

WARNING

The court hearing this matter directs that the following notice be attached to the file:

A non-publication and non-broadcast order in this proceeding was issued by The Honourable Madam Justice S. McPherson on January 11th, 2021 in the trial of Stephen Fisher held in Orangeville (January 11 – 15, 2021) pursuant to Section 136 *Courts of Justice Act*,

136 (1) Subject to subsections (2) and (3), no person shall,

(a) take or attempt to take a photograph, motion picture, audio recording or other record capable of producing visual or aural representations by electronic means or otherwise,

(i) at a court hearing,

(ii) of any person entering or leaving the room in which a court hearing is to be or has been convened, or

(iii) of any person in the building in which a court hearing is to be or has been convened where there is reasonable ground for believing that the person is there for the purpose of attending or leaving the hearing;

(b) publish, broadcast, reproduce or otherwise disseminate a photograph, motion picture, audio recording or record taken in contravention of clause (a); or

(c) broadcast or reproduce an audio recording made as described in clause (2) (b). R.S.O. 1990, c. C.43, s. 136 (1).

Offence

(4) Every person who contravenes this section is guilty of an offence and on conviction is liable to a fine of not more than \$25,000 or to imprisonment for a term of not more than six months, or to both. R.S.O. 1990, c. C.43, s. 136 (3, 4).

A Common Law publication ban is also issued in relation to the specific details about persons mentioned in the recording that was subject to the trial pursuant to Supreme Court of Canada case *R. v Mentuck*, [2001] SCC 76 reported at [2001] 3 S.C.R. 442.

ONTARIO COURT OF JUSTICE

DATE: 2021 February 11
COURT FILE No.: Orangeville 0611 998 18 1523

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

STEPHEN FISHER

Before Justice S. McPherson
Heard on January 11-15, 2021
Reasons for Judgment released on February 11, 2021

Ms. K. Beaudoincounsel for the Crown
Ms. P. Machado Counsel for the defendant Stephen Fisher

McPHERSON J.:

OVERVIEW:

[1] Police Constable (P.C) Stephen Fisher was employed as a police officer with the Orangeville Police Service (O.P.S.) on June 16th, 2018. P.C. Fisher was on duty that day. Shortly after completing an interview with a witness in the “soft interview room” at the Orangeville police station, P.C. Fisher attended the video monitoring room to make a copy of that video. While doing so, P.C. Fisher observed a still shot of a video of Acting Staff Sergeant (S/Sgt.) Dave McLagan and P.C. Andy May on the monitoring screen.

[2] P.C. Fisher played several minutes of that nearly 40-minute video. What he witnessed was a troubling conversation between S/Sgt. McLagan and P.C. May. In the few minutes that he watched, P.C. Fisher heard about an officer padding hours in addition to derogatory comments about Special Constable (S/Cst.) Rick Stevens, a peace officer who was also employed by O.P.S. as a court officer.

NOTE: This judgment is under a publication ban described in the WARNING page(s) at the start of this document. If the WARNING page(s) is (are) missing, please contact the court office.

[3] P.C. Fisher downloaded a copy of that video onto a personal USB that he used for work purposes. P.C. Fisher, armed with a copy of that conversation, advised S/Cst. Stevens that he had something that S/Cst. Stevens may be interested in. P.C. Fisher attended S/Cst. Stevens' home on June 18, 2018 in a police cruiser and in his O.P.S. police uniform. P.C. Fisher provided S/Cst. Stevens with the USB containing the video. P.C. Fisher stood by while S/Cst. Stevens, and his wife, downloaded the video onto S/Cst. Stevens' computer.

[4] P.C. Fisher was aware that S/Cst. Stevens had a harassment complaint against P.C. May. P.C. Fisher was also aware of his legislated duty to report harassment and violence in the workplace as mandated by both an O.P.S. policy and the corresponding provincial legislation.

[5] Sometime late summer or early fall of 2018, senior members of O.P.S. became aware of the recording and of P.C. Fisher's involvement in taking and providing the recording to S/Cst. Stevens. As a result, O.P.S. asked the Ontario Provincial Police (O.P.P.) to investigate the incident.

[6] Ultimately, this set of events led to P.C. Fisher being served a notice of misconduct under the *Police Service Act* (PSA). He was also charged criminally with disseminating a private communication contrary to s. 193(1) of the *Criminal Code of Canada* and for breach of trust for disclosing a private communication contrary to s. 122 of the *Criminal Code of Canada*.

[7] P.C. Fisher's criminal trial commenced on January 11, 2021 and finished on January 15th, 2021. At the start of the trial, P.C. Fisher pled not guilty to both offences.

[8] The Crown elected to proceed by indictment on both counts. Despite a defence election to be tried in the Ontario Court of Justice, the counts are absolute jurisdiction offences.

[9] The Crown called four witness in pursuit of a conviction for these offences. Each witness was a peace officer with the O.P.S. at the time of the alleged offences. The witnesses include S./Sgt. Dave McLagan, P.C. Andy May, S/Cst. Rick Stevens, and Sgt. Phillips.

[10] As is his right, P.C. Fisher elected to give evidence in his own defence. Of course, he was not required to do so.

[11] The defence also called P.C. Giovanetti, the former O.P.S. Association president.

[12] In addition to the *viva voce* evidence, I have considered the agreed statements of fact and the 12 exhibits filed. Any failure to refer to any portion of the evidence, the cases or any submission, is not a reflection that it has been missed.

[13] On January 15, 2021, I acquitted P.C. Fisher of both counts as alleged. These are my reasons for finding him not guilty.

GENERAL LEGAL PRINCIPLES

[14] Clearly, the burden or onus of proving the guilt of any accused person charged with a criminal offence rests upon the Crown. That burden never shifts.

[15] A defendant is presumed innocent until the Crown establishes each element of each offence beyond a reasonable doubt.

[16] As a standard, reasonable doubt does not require proof beyond all doubt, nor is it proof to an absolute certainty. At the same time, reasonable doubt lies far closer to absolute certainty than it does to a balance of probabilities.

[17] Reasonable doubt cannot be based on sympathy or prejudice but must be founded in reason and common sense, and be logically connected to the evidence or the absence of evidence.

[18] In evaluating the evidence, a court must consider both the credibility and reliability of each witness. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately observe, recall and recount events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence.

[19] In assessing credibility, it is important to remember that the fact that one witness has the status of an accused person and the other that of a complainant or observer, is irrelevant to the assessment of credibility. All witnesses are entitled to be heard free of any preconception.

[20] Even though credibility and reliability are crucial to the issue here, a criminal trial is not a credibility contest. Because of the presumption of innocence, when confronted with contradictory versions, a judge does not have to decide which of the versions is true. Nor would it be appropriate to decide solely on the basis of which version is preferred.

[21] The question at that end of the day is always whether the evidence as a whole raises a reasonable doubt, or to put it another way, whether it satisfies the court beyond a reasonable doubt as to the guilt of P.C. Fisher. In considering this question, I am guided by the principles articulated by the Supreme Court of Canada in *R. v. W.(D)*., [1991] 1 S.C.R. 742.

[22] Those principles instruct that if the accused's account of what happened is believed, he will be acquitted. Even if the accused is not believed, he is entitled to be acquitted if his testimony is not rejected and together with any other evidence in the case leaves a reasonable doubt as to his guilt.

[23] Further, even if his testimony is rejected, he is still not necessarily convicted. Rejection of the accused's evidence does not alter the burden of proof nor does it bolster the Crown's case in most instances. The burden is still on the Crown to prove beyond a

reasonable doubt on the basis of all unrejected evidence that P.C. Fisher is guilty of the offences charged.

[24] I have attempted to assess all the evidence in this case in accordance with these principles.

THE UNCONTROVERTED EVIDENCE

[25] S/Sgt. McLagan and P.C. May were working at the O.P.S. police station on June 15th, 2018.

[26] The two had a 40-minute long conversation in the 'soft interview room' that was automatically (without any human action) captured on audio and video recording.

[27] The subject matter of the conversation between the two men involved sensitive and derogatory content related to several other members of the O.P.S.. One of the persons discussed in the recording was O.P.S. S/Cst. Rick Stevens. The portion of the video relating to S/Cst. Rick Stevens runs from minute 6:55 until minute 10:59 on the recording.

[28] Both S/Sgt. McLagan and P.C. May testified about their subjective belief that the conversation was private.

[29] The 'soft interview room' was constructed to take statements of vulnerable witnesses. The room was constructed to record automatically via motion activation.

[30] There were some technical issues with that room throughout the spring and summer of 2018 that resulted in a series of emails advising members of the O.P.S. that the safest route to ensure a proper recording was to always manually record an interview.

[31] As with all recordings captured in the 'soft interview room', the recording of this conversation was automatically downloaded to the computer in the 'monitor room' where it remained until it was seen by P.C. Fisher on June 16th, 2018.

[32] S/Sgt. McLagan was heavily involved in the creation of the 'soft interview room' which was designed to record on motion. It was his responsibility to communicate technical issues to other members of the O.P.S. surrounding that room in the spring and summer of 2018.

[33] There were signs posted throughout the police station advising patrons and employees alike that the building was under video and audio recording. In addition to the station at large, there was a sign on the door to the 'soft interview room' advising the same. There was another sign inside that room.

[34] P.C. May was the supervisor of S/Cst. Stevens as well as the spouse of Deputy Chief of Police (D.C) Leah Gilfoy. P.C. May and his wife were personal friends with O.P.S. Chief of Police (Chief) Kalinski.

[35] S/Sgt. McLagan's direct supervisor was D.C. Gilfoy, the spouse of P.C. May.

[36] S/Cst. Stevens, P.C. Fisher, and P.C. Giovanetti had, at one time or the other, individual harassment complaints against P.C. May.

[37] The O.P.S. created a policy on harassment and violence in the workplace that mirrored provincial legislation. The policy mandated a duty to report harassment and violence in the workplace on all of its employees.

[38] Having set out the uncontroverted facts, I will turn now to the evidence of the individual witnesses that relate to the issues before this court. I will also assess credibility and reliability that flows from that evidence.

[39] Despite the allegations of harassment and toxicity within the Orangeville Police Service, this court must remain focused on the purpose of this trial. This trial is solely about whether the Crown has established P.C. Fisher's guilt beyond a reasonable doubt on the counts alleged. Accordingly, I will not address the evidence surrounding the O.P.S. as a workplace unless it impacts on the credibility or reliability of a witness or becomes critical to an issue on the criminal trial of P.C. Fisher.

Staff Sergeant Dave McLagan

[40] S/Sgt. McLagan was in charge of communications and records. He played a key role in setting up the 'soft interview room'. He was intimately aware of and responsible for communicating the issues that arose with the technology in that room. He explained that the room was constructed to automatically record interactions in that space on motion sensor.

[41] S/Sgt. McLagan outlined that the 'soft interview room' was located in the police station. It was not directly accessible to the general public unless with police escort but all police officers and O.P.S. staff had access to the room. The room was equipped with video and audio equipment including a camera and a microphone that was activated to start recording upon motion.

[42] S/Sgt. McLagan explained that just like their 'hard interview room', the 'soft interview room' was motion activated in order to preserve space on the hard drive such that it would record only when there was activity.

[43] Once a recording is made, it is automatically downloaded to the monitor room computer where it is kept on a server accessible to any police officer for a period of 7-10 days. The monitor room computer is located in the cell area and required a generic access code that is posted on the wall next to the computer that holds the recordings. In every case, the expectation is that an investigating officer will download their own video for disclosure purposes.

[44] There is no question that there were a number of issues with the 'soft interview room' including the location of the microphone, audio distortion, and failures in detecting motion. These issues resulted in S/Sgt. McLagan and others notifying O.P.S. members of the potential shortcomings and concerns via email.

[45] S/Sgt. McLagan testified that he was doing his morning rounds on June 15th, 2018 at the Orangeville police station when he came across P.C. May in the 'soft interview room'. S/Sgt. McLagan was aware that P.C. May often used that room as an office. In fact, in addition to the interview area, the room was also equipped with a desk and a police computer.

[46] S/Sgt. McLagan acknowledged that during the first parts of the conversation that was recorded, the door was opened. However, after a few minutes P.C. May got up and closed the door. That action signalled to S/Sgt. McLagan that Cst. May wished to have a private conversation.

[47] When asked, S/Sgt. McLagan characterized the conversation as a discussion that was operational in nature which then turned to private personnel matters. He testified that they were return to work conversations in relation to two individuals and then performance related comments about other individuals within the O.P.S.. In cross-examination, he fairly acknowledged that he was not in a supervisory role over the subjects discussed in the recording.

[48] S/Sgt. McLagan acknowledged that he was familiar with the workplace violence and harassment policy and that it was meant to mirror provincial legislation to stop workplace violence and harassment. In fact, he had had to deal with staff on issues covered by that mandate.

[49] He understood that the policy mandated a reporting obligation to a supervisor and that obligation extended to wherever that conduct arose both at and outside of the police station.

[50] S/Sgt. McLagan initially testified that this was a conversation between supervisors about the return to work and thus not harassment. After further consideration, he explained that because the definition is broad, the contents of the recording could have been reportable conduct under the workplace harassment policy but he would argue against that point. Finally, he accepted that the conversation violated the policy. He did not report his conduct or that of P.C. May. He did not face any discipline for that failing.

[51] S/Sgt. McLagan explained that he did not believe that the automatic recording function was working at the time he had this conversation. He also acknowledged that had he planned that conversation he would not have had it in the 'soft interview room'. At no point did he consent to having the conversation recorded or disseminated.

[52] S/Sgt. McLagan believed he was having a private conversation but acknowledged in court, and to the O.P.P investigator, that he should have assumed he was being recorded. He clarified that what he meant by that was by the nature of the fact that the room was audio and video recorded, he should have assumed it was functioning at the time.

[53] In addition to knowing there was a camera and microphone in that room prior to the conversation, S/Sgt. McLagan candidly admitted that at the time, there was a sign on the door and inside that room advising that the room was video and audio recorded.

Similar signs were posted in the 'hard interview room' and in the cellblock. He was well familiar with the automated nature of those systems.

[54] After finding out about the incident, S/Sgt. McLagan felt anger and embarrassment from this incident. He was approached by P.C. Giovanetti and S/Cst. Stevens and felt that they had productive conversations about that recording. He also told them both that capturing the recording was a criminal offence.

[55] After learning about the incident, S/Sgt. McLagan was asked to gather information related to this incident by D.C. Gilfoy, P.C. May's spouse, including retrieving hallway or cell video. S/Sgt. McLagan could not remember if the surveillance video captured other persons in the hallway. Interestingly, despite his own feelings related to privacy, he did not obtain the consent of anyone captured on the video including P.C. May before disseminating that video to D.C. Gilfoy. He explained that obtaining consent was not their practice.

[56] I found S/Sgt. McLagan to be both a credible and reliable witness. I found him to be exceptionally fair in detailing the workings of the 'soft interview room' including the technological issues and the communication surrounding that room; in setting out his feelings about the recording; and in his perception of the nature of the recorded conversation. While it took S/Sgt. McLagan some time to acknowledge that the conversation may have violated the workplace harassment policy, I find that was as a result of him thoughtfully and honestly contemplating the circumstances surrounding the conversation and not because he was trying to mislead or minimize the troubling aspects of the conversation.

Police Constable Andy May

[57] P.C. May is a retired police constable with 42-years of police experience: first with the Toronto Police Service (T.P.S.) and then with the O.P.S.. By nearly all accounts, including his own, P.C. May's interpersonal relationships repeatedly led him into conflict with others. In his own words, people either loved him or hated him.

[58] In June 2018, P.C. May was working as a police constable with O.P.S.. Despite that rank, he was positioned as a supervisor of special constables working out of the Orangeville courthouse including S/Cst. Rick Stevens.

[59] While P.C. May had an office at the courthouse, he began and ended each day at the O.P.S. police station in the 'soft interview room'. In fact, for two years he utilized the 'soft interview room' each morning before attending court. He used the room to check emails and to review the previous days' time sheets.

[60] At minute 6:45 of the recording, P.C. May is seen to shut the opened door in the 'soft interview room'. He explained that he did so because the conversation was moving towards an employee and he wanted some privacy.

[61] P.C. May described the tenor of the conversation as one where he was being himself, as he would normally be in a closed-door meeting.

[62] When he found out about the recording, P.C. May felt anger and shock. He felt anger because he knew that in order to record something, a person would have to had to do something to physically obtain that recording. P.C. May offered an opinion that police officers should know better. He likened the privacy attached to his discussion with his colleague to the privacy that attaches to discussions between a lawyer and client.

[63] P.C. May testified that at no time did he consent to the recording being made or being disclosed.

[64] At best, I place very little weight on the evidence of P.C. May. I find that he was neither a credible nor a reliable witness. The deficiencies in his evidence can either be attributed to him being a revisionist historian or to him being retaliatory. I basis this conclusion on the following portions of his evidence:

(1) P.C. May testified that he had assumed that the 'soft interview room' required deliberate action of setting the recording. This was based on his knowledge that that is how the 'hard interview room' worked. The evidence in this case is clear – the 'soft interview room' was modeled after the 'hard interview room' and cell video to record upon motion.

(2) When asked if he was aware of the technological issues with the 'soft interview room' he answered with a very decisive "No". He maintained that position throughout cross-examination until he was confronted with the inescapable proof that he was aware of the issues. Ms. Machado confronted P.C. May with an email where P.C. May responded to the email that set out the issues with the room. P.C. May then explained that while he had received those emails, he did not put much weight on them because he did not work at the main station. This despite his earlier evidence that he worked there every morning and every afternoon.

(3) When asked to describe the conversation captured by the automatic recording, he explained that it is generally private but casual. Specifically, he described it as being in relation to S/Cst. Rick Stevens and in relation to getting him back to full duties. From my review of the conversation, this is not an accurate recount. This makes him either unreliable in his memory or incredible in his spin on the purpose and nature of the belittling conversation that P.C. May engaged in.

(4) When asked if he was mocking S/Cst. Stevens' view that he was overworked, P.C. May testified that that was not how he interpreted the video. When asked if he laughed at S/Cst. Stevens for feeling he was overworked, he denied laughing at him. P.C. May's evidence on this point, is another example of his inability to give credible and reliable evidence. It is abundantly clear from the video that he is both mocking and laughing at S/Cst. Stevens' concerns about workload.

(5) In describing his relationship with S/Cst. Stevens, P.C. May portrayed a great working relationship with a minor hiccup related to

entrances at the courthouse. In painting that picture, P.C. May misled the court by failing to accurately provide the history between the two. In fact, P.C. May failed to disclose the fact that he received a notice of conduct in relation to an allegation of harassment under the O.P.S. harassment policy. He explained that the complaint was withdrawn and that minor complaints get dealt with that way.

(6) When asked if the recorded conversation constituted harassment under the O.P.S. policy, the best P.C. May could do was acknowledge that it was inappropriate but then pull back from that view by advising that the O.P.P. investigator found that nothing was wrong. His shifting view on nature of the conversation on its own may not have been problematic but together with the other concerns enhances his unreliability.

(7) With great difficulty, P.C. May acknowledged that if he had come across the video (as per policy), he would have to report the conversation. However, he could not maintain that position when he was asked about whether P.C. Fisher had that same duty to report the recording. To that suggestion, P.C. May responded that the conversation was private and that the P.C. Fisher's duty to report depended on how he obtained that recording. Again, it would appear that P.C. May's disdain for P.C. Fisher prevented him from answering questions dispassionately and objectively. I find that P.C. May's failure to appreciate that his own duty to report would mirror P.C. Fisher's duty to report highlighted P.C. May's reliability issues.

(8) When asked if he made notes about the "personnel" issues that were being discussed with S/Sgt. McLagan in the recording, P.C. May laughed and said no not when he was just bringing him up to speed. I find that the discussion captured does not reflect a discussion about "personnel" as portrayed by P.C. May. I find that it was a slagging of others by one co-worker to another. P.C. May's distortion about the discussion being in relation to "personnel issues" causes reliability concerns to the extent that it interferes with P.C. May's ability to accurately and fully set out the nature of the interaction.

(9) In explaining the contents of the recording, P.C. May did his level best to minimize the derogatory aspects of the recording. He denied belittling a co-worker, he minimized speaking casually about a colleague who presented with suicide issues, he distanced himself from comments made by either forgetting the context or attributing the narrative of the conversation to others. These are true reflections of both an incredible and unreliable witness who is motivated to distance himself from the conduct.

Special Constable Rick Stevens

[65] Mr. Rick Stevens worked with the O.P.S. for over 20 years before the O.P.S. was subsumed by the O.P.P. In the summer of 2018, he worked at the Orangeville courthouse

as a special constable and was supervised by P.C. May. He no longer works with the O.P.S. or with the O.P.P. for that matter.

[66] In May of 2018, S/Cst. Stevens had made a complaint about P.C. May to S/Sgt. White. S/Cst. Stevens did not feel that that complaint was properly addressed.

[67] On June 18, 2018, S/Cst. Stevens received a USB from P.C. Fisher. P.C. Fisher attended S/Cst. Stevens' home in uniform and provided a USB with the recording to S/Cst. Stevens. S/Cst. Stevens' wife assisted by downloading the recording onto S/Cst. Stevens' personal computer. He does not recall what P.C. Fisher said to him at that time

[68] Ultimately, S/Cst. Stevens and his wife watched the video. After sitting on the video for a couple of weeks, S/Cst. Stevens disclosed it to S/Sgt. White and to Ms. Cathy Moran, the Human Resource Manager for the Town of Orangeville. He did not tell them where the video came from. S/Cst. Stevens had also shown the video to the O.P.S. police association president, Doug Fry and to P.C. Giovanetti. S/Cst. Stevens was never charged with any offence in relation to disseminating that recording.

[69] S/Cst. Stevens described P.C. May as a bully and an antagonist. He explained to the court that P.C. May tasked him, a special constable, with monitoring P.C. Fisher's movements while P.C. Fisher was assigned to the courthouse.

[70] S/Cst. Stevens testified that he withdrew his harassment complaint against P.C. May as it related to the recording because he felt that his job was at risk. He felt this as a result of a direct conversation he had with Chief Kalinski in November 2018. As a result of that conversation, S/Cst. Stevens truly felt that there was no one he could trust with his complaint.

[71] S/Cst. Stevens testified that as a special constable he had access to the 'soft interview room'. He explained that that room was always unlocked. In fact, after his return to work, his superiors assigned him to do his work out of that office. He knew that the room was recorded. There were signs posted about that room being recorded and signs posted throughout the building about audio and video recordings.

[72] I found Mr. Stevens evidence to be both reliable and credible. There is nothing in substance or manner that caused me any concern about his evidence.

Sergeant Steven Phillips

[73] Sgt. Phillips has been a police officer for 28 years. He is currently employed as a Sergeant with the O.P.P. He had held the same rank with the O.P.S. before the costing.

[74] Sgt. Phillips was P.C. Fisher's direct supervisor during the summer of 2018. They had a good working relationship. P.C. Fisher texted Sgt. Phillips on August 21, 2018 that he had been served a P.S.A. Notice of Misconduct by S/Sgt. White.

[75] Sgt. Phillips testified that P.C. Fisher came to his home on August 30, 2018. P.C. Fisher advised Sgt. Phillips about the conversation that he had observed while burning a

DVD. Sgt. Phillips did not see the recording. He was unaware if P.C. Fisher made a copy of the recording or just advised S/Cst. Stevens about it. At the time he heard about it, he did not think it was anything criminal. He just advised P.C. Fisher to be honest when dealing with the investigators.

[76] Despite learning about the derogatory conversation from P.C. Fisher, Sgt. Phillips did not report the conversation. He described the conundrum that both he and P.C. Fisher faced as being uncomfortable. In clarifying what he meant, Sgt. Phillips detailed that one of the parties to the conversation was S/Sgt. McLagan, his direct supervisor, and the other was married to the Deputy Chief and was good friends with the Chief of Police. Furthermore, Sgt. Phillips noted that the third person in the chain of command was S/Sgt. White, the very person who served P.C. Fisher with the Notice of Conduct.

[77] Sgt. Phillips' point was that there were just so many conflicts to navigate. In the end, he spoke with P.C. Fisher about who they could talk to as he was trying to do his best for P.C. Fisher at the time.

[78] Sgt. Phillips testified that there were cameras throughout the Orangeville Police Station. In relation to the 'soft interview room', Sgt. Phillips testified that he was always aware that it was a recorded room. In fact, it was his evidence that it was common knowledge that that room was recorded. He was not sure if it was common knowledge that there were issues with the recording but he testified that whenever he went past the 'soft interview room' he would shut the door because he knew it was an automatically recorded room. His concern was that because people were always joking around, the joking around might be automatically captured by the recording.

[79] As for the 'monitor room', Sgt. Phillips testified that all officers had access to that room. Sgt. Phillips acknowledged telling the O.P.P. investigators that their questions about the monitor room were "Dave questions". He explained in court that what he meant by that is that S/Sgt. McLagan was well versed in technology and would know exactly how the cameras worked.

[80] Sgt. Phillips was aware of the workplace harassment policy that imposed a duty to report harassment. He believed that such a complaint should be run up the chain of command. He acknowledges that for him that would have been to S/Sgt. McLagan and that that would have been extremely difficult.

[81] I found Sgt. Phillips to be an honest, direct and careful witness. There was nothing about his evidence or the manner in which he provided it that caused this court any reliability or credibility concerns.

Police Constable James Giovanetti

[82] P.C. Giovanetti testified about the difficulties he had with P.C. May during the course of his work as the O.P.S. association president. He also testified that he was a subject that was discussed in the recording. He received a copy of the recording from S/Cst. Stevens. He did not report the incident because he felt nothing good would come from it.

[83] I found that P.C. Giovanetti's evidence was of negligible value to the issues that must be determined in this case. As I have already indicated, the O.P.S. is not on trial in relation to allegations of harassment in the workplace. This trial is about whether or not P.C. Fisher disclosed a private communication and/or whether he criminally breached the trust in so doing.

Police Constable Stephen Fisher

[84] P.C. Fisher has been a police officer for 15 years. First, with York Regional Police (Y.R.P.) and then with the O.P.S. as of 2008.

[85] During his time with O.P.S., he filed three complaints under the O.P.S. workplace harassment policy. Two of the complaints were against P.C. May and the third against an off-duty officer who attended the police station and had to be restrained.

[86] P.C. Fisher and P.C. May had a tumultuous relationship. Despite sharing a rank, P.C. May supervised P.C. Fisher when he was placed for duty at the Orangeville courthouse. P.C. Fisher testified that P.C. May once left two pages of instructions for him outlining what P.C. Fisher could and could not do at the workplace. One of the instructions prevented him from attending the areas that officers socialized in while at the courthouse. The other outlined that the special constables would have supervisory powers over P.C. Fisher when P.C. May was not present.

[87] P.C. Fisher testified that the 'soft interview room' was created to meet the needs of victims and witnesses required to give statements of evidence. P.C. Fisher acknowledged that the room was also used as an office as well. P.C. Fisher testified that the audio and video recording was automatically engaged by motion.

[88] P.C. Fisher testified that there were signs on the 'soft interview room' door and on the wall inside the room advising of the recording. He also explained that the microphone was not clearly visible but that it was in clear sight. The camera was in clear sight as well.

[89] P.C. Fisher understood that the room was set up for automatic recording. He was aware in late spring and summer of 2018 that there were some issues with sensitivities because the room was not soundproof. He explained that the speaker system from hallway could be heard in the interview room. Furthermore, if those in the 'soft interview room' were speaking but not moving, the recording had been known to stop recording. He was also aware that the police statements would often be broken down into a number of smaller recordings for the same reason. He advised that officers were notified about these issues. He also testified that there was an email stuck to the door reminding officers that the best practice was to press the record button to ensure complete recording.

[90] P.C. Fisher testified that he became aware of the recording the day after the conversation between S/Sgt. McLagan and P.C. May took place. On that day, P.C. Fisher was conducting an interview with a witness. In order to ensure the recording was activated, he attended the monitor room. He found the computer in playback mode. P.C. May and S/Sgt. McLagan were visible on the screen. Seeing that image, he switched the computer to recording mode in preparation for his interview. He took his statement and

then returned to the monitor room and pressed playback on the computer. That action resulted in the video of S/Sgt. McLagan and P.C. May coming onto the screen. P.C. Fisher testified that he pressed play and listened to approximately 2-3 minutes of their conversation.

[91] P.C. Fisher testified that to his knowledge there was nothing preventing him from watching that video. He based that position on the fact that there was no security preventing the recording from being played and no special log in required. In fact, he indicated that the log in details for the monitor equipment was stuck on the wall for anyone in the room to see as well as a warning that anything that happened in that room was audio and video recorded.

[92] P.C. Fisher testified that the portion of the video that he saw captured the parties mocking and belittling S/Cst. Rick Stevens for his work accommodation. P.C. Fisher felt disgust that those two individuals were supervisors and were speaking about S/Cst. Rick Stevens who had been injured by an inmate in the course of his work. P.C. Fisher testified that he knew what he observed was workplace harassment. He believed that he had a duty to report the incident and to ensure that the O.P.S. was a safe environment for everyone to work in.

[93] P.C. Fisher testified that he was uncertain about what to do but he knew he had limited time to preserve the recording since it would only be held for 7-10 days. As a result, he copied the existing recording onto his USB drive that he used for work. He then took some time contemplating what to do with it.

[94] P.C. Fisher felt that if he reported the recording to Sgt. Phillips, his direct supervisor, that he would do the right thing. However, he was concerned because S/Sgt. McLagan was Sgt./ Phillips direct supervisor. He was also bothered by the fact that P.C. May was married to the Deputy Chief. P.C. Fisher had no confidence they would report it and actually felt that the video would disappear.

[95] P.C. Fisher was aware of the complaint that S/Cst. Stevens had against P.C. May. After some thought he reached out to him. He advised S/Cst. Stevens that he had something that would be beneficial to that complaint. P.C. Fisher ultimately met with S/Cst. Rick Stevens at his home on June 18, 2018 and provided him with the video.

[96] At the time that P.C. Fisher attended S/Cst. Stevens' home he was on duty, in uniform and operating a cruiser. P.C. Fisher was present when S/Cst. Stevens' wife assisted him in copying the file onto his personal laptop. S/Cst. Stevens returned the USB to P.C. Fisher who then deleted it from that device.

[97] When P.C. Fisher was asked if he believed that the conversation was private, he testified that he did not. He explained that it was common knowledge that that room was recorded, and all of the station was recorded. His view was that there was no reasonable expectation of privacy at the station except in the change rooms and maybe in the Chief's office. With respect to the 'soft interview room', he highlighted that there were signs in the room and on the door alerting people about the room being recorded. He also had

knowledge that other people had complained about working in the room because they were uncomfortable being monitored all the time.

[98] In the end, P.C. Fisher testified that he believed he disclosed the video lawfully. In his mind, his authority to do so was under the O.P.S. workplace harassment policy. His view was that he could not report up the chain of command because of the parties involved. P.C. Fisher also pointed out that he gave the recording to a peace officer who was employed with the O.P.S.. P.C. Fisher's view was that he did not disclose the conversation externally but to someone who had the authority and the ability to access it themselves.

[99] P.C. Fisher testified that he did not believe he used his position as a police officer for improper purposes. Furthermore, he testified that he did not have anything to gain personally or professionally. In fact, he knew that he would cause serious harm to himself in taking the actions that he did but felt duty bound to do so.

[100] P.C. Fisher was cross-examined at length about his understanding of privacy and the dangers and risks associated to leaks of protected police information. He was questioned about his understanding of the boundaries surrounding employee information like contact information, medical information and performance review information. He was questioned about section numbers of the *Charter* and the privacy rights that flow from it. He was questioned about the need for judicial authorizations in seeking private information.

[101] What became clear from this examination was that P.C. Fisher believed that the police station held limited privacy rights for those that use it including police officers. He based this view on nature of the setting and the omnipresent recording system in the workplace. While he accepted that information about confidential informants and discussions held in the Chief and Deputy Chief's office may have inherent privacy protections, general conversations in public areas of the station, open for use by officers, simply do not.

[102] On the issues of technical problems, P.C. Fisher did not take the notices to mean that the recording was not working. His understanding was that the 'soft interview room' was still recording but that by pushing that button an officer would prevent the recording from being broken up.

[103] P.C. Fisher explained that the monitor room computer does not separate individual recordings in separate files. Instead, he explained that there is an ongoing recording for which an officer must select the beginning and end to parse out the portion required for copy.

[104] P.C. Fisher said he does not know why he hit play on the recording in the first place. At best, he explained it came out of a feeling that he needed to. He testified that he was not searching for the video but that he stumbled upon it in the course of his duties. He acknowledged that he had no idea what he was going to hear but that he never expected senior managers to have confidential conversation in that room. He reiterated

that no one thought that the 'soft interview room' was private. It was audio and video recorded and everyone knew that.

[105] When the Crown suggested that P.C. Fisher felt entitled to watch the recording, he said he did not know about being entitled but he felt he was not prohibited. When it was suggested to him that it was none of his business, he adamantly disagreed and testified that it was his business what other officers do in the police station. He stated that he wore the O.P.S. uniform and he felt that he had to hold them to account.

[106] P.C. Fisher was challenged about what portion of the video he watched. He could not remember if it started at the beginning. He recalled some conversation about padding hours. He heard S/Cst. Stevens being mocked. He did not watch all of the video.

[107] I found P.C. Fisher to be a generally credible and reliable witnesses. While the Crown outlined concerns about P.C. Fisher's credibility as it related to privacy, its definition and its application to a variety of scenarios, I did not find his evidence in those areas concerning. In my view, P.C. Fisher's lack of understanding in those areas may have resulted in issues in the trial of others, however, his candid expression of lack of experience in the area of judicial authorizations and his extended time away from work as a result of these charges serve to explain those deficiencies.

[108] Frankly, I found that P.C. Fisher was thoughtful in expressing his beliefs about privacy in various context that arise in a police station that is also a workplace. There was nothing that caused me to pause in accepting his evidence as distorted, false, imprecise or undependable.

FINDING OF FACTS

[109] I find as fact that P.C. Fisher made a copy of a previously recorded conversation that took place between P.C. May and S/Sgt. McLagan on June 16th, 2018. That conversation had been automatically captured on the 'soft interview room' recording system of the Orangeville Police station located in Canada.

[110] I find that P.C. Fisher had inadvertently come across that video which was already preserved on the 'monitor room' computer. He did so while he was engaged in other police duties on June 16, 2018. I find that P.C. Fisher took overt steps to preserve that recording on a USB he used for work. He then disseminated a copy of that recording to S/Cst. Rick Stevens who was also employed with O.P.S.. I find that the basis for P.C. Fisher's action was that he believed that the recording captured conduct that fell under the purview of the OPS workplace harassment policy.

[111] It is also clear that the content of that video contained sensitive information about several employees of the O.P.S.. I find that portions of the conversation were disconcerting. Arguably, the content of the conversation would fall under the O.P.S. policy on workplace harassment and violence as well as the corresponding provincial legislation.

[112] I accept as fact that both S/Sgt. McLagan and P.C. May thought that the contents of their conversation were private.

[113] I turn now to the legislative framework for which the facts must be assessed.

ANALYSIS

S. 193 – Disclosure of an Intercepted Communication

[114] Section 193(1) of the Criminal Code of Canada makes the use or disclosure of an intercepted communication or disclosure of any part, substance, or meaning thereof or its existence, an electable offence:

193 (1) Where a private communication has been intercepted by means of an electro-magnetic, acoustic, mechanical or other device without the consent, express or implied, of the originator thereof or of the person intended by the originator thereof to receive it, everyone who, without the express consent of the originator thereof or of the person intended by the originator thereof to receive it, willfully

(a) uses or discloses the private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof, or

(b) discloses the existence thereof.

[115] Section 193(2) provides exemptions to the offence set out in subsection (1). While there are six enumerated exemptions, the parties agree that only two need be contemplated in this case. They are exemptions (a) and (e).

(2) Subsection (1) does not apply to a person who discloses a private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof or who discloses the existence of a private communication

(a) in the course of or for the purpose of giving evidence in any civil or criminal proceedings or in any other proceedings in which the person may be required to give evidence on oath;

....

if the disclosure is necessarily incidental to an interception described in paragraph 184(2)(c), (d) or (e);

(e) where disclosure is made to a peace officer or prosecutor in Canada or to a person or authority with responsibility in a foreign state for the investigation or prosecution of offences and is intended to be in the interests of the administration of justice in Canada or elsewhere; or

....

The issues Related to the s. 193(1) Allegation

[116] The issues that must be determined in relation to the offence of disclosing a private communication under s. 193(1) are as follows:

- (1) Did the conversation amount to a private communication as defined in s.183 of the *Criminal Code of Canada*?
- (2) If yes, was P.C. Fisher exempt from liability under s. 193(2)(a) or 9(e) of the *Criminal Code of Canada*?
- (3) If P.C Fisher disclosed a private communication and was not exempt should his conduct be excused as *deminimus*.

[117] In assessing whether the recording of S/Sgt. McLagan and P.C. May was a private communication, I turn to the definition section set out in s.183 of the *Criminal Code of Canada*. It states as follows:

private communication means any oral communication, or any telecommunication, that is made by an originator who is in Canada or is intended by the originator to be received by a person who is in Canada and that is made under circumstances in which it is reasonable for the originator to expect that it will not be intercepted by any person other than the person intended by the originator to receive it, and includes any radio-based telephone communication that is treated electronically or otherwise for the purpose of preventing intelligible reception by any person other than the person intended by the originator to receive it; (*communication privée*)

[118] Clearly, the recorded conversation was an oral communication between S.Sgt. McLagan and P.C. May while they spoke inside the ‘soft interview room’ at the Orangeville Police Station located in Canada. Both S/Sgt. McLagan and P.C. May are originators and receivers of that communication.

[119] I accept as fact that neither P.C. May nor S/Sgt. McLagan turned their mind to the possibility that the conversation would be recorded or disseminated. I accept that each of them believed that they were having a private conversation. In addition to their direct evidence under oath on that point, I have factored into that finding P.C. May’s action in closing the door part way into the conversation as well as the blatantly insensitive and distasteful words that were spoken between them.

[120] Where the prosecution fails in establishing proof beyond a reasonable doubt that this was a private communication is the statutory requirement set out in s. 183 of the *Criminal Code* that that communication be “*made under circumstances in which it is **reasonable** for the originator to expect that it will not be intercepted by any person other than the person intended by the originator to receive it*”.

[121] It is the totality of the following circumstances that lead to my finding that the recording was made in circumstances where it was **not** reasonable for either Cst. May **or**

S/Sgt. McLagan (as originators) to expect that the conversation would not be intercepted by any other person aside from each other:

- (1) The Orangeville Police station is a public place which is heavily furnished with audio and visual surveillance equipment.
- (2) The police station had a number of posted signs alerting accused persons, witnesses, members of the public, civilian staff and police officers about the use of audio and video recording throughout the police station.
- (3) The conversation took place in the 'soft interview room' which was designed to automatically record the interactions of that room including gather evidence from witnesses who attended the police station. The fact that the room also served as an office does not change its primary use or design.
- (4) The 'soft interview room' used audio and video recording equipment that activated recording on motion. The 'soft interview room' was developed to mirror the technology already in use in other parts of the police station including the 'hard interview room'.
- (5) Both P.C. May and S/Sgt. McLagan were longtime police officers who understood the purpose of the interview rooms. They were expected to retrieve recordings made in interview rooms and provide them to the Crown as evidence. Both officers had been alerted in member-wide emails about the nature of the automatic recordings and the issues that persisted in that regard.
- (6) The 'soft interview room', contained a specific warning to all people who used it, or attended within it, that it contained audio and video recording equipment. It did so via posted signs on the door to the room and on a wall within the room. That warning was reinforced through the very fact that the camera was visibly positioned to the left of the window and the microphone attached to a flowerpot.
- (7) The posted warnings served to ensure that members of the public were apprised of the recording, the evidence of Sgt. Phillips, S/Cst. Rick Stevens, P.C. Fisher, and S/Sgt. McLagan reinforced that all OPS members knew that room was designed to automatically record on motion.
- (8) Sgt. Phillips' evidence that he would close the door to the room to prevent the automatic recording of workplace joking is illustrative of the knowledge that the room was recording and could pick up workplace shenanigans. His view again was that everyone knew the room was recording.
- (9) The automatic recordings from the 'soft interview room' could also be live monitored from the 'monitoring room' computer held in a separate room. While there was no evidence of anyone doing so, presumably, staff

of the O.P.S could have live monitored this, or any other, conversation or interview broadcasted from the “soft interview room”.

(10) Additionally, the motion activated recordings captured by the equipment in the ‘soft interview room’ were automatically downloaded on the computer in the ‘monitor room’ and preserved for 7-10 days. Any O.P.S. staff could access and copy recordings using a generic code that was posted on the wall. That code granted access to police and civilian employees alike to remove recordings from the ‘monitor room’ computer.

(11) S/Sgt. McLagan was an experienced police officer who was responsible for the communications and records relating to issues that developed with the ‘soft interview room’. He, more than anyone, understood the functioning of that room as evidenced by his email setting out the automatic recording feature of that room in his email to all members of the O.P.S. on April 23, 2018.

(12) S/Sgt. McLagan candidly acknowledged to the court and to the O.P.P. that he should have known that he was being recorded in that room.

(13) I reject P.C. May’s evidence that he was unaware that the room was automatically audio and video recorded. He directly responded to emails where issues with the recording technology was flagged.

(14) All officers with the exception of P.C. May (whose evidence I have rejected) was aware of the room’s design as it had been constructed in a similar fashion to the ‘hard interview room’ to record on motion. I find that automatic recording feature of the technology was not new to O.P.S. police officers including S/Sgt McLagan and P.C. May.

(15) A critical feature in determining that it was not reasonable to expect that the recording would not be intercepted is that there was no human intervention or action taken in making the recording. In those circumstances alone, I cannot fathom how any police officer, trained in statement taking, including S/Sgt. McLagan and P.C. May, could reasonably expect that the communication would not be intercepted by anyone else. By the rooms very design, which I find was known to both officers, every motion-based interaction that transpired in that room was broadcasted to the ‘monitor room’, recorded and then downloaded onto an accessible and shared computer where it was stored for 7-10 days.

(16) Whether there were technical issues with the recording does not change the reasonableness of either P.C. May’s or S/Sgt. McLagan’s belief that the room was recorded. In fact, the emails highlight that investigators were repeatedly reminded about the automatic nature of technology albeit unreliable technology.

[122] Thus, I do not find that either originator of the conversation could reasonably expect that their conversation would not have been intercepted by anyone other than the other. The room was designed to automatically record the activity in that room when the sensors detected movement. It did not require human intervention to start the recording or to download and preserve that recording. All users of that room were fairly warned that the room was audio and video recorded. The users in this case, were experienced police officers who understood the room's function and at least one had a role in the creation or functioning of the room. In this case, the room functioned by design in intercepting the communication in a room warning every user of such interception. The recording was then preserved on the 'monitor room' computer where it was found by P.C. Fisher.

[123] I have reviewed the case law surrounding video recorded rooms at police stations and their application to accused persons and witnesses held in those rooms. Arguably, a police officer, trained to take statements in recorded interview rooms, is on high alert about the lack of privacy that extends to those rooms. That lack of privacy was highlighted and reinforced by the O.P.S. who warned its members in writing that the technology installed was set to record on motion and automatically downloaded and stored for 7-10 days.

[124] I appreciate the Crown's efforts to distinguish between expectations of employees of the O.P.S. who use that room and witness/accused persons taken into those rooms. However, the distinction of status does not change what one could reasonably expect in relation to being recorded. In fact, I would expect any police officers, especially veteran officers, to be better informed than members of the public on the use of the room and how it operated. Perhaps even more so when one considers the visibility of the equipment, the signage, the email reminders about the equipment and the similar technology used in the 'hard interview room'.

[125] In the end, accept that P.C. May and S/Sgt. McLagan did not wish to have their troubling conversation overheard or recorded. However, asking this court to find that P.C. Fisher breached the trust and criminally disclosed a private communication in circumstances where the conversation was carelessly held in a broadcasted room would be to use the criminal law as a sword and not a shield.

[126] In light of my finding that the recording was not a private communication as defined by the *Criminal Code of Canada*, I need not address the exemptions set out in s. 193(2) or the argument related to the principle of *deminimus*.

[127] I turn then to my reasons in finding that the Crown has not established the offence of breach of trust beyond a reasonable doubt.

Did P.C. Fisher commit the offence of breach of trust contrary to s. 122 of the *Criminal Code*?

[128] P.C. Fisher is charged with breaching the public trust in the course of his duties as a police officer by disclosing a private communication contrary to s. 122 of the *Criminal Code of Canada*.

[129] Section 122 of the *Criminal Code of Canada* states:

122. Every official who, in connection with the duties of their office, commits fraud or a breach of trust, whether or not the fraud or breach of trust would be an offence if it were committed in relation to a private person, is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction.

[130] After some prompting, the Crown acknowledged that the offence, as particularized in the court information, required that she prove that P.C. Fisher breached the trust by disseminating a **private communication**. Thus, by nature of the wording of the charge, if I found that the recording was not a private communication, then P.C. Fisher must be acquitted of this count as well.

[131] Having already outlined my reasons why the Crown has not proven that the recording was a private communication, P.C. Fisher is acquitted on this count as well.

[132] However, in the event that I have erred in finding that the conversation that was intercepted was not a private communication, I would nonetheless still have acquitted P.C. Fisher of this count.

[133] The unanimous decision in 2006 of the Supreme Court of Canada in *R. v. Boulanger*, [2006] S.C.J. No. 32, is the leading Canadian jurisprudence on the required constituent elements of the offence of breach of trust by a public officer, s. 122 of the *Criminal Code*.

[134] In *Boulanger*, the Supreme Court reversed a breach of trust conviction and entered an acquittal. The appeal required the Supreme Court, in the words of McLachlin, C.J., “to clarify those elements” of the crime of breach of trust. (*supra*, at paras 1; 4; 7)

[135] The Supreme Court analyzed the common law roots of the s. 122 offence, noting that “error in judgment” did not make out the offence and that proof of “corruption” was required, not mere “mistake or error”. (*Ibid*, at paras 11-18) As well, the common law required that “the misconduct at issue be serious misconduct: there must be a serious departure from proper standards... A mistake, even a serious one, will not suffice.” (*Ibid*, at para. 28) The Supreme Court required proof of “misfeasance” requiring “dishonesty, corruption or oppression.” (*Ibid*, at paras. 30-41)

[136] The Supreme Court discussing the required *actus reus* for the crime of breach of trust, the Court noted that it could be a violation of a duty “imposed by law or regulation” or “by a guideline.” However, “it cannot be that every breach of the appropriate standard of conduct, no matter how minor, will engender a breach of the public’s trust.” (*Ibid*, at paras 49-50) The Court went on, importantly, to state that “This said, perfection has never been the standard for criminal liability in this domain: ‘mistakes’ and ‘errors in judgment’ have always been excluded. To establish the criminal offence of breach of trust by a public officer, more is required. The conduct at issue, in addition to being carried out with

the requisite *mens rea*, must be sufficiently serious to move it from the realm of administrative fault to that of criminal behaviour. ... What is required is conduct so far below acceptable standards as to amount to an abuse of the public's trust in the office holder. ... As stated in *R. v. Creighton*, 1993 CanLII 61 (SCC), [1993] 3 S.C.R. 3, "[t]he law does not lightly brand a person as a criminal." (*Ibid*, at para 52) Thus, the *actus reus* for the offence must be "a marked departure from accepted standards" and not mistakes or errors in judgment or administrative fault.

[137] The *mens rea* required to make out the criminal offence of breach of trust, stated the Court, is the "elevated" standard of dishonest or corrupt intention. "Mistakes" or "errors of judgment" could not suffice. A "dishonest, partial, corrupt or oppressive" state of mind is essential. (*Ibid*, at paras. 55-56) The mere "fact that a public officer obtains a benefit is not conclusive of a culpable *mens rea*." (*Ibid*, at para. 57) If the action by the official was taken "honestly and in a genuine belief it was a proper exercise of his jurisdiction," no crime will be made out. (*Ibid*, at para. 57)

[138] In the end the Court concludes that the offence of breach of trust by a public officer will be established where the Crown proves beyond a reasonable doubt the following elements:

- (1) The accused is an official;
- (2) The accused was acting in connection with the duties of his or her office;
- (3) The accused breached the standard of responsibility and conduct demanded of him or her by the nature of the office;
- (4) The conduct of the accused represented a serious and marked departure from the standards expected of an individual in the accused's position of public trust; and
- (5) The accused acted with the intention to use his or her public office for a purpose other than the public good, for example, for a dishonest, partial, corrupt, or oppressive purpose. (*Ibid*, at para 58)

[139] P.C. Fisher was an official. He was a police officer. He was acting in connection with his duties as a police officer. However, had I found that conversation was a private communication, there is still no proof beyond a reasonable doubt of either the required *actus reus* or *mens rea* to constitute the criminal offence. P.C. Fisher's act did not clearly benefit him, in fact it hurt him considerably. I accept his evidence that he was aware of that likelihood when he gave the recording to S/Cst. Stevens.

[140] I find that at most P.C. Fisher's choice in providing the communication to S/Cst. Stevens represented an error in judgment and not a marked departure from the standards expected or accepted of one in his official position. The basis for this finding is that P.C. Fisher provided the communication to uphold his duty to report workplace harassment and provided to a fellow member of the O.P.S. in that pursuit. Sgt. Phillips' evidence highlighted why this was an error and not a marked departure from the standards. Sgt.

Phillips testified that it would have been very difficult to have known what to do with that recording given the inherent conflicts and the duty to report the recording.

[141] In respect of *mens rea*, P.C. Fisher's conduct was occasioned, not by corrupt or dishonest intention (beyond a reasonable doubt), but by an honest belief that it was a required of him as a result of the O.P.S. policy on workplace harassment. There was a reasonable doubt that the *mens rea* necessary for conviction under s. 122 of the *Criminal Code* was established.

[142] Thus while, the Crown had not established the offence as particularized in the Information since the conversation was, in my view, not a private communication, the prosecution would also have failed for these reasons.

CONCLUSION

[143] Accordingly, the Crown has failed to prove that Mr. Fisher committed the criminal offences of disclosing a private communication contrary to s. 193(1) of the *Criminal Code of Canada* and breach of trust contrary to s. 122(1) of the *Criminal Code of Canada*.

[144] Mr. Fisher is acquitted of both counts.

Released: February 11, 2021

Signed: Justice S. McPherson