IN THE MATTER OF: *The Law Enforcement Review Act*
Complaint #2017/185

AND IN THE MATTER OF: A hearing pursuant to section 17 of *The Law Enforcement Review Act*, C.C.S.M., c. L75

BETWEEN

C.P. Complainant	)	Nicole Watson and Richard Bars, Counsel for the Complainant
- and -	)	
Constable G.P. Respondent	)	Josh Weinstein, Counsel for the Respondent
	)	Hearing dates: May 24-30 and November 2, 2022 Decision: November 14, 2023

Restriction on Publication:
Pursuant to section 25 of *The Law Enforcement Review Act*, no person shall cause the Respondent's name to be published in a newspaper or other periodical publication, or broadcast on radio or television.

TABLE OF CONTENTS

A. Cellitti, P.J.

1) Restriction on Publication

[1] At the outset of these proceedings, I made an order pursuant to section 25 of *The Law Enforcement Review Act* ("the *Act*") that no person shall cause the Respondent's name to be published in any newspaper or other periodical publication, or broadcast on radio or television.

2) Introduction and History of the Proceedings

[2] This matter came before me for a hearing pursuant to section 17 of the *Act*.

[3] On December 20, 2017, the Complainant filed a Law Enforcement Review Agency ("LERA") complaint under the *Act* relating to the Respondent, a member of the Winnipeg Police Service ("WPS").

[4] On November 7, 2018, a notice was issued by the Law Enforcement Review Commissioner referring this matter to the Provincial Court for a hearing to determine the merits of that complaint, which alleges the commission of certain disciplinary defaults by the Respondent, as defined by section 29 of the *Act*.

[5] It is alleged that on or about December 2, 2017 that the Respondent:

> 1) abused his authority contrary to subsection 29(a) of the *Act* by conducting an unreasonable seizure of the Complainant's camera without a warrant, contrary to section 8 of *The Canadian Charter of Rights and Freedoms* (the "*Charter*");
>
> 2) abused his authority by using oppressive or abusive conduct or language, contrary to subsection 29(a)(iii) of the *Act*; and

3) abused his authority by being discourteous or uncivil, contrary to subsection 29(a)(iv) of the *Act*.

[6] I take note that the date of the alleged disciplinary defaults on the original notice issued by the Law Enforcement Review Commissioner was December 20, 2017. That date was amended to December 2, 2017 by virtue of an Order issued by Judge T. Killeen on June 4, 2021, a copy of which was filed as Exhibit 3 in these proceedings.

[7] Pursuant to section 1(2) of the *Act*, my role is to act as "*persona designata*" and not as a court when performing a duty or exercising a power under the *Act*. In the context of this proceeding, my role is to determine whether the Respondent has committed one or more of the alleged disciplinary defaults, and if he has, to impose an appropriate penalty or penalties.

[8] This matter proceeded to hearing before me on May 24, 25, 26, 27 and 30, 2022. I heard testimony from three witnesses:

1) the Complainant;

2) the Respondent; and

3) Constable E.N., the partner of the Respondent at the time of the alleged incident.

[9] A total of 14 exhibits were also filed at this hearing.

[10] Closing arguments were presented by counsel on November 2, 2022. The matter was then adjourned *sine die* in order for me to provide written reasons for my decision, as required by section 27(1) of the *Act*.

[11] In arriving at my decision, I take note that this is a matter where counsel have filed extensive briefs and numerous cases in support of their respective positions. I

have also reviewed transcripts of the trial proceedings and portions of the audio recordings of the witness testimony. I have also taken the opportunity to review numerous previous first-instance decisions relating to alleged disciplinary defaults under the *Act*. I have carefully considered all of this material in arriving at my decision.

3) Overview of the Alleged Disciplinary Defaults

[12] On December 2, 2017, the Complainant was employed by the Winnipeg Sun as a photojournalist. On that day, he was alerted to an incident that was unfolding at the Lord Selkirk Furniture store on Main Street in Winnipeg. He attended to that location in his capacity as a photojournalist along with his camera. As it turned out, the Complainant came upon a crime scene at that location, as a male had been seriously assaulted and was receiving medical attention. That male later passed away as a result of the injuries that he sustained from the assault.

[13] The Respondent arrived on scene along with his partner, Constable E.N., after the Complainant's arrival on scene and after the Complainant had already taken a number of photographs. In the course of interacting with the Complainant, it is alleged that the Respondent abused his authority by using oppressive or abusive conduct and/or language and by being discourteous and/or uncivil.

[14] It is further alleged that the Respondent abused his authority by seizing the Complainant's camera without a warrant.

4) Issues

[15] The issues on this hearing are as follows:

1) What is the standard of proof in disciplinary default proceedings under the *Act*?

2) What is an "abuse of authority" as that term is used in section 29 of the *Act*?

3) Did the Respondent abuse his authority by using oppressive or abusive conduct or language, contrary to section 29(a)(iii) of the *Act*?

4) Did the Respondent abuse his authority by being discourteous or uncivil, contrary to section 29(a)(iv) of the *Act*?

5) Did the Respondent abuse his authority contrary to section 29(a) of the Act by conducting an unreasonable seizure of the Complainant's camera contrary to section 8 of the *Charter*?

5) What is the standard of proof in disciplinary default proceedings under the *Act*?

[16] Section 27(2) of the *Act* states:

> The provincial judge hearing the matter shall dismiss a complaint in respect of an alleged disciplinary default unless he or she is satisfied on *clear and convincing evidence* that the respondent has committed the disciplinary default.
>
> (Emphasis added.)

[17] The Complainant therefore bears the onus of satisfying me that the Respondent committed the disciplinary defaults on the basis of clear and convincing evidence.

[18] While the onus of proof is clear, the parties maintain that the standard of proof in disciplinary default proceedings under the *Act* is not.

[19] Counsel for the Complainant maintains that the standard of proof is simply a balance of probabilities, and that "clear and convincing" refers to the quality of the evidence and not a higher standard of proof.

[20] Counsel for the Respondent maintains that "clear and convincing" refers to an elevated standard of proof that is higher than simply a balance of probabilities.

[21] Disciplinary default proceedings under the *Act* have been described as civil proceedings, but also as administrative proceedings:

LERA Complaint # 6180, at paragraph 54 (Smith J., August 18, 2006);

LERA Complaint # 6100, at paragraph 46 (Joyal J., February 20, 2007).

[22] There is no appellate authority in Manitoba that clarifies the applicable standard of proof in disciplinary default proceedings under the *Act*.

[23] However, over the years, numerous Manitoba first-instance decisions have interpreted the standard of "clear and convincing evidence" in section 27(2) as being higher than proof on a balance of probabilities, but less than proof beyond a reasonable doubt:

LERA File # 3037, at paragraph 16 (Enns J., December 3, 1998);

LERA Complaint # 5328, at paragraph 15 (Giesbrecht J., November 24, 2004);

LERA Complaint # 6180, at paragraph 54 (Smith J., August 18, 2006);

LERA Complaint # 6100, at paragraphs 46-47 (Joyal J., February 20, 2007);

LERA Complaint # 2004/192, at paragraphs 72-74 (Moar J., November 27, 2008);

LERA Complaint # 2011-137, at paragraph 6 (Harvey J., October 14, 2016).

[24] The reason for a high standard of proof is because the consequences to the careers of police officers resulting from an adverse decision are very serious. As a result, the evidence must be clear and it must be free from confusion. It must also be convincing which, when combined with the word clear, means that it must be compelling:

LERA Complaint # 3181, at pages 2-3 (Chartier J., October 26, 2000).

[25] Counsel for the Complainant relies on an undated first-instance decision to suggest that the standard of proof is simply a balance of probabilities, and that the requirement of "clear and convincing evidence" speaks to the quality of the evidence necessary to meet that standard. It means that the proof must be clear and convincing and based on cogent evidence, and that the reason for this is because the consequences to a police officer's career flowing from an adverse decision can be very serious:

LERA Complaint # 3601, at pages 4-5 (Miller A.C.J., undated decision).

[26] Counsel for the Complainant relies on the Supreme Court of Canada's conclusion that there is only one standard of proof in civil cases at common law, and that is proof on a balance of probabilities:

F.H. v. McDougall, 2008 SCC 53 at paragraph 49.

[27] An important decision of the Supreme Court of Canada that post-dates the release of the Court's decision in *McDougall* is *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19. In that case, the appellant made a complaint against two police officers under the *Ontario Police Services Act* and also brought a civil action for damages against the officers arising from the same incident. The officers were ultimately found not guilty of misconduct, which was upheld on appeal. The officers then filed a motion to dismiss the civil action on the basis of issue estoppel, taking the position that the disciplinary hearing had determined the issues underpinning the civil action. That motion was successful, and an appeal of that order was dismissed. On further appeal to the Supreme Court of Canada, the majority allowed the appeal and stated the following at paragraph 60:

> As the Court of Appeal recognized, because the *PSA* requires that misconduct by a police officer be "proved on clear and convincing evidence" (s. 64(10)), it follows that

> such a conclusion might, depending upon the nature of the factual findings, properly preclude relitigation of the issue of liability in a civil action where the balance of probabilities – a lower standard of proof – would apply. However, this cannot be said in the case of an acquittal. The prosecutor's failure to prove the charges by "clear and convincing evidence" does not necessarily mean that those same allegations could not be established on a balance of probabilities. Given the different standards of proof, there would have been no reason for a complainant to expect that issue estoppel would apply if the officers were acquitted... Thus, the parties could not reasonably have contemplated that the acquittal of the officers at the disciplinary hearing would be determinative of the outcome of Mr. Penner's civil action.

[28] The majority decision therefore recognizes that "clear and convincing evidence" in the context of disciplinary proceedings under a legislative scheme and a balance of probabilities in the context of a civil action are different standards of proof. This distinction was central to the majority's decision to overturn the decision from the court below. I note that the *McDougall* decision is not cited by either the majority or the minority in *Penner*, despite the fact that *McDougall* was released only five years earlier.

[29] Counsel for the Complainant has relied upon the decision of the Manitoba Court of Appeal in *Bannerman Lumber Ltd. et al v. Goodman*, 2021 MBCA 13, in support of the position that "clear and convincing evidence" does not represent an elevated standard of proof. The Court in *Bannerman* was dealing with a situation where the respondent wanted to appeal a finding under the federal *Bankruptcy and Insolvency Act*. One of the issues addressed by Beard J.A. (in Chambers) was whether there is a standard of "clear and conclusive evidence", and if so, what that standard is and how it is to be applied. Beard J.A. stated the following at paragraph 41:

> It is clear that, at least since *McDougall*, the "standard" of "clear, convincing and cogent" evidence is not a standard of proof; rather, it relates to the weight to be given to the evidence. This is a determination that is to be made by the trial judge, not by the appellate court. To repeat Rothstein J. in *McDougall*, "[i]f a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test" (at para 46).

[30] Obviously, the decision in *Bannerman* did not relate to the legislative scheme in the *Act* or, more specifically, to the applicable standard of proof on disciplinary default proceedings. In my view, the decision in *Bannerman* does not provide a blanket statement that applies to every civil proceeding, nor does it overshadow the majority decision in *Penner*.

[31] In civil proceedings, absent an express statutory provision to the contrary, the standard of proof is on a balance of probabilities:

> *Stetler v. Ontario Flue-Cured Tobacco Growers' Marketing Board*, 2005 CanLII 24217, at paragraph 79 (Ont. C.A.).

[32] However, it is within the authority of a legislature to create a standard of proof specific to a particular statute:

> *Jacobs v. Ottawa (Police Service)*, 2016 ONCA 345, at paragraph 7.

[33] Counsel for the Complainant has asked me to follow the undated decision in *LERA Complaint #3601* to find that the standard of proof is simply that of a balance of probabilities. With all due respect, that decision did not quote any other Manitoba decisions that articulated a higher standard of proof to explain why a different conclusion was appropriate, nor was there a thorough explanation as to how that conclusion was reached.

[34] The preponderance of first-instance decisions in Manitoba over the course of many years have interpreted the standard of proof articulated in section 27(2) of the *Act* as higher than proof on a balance of probabilities, but less than proof beyond a reasonable doubt. In *LERA Complaint # 6100* (February 20, 2007), Joyal J. (as he then was) referred to the elevated standard of proof as being "a unique standard of proof (rooted in statute) which cannot be confused nor need it be reconciled with anything approaching proof on a balance of probabilities".

[35] I am of the view that this statement succinctly and aptly describes the elevated standard of proof that is applicable to disciplinary default proceedings under the *Act*. To be clear, I am of the view that the standard of "clear and convincing evidence" under the *Act* is a higher standard than proof on a balance of probabilities, but lower than the criminal standard of proof beyond a reasonable doubt. This elevated standard is unique to disciplinary default proceedings under the *Act*.

6) What is an "abuse of authority" as that term is used in section 29 of the *Act*?

[36] The Respondent is alleged to have breached subsections 29(a), 29(a)(iii) and 29(a)(iv) of the *Act*, which provide:

> A member commits a disciplinary default where he affects the complainant or any other person by means of any of the following acts or omissions arising out of or in the execution of his duties:
>
> (a) abuse of authority, including
>
> …
>
> (iii) using oppressive or abusive conduct or language,
>
> (iv) being discourteous or uncivil,
>
> …

[37] The question is what constitutes an "abuse of authority" that gives rise to a disciplinary default.

[38] In *LERA Complaint # 6100* (February 20, 2007), Joyal J. (as he was then) stated at paragraphs 51-54:

> Read contextually in the entirety of the *Act*, it would seem that the legislators have, with section 29(a), recognized a police officer's "abuse of authority" as one category of behaviour which, along with the other sorts of behaviour and conduct set out in section 29(b)-(i), is deserving of a disciplinary default. It is only the cases where a police officer's behaviour or conduct can be concluded to be abusive of his authority that are sanctionable pursuant to section 29(a). Default is not to be found for absolutely any and all manifestations of the impugnable behaviour set out in section 29(a)(i)-(vii). Each case will depend upon its own facts.
>
> On a contextual reading of the *Act* and the consideration of its purposes, one can conclude that an "abuse of authority" connotes conduct of an exploitative character.

> The exploitative potential flows from an officer's position of authority which permits the impugned conduct to have an inappropriately and unjustifiably controlling, intimidating or inhibiting effect on a given complainant in the context of a particular fact situation. Police conduct which can be properly found as an "abuse of authority" is that exploitative conduct which, even after an examination of the factual context of a given case, cannot be viewed as consistent with a reasonable police officer's good faith intention to lawfully perform his duties and uphold the public trust. Judicial decisions such as the one in the case at bar, continue to develop a set of reference points and criteria by which an alleged abuse of authority can be evaluated. The development of those reference points and criteria must find a way to balance the need to hold police officers to account, while not defining "abuse of authority" too broadly or vaguely.
>
> In continuing to confirm the expectation of appropriate and justifiable police conduct and in giving more clear meaning to the idea of police "abuse of authority", this Court's future decisions … must take care to not encourage hearings pursuant to section 29(a) for every example of sub-par police behaviour. The developing definition of an "abuse of authority" must ensure, for example, that the LERA forum not become a means for attacking all police conduct which may have been the subject of earlier judicial determination respecting such matters as *Charter* breaches and the consequent exclusion of evidence …
>
> The above warning should not be seen to suggest that a police officer's good faith preempts a finding of an abuse of authority. In a LERA proceeding, good faith in the course of police investigative conduct will not always or necessarily be determinative. Certain types of conduct, depending upon its seriousness, will vitiate a police officer's good intentions and/or good faith…
>
> (Emphasis added.)

[39] In *LERA Complaint # 2011-137* (October 14, 2016), Harvey J. also provided a helpful summary at paragraph 4:

> "Abuse of authority" has been considered in many cases, and after reviewing several authorities, was summarized succinctly by my colleague Martin, P.J. in her decision of November 25, 2010, *J.W. v. Constable K.G.* as conduct that is:
>
> - burdensome, harsh or wrongful or which lacks probity or fair dealing;
>
> - indicative of lack of fair dealing or bad faith or improper motive;
>
> - treating badly or injuriously; and
>
> - exploitive in the sense that it is inappropriate and unjustifiable, controlling, intimidating or inhibiting.

[40] These pronouncements provide useful parameters to determine whether police conduct amounts to an abuse of authority.

7) Did the Respondent abuse his authority by using oppressive or abusive conduct or language, contrary to section 29(a)(iii) of the *Act*?

and

Did the Respondent abuse his authority by being discourteous or uncivil, contrary to section 29(a)(iv) of the *Act*?

[41] The resolution of these two issues requires assessments of credibility and reliability and, ultimately, findings of fact. A detailed review of the trial evidence is therefore necessary to provide a proper context for my analysis.

a) Summary of the *Viva Voce* Evidence

i) C.P.

[42] The Complainant, C.P., is a full-time photojournalist for the Winnipeg Sun. He has been so employed since 1996. His work consists of assignments booked by editors that decide what the public would be interested in. He also gets tips from community members if something of significance is happening, resulting in him attending to various locations to take photographs if he assesses that members of the community would be interested in what is happening.

[43] When he is working, he does not wear a uniform. He carries a digital camera with a wide-angle lens (for close-up photos) and a telephoto lens (for photos taken from a greater distance). He would carry his driver's licence and a provincially-issued photo identification card with his full name and professional affiliation listed on it. He would carry both in a lanyard around his neck.

[44] He had attended crimes scenes approximately once or twice per week throughout his career.

[45] On December 2, 2017, he was working. He had a booked assignment at 1:00 p.m. Before that, he was driving his car in the downtown area when he received a phone tip regarding a "ruckus" in the 800 block of Main Street where someone had a weapon. He was not given much information, but he attended to that location and saw police cars and about a half dozen civilians with their faces pressed up against the window of a business. He parked his car nearby and walked over to that location, taking his camera and lenses with him. He was wearing leather boots, dark pants, a blue zipper jacket, gloves, a toque and his lanyard on the outside of his clothing and jacket.

[46] He walked over to the location of the activity, which was the Lord Selkirk Furniture store. This was in an area of low-rise, flat-roofed buildings with glass windows and doors that faced a paved sidewalk area that was about 20 feet wide going up to the curb. There was no police tape outside, nor were there any police officers outside. He walked up to where the people were congregated and could see a male inside on the floor that appeared to be injured, but conscious and alert. He determined that this was a matter of public interest that warranted him taking photographs. He took up a position 20 feet south of the front door of the business near the curb, took a knee and started looking through his camera lens to see what was happening inside. He noticed that the condition of the injured male had worsened. He took two photographs. There was still no police tape and the civilians who had been looking through the front window had dispersed. He then went up to the front window and saw a police officer come out with a shotgun, so he took a photograph of him with his wide-angle lens. This officer did not say anything to him. He then went back to the curb to get out of the way. He put his telephoto lens back on to see what would happen next.

[47] The Winnipeg Fire Paramedic Service then arrived in two vehicles. They entered the building and started to treat the injured male. He then took a photograph with his telephoto lens from his position on the curb.

[48] At that point, more police officers arrived. He then heard, "move, move, move". This startled him. He approached one of the officers that had just arrived and identified himself as working media and a photographer with the Winnipeg Sun. He was later able to identify this officer as the Respondent. The Respondent made comments to the effect of "this is serious, we don't want any fucking pictures, don't need you here distorting". The Complainant offered to move, but he indicated that he was not going away because he was working. The Respondent pointed north and said "fuck off". The Complainant then walked north past the front door of the business and continued to take photographs with his wide-angle lens. The Respondent then said "hey". The Complainant turned around and saw the officer immediately get into his personal space and walk him backwards. He had the impression that the Respondent was trying to make him trip. He says that the Respondent said, "I told you to get the fuck out of here. I'm not going to tell you again. Now, fuck off." The Complainant then moved in front of Furniture Surplus Direct, which was the next building further north down Main Street and about 50 feet away from the front door of the Lord Selkirk Furniture store.

[49] Prior to being told to move by the Respondent, the Complainant had not been told to move by anyone else, nor had he had any verbal interaction with any other law enforcement personnel at the scene.

[50] The Complainant indicated that he had never met the Respondent prior to December 2, 2017.

[51] The Complainant was referred to the CCTV footage that was filed as Exhibit 2 at Tab 5. He maintains that this footage started after he arrived on scene. He saw himself in the video after the Respondent yelled "hey".

[52] When the Respondent got into his personal space, he described the encounter as being a hostile one that left him feeling disappointed, threatened and intimidated. He also felt like he was being prevented from doing his job.

[53] From the spot approximately 50 feet north of the Lord Selkirk Furniture store, he was reviewing the photographs that he had already taken when he heard the words "fuck off" from the Respondent. The Respondent violently swung his head towards him. He pulled his head back to avoid being struck by the Respondent. The Complainant said that he was going to speak to his sergeant. The Respondent responded by saying that he was taking advantage of a person in medical distress for personal and financial gain and that the Complainant hated the police, which the Complainant denied. The Complainant maintains that he felt bullied. The Respondent then said "how did I get some fucking pervert with a camera". The Complainant responded by saying "how do I know you're not some guy with a uniform fetish?". The Respondent then walked away and started conferring with some other officers. The Complainant stayed on scene at the same location.

[54] The Respondent approached him again, smiling and with hands outstretched. He indicated to the Complainant that they would be seizing his camera as part of the investigation. The Complainant described the Respondent's manner as being "sarcastic". The Complainant felt that the camera was going to be removed from him forcibly if he did not turn it over, so he handed it to the Respondent. The Respondent also asked for his identification. He provided both his media identification and his driver's licence. The Respondent took the camera and his driver's licence. The Complainant advised the Respondent that the camera belonged

to the Winnipeg Sun and that he wanted an incident report card. The camera was placed in the trunk of a marked cruiser car. The Respondent later returned and gave him a police incident report card. The injured male was transported out during this interaction.

[55] At this point, there was still no police tape at the scene. There were members of the community milling around the area.

[56] He then arranged to get his backup camera so he could continue working that day. He also contacted his editor and his manager to let them know what had happened.

[57] The camera that was seized was returned to him through his editor later that day or the next day that he worked.

[58] The Complainant said that he felt extremely disappointed and upset about his interaction with the Respondent.

[59] The Complainant submitted his complaint to LERA on December 20, 2017. He had never filed a LERA complaint before, so the process was new to him.

[60] He indicated that he had never refused to identify himself to a police officer while at a scene.

[61] He now experiences anxiety in his contacts with police as a result of this incident, and it has made it more difficult for him to do his job because he is fearful of experiencing similar negative interactions with the police, which has caused him stress. He is also no longer booked to attend police show-and-tell assignments, as his editors make an effort to not expose him to the police in his capacity as a photojournalist.

[62] On cross-examination, the Complainant confirmed that he submitted a complaint to LERA on December 20, 2017. He submitted a cover sheet and a typed

complaint, which he signed. They later requested some further information from him. He also provided an affidavit dated July 17, 2019 in support of an application to obtain copies of various police policies.

[63] The Complainant confirmed that the camera and memory card that were seized belonged to the Winnipeg Sun, and everything that was on the memory card was the property of the Winnipeg Sun.

[64] The Complainant confirmed that his media identification does not have his date of birth or his address on it, and only has his first and last name on it. This badge was issued to him so that he can access the Manitoba Legislature for press conferences.

[65] The Complainant confirmed that the injured male appeared to stop breathing while he was photographing him.

[66] He realized that other vehicles were likely going to arrive, so that is why he parked out of the way.

[67] When he walked north away from the scene, he continued to take photographs of the inside of the furniture store with his wide-angle lens because he could not see inside of the store and wanted to see what he might capture.

[68] Prior to the Respondent's arrival, no one was dealing with moving crowds out.

[69] He did not know whether the injured male was going to be moved.

[70] The scene had already expanded when he was in a prone position 20 feet away from the store and when he heard the Respondent say "move, move, move".

[71] The Complainant confirmed that his initial LERA complaint did not contain the reference to the Respondent saying "this is serious, we don't want any fucking

pictures, don't need you here distorting", and that this was said for the first time during his testimony at this hearing. He confirmed that his written complaint was accurate, but not "full" or complete. He completed his complaint on his own time, without the assistance of a lawyer. He maintains that he was restrained by the limitations of the time frame within which a complaint could be made.

[72] Once a lawyer became involved in this case, the Complainant had the benefit of reviewing his case with a lawyer. His lawyer also assisted him in preparing an affidavit in support of an application to obtain copies of police policies. That affidavit contained a description of his interaction with the Respondent when the Respondent first arrived on scene. Again, there was no mention of the Respondent saying "this is serious, we don't want any fucking pictures, don't need you here distorting". In other parts of the affidavit, he did state that the Respondent told him to "fuck off". In other words, he was not simply trying to avoid the use of profanity in his affidavit.

[73] The Complainant also confirmed that his complaint and his affidavit do not mention that he identified himself as media to the Respondent, nor did he mention in either document that he told the Respondent that he was not leaving because he was still working.

[74] The Complainant also confirmed that his complaint and affidavit do not contain any reference to the Respondent saying "fuck off" when he pointed north or to walking him backwards. His complaint also does not have any reference to the Respondent trying to trip him.

[75] The Complainant had not seen the video footage at the time that he submitted his LERA complaint.

[76] The Complainant confirmed that the reference in his direct-testimony to the Respondent yelling "I told you to get the fuck out of here. I'm not going to tell you again now, fuck off" was not contained in his written LERA complaint or in his affidavit.

[77] The Complainant confirmed that when the Respondent arrived at the scene, he was on the sidewalk and about 20 feet south of the front door of the business, and the Respondent directed him to go north and through the sidewalk area directly in front of the business.

[78] The Complainant confirmed that he stated in his written complaint that when he was told to, he moved north and starting taking photographs with his camera without breaking stride. He acknowledged on cross-examination that the video footage (Exhibit 2, Tab 5) does not depict that, and that in fact the video shows that he pivoted and faced south. His written complaint did not contain any details about the Respondent yelling "hey" and stopping to get further instructions from him.

[79] The Complainant acknowledged that the video shows him (at 7:48) being only a few feet from the stretcher, and that the video does not depict him heading north and steadily walking, as his LERA complaint states that he did.

[80] The Complainant said that the Respondent tried to head-butt him.

[81] The Complainant attended to the LERA offices to provide further information in mid-January 2018. He told LERA that his boxing training as a youth allowed him to see that the Respondent tried to head-butt him.

[82] The Respondent was wearing a general patrol uniform that day.

[83] The Complainant confirmed that his testimony is true, but that he might be misremembering the timeline on some of the comments that were made that day.

[84] His LERA complaint does not contain any details of the "pervert with a camera" and "uniform fetish" comments, but his affidavit does.

[85] Before he provided his affidavit in July 2019, he had had an opportunity to review the LERA Commissioner's file, which contained the Respondent's notes and a typed narrative report, which outlined the Complainant's "uniform fetish" comments.

[86] His LERA complaint does not mention that the Respondent had his arms outstretched when he came to take his camera.

[87] The video footage was shown to the Complainant during his cross-examination. At 7:48, he says that his lanyard with his identification was outside of his jacket, but that it was not visible because it was behind his camera, which was strapped around his neck.

[88] Cst. E.N. was also wearing a general patrol uniform.

[89] He says that he was never cautioned by the Respondent that he could be charged with obstruction if he did not move.

[90] He was never asked by the Respondent if he had any photographs that may be of assistance to the investigation.

[91] He never actually saw the camera placed in the trunk of the cruiser car, nor did he see it placed on the dash of a cruiser car.

[92] The only time that he saw Cst. E.N. was at the cruiser car.

ii) Cst. G.P.

[93] Cst. G.P. testified that he carried the rank of constable in December 2017, but that he is currently a Patrol Sargeant. He had 13 years of service with the WPS as of December 2017.

[94] He referred to his notebook throughout his testimony to refer to notes that he made at or near the time of the incident.

[95] On December 2, 2017, he was partnered with Cst. E.N. They were on a day shift that day, and they were in a marked cruiser car and in full police uniform.

[96] On that day, while they were at the Children's Hospital, they heard a radio communication about a high priority call on Main Street. An individual was at the Lord Selkirk Furniture store at 835 Main Street and was swinging a knife at customers and staff on scene. This type of call is extremely volatile and presents unknowns.

[97] They attended to that location and arrived on scene at 11:48 a.m. He saw an active and chaotic scene. He was unsure if it was a crime scene or a medical incident. There were a number of police cars and officers, fire trucks, firefighters and paramedics.

[98] The information that he had was that the incident had started across the street and came across, so he considered the entire area a crime scene. Bystanders are not allowed in a crime scene, but bystanders can be outside of a crime scene area.

[99] When he arrived at the scene, he did not know whether any members of the media were present.

[100] He did not know the Complainant prior to that day, nor had he had any prior dealings with him. He also did not know him to be a member of the press.

[101] He first saw the Complainant crouched down between two parked cars.

[102] He prepared a narrative report, which was a supplemental report of the incident.

[103] When he prepared his notes and narrative, he did not know about any complaint being made by the Complainant.

[104] He disagrees with the position noted by the Complainant on Exhibit 14, the map with markings. He maintains that the Complainant was actually a bit further north.

[105] When he first saw the Complainant, he had a camera and assumed that he was taking photographs.

[106] He asked the Complainant to move north, but not in a yelling voice. He did not say "fuck off" or "fuck you". He did not say "this is serious, don't need you taking fucking pictures, don't need you distorting". He did not ask him to move through the crime scene. If he had been further south, he would have asked him to move to the south.

[107] The Complainant refused to move and said that he could stand wherever he wanted. He told him to move a second time, and that the area was going to be taped off. He was concerned about the Complainant being in an active crime scene and emergency scene, and also about impeding the entry and exit of medical or police responders through the front door of the furniture store. The Complainant then got up and began to comply by taking a step or two in the direction that he asked him to move to, but he moved east towards the front of the furniture store and rapidly took a number of photographs. At that point, he cautioned the Complainant that he could be charged with obstruction of justice and that he needed to move to the area by the streetlight. He did not say "get the fuck out of here, I'm not going to tell you again, now fuck off". The Complainant eventually moved north.

[108] To this point, the Complainant had not yet identified himself as a member of the press or the media.

[109] He did not try to intimidate the Complainant by using his height or by getting into his personal space.

[110] He then spoke to other officers at the scene and found out that the Complainant had arrived prior to the police arriving at the scene, and that he might have photographs of the suspect that had fled from the business.

[111] The incident was a serious one from his perspective, and one that might become a homicide, so he went to speak with the Complainant. He still did not know that he was a member of the press, nor did he see any identification or a press pass on the front of the Complainant's jacket.

[112] The Complainant refused to answer whether he was on scene prior to police arrival and whether he had any photographs of any individuals leaving the store or fleeing the scene. He also refused to identify himself and said that he did not have to speak to him. He refused to say whether he was working for someone. He did not have his arms outstretched as he approached the Complainant, nor did he try to head-butt or strike him.

[113] He became concerned that the Complainant's lack of cooperation would lead to him destroying the photographs. It was not feasible to obtain a warrant at that time, because things were unfolding quickly. The Respondent was not comfortable leaving the camera in the Complainant's possession. He then advised the Complainant that he would have to seize the camera as evidence. The Complainant took the camera off his neck and said "fine, take it", but that he wanted a report number. He seized the camera at 12:05 p.m. and asked the Complainant to accompany him to the cruiser car to identify him and to provide him with the incident number. Cst. E.N. was within a few feet of the Respondent and was with him the entire time. He did not see any identification lanyard on the Complainant at that time. After he seized the camera, the Complainant continued to be hostile.

[114] They then all walked to the cruiser car, but onto the street past the fire trucks and paramedics. He asked the Complainant for identification, at which point he unzipped his jacket and pulled out a lanyard with his hand. That was the first time he had seen the lanyard. It contained the identification in Exhibit 6 and nothing else. Generally, computer checks are done by police via government issued identification such as status cards, driver's licences or passports. The Respondent did not consider this identification as being sufficient because it did not have his date of birth, address or other pertinent information about him. The Complainant eventually provided his Manitoba driver's licence after several requests.

[115] The Respondent completed his computer checks after a few minutes. It was at that point that the Complainant told him that he worked for the Winnipeg Sun as a reporter. He advised that the camera was a work camera that belonged to the Winnipeg Sun. The Complainant's identification was returned to him and he was given an incident card. The Complainant then indicated that he did not recognize the on-scene officers as police officers. The Respondent described his comments as being consistent with Freemen-on-the-Land ideology. The Complainant then spoke of them "pretending to be cops" with "uniform fetishes". The Respondent did not say anything to the Complainant about being a "pervert with a camera", nor did Cst. E.N.

[116] That concluded the Respondent's involvement with the Complainant.

[117] The Respondent placed the camera on the dash of the cruiser car while he did his computer checks. He never placed it in the trunk of the cruiser car. He kept the camera on his lap on the way back to police headquarters so that it did not get jostled around on the way.

[118] At police headquarters, the Respondent and Cst. E.N. attended to the Major Crimes Unit office for a briefing with the sergeant. The Respondent had the camera

with him at that time. He turned the camera over at 2:33 p.m. He never turned the camera on to see what was on it. He did not search the camera or its contents in any way.

[119] He had a briefing with the sergeant of the Major Crimes Unit at 4:00 p.m. He then completed his notes and supplementary narrative report. He did not know that the Complainant would be filing a complaint against him.

[120] In terms of police policies, updates or changes are released in routine orders or general orders. Hundreds of such orders are released each year electronically. These can be small changes or large changes in policy. There is an annual process where a form is signed by officers that acknowledges that they have read or heard about the listed policy changes. This is something that he participates in.

[121] The Respondent was then shown the video footage.

[122] At 7:48, the Respondent noted that the Complainant was about two to four feet away from the stretcher and the front door of the business.

[123] The Respondent maintains that he never used his body to physically push the Complainant back.

[124] The Respondent denied using any rude, abusive language or profanity towards the Complainant. He never intimidated him or made any threats towards him.

[125] On cross-examination, the Respondent indicated that he did not complete the Report to a Justice regarding the seizure of the camera. That document contains a list of items seized that is filed with the Court, but it does not include the grounds for the seizure.

[126] At 2:33 p.m., he handed the camera over to a public information officer. He was not made aware that afternoon that the WPS intended to return the camera.

Later that day, he was made aware that the camera was being returned, but not by his superiors.

[127] By the time he completed his catch-up notes and his narrative, he knew that the Complainant was a member of the media and that he was upset about the seizure of his camera.

[128] The Respondent said that he and Cst. E.N. discussed the incident before he wrote his catch-up notes.

[129] The Respondent acknowledged that he signed documentation once per year to certify that he reviewed changes to police policies. In 2017, he was familiar with a media policy that allowed media to have the same access to a scene as members of the public, and that members of the media are not to be restricted from asking questions or performing their job.

[130] The Respondent had been to hundreds of crime scenes, and he had seen members of the media photographing crime scenes before.

[131] When he first saw the Complainant with a camera, he did not know who he was, who he worked for or what his intentions were.

[132] The Complainant did not identify himself as a member of the working media when he first told him to move.

[133] The Respondent denied saying, “this is serious, don’t need any fucking pictures, don’t need you here distorting.”

[134] He told the Complainant that the scene needed to be taped off and that is why he needed him to move. He does not recall asking him to move to allow first responders to access the scene.

[135] The Respondent denied being discourteous to the Complainant or using abusive language towards him.

[136] The Respondent denied saying, "how do I know you're not just some fucking pervert with a camera?"

[137] The Respondent said that the preservation of the injured male's dignity had no bearing on his decision to seize the camera.

[138] The Respondent acknowledged that he has an obligation to be familiar with and comply with laws and police policies regarding search and seizure. In 2017, he was familiar with the WPS search and seizure policy.

[139] The Respondent indicated that he was unaware of a WPS policy that requires him to call the Technological Crimes Unit prior to seizing a camera, with or without a warrant. He reviewed the policy during his testimony. He initially said that the policy appeared to apply only to members of that unit, but he later acknowledged that the policy applies to all police officers, regardless of their unit.

[140] The Respondent acknowledged on cross-examination that other police officers told him that the Complainant was "possibly" on scene prior to police arrival and that is what his notes say.

[141] The Respondent confirmed that the Complainant initially produced identification that did not contain his date of birth, so he requested government photo identification. The Respondent says that he never handled the identification now labelled as Exhibit 6.

[142] When the Respondent filled out the incident card that he gave to the Complainant, he knew that the Complainant was unhappy with him.

[143] Once he did find out that the Complainant was a member of the media, there was no reason why he could not return the camera to him.

[144] On re-examination, the Respondent indicated that he had no idea how the camera worked. He did not know anything about removing a data card from it. He never searched the camera.

[145] The Respondent also confirmed that the injured male at the furniture store passed away as a result of the incident.

iii) Cst. E.N.

[146] Cst. E.N. has been a police officer with the WPS for seven years. In December 2017, he was working general patrol in the north end district.

[147] Cst. E.N. referred to his notes from the December 2, 2017 incident throughout his testimony.

[148] Cst. E.N. and the Respondent attended to the Lord Selkirk Furniture store at 835 Main Street on that date. This was a high priority call that involved public and officer safety. The call was that a male with a knife was threatening people at that location. Before arriving on scene, they received an update that this male had gone unresponsive and was getting CPR. This was an important update because this was now potentially a homicide investigation or an in-custody death, since police were already on scene.

[149] When they arrived, they parked their cruiser car south of the scene. They were looking to assist. They wanted to make sure that there was an unobstructed path for emergency service vehicles and they also wanted to preserve the integrity of the crime scene and any evidence that might be there. There was a fire truck and an ambulance already on scene when they arrived. Those vehicles were located in the second lane from the curb. There were parked vehicles in the first lane. Paramedics were already on scene. The scene was chaotic and dynamic, as personnel were coming and going, working on the injured male. It was very

important to keep the front doors of the store clear so that emergency personnel could do their job effectively and ultimately try to save the injured male's life.

[150] When they arrived on scene, he was unaware whether any media personnel were already there.

[151] He did not know the Complainant or recognize his name prior to that date.

[152] Cst. E.N. approached the scene together with the Respondent. He noticed that emergency personnel were working on the injured male. He noticed the Complainant crouched between two parked cars directly in front of the store. He disagrees that the Complainant was positioned further south.

[153] Cst. E.N. heard the Respondent tell the Complainant to move in a raised voice. He was not shouting or yelling. He did not hear the Respondent say "this is serious, don't need you taking pictures, don't need you distorting", nor did he hear the Respondent use profanity towards the Complainant in asking him to move. He heard him ask the Complainant to move three times.

[154] When they arrived, they were in a marked cruiser car, and he was in full police uniform. His badge number was displayed on what he was wearing.

[155] He does not recall the Respondent screaming "hey" to the Complainant.

[156] After the first request to move, the Complainant did not move from a crouched position between the parked cars. The Respondent asked him to move a second time. The Complainant stood up and indicated that he could stand wherever he wanted. The Complainant then walked east on the sidewalk towards the front of the store. There were many emergency personnel going back and forth from the store to their vehicles. The scene was expanding and chaotic. There was a need to preserve the integrity of the scene.

[157] The Respondent then approached the Complainant a third time and told him to move. He also cautioned him for obstruct justice. They used their discretion to not arrest him though. The Complainant did not move immediately. He was not cooperative and not compliant with the Respondent's directions. He faced the Respondent and did not leave immediately. The Complainant eventually went north. The Respondent did not do anything to physically move the Complainant north, nor did he see him use any intimidation tactics. The Complainant had not identified himself as a member of the media, nor was he wearing identification that indicated he was a member of the media.

[158] He did not hear the Respondent yell at the Complainant or tell him to "fuck off" when the Complainant moved north.

[159] At that point, one of the officers that was inside the store came out and told them that the male with the camera was there prior to police arrival and may have photographs of the suspect that had left the scene. Cst. E.N. and the Respondent then approached the Complainant together. The Respondent questioned the Complainant about the photographs on his camera. The Complainant did not want to speak to them. The Respondent asked him for his name and whether he was there in a working capacity for his employer. The Complainant did not want to provide this information. He did not identify himself as media at that point. Cst. E.N. did not know that he was a member of the media at that point. The Complainant made comments at that time to the effect that he did not recognize them as legitimate police officers and asked them if they had an "uniform fetish". This led him to believe that they were dealing with someone with Freeman-on-the-Land beliefs. He was familiar with those beliefs from the police academy, and he had dealt with people displaying that type of ideology. He had a concern about preserving any evidence on the camera. The Respondent then seized the camera due to what he

called “exigent circumstances”. The Complainant handed the camera over right away. He does not recall the Respondent reaching out his arms to take the camera. They still had not identified the Complainant. He followed them to the cruiser car and eventually unzipped his jacket and pulled out a lanyard and said “this is all you need”. He never took the identification out, but he recalls seeing it. He had never seen identification like that before. It was not sufficient for them to conduct police checks given that it did not contain his full name, address or date of birth. The Complainant eventually provided his driver’s licence, and he eventually mentioned that he was a reporter or journalist.

[160] They never searched the camera or its contents before it was returned. If it was going to be searched, it would have been searched by the investigating unit. Cst. E.N. and the Respondent were not part of the investigating unit in this case, nor would they have been involved in drafting any search warrant, preservation order or report to justice.

[161] Cst. E.N. never saw the Respondent attempt to head-butt or swing his head towards the Complainant. He would have been present and in a position to see that if that had occurred.

[162] The Respondent never asked the Complainant why he hated the police.

[163] Neither he nor the Respondent ever asked the Complainant if he “was just some pervert with a camera”. He would have heard that comment if it had been said because he was with the Respondent at the point north of the store.

[164] Cst. E.N. testified that he will talk to his partner about events that have happened in relation to a particular incident. Police notes are generally prepared independently. At the time that he prepared his notes in this case, he did not know

that the Complainant would be making a complaint. He was not following any media releases or anything online about this case.

[165] They had a briefing at 4:00 p.m. that day. By that time, he believes that his notes had been completed.

[166] The Respondent placed the camera either on the dash or on his lap. The camera was never put in the trunk. The camera was eventually turned over to the public information officer (Cst. Carver) at the direction of the Major Crimes Unit.

[167] Cst. E.N. was not aware that 45 days prior to December 2, 2017 that legislation had been passed regarding search warrants for documents and data in the possession of the media.

[168] Cst. E.N. was shown the video footage. He observed the stretcher on the sidewalk just outside the door to the store. He recognized the Respondent and the Complainant in the video. He could not see himself, but he would have been positioned about 10 feet away from the stretcher, where he could see the interactions and hear the conversation between the Respondent and the Complainant.

[169] Cst. E.N. says that he did not see any behaviour by the Respondent during this incident that caused him any concern about his professionalism as a police officer.

[170] On cross-examination, Cst. E.N. confirmed that a number of the things that he testified to in direct were not contained in his notes, and that the majority of his notes relate to the interaction with the Complainant.

[171] Cst. E.N. confirmed that he discussed this incident with the Respondent before or while he made his notes, and also after the date of the incident. He was also interviewed by a LERA investigator along with the Respondent.

b) Summary of the Video Footage of December 2, 2017

[172] A USB thumb drive was included at Tab 5 of Exhibit 2 (the Agreed Book of Documents).

[173] This thumb drive contains approximately one hour of closed circuit video footage taken by a stationary camera located inside of the Lord Selkirk Furniture store.

[174] I had the advantage of watching the video on numerous occasions, and stopping and starting it at various points.

[175] The video shows only one angle, meaning that the camera was stationary and did not shift or move, nor does the video zoom in or out. The video is choppy and is best described as a series of still images shown in the order that they occurred, as opposed to a continuous, flowing video stream. The video is in colour and is of good quality, but it does not contain sound.

[176] The video does not contain a time stamp. The video begins at "00:00", which signifies the running time on the software that plays the video. Any times that were mentioned in the witness testimony and that are referred to in these written reasons refer to the running time on the software and not to the actual time.

[177] The video shows a view of the inside of the furniture store. It shows the front door, which is made of clear glass from top to bottom. A series of large windows are located to the right of that door, which provide a clear view of the area on the sidewalk located north of the door.

[178] The video begins with a view of the injured male on the floor just inside the front door of the store. Numerous police officers were already present. Numerous paramedics arrived shortly thereafter.

[179] Both the Complainant and the Respondent can be seen through the windows in the video footage. Both acknowledged as much during their testimony and pointed themselves out as the video was played.

[180] The Complainant is first seen at 7:48, and the Respondent is first seen at 7:49. Up to that point in time, police officers and paramedics can be seen attending to the injured male, and a stretcher can be seen just outside the front door. The Respondent can be seen facing the Complainant in front of the large windows, just a few feet from the front of the store and the stretcher. They are together for no more than a few seconds, with the Respondent facing north and the Complainant facing south. During that time, there is no indication of any attempted head butt by the Respondent towards the Complainant.

[181] During his testimony, the Complainant indicated that his lanyard contained his identification, and that he was wearing it around his neck on the outside of his jacket. During the few seconds that the Complainant is visible on the video footage, it is difficult to definitively determine whether his lanyard is visible. The Complainant can be clearly seen to be holding his camera in front of him around the middle of his torso, at around the same level where one might expect the lanyard to extend to.

[182] The injured male was eventually placed on a backboard. At approximately 19:40, he was removed from the store and placed on the stretcher that was positioned outside of the door. Prior to that, officers and paramedics were going in and out through the front door. Officers and paramedics could also been seen standing on the sidewalk outside the door and windows.

c) Summary of the Winnipeg Police Service Policies

[183] Four separate WPS policies were included at Tabs 1 to 4 of Exhibit 2 (the Agreed Book of Documents). Each policy was in effect on December 2, 2017. The following is a brief description of the key parts of each policy.

i) Media Policy

[184] This policy provides guidance on a number of issues relating to accredited news organizations, including providing access to scenes. The policy was filed without any redactions.

[185] A number of points from this policy are noteworthy:

- media are to be allowed the same access to a scene that is afforded to the public;

- media access to a scene is not permitted if their presence may interfere with or obstruct emergency personnel or may disturb evidence;

- if access to the media must be restricted, attempts should be made to advise the media of the reason for the restriction. Members of the media should be asked to move out of the area, with every effort being made to restore access as soon as practicable;

- when directed to move, members of the media are to be accompanied to ensure their safety and to maintain the integrity of the investigation while they obtain information and/or photographs;

- members of the media are not to be restricted from asking questions or taking pictures in areas where access is allowed; and

- in order to seize audio and/or video recording devices from the media, the procedure in the Search and Seizure policy is to be followed.

ii) Technological Crimes Policy

[186] This policy provides information and sets procedures for securing, seizing and transporting equipment with a view to recovering computer-based or electronic device evidence. The policy was filed without any redactions.

iii) Search and Seizure Policy

[187] This policy provides information and procedures relating to warrantless searches, search warrants, sealing orders and production orders. Large portions of this policy were redacted. The redacted copy does not contain any provisions that are specific to members of the media.

iv) Report to a Justice Policy

[188] This policy governs situations where property is seized by an officer with or without a warrant and provides guidance on when a Report to Justice must be submitted to the Court and sets procedures for doing so. The policy was filed without any redactions.

d) Assessments of Credibility and Reliability and Findings of Fact

[189] My analysis of the trial evidence in this case will focus largely on the credibility and reliability of the witness testimony. I am mindful of the significant differences between the Complainant's testimony and the testimony of the officers.

[190] In evaluating the trial testimony, I must bear in mind various principles.

[191] I am mindful of the fact that I can accept some, all or none of the testimony of any given witness.

[192] In terms of assessing the testimony of the witnesses in this case, I must also remember that, as the trier of fact, my evaluation must focus not only on credibility, but also on reliability. While credibility refers to veracity, reliability is concerned

with accuracy. Credibility relates to sincerity, or a willingness to speak the truth as the witness believes it to be. Reliability relates to the actual accuracy of the testimony, which involves considerations of the ability to accurately observe, recall and recount the events in issue:

R. v. Perrone, 2014 MBCA 74, at paragraph 25.

[193] I will start by assessing the testimony of the Respondent.

[194] The Respondent testified in a clear, calm and detailed manner. He referred to his notebook throughout his testimony.

[195] During his testimony, the Respondent denied the following:

1) that he said any of the following things to the Complainant:

- "fuck off" or "fuck you";

- "this is serious, don't need you taking fucking pictures, don't need you distorting";

- "get the fuck out of here, I'm not going to tell you again, now fuck off"; and

- "how do I know you're not just some fucking pervert with a camera?";

2) that he asked the Complainant to move through the crime scene;

3) that he intimidated the Complainant in any way, including by using his height or by getting into his personal space;

4) that he threatened the Complainant in any way;

5) that he attempted to head butt or strike the Complainant or that he used his body to push him back;

6) that he had his arm outstretched when he seized the camera; or

7) that he used any rude or abusive language or profanity towards the Complainant, or that he was discourteous to him.

[196] On the other hand, the Respondent acknowledged that he seized the Complainant's camera without a warrant.

[197] Cst. G.P. was not shaken from his position on these points on cross-examination. To a large extent, much of his testimony was corroborated by Cst. E.N.'s testimony, which was also clear and detailed.

[198] I do not find it unusual for the Respondent and Cst. E.N. to have discussed what took place on December 2, 2017 before and while they wrote their catch-up notes. Given the testimony that I heard from the officers, I am not concerned by the similarities in their notebook entries or that there was any attempt to record and relate a consistent version of events to cover up any wrongdoing. Any suggestion that the entries are too "strikingly similar" ignores the possibility that they both accurately recorded the events of December 2, 2017 in a similar fashion.

[199] I will next assess the testimony of the Complainant.

[200] In this case, the three disciplinary defaults are alleged to have occurred on December 2, 2017. The Complainant provided his initial written complaint to LERA on December 20, 2017 when he did not yet have counsel. The affidavit that he provided in support of an application to obtain copies of various police policies is dated July 17, 2019, which was prepared with the assistance of his lawyer. He then testified on May 24, 25 and 26, 2022.

[201] The Complainant was cross-examined at length regarding his initial written LERA complaint and affidavit, as compared to his trial testimony, with an emphasis on inconsistencies.

[202] It is trite to say that witnesses may be impeached on cross-examination by adducing evidence that they have made statements inconsistent with their present testimony. Once it is established that a witness has made a prior inconsistent statement, such a statement can be useful and relevant to show that the witness has changed their story on the same subject matter and to challenge the credibility and/or the reliability of their testimony. The nature and extent of any inconsistency are important factors for the trier of fact to consider in assessing the weight to assign to the witness' testimony in the context of the circumstances of a particular case.

[203] In this case, the Complainant provided his testimony in a clear, calm and articulate manner. He provided significant details throughout his testimony.

[204] However, there were numerous differences between the Complainant's initial written LERA complaint and his affidavit as compared to his trial testimony. To be clear, none of these differences amount to contradictions. Rather, the Complainant's trial testimony contained details that were not contained in the initial written complaint or the affidavit, or in some cases, both.

[205] The Complainant testified that his initial written complaint to LERA was accurate, but that it was not "full" or complete. He completed that complaint on his own time, without the assistance of a lawyer. He claimed to be restrained by the limitations of the time frame within which a complaint could be made. At that time, complaints had to be submitted within 30 days of the alleged disciplinary default.

[206] Once a lawyer became involved in this case, the Complainant had the benefit of reviewing his case with a lawyer. His lawyer also assisted him in preparing an affidavit in support of an application to obtain copies of WPS policies.

[207] The following list highlights the areas of differences between the Complainant's trial testimony and his initial written LERA complaint and affidavit:

1) the Complainant confirmed that his initial written complaint did not contain the reference to the Respondent saying “this is serious, we don’t want any fucking pictures, don’t need you here distorting”, and that this was said for the first time during his testimony at this hearing;

2) the Complainant’s affidavit contained a description of his interaction with the Respondent when the Respondent first arrived on scene. Again, there was no mention of the Respondent saying “this is serious, we don’t want any fucking pictures, don’t need you here distorting”. In other parts of the affidavit, he did state that the Respondent told him to “fuck off”;

3) the Complainant also confirmed that his written complaint and his affidavit do not mention that he identified himself as media to the Respondent, nor did he mention in either document that he told the Respondent that he was not leaving because he was still working;

4) the Complainant also confirmed that his written complaint and affidavit do not contain any reference to the Respondent saying “fuck off” when he pointed north or to walking him backwards;

5) the written complaint also does not contain any reference to the Respondent trying to trip the Complainant;

6) the Complainant confirmed that the reference in his direct testimony to the Respondent yelling “I told you to get the fuck out of here. I’m not going to tell you again now, fuck off” was not contained in his written complaint or in his affidavit;

7) subsequent to being asked to move north by the Respondent, the Complainant acknowledged that his written complaint did not contain any

details about the Respondent yelling "hey" and stopping to get further instructions from him;

8) the Complainant's written complaint does not contain any details of the "pervert with a camera" and "uniform fetish" comments, but his affidavit does. Before he provided his affidavit in July 2019, he had had an opportunity to review the LERA Commissioner's file, which contained the Respondent's notes and a typed narrative report, which outlined the Complainant's "uniform fetish" comments; and

9) the Complainant's written complaint does not mention that the Respondent had his arms outstretched when he came to take his camera.

[208] The Complainant claims to have been restrained by the limitations of the time frame within which a written complaint could be made under the *Act*. In December 2017, complaints under the *Act* had to be submitted within 30 days of the alleged disciplinary default, pursuant to section 6(3). Section 6(6) also provides an opportunity to seek an extension allowing for up to six months from the date of the alleged disciplinary default. Even recognizing that he did not receive any assistance from a lawyer or from anyone else in preparing his written complaint, no satisfactory reason has been provided to explain why the Complainant could not have provided a more fulsome, detailed explanation of what took place in his initial written complaint within 30 days, or why an extension was not sought. I take note of the fact that he had no difficulty providing fulsome details and answers to questions during his trial testimony. The fact that section 6(3) now allows for a complaint to be submitted within six months of the alleged disciplinary default does not, in and of itself, persuade me that 30 days was not enough time for the Complainant to provide a fulsome, detailed account of everything that occurred (this amendment to the *Act* came into force on March 1, 2023).

[209] In terms of the affidavit, there is no suggestion that there were any time restraints in preparing it. Again, no satisfactory explanation has been provided as to why the affidavit does not contain the missing details. I am also mindful that a lawyer assisted the Complainant in preparing his affidavit.

[210] I have other concerns regarding the Complainant's testimony, namely:

1) the Complainant says that when the Respondent arrived at the scene, he was on the sidewalk and about 20 feet south of the front door of the business, and the Respondent directed him to go north and through the sidewalk area directly in front of the business. The Respondent maintains that the Complainant was directly west of the front door of the store, and that he did not ask the Complainant to move north through the crime scene. In my view, it simply does not make sense that the Respondent would have directed the Complainant to go north, which would have him walking through the immediate area outside the front door of the business, an area that should remain clear and protected as a potential crime scene and to allow emergency personnel to have unfettered access to the store;

2) the Complainant confirmed that he stated in his written complaint that when he was told to, he moved north and starting taking photographs with his camera without breaking stride. He acknowledged on cross-examination that the video footage does not depict that, and that in fact the video shows that he pivoted and faced south at 7:48 when he would have been only a few feet from the stretcher; and

3) on cross-examination, the Complainant maintained that he was telling the truth, but he acknowledged that he might be misremembering the timeline on some of the comments that were made that day; and

4) during cross-examination, I noted that, at times, the Complainant was evasive and reluctant to provide direct answers to questions.

[211] In the end result, I have serious and significant concerns regarding the credibility and reliability of the Complainant's testimony. In my view, the differences between the prior statements and the trial testimony are material inconsistencies that I do not regard as simply being the addition of insignificant and peripheral details to his trial testimony. Rather, the additional details form the essence of the alleged abusive conduct in this case. As a matter of common sense, one would expect the missing details to have been included in the written complaint and most certainly in the affidavit that was prepared with the assistance of a lawyer, at points in time that were much closer to December 2, 2017. In my view, the absence of these details from the initial complaint and affidavit greatly undermine the Complainant's credibility and reliability. As a result, I am not prepared to accept the Complainant's testimony where it differs from the testimony of the Respondent.

[212] On the other hand, I am prepared to accept the testimony of the Respondent, which includes his denials.

[213] Accordingly, the Complainant has not persuaded me on the basis of "clear and convincing evidence" that the Respondent committed the second and third alleged disciplinary defaults. As a result, the second and third disciplinary defaults are dismissed.

8) Did the Respondent abuse his authority contrary to section 29(a) of the *Act* by conducting an unreasonable seizure of the Complainant's camera contrary to section 8 of the *Charter*?

a) Section 8 and the warrantless seizure of the camera

[214] This leaves the first alleged disciplinary default regarding an alleged abuse of authority by the Respondent by seizing the Complainant's camera without a warrant.

[215] Section 8 of the *Charter* states:

> Everyone has the right to be secure against unreasonable search or seizure.
> (Emphasis added.)

[216] When section 8 of the *Charter* is engaged, a determination must be made as to whether the search or seizure was reasonable. A warrantless search or seizure is presumptively unreasonable, and the party asserting the search or seizure was reasonable bears the burden of rebutting this presumption on a balance of probabilities. A search or seizure will be reasonable if it is authorized by law, the law itself is reasonable and the manner in which the search or seizure was carried out is reasonable:

R. v. Reeves, 2018 SCC 56, at paragraph 14;

R. v. Collins, 1987 CanLII 84, at paragraphs 21 and 23 (S.C.C.).

[217] The Respondent has acknowledged that he seized the Complainant's camera without a warrant. The question is whether this seizure amounts to an abuse of authority and therefore a disciplinary default.

b) Pertinent findings of fact

[218] After conducting a thorough analysis of the trial evidence, I articulated various concerns regarding the credibility and reliability of the Complainant's testimony, such that I am not prepared to accept the Complainant's version of events.

I also indicated that I am prepared to accept the testimony of the Respondent where it conflicts with the testimony of the Complainant. Accordingly, the following is a list of my findings of fact that are pertinent to the seizure of the camera by the Respondent:

1) the Respondent approached the furniture store with the belief that he was attending to a crime scene connected to a potential homicide;

2) once it came to the Respondent's attention that the Complainant had possibly arrived at the scene prior to police arrival and that he might have photographs of the suspect that had fled the scene on his camera, he approached the Complainant, who refused to identify himself or tell the Respondent who he worked for. The Complainant's lack of cooperation led the Respondent to be concerned that any photos that existed would be destroyed. It was at that point that the Respondent made the decision to seize the camera and did so. I accept the Respondent's testimony that the Complainant handed the camera over to him when he asked for it;

3) I accept that neither the Respondent nor Cst. E.N. viewed any of the photographs on the camera or made any attempt to do so. There is also no evidence that the camera was ever searched by any other member of the WPS. The camera was in fact returned to the Complainant undamaged later that same day; and

4) the Respondent testified that changes to WPS policies are released to members electronically throughout each year. Officers acknowledge having reviewed policy changes by signing a form on an annual basis, which the Respondent maintains that he has done. I accept that the Respondent followed this protocol. Four of those policies were filed as exhibits in this case.

[219] Counsel for the Complainant takes the position that the Respondent knew that the Complainant was a working member of the media and argued that the Respondent acted contrary to law and police policies when he seized the camera from the Complainant.

[220] Counsel for the Complainant pointed out that, on October 18, 2017, approximately 45 days before the events of this case, the *Journalistic Sources Protection Act*, c. 22, came into force. This piece of federal legislation created amendments to both the *Criminal Code* and the *Canada Evidence Act*. Section 488.01(2) of the *Criminal Code* requires an application for a warrant, search warrant, authorization or order under certain specified provisions to be made to a superior court judge if the applicant "knows that the application relates to a journalist's communications or an object, document or data relating to or in the possession of a journalist". This provision was in force on December 2, 2017. The Respondent indicated on cross-examination that he was unaware of the existence of this legislation.

[221] An important feature of the Complainant's position is that, prior to the seizure of the camera, the Respondent was aware or should have been aware that he was a working member of the media throughout his dealings with the Complainant on the day in question, and that the Respondent should therefore have acted in accordance with the law and police policies. The jurisprudence has highlighted the important role that the media serves in a free and democratic society:

Denis v. Cote, 2019 SCC 44 at paragraphs 45-46;

CBC v. Manitoba, 2009 MBCA 122 at paragraph 39.

[222] That being said, I accept the Respondent's position that the Complainant did not identify himself as a member of the media until after the seizure of the camera

and only once they were near the cruiser car. I accept that the lanyard that the Complainant had around his neck that contained his identification was not visible to the Respondent or to Cst. E.N. prior to the Complainant pulling it out of his jacket near the cruiser car. I accept that the Respondent did not know that the Complainant was a working member of the media until after the seizure of the camera. I therefore accept that the Respondent seized the camera without a warrant, without the knowledge that the Complainant was a working member of the media. I am also not persuaded that it would have been reasonable for the Respondent to have been aware that the Complainant was a working member of the media simply because he was taking photographs at a crime scene. The fact that the Complainant was a working member of the media at the time of the seizure is therefore not a significant factor as I conduct my analysis of the Respondent's conduct in connection with this alleged disciplinary default.

[223] I must therefore determine whether the warrantless search that was conducted by the Respondent amounts to an abuse of his authority with these findings of fact in mind.

c) Did the Complainant have an expectation of privacy in the camera?

[224] The first question that I must consider is whether the Complainant had an expectation of privacy in the digital camera. This camera and everything on the memory card belonged to his employer, the Winnipeg Sun. Both the Complainant and the Respondent take the position that the Complainant had an expectation of privacy in the camera, and I agree with that. I note that the Respondent would not have been aware of who owned the camera at the time that he seized it. However, I find that the Complainant's expectation of privacy was, in fact, diminished given that the camera and what was contained on the memory card belonged to his employer:

R. v. Reeves, 2018 SCC 56 at paragraph 39;

R. v. Cole, 2012 SCC 53 at paragraph 58.

d) Was the seizure of the camera authorized by law?

[225] In assessing the warrantless seizure, this is the primary point at issue in this case, as there are no arguments that have been advanced that the laws that could justify the seizure are unreasonable or that the manner in which the seizure was carried out was unreasonable.

[226] The Respondent relies on sections 487.11 and 489(2)(c) of the *Criminal Code* as providing him with the lawful authority to seize the Complainant's camera.

i) Exigent Circumstances (Section 487.11, *Criminal Code*)

[227] Section 487.11 of the *Criminal Code* states:

> A peace officer, or a public officer who has been appointed or designated to administer or enforce any federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament, may, in the course of his or her duties, exercise any of the powers described in subsection 487(1) or 492.1(1) without a warrant if the conditions for obtaining a warrant exist but by reason of exigent circumstances it would be impracticable to obtain a warrant.
>
> (Emphasis added.)

[228] Section 492.1(1) does not apply to this case, as it involves the installation and monitoring of a tracking device.

[229] Section 487(1) outlines the general search warrant power. It allows a justice to issue a warrant to search for and seize in any building, receptacle or place anything that there are reasonable grounds to believe will afford evidence which respect to the commission of an offence under the *Code* and requires the filing of a Report to Justice in accordance with section 489.1.

[230] It is therefore necessary for a police officer to believe that evidence exists and that immediate action is necessary to prevent its destruction. There must also be

evidence of objectively reasonable grounds to support that belief. A general concern for the possible destruction of evidence is insufficient to establish exigent circumstances. The officer must subjectively believe that the destruction of evidence is imminent and that immediate action is required. That subjective belief must also be objectively reasonable. A review of the totality of the circumstances must be undertaken to make these assessments.

[231] In this case, once it came to the Respondent's attention from other officers that the Complainant had possibly arrived at the scene prior to police arrival and that he might have photographs of the suspect that had fled the scene on his camera, he approached the Complainant, who refused to identify himself or tell the Respondent who he worked for. Upon arrival at the scene, the Respondent had noted that the Complainant had a camera and that he was taking photographs. The Complainant's lack of cooperation led the Respondent to be concerned that any photos that existed would be destroyed. It was at that point that the Respondent made the decision to seize the camera and did so.

[232] When I look at the totality of the circumstances up to the point of the seizure, I am not satisfied that there were reasonable and probable grounds to believe that the camera contained photographs of the suspect. Even if I were to conclude that the Respondent had subjectively formed those grounds, I cannot conclude that such grounds were objectively reasonable. At best, the second-hand information that the Respondent had been provided by other officers is that the Complainant had possibly arrived at the scene prior to the arrival of the police and that he might have photographs of the suspect that had fled the scene on his camera. That being said, I am mindful that it was still the Respondent's subjective belief that if there were photographs of the suspect on the camera, that he was concerned that they would be destroyed based on his observations and his interactions with the Complainant to

that point. I cannot say that this belief was unreasonable based on what had occurred to that point. However, I am not persuaded that exigent circumstances as outlined in section 487.11 existed in this case. To be clear, this is due to the absence of objective reasonable and probable grounds to believe that evidence of the suspect's identity would actually be found on the camera.

ii) Section 489(2)(c), *Criminal Code*

[233] Section 489(2)(c) of the *Criminal Code* provides:

> Every peace officer, and every public officer who has been appointed or designated to administer or enforce any federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament, who is lawfully present in a place pursuant to a warrant or otherwise in the execution of duties may, without a warrant, seize any thing that the officer believes on reasonable grounds
>
> …
>
> (c) will afford evidence in respect of an offence against this or any other Act of Parliament.
>
> (Emphasis added.)

[234] This provision requires subjective reasonable and probable grounds, and those grounds must be objectively reasonable.

[235] My analysis and ultimate conclusion regarding section 489(2)(c) is the same as my analysis and conclusion in relation to section 487.11 (exigent circumstances). This is a case where the Respondent held the subjective belief that the camera would afford evidence of the suspect's identity. However, the totality of the evidence does not persuade me that the Respondent's belief was objectively reasonable.

iii) The *Waterfield* test

[236] Counsel for the Respondent takes the position that there is free-standing common law authority that justified the Respondent's seizure of the camera and in that regard relies on *R. v. Waterfield*, [1963] 3 All E.R. 659 (U.K. Court of Criminal Appeals).

[237] With respect, I disagree with this position.

[238] In Canada, police derive their powers from either statute or common law. The ancillary powers doctrine, also known as the *Waterfield* test, has allowed the Supreme Court of Canada to create new common law powers for police officers to investigate and detain citizens.

[239] In short, the *Waterfield* test requires the court to consider:

1) whether the police conduct giving rise to the interference falls within the general scope of any duty imposed on the officer by statute or at common law; and

2) if this threshold test is met, whether such conduct involved an unjustifiable use of powers associated with the duty.

[240] The Supreme Court of Canada first adopted the *Waterfield* test in *Dedman v. The Queen*, [1985] 2 S.C.R. 2, to justify and create new police powers of detention pertaining to arbitrary roadside stop programs designed to detect impaired drivers.

[241] The Supreme Court of Canada has subsequently applied the *Waterfield* test to establish further common law police powers. The following are some examples:

- searches incident to arrest (*Cloutier v. Langlois*, [1990] 1 S.C.R. 158);

- police powers in responding to 911 emergency calls (*R. v. Godoy*, [1999] 1 S.C.R. 311);

- searches incidental to investigative detentions (*R. v. Mann*, 2004 SCC 52);

- safety searches (*R. v. MacDonald*, 2014 SCC 3); and

- sniffer dog searches (*R. v. Kang-Brown*, 2008 SCC 18).

[242] I am not persuaded that the *Waterfield* test should be used to provide a free-standing basis to justify searches or seizures by police officers in individual cases or

in unique circumstances where no statutory or common law authority for the search or seizure otherwise exists. Further, this is not a case where I have been asked to create a new police search or seizure power, nor do the circumstances here call for that. I am therefore not persuaded that the *Waterfield* test provides lawful authority for the actions of the Respondent in this case.

iv) Conclusion

[243] For the reasons that I have articulated, the seizure of the camera was not authorized by law.

e) Did the warrantless seizure amount to an abuse of authority?

[244] Having concluded that the warrantless seizure was not authorized by law, I must next assess whether this breach of section 8 amounted to an abuse of authority pursuant to section 29(a) of the *Act*.

[245] Citizens have the right to be served by a professional and competent police service that respects the *Charter* rights of its citizens. However, not every breach of an individual's *Charter* rights constitutes an abuse of authority that results in a finding of disciplinary default.

[246] In *LERA Complaint #5951* (December 12, 2005), Swail J. made the following comments:

> Anyone who attends at criminal court on a regular basis will be aware of the fact that charges against accused persons are regularly dismissed because of both serious and technical breaches of the accused's Charter rights by investigating officers. If police officers were subjected to disciplinary proceedings every time a judge made such a finding, police work would be impossible, and police officers would operate under a form of "disciplinary chill". Police officers are not lawyers and cannot be expected to know every nuance of Charter-related law. Further, the rights of accused with regard to arbitrary detention, arbitrary arrest, and unreasonable search and seizure are constantly being refined by our higher courts. The common-law regarding such rights may well change between the time of an individual's arrest and his or her trial. Police officers, acting in good faith, should not be held to a retroactive standard of conduct.

[247] I agree with these comments.

[248] In *S.B. v. Horyski*, [2008] M.J. No. 476 (Man. Q.B.), the officer was found to have failed to give the complainant her section 10 *Charter* rights upon being detained. On appeal, the Court found that, standing alone, the failure to advise of the right to counsel is not an abuse of authority. It is a professional error which could result in legal ramifications, such as the rendering of evidence inadmissible if any is obtained, but absent more than that, it is not an abuse of authority. The officer in that case had acted professionally throughout and was not abusive or threatening. The officer's failure to provide the complainant with her section 10 *Charter* rights did not amount to a disciplinary default.

[249] When I look at the totality of the circumstances in this case, I must remember that the Complainant had a diminished expectation of privacy in the camera. The camera was seized from him without a warrant. There is no evidence that the camera was searched while it was in the custody of the police. The camera, in fact, was returned undamaged later that same day. I recognize that the Complainant was temporarily deprived of the use of the camera. While there was a section 8 breach, I find that the intrusion on the Complainant's privacy interest was minimal, particularly given my finding that the Respondent did not find out that the Complainant was a working member of the media until after the camera was seized. This significantly attenuates the level of seriousness in relation to the breach. I find that the breach was at the low end of the spectrum of seriousness.

[250] Further, I must analyze whether the breach occurred in the context of good faith or bad faith by the Respondent. I must bear in mind that the Respondent was dealing with a rapidly unfolding and chaotic scene from the point in time that he arrived at the furniture store. The suspect male had in fact fled from the scene, and police were concerned about trying to identify him. I have already concluded that

reasonable and probable grounds to believe that the camera contained photographs of the suspect did not exist. That means that the legal standard was not met for the seizure pursuant to sections 487.11 and 489(2)(c) of the *Criminal Code*. That, however, does not change the fact that the Respondent's conduct was motivated by his desire to preserve all available evidence that could identify the suspect in relation to a very serious assault that ultimately became a homicide.

[251] When police officers arrive at a potential crime scene, amongst the various investigative tasks that they can be expected to engage in, it is reasonable to expect that they will attempt to secure the scene to prevent the loss, contamination or destruction of evidence and identify any suspects or witnesses. Given that surveillance video cameras and cameras in personal handheld devices have become commonplace in today's society, it is also reasonable for police officers to canvass whether evidence is obtainable from such devices, which often produce high quality video footage and high resolution photographs. In this case, there was an obvious and high public interest in identifying the suspect in relation to a very serious incident. The fact that other investigative avenues existed that might have yielded the identity of the suspect does not mean that the Respondent's pursuit of the Complainant's camera was unreasonable, as there was no guarantee that the suspect could be identified in any other way.

[252] I am also not moved by the suggestion that a preservation demand should have been issued to the Complainant. Such a demand must be made in writing. The Respondent testified that he was not familiar with what that entailed. Even if he had been familiar with what a preservation order entailed, I am of the view that it simply would not have been practical to issue one in writing as things were rapidly unfolding on scene.

[253] In this case, the Respondent reacted to circumstances as they were unfolding. While reasonable and probable grounds did not exist, I find that the Respondent acted in good faith when he seized the camera. He did so based on his observations and interactions with the Complainant and based on the second-hand information that he was given by other officers, with a view to preserving evidence that he believed would be lost if he did not act immediately. His intentions were laudable. I find that he was not abusive or threatening towards the Complainant. In fact, I find that he behaved in a professional manner when he dealt with the Complainant. His actions did not amount to exploitive behaviour or an abuse of his authority. His warrantless seizure amounted to a professional error. After a review of my findings of fact and a through review of the totality of the circumstances, this is not a situation where the Respondent's professional error rises to the level of an abuse of authority.

[254] Two final points need to be addressed.

[255] First, the Complainant further alleges that the Respondent abused his authority because he did not file a Report to Justice, as required by section 489.1 of the *Criminal Code*. That provision requires the filing of such a report where an item is seized pursuant to section 487.11 or section 489 of the *Criminal Code*. The Complainant also argues that the WPS policy requires the actual seizing officer to file such a report.

[256] This argument can be summarily dismissed. While the Respondent admitted that he did not file a Report to Justice in this case, there is no evidence that such a report was not submitted by another officer in this case. This point was not the subject of any agreement at trial as to what actually occurred in this case.

[257] Further, after carefully reviewing section 489.1 and the WPS Report to Justice policy, I am not persuaded that the actual seizing officer is the one who must complete and file the Report to Justice, as opposed to any other officer involved in

the investigation. In any given case, a particular item that has been seized could conceivably be handled by more than one police officer. The expectation is that only one Report to Justice will be filed for that item, not one for each officer that has handled it. Also, a Report to Justice completed and filed by only one of the officers involved in an investigation would suffice to comply with section 489.1 and the WPS policy.

[258] Even if I were to accept the Complainant's argument that the Respondent was personally required to file a Report to Justice, his failure to do so in this case did not further impact the Complainant's privacy interest given that the camera was returned later the same day. Such amounts, at best, to a professional error and does not amount to an abuse of authority.

[259] The second point is that the Complainant has argued that the Respondent breached the WPS Technological Crimes Policy by not asking for assistance when seizing the camera.

[260] This argument can also be summarily dismissed. After the seizure, the camera was returned undamaged later that same day. There is also no evidence that any of the contents of the camera were compromised or destroyed. In fact, there is no evidence that the camera was even searched. A review of the policy would suggest that its purpose is to ensure the safe handling of devices for the purpose of preserving the integrity of the contents and also to ensure that the devices themselves are not damaged such that, if appropriate, they can be safely returned to their owners after the investigation is complete. I am not persuaded that the policy clearly specifies that the Respondent was required to seek assistance from the Technological Crimes Unit prior to seizing the camera. In fact, the policy includes a clause on page 2 that provides direction to officers in circumstances where a device is seized without the assistance of a Technological Crimes Unit member. Even if the policy required the

Respondent to seek assistance, such amounted to no more than a professional error and does not reach the level of an abuse of authority in the circumstances of this case.

[261] Accordingly, for all of the foregoing reasons, the first disciplinary default is also dismissed.

9) Conclusions

[262] Accordingly, for the reasons that I have articulated, all three of the alleged disciplinary defaults are dismissed.

[263] Pursuant to section 25 of the *Act*, the ban on publication of the Respondent's name will remain in place.

[264] One final point is warranted. I have concluded that the applicable standard of proof in cases of an alleged disciplinary default under the *Act* is higher than a balance of probabilities. I have analyzed the evidence in this case and made conclusions with this standard of proof in mind.

[265] In this case, I have made findings of fact after a fulsome assessment of the credibility and reliability of the witness testimony. I have also made findings as it relates to the seizure of the camera. Having regard to my analysis, findings and conclusions, I am of the view that this is a case where the Complainant would have failed to establish any of the three disciplinary defaults even if the applicable standard of proof had been on the lower standard of a balance of probabilities.

10) Recommendations

[266] The result of this hearing is the dismissal of all three disciplinary defaults against the Respondent. Despite this conclusion, section 33 of the *Act* states:

> Where a provincial judge identifies any organizational or administrative practices of a police service which may have caused or contributed to an alleged disciplinary default,

> the provincial judge may recommend appropriate changes to the Chief of Police and to the police board for the police service.
>
> (Emphasis added.)

[267] My assessment of section 33 is that it provides me with a discretion to recommend appropriate changes to any organizational or administrative practices of the WPS that may have caused or contributed to the alleged disciplinary defaults in this case, even in the face of the dismissal of all three allegations.

[268] In this case, the parties focussed their attention on the merits of the proceedings. Neither party made any submission as it relates to recommendations for change.

[269] The circumstances of this case are unusual. While the parties provided numerous first-instance decisions on disciplinary default proceedings under the *Act* to support various arguments, neither party provided a case that was factually similar to this case. That being said, the possibility exists that a similar scenario could play out at a future crime scene.

[270] In this case, various policies of the WPS were filed as an exhibit. I also heard the testimony of the Respondent as it relates to how officers with the WPS review policy changes. Beyond that, there was no evidence presented on how policies are drafted and by whom.

[271] I am mindful that counsel for the Complainant has pointed out various changes in legislation that occurred prior to this incident that the Respondent was not aware of. There was no evidence presented on how and when changes in the law are incorporated into police policies.

[272] I have considered the factual circumstances of this case. I am not persuaded that it would be appropriate for me to make any specific or general recommendations

as a result of this case. However, some general comments (and not recommendations) are appropriate.

[273] As a general matter, WPS policies that refer to legislation or common law principles should be reviewed and updated regularly to account for significant and fundamental changes in the law (statutory or common law) that have an impact on the duties and responsibilities of police officers. When such changes occur, those should be distributed to all police officers for their review at the earliest possible opportunity. Police officers are not lawyers, but they are at the front lines of law enforcement and should be made aware of changes in the law and corresponding changes to the limits of their powers and authority. The distribution of updated policies is an efficient way to provide that information in a timely way, allowing police officers to conduct themselves in a lawful manner at all times.

Original signed by Judge Cellitti

A. Cellitti, P.J.