

IN THE MATTER OF: *The Law Enforcement Review Act*
Complaint #2015/172

AND IN THE MATTER OF: A Hearing pursuant to section 17 of *The Law Enforcement Review Act*, RSM 1987, c. L75

IN THE PROVINCIAL COURT OF MANITOBA

BETWEEN:

| | | |
|--------------|---|--|
| J.S. |) | Robert Tapper Q.C. |
| Complainant, |) | for the Complainant. |
| |) | |
| - and - |) | |
| |) | |
| R.C. |) | Richard Wolson Q.C. and Daniel Wolson |
| Respondent. |) | for the Accused |
| |) | |
| |) | |
| |) | |
| |) | Hearing date: October 18, 19, 20, 2017 |
| |) | Decision date: March 12, 2019 |

NOTE: These Reasons are subject to a ban on publication of the Respondent's name pursuant to s. 13(4.1)(b) of *The Law Enforcement Review Act*, R.S.M. 1987, c. L75.

LERNER, P.J.

[1] On November 13, 2015, J.S., a co-owner of the Green Brier Inn (GBI), a hotel and bar in Winnipeg, filed a *Law Enforcement Review Act* (LERA) complaint against the Respondent, Cst. R.C., a member of the Winnipeg Police Service. The facts will be reviewed in greater detail in the course of this decision, but in summary, the complainant alleges that in the course of Cst. R.C.'s investigation of a sexual assault allegation, and more specifically Cst. R.C.'s attempts to obtain video recordings of an interaction between the alleged victim and a suspect at the

GBI, Cst. R.C. abused his authority in word and deed in the course of his dealings with J.S., as well as J.S.'s hotel manager.

[2] The matter in question was referred to a Provincial Judge for hearing pursuant to the provisions of s. 17(1) of the *Law Enforcement Review Act*, when the matter could not be resolved under s. 15 (informal resolution) or s. 16 (admission of disciplinary default) of the *Act*.

[3] The notice of the alleged disciplinary default alleges

- an abuse of authority on October 21, 2015 by conducting an unreasonable search contrary to section 8 of *The Charter of Rights and Freedoms*;

- an abuse of authority between October 11, 2015 - October 31, 2015, by using oppressive or abusive conduct or language.

[4] However, per the case management conference (CMC) memo provided to me in the ordinary course prior to the trial, the Complainant stated that the complaint drafted by the Commissioner with respect to the *Charter* breach was inaccurate, and that there were no *Charter* breaches alleged.

[5] Rather, the CMC memo indicates that the Complainant alleged that between October 11 - 31, 2015, Cst. R.C. committed disciplinary defaults under s. 29 of the *Act* as follows:

- abusing his authority contrary to subsections 29(a)(iii) and (iv) by using oppressive or abusive conduct or language, and being discourteous and uncivil, both to J.S. and to the desk clerk employed by J.S.;

- abusing his authority contrary to s. 29(a) of the *Act* by threatening to do harm to J.S.'s business.

[6] There was no issue raised at the hearing with respect to the noted revision of the complaint. The nature of the LERA complaint is clear: that Cst. R.C. committed disciplinary defaults through oppressive or abusive conduct or language, and being discourteous and uncivil, both to J.S. and to Ms. V.R., which includes an abuse of authority by threatening to do harm to J.S.'s business.

[7] I also note that although there is no evidence of a desk clerk being the object of discourteous conduct or language, as alleged in the complaint; it was clear throughout the proceedings that the individual referred to, though her position was misdescribed in the complaint, was V.R., the inventory/day manager at the GBI.

[8] The Complainant called a number of witnesses at the hearing.

[9] Ms. V.R. has been a manager at the GBI since 2013. She testified that the main floor of the Inn serves as a pub, and that there are hotel rooms located on the second floor. She testified that there is also a "server room" on the second floor, which contains video footage collected by the video cameras located throughout the establishment; access to the server room is limited to herself, the night manager Scott, and the owners. Ms. V.R. also explained that police attend to the GBI approximately four to five times per week to obtain video footage of events and incidents within the GBI, and that she invariably cooperates with those requests. She stated that she had never asked for a search warrant or production order as a precondition to turning over the requested footage.

[10] Ms. V.R. testified that prior to October 21, 2015, she had seen Cst. R.C. on two or three occasions, and that on all of those occasions Cst. R.C. was easy to talk to. She testified that Cst. R.C. had "asked and asked" for footage of an incident involving a sexual assault. She testified that on his second visit, Cst. R.C. asked for her employer, J.S., one of the owners of the GBI. On the third occasion, Cst. R.C.

attended with a female officer. Ms. V.R. testified that on that occasion, Cst. R.C. told her that he had been attempting to contact J.S., but had not been able to reach him. Ms. V.R. testified that the mood was light, but that within that context Cst. R.C. told her that the police needed the footage, and that if they did not receive it they might have to come back on the hotel's busiest night to obtain it. If uttered as alleged, I find that this was clearly a threat of deliberate business disruption if the footage in question was not produced, and oppressive conduct on the part of Cst. R.C.

[11] Ms. V.R. testified that on October 21, 2015, she was working at the GBI when she was called out from the back. Cst. R.C. had returned, this time alone. Cst. R.C. told her that he wanted to speak to her privately, so she took him upstairs to the hotel's second floor lobby. Ms. V.R. testified that Cst. R.C. told her two or three times that they were not providing the requested evidence. She stated he told her that they could arrest "J." - a reference to her boss, J.S. - for this. Her evidence was that Cst. R.C. said this more than once, and that he was loud and appeared frustrated. She said she felt frightened, that this was her boss and she did not want him to go to jail. Ms. V.R. testified that Cst. R.C. then told her that he wanted to look at the monitors in the server room in order to check the positioning of the cameras in the hotel. Ms. V.R.'s evidence is that she told Cst. R.C. that she did not have access to the server room, but that he said again and again that he was "on an official order". Ms. V.R. said she ultimately relented, testifying that she "felt she had no choice", and allowed Cst. R.C. into the server room. Ms. V.R. stated that once inside the server room, Cst. R.C. told her that he wanted to look at the actual footage of the event in question, which I note was more than he had initially said he wished to do. He then viewed the video footage. Having done so, Cst. R.C. told

her that that's what he wanted to see, and now had proof that the footage was in the possession of GBI, but that "they" did not want to turn it over to police.

[12] Ms. V.R. also testified that having seen the footage, Cst. R.C. then asked for the Complainant's cell phone number, which he then called using the hotel's phone. Ms. V.R. said that J.S. answered the phone, at which point Cst. R.C. "burst out" on his end. She described Cst. R.C. as loud and abusive, and that his voice was "so aggressive, like we were fighting". She testified that she heard Cst. R.C. tell J.S. that he had been looking for him for a long time, and that "I've got you now". She stated that she heard him tell J.S. to ask his (J.S.'s) friends what kind of person Cst. R.C. was, and what Cst. R.C. "could do with [him]". She recalled hearing the name "Andy" spoken by Cst. R.C. in this context. She described the conversation as lasting approximately three to four minutes. Significantly, she testified that she did not hear J.S. speak during the call, and stated that Cst. R.C. spoke for the entirety of the call. Ms. V.R. also testified that she heard Cst. R.C. repeat to J.S. the threat that he had made to her about returning to the GBI on its busiest night, and that they would see how J.S. was able to run his business under those circumstances.

[13] Ms. V.R. was not consistent in a number of respects as between her evidence and her LERA statement, including the number of times Cst. R.C. had attended the GBI prior to October 21, 2015 to obtain the footage in question. In her evidence in chief, she testified that Cst. R.C. had attended the GBI in search of the video footage two to three times prior to October 21st. In cross-examination, when reminded that her LERA statement indicated that Cst. R.C. had attended once prior to the 21st, she testified that he had attended once prior, but then called twice thereafter. However, on further cross-examination, and in response to a suggestion to this effect from counsel for the Respondent, Mr. Wolson, she agreed that Cst.

R.C. had attended twice, and then called twice (the latter in one day) prior to the 21st.

[14] While the number of occasions Cst. R.C. attended and/or called in advance of the 21st is ultimately unclear, what is clear from Ms. V.R.'s evidence is that Cst. R.C. had made repeated unsuccessful attempts to obtain the footage prior to October 21st.

[15] With respect to the allegation that in the course of his attendance on October 21st, Cst. R.C. made a contingent threat to harm J.S.'s business, I note the following exchange:

Mr. Wolson: I'm going to suggest to you that what he said to you when he talked to you privately, that he could send police cars, is that he said 'I come during the day because that's the least busy time in the day for you, for the hotel.

Ms. V.R.: No.

Mr. Wolson: Didn't say that.

Ms. V.R.: it was not in that sense.

Mr. Wolson: Did he make that comment? Did he say 'I've come during the day because it's the least busy time for you in the hotel?

Ms. V.R.: Not in those discussions. It could be a part of it, but he said he can send the cop cars at night, then we will see how you guys will run the business.

Mr. Wolson: I've hear you say that, but I asked you about my other suggestion, and your response was... I didn't hear it. He could have said that?

Ms. V.R.: No. At best of my knowledge, I don't think so he said that.

Mr. Wolson: You don't think he said it. Okay. You don't know whether he said it.

Ms. V.R.: Yeah.

Mr. Wolson: Right.

[16] I find the effect of this exchange, and Ms. V.R.'s evidence, to be that Ms. V.R. does not believe that Cst. R.C. said to her that he came to the GBI during the day because it's the least busy time, but that she could not rule it out completely. More importantly, however, Ms. V.R. clearly did not concede that Cst. R.C.'s threat about coming at night, and the impact on the business, had not been made.

[17] I note in this regard the manner in which counsel's questions were phrased in this portion of the cross-examination. The thrust of counsel's initial question is effectively "could Cst. R.C. have said it in the way that I am proposing, instead of the way you put it?" Ms. V.R.'s response is an emphatic "no", and "not in that sense". The next question from counsel is "did he make that comment? Did he say 'I've come during the day because it's the least busy time for you in the hotel?'" To that Ms. V.R. says that she did not hear it, to the best of her knowledge he did not say it, but concedes that it might have been said. As noted, this is not a concession about the threat not having been made, or that it might not have been made. It is, at its best for the Respondent, a concession by the witness that there may also have been a comment by Cst. R.C. about the benefit of the current timing of his visits, but without abandoning the position that he had also made the threat in question.

[18] In cross-examination, Mr. Wolson also suggested a number of times to Ms. V.R. that in the discussion of October 21st, Cst. R.C. had said to her that if "J.S." did not provide the footage he (Cst. R.C.) could obtain a court order, and that if the order were not followed, J.S. could be arrested. Ms. V.R. rejected the suggestions that Cst. R.C. had mentioned obtaining a court order, and maintained that Cst. R.C. had simply said that "J." could be arrested.

[19] In cross-examination, it was put to Ms. V.R., and conceded by her, that in her statement to a LERA investigator she stated that Cst. R.C. had said to J.S. “you’ve been avoiding me”, that he could arrest him if he “didn’t follow the court order”, and to ask his friends what kind of person he (Cst. R.C.) is.

[20] It’s important to note, however, that the aforementioned exchanges deal with two separate and distinct aspects of the incident: the first refers to what Cst. R.C. said to Ms. V.R. about arresting J.S., the second refers to the LERA statement account of the subsequent exchange between Cst. R.C. and J.S. It is entirely conceivable, and I find, that Cst. R.C. said one thing to her, and then another - referencing a court order - to J.S.

[21] Ms. V.R. was also challenged with respect to a number of other inconsistencies between her evidence and her statement to LERA. She was asked, for example, whether after viewing the video Cst. R.C. told her that “he could make an official complaint about it if [they] did not submit the footage or keep it”. She responded that the wording was “a little different”, and that Cst. R.C. had said “that’s what I want to see”, referring to the video he had just watched, “you guys have this, now I saw the evidence, now I can complain about it.” She specifically rejected the suggestion that Cst. R.C. had told her that they had to keep the footage, and that he could “complain about it” if they did not “submit” the video. She was then shown her statement to LERA, in which she described Cst. R.C. as having included the latter phrase when speaking to her. Ms. V.R. stated that it had been two years since she had provided that statement, but agreed that when she had spoken to LERA, she had told them the truth.

[22] I find confirmation that the threat to arrest J.S. was made to Ms. V.R. by virtue of the very fact that she let Cst. R.C. into the server room. Her evidence was

that no one but staff is allowed in that area. In fact, the evidence at the hearing was that the GBI had someone on retainer who retrieved the tapes for them; the police were not permitted to enter the server room for that purpose. Why then would Ms. V.R. have let Cst. R.C. into the server room? I find the answer is to be found in the evidence of Ms. V.R.: "I was pretty scared. He's my boss, I did not want my boss to be arrested... He said again and again he's on an official order... so I had no choice, I had to let him in".

[23] I would add in this regard that Ms. V.R. presented as anything but a push over. I find that there would have had to have been a significant threat in order for her to have let Cst. R.C. into the server room, as opposed to the quick and easy acquiescence testified to by Cst. R.C.

[24] In cross-examination, Ms. V.R. confirmed her statement to LERA that the comments made by Cst. R.C. to J.S. were: you've been avoiding me, I could arrest you if you don't follow the court order, and you should ask your friends what kind of person I am. Clearly, though, she did not agree that this is everything that was said by Cst. R.C.; she testified that Cst. R.C. repeated his business threat, and she was neither directly challenged nor shaken on this point.

[25] In direct examination, Ms. V.R. testified that when speaking to J.S., Cst. R.C. repeated his threat to the effect that he would send police cars to the GBI on its busiest night, and that they would then see how J.S. would be able to run his business. She was not specifically challenged in cross-examination on this portion of her evidence, but I note that J.S. did not testify to that comment having been made. As noted elsewhere, however, J.S.'s evidence was that he could not hear a lot of what Cst. R.C. was saying.

[26] In summary, I would describe the aforementioned discrepancies as minor in nature, without significant impact on the weight to be ascribed to Ms. V.R.'s evidence. Ms. V.R. was a compelling witness, generally unscathed by the cross-examination of highly skilled and experienced counsel.

[27] I have also concluded that the differences between Ms. V.R.'s evidence and that of J.S. also demonstrate no attempt to dovetail the evidence of one with the other.

[28] I note as well that while Ms. V.R. stood her ground with respect to those aspects of her recollections that she was sure about, she was fair in her concessions with respect to suggestions posed to her, regardless of whether they benefitted the Respondent.

[29] I find that the totality of Ms. V.R.'s evidence supports the conclusion, which I have reached, that Cst. R.C. threatened to send police cars to J.S.'s hotel at night, rather than during the day, effectively as a punishment for what Cst. R.C. perceived to be a lack of cooperation by J.S. and his employees. As described elsewhere in this decision, corroboration for this business-related threat having been made is to be found in its repetition, albeit in a somewhat different form, to Cst. A.T. I also accept that in order to gain entry to the server room, Cst. R.C. told Ms. V.R. that he could arrest J.S., and that this comment was not contingent on a possibility that J.S. would disobey a not-yet-obtained court order at some point in the future. Rather, I find that it is something that Cst. R.C. stated he had the present ability to do, based on the fact that the video in question had not been turned over to him. I find that Cst. R.C. had no basis in law to make this threat.

[30] J.S. also testified.

[31] J.S. conceded in cross-examination that Cst. R.C. may have said to him that if he didn't cooperate, he would get a production order. But when asked if Cst. R.C. also said "if you don't comply with the production order you could be arrested", J.S.'s reply was "He said I'm going to be arrested". When the question was repeated, J.S. replied that Cst. R.C. told him that if he (Cst. R.C.) did not get what he wanted, he would take care of him and was going to arrest him. I draw the inference from this response that J.S. was not agreeing with the suggestion about the contingent threat. However, when his LERA statement was put to him, to the effect that Cst. R.C. had said something about getting a production order, J.S. responded that he did not disagree that "he said I would be arrested if I did not comply with the production order". I find it is unclear whether he is referring to the first or second conversation between them; in the second conversation, recorded by J.S., it is unchallenged that this comment was made. The issue is what was said by Cst. R.C. in the first conversation, which was not recorded.

[32] I find that the concessions that J.S. made in the course of cross-examination about comments Cst. R.C. may have made to him in the first conversation were a function of the fact that, as he testified, he could not hear much of what Cst. R.C. was saying. I do not take his evidence in this regard as amounting to concessions that these things were in fact said. By way of example, although J.S. conceded in cross-examination that Cst. R.C. may have said "if you don't cooperate I'm going to get a production order", it's clear from the context of J.S.'s answers as a whole that he is only conceding the possibility of that occurring, as he could not hear much of that conversation because people were talking over each other. In support of this conclusion, I note that only 15 minutes later, in the recorded conversation between the two, Cst. R.C. does not refer to getting a production order if J.S. doesn't cooperate. Rather, he states that "what I am doing now is consulting my

Sergeant, and we are going to be applying for a production order”. There is no discussion or suggestion about cooperation to avoid a production order. Cst. R.C. has clearly moved beyond that by this point. In his direct examination, Cst. R.C. in fact confirms that at the point he was speaking to J.S., he had already decided to seek a production order, regardless of what J.S. said or did. Cst. R.C. could not, therefore, have made a comment to J.S. about obtaining a production order if he failed to cooperate. J.S.’s concession that this may have been said was clearly a concession as to the possibility thereof, but strictly as a function of his inability to hear much of what Cst. R.C. was saying in that initial conversation.

[33] I also note that while J.S. ultimately conceded, for the reason described above, the possibility of Cst. R.C. having threatened him with arrest for failure to comply with a production order, his initial responses to that suggestion, posed twice in cross-examination, were that “He said I’m going to be arrested”, and in response to the repetition of that suggestion: “He said that if I don’t give him what he wants, he’s going to take care of me and he’s going to arrest me”. In light of the animus toward J.S. demonstrated by Cst. R.C., I have concluded that what was said to J.S. in the first conversation between them was a threat to arrest him simpliciter, as well as a threat to arrest him if Cst. R.C. did not get what he wanted. Although J.S. could not hear much of what R.C. was saying for most of that conversation, I find that he was sure, and accurate, about what he did hear.

[34] I conclude that J.S. was truthful and accurate in his evidence.

[35] The hearing also heard from S.M., a liquor and gaming inspector with the Manitoba Liquor and Gaming Authority for 14 years. Ms. S.M. testified that she knows J.S. as a friend, as well as in the course of her employment. She stated that she met J.S. at a wine festival on April 29, 2016. Cst. R.C., whom Ms. S.M. knew

as an acquaintance, was also present, doing security work in a private capacity. Ms. S.M. testified that she had a conversation with J.S. at the festival for about 10 minutes. She testified that after that conversation ended, Cst. R.C. came over and spoke to her. Ms. S.M. recalls Cst. R.C. asking her if she was still a liquor inspector. Ms. S.M. told him that she was. It was her evidence that Cst. R.C. then stated that the two of them should do a joint inspection of the GBI. In cross-examination, she conceded that Cst. R.C. may have included the words "some day" in that suggestion, but maintained that the suggestion was specific to the GBI. She also testified that Cst. R.C. then stated to her that the GBI licensee (which I find to have been a clear reference to J.S.) was obstructing him or them - she could not remember which - from doing their job. She testified that one or two days later, she had a brief conversation with J.S. about the exchange with Cst. R.C.

[36] In cross-examination, Ms. S.M. agreed that her conversation with Cst. R.C. took place after several hours of wine sampling on her part. She described herself as "coherent", and in compliance with a code of conduct mandating proper behaviour for liquor inspectors in public. Ms. S.M. also agreed that during her conversation with Cst. R.C., a woman was yelling at the crowd to leave. She also confirmed that she had made no notes of the conversation. She agreed that given all of that, she would not recall the conversation with Cst. R.C. verbatim. She was, however, clear and consistent as to the subject matter of the conversation with the Respondent, which was that he made the afore-mentioned comments about J.S., and had stated that they should do a joint inspection of the GBI at some point in the future.

[37] I find no reason to disbelieve the evidence of Ms. S.M., and I accept her evidence.

[38] Cst. A.T., a 24 year Constable with the Winnipeg Police Service, testified at the hearing with respect to a telephone conversation between himself and Cst. R.C. The conversation between Cst. A.T. and Cst. R.C. took place on the day of the above-noted telephone conversation between Cst. R.C. and J.S. Cst. A.T. recorded the conversation: the recording is Exhibit 1; the transcript of the recording is Exhibit A for identification.

[39] In the conversation, Cst. A.T. told Cst. R.C. that he believed he had brought up his (A.T.'s) name in the course of the telephone conversation between Cst. R.C. and J.S., and Cst. A.T. objected to that having been done. Cst. A.T. also attempted to explain J.S.'s position, including that he was a busy man who received multiple requests for videotapes weekly, was generally cooperative with respect to those requests, travelled frequently, was presently in the U.S., and had not necessarily even received the request for the videotape that Cst. A.T. was seeking. He also suggested that by seeking a production order for the video in question, as opposed to continuing to pursue the voluntary cooperation of J.S., Cst. R.C. was going to ruin things for other officers who would need videotape evidence from the GBI in the future.

[40] Of particular significance in the recorded conversation are the following exchanges:

Cst. R.C.: He's the guy that took it to the next step, so in the same token, if he wants to play that same game with us, then realize that next time he's got a whole bunch of Manitoba Warrior assholes in his bar, he's not going to get any fucken play from us, and if he wants a bunch of guys breathing down his fucken neck, then keep going that production route.

Cst. A.T.: That's fine, I mean, if you want to threaten him that way, that's, go right ahead, I really don't care.

Cst. R.C.: That's the reality because he's threatening (inaudible).

Cst. A.T.: (inaudible) that's a straight up threat Rick, and that's bullshit.

Cst. R.C.: And him doing the production order threat is a threat as well.

Cst. A.T.: What threat?

Cst. R.C.: I'm saying that's the, that's the reality of what it is.

[41] The exchanges continue in a similar vein. The thrust of Cst. R.C.'s subsequent comments in this regard is that if there is a call for service police would attend, but that the quality of service would be negatively impacted; to wit:

Cst. R.C.: ...You know damn well what happens to establishments who are not police friendly, cause that's what I'm telling you from officer.

[42] I find that the exchanges above, and elsewhere in the recorded conversation, are a clear threat by Cst. R.C. that police service to J.S.'s establishment would be either delayed or downgraded as a result of what he perceived to be J.S.'s lack of voluntary cooperation with respect to provision of the videotape. This was an escalation from the comments Cst. R.C. is alleged to have made to J.S., and his manager Ms. V.R., with respect to attending to J.S.'s place of business during its busiest hours, which latter comments I find amounted to a threat of interference with the conduct of J.S.'s business. Here, Cst. R.C. was in fact threatening a course of conduct by police that would interfere with J.S.'s ability to conduct business in safety and, potentially, to conduct business at all.

[43] While this threat was made to Cst. A.T. and not to J.S., I find that Cst. R.C. was clearly aware that the two were friends. I conclude that Cst. A.T. would have known that there was a substantial likelihood that this threat would be conveyed to J.S. At the very least, what J.S. was being told, through the medium of his friend Cst. A.T., was that by "compelling" Cst. R.C. to go to the effort of applying for a

production order, he ran the risk, if not the likelihood, of his livelihood being negatively impacted.

[44] I bear in mind that there is undisputed evidence presented at the hearing that no officer could effect what was described as a non-service to a business. I find this unchallenged fact to be beside the point. The overall pith and substance of Cst. R.C.'s comments to Cst. A.T. in this respect was not that there would be an outright denial of service to the GBI, but rather a negative impact on the quality of police service to that business, including response times. Given his comments to Cst. A.T. in this regard ("you know damn well...") quoted above, Cst. R.C. clearly believed this to be a real and viable outcome. I reach this conclusion not simply because Cst. R.C. said so, but because he said this, in both content and tone, in a matter-of-fact, "everybody knows" manner, to a fellow officer, and one with considerable experience. It is clear from the way in which this assertion was presented by Cst. R.C. that he clearly did not expect to be challenged on this point. I note that there was only a mild challenge to this assertion by Cst. A.T. Even were I to conclude that what Cst. R.C. was threatening was a patently unlikely outcome, which, based on the evidence, I do not, there was clearly enough of an air of reality to it, for the reasons I have mentioned, to leave the Complainant with a reasonable concern that it could come to pass.

[45] If nothing else, Cst. R.C.'s comments to the foregoing effect demonstrated him to be an apparently passionate advocate and proponent of this consequence for J.S.; this, in turn, made it a more realistic possibility.

[46] Even if there had been absolutely no possibility that what Cst. R.C. was threatening could come to pass, I find that the mere uttering of this disquieting sentiment by Cst. R.C., coupled with the real possibility that it would be conveyed

to J.S., is sufficient to constitute an abuse of authority, as both oppressive language and conduct, and by constituting a threat to do harm to J.S.'s business.

[47] I also find that the nature and tone of the comments made by Cst. R.C. in the recorded conversation between himself and Cst. A.T. confirms the accuracy of J.S.'s evidence, that of Ms. V.R., and that of Ms. S.M., as to Cst. R.C.'s comments to them. There are several clear themes that run through the evidence of all three: Cst. R.C. is of the very strong opinion that J.S. is being uncooperative with police; he views this conduct as being threatening (read hostile) to police; and he is clearly angered by this. As a result, he feels that police powers should be used, and indeed abused, to punish J.S. The manner by which Cst. R.C. proposes police powers should be used in this respect is as well consistent across the three conversations: that the nature and quality of police attendance, and/or service, at J.S.'s place of business should and would be negatively impacted by J.S.'s purported transgression. Ms. S.M.'s evidence also demonstrates that even as late as April of 2016, Cst. R.C. still considered the way to get at J.S. as being through his business.

[48] It's interesting to note as well that Cst. R.C.'s comments to Ms. S.M. come shortly after Ms. S.M. had spoken to J.S. at the wine festival. Given that Cst. R.C. approaches Ms. S.M. within a very short time after that conversation had ended, and given that he initiates a discussion about a joint inspection of the GBI, it's clear that Cst. R.C. had observed Ms. S.M.'s conversation with J.S. The fact that Cst. R.C. then initiated a conversation with Ms. S.M. to propose a joint police/liquor control inspection of J.S.'s business also leads to the inference that Cst. R.C. wanted J.S. to be aware of his comments. I find that the timing of the comments was more than mere coincidence. I find that Cst. R.C. observed the conversation, concluded that there was an acquaintanceship or friendship between the two, or at least the possibility thereof, and made the comments to Ms. S.M.

with the intent to have those comments relayed to J.S. I conclude that Cst. R.C.'s goal in this regard was to let J.S. know he had not forgotten about their interaction, to let J.S. know that his business was still in potential jeopardy, and to instill fear in J.S. as a result. While Cst. R.C.'s anger may have been inspired by the then extant LERA complaint, rather than the video issue, what is significant is the modus operandi: making comments implicitly threatening J.S.'s business, and doing so through a third party who know J.S., thereby increasing the chances that the comments would find their way to J.S. The fact that this type of comment was also made by Cst. R.C. to Cst. A.T., as demonstrated by Exhibit 1, supports Ms. S.M.'s recollection as to Cst. R.C.'s comments to her, and the fact that this had independently happened with her as well.

[49] In his evidence, Cst. R.C. testified that he said to Ms. S.M. "why don't we do a joint inspection one day", not that they specifically do a joint inspection of the GBI. He testified in direct examination that although police officers have the authority to do an inspection under the *Liquor Control Act*, he had never done one. I find that a general "out of the blue" comment as to a joint inspection would therefore have been rather unlikely. A far more likely comment to have made in this regard was one with specific reference to J.S., as J.S. appears to have been the primary focus of his remarks to Ms. S.M. I find that this comment was even more likely to have been made in regards to J.S. in light of Cst. R.C.'s demonstrated animus towards him.

[50] It was also agreed that in or around October 2015 Cst. R.C. told Sgt. D. that he had seen *Liquor Control Act* (LCA) "issues" at the GBI, and that he was told by Sgt. D. to "return the matter to Superintendent Dennison". This fact does not in my view assist Cst. R.C. That is, despite having been told to leave the LCA issue to a high ranking Winnipeg Police Service officer, months later he is still pursuing

it. As noted, this provides confirmation of the depth and breadth of Cst. R.C.'s animus toward J.S.

[51] As well, Cst. R.C. admitted in cross-examination that he mentioned J.S. by name in a 2016 lecture to junior police officers on the topic of obtaining videos and the use of production orders. Cst. R.C. testified that he had only one example of an instance where the use of a production order was required to obtain a video, and that was the incident involving J.S. and the GBI. Cst. R.C. offered the uniqueness of the incident involving J.S. as the rationale for mentioning his name. I reject this explanation in its entirety. I find that there was only one reason for Cst. R.C. to identify J.S. and the GBI by name in the course of his lecture: to poison the minds of his audience against J.S. and his business.

[52] I also find that Cst. R.C.'s identification of J.S. and the GBI by name when lecturing junior police officers on the topic of production orders and video evidence provides further confirmation of Cst. R.C.'s ongoing animus to J.S., his efforts to "get at" J.S. through his business, and the fact that he had expressed and/or demonstrated the latter sentiments to Ms. V.R., J.S., Cst. A.T., Ms. S.M., and the audience of police officers whom he was lecturing.

[53] In his evidence, Cst. R.C. outlined the multiple efforts he made to contact J.S. to obtain the video. These include:

- October 14 - he left a message with a GBI bartender as to the date and time of video he was inquiring about, his card, along with two blank DVDs.
- He was told by the bartender that the only person who could authorize the provision of the video was J.S.

- October 15 – he contacted GBI staff again. He left a message to have J.S. contact him.
- October 16 – he left a similar message on the GBI business voice-mail.
- October 19 – he called GBI and left a voice-mail for J.S. He also called J.S.'s cell phone (obtained by record checks) on the same date. The person who answered said that J.S. was in the washroom, Cst. R.C. left his contact information with this individual. He did not receive a call back. He called the same number and heard a voice-mail greeting which appeared to be the same voice as had answered his first call to that number.
- October 20 – he attended the GBI and spoke to V.R. He was told by Ms. V.R. that J.S. was not present, but that she would pass along any messages. Cst. R.C. left his contact information, as well as the dates and times of the video that he was requesting. He received no call back.

[54] I accept that Cst. R.C. made the noted efforts to obtain the video, and that they were unsuccessful. I also accept that Cst. R.C. believed, perhaps correctly, that it was J.S. he was speaking to when he was told that J.S. was in the washroom and would call him back.

[55] Cst. R.C. testified, and I accept, that he had never had to resort to a production order to obtain a video, and that he had always received the cooperation of the businesses from whom he sought videos.

[56] I also accept Cst. R.C.'s evidence that he had previously been criticized by a judge for a delay in obtaining a video. I find that that this had, as he testified,

affected him, and thereafter he had attempted to obtain videos in a more timely way.

[57] I also accept that Cst. R.C. was told that the videos he was seeking lasted for approximately a week. He explained the multiple calls that he made to the GBI by saying that he was concerned about the possibility that the videos he was seeking would be overwritten.

[58] I find that Cst. R.C.'s view that this was a time-sensitive and serious matter was accurate. However, I also find that Cst. R.C.'s evidence as to his view of the nature and progress of the investigation provides a strong motive for him to have behaved as alleged by Ms. V.R. and J.S.

[59] Cst. R.C. had continued to invest a significant amount of time in a course of conduct - attempting to secure the voluntary cooperation of the complainant - without any sign of progress in this potentially important area of the investigation. There was the real prospect, supported by the evidence of R.G., a video technician, that the videos could be overwritten. The evidence is that this is in fact what ultimately occurred in this case. The clock was ticking for Cst. R.C. It was only on October 21st, having spent seven days pursuing an unsuccessful, fruitless path, that he turned to the option that arguably could and should have been pursued soon after he concluded that he was not receiving cooperation from J.S.: obtaining a production order. His Sergeant had now directed him to do what he should have done long before. The result, I find, was anger and panic on Cst. R.C.'s part, fuelling his behaviour toward Ms. V.R. and J.S.

[60] Cst. R.C. testified that he attended the GBI on October 21, and that he was allowed access to the video room following a simple request. In his Information to Obtain for the production order, Exhibit 3, para. 12, Cst. R.C. leaves the

impression that this was a voluntary decision by Ms. V.R.: “I learned the following: the video system was on the second floor and she agreed to show me the system”.

[61] In evidence, Cst. R.C. elaborated that he asked to speak to Ms. V.R. in private, she started walking up to the second floor and he followed her. He testified that he told Ms. V.R. that we would be applying for a production order. He advised Ms. V.R. that he would like to see the video to “see that it exists”. He testified that he told Ms. V.R. that “if there was any failure to comply with the demand that I am providing right now, the owner could be arrested at that point”. When asked by his counsel what demand he was referring to, his response was that it was “the demand to produce the production order”.

[62] If in fact these are the words uttered by Cst. R.C. to Ms. V.R., they make no sense. I find that even at the late date of the trial, Cst. R.C. was unable to articulate what demand he was making of Ms. V.R., I find that the reason for this is twofold: firstly, that there was no lawful “demand” for Cst. R.C. to have made in those circumstances. At this stage he did not know whether the video(s) in question existed. He needed to get into the video room to make that determination, and this would have required the permission of the GBI. Until that point, Cst. R.C. was not in a position to proceed further. Even after he had verified the existence of the video, his options were limited to making a preservation demand in written form, followed by an application for a production order. Secondly, I find that Cst. R.C. was struggling to explain his demand of Ms. V.R. because he did not in fact tie his threat to arrest J.S. to any particular event, but simply made a bald threat to arrest him.

[63] Cst. R.C. was asked by his counsel in direct examination whether he had told Ms. V.R. that if J.S. did not give him the video he would arrest J.S. Cst. R.C. replied that he did not. He testified that he had explained the “process of the production order”. He denied having said to her that he just wanted to see the positioning of the camera, the pretext that Ms. V.R. said had been used by R.C. to gain access to the server room. He denied having threatened Ms. V.R. with respect to J.S. He denied having said that “this was an official order”. He said that he was making a demand that the video be saved, and that a failure to do so may result in the owner being arrested. He testified that he told her that he had to ask her to relay that very clearly to the owner.

[64] Interestingly, and notwithstanding having made this clear to Ms. V.R., he then asked Ms. V.R. permission to use the hotel to call J.S. Cst. R.C. explained that he did so to prevent any suggestion that the aforementioned advice was not conveyed to J.S. I note that the agreed facts are that Cst. R.C.’s Sergeant had told him that he could make the preservation demand and provide warnings re non-compliance to either J.S. or Ms. V.R. Based on the instructions and advice of his Sergeant, there was no legitimate reason to have made the call to J.S. I find that he made the call from the hotel in order to better ensure that he would reach J.S. and berate him.

[65] Cst. R.C. testified in cross-examination that when speaking to J.S. on October 21st, he was already committed to obtaining a production order no matter what J.S. said to him at that time. He testified that this was so because he was of the view that if J.S. had given him the video at that point without a production order, he (Cst. R.C.) would have seen that as “me threatening the use of a production order to obtain the video, and that wasn’t right.” But by the same token, his evidence establishes that he clearly felt free to threaten J.S. with arrest on a

contingency basis i.e. what would happen if J.S. didn't comply with the preservation demand and production order. I find that there was no basis for Cst. R.C. to believe that J.S. would not comply with a court order; in fact, J.S. told him the opposite.

[66] Cst. R.C. also testified in cross-examination that he wasn't "mad" at J.S., and that he wasn't angry at him for "insisting on his rights". I note, however, that J.S. never actually insisted on his "rights". He testified, and the recording of their second conversation confirms, that he told Cst. R.C. that he would comply with the request to provide the videos, regardless of whether a production order was obtained.

[67] Further, I find that it is obviously untrue that Cst. R.C. was not angry with J.S., and more specifically that he was not angry at him because he had to obtain a production order; all of the evidence, and in particular his recorded comments to Cst. A.T., suggests the opposite. The rejection of Cst. R.C.'s evidence in this regard results in a further negative credibility finding against him.

[68] Cst. R.C. also testified that he made threatening comments about J.S. in his telephone conversation with Cst. A.T. out of frustration, in response to threats he perceived from Cst. A.T. The threat, he suggests, was that Cst. A.T. was telling him that his conduct with J.S. was ruining his chances to reach his goal of becoming a homicide unit detective. I find that Cst. R.C.'s purported inference was not possible based on the recorded and transcribed comments of Cst. A.T., and that his evidence in this regard was a failed attempt by Cst. R.C. to explain away his obvious anger at J.S., as displayed in the recorded conversation. As well, even were it true that Cst. R.C.'s comments emerged from frustration with Cst. A.T., it makes no sense that he would have expressed his frustration towards J.S. rather

than Cst. A.T. I don't accept Cst. R.C.'s evidence in this regard, which both further impacts his credibility, and provides further confirmation of his animus towards J.S.

[69] With respect to the preservation demand purportedly made by Cst. R.C. to J.S., I note that the *Criminal Code* requires the demand to be in Form 5.001, not in verbal form. The fact that the preservation demand was made verbally by Cst. R.C. likely rendered it of no force or effect, this is further evidence that Cst. R.C. was acting beyond his authority, as well as the fact that he was out of his depth with respect to the process he was pursuing. The foregoing provides further motive for him to have behaved in the aggressive and desperate manner that is alleged against him.

[70] Further, as the *Code* requires that a preservation demand be in written form, Cst. R.C.'s phone call to J.S. was of no value to the investigation. I find that it was simply a pretext by Cst. R.C. to berate and threaten J.S.

[71] As well, I note that section 487.0198 of the *Criminal Code* provides that failure to comply with a preservation demand is a summary proceeding with its own penalty section: the result is not a charge of obstruction of justice as threatened by Cst. R.C. in his recorded phone conversation with J.S. There is no possibility of imprisonment: the only sentence available is a fine. Cst. R.C.'s references to obstruction of justice charges are simply further evidence of being out of his depth with respect to the path that he was belatedly attempting to follow, and also of recklessly inflating the seriousness of the consequences of failure to comply.

[72] Further, there is no evidence that Cst. R.C. was told by Sgt. D. to threaten J.S. with a charge of obstruction of justice: he was simply told to warn J.S. that he

could be arrested if he failed to comply. While this might be considered an innocent mistake in a different context, I find in the circumstances that it was part of Cst. R.C.'s abusive conduct toward J.S.

[73] I accept that Cst. R.C. said to J.S. "I'm in your personal server room. What are you going to do about?" and laughed. While those words were not confirmed by Ms. V.R. (in the sense that they were not included in her evidence, not in the sense that they were denied), I find that her evidence is very much along the same lines: when J.S. answered, R.C. "burst out" on the phone, he was "so loud, a voice like fighting, so aggressive, he was abusing, he said 'I've got you now!' I've been looking for you for a long time, now I've got you". I find that this confirms Cst. R.C.'s anger, and the fact that he was taking this matter personally.

[74] I do not expect the words reported by J.S. and Ms. V.R. to line up precisely, or that each would remember exactly what was said by Cst R.C. Significantly, however, each of them confirms the tone and emotional nature of Cst. R.C.'s comments, as well as the fact that J.S. could not get a word in edge-wise. I also find that the words/sentiment "I've been looking for you a long time, I've got you now" provides corroboration for J.S.'s evidence that at the outset of the conversation Cst. R.C. stated "I'm in your personal server room, what are you going to do it". While the words may not be the same, the gloating and mocking sentiment very much is.

[75] In conclusion, I find that Cst. R.C. threatened the arrest of J.S., both to Ms. V.R. and to J.S. himself at a point where there was no basis in fact or law to arrest J.S. or to threaten to do so. This was oppressive and abusive conduct, and amounts to an abuse of authority.

[76] I find that the above-noted threats were made by Cst. R.C. not simply out of anger and frustration, but in the case of Ms. V.R., in order to coerce her into providing access to the private server room of the GBI. This too was oppressive conduct, and amounted to an abuse of the officer's authority.

[77] I also find that the language used by Cst. R.C. to Ms. V.R. and to J.S. as described in the evidence of both, was uncivil and discourteous, and amounted to an abuse of authority.

[78] Finally, I also find that Cst. R.C. repeatedly threatened to do harm to the business of Mr. J.S., and that this too amounted to an abuse of his authority.

"original signed by:"

LERNER, P.J.