ALBERTA LAW ENFORCEMENT REVIEW BOARD

Citation: *James v Edmonton (Police Service)*, 2014 ABLERB 057

Date: 20141125

Appellant: Darrel James

Respondent: Chief of Police, Edmonton Police Service

Officers: Cst. K. Cormier (No. 3093), Cst. J. Phalen (No. 3112), Cst. J. Adams (No. 3079), Cst. J. Burgess (No. 3232), Cst. M. Burke (No. 2395), Cst. D. Chagnon (No. 2788), Cst. H. Herbert (No. 2886), Cst. D. Webber (No. 2706), Cst. D. Wowk (No. 3132), Sgt. A. Alkarout (No. 1870)

Panel Members: David Loukidelis QC, Archie Arcand and Christine S. Enns

Summary: The appellant filed a complaint about the conduct of two police officers who forcibly arrested him and further complained that the other involved officers failed to make records as required and failed to provide disclosure, contrary to the *Police Service Regulation*. The Chief dismissed the complaints without a hearing. The dismissal of the complaint of unlawful arrest and failure to take notes was reasonable. The appeal from dismissal of the complaint of unnecessary or excessive use of force is allowed and that allegation is directed to a disciplinary hearing.

Authorities Considered: *Calgary (Police Service) v Alberta (Law Enforcement Review Board)*, 2013 ABCA 73; *Furlong v Alberta (Law Enforcement Review Board)*, 2013 ABCA 121; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62; *Dunsmuir v New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 SCR 190; *Zalaski v Alberta (Law Enforcement Review Board)*, 2013 ABCA 347 at 37-39; *Pelech v Law Enforcement Review Board,* 2010 ABCA 400; *Edmonton (Police Service) v Furlong,* 2013 ABCA 12; *Newton v Criminal Trial Lawyers' Association*, 2010 ABCA 399; Land *v Law Enforcement Review Board*, 2013 ABCA 435; *Wood v Schaeffer*, 2013 SCC 71; *R v Nasogaluak*, 2010 SCC 6 at 32-35; *Unrau*, Board Decision 003-2006; *Taing v Alberta (Law Enforcement Review Board)*, 2012 ABCA 138; *Economic Development Edmonton v Wong*, 2005 ABCA 278; *Callan v Suncor Inc*, 2006 ABCA 15; *Korchinski* v *Law Enforcement Review Board*, 2012 ABCA 357

Legislation Considered: *Police Act*, RSA 2000, c P-17; *Police Service Regulation*, Alta Reg 356/1990

INTRODUCTION

[1] This appeal stems from an incident that occurred on July 19, 2011, after respondents Phalen and Cormier observed vehicles belonging to the appellant parked in the vicinity of 53rd Street and 129th Avenue in Edmonton. The appellant was told that police were present and he arrived soon after in a vehicle that police quickly identified as being registered to a suspended driver. The appellant initially parked behind the respondents' police cruiser.

[2] When asked, the appellant told respondents Phalen and Cormier that he was the owner of the parked vehicles, and they responded that, because the vehicles were illegally parked, they would be towed away. Respondent Cormier said the appellant had been told three weeks earlier that the vehicles were illegally parked and was told to remove them. (The appellant denied he had received these instructions.)

[3] Following a short discussion at the scene, respondent Cormier asked the appellant to provide identification to assist in determining ownership of the vehicle he was driving and to verify if the appellant was a suspended driver. He declined to do so. The appellant then drove the vehicle around the parked police car and parked on the street and returned to the respondents. The appellant was again asked for his driver's licence, which he refused to produce, stating he had done nothing wrong.

[4] The appellant was advised that he was under arrest for obstructing a police officer. Respondents Cormier and Phalen moved to arrest the appellant, who physically resisted, and the respondents forcibly subdued him. The task of subduing the appellant was arduous, resulting in respondent Cormier requesting back up, with numerous officers responding.

[5] During the struggle to arrest the appellant, he was handcuffed and taken to the ground. As a result, he received injuries including abrasions to the body and face, resulting in blood dripping from the appellant's face and some of it spattering respondent Phalen, who became concerned over a possible exposure. Following the arrest, the appellant was brought to the police station to be processed. His injuries were observable, but he refused EMS services. Respondent Cormier stated that he informed the appellant the reasons for his arrest, but the appellant denied he was ever informed.

[6] The appellant went through the identification process, but initially refused to wash his face, bloodied during the arrest process, for his photograph. He was warned that if he did not wash his face he would be returned to his cell. The appellant washed his face, was photographed and was released from custody.

[7] On July 11, 2012,[1] through his counsel, the appellant lodged a complaint against respondents Phalen and Cormier which can be summarized as follows:

[1] We note that the appellant's complaint was made on July 11, 2012. The initial request to interview the appellant and civilian witnesses was made to appellant's counsel on August 10, 2012 (record at pp 488-489). Additional requests were made in writing and by telephone on August 28, 2012, September 12, 2012 (record at pp 484-485), October 4, 10 and 25, 2012 (record at p 481, pp 478-479), February 27, 2013, and April 11-12, 2013 (record at p 471). Interviews took place on May 9 and 15, 2013 (record at pp 272-320).

- Asking for ID when they had no reason to and when asked why by the appellant they did not provide any reasons;

- Without warning or advice under s 10 of the *Charter*, the respondents grabbed the appellant by the arm and when he freed himself they put him in a headlock;

- When he freed himself from the hold he was then struck in the groin and punched in the face;

- The appellant was thrown against a vehicle and pepper sprayed. He was then handcuffed and taken to the ground where he was kneed in the head and his face was rubbed into the pavement;

- The appellant was taken to Edmonton Police Service ("EPS") North Division where after approximately two hours he was to be photographed for ID purposes. When he was told to wash the blood off his face he refused as he wanted to be photographed as he was, to preserve evidence. However, the appellant was warned that if he did not wash off the blood he would stay overnight in jail. This was a breach of ss 7 and 11(d) of the *Charter*;

- There were no grounds to detain or arrest and no ground to use force. The force was severe and caused injuries. The appellant was not informed why he was detained or about his rights to legal counsel. This was a breach of ss 7, 9, 10 and 12 of the *Charter*; and

- The appellant was incarcerated and released on a promise to appear. That was a breach of s 9 of the *Charter* and s 495 of the *Criminal Code*.

[8] On December 20, 2012, a second letter of complaint was sent to the Chief complaining that numerous other officers, including supervisors, were at the incident scene, who talked to respondents Phalen and Cormier and witnessed some of the incident. The appellant complained that as per EPS policy, the additional officers were all obliged to document what they observed, however, no record exists. The member in charge of the investigation failed to gather the information and provide it to the Crown prosecutor who was pursuing charges against the appellant.

[9] The Chief directed an investigation into the appellant's allegations, which can be summarized as follows:

1. Respondents Phalen and Cormier unlawfully exercised their authority, by arresting the appellant without grounds to do so, contrary to s 5(1)(i) of the *Police Service Regulation* ("PSR").

2. Respondents Phalen and Cormier unlawfully exercised their authority by using inappropriate (excessive) force in the course of arresting the appellant, contrary to s 5(1)(i) of the PSR.

3. Respondents Phalen and Cormier neglected their duty by not informing the appellant of the reason for his detention and arrest, contrary to s 5(1)(h) of the PSR.

4. Respondents Phalen and Cormier unlawfully exercised their authority by keeping the appellant in custody before releasing him on his promise to appear in court, contrary to s 5(1)(i) of the PSR.

5. Respondents Phalen and Cormier unlawfully exercised their authority by instructing the appellant to clean blood off his face while in custody and before being photographed, contrary to s 5(1)(i) of the PSR.

6. The respondents other than Phalen and Cormier committed insubordination and neglect of duty, contrary to ss 5(1)(g) and (i) of the PSR, by failing to make notes of their involvement at the scene and, in the case of respondent Phalen, by failing to record and disclose the identities of the officers who attended.

7. Respondents Phalen and Cormier committed deceit and conducted themselves discreditably by, during resolution discussions with a Crown prosecutor, falsely advising the Crown that the appellant had quickly accelerated his vehicle such that one or both of respondents Phalen and Cormier had to jump out of the way.

[10] In a disposition letter dated November 6, 2013, the Chief dismissed the complaint, stating the following:

> In conclusion, the PSB investigation into your concerns did not reveal any reasonable prospect of establishing the facts necessary to sustain any finding of misconduct at a disciplinary hearing against any of Cst. Cormier, Cst. Phalen, Cst. Adams, Cst. Burgess, Cst. Burke, Cst. Chagnon, Cst. Herbert, Cst. Webber, Cst. Wowk, and Sgt. Alkarout.[2]

[11] On December 13, 2013, the appellant appealed this decision to the Board, alleging various defects in the Chief's disposition. The appellant contended that, among other grounds, it was not reasonable for the Chief to conclude there was no reasonable prospect of establishing the facts necessary to obtain a conviction at a disciplinary hearing "with respect to all of the allegations set out in the letter of complaint".[3]

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[2] Record, p 639.

[3] Notice of appeal filed with the Board. We note here that the appellant's submissions in this appeal, which was heard in writing, addressed only the dismissal of allegations 1, 2 and 6. The other parties therefore responded on the basis that the appellant had abandoned the appeal from dismissal of allegations 3, 4, 5 and 7. The Board confirmed this in writing after the submissions had been exchanged.

ISSUE

Standard of review

[12] We review this decision applying the standard of reasonableness, which requires us to determine whether the outcome is within the range of acceptable, reasonable outcomes on the facts and law.[4] In applying the reasonableness standard of review, we also review the reasons for decision to determine if they demonstrate justification, intelligibility and transparency.[5] In cases where the reasons for decision do not, when read together with the outcome, serve the purpose of showing that the result falls within a range of reasonable outcomes, the decision will be unreasonable.[6]

[13] We must take care when assessing whether a decision lies within the range of reasonable outcomes. We must keep in mind the fact that reasonableness review is motivated by deference. At the same time, the case law offers relatively few signposts to guide the assessment of whether a decision is or is not unreasonable. One consideration the cases lay down is that, in assessing the reasonableness of a decision, we have regard to the close regulatory context for the decision.[7] In this case, the Chief's decision was in the nature of a threshold screening decision that forms part of the regulatory framework for police conduct.[8] We therefore must keep in mind the fact that, in Alberta's police discipline system, the expertise and experience of a police chief in police operations and discipline are factors.[9]

[14] In deciding whether to direct that a disciplinary hearing be held, a police chief is charged with performing a screening function in some ways analogous to the function of Crown counsel in deciding whether to press forward with criminal charges. The chief's task is to decide whether there is enough evidence that a reasonable and properly instructed person could convict the officer. The chief may, in performing this role, engage in a limited weighing of

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[4] *Calgary (Police Service) v Alberta (Law Enforcement Review Board)*, 2013 ABCA 73 [*Cody*]; *Furlong v Alberta (Law Enforcement Review Board)*, 2013 ABCA 121. Although the appellant argued that the Chief's investigation of allegation 6 was inadequate, for the reasons set out later, we have determined that the investigation was not deficient or compromised in a way that would engage our civilian oversight mandate.

[5] *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*NLNU*]; *Dunsmuir v New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 SCR 190; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12.

[6] *NLNU* at para 14.

[7] See, for example, *Zalaski v Alberta (Law Enforcement Review Board)*, 2013 ABCA 347 at 37-39.

[8] There is no indication in the material before us that the complaint investigation or processes were tainted, flawed or grossly inadequate, so our civilian oversight mandate is not engaged.

[9] *Pelech v Law Enforcement Review Board,* 2010 ABCA 400; *Edmonton (Police Service) v Furlong,* 2013 ABCA 12; *Newton v Criminal Trial Lawyers' Association*, 2010 ABCA 399; *Plimmer v Calgary (City) Police Service*, 2004 ABCA 175.

evidence, but must not stray beyond the screening function and dispose of the complaint's merits without a hearing.[10]

[15] As we discuss below, we have decided that the Chief's decision in relation to allegation 2, 'excessive force', went beyond his screening role and decided the merits without a hearing. His decision was to that extent unreasonable, so we allow that part of the appeal and direct that a disciplinary hearing be held into that allegation. We find, by contrast, that the Chief's decision on the remaining two allegations—unlawful arrest and insubordination—were reasonable and the appeal is to that extent dismissed. We will first deal with the latter allegations.

Unlawful arrest

[16] The appellant argued before us that the Chief failed to address the fact that the PSR refers to "unnecessary" exercise of authority, not just "unlawful" exercise of authority. He argued that, even if he did fail to promptly produce an operator's licence upon request, it was neither necessary nor reasonable to arrest him. He ought to have been clearly warned that he would be arrested if he did not comply. Accordingly, his arrest was neither necessary nor reasonable, and respondents Cormier and Phalen thus unnecessarily exercised their authority in arresting him. The Chief therefore ought to have ordered a hearing into that allegation.

[17] The appellant contended that there "is no suggestion from either the Chief's disposition letter, or the internal investigative reports or reviews, that the Chief considered whether or not the arrest was 'necessary' even if it was lawful."[11] Yet, the appellant argued:

> The relevant portion of the letter of complaint states as follows:
>
> d) One of the officers approached the Complainant and asked for his I.D. The Complainant asked why he needed to see it and got no response;
>
> e) Without warning or any advice under s. 10 of the *Charter*, the officers grabbed the Complainant by the arm.[12]

[18] It is apparent to us that the complaint was investigated and disposed of as an allegation of unlawful, not unnecessary, exercise of authority. Section 5(2)(i) of the PSR defines "unlawful or unnecessary exercise of authority" as, for present purposes, "exercising his authority as a police officer when it is unlawful or unnecessary to do so."

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[10] *Cody*; *Land v Law Enforcement Review Board*, 2013 ABCA 435 [*Land*].
[11] Appellant's submissions, para 9.
[12] Appellant's submissions, para 6.

[19] On July 31, 2012, the Chief directed that an investigation be conducted to "determine if there is a criminal component to this matter/PSR elements related to this incident."[13] On its face, this did not limit the investigation to an allegation of unlawful exercise of authority. The notices of complaint provided to respondents Phalen and Cormier did, however, have the appellant's complaint letter attached.[14] The directions given to each of them to attend for compelled interviews under the PSR framed the allegation as "no grounds" to detain or arrest the appellant after he had refused to provide his identification. Similarly, the PSB investigative summary[15] and other investigation-related documents framed the allegation as one of unlawful, not unnecessary, arrest.[16] Last, the Chief's decision itself referred to the complaint as an allegation "that there were no grounds to detain you and arrest you".[17] It also characterized the allegation as "the misconduct of unlawful exercise of authority" with respect to the arrest.[18]

[20] In the end, we are satisfied that the investigation and Chief's decision clearly related to an allegation of unlawful exercise of authority alone. The Chief's decision to focus on the allegation of unlawful exercise of authority was reasonable given the terms in which the appellant's complaint was framed in the July 11, 2012 letter from his legal counsel to the Chief. As noted above, the appellant has, on this point, quoted what he said were the relevant portions of his complaint. The portions quoted above do lay out the circumstances for the complaint, but we note that paragraph i) of the letter, which follows and draws on the outline of the factual allegations, frames the complaint this way:

> Based on the above, there were no grounds to detain or arrest and no grounds to use force. The force was severe and caused injuries. He was not told why he was being detained or about his right to counsel. This was in breach of ss. 7, 9, 10 and 12 of the *Charter*.[19]

[21] Again, a good deal of the appellant's arguments in this appeal addressed the Chief's failure to address unnecessary exercise of authority, which is what the appellant says happened here.

[22] The Chief argued that, at least where a complaint is submitted by legal counsel, there should be no obligation to interpret a complaint and expand the scope of any investigation.[20] He argued that there is no basis for us to intervene, on the basis that the investigation was

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[13] Record, p 10.
[14] Record, p 88 and p 154.
[15] Record, p 508.
[16] See, for example, the final investigation report, at pp 519 and 541, the disposition review, at pp 589 and 606.
[17] Record, p 631.
[18] Record, p 632.
[19] Complaint letter, record, p 9.
[20] Chief's submissions, para 15.

compromised or tainted, because the investigation focused on the complaint as lodged and was not broader. We share this view in the circumstances of this case.

[23] We also conclude that it was reasonable for EPS to focus the investigation as it did in the present circumstances. The circumstances of the incident, as well as the language used in the complaint, were such that it was reasonable to focus on the lawfulness of the arrest. It follows that, since the necessity of the exercise of authority was not part of the complaint, the Chief cannot be faulted for not having addressed this issue. As no complaint of this kind was made or investigated under the Act, there was no disposition of the matter by the Chief.

[24] Moreover, the Chief submitted, the appellant's notice of appeal raised only the issue of unlawful exercise of authority. Section 48(2) of the Act, he pointed out, provides that a notice of appeal "must set out the grounds on which the appeal is based". This means the issue of unnecessary exercise of authority is not properly before the Board, he argued.[21] The Board often handles appeals brought by individuals who are not represented by counsel. A self-represented appellant may have difficulty specifying the "grounds" of their appeal and the Board will be called on in some of these cases to ensure that the appeal rights of the appellant are not inappropriately curtailed. While we find no fault here, we conclude that the appeal ground that was explicitly raised, and on which the other parties would reasonably expect to join issue, was the lawfulness of the exercise of authority by respondents Cormier and Phalen in arresting the appellant on the grounds they did, not whether it was unnecessarily exercised.[22] Accordingly, even if we assume for discussion purposes only that the Chief had investigated and disposed of a complaint of unnecessary exercise of authority, that matter has not been appealed to the Board and we would decline to address it.

[25] It remains, however, for us to address the appellant's arguments touching on the lawfulness of the exercise of authority. The appellant has not vigorously contested in this appeal that, had respondents Cormier and Phalen clearly asked him to produce his driver's licence and had he refused, they would have had grounds to arrest him under the *Traffic Safety Act* and the *Criminal Code*. He has argued, however, that they instead asked him to produce "ID", not a driver's licence, such that the Chief should have ordered a hearing into the lawfulness of the arrest.[23] We therefore must consider whether the Chief's decision not to direct a hearing on this allegation was reasonable.

[26] The essence of the appellant's argument on this issue is that his arrest was unlawful because respondents Phalen and Cormier asked for "ID" instead of his driver's licence: "'ID' is

[21] Chief's submissions, paras 16-21.
[22] The respondents did join issue on, and argue, that their exercise of authority was necessary.
[23] Appellant's submissions, paras 21-28.

not synonymous with 'subsisting operator's licence' [the term used in the legislation]. The distinction is important, the appellant argued, in determining the lawfulness of the arrest."[24] Since no demand for a "subsisting operator's licence" had been made, his refusal to provide "ID" could not be lawful grounds for arrest.

[27] The appellant submitted that the Chief's decision is flawed because he assumed the respondents' version of the event was correct. He argued that he initially was asked for ID, which he refused to produce because he stated that he had done nothing wrong. In his interview during the investigation, the appellant was not asked whether or not he refused to provide his driver's licence, and in this appeal he pointed to the "street check report" as corroborating his version of events:

> Police were in the area of 129 AV and 53 ST investigating two abandoned large cube vans. JAMES, Darrell [sic] arrived and was aggressive in asking Police if there was a problem with the vans. When informed that they were going to be towed JAMES stated he would tow them himself. When asked for his I.D. JAMES refused and when arrested for obstruction JAMES resisted arrest and began to fight with Police. JAMES had to be physically controlled to be placed in handcuffed [sic]. JAMES later made statements that he does not recognize the government or Police as having authority over him.[25]

[28] The appellant relied on the use in the 'street check report' of the term "ID".[26] The 'street check report' is an internal EPS document. Although its author is not stated, it appears from respondent Phalen's interview by PSB that he prepared it, for the purpose of advising other officers about the demeanour and attitude of the appellant.[27] It does not appear, in other words, to have been intended to record the incident itself for any purpose.[28]

[29] In any case, even if we assume for discussion only that the term "ID" would not, in the circumstances, have been interpreted by a reasonable person in the appellant's shoes as a request for a driver's licence, we note that the Chief had in the record before him considerable evidence that the respondents had asked the appellant for his driver's licence, not some other kind of "ID". We also note that the evidence suggested that request was made in the context of a concern, revealed by a police computer check, that the appellant might be driving a vehicle

[24] Appellant's submissions, para 23.
[25] Appellant's submissions, para 25, report at record, p 321.
[26] The complaint letter prepared by his counsel, as quoted earlier, also used the term "ID".
[27] Interview of respondent Phalen, record, p 138.
[28] The document is undated, though its body contains the date of July 21, 2011 (two days after the incident, the complaint being made July 11, 2012, almost a year after the incident). We also note the appellant's contention that the fact the Chief did not mention this report in his decision indicates that the decision was unreasonable. We do not agree. The Chief had this report before him and the fact that he did not specifically mention each and every record or piece of evidence does not in this instance lead one to conclude that the outcome was, on this issue, unreasonable.

while his licence was suspended. The request made to the appellant was, the evidence suggested, made for the purpose of confirming whether he was a suspended driver. Accordingly, even if one assumes for discussion that the appellant was asked for "ID", the request made in the context of a possible violation of this kind would drive home what was intended: he was asked for his driver's licence.

[30] In any case, we note that, when he was interviewed by investigators, the appellant referred to being asked for his ID, but did not tell investigators that, at the time of the incident, he did not know what this meant. He did not, when interviewed formally, show or allege any confusion on his part as to what he thought the respondents were asking for. He told investigators that, because he felt he had not done anything wrong, he did not need to comply.

[31] As the respondents submitted, it is an offence under s 167(7) of the *Traffic Safety Act* for a "person driving or otherwise having the care and control of a motor vehicle" to fail to produce his or her subsisting driver's licence. Canadian courts have consistently held that such a demand must be made "as soon as is reasonably possible, that is, allowing only such delay as is reasonably necessary to enable the police officer to carry out his duties."[29] Given the circumstances, they argued, respondent Cormier had reasonable grounds to arrest the appellant for resisting and wilfully obstructing a peace officer in the execution of his duty pursuant to the *Criminal Code*.

[32] The respondents submitted that the evidence before the Chief from respondent Cormier was that he had asked the appellant for his driver's licence because the vehicle he was driving was registered to a suspended driver. When the appellant refused, he further advised him that he could be arrested for obstruction. When the appellant continued to refuse to produce his licence, respondent Cormier told him that he was under arrest for obstruction.[30] It was also noted that respondent Phalen's evidence was that respondent Cormier had made more than one demand and warning before the arrest. Last, the respondents argued that, despite the appellant's characterization of the exchange as one that escalated to violence within seconds, he also had told PSB that the respondents "kept harassing" him for "ID" before they made any physical contact with him. Further, a witness to the incident told investigators that the respondents had talked to the appellant before touching him (although he was inside and could not hear the conversation).[31]

[33] In these circumstances, was the Chief's decision that there was no reasonable prospect of establishing the facts necessary to obtain a conviction at a disciplinary hearing reasonable?

[29] Respondents' submissions, para 30.
[30] Respondents' submissions, para 32.
[31] Respondents' submissions, para 33.

We conclude that it was reasonable. Respondents Cormier and Phalen observed the appellant driving a vehicle that was registered to a suspended driver. There was clear undisputed evidence to that effect. It was reasonable for the Chief to conclude that there was no reasonable prospect that a presiding officer would find that the respondents limited their request to one for "ID" and that the appellant did not understand that they wanted his driver's licence.

[34] Further, it was reasonable for the Chief to have concluded that it would be found at a hearing that respondent Cormier had, while performing his lawful duty, requested that the appellant produce his operator's or driver's licence, in order to confirm that he was not a suspended driver. In his PSB interview, the appellant referred to the request for "ID",[32] but we note the evidence throughout the record supports that the request had been for a driver's licence, not some other kind of ID.[33]

[35] We further conclude that it was reasonable for the Chief to conclude that the appellant's failure to comply with the request established lawful grounds for his arrest. The appellant's complaint letter confirms that he had asked the respondent why the respondent "needed to see" his identification, but alleged that he got no reply. He said that he was then grabbed without warning: the arrest was underway. The appellant's evidence during the investigation was to similar effect. Yet, we also note that the appellant's own evidence was that a request for identification had been made as soon as he arrived on the scene. He declined, got back into a truck, drove ahead and parked, after which he told investigators, the respondents "proceeded to harass me for my ID which I told them, I did nothin'. Kay, then it snowballed from there."[34] This speaks to a longer period of interaction than an alleged request and then more or less immediate arrest. In this regard, we note respondent Cormier's evidence was that he told the appellant he would be arrested if he did not comply with the request. Respondent Phalen's evidence was to the same effect.

[36] The Board concludes that it was reasonable for the Chief to conclude that there was no reasonable prospect of establishing the facts necessary for a conviction on the allegation of 'unlawful arrest'. The Chief did not, in this regard, go too far in assessing the evidence in making his determination.

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[32] Record, p 219.

[33] They refer to the record at pp 334, 336, 343, 345-346, 349, 351-352, 354, 359 and 368.

[34] Record, p 219, also at p 233. Elsewhere in his PSB interview, the appellant said that, in response to the request, "I said, 'No, I'm not giving you ID. I didn't do nothing wrong.'" Record, p 228.

Failure to take notes/disclosure

[37] The appellant submitted that all officers attending the incident were obliged by policy and training to make records of their involvement. The appellant referenced case law from the Supreme Court of Canada in support of this position.[35] If attending officers spoke with respondents Phalen or Cormier or to any civilian witnesses, argued the appellant, they were obligated to record what they were told.[36] Similarly, any officers who knew force was used and observed injuries are under a duty to record in their notes or in a report.

[38] The appellant argued that the Chief's disposition was unreasonable as it failed to consider policy obligations regarding officer note taking. Any applicable EPS policy was not contained within the record before the Chief, and now the Board. The Chief's disposition letter contained no suggestion that officer policy or training was considered in the context of this complaint. The disposition provided no explanation regarding the nature of officer involvement that would require notes to be taken. Also, submitted the appellant, the Chief failed to consider whether supervisory duties were carried out according to policy, including the obligation to make notes and other reports relating to use of force, in addition to the failure to gather and provide this information to the Crown. The appellant requested that the Board remit this portion of the appellant's complaint back to the Chief for further investigation as to whether the members' conduct was in accordance with EPS policy.

[39] The respondents argued that the appellant misapprehended or misapplied the case law related to obligation to take notes, as it extends to officers who have investigated or witnessed a crime. As there was no evidence to suggest these respondents witnessed the arrest or use of force, as they were called after this occurred, the duty to take notes did not apply, and did not amount to insubordination or neglect of duty.

[40] Although the witnesses believe they spoke to a supervisor, submitted the respondents, the record is clear that they spoke to respondent Adams.[37] Policy provides that the reviews and reports regarding use of force are to be conducted at the direction of a watch commander or duty officer, and in this matter, there is no indication that any such review was directed. Further, stated the respondents, the record does not indicate that respondent Alkarout was dispatched in the capacity of a supervisor or to review use of force. His statement indicates he responded to the broadcast over the police radio that there was an officer in distress.[38]

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[35] *Wood v Schaeffer*, 2013 SCC 71 at para 67.
[36] We note that this element of the appellant's complaint applies to respondents Adams, Burgess, Burke, Chagnon, Herbert, Webber, Wowk and Alkarout.
[37] Record, p 168.
[38] Record, p 213.

[41] The respondents argued that, if the appellant felt the record was incomplete, he had the opportunity to make an application for additional evidence before this Board to bring in the note-taking, report writing or other policy, but did not do so. As such, the Chief's disposition of this portion of the appellant's complaint was reasonable.

[42] In response to the appellant's argument that the Chief's investigation was inadequate, the Chief submitted that all eight involved officers were ordered to provide explanatory reports. Generally, these reports indicated that no notes were taken as these respondents observed nothing relevant.

[43] The appellant argued that the investigation was inadequate because the Chief's disposition did not contain a detailed analysis of how each respondent's explanation fit with EPS policy, whether supervisory review of the use of force was conducted or, if it was, how it was conducted. The Chief referred to *Pelech* to support his argument that the complainant does not have the right to have every complaint investigated as the complainant wishes.[39] Here, the explanatory reports support the view that these respondents observed nothing of significance about the appellant's arrest or the use of force. Given this, it was not incumbent on the Chief to dedicate further resources to lengthy analysis in the disposition letter or to detailed investigation into the supervisory review issue. *Pelech* indicates "not every complaint justifies an investigation that exhausts every possible lead, and the Chief is entitled to allocate his resources in a reasonable way."[40]

[44] We have reviewed the entirety of the record and the submissions of the parties and conclude that the Chief's decision regarding allegation six was reasonable based on the law and facts before him. Our reasons for this conclusion are as follows:

- The Chief directed that PSB investigate this portion of the complaint. The eight respondents were notified of the service investigation and directed to provide explanatory reports, which they did.

- The notices of service investigation to the respondents quoted the portion of the appellant's complaint regarding obligations through policy or training to make records, as well as the allegation that these respondents breached EPS Policy.

- These respondents were specifically asked to respond to the allegation that they breached EPS policy and failed to provide disclosure.

[39] *Pelech*, at para 36.
[40] *Pelech* at para 40.

- The explanatory reports indicate that these respondents did not witness the request for ID/driver's licence, the arrest, take-down of the appellant or the force used while the appellant was on the ground.

- The two officers who assisted respondents Phalen and Cormier did so in a limited way. Their statements indicated they observed the appellant's injuries and respondent Adams' statement indicated he spoke to the witnesses.

[45] In circumstances where a party believes that evidence is missing from the appeal record before the Board, the Act provides an opportunity for the Board to admit additional evidence in appropriate cases.[41] The Board's procedure is to provide the parties with a deadline to give notice of any intended applications. No such application was made here. We are unable to consider evidence not contained in the record, much less to speculate on policy or other evidence.

[46] The appellant argued that the Chief's disposition is inadequate, as it does not specifically reference or analyse any applicable policy. In reviewing this issue, we are to consider the entirety of the record, and in doing so, note, as referenced above, that the issue of policy was raised with the respondents and addressed in their statements. The Chief, by way of his experience and expertise, should also be expected to have relevant policies in mind during his investigation and review of discipline complaints, despite the fact that relevant policy may not have been explicitly in evidence before him or mentioned in his decision.

[47] As relevant EPS policy is not before the Board, we are unable to consider it directly. We are, practically speaking, unable to consider whether the Chief's disposition was reasonable in relation to any applicable policy. We are limited to considering two things. First, is the absence of the policy and any express consideration of it sufficient to render the investigation inadequate and make the Chief's disposition unreasonable? Second, if not, is the disposition as it stands unreasonable because there is no policy analysis?

[48] While the investigation ideally should have included the policy, and provided reasons specific to policy, for the reasons provided above we are unable to conclude that the issue of policy went entirely unaddressed. Similarly, we are unable to conclude that the failure to include the policy or specifically address it in the disposition letter rendered the Chief's investigation or disposition tainted, flawed or grossly inadequate to a degree sufficient to allow the Board to intervene.

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[41] *Police Act,* s 20(1)(g).

[49] That being said, in our view, the Chief's investigation was reasonable, but only just that. As the Board has noted on a number of occasions, our appellate review also looks to transparency, justification and intelligibility. Going forward, therefore, it would be prudent for complaint investigations involving EPS policy to include, and specifically address, the applicable policies. Doing these things would enhance the thoroughness and transparency of EPS complaint investigations and dispositions by the Chief. This would better serve complainants, the Board and the public at large, and would provide greater confidence that relevant policy concerns have been thoroughly addressed. It would also give greater assurance that the outcomes are reasonable, intelligible and transparent.

Unlawful or unnecessary use of force

[50] We now must consider the Chief's decision not to direct a hearing into the allegation against respondents Cormier and Phalen of unlawful or unnecessary exercise of authority, contrary to s 5 of the PSR. Section 5(2)(i) of the PSR defines "unlawful or unnecessary exercise of authority" as, for present purposes, "applying inappropriate force in circumstances in which force is used."

[51] The appellant argued that the Chief unreasonably decided that there was no reasonable prospect of establishing the facts necessary to obtain a conviction at a disciplinary hearing into this allegation. For the reasons that follow, we find that the Chief's decision on this allegation was not reasonable and we direct a disciplinary hearing into the allegation.

[52] It is necessary to quote at length the Chief's reasons for dismissing this allegation without a hearing:

> You have alleged that excessive force was used on you by the police. Specifically you allege that you were punched, kicked, thrown to the ground, threatened with pepper spray, placed in a headlock, pushed up against a truck, kneed in the groin, punched in the face and your head was driven into the pavement.
>
> You, Cst. Phalen and Cst. Cormier all agree that this sequence of events began when Cst. Cormier attempted to take hold of your arm and you resisted. With one notable exception, the description of the events between the initial resistance and the point where you were handcuffed is reasonably consistent. In analyzing the sequence of events, it is relevant that you are [larger than either respondent Phalen or respondent Cormier]
>
> According to you, the officers tried to grab your arm or your neck several times and you resisted, pulling away from them and remaining upright. After several attempts, the officers kneed you, punched you once in the face, and got you to the ground, "leaning on me and bashing my head into the pavement with their knee". At one point while you

were standing, you were threatened with pepper spray, but the pepper spray was not deployed. You characterize yourself as "madder than hell", with your adrenaline pumping, and you acknowledge that you continued resisting at least to some degree until after you were handcuffed on the ground.

According to Cst. Cormier and Cst. Phalen, after you initially broke free from Cst. Cormier's grasp, they attempted to grab your hands. They struggled with you against your tow truck, attempting to take you to the ground, and Cst. Cormier displayed his OC spray (pepper spray) but did not deploy it. Cst. Phalen delivered a knee strike to your thigh, as did Cst. Cormier, and Cst. Phalen also delivered one open-handed strike to your face. You were wrestled to the ground, being handcuffed in the process. Even while on the ground you continued to struggle and attempt to turn to face the officers, so Cst. Phalen knelt on the ground and placed his knee against the side of your head to prevent you, who were bleeding at that point, from spitting at the officers.

The altercation between yourself and the officers was witnessed by various acquaintances of yours. These acquaintances generally describe you initially being on your feet, eventually being struck in the face and kneed by the officers, and then taken to the ground.

The one area where there are significant discrepancies in the evidence is in the nature of the force that was used on you while you were on the ground. The officer's evidence is summarized above: they deny driving your head into the pavement, although Cst. Phalen acknowledges that he held your head down with his knee as you were struggling. You provide various descriptions of the officers' actions. Notably, at several points during your interview, you describe other force that the officers used but make no mention of your head being banged into the pavement, even though this is the most serious aspect of your allegation of use of force. At other places, you describe this force in various inconsistent ways: "driving his feet into my head onto the pavement", "bashing my head into the pavement with their knee", "leaning on me and kneeing me in the head". [A] describes the officers as "slamming [your] head to the cement and kicking [your] head", however, [A]'s evidence has serious inconsistencies. His description of how the incident began is significantly different from that of Cst. Cormier, Cst. Phalen, and yourself: he describes you as "docile" throughout which is contrary to your description of your own behaviour; and he makes no mention of you being kicked in the head in his interview. Another long-time friend of yours, [B], describes the officers smashing your face into the ground and one officer continuing to kick you when he was on the ground, although you do not claim that you were kicked.

Section 25 of the *Criminal Code* justifies the use of force by police officers where the officers can establish, on a balance of probabilities, that the officers (i) were required or authorized by law to perform an action in relation to the administration or enforcement of the law; (ii) acted on reasonable grounds in performing that action; and (iii) did not use unnecessary force. For the reasons outlined in the preceding section of this letter, Cst. Cormier and Cst. Phalen were entitled to arrest you. Pursuant to s. 25, they were entitled to use reasonable force to effect that arrest. On your own admission, you initially resisted the attempts of Cst. Cormier to place you under arrest and continued to resist the officers' efforts to control you and handcuff you. Cst. Cormier, Cst. Phalen and

> yourself all agree that your resistance continued even after you were on the ground and handcuffed.
>
> In the circumstances, I have determined that there is no reasonable prospect of establishing the facts necessary to obtain a conviction at a disciplinary hearing for the misconduct of unlawful exercise of authority against Cst. Cormier or Cst. Phalen in their use of force to subdue you. Specifically:
>
> (a) With the exception of the allegation that your head was "slammed into the pavement", there is no reasonable prospect of establishing that the force used exceeded what was reasonably necessary to control you and effect your arrest.
>
> (b) There are significant weaknesses in the evidence of the witnesses who claim that your head was "slammed into the pavement". The allegation is denied by Cst. Cormier and Cst. Phalen, and does not appear to be supported by the injuries sustained by you. There is no reasonable prospect of establishing that this specific alleged use of force occurred.[42]

[53] The appellant was taken to the ground and held by respondents Cormier and Phalen. Respondent Phalen told investigators that he used his knee to press the appellant's head onto the pavement, as he believed that the appellant might spit at him.[43] The appellant submitted there was no evidence before the Chief to support the conclusion that the appellant had spit at the respondent or gave any indication that he might.[44]

[54] It is clear the Chief viewed this as the most serious aspect of the use of force allegations, but, as the above passage confirms, he dismissed this allegation, saying the appellant had not told investigators that his head had been banged onto the pavement. The appellant argued that this conclusion was unreasonable:

> This conclusion is unreasonable in that it unreasonably disregards the following statements made by the Appellant when he was interviewed by Det. Sinclair:
>
> - … they got me down on the ground and the one kept driving his feet into my head onto the pavement … (Record, p. 239)
>
> - … I remember them … bashing my head into the pavement with their knee (Record, p. 240)
>
> - … he's leaning on me and he's kneeing me in the head, ay? … bashing my head into the pavement (Record, p.241) [45]

[42] Record, pp 632-634.
[43] Record, p 107.
[44] Appellant's submissions, p 11, para 36
[45] Appellant's submissions, p 11, para 37

[55] The Chief also referred to the photographs and descriptions of the appellant's injuries as not supporting a finding that the appellant's head been slammed into the pavement. The appellant argued that this did not accord with the evidence before the Chief:

> …The detainee holding facilities log contained a record indicating that the Appellant had "several minor scrapes/abrasions to the face" (Record, p. 373). The photographs of the Appellant which were provided to PSB show a large abrasion to the left side of the bridge of the Appellant's nose, a further scrape and abrasion to the Appellant's left cheek, and abrasions to the Appellant's right cheek and on the far right part of the Appellant's forehead (Record, p. 405). These records demonstrate that the Appellant did indeed sustain injuries consistent with the allegation that his face was slammed or otherwise inappropriately and repeatedly brought into contact with the pavement.[46]

[56] The appellant also argued that it was not reasonable for the Chief to conclude that an objectively reasonable person, standing in the respondents' place, would believe that the level of force used was reasonable. He pointed to evidence from witnesses that they had asked the respondents not "not to be so aggressive" indicating they did not view the level of force as reasonable."[47]

[57] The respondents submitted that police are entitled to use force in making an arrest, noting that the Supreme Court of Canada has held that police may have to resort to force in order to complete an arrest or prevent an offender from escaping custody:

> …Section 25 of the *Criminal Code* provides that a police officer is justified in using force to effect a lawful arrest, provided that he or she acted on reasonable and probable grounds and used only as much force as was necessary in the circumstances. However, the use of force should not be judged against a standard of perfection: "it must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances.[48]

[58] Here, the respondents argued, the force used was reasonable and necessary, since the appellant admittedly was resisting[49] and, as the appellant stated, he was "madder than hell", continuing to resist even after he was handcuffed.[50]

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[46] Appellant's submissions, para 38.
[47] Appellant's submissions, para 40.
[48] Respondents' submissions, para 41, quoting from *R v Nasogaluak*, 2010 SCC 6 at 32-35. They also cited Board Decision 019-2010, which dealt with use of force by officers in effecting an arrest.
[49] They also contended that, contrary to the appellant's claim that the respondents did not warn him not to resist, both respondents stated that a warning was given. Respondents' submissions, para 45.
[50] Respondents' submissions, para 41.

[59] There are undoubtedly areas of agreement among the appellant, respondents Phalen and Cormier, and the witnesses, as to what happened. As the Chief's decision noted, the appellant acknowledged being angry and he acknowledged that he had resisted. We acknowledge this in considering the reasonableness of the Chief's decision. Without affording more or less deference than the reasonableness standard of review permits, we have reviewed this aspect of the Chief's decision with as great a degree of diligence as is proper.

[60] We consider that the Chief reasonably determined, in effect, that a presiding officer would accept after hearing the evidence that the respondents were justified in using some force to arrest the appellant. The evidence available in the record is consistent and reasonably would support the conclusion that the appellant was resisting and non-compliant. We conclude, however, that the Chief's finding on the allegation that the respondents had used unnecessary force by, after the appellant was on the ground and handcuffed, slamming, banging, forcing or hitting the appellant's head on the road surface was not reasonable on the facts. As will be seen below, our concern with the Chief's decision on the 'head banging' allegation leads to the conclusion that only the inappropriate use of force allegation should be directed to a disciplinary hearing. The entire incident, of course, clearly was dynamic, with the actions of the respondents and the appellant being intertwined and not discrete. Accordingly, while our concern here is the Chief's treatment of the conflicting evidence, and where he took his assessment of the evidence, the appropriate thing for us to do is to direct charges and a hearing respecting the use of force overall in the situation. In our view, the Chief, in analysing the evidence as he did and in finding no reasonable prospect of establishing the facts necessary to obtain a conviction at a disciplinary hearing into this allegation, exceeded his proper screening role and made a finding on the merits, without a hearing. On this basis, we find his disposition on this allegation to be unreasonable.[51]

[61] As noted earlier, in *Land,* the Alberta Court of Appeal considered the role of the Chief in determining whether to send a complaint to a disciplinary hearing.[52] In considering the Chief's screening role, the Court made several references to the Chief's obligation to review evidence and his or her ability to engage in some assessment of the evidence. The Court referred to the Board's decision in *Unrau*,[53] where the Board said this about the decision whether to send a complaint to hearing:

> To properly assess whether to proceed to a hearing it is important that the initial determination be made with the benefit of reviewing all of the evidence, not only the

[51] We should make it clear here that we make no observations as to the amount of force that the respondents used up to the time the appellant was subdued. This will be left to the presiding officer at the disciplinary hearing that we are directing.
[52] *Land.*
[53] *Unrau*, Board Decision 003-2006 [*Unrau*].

> evidence related to the allegations but also the evidence of those responding to the allegations. If, on conclusion of that assessment, 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 assess the credibility of the witnesses, assess the admissibility of evidence, etc. [emphasis added][54]

[62] In *Land*, the Court interpreted the phrase used in *Unrau* "more than a *prima facie* case" to indicate that "there must, at the very least, be *some evidence*, to substantiate the allegation.[55] It concluded that the concept of a "reasonable prospect of conviction" involves an evidentiary threshold akin to the test for a preliminary inquiry in criminal matters: "is there enough evidence which, if believed, could lead a reasonable and properly instructed person to convict?"[56] The Court also referred to its decision in *Taing*[57] as seeking to ensure that "incredible" or "baseless" complaints could be dismissed, and to *Canadian Civil Liberties*[58] as allowing a "limited weighing of evidence for such purposes."[59]

[63] The Court indicated that the Chief may make a preliminary assessment of the evidence, particularly where circumstantial evidence is involved and noted *Canadian Civil Liberties*, where it was said that, "if circumstantial evidence needs to be considered, the judge can engage in a limited weighing of the evidence as a whole in order to consider the permissible inferences that may be drawn from that evidence."[60]

[64] In considering the Chief's role in reviewing evidence, the Court stated, "nothing prevents the Chief from engaging in a preliminary assessment of the circumstantial evidence while at the same time applying a test akin to that of a judge considering committal at a preliminary inquiry."[61] The Court also referenced the ability to "conduct some assessment of the evidence as a whole in order to properly determine whether a hearing is warranted."[62]

[65] Again, the Court ultimately expressed the test to be applied by the Chief as follows: "Is there enough evidence before the Chief that, if believed, could lead a reasonable and properly

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[54] *Land*, at para 35.
[55] *Land*, at para 51.
[56] *Land,* at para 57.
[57] *Taing v Alberta (Law Enforcement Review Board)*, 2012 ABCA 138 [*Taing*].
[58] *Canadian Civil Liberties Assn v Ontario (Civilian Commission on Police Services)* (2002), 61 OR (3d) 349 (ONCA) [*Canadian Civil Liberties*].
[59] *Land*, at para 59.
[60] *Land*, at para 59.
[61] *Land,* at para 61.
[62] *Land*, at para 61 referring to *Economic Development Edmonton v Wong*, 2005 ABCA 278 at paras 16-17, 20 and *Callan v Suncor Inc*, 2006 ABCA 15 at paras 13-16.

instructed person to convict the police officer at a disciplinary hearing?"[63] We therefore understand from *Land* that a chief, in performing her or his screening role, is obligated to review the whole of the evidence and is permitted to engage in some degree of assessment or weighing of that evidence. This is not, however, the end of the matter. We have referred already to the Court of Appeal's decision in *Cody*, which addresses the limits of the Chief's screening role in deciding whether to order a disciplinary hearing. As we have underscored, however, the Chief must not, in assessing the evidence, go beyond the limited weighing contemplated by *Land*. The Chief also must not, as *Cody* tells us, dispose of an allegation's merits.[64] For the following reasons, we conclude that the Chief exceeded his screening function in disposing of the allegation of 'excessive force'.

[66] We note, first, that, in addition to the appellant's complaint and interview, the record contains evidence regarding the alleged use of force while the appellant was on the ground from four different sources: respondents Phalen and Cormier, and civilian eye-witnesses A and B. The record also contains the audio/video recording, and transcript, of the PSB interview of civilian witness A,[65] who described having witnessed the incident from inside a nearby business. Consistent with this, counsel for the appellant provided four witness statements to PSB during the complaint investigation, including statements by A and B.[66] B's statement indicated that he was with the appellant and riding in the passenger side of the vehicle when the appellant stopped to speak to respondents Phalen and Cormier. B's statement indicated that he got out of the vehicle and witnessed the remainder of the incident from beside the vehicle.[67]

[67] In reviewing the Chief's disposition of this element of the appellant's complaint, we note that the Chief analysed the evidence regarding "significant discrepancies" and made the following observations or findings:

- Comparison between the respondents' versions of events and the appellant's;

[63] *Land*, at para 62.
[64] *Land.*
[65] Record, pp 296-320.
[66] During the Board's deliberations, it was noted that these four statements had for some unknown reason been omitted from the record produced to us. Counsel for the Chief confirmed that this had been an error and provided the missing statements to the Board and the other parties. Further, in response to the Board's concern regarding a video referred to in the record at p 362, which appeared to be missing, the Chief confirmed that the video was from EPS North Division holding cells, and was not before the Chief during the investigation.
[67] Although a 'tasking report' indicated that an interview would be conducted with B, no such interview was contained within the record. In response to the Board's request for clarification on this item, counsel for the Chief advised that, after receiving B's statement, PSB determined that an interview was not required.

- Noting that the respondents had denied driving the appellant's head "into the pavement",[68] and that respondent Phalen had acknowledged holding the appellant's head down with his knee while the appellant struggled;

- Commenting that, at various points in his interview, the appellant described other force, but made no mention of his head being "banged into the pavement";

- Commenting that the appellant's descriptions of the force used while he was on the ground were varied and inconsistent;

- Analysis of A's evidence, and then identifying differences between A's evidence and the appellant's as to how the incident began;

- Noting discrepancies within A's evidence regarding the alleged kicking of the appellant;

- Analysis of B's evidence regarding the use of force on the ground as compared to the appellant's;[69]

- Assessing witnesses' evidence regarding the appellant's head being "slammed into the pavement" as having "significant weaknesses";[70] and

- Concluding that the appellant's allegations of force, in relation to his head and the pavement, did not appear to be supported by the injuries sustained by the appellant.[71]

[68] The Chief was faced with competing evidence: that of the two respondent officers, denying the alleged force used on the appellant's head, and that of the appellant and of witnesses A and B, on the issue of whether the respondents used more force than was reasonably necessary on the appellant's head.

[69] We acknowledge once again that *Land* and *Cody* indicate that the Chief is entitled to assess the evidence to a limited degree for the purpose of determining whether a complaint should go to disciplinary hearing. We conclude, however, that he overstepped his screening role in this case, including by doing the following:

- In noting that the appellant's descriptions of the force used by the respondents were varied and inconsistent, the Chief, in our opinion, weighed the credibility or the accuracy of his evidence to an impermissible degree;

[68] Record, p 633.
[69] Record, p 633.
[70] Record, p 634.
[71] Record, p 634.

- By commenting on the appellant's failure to mention the use of force on his head against the pavement at certain points in his interview, the Chief, again, inferred that the appellant's evidence was not credible or reliable;

- In analyzing A's evidence as against that of the respondents and the appellant's, as to how the incident began, the Chief doubted A's credibility regarding his description of the use of force on the appellant;

- In analyzing B's evidence regarding additional kicks on the ground as compared to the appellant's evidence about kicking, the Chief went too far in assessing B's credibility and discounted his evidence regarding the use of force on the appellant's head;

- In finding, after analysis, that the civilian witnesses' evidence had significant weaknesses, the Chief made a finding that exceeded the permitted limited weighing of evidence; and

- In concluding that the injuries sustained by the appellant were inconsistent with the force alleged, the Chief similarly went too far and made determinations, based on his assessment of the extent of the injuries, as to what they indicated about the level of force.

[70] In particular, we note that the Chief explicitly preferred the appellant's evidence over the respondents' about what happened at one point during the take-down, and then proceeded to prefer the respondents' evidence on another point. In preferring evidence in this manner, the Chief further demonstrated that he exceeded his screening role and made determinations as to the credibility, or reliability of evidence, and the merits of this allegation.

[71] We acknowledge that it can be difficult for a chief to stay on the right side of the line in relation to the proper screening role. In *Cody*, the Court indicated that the Board must, in a case like this, ask itself if the Chief's decision was unreasonable because he asked the wrong question.[72] We conclude that this is what happened here—the Chief overstepped his screening role, such that his disposition of this allegation by the appellant was unreasonable.

[72] We are also of the view that, in the event the Chief asked the right question, as contemplated by *Cody*, the answer that he arrived at was unreasonable. We have already discussed the evidence of the respondents, the appellant and the two civilian witnesses respecting this allegation. In our view, having regard to this evidence, it was unreasonable for the Chief to conclude at this screening stage that a reasonable, properly instructed person could not convict the respondents at a disciplinary hearing into a charge of using inappropriate

[72] *Cody*, para 25.

force in the circumstances.[73] The evidence was such, in other words, that the Chief ought reasonably to have directed a disciplinary hearing into the allegation, and such that it was unreasonable for him not to have done so.[74]

[73] We are aware that in *Cody,* the Court remitted the matter to the Chief for reconsideration: that remedy was, in our view, driven by the procedural history of that case. In *Cody*, the Board had found there was a reasonable prospect of conviction and ordered a hearing, but the Court found that the Chief had asked the wrong question, thus concluding that the proper question should be remitted to him. Here, we have concluded that the Chief asked the wrong question, but we have also decided that, even if he had asked the proper question, the evidence is such that his decision not to direct a hearing was unreasonable on the facts. In these circumstances, it is within the Board's authority under s 20(2)(b)(ii) and s 45(3) of the Act to direct a hearing on the allegation and the appropriate course is to direct a disciplinary hearing under s 45(3) of the Act.

CONCLUSION

[74] Under s 20 of the Act, therefore, the Board directs the Chief lay separate charges against respondent Cormier and respondent Phalen of unlawful or unnecessary exercise of authority, as defined in s 5(1)(i) of the PSR, each in the following terms:

- You are alleged to have contravened the *Police Service Regulation* by engaging in the misconduct of unlawful or unnecessary exercise of authority pursuant to section 5(1)(i) of the *Police Service Regulation*, as defined in section 5(2)(i) of the *Police Service Regulation*. The particulars of this allegation are that on or about July 19, 2011, in or about the City of Edmonton, in the course of your participating in the arrest of Darrel James, you applied inappropriate force in the circumstances in which the force was used.

[75] We further direct under s 20 that a disciplinary hearing be conducted under s 45(3) of the Act respecting these charges.

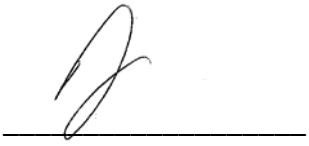
[76] As indicated earlier, the use-of-force incident was dynamic and involved intertwined actions of three individuals. Our main concern has been with the Chief's treatment of, and finding based on, the conflicting evidence about the force used on the appellant's head. Given the dynamic nature of the event overall, however, the Board considers it appropriate to frame

[73] We have also kept in mind the law on use of force, notably, but not exclusively, the Supreme Court of Canada's decision in *R v Nasogaluak*, 2010 SCC 6. We have also found instructive on use of force the reasons of Watson JA, in denying leave to appeal a Board decision, in *Zalaski v Law Enforcement Review Board*, 2013 ABCA 347.
[74] In addition to *Land*, also see, more generally, *Korchinski* v *Law Enforcement Review Board*, 2012 ABCA 357.

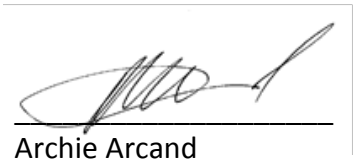
the charge in more general terms, recognizing that the parties' actions all constituted interrelated parts of a single event.

Edmonton, Alberta

November 25, 2014



David Loukidelis QC
Chair



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