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## LAW ENFORCEMENT REVIEW BOARD

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**IN THE MATTER OF the Police Act (the “Act”),  
R.S.A. 2000, c.P-17, and the Police Service  
Regulation.**

**AND IN THE MATTER OF the Appeal of Jeffery  
Pringle (the “Appellant”) concerning complaints  
against Constable T. Eltom (2091), Constable C.  
Cardoso (1849), Constable G. Gibson (1818) and  
Constable K. Garstad ( 1497) (the “Respondents”) of  
the Edmonton Police Service (the “EPS”).**

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### JUDGMENT OF THE BOARD

(Phillips/Parish)

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#### MATTERS BEING APPEALED

[1] On February 4, 2001, the Appellant was arrested by Respondents Eltom and Garstad for impaired driving. This arrest led to the Appellant being charged with four criminal offences that were the subject of criminal proceedings in Alberta Provincial Court on February 7, 2003.

[2] This matter came before the Board arising from a complaint initially made by the Appellant’s aunt, and subsequently by the Appellant’s counsel, to the Chief of Police on September 28, 2001.

[3] Disciplinary proceedings were held in abeyance pending the criminal trial of the Appellant. The trial Judge, the Honourable Judge A. Lefever, Provincial Court of Alberta, heard evidence from the Appellant and the Respondents during the course of the trial as to the events that transpired on February

4, 2001. The Respondents were witnesses for the prosecution at the Appellant's criminal trial. Judge Lefever found that two of the charges were proven beyond a reasonable doubt. However, Judge Lefever directed an acquittal on all counts, because the Appellant had been subject to breaches of his rights under sections 8 and 9 of the *Charter of Human Rights and Freedoms* (*R. v Pringle* [2003] AJ No. 118).

[4] Following the conclusion of the criminal trial, the EPS conducted an investigation into the service complaint against the Respondent police officers. The complaint contained allegations of misconduct against the Respondents, as follows:

- that the Appellant was assaulted by the Respondents while in custody at South Division;
- that the Appellant was handcuffed to a bench on two occasions, while being held in custody in a holding room;
- that the Appellant's detention was continued subsequent to an alleged assault on Respondent Cardoso;
- that the Appellant was strip searched, subsequent to a decision by Respondent Eltom to continue the Appellant's detention;
- that Respondent Eltom breached policy by using white-out correction fluid on a police occurrence report.

[5] On July 15, 2004, the Chief of Police rendered a decision about the allegations of misconduct, without a hearing.

[6] The Chief found that the Respondents used reasonable force to restrain the Appellant, that the Appellant was handcuffed to the bench to prevent injury to himself, that the Appellant initiated the physical altercation and continued detention was reasonable in the circumstances, that the strip search is routine for violent detainees sent to the Arrest Processing Unit and that the decision to send the Appellant there was reasonable, and that it was not contrary to EPS Policy in 2001 to use white out to make an amendment to a report.

[7] The Chief therefore found all allegations against the Respondents to be "not sustained".

[8] The Appellant appealed that finding to the Board. In a preliminary hearing the Board heard argument as to the admissibility of the decision of Judge Lefever as evidence on behalf of the Appellant. The Board ruled on July 30, 2008 (Judgment No. 020-2008) that the trial court decision was admissible with future determination to be given to the weight of the decision. The Respondents appealed the Board decision to the Court of Appeal. The Honourable Judge J. Watson, Court of Appeal, refused leave to appeal on December 18, 2008 on the basis that the appeal was premature: *Wasylyshen v. Alberta (Law Enforcement Review Board)*, 2008 ABCA 432 (hereinafter “*Wasylyshen*”).

[9] The matter returned for a hearing before the Board on January 9, 2009, at which time the Appellant submitted the trial decision of Judge Lefever dated February 7, 2003 as his only evidence. The Respondents submitted no evidence.

[10] Both counsel submitted brief written arguments to the Board.

[11] The Appellant contends that Respondent Eltom should be charged with offences under the *Police Service Regulation*, namely, unlawful or unnecessary exercise of authority and discreditable conduct. The Appellant agrees with the submission of the Respondents that the appeal should be dismissed as against Respondents Cardoso, Gibson and Garstad.

## **MATERIALS BEFORE THE BOARD**

[12] Neither the Appellant nor the Respondents called any *viva voce* evidence. The documentary material before the Board was therefore comprised of:

- i. the decision of Judge Lefever in *R v. Pringle* [2003] AJ No. 118 (hereinafter “*Pringle*” or the “Lefever decision”), admitted in accordance with the Board’s preliminary ruling in Judgment No. 020-2008; and
- ii. the decision of the Edmonton Chief of Police dated July 15, 2004 (hereinafter “the Chief’s disposition letter”), which came before the Board as part of the record pursuant to section 20(1)(d) of the *Police Act*.

In addition, the Board was provided with a copy of the Appellant's complaint letter as part of the record pursuant to section 20(1)(d) of the Act, and the Appellant's Notice of Appeal filed with the Board as the initiating documents for his appeal.

[13] The Board was required to make its decision based solely on these documentary materials.

### **ISSUES FOR THE BOARD**

[14] The ultimate issue for the Board to determine in appeals under section 20(2)(b) of the Act, is whether there is "*more than a prima facie case but less than a likelihood of conviction*" (Unrau, LERB Judgment No. 003-2006).

[15] The Board must now determine to what degree, if at all, that written material can support a finding that there is a reasonable prospect of establishing the facts necessary to prove that a disciplinary offence(s) has been committed such that the matter should be referred back to the Chief for a hearing.

[16] The Board must also decide whether the appeal should be dismissed as against Respondents Cardoso, Gibson and Garstad.

### **CHARGES AGAINST RESPONDENTS CARDOSO, GIBSON AND GARSTAD**

[17] Counsel for the Respondents submitted that the appeal should be dismissed against the Respondents Cardoso, Gibson and Garstad. Counsel for the Appellant agreed with this submission. The Board accepts these submissions, and accordingly the appeal against the Respondents Cardoso, Gibson and Garstad is dismissed. The Board affirms the decision of the Chief of Police with respect to these three officers.

## CHARGES AGAINST RESPONDENT ELTOM

### SUMMARY

[18] This leaves for the Board's consideration only the appeal regarding the Respondent Eltom.

[19] The only evidence submitted by the Appellant to support a positive finding under section 20(2)(b) is the decision in *R v. Pringle*. The Board has already held that this decision is admissible.

[20] Respondent Eltom did not submit any evidence.

[21] The function of the Board in this appeal under section 20(2)(b) of the *Act*, is to consider whether there is a reasonable prospect of establishing that a disciplinary offence(s) has been committed. The standard applied by the Board is less than that required under section 20(2)(a) where the Board must consider, on a balance of probabilities, whether the evidence establishes that a police officer is guilty of misconduct, or whether a penalty is appropriate for particular misconduct.

[22] In this case, the circumstances of the matter had been previously reviewed by a trial court Judge. That Judge made findings of fact after a trial involving sworn evidence and cross examinations relating to the same incident now before the Board. The decision of the Judge in that trial, including the finding of facts made, was entered into evidence before the Board in the hearing of the present appeal. Respondent Eltom called no evidence at all to challenge those findings. The Board therefore finds itself in the position that the only evidence before it for its consideration leads to the finding that there would be a reasonable prospect of establishing that a disciplinary offence has been committed by Respondent Eltom. Accordingly, the Board holds that the Appellant's appeal should be allowed in part.

### REASONS

[23] The Board determined that Judge Lefever's decision is admissible in its earlier ruling. The Respondents have only reiterated arguments made earlier with respect to this issue. In these

circumstances, the Board has accepted the Lefever decision as evidence. However, as stated at para. 21 of Judgment No. 020-2008, the Board must now consider what weight to attach to the Lefever decision.

[24] In *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787 (“*Khelawon*”), relied upon by the Board in making its preliminary ruling on admissibility of the Lefever decision, Madam Justice Charron discussed not only the test for threshold admissibility, but also the test for ultimate reliability of hearsay statements. Charron J. notes that para. 2 that – like other evidentiary rules – the rule about hearsay statements is “*intended to enhance the accuracy of the court’s findings of fact, not impede its truth-seeking function*”. She further discussed the importance, in light of the decision-maker’s “*truth-seeking function*”, of contextual analysis in determining threshold and ultimate reliability (at para. 3, and see also para. 50).

[25] In Justice Charron’s view, set out at paras. 61-64 of *Khelawon*, there are two ways to overcome the dangers of hearsay. First, the decision-maker may consider the overall security or trustworthiness of the statements in question. Second, the decision-maker may consider whether there is a sufficient alternative means to test the truth and accuracy of the statement. (Indeed, the Board notes, Justice Charron points out, at para. 64, that a statement which was made earlier and under oath, subject to cross-examination and admitted as testimony at a former proceeding may be received in a subsequent trial “*because the dangers underlying hearsay evidence are absent*”.)

[26] From these comments, the Board is able to discern the following principles related to the use of the Lefever decision, and the weight the Board may give to the statements in that decision:

- the Board must remain cognizant of the ultimate question in this appeal – which is whether there is more than a prima facie case but less than likelihood of conviction on the allegations set out in the complaint;
- the Board must consider the overall trustworthiness of the statements made by Judge Lefever in order to determine the ultimate reliability of the statements; and
- the Board must consider whether there are alternative means to test the truth and accuracy of the statements made by Judge Lefever.

[27] The Board may – in making its determination – keep in mind that testimony received in a previous proceeding and tested by cross-examination is generally viewed as reliable.

[28] The Board must, therefore, consider the Lefever decision in light of these principles, and also in relation to the Chief's disposition letter and the ultimate question in this appeal.

### **Application of these principles to the issue to be determined in this appeal**

[29] The Board notes that this appeal is of the decision of the Chief of Police that the allegations made by the Appellant against Respondent Eltom were "not sustained", which decision was made without a hearing. Accordingly, the Board in this appeal is not required to make a finding of misconduct, or to make a determination about proper penalty. Instead, at this first stage appeal, the Board is required only to determine whether there is "*something more than a prima facie case but less than a likelihood of conviction*" on the misconduct alleged: see para. 94 of *Unrau*.

[30] The Board points this out because there are some important ramifications of this fact. First, as Watson J.A. said at para. 4 of *Wasylyshen*:

*"the 'worst case' for the appellants [Respondent Eltom in this appeal] at the hearings would be that the Board might decide that the chief of police should have referred the respondents' [Appellant Pringle in this appeal] complaints to presiding officers for adjudication on police misconduct accusations against the appellants."*

[31] The Board in this appeal is not required to make any finding of guilt or innocence of the allegations, and indeed the Board specifically does not do so in these circumstances.

[32] In addition, the remedies available to the Board are less broad than in an appeal after a hearing has been held. In this appeal, the Board may grant one of six remedies:

- affirm the chief's disposition;
- direct a hearing to be conducted;

- direct the Chief to lay a charge;
- direct the Chief to have the matter investigated again;
- take action required by the Peace Officer Act; or
- take any other action the Board considers proper in the circumstances.

[33] Importantly, none of these decisions excepting for affirming the chief's disposition is "final" (recognizing that "final" must be read in the context that there is always the potential for an appeal of a Board decision to the Court of Appeal). Fairness can only be determined in light of the fact that this Board decision is at the earliest stage of the possible proceedings.

[34] Secondly, the level of "proof" required in an appeal of a Chief's disposition when no hearing has been held is less than that required in an appeal when a hearing has been held. In *Robertson v. Edmonton (City) Police Service* (#10), 2004 ABQB 510, Slatter J. (as he then was) referred to the test at this stage as whether the "*matter complained of ... is capable of constituting a disciplinary offence*", and said that "*[n]o issue of proof arises at this stage*" (at para. 160). This Board in *Unrau* explicitly agreed with these obiter comments by Justice Slatter when it established the oft-quoted test of "*more than a prima facie case but less than a likelihood of conviction*" (at para. 94). In *Unrau* at para. 95, this Board also said that if a Board concludes that:

*"there is a reasonable prospect of establishing the facts necessary to obtain a conviction on some type of disciplinary charge then the matter should proceed to a hearing so that the adjudicator has the opportunity to access the credibility of witnesses, assess the admissibility of evidence, etc."*

[Emphasis added.]

[35] It is in this context that this Board must assess the document material the parties have placed before it.

[36] The Appellant argues that Respondent Eltom engaged in unlawful or unnecessary exercise of authority, and discreditable conduct. In support of these allegations, the Appellant refers to the findings of Judge Lefever, and specifically to the purported events in the holding cell, including the decision to send the Appellant to the detention unit (which would lead to a strip search), and the fact that the Respondent

used white-out to amend his original police occurrence report.

[37] Notably, Judge Lefever's findings with respect to the background facts parallel the Chief of Police's findings in many respects. For example, the Chief of Police in his disposition letter sets out the following facts:

- On February 4, 2001 the Appellant was driving a car at approximately 5 a.m. when his driving pattern attracted the attention of Respondent Eltom (and Garstad).
- The Respondent Eltom (and Garstad) attempted to stop the Appellant's vehicle. However, the Appellant failed to stop and a short police pursuit occurred until the Appellant lost control of his vehicle.
- The Respondent Eltom (and Garstad) arrested the Appellant for impaired driving, and gave him a demand for a breath sample.
- The Appellant was taken to the South Division Station at approximately 5.30 a.m. where he was given the opportunity to contact a lawyer. After about one hour, a second demand for a breath sample was made.
- The Appellant was uncooperative and would not provide a proper breath sample.
- The Appellant was placed in a holding cell where he kicked and hit the door.
- The Respondent Eltom (and Cardozo) had the Appellant sit on the cell floor with his hands behind him and the Appellant was handcuffed to the leg of a cell bench.
- Later, the Appellant was released from the hand cuffs. The Appellant again kicked and hit the door and was loud and abusive.
- Still later, the Respondent Eltom returned to the cell and again restrained the Appellant with the use of hand cuffs.
- The Appellant was released from the hand cuffs a second time.
- "A decision was made to release Mr. PRINGLE on his own Recognizance" (quoted from page 2 of the Chief's disposition letter).
- When the Respondent Eltom (and Cardozo) entered the cell to serve the Appellant with his release documents, "a physical altercation occurred" between the Appellant and police officers including the Respondent Eltom.

- “A decision was made to detain Mr. PRINGLE in custody and to transfer him to the Arrest Processing Unit” (quoted from page 2 of the Chief’s disposition letter).
- The Appellant was strip-searched at the time of his admission to the Arrest Processing Unit.
- “Given the fact that Constable ELTOM’s use of “white-out” was not the most appropriate method of making an amendment or correction to his report, there is insufficient evidence to support this allegation” (quoted from page 4 of the Chief’s disposition letter).

[38] Indeed, much of the remainder of the Chief’s description of the events in the South Division Station refers to the Appellant’s behaviour. In many ways, the Chief’s description of the Appellant’s behaviour is not unlike Judge Lefever’s, who at para. 44 of his decision described the Appellant as “not a ‘model’ prisoner”.

[39] Where the Chief and Judge Lefever primarily differ, however, is in the nuanced details relating to these facts, and the inferences and conclusions to be drawn from these facts. Judge Lefever, after hearing testimony from the witnesses (unlike the Chief of Police, who conducted a paper review) concluded:

- that protection of property or prevention of harm was not a sufficient reason to handcuff the Appellant to the cell bench;
- that there was a significant discrepancy – even in the testimony of the individual police officers involved – about what happened during the physical altercation in the holding cell;
- that Respondent Eltom used white-out to amend his description about what happened during the physical altercation, in his police occurrence report; and
- that Respondent Eltom’s rationale for sending the Appellant to the detention unit was not credible in light of the earlier events, but was instead done to punish and humiliate the Appellant.

[40] The Board’s view is that Judge Lefever’s decision on these points is entitled to some weight in determining the limited question before it - whether there is a reasonable prospect of establishing the facts necessary to prove the commission of a disciplinary offence. Judge Lefever’s decision represents the

considered conclusions of an independent judicial decision maker, arrived at after hearing evidence on oath. It is – to use the phrase used by Charron J. in *Khelawon* – trustworthy. The Lefever decision can therefore be relied upon by the Board at least for the limited purpose of deciding the question at hand, whether there is a reasonable prospect of establishing the facts necessary to obtain a conviction for a disciplinary offence. The Board is not required to adopt Judge Lefever's findings of credibility to make a determination in this first stage appeal, and specifically does not do so in making this determination. It does, however, note that the facts as found by Judge Lefever, if believed by the presiding officer or by the Board on a further appeal, could ground a finding of misconduct.

[41] Respondent Eltom was aware of Judge Lefever's decision, and that the Board had previously ruled that the decision was admissible. It was certainly open to Respondent Eltom to lead evidence to contradict or explain Judge Lefever's findings. Respondent Eltom chose not to do so.

[42] In the circumstances, the Board concludes that there is a reasonable prospect of establishing that a disciplinary offence(s) has been committed by Respondent Eltom and accordingly directs the Chief to hold a hearing under section 45(3) of the *Act* on the following charges:

1. *Discreditable Conduct pursuant to section 5(2)(e)(viii) Police Service Regulation for doing anything prejudicial to discipline or likely to bring discredit on the reputation of the police service.*
2. *Unlawful or Unnecessary Exercise of Authority pursuant to section 5(2)(i)(i) Police Service Regulation in exercising his authority as a police officer when it is unlawful or unnecessary to do so.*

Particulars of the conduct that must be examined in relation to the above charges are:

Charge 1: The conduct of Respondent Eltom in whitening out aspects of his report relating to the arrest of the Appellant on February 4, 2001.

Charge 2: The events leading up to and the decision to handcuff the Appellant to the bench in the cell and the events leading up to and the decision to send the Appellant to the detention unit.

[43] To be clear, the Board's finding that Judge Lefever's ruling justifies a hearing into the allegations

in question is far removed from the suggestion that Judge Lefever's ruling could be or should be determinative of the outcome of that hearing. The Board specifically leaves open the question of whether Judge Lefever's ruling ought to be admissible in the disciplinary hearing or any appeal from a disciplinary hearing. Similarly, the Board leaves open any question about the weight to be given to the ruling in contrast to other evidence if the ruling is in fact admissible in the disciplinary proceedings, or in any appeal from the decision of the presiding officer.

A handwritten signature in black ink, appearing to read 'J. Phillips', written over a horizontal line.

John E. Phillips  
Chair

DATED at the City of Edmonton,  
in the Province of Alberta, this  
6th day of May, 2010.

cc: Board Counsel  
T. Engel, Counsel for the Appellant  
J. Henderson, Counsel for the Respondents