 – 8 inclusive.
[75] Transcript, page 65, line 2 to page 66, line 3.

the Professional Standards Branch during the course of the investigation into Mr. E.F.'s complaint. The effort to discredit the officer's evidence on this basis did not succeed for a number of reasons. First, the memorandum in question was authored nearly three months after the fact and was based strictly on memory (no prior notes or reports). This would challenge virtually anyone's ability to recall specific details.

Second, it is clear from the officer's testimony that nothing of consequence arose from his interaction with Mr. E.F. that required an investigation and formal report. It wasn't the case of a deliberate decision not to document an event that he should have. In this regard, the officer testified that Mr. E.F. had done nothing wrong and was not being investigated, detained or placed under arrest. It is also clear that Constable A.B. did not anticipate a complaint coming from Mr. E.F..

Third, expecting a Beat officer to make detailed reports or notes with respect to every interaction he or she has with people each day, regardless as to whether this contact involves or leads to a formal investigation, would fetter the entire Beat program so as to render it completely ineffective. As the officer testified, Beat officers experience a significant number of interactions with members of the general public every day. For the most part, these contacts do not involve or lead to investigations and are not documented.

The final reason for rejecting the prosecution's attempt to impeach Constable A.B.'s credibility on the basis that details were missing from his explanatory memorandum to Professional Standards is evident on the face of the document. In this regard, the officer stated in this memorandum (in part) as follows:

> "I cobbled together a reply when I wasn't aware of, first of all, the jeopardy I was facing, nor the specific allegations against me."

Fairness and reason dictates that, if a person does not know the specific nature of the allegations against them, they cannot be accused of failing to address matters they did not know were in issue.

C. Constable C.D.

As with Constable A.B., I found that Constable C.D. testified in a candid fashion and that his evidence on the essential details was unwavering and cogent.

While he did not have a perfect memory with respect to every detail of the interaction with Mr. E.F., I found him to be both credible and reliable with respect to the salient points. As with Constable A.B., Constable C.D. stated the explanatory memorandum

he provided to the Professional Standards Branch in response to Mr. E.F.'s complaint was based solely on memory and without the benefit of understanding the specific allegations being made against him. For this reason, certain details were left out of the document.

D. Summary With Respect to the Issues of Credibility and Reliability

This is a difficult case in that the version of events provided by the complainant directly conflicts with that given by Constable A.B. and Constable C.D. as it relates to the material facts. The task of assessing overall credibility and reliability is made even more difficult given that the incident in question took place over seven years ago. While I do not accept that the officers' memories are perfect, the weight of the evidence compels me to accept the version of events provided by the officers over that of the complainant.

V. Findings of Fact

In addition to those facts set out in the Agreed Statement of Facts as they relate to Counts #1, #2, and #3 against both officers, I find the following facts:

1. The encounter between Constables A.B. and C.D. and Mr. E.F. and Ms .I.J. on the day in question was entirely serendipitous;

2. Approximately six to twelve months prior to the date of this incident, Constable A.B. had one previous encounter with Mr. E.F.. This encounter related to a search warrant for an AK 47 that the officer assisted in executing at the complainant's residence on 118 Avenue;

3. Some time prior to the date of the incident giving rise to Mr. E.F.'s complaints, Constable A.B. had been made aware that Mr. E.F. had associated with two native gangs, frequented prostitutes, was a user of illegal street drugs, and at times had harbored prostitutes and gang members;

4. Constable C.D. had never met Mr. E.F. prior to the date of the incident in question. He knew of Mr. E.F. through other officers who had advised him of the complainant's strong criminal associations – specifically, aboriginal street gangs and "biker wannabes". He acted as cover officer for Constable A.B. who was the one who principally engaged Mr. E.F. in conversation;

5. In conversation with Mr. E.F., Constable A.B. and Constable C.D. were surprised to learn that the complainant had recently moved from the aforementioned 118 Avenue location and was now living within the confines of the officers' Beat in the area of 107 Avenue;

6. Constable A.B. asked the complainant if he knew the whereabouts of two individuals associated with the aforementioned AK 47 investigation, one of whom he knew beforehand to be a member of the Red Alert gang and was known to carry weapons, to be violent, and to be involved in the drug culture;

7. Constable A.B. requested that the complainant verify his claim that he resided nearby (at the 107 Avenue location). In response, Mr. E.F., on his own volition and without being coerced, agreed to show the officers his residence and permitted them entry. I further accept as fact that the complainant was eager to do this;

8. Based on the fact that Mr. E.F. had been the subject of a search warrant for an AK 47 and was known to associate with gang members, the officers took safety precautions with respect to their entry into the suite by:

   - drawing their service pistols before entering,
   - listening and looking for the presence of others inside the premises before entering,
   - clearing the suite after entering to ensure they would not be taken by surprise by a person who would have no qualms about harming a police officer;

9. The officers did not possess and did not advise Mr. E.F. that they possessed any kind of arrest warrant in relation to Mr. E.F.'s past associates (not including Ms. I.J. who was dealt with by Constable K.L.);

10. The officers did not possess and they did not advise Mr. E.F. that they possessed a search warrant pertaining to his residence;

11. At no time during their dealings with Mr. E.F. did he ever offer any objection, verbally or otherwise, to the attendance of the officers at his suite;

12. At no time during their dealings with Mr. E.F. did the officers:

   - believe Mr. E.F. had committed an offence;
   - become involved in an investigation of an offence of any kind;
   - conduct a search for evidence or contraband;
   - enter his suite for the purpose of locating certain individuals wanted by the police; or
   - otherwise conduct an investigative search once inside the suite;

13. At no time during their dealings with Mr. E.F. did the officers obtain his informed consent to enter his residence by advising him he was not obliged to allow them entry and that any evidence of an offence found therein could be used against him;

14. At no time during their dealings with Mr. E.F. did the officers ever make any authoritative demands of or physically restrain the complainant;

15. Overall, Constable A.B. and Constable C.D. both honestly believed that Mr. E.F. freely allowed them entry into his residence and that this belief was objectively reasonable in the circumstances; and

16. The officers left the suite and Mr. E.F. shortly after observing some of his personal property in the residence.

VI. Analysis

A. Count #1 – Unlawful Detention

As made clear by the Presenting Officer, the import of count #1 is that Constable A.B and Constable C.D. unlawfully detained Mr. E.F., compelling him to take them to his apartment suite for the purpose of verifying his tenancy.

The term "detention" has become a term of art in the context of Canadian criminal procedure. In essence, it refers to the scope of police authority to interfere with a person's liberty short of an arrest. At a certain threshold, an interaction between a police officer and an individual triggers specific rights pursuant to the Canadian Charter of Rights and Freedoms (hereinafter referred to as the *Charter*). Particularly, the right to be free from arbitrary detention (section 9) and the right to counsel (section 10). If these rights are violated, then it can be said the detention in question was improper.

The law respecting the power of the police to lawfully detain individuals began to crystallize in *R. v. Simpson*[76] which was decided in 1993. This case concerned the power of the police to arbitrarily stop a motor vehicle for purposes relating to the investigation of possible criminal activity by the occupants. The Ontario Court of Appeal relied on the test for ancillary police powers established in the English case of *R. v. Waterfield* [77] to determine the nature and extent of a police officer's authority to detain someone in the context of the *Charter*. Unfortunately, *R. v .Simpson* left many unanswered questions relating to the scope of authority the police possessed to detain individuals. Most importantly, a clear test for when a person would be considered detained by the police was not articulated.

R. v. Simpson remained the leading case on investigative detention until the Supreme Court of Canada decision in *R. v. Mann*[78] (decided in July, 2004, several months after the incident which is the subject of this hearing). With respect to the issue of detention,

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[76] 1993 CanLII 3379 (Ont. C.A.)

[77] [1963] 3 All E.R. 659 (C.A.).

[78] (2004) SCC 52 (CanLII)

the following assertion by the Supreme Court of Canada in that case is both relevant and instructive:[79]

> ""Detention" has been held to cover, in Canada, a broad range of encounters between police officers and members of the public. Even so, the police cannot be said to "detain", within the meaning of ss. 9 and 10 of the Charter, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be "detained" in the sense of "delayed", or "kept waiting". But the constitutional rights recognized by ss. 9 and 10 of the Charter are not engaged by delays that involve no significant physical or psychological restraint."

This declaration, and those made later by the Supreme Court of Canada in *R. v. Grant*[80] significantly damages the suggestion that it was inappropriate for the cited officers to even ask Mr. E.F. where he lived.[81] This is not the law in Canada and never has been. The law has always permitted police officers to ask questions of people situated in public areas. These individuals are entitled not to answer or otherwise speak to the police if they so choose. The real issue is whether, in speaking with a member of the public, a police officer has effectively placed the person under detention so as to invoke their Charter rights.

The clearest direction with respect to when an interaction between a citizen and the police becomes a detention for *Charter* purposes was provided by the Supreme Court of Canada in the companion cases of *R. v. Grant*[82] and *R. v. Suberu*[83] (decided in 2009, (several years after the incident which is the subject of this hearing).

The Court in *R. v.* Grant summarized its decision with respect to the meaning and test for detention as follows:[84]

> "1. Detention under ss. 9 and 10 of the *Charter* refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.
>
> 2. In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, *inter alia*, the following factors:

[79] *Ibid.*, paragraph 19.
[80] 2009 SCC 32 (CanLII) and see quote referenced by note 86 and comment of the Court referenced by note 87.
[81] Transcript, page 199, lines 13 – 22.
[82] *Supra,* note 80.
[83] 2009 SCC 33 CanLII
[84] *Supra,* footnote 80, at paragraph 44.

(a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.

(b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.

(c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication."

The Court also stated that, "To answer the question whether there is a detention involves a realistic appraisal of the entire interaction as it developed, not a minute parsing of words and movements".[85]

It is also appropriate to reference the following statement made by the majority in this case with respect to the general right of a citizen to walk away from the police:[86]

> "Another often-discussed situation is when police officers approach bystanders in the wake of an accident or crime, to determine if they witnessed the event and obtain information that may assist in their investigation. While many people may be happy to assist the police, the law is clear that, subject to specific provisions that may exceptionally govern, the citizen is free to walk away: *R. v. Grafe* 1987 CanLII 170 (ON CA), 1987 36 C.C.C. (3d) 267 (Ont. C.A.). Given the existence of such a generally understood right in such circumstances, a reasonable person would not conclude that his or her right to chose whether to cooperate with them has been taken away. This conclusion holds true even if the person may feel compelled to cooperate with the police out of a sense of moral or civic duty. The Ontario Court of Appeal adverted to this concept in *Grafe*, where Krever J.A. wrote, at p. 271:
>
>> The law has long recognized that although there is no legal duty there is a moral or social duty on the part of every citizen to answer questions put to him or her by the police and, in that way to assist the police: see, for example, *Rice v. Connolly*, [1966] 2 All E.R. 649 at p. 652, *per* Lord Parker C.J.. Implicit in that moral or social duty is the right of a police officer to ask questions even, in my opinion, when he or she has no belief that an offence has been committed. To be asked questions, in these circumstances, cannot be said to be a deprivation of liberty or security.

[85] *Ibid*, in paragraph 32.
[86] *Ibid*, in paragraph 37and 38.

In the context of investigating an accident or a crime, the police, unbeknownst to them at that point in time, may find themselves asking questions of a person who is implicated in the occurrence and, consequently, is at risk of self-incrimination. This does not preclude the police from continuing to question the person in the pursuit of their investigation. Section 9 of the *Charter* does not require that police abstain from interacting with members of the public until they have specific grounds to connect the individual to the commission of a crime. Nor does s. 10 require that the police advise everyone at the outset of any encounter that they have no obligation to speak to them and are entitled to legal counsel."

It should be noted that the facts in *R. v.* Grant involved a police officer commencing an encounter with an individual by stepping in front of him as he walked down a sidewalk in Toronto and making general inquiries of him. The Court held that these actions did not of themselves constitute a detention.[87]

The current state of the law respecting the authority of the police to detain individuals was not referenced by the prosecution or the defence in this case. Rather, the prosecution appeared to rely upon the *R. v. Simpson* statement of the law concerning investigative detention which was made in 1993. This exposes one of the major difficulties that arise when disciplinary hearings are conducted years after the event giving rise to the initiating complaint.

Without wading too deeply into the murky waters of legal theory, it is generally accepted that "... while new legislation is presumptively prospective only, judge-made law is by its very nature inherently retrospective in that it attributes legal consequences as announced in the particular case to the prior events that are at issue in the litigation". [88] There are narrow circumstances when the impact of judge-made law can be limited to a prospective effect. Specifically, this can occur if the litigants can demonstrate a clear and detrimental reliance on a prior ruling. [89]

In this case, I can see no reason to depart from the standard principle concerning the retrospective application of judge-made law. Therefore, the actions of the officers will be assessed in light of the current state of the law respecting the authority of the police to detain. This decision is also based on the fact that the *R. v. Simpson* line of cases are limited in their application as they are based on appreciably different facts and, more importantly, did not consider the issue of detention as comprehensively as has the Supreme Court of Canada.

It is clear from the aforementioned Supreme Court of Canada decisions in *R. v. Mann* and *R. v. Grant* that not every encounter a person has with the police which results in a

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[87] *Ibid*, paragraph 47, although the Court held the accused was detained for other reasons.

[88] *Ontario (Finance) v. Progressive Casualty Insurance Company of Canada* 2009 ONCA 258 (CanLII) (Ont.C.A.) at paragraph 54.

[89] *Ibid.* at paragraph 58, and see also *R. v. Lombard* 2011 ONSC 248 CanLII (Ont. S. Ct. J. and *Canada (Attorney General) v. Hislop* 2007 SCC 10 CanLII re prospective effect of rulings concerning the Constitution when substantial changes to the law are made and factors such as good faith reliance by government actors and fairness to the litigants come into play.

delay will amount to a detention as defined in the context of the *Charter*. In applying the aforementioned test for detention as set out in *R. v. Grant* to the facts of this case (as I have found them), the first question to be asked is whether Mr. E.F. was ever physically restrained by either Constable A.B. or Constable C.D. I have found that he was not.

The next step in the test is to determine whether Mr. E.F. was under a legal obligation to comply with a request or demand made by Constable A.B. or Constable C.D. . It is clear that Mr. E.F. was not under any legal duty to comply with any request or demand.

Finally, it must be determined whether Mr. E.F. was psychologically detained. This involves ascertaining whether the reasonable person in Mr. E.F.'s circumstances would conclude that he or she had been deprived by the police officers of their liberty of choice to not answer the officers' questions and to leave the officers' presence. It is clear from the facts that Mr. E.F. voluntarily responded to Constable A.B 's questions and was eager to show the officers his new residence. In these circumstances, the reasonable person would not conclude that they had been deprived of their liberty of choice.

In light of the foregoing analysis respecting whether or not Mr. E.F. was detained, I am compelled to conclude on the basis of the facts and evidence that he was not.

B. Count #2 – No Consent (Neither Simple Nor Informed)

On its face, count #2 concerns the allegation that the cited officers entered Mr. E.F.'s suite without his consent. Given that I found Mr. E.F., of his own accord and without coercion, showed the officers his residence, the charge is not supported by the accepted evidence. The prosecution, however, argued that, even if Mr. E.F. provided his initial consent for the officers to enter his suite, they were obliged to verify that consent by "...asking certain questions and getting certain answers".[90] He ultimately suggested that a simple consent to enter the complainant's residence was inadequate and that an informed consent was required.

In partial support for this assertion, the prosecution offered the case of *R. v. Godoy.*[91] As noted above, this case involved a forcible entry by the police in the context of responding to a 911 call. The Court held that the police could forcibly enter a premises in order to preserve life and safety, but that the intrusion must be limited to give effect to that purpose. Given the dramatic difference between the facts upon which the Court's decision was based and the facts of this case, *Godoy* has no application to the disciplinary charge in question.

The prosecution also relied on the aforementioned case of *Kadri v. Constable Anstey*[92] which involved a child of tender years giving a police officer access to a residence. However, Mr. E.F. is obviously not a child and he had full authority to allow the cited

[90] Transcript, page 201, line 14 to page 202, line 6.
[91] *Supra*, note 60.
[92] *Supra*, note 61.

officers into his suite. The facts in *Kadri* are too disparate to have any application to the present case.

The above noted decision of the Supreme Court of Canada in *Borden*[93] was also proffered in support of the argument that any consent that may have been given by the complainant was vitiated because it was not informed. However, it should be noted that *Borden* involved the seizure of evidence that was requested of an accused person by the police during the course of a criminal investigation. In the present case, the cited officers did not suspect the complainant of committing any offence, they were not seeking any evidence in support of a charge (i.e., they were not conducting an investigation), and they had no reason to believe any wanted persons were inside of Mr. E.F.'s suite. Instead, the officers were seeking to verify Mr. E.F.'s claim relating to the location of his new residence. In this regard, the interaction was not adversarial in nature, but one marked by cordiality and cooperation.

Requiring informed consent from a person who is not suspected of committing an offence and who has demonstrated their eagerness for an officer to enter their residence is apparently based on the theoretical possibility the officer might unexpectedly observe something detrimental to that person's legal interests. This is neither supported by customary social interaction nor the law. Such a rule would render police interaction with the public exceptionally awkward and establish an artificial barrier that would impede efforts at community policing.

For example, under such a rule, if a citizen were to call the police to investigate a break, enter and theft in their home, the police would first have to obtain the occupant's informed consent to enter the premises to investigate. This would be so even if the complainant who had requested the police in the first place was standing at the door beckoning them inside. On this point, it is useful to consider how the issue is addressed in the United States.

In some American states, the courts have imposed a requirement on the police to inform an individual they have the right to refuse a request to search their residence without warrant. This requirement is limited to circumstances where the police are conducting a "knock and talk" for the purpose of obtaining consent to search for contraband or evidence of a crime. For example, in *State* v. *Ferrier*[94], the Washington State Supreme Court held that:[95]

> "[W]hen police officers conduct a knock and talk for the purpose of obtaining consent to search a home, and thereby avoid the necessity of obtaining a warrant, they must, prior to entering the home, inform the person from whom consent is sought that he or she may lawfully refuse to consent to the search and that they can revoke, at any time, the consent that they give, and can limit the

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[93] *Supra*, note 63.
[94] (1998) 136 Wash.2d 103
[95] *Ibid.*, at 118-19

scope of the consent to certain areas of the home. The failure to provide these warnings, prior to entering the home, vitiates any consent given thereafter."

However, these same courts have also recognized that the requirement of informed consent must be limited in order to avoid peculiar and unintended consequences. In *State v. Williams*[96], the Court concluded that a "*Ferrier* warning" was not required outside the context of a request to search for contraband or evidence. Although not binding in any Canadian jurisdiction, the following reasoning of the Court is compelling[97]:

> "We recognize that law enforcement officers need to enter people's homes in order to provide their valuable services for the community on a daily basis. We do not find it prudent or necessary to extend *Ferrier* to require that police advise citizens of their right to refuse entry every time a police officer enters their home. Police officers are oftentimes invited into homes for investigative purposes, including inspection of break-ins, vandalism, and other routine responses. We do not find a constitutional requirement that a police officer read a warning each time the officer enters a home to exercise that investigative duty. To apply the *Ferrier* rule in these situations would unnecessarily hamper a police officer's ability to investigate complaints and assist the citizenry. Instead, we limit the requirement of a warning to situations where police seek to conduct a search for contraband or evidence of a crime without obtaining a search warrant."

It should be noted that the police officers in the present case were not in an "investigative mode" during their interaction with Mr. E.F.. They were not actively searching for contraband, evidence, or persons they could arrest. Mr. E.F. willingly granted them access to his suite as a way of verifying that he lived there and was no longer involved with street drugs or the criminal element. In my view, the necessity for obtaining an informed consent (as opposed to simple consent) to enter private property is predicated on circumstances where the police are purposefully conducting an investigation and evidence is being sought therein.

As for the prosecution's suggestion that the officers were obliged to verbally verify Mr. E.F.'s consent beyond the complainant's actions in unlocking the door to the suite, stepping back and looking at the officers, the Alberta Court of Appeal decision in *R. v. Schmidt*[98] is instructive. In *Schmidt*, an individual who had rented a one-room apartment asked a Constable for assistance in removing unwanted guests from his suite. The issue of unwanted guests was an ongoing problem for the renter who was afraid to evict them on his own. One day, while on routine patrol, the Constable and his partner stopped at the renter's suite to check up on him. The renter answered the door, then backed away from it and waved his arm which the officers took as an indication for them to enter. Schmidt, apparently a guest, was inside the suite and ended up being

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[96] (2000)142 Wn. 2d 17 (Supreme Ct.)

[97] Ibid, at 27-28.

[98] 2011 ABCA 216 (CanLII)

arrested and charged in relation to his possession of a sawed-off shotgun and ammunition.

Schmidt called the renter as a witness for his defence. The renter testified that he did not invite the officers into his residence. However, the Court found that, even if the officers did not have the renter's actual consent, their conclusion that they had his consent was reasonable and so they acted in good faith. Likewise, I find that the officers in this case were reasonable in concluding that the verbal permission Mr. E.F. gave to enter his suite, which was provided on the street, was confirmed by the non-verbal actions the complainant took in opening the door and standing back so as to allow them entry.

Was Mr. E.F.'s consent vitiated by the safety sweep of the apartment conducted by the officers? In this regard, Constables A.B.and C.D. drew their service pistols before entering the suite, then checked the residence for the presence of unknown persons who could have posed a threat to their safety. If such action provoked a withdrawal of consent by Mr. E.F., there is no cogent evidence upon which to base this conclusion. In fact, the evidence is that Mr. E.F. chuckled and continued to open the door for the officers.

C. Count #3 – Breach of EPS Policy

Count #3 alleges the cited officers breached Part 1, Chapter D, Section 11 of the EPS Policy and Procedure manual as it read at the time of the incident in question (this policy provision is entitled "Search Conducted with Informed Consent" and is included in Exhibit 5). Read in context, the tenor of this section of policy is that it is possible to receive a person's consent to some form of search in circumstances where there is no other legal authorization empowering the police to take such action. The policy statement goes on to provide the nature of the consent required in order for the search to be considered lawful.

It is clearly evident that this policy provision (again, as it read on the date of this incident) refers to the search for evidence of an offence that could possibly be used against a person (ref. 1,D.11(A)(2) and 1.D.,11(C)). Practically speaking, the policy by and large applies to persons who are already suspected of having committed an offence (thus use of the word "suspect" in 1,D,(11)(A)). However, it can sometimes apply to someone who is not a suspect. In any event, the trigger required in order for the policy to apply in a given case is the desire of the police to conduct a search for evidence.

Based on the facts I have found, the safety sweep of the apartment was neither intended to be, nor did it constitute a search for evidence. Notwithstanding the cooperative and congenial attitude demonstrated by Mr. E.F., who was eager to show the officers his suite, given what was known of his past criminal associates (i.e., violence and weapons), it was both reasonable and prudent for the officers to conduct a

quick scan of the premises to ensure they were not blindly walking into a situation that could quickly become life threatening in nature.

If an officer's motivation did not factor into the procedural dictate in question, the policy would not make any sense. This is because it is predicated on the purposeful act of searching for incriminating evidence. In this regard, while it is possible to unintentionally find evidence, it is not possible to accidentally search for evidence. If an officer does not possess the intent to search for incriminating evidence, the requirement of informed consent as set out in the policy is obviated. In this case, the officers did not conduct such an investigative search, but rather scanned the apartment for reasons solely related to officer safety (which was reasonable given the totality of the circumstances).

VII. Decision

I find that all three charges were not proven.

In closing, it should be noted that this decision is heavily dependent on my findings of fact. The result with respect to count #1 would have been entirely different had I found as fact that the officers obtained Mr. E.F.'s cooperation through some form of oppression or intimidation.

The decision with respect to counts #2 and #3 would have been different had I found that the officers coerced, inveigled, or otherwise tricked their way into Mr. E.F.'s suite for the purpose of searching for contraband, evidence, or wanted persons. In other words, had I found that the true motivation for entering Mr. E.F.'s residence had been to conduct an investigative search, then, as a condition precedent to such action, it would have been first necessary for the officers to have obtained the complainant's

informed consent.

Issued this 15th day of December, 2011

Superintendent T. GRUE
Presiding Officer

Mr. G.D. SIM, Esq.
Presenting Officer

Mr. M.R. Danyluik, Esq.
For the Police Officers

EXHIBITS

Note: Exhibits 1 – 7 and A were entered in Part I of the hearing while Exhibit 8 was entered in Part II.

Exhibit 1 -	Memorandum dated 2010 October 13 appointing Superintendent Grue as the Presiding Officer.
Exhibit 2 -	Memorandum dated 2010 October 13 appointing Mr. Gregory Sim as the Presenting Officer.
Exhibit 3	Notice and Record of Disciplinary Proceedings with respect to disciplinary charges filed against Constable C.D. .
Exhibit 4	Notice and Record of Disciplinary Proceedings with respect to disciplinary charges filed against Constable A.B. .
Exhibit 5	Agreed Statement of Facts and excerpts from EPS Policy and Procedure.
Exhibit 6 For Ident.	Letter from Mr. E.F. dated February 12, 2004.
Exhibit 7	Statement from Mr. E.F. dated June, 2004.
Exhibit A For Ident.	Statement from Mr.G.H..
Exhibit 8	Statement from Constable A.B. dated 2004 April 28.