

**REVIEW ON THE RECORD
DECISION ON MISCONDUCT**

PURSUANT TO SECTION 141 POLICE ACT, R.S.B.C. 1996, c. 267

In the matter of a Review on the Record into
An ordered investigation concerning

Special Municipal Constable Foster Martin
Formerly of the Victoria Police Department

To: Former Special Municipal Constable Foster Martin ("SMC Martin")

And to: Chief Constable D. Manak, Victoria Police Department (Vic PD)

And to: C. Pecknold, Police Complaint Commissioner (the "Commissioner")

And to: C. Hatcher, Counsel to SMC Martin ("Counsel to SMC Martin")

And to: Sgt. L. Hollingsworth Agent and Representative for SMC Martin
(the "Representative")

And to: M. Underhill, K.C., & E. Ronsley, jointly Counsel to the Commissioner
("Counsel to the Commissioner")

And to: Insp. C. Brown, Vic PD, Discipline Authority (the "Discipline Authority")

Review hearing date: June 26, 2023, Victoria B.C.

Decision date: October 4, 2023

Place: Victoria, B.C.

Executive Summary

This Review has concluded that the decision of the Discipline Authority with respect to SMC Martin was incorrect, in part. The decision was incorrect in assessing the credibility of SMC Martin. It was also incorrect in concluding that SMC Martin had not committed misconduct by way of Deceit pursuant to section 77(3)(f)(i)(A) of the *Police Act* as a result of his various responses to questions posed by the Investigator during his *Police Act* interviews of the member.

I have therefore found that the member has committed acts of misconduct pursuant to sections 77(3)(h), Discreditable Conduct, and Deceit, pursuant to section 77(3)(f)(i)(A) of the *Police Act*.

This decision also confirms that, as Adjudicator, I lack the jurisdiction to re-consider the issues of potential misconduct relating to SMC Martin that were not substantiated by the Discipline Authority at the section 112 stage of proceedings.

Final submissions have been requested from the parties with respect to appropriate disciplinary sanctions or corrective measures.

REASONS FOR DECISION:

I Overview

- (1) This is a Review on the Record concerning certain alleged acts of misconduct by SMC Martin.
- (2) SMC Martin is a former Special Municipal Constable appointed to that position July 15, 2021. SMC Martin's duties were primarily focused on serving as an auxiliary jailer in Vic PD cells.
- (3) The date SMC Martin ended his service is not clear, however, the Representative and Counsel to SMC Martin have confirmed that since the date of the Review hearing, the member has ended his service with Vic PD.
- (4) The allegations of misconduct appear to have arisen in the context of a detailed background investigation of SMC Martin as a result of his application to join the Victoria Police Department as a police officer.

- (5) The focus of this review are the records described in section 141(3) of the *Police Act*. This includes the findings of the Discipline Authority under section 125 (1) (a) and section 126 of the *Police Act* concerning SMC Martin. My task, in general terms, is to review the record, determine whether or not the decisions of the Discipline Authority were correct and confirm whether or not misconduct on the part of the member has been proven.
- (6) I will review the specific applicable provisions of the *Police Act* in greater detail further in this decision, however, the key issues to be considered in this Review are:
- (i) Whether or not I have jurisdiction to consider alleged acts of misconduct that were not substantiated by the Discipline Authority at the section 112 stage;
 - (ii) Whether or not the Discipline Authority correctly assessed the misconduct allegations of SMC Martin taking into consideration his overall credibility and all evidence set out in the Record;
 - (iii) Whether or not SMC Martin committed misconduct by way of Deceit; and
 - (iv) Whether or not the Discipline Authority correctly applied the principles of section 126 of the *Police Act* in reaching the decision to propose limited disciplinary and corrective measures in connection with SMC Martin's proven misconduct.

II History of Proceedings :

- (7) The history of proceedings relating to this Review is complex and warrants a detailed summary of developments as they took place.
- (8) Proceedings under the *Police Act* were commenced as a result of a report received by the Office of the Police Complaint Commissioner ("OPCC") from the Victoria Police Department November 25, 2021. The report detailed allegations that SMC Martin had showed a work colleague unsolicited video footage of a person, described as a neighbour of the member, engaged in intimate sexual relations (the "Neighbour Video").
- (9) On December 16, 2021 the Commissioner ordered an investigation under section 93(1) of the *Police Act* into one allegation of Discreditable Conduct by SMC Martin pursuant to section 77(3)(h).
- (10) Sgt. P. Spencelayh of the Vic PD was appointed as Investigator of the allegations (the "Investigator").
- (11) On April 21, 2022, the Investigator amended the investigation to include an allegation of Deceit pursuant section 77(3)(f)(i)(A) of the *Police Act* as a result of allegations that SMC Martin provided misleading statements concerning the Neighbour Video and the sharing of its contents with a co-worker.

- (12) On April 22, 2022, Chief Manak issued SMC Martin an additional notice of complaint pursuant to section 83(3) of the *Police Act* with respect to the Deceit allegation.
- (13) On June 16, 2022 the Investigator submitted the final investigation report (the “FIR”) to Insp. C. Brown, VPD, the assigned Discipline Authority.
- (14) The Discipline Authority reviewed the FIR in accordance with his responsibilities under section 112 of the *Police Act*. As a result of that review, the Discipline Authority found that:
- (a) The allegation of possible misconduct by SMC Martin video recording a person having intercourse in the Neighbour Video and showing that recording to a co-worker while on duty (“Initial Misconduct Allegation #1) was not substantiated;
 - (b) The allegation of possible misconduct by way of Discreditable Conduct as a result of SMC Martin taking videos of a prisoner masturbating in Vic PD cells and showing that video to friends (“Initial Misconduct Allegation # 2”) appeared to be substantiated; and
 - (c) The allegation of possible misconduct by way of Deceit as a result of SMC Martin not being truthful during his *Police Act* interviews with the Investigator (“Initial Misconduct Allegation # 3”) also appeared to be substantiated.
- (15) Subsequent to the Section 112 decision, the Discipline Authority approved an application from the Representative, on behalf of SMC Martin, to conduct a further investigation. The investigation was intended to pursue other possible sources of access to the Neighbour Video by SMC Cochrane and hence, possible culpability on the part of others.
- (16) The supplemental investigation was completed by the Investigator with a report delivered July 29, 2022. No change in the section 112 decision arose from considering the supplemental report as the Discipline Authority found no substance to the suggestions made by SMC Martin concerning other persons providing SMC Cochrane with video access.
- (17) On September 7, 2022 a discipline proceeding was convened concluding October 7, 2022. The Discipline Authority provided a written decision pursuant to section 125 of the *Police Act*. The Discipline Authority substantiated the following allegation which was admitted by SMC Martin at the hearing:
- “Discreditable Conduct pursuant to section 77(3)(h) of the Police Act for taking a video of himself on duty with a male prisoner in the background purportedly masturbating and sharing it with work colleagues.” (“Final Misconduct Allegation # 2”)*

(18) The Discipline Authority did not substantiate the following allegation:

“Deceit pursuant to section 77(3)(f)(i)(A) of the Police Act with respect to the Member knowingly being untruthful during his Police Act interview about showing a video of his neighbour having sex to SMC Cochrane” (“Final Misconduct Allegation #3”)

(19) With respect to the substantiated misconduct, Final Misconduct Allegation #2, the Discipline Authority proposed a two day suspension without pay.

(20) On January 16, 2023 the Commissioner completed consideration of the Discipline Authority’s decision issued under section 125 of the *Police Act*. The Commissioner determined that a Review on the Record was necessary and issued a notice of appointment of myself as Adjudicator (the “Notice”).

(21) Subsequent to the Commissioner’s appointment Notice, the parties were advised of the need to provide written submissions with respect to the review process. The Discipline Authority was also invited to provide submissions as authorized by section 141(7) of the *Police Act*.

(22) The Discipline Authority responded to the invitation in writing declining the opportunity to make submissions. However, the Discipline Authority did invite myself as Adjudicator to further investigate certain information that had come to the DA’s attention subsequent to his Discipline Decision.

(23) The parties were invited to make submissions on the suggestion made by the Discipline Authority. Ultimately, both parties made submissions, however, I determined by way of a written decision that there was no legal authority to embark on the investigation suggested.

(24) A further application for investigation was received from the Representative on behalf of SMC Martin, again seeking new evidence on the video evidence. The views of the Commissioner on this application were sought through Counsel. As a result of all submissions made, I determined, by further written decision, that no additional investigation would be pursued.

(25) Written submissions on the issues under review were received from both parties and a hearing to allow the parties to make oral representations was convened June 26, 2023.

(26) At the commencement of that hearing, a threshold issue was raised concerning my authority as Adjudicator to re-consider Initial Misconduct Allegation #1 in the review process.

(27) The parties agreed to provide supplemental written submissions on that issue within prescribed time limits following the conclusion of the oral hearing.

- (28) It was also determined that the June 26, 2023 hearing would be limited to considering issues of misconduct, leaving any possible sanctions or penalties for consideration on another date.

PART I JURISDICTION

III Sections 112(4) and (5) of the *Police Act* – JURISDICTION OF ADJUDICATOR

- (29) As noted above, the threshold issue raised with the parties at the Review on the Record oral hearing touched on my jurisdiction as Adjudicator to review the decision taken by the Discipline Authority with respect to Initial Misconduct Allegation # 1.

- (30) At the section 112 stage of these proceedings, in a written decision dated June 30, 2022, the Discipline Authority made the following decision:

“Allegation #1: Discreditable Conduct for the conduct alleged in relation to SMC Martin taking videos of his neighbour having sex and showing a video to a co-worker on duty- appears not to be substantiated.”

- (31) As noted above, two other allegations of apparent misconduct were substantiated by the Discipline Authority.

- (32) A Form 2 “Notice of Discipline Proceeding” was signed by the Discipline Authority July 13, 2022 and updated July 19, 2023. Both notices provided notice of a hearing on the following issues:

“ The following misconduct has been alleged against [SMC Martin]:

1. Misconduct Allegation #1- *Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act* which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department.
2. Misconduct Allegation #2- *Deceit* pursuant to section 77(3)(f)(i)(A) of the *Police Act* which is, when in the capacity of a member, making or procuring the making of any oral or written statement that, to the member’s knowledge, is false or misleading.”

- (33) A final Discipline Decision entitled “Findings of Discipline Authority” was rendered by the Discipline Authority October 9, 2022, pursuant to section 125 of the *Police Act*. In that decision, reference was made, at paragraph 12, to the fact that Initial Misconduct Allegation #1 was not substantiated. However, the decision does indicate that this is a new finding.
- (34) Neither the subsequent Form 3, or Form 4, made reference to Initial Misconduct Allegation #1 in any manner.
- (35) The “Findings of Discipline Authority” found that the allegation of Discreditable Conduct was proven against SMC Martin with respect to the Prisoner Video, however, the allegations of Deceit were not proven to be misconduct.
- (36) Sections 112(4) and (5) of the *Police Act* provide as follows:

(4)If, on review of the report and the evidence and records referenced in it, the discipline authority decides that the conduct of the member or former member does not constitute misconduct, the discipline authority must include that decision, with reasons, in the notification under subsection (1) (c).

(5)The discipline authority's decision under subsection (4)

(a)is not open to question or review by a court on any ground, and

(b)is final and conclusive, unless the police complaint commissioner appoints a retired judge under section 117 (1) [appointment of new discipline authority if conclusion of no misconduct is incorrect].

- (37) There is no dispute that my appointment as Adjudicator did not take place under section 117(1) of the *Police Act*.
- (38) The appointment of an Adjudicator to conduct a Review on the Record takes place under section 141 of the *Police Act* which provides as follows:

141 *(1)In this section and section 143 [public hearing], "disciplinary decision", in relation to a discipline proceeding under section 124 [discipline proceeding], means any of the matters described in section 133 (1) (a) (i) to (iv) [review of discipline proceedings], including any further reasons provided under section 128 (3) [disciplinary disposition record].*

(2)Subject to section 143 (1) [public hearing], if the police complaint commissioner determines that there are sufficient grounds to arrange a public hearing or review on the record in respect of a disciplinary decision under section 138 [determining whether to arrange public hearing or review on the record] or 139 [reconsideration on new evidence], the police complaint commissioner may appoint an adjudicator under section 142 [appointment of

adjudicator for public hearing or review on the record] to conduct a review on the record of the disciplinary decision under this section.

(3) For the purposes of a review on the record under this section, the record of a disciplinary decision consists of

- (a) the final investigation report of the investigating officer, any supplementary reports or investigation reports under section 132 [adjournment of discipline proceeding for further investigation] and all records related to the investigation and the discipline proceeding,*
- (b) the records referred to in section 128 (1) [disciplinary disposition record],*
- (c) the report referred to in section 133 (1) (a) [review of discipline proceedings], and*
- (d) in the case of a review on the record initiated under section 139 [reconsideration on new evidence], any record relating to the new evidence referred to in that section.*

- (39) The issue, therefore, is whether or not I have jurisdiction to review Initial Misconduct Allegation #1 in my capacity as adjudicator appointed to conduct a Review on the Record under section 141 , taking in account sections 112(4) & (5) of the *Police Act*.

IV Counsel for the Commissioner- Submissions on jurisdiction of the Adjudicator

- (40) The Commissioner's position, as set out by Counsel for the Commissioner, can be summarized as follows:

- (a) An adjudicator appointed by the Commissioner to preside at a review on the record has no inherent jurisdiction. The adjudicator's jurisdiction is conferred by the Notice issued by the Commissioner, and is confined to those specific powers set forth in the Act.*

These powers do not include an authority to reconsider, whether in whole or in part, the Commissioner's decision to order a review on the record, based on the adjudicator's own interpretation of the Commissioner's jurisdiction under s. 138 of the Act.

The adjudicator thus lacks jurisdiction to reconsider the Commissioner's decision to include the Initial Misconduct Allegation # 1 in this review on the record. The validity of the Notice, whether on jurisdictional or other grounds, can only be challenged on judicial review.

- (b) In any event, the Commissioner submits that the Notice is valid. Subsection 112(5) does not prevent the Commissioner from including the Neighbour Videos Allegation in this review on the record. Subsections 112(4) and (5) do not apply to this case where certain allegations did not "appear" to be substantiated under s. 112(2)(d)(i), but other allegations moved forward to a discipline proceeding pursuant to s. 112(3). Further, even if s. 112(5) did apply in this case, the words "final and conclusive" contained therein do not restrict the allowable scope of this review on the record.*

(Submissions of Counsel- July 10, 2023 pages 1-2)

(41) The specific submissions advanced by Counsel for the Commissioner are as follows:

- (a) Adjudicators appointed under the *Police Act* have no inherent jurisdiction. The adjudicator's jurisdiction is conferred by the Notice of Appointment issued by the Commissioner, and is confined to those specific powers set forth in the Act. Under the Act, "adjudicators are appointed to carry out the specific functions mandated in the Act".⁴ Their role is to decide, pursuant to the Commissioner's direction in the Notice, whether misconduct is proven, determine disciplinary measures, and make recommendations regarding policy and practice of police departments;
- (b) Adjudicators do not have any supervisory or reconsideration authority with respect to decisions made by the Commissioner;
- (c) The responsibility in s. 141(10)(a) to "decide whether any misconduct has been proven" is not limited by prior findings of the discipline authority;
- (d) Decision-makers are generally authorized to interpret the scope of their own jurisdiction but the court has drawn a distinction between (1) interpreting the scope of one's own jurisdiction as decision-maker; and (2) reviewing the grant of jurisdiction from another statutory entity. The latter inquiry is outside the jurisdiction of the decision-maker: *Human Rights Comm. v. Human Rights Tribunal, 2000 BCSC 1798 [HRC]*, *Briggs v. Ministry of Environment, 2000 BCHRT 38 [Briggs]*, and *Diaz-Rodriguez v. British Columbia (Police Complaint Commissioner), 2020 BCCA 22*;
- (e) Section 112(5) is expressly applicable to decisions under s. 112(4). But the Act is silent as to whether s. 112(5) also applies to determinations under s. 112(2)(d)(i). It is the latter determination which we are concerned with here. Properly construed, a determination under s. 112(2)(d)(i) cannot be treated as equivalent to a decision under s. 112(4), and thus does not trigger s. 112(5). Section 112(2)(d)(i) is drafted differently from s. 112(4), and the distinct wording used in each provision must be given meaning;
- (f) In particular, s. 112(2)(d)(i) directs a determination regarding a specific "allegation" against the member, whereas s. 112(4) addresses the member's "conduct" as a whole. Further, s. 112(2)(d)(i) directs a determination as to whether the allegation "appears" to be substantiated whereas s. 112(4) directs a "decision" as to whether the member's "conduct constitutes misconduct". Treating these two provisions alike would offend the basic principle that different words used within a single statute must be interpreted to have different meanings;
- (g) Applying s. 112(5) to a determination under s. 112(2)(d)(i) would also contravene the principle that express inclusion by the Legislature of one item signals exclusion of other items. In other words, if the Legislature intended s. 112(5) to apply to findings under both subsections, it would not have stated expressly that s. 112(5) applies to decisions under s. 112(4) while remaining silent as to whether s. 112(5) applies to determinations under s. 112(2)(d)(i);

- (h) Finally, applying s. 112(5) to determinations under s. 112(2)(d)(i) would produce an absurd process whereby related allegations against the same member could be subject to concurrent Police Act proceedings before different decision-makers. This result cannot have been intended by the Legislature;
- (i) In summary, s. 112(5) only applies in cases where the discipline authority determines under s. 112(4) that the member's conduct as a whole "does not constitute misconduct". It does not apply to a conclusion under s. 112(2)(d)(i) that an individual allegation does not "appear" to be substantiated;
- (j) The distinction between the meaning of "conduct" and "allegation" in ss. 112(4) and 112(2)(d)(i), respectively, is reinforced by the requirements in s. 112(2)(a) and (c) to both describe "any conduct of concern" and identify "each allegation of misconduct considered". These requirements would be redundant if the Legislature intended that "conduct" and "allegation" be read synonymously for the purposes of s. 112;
- (k) Not only is the scope of a finding under s. 112(4) different from one under s. 112(2)(d)(i) (i.e., the member's conduct as a whole versus a particular allegation) but the subsections also direct the application of different legal tests. Section 112(4) directs a finding that the conduct "does not constitute misconduct", whereas s. 112(2)(d)(i) only directs notice as to whether the allegation "appears" to be substantiated by the evidence. Had the Legislature intended that a discipline authority's conclusion under s. 112(2)(d)(i) be treated as though it was a decision under s. 112(4), it would have applied the same legal test in both provisions. A "decision" that a member's conduct "does not constitute misconduct" is simply not equivalent to a determination that the evidence does not "appear[] to substantiate the allegation and require the taking of disciplinary or corrective measures". The latter is of course a less conclusive finding. It thus makes sense that the Legislature only made s. 112(5) applicable to the former;
- (l) It is submitted that applying s. 112(5) to a determination under s. 112(2)(d)(i) would also be contrary to the basic principle of statutory interpretation that express inclusion of one item signals exclusion of others.¹⁸ In other words, if the Legislature intended s. 112(5) to apply equally to findings under s. 112(4) and s. 112(2)(d)(i), it would not have expressly stated that s. 112(5) applies to findings under s. 112(4) while remaining silent as to whether s. 112(5) also applies to findings under s. 112(2)(d)(i);
- (m) Applying s. 112(5) to a determination under s. 112(2)(d)(i) would also be contrary to the basic principle of statutory interpretation that express inclusion of one item signals exclusion of others.¹⁸ In other words, if the Legislature intended s. 112(5) to apply equally to findings under s. 112(4) and s. 112(2)(d)(i), it would not have expressly stated that s. 112(5) applies to findings under s. 112(4) while remaining silent as to whether s. 112(5) also applies to findings under s. 112(2)(d)(i);
- (n) Even if s. 112(5) did apply, the words "final and conclusive" in that provision would not restrict the scope of this review on the record; and

- (o) Finally, as noted in the Commissioner’s submissions dated April 28, 2023, the evidence underlying the Initial Misconduct Allegation # 1 was squarely in issue during the discipline proceeding because it was central to the discipline authority’s consideration of whether or not SMC Martin committed deceit by denying that he showed a video of his neighbour having sex to his co-worker. As such, consideration of such evidence during the Review process creates no unfairness to the Member.

V Counsel for SMC Martin-Submissions on jurisdiction of the Adjudicator

- (42) Counsel for SMC Martin has advised that she had been retained as counsel to assist in replying to the submissions of Counsel to the Commissioner on the issue of jurisdiction.
- (43) The response of the Counsel on behalf of SMC Martin, can be summarized as follows:
- (a) The Adjudicator has the authority to decide whether or not he has jurisdiction at the Review on the Record on the basis of statutory interpretation; and
- (b) The unsubstantiated allegation of misconduct, Initial Misconduct Allegation # 1, cannot be reviewed by the Adjudicator in the course of the Review on the Record proceedings because the Commissioner has exceeded his jurisdiction under the Act by including that matter in his Notice.
- (44) The argument on behalf of the Member continues by asserting that the Commissioner’s position effectively reduces the Adjudicator to a mere pawn of the Commissioner who must decide the issues relating to Initial Misconduct Allegation #1 as set out on the Notice without question – even if the Act on a plain reading does not authorize the UA’s inclusion. Counsel maintains that this cannot be the case. While the appointment of the Adjudicator was at the “direction of the Commissioner”, the source of the Adjudicator’s authority is the Act. (*Lowe v. Pitfield, Bowyer and Jones* 2012 BCSC 1018 at para. 45.
- (45) Counsel for SMC Martin acknowledges that an adjudicator has no inherent jurisdiction. Counsel further agrees that there are situations in which an adjudicator as a statutory decision-maker cannot question the validity of the notice appointing them.
- (46) However, Counsel for SMC Martin takes issue with the argument of Counsel to the Commissioner that certain authorities support the conclusion that an adjudicator under the Police Act has no authority to determine whether or not an appointment notice is valid: *Human Rights Commission v. Human Rights Tribunal* 2020 BCSC 1798; *OPCC 4 2019-01 Ludeman and Logan*; *Reasons for Ruling on Scope of Public Hearing 19 Oct. 20201*; *Diaz-Rodriguez v. BC (PCC) 2020 BCCA 221*).

- (47) Counsel for SMC Martin submits that, in fact, the Court of Appeal in *Diaz-Rodriguez* did not decide that an adjudicator would have no jurisdiction to interpret a notice of adjudicator appointment issued by the Commissioner's to ensure compliance with the Act.
- (48) Counsel specifically submits that there is in fact no Court of Appeal authority directly on point with respect to this issue, specifically dealing with the authority of an adjudicator appointed to conduct a Review on the Record pursuant to section 142 of the Police Act.
- (49) Counsel acknowledges that the *Police Act* assigns the Commissioner statutory supervisory powers over certain aspects of disciplinary process. However, it is submitted that such authority does not extend to adjudicative powers with respect to misconduct allegations, and certainly not plenary powers to interpret the statute contrary to the clear operation and purpose of the Act as a whole (*Florkow v BCPC, 2013 BCCA 92, at para. 61*)
- (50) It is further acknowledged that while an adjudicator may not have express statutory authority to decline to decide an allegation of misconduct set out in a notice of appointment to conduct a review on the record, on the strength of the decisions of *Bowyer and Lowe v. Diebolt 2013 BCSC*, and the doctrine of implied jurisdiction, an adjudicator has the ability to determine their own jurisdiction arising under the *Police Act*.
- (51) On the proper interpretation of section 112 of the *Police Act*, Counsel for SMC Martin takes the position that the privative provision found in subsection 112(5)(b) is a complete bar to further consideration of an unsubstantiated allegation of misconduct, unless the Commissioner elects to proceed under section 117 of the Act.
- (52) Counsel further disagrees with the Commissioner's argument that the privative clause in s. 112(5) of the *Police Act* applies only ss. 112(4), not to s. 112(2)(d)(i). Specifically, the submission is that section 112(5) refers only to ss. (4) because that is the only aspect of the Discipline Authority decision that is "final and conclusive" at this initial stage. Counsel further submits that this language does not include "apparent" because there is no concern about pre-judging what is effectively an acquittal (or more accurately, a non-committal). Furthermore, it is submitted that there is no concern about apparent bias or a lack of presumptive innocence on unsubstantiated counts because they will not be considered by the DA.
- (53) In summary on this point, Counsel for SMC Martin submits that the privative clause in s. 112(5) of the *Police Act* does not say "...unless the PCC appointed a retired judge under s. 117(12) OR under s. 138 and s. 142". Therefore, it is submitted that the Commissioner did not have jurisdiction to order a Review on the Record on the unsubstantiated allegation of misconduct) and is now asking the Adjudicator to proceed in contravention of the Act.

- (54) The next issue advanced by Counsel for SMC Martin is there is no “disciplinary decision” with respect to the unsubstantiated allegation of misconduct as defined by s. 141(1) of the Police Act. Put another way, there is no ‘record’ of the unsubstantiated allegation of misconduct to ‘review’.
- (55) Under s. 141 of the *Police Act*, there is a specific definition of “disciplinary decision” which means ‘any of the matters described in s. 133(1)(a)(i) to (iv) and s. 128’. Section 133(1)(a) requires a report by the discipline authority setting out, inter alia, findings and reasons under s. 125(1)(b) (findings on misconduct after a DP) and s. 128 (discipline or corrective measures).
- (56) Counsel further submits that for obvious reasons, there is no reference to s. 112 in section 133 of the *Police Act*. Section 133 only includes allegations which were substantiated by the DA in the first instance under s. 112(3) and proceeded to hearing under s. 124, as well as the discipline that followed pursuant to s. 126 and summarized in the s. 128 Disciplinary Decision Record.
- (57) Counsel submits that the unsubstantiated allegation of misconduct at issue in this case is not part of the s. 133 report or the s. 128 report. Therefore, it is submitted, that there is in fact no record for the Adjudicator to review that includes Initial Misconduct Allegation #1.
- (58) Finally, Counsel submits that the Commissioner’s argument that any unfairness to SMC Martin could be wholly remedied simply by the member being permitted to adduce new evidence under s. 141(4) is without merit.
- (59) Counsel to SMC Martin maintains that the only way to have prevented manifest unfairness to SMC Martin by the reconsideration of Initial Misconduct Allegation # 1 was for the Commissioner to have arranged for a retired judge to be appointed under s. 117(3) of the *Police Act* within 20 business days of the s. 112 (1)(c) as the Act requires.

VI Jurisdiction Analysis

- (60) I have broken down the issues relating to an analysis of the jurisdiction issues as follows:
- (A) The scope of, and Adjudicator’s role in, conducting a review on the record; and
 - (B) The scope and meaning of section 112(5) of the *Police Act*.

(A) Adjudicator's jurisdiction to re-consider, in whole or in part the Commissioner's decisions concerning the Notice and Initial Misconduct Allegation # 1:

- (61) On this point, respectfully, it appears that there may have been a misunderstanding on the issue raised by my inquiry at the start of the hearing. What was raised at the outset of the hearing was a question as to my jurisdiction as adjudicator, not the jurisdiction of the Commissioner. In no sense has the Commissioner's decision to order a review, or the terms of that review, been challenged, directly or indirectly by myself as Adjudicator. Indeed, that point was specifically raised during the threshold discussion on this issue.
- (62) There is no doubt that adjudicators appointed to conduct a Review on the Record under the *Police Act* do not have inherent jurisdiction. An adjudicator's authority can only arise from an appointment made by the Commissioner following the processes under the *Police Act* set out primarily in sections 138(1), 141 and 142 of the *Act*.
- (63) However, it is my finding that once an appointment to conduct a review on the record has been made, it is the duty of the adjudicator to discharge their mandate in accordance with the powers and duties set out in the *Police Act* and the principles of procedural fairness. I am satisfied that it would be a dereliction of my duty as an appointed adjudicator not to consider my statutory authority before embarking on an ordered review.
- (64) I cannot find that the record in these proceedings confirms a challenge to, or reconsideration of, the Commissioner's notice of appointment, or any decisions reached by the Commissioner in coming to that appointment decision. Rather, I find that my role as adjudicator is to ensure that any decisions taken are decisions that are lawful, and the result of a proceeding that ensures procedural fairness.
- (65) The fact that Counsel to the Commissioner included specific submissions on the substance of Initial Misconduct Allegation # 1 in the written argument tendered in these proceedings provided a lawful basis for myself as adjudicator to seek clarification of my statutory authority to consider that matter.
- (66) By raising the question of the applicability of section 112(5) to the current proceedings, I am satisfied that the Commissioner had both the duty, and the statutory authority, to provide advice to myself as adjudicator on that point in accordance with 177(2) (j) of the *Police Act*. Requesting clarification and advice in this manner from Counsel representing the Commissioner is not a challenge to the Commissioner's authority, and is certainly not intended to be such.
- (67) Advice with respect to my jurisdiction to consider Initial Misconduct Allegation #1 has been sought from the parties, and a comprehensive response has been provided by Counsel to the Commissioner and Counsel to SMC Martin.

- (68) I find, however, that nothing in that process raises any issue of a challenge to the Commissioner's authority, a reconsideration of the Commissioner's decisions, or the validity of the scope of the notice of appointment.

(B) Relationship of section 112(5) of the Police Act to section 112(2)(d)(i).

- (69) Counsel to the Commissioner raises an important issue of statutory interpretation concerning section 112(5) of the *Police Act*. The question is whether or not that section has any applicability to a decision made under section 112(4) that finds that alleged misconduct considered in a Final Investigation Report does not appear to be substantiated.
- (70) In the current case, it was determined by the Discipline Authority that some elements of the Member's conduct appeared to substantiate misconduct. However, some conduct, including that involving the Neighbour Video central to Initial Misconduct Allegation # 1, was found not to substantiate misconduct.
- (71) The submission of Counsel to the Commissioner is that the plain reading of section 112(5) does not apply to partial findings of apparent misconduct and applies to conduct as a whole, as opposed to specific misconduct allegations. Rather, Counsel submits that only those cases where all misconduct alleged does not appear to be substantiated are governed by section 112(5). And, of course, such is not the case here.
- (72) Counsel to SMC Martin submits that section 112(5) is applicable to an unsubstantiated allegation of misconduct arising from a discipline proceeding.
- (73) In *Florkow, supra*, the BC Court of Appeal considered section 112(5) in the context of an ordered public hearing. Public Hearing appointments are also made under section 141 of the *Police Act*, the section governing appointments to conduct a Review on the Record. The Court in that case found that section 112(5) was a bar to reconsidering allegations of misconduct that were not substantiated by a Discipline Authority in the context of a Public Hearing. The decision did not, however, decide the issue as to whether or not a partial finding that misconduct appeared to be substantiated met the same standard.
- (74) At paragraph 6 of the decision in *Florkow*, the Court observed that:

"Part XI of the Act is dense, complicated and often confusing. Its provisions are hedged round with exceptions, qualifications and limitations that are often located in other sections not in close proximity. One must frequently follow cross references to other

sections, and few provisions can be said to stand alone. It is not a model of clarity. Nevertheless, the meaning of s. 143(1)(b) must and can be resolved by reference to the longstanding principle that statutory provisions must be read “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of [the Legislature].” (Rizzo & Rizzo Shoes Ltd. (Re) [1998] 1 S.C.R. 27, at para. 21.)

(75) Further at paragraph 42 of *Florkow*, the Court noted, in part, that:

As we have seen, the amended Act prescribes a multi-stage winnowing process for the resolution of complaints. If no misconduct is found by the DA at the end of the investigation stage, or by the retired judge on review of the DA’s decision, the finding is said to be final unless certain events occur. Where, as in this case, only the first stage was reached – i.e., a DA has determined under s. 112(4) that the impugned conduct did not constitute misconduct – s.112(5) states that that determination is “final and conclusive” and “not open to question or review by a court on any ground” unless s. 117(1) applies.

(76) I am satisfied that the principles set out in *Florkow* concerning the legislative intent of Part XI of the *Police Act* have direct relevance to the issue of section 112(5) and the unsubstantiated allegation under consideration as part of this Review on the Record.

(77) The modern principles of statutory interpretation provide for a consideration of a legislative provision in light of its assumed purpose, intent and context.

(78) With those principles in mind, I find that it is reasonable to conclude, as noted in *Florkow*, that the assumed purpose of section 112(5) of the *Police Act* is to provide finality for allegations of misconduct considered by a disciplinary authority that were determined not to be substantiated.

(79) The discipline authority has a duty under section 112 to consider each allegation of misconduct and determine whether or not each such allegation appears to be substantiated. Obviously, the discipline authority also has the implicit duty to determine which allegations of misconduct do not appear to be substantiated.

(80) Section 112(4) simply confirms that if a discipline authority concludes that “the conduct” of a member does not constitute misconduct, then, in such circumstances, reasons for that decision are required.

(81) I do not read section 112(4) as applying to the totality of the conduct of the member, but rather to the conduct referenced in a specific misconduct allegation that has not been substantiated by the discipline authority.

- (82) I am further satisfied that section 112(5) is found in the context of a Part XI *Police Act* process that *Florkow* described as “*multi-stage winnowing process for the resolution of complaints*”. That provision is part of a complex, and highly specialized legislative regime.
- (83) There can be no doubt that the language of section 112 is awkward, similar to many other provisions of the *Police Act*. The argument is made that unless all alleged misconduct is not substantiated, section 112(5) cannot apply. However, having considered section 112 in its totality and the assumed purpose of the disciplinary process in the context of part XI of the *Police Act*, I am not satisfied that such a conclusion is correct. I find that:
- (a) Section 112(2)(c) requires a discipline authority to report on each allegation of misconduct considered;
 - (b) Section 112(2)(d) requires that a discipline authority specifically report on each allegation of misconduct and advise whether or not each such allegation of misconduct appears to be substantiated. As such, it appears that there is a specific duty to report on each allegation as to whether it is substantiated, or not;
 - (c) If an allegation of misconduct does not appear to be substantiated, the discipline authority has a further specific obligation under section 112(4) to provide reasons as to why such a decision was taken;
 - (d) If an allegation of misconduct is not substantiated, section 112(5) confirms that such a decision is, final and conclusive unless the Commissioner appoints a retired judge under section 117(1);
 - (e) Section 112(5) is intended to support the discipline winnowing process that takes places through the varying stages in Part XI of the *Police Act*; and
 - (f) If an unsubstantiated allegation of misconduct requires further review, an appointment under section 117 of the *Police Act* provides clear authority for an adjudicator to consider such a matter.
- (84) Considering all of the foregoing and the record associated with this review, I am satisfied that section 112(5) does in fact limit my jurisdiction to consider a misconduct allegation that was not substantiated by the Discipline Authority under section 112(4) of the *Police Act*. My jurisdiction is limited as my appointment arises under section 141, and not 117, of the *Police Act*.
- (85) Although I am required to considered the entirety of the record described by section 141 (3) of the *Police Act*, which would include the facts relating Initial Misconduct Allegation # 1, I am satisfied that such a review cannot extend to concluding that the Discipline Authority’s decision not to substantiate that Initial Misconduct Allegation # 1 was incorrect.

- (86) I am satisfied that section 112(5) of the *Police Act* clearly excludes my jurisdiction to reconsider that matter as the Discipline Authority's decision on that point is "final and conclusive".
- (87) I find that the plain meaning of section 112(5), considered in the context and intent of the overall disciplinary process in Part XI of the *Police Act*, is to ensure that as a subsequent adjudicator, not appointed under section 117, a review of Initial Misconduct Allegation # 1 is beyond the scope of my statutory authority.

PART II
REVIEW OF ALLEGED MISCONDUCT BY THE MEMBER

VII Decision to be reviewed

- (88) As set out above, on September 7, 2022 a discipline proceeding was convened concluding October 7, 2022. As a result of that hearing, the Discipline Authority provided a written decision pursuant to section 125 of the *Police Act*.
- (89) The Discipline Authority substantiated the following allegation which was admitted by SMC Martin at the hearing:
- "Discreditable Conduct pursuant to section 77(3)(h) of the Police Act for taking a video of himself on duty with a male prisoner in the background purportedly masturbating and sharing it with work colleagues." ("Final Misconduct Allegation # 2")*
- (90) The Discipline Authority did not substantiate the following allegation:
- "Deceit pursuant to section 77(3)(f)(i)(A) of the Police Act with respect to the Member knowingly being untruthful during his Police Act interview about showing a video of his neighbour having sex to SMC Cochrane" ("Final Misconduct Allegation #3")*
- (91) With respect to the substantiated misconduct, Final Misconduct Allegation #2, the Discipline Authority proposed a two day suspension without pay.
- (92) The Discipline Disposition Record filed by the Discipline Authority pursuant to section 128(1) of the *Police Act* confirmed the findings set out above, resulting in the Commissioner's decision to order a Review on the Record. As a result of that decision, the privative clause found in section 133(6) of the *Police Act* does not apply to the Discipline Decision.

- (93) In light of the conclusion reached in the jurisdictional analysis noted above, submissions of the parties with respect to re-consideration of Initial Misconduct Allegation # 1 will not be reviewed, although the evidence relevant to that allegation does, of course, form part of the record before me.

VIII Standard of Review, documents reviewed and *Police Act* definitions of Misconduct

- (94) S. 141 (9) of the *Police Act* confirms that the standard to be applied in my review of the Disciplinary Decision is correctness. That standard was defined by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 50 as follows:

50. *As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.*

- (95) The documents reviewed in accordance with section 141(3) of the *Police Act*, as disclosed by the OPCC, include a flash drive and hard copies of the Final Investigation Report (the "FIR"), attachments to that report, submissions of parties in relation to the Discipline Proceeding, as well as Forms 3 and 4 (the "Record").
- (96) The definition of "*discreditable conduct*" relevant to the misconduct allegations set out in the *Police Act* section 77(3) (h) is as follows:

"discreditable conduct", which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department, including, without limitation, doing any of the following:

- (i)acting in a disorderly manner that is prejudicial to the maintenance of discipline in the municipal police department;*
- (ii)contravening a provision of this Act or a regulation, rule or guideline made under this Act*
- (iii)without lawful excuse, failing to report to a peace officer whose duty it is to receive the report, or to a Crown counsel, any information or evidence, either for or against any prisoner or defendant, that is material to an alleged offence under an enactment of British Columbia or Canada;*

- (97) The definition of Deceit relevant to the third misconduct allegation is set out in the *Police Act* at section 77(3)(f)(i)(A):

(3) Subject to subsection (4), any of the conduct described in the following paragraphs constitutes a disciplinary breach of public trust, when committed by a member:

(f) "deceit", which is any of the following:

(i) in the capacity of a member, making or procuring the making of

(A) any oral or written statement,

IX Submissions of Counsel to the Commissioner - Misconduct Issues

- (98) Counsel to the Commissioner submits that the Discipline Authority erred in concluding that the allegation of *Deceit* was not substantiated in relation to statements made by SMC Martin during the investigation of this matter. Counsel submits that the evidence establishes that SMC Martin knowingly provided false or misleading information when he:

(a) denied that he showed a co-worker a video of his neighbour having sex in the Neighbour Video, and suggested that the person who reported that incident was lying; and

(2) denied that he took and shared a video of a prisoner masturbating in cells with work colleagues (the "Prisoner Video"),

- (99) The Commissioner does not take issue with the Discipline Authority's decision to substantiate Final Misconduct Allegation # 2, although does take issue with the disciplinary sanctions imposed.
- (100) As the Representative has asked to defer SMC Martin's submissions on sanctions until after completion of my misconduct review, I will defer consideration of the Commissioner's submissions on those issues until I have heard from the Representative.
- (101) The written submissions of Counsel to the Commissioner in this Review with respect to the issue of *Deceit* can be summarized as follows:
- (a) The elements of *Deceit* relevant to Final Misconduct Allegation # 3 are established in this case as a result of statements made by SMC Martin in his interview with the Investigating Officer that were untrue and misleading. Specifically, SMC Martin stated that:

(i) “without a doubt” he never showed a video of his neighbour having sex to a co-worker at work;

(ii) he could not have done so because the videos of his neighbour were never saved on his phone;

(iii) the allegation that he showed a co-worker a video of his neighbour having sex was “false information”; and

(iv) he “definitely” did not record or share any videos of individuals in jail cells.

(the “Deceitful Statements of SMC Martin”)

- (b) The Deceitful Statements of SMC Martin were not only untrue, but also known to the member to be false or misleading when made to the Investigator;
- (c) Furthermore, the Deceitful Statements of SMC Martin were not only inaccurate information provided to the Investigating Officer, but also self-serving and not indicative of inadvertence or misunderstanding. Rather, the evidence establishes on a balance of probabilities that SMC Martin knew these statements were misleading at the time he made them;
- (d) SMC Martin subsequent to his initial interviews with the Investigator contended that he simply did not recall showing a video of his neighbour having sex to SMC Cochrane at work. He maintained that showing such a video to a co-worker would not be a significant event for him and thus, he would be unlikely to remember it even if it did happen;
- (e) However, Counsel submits that that position does not reflect the evidence initially given to the Investigating Officer. In his initial interview, SMC Martin stated unequivocally that the incident described in the Notice of Investigation *did not* and *could not* have happened, and he impugned the integrity of the co-worker who reported it;
- (f) As SMC Martin acknowledged in his interview, the clear implication of his evidence was that the co-worker who reported the incident was simply lying. The Commissioner submits that, even accepting SMC Martin’s later testimony regarding his inability to recall the incident, the evidence establishes on a balance of probabilities that SMC Martin knew it was misleading to say “without a doubt” that the incident did not and could not have happened;
- (g) The same conclusion applies to SMC Martin’s evidence with respect to the allegation that he recorded a video of a prisoner masturbating in Vic PD cells and shared this video with friends. SMC Martin told the Investigating Officer, without qualification, that there was no truth to this allegation. This statement was clearly known to be false and misleading given that, as SMC Martin eventually admitted, he knew he had recorded a video of a prisoner masturbating in Vic PD jail cells and shared this video with “one or two coworkers”; and

- (h) Finally, Counsel submits that there is no legal authority for the Discipline Authority's apparent conclusion that SMC Martin's subsequent admission to the allegation of acts of deceit "cured" the earlier false statement such that it could not ground a finding of *Deceit*.

X Submissions of Representative for SMC Martin - Misconduct Issues

96. The Representative for the SMC Martin provided detailed written and oral submissions which have been entered as an exhibit in these proceedings.
97. First, the Representative takes issue with the position advanced by the Commissioner that a special municipal constable has the same powers, duties and immunities as a regular constable. It is submitted that the reality is that required training for a special municipal constable is markedly different resulting in lower recruitment and service standards. As a result, the Representative submits that it is not reasonable to hold such a constable to the same standard applicable to a regular officer.
98. Next, the Representative denies that the evidence discloses any acts of Deceit on the part of SMC Martin by knowingly providing false or misleading information during the investigation.
99. The Representative acknowledges that during SMC Martin's interview dated January 21, 2022, he admitted that he had recorded the neighbour videos, and shared them with friends via Snapchat, a mobile app which allows users to send videos, photos, and messages to other individuals.
100. However, the Representative submits that It is SMC Martin's position that he had no knowledge of those videos being retained on his phone as later confirmed by the investigation. It is submitted that SMC Martin believed that he had recorded the videos only via Snapchat and they had been deleted shortly thereafter for all purposes.
101. The Representative further maintains that while SMC Martin denied showing SMC Cochrane one of the videos, no evidence was obtained to support his theory that she viewed the video in some other manner and then falsely reported that he showed it to her. At the Discipline Proceeding, it is acknowledged that SMC Martin conceded it was *possible* that he showed SMC Cochrane a video of his neighbour having sex, although he does not remember doing so.
102. The Representative notes that the allegation of *Deceit* resulted from an account of events describing the incident by SMC Cochrane and a denial of that account by SMC Martin. It is submitted that the Investigator stated in the FIR, that it became apparent to him that either SMC Martin or SMC Cochrane were "being deceitful or that one of them was honestly mistaken in their account of what had occurred."

103. Ultimately, the Representative notes that the Investigator indicated that the “specific details” provided by SMC Cochrane in her statement, “the nature of the reported events,” and the apparent significance of the event led him to reasonably believe that SMC Martin was being deceitful. He described that he did not believe that two completely divergent accounts were because of an honest lapse of memory
104. The Representative submits that the Investigator stated in his FIR in reference to SMC Cochrane viewing the video that the details she provided were so specific that it is extremely unlikely, if not impossible, that such details could be conveyed by her if she had not actually seen the video in question. The Investigator then states the he “uncovered no evidence or information to support the conclusion that someone else, other than SMC Martin, showed her the video,” and concludes that SMC Martin on a balance of probabilities showed SMC Cochrane the video and that he provided “misleading information” constituting the contested allegation of *Deceit*.
105. It is submitted that SMC Martin maintained a clear denial of showing SMC Cochrane the video in question, this denial in no way attempted to “mislead” the investigator. SMC Martin stated that it did not happen. All this occurred prior to SMC Martin having an opportunity to review the evidence that the Investigator had accumulated.
106. Upon being provided a copy of the FIR, the Representative notes that SMC Martin had an opportunity to review the evidence presented and agreed with the Investigator’s assessment that the details SMC Cochrane provided in relation to the video were so specific that it is extremely unlikely, if not impossible, that such details could be conveyed if she had not actually seen the video in question.
107. As maintained previously, SMC Martin stated that he did not show her the video and believed someone else must have and requested further investigation in an attempt to discover how SMC Cochrane came to view the video. However, the Representative acknowledges that the supplemental investigation did not identify any evidence that someone other than SMC Martin showed SMC Cochrane or provided her with the video in question.
108. The Representative takes issue with the conclusion that SMC Cochrane provided a more credible report of her deals with SMC Martin in relation to the videos in question. Specifically, the Representative notes inconsistencies in the evidence on shift assignments and other matters.
109. The Representative submits that SMC Martin agrees with the Investigator’s belief that SMC Cochrane did see one of the videos in issue, and this aspect is not contested by SMC Martin, nor is it inconsistent with his account. SMC Martin submits, however, that this conclusion does not provide evidence that he showed SMC Cochrane that video.

110. The Representative maintains that it was SMC Martin's belief that the videos in issue were not being saved on his phone as that was his understanding of the Snapchat App that he used. The information provided during the investigation alerted him to make further inquiries and determine that he had the Snapchat App settings configured in a manner inconsistent with how he believed it was operating, such that it was saving the videos to his phone. SMC Martin was incorrect in stating that the videos were never saved on his phone (rather he believed they were recorded, sent via Snapchat, after which they would be deleted and disappear) and thus, at the time it was his honest belief that it was impossible for him to have shown any of the videos to SMC Cochrane. As such, it is submitted that this makes SMC Martin's statements mistaken, not deceitful.
111. The Representative submits that SMC Martin did not provide any contradiction to his previous statements during the Discipline Proceeding. Rather, it is submitted that he was simply at the point where clearly everyone else believes the evidence that had been presented and conceded that whatever remains, *however improbable, must be the truth.*
112. As noted, SMC Martin maintains that he did not show SMC Cochrane the video, or rather has no memory of doing so. However he acknowledged that there appeared to be no other reasonable explanation based on the evidence that was obtained in this matter.
113. The Representative submits that SMC Martin believed that by continuing to deny these events, he was suggesting that SMC Cochrane was the one being deceitful. It is further submitted that was clear to SMC Martin that the Investigator and the Discipline Authority believed SMC Cochrane's evidence. Therefore, SMC Martin decided to make this concession and take responsibility to gain some leniency in the disciplinary measures that would be imposed by the Discipline Authority.
114. With respect to statements made by SMC Martin concerning the prisoner video, again the Representative submits that no act of Deceit has taken place by knowingly providing false or misleading information during the investigation into that matter.
115. On the nature of SMC Martin's responses during the Discipline Proceeding when the Investigator questioned him about video recordings of prisoners, it is SMC Martin's submission that he misunderstood the question's reference and maintains that the context of his actions would not be described as "videotaping individuals within their jail cells," without the appropriate context which he gleaned later. As such the Representative submits that SMC Martin's responses were not knowingly false, misleading or deceitful.
116. Finally, the Representative submits that even if the statements of SMC Martin may have been false or misleading, they were not made intentionally or recklessly. As such, it is SMC Martin's position that Deceit has not been proven with clear, convincing and cogent evidence.

XI The Credibility of SMC Martin

117. There are a number of significant issues in the Record affecting SMC Martin's credibility. Considering the totality of the Record, I am satisfied that multiple issues arise with respect to the SMC Martin's ability to accurately, consistently and completely observe, recall and report on events related to the misconduct allegations.
118. There are also many issues that touch on the trustworthiness of SMC Martin's evidence, also impacting his overall credibility. Few of these issues were specifically addressed in the Discipline Authority's decision. Let me explain.
119. Throughout SMC Martin's interaction with the Investigator, and later during the Discipline Proceeding, the Member's attitude to his evidence was casual, unprofessional and deliberately misleading.
120. I find that SMC Martin's recollection of events was deliberately evasive, selective and incomplete on some of the most crucial issues in dispute such as:
- (a) The nature of the Neighbour and Prisoner video recordings taken;
 - (b) The retention of videos on the Member's phone;
 - (c) Whether or not the Member could have shared the Neighbour Video with SMC Cochrane; and
 - (d) Whether or not the Member had taken and shared with work colleagues the Prisoner Video showing a prisoner in cells engaged in a sexual act.
121. For example, SMC Martin repeatedly emphasized how little memory he had of any of his dealings with SMC Cochrane, his sharing of the Neighbour Video or any follow up comments. His attitude was clear in that sharing videos, even ones depicting intensely personal matters such as the Neighbour Video and that of the prisoner in cells were routine parts of his life experience with friends, warranting no specific memory or recollection.
122. SMC Martin also waived significantly in his testimony demonstrating material inconsistencies in his evidence. SMC Martin's statements to the Investigator contradicted his interview evidence as detailed in Counsel's submissions on "SMC Martin's Evidence in the Discipline Proceeding", page 17 Counsel's submissions. And further at the Discipline Proceeding, SMC Martin conceded that contrary to his earlier evidence and statements, it was possible that he showed the Neighbour Video to SMC Cochrane, however denied having any memory of doing so, and stating that even if he did, it would not have been a significant event for him to recall.

123. As noted, SMC Martin was initially adamant that he did not, and could not, have shared the Neighbour Video with SMC Cochrane under any circumstances. After attempting to deflect responsibility back to SMC Cochrane, and subsequent re-investigation of his allegations, the Member was left with little option but to acknowledge that SMC Cochrane had seen the video in question while at work.
124. SMC Martin was also categorical in his denial of taking and sharing the Prisoner Video during his initial interviews with the Investigator.
125. SMC Martin maintains that he was being truthful throughout, confirming that during the initial criminal investigation, he had not disputed the taking of videos of his neighbour engaged in sex acts. He questioned why he would have denied sharing the Neighbour Video having admitted to taking the videos of his neighbour.
126. The answer to that question can be found either in his casual and incomplete attitude to facts, or his awareness that the sharing of the videos with a co-worker could have profound impacts on his employment with Vic PD.
127. In any event, under no circumstances does the member's late and partial co-operation in acknowledging his role in taking, and sharing intimate videos with his friends confirm or enhance SMC Martin's credibility. SMC Martin's recollections and reports on his actions were deliberately incomplete and misleading, particularly as they attempted to deflect blame to SMC Cochrane, or others.
128. For a person serving as a Special Municipal Constable, and aspiring to serve as police officer, such a casual, egocentric, flexible and incomplete perspective on the facts directly challenges the member's credibility, as he has clearly demonstrated an inability to accurately and completely observe, recall and report on events in his life.
129. In considering SMC Martin's credibility, I have also taken into consideration his attempt to mislead the Investigator and the discipline process by deflecting responsibility for his conduct. SMC Martin did so by unfairly casting aspersions on his co-worker, SMC Cochrane when he knew, or ought to have known, that neither she, or any other person, had culpability in any of his misconduct. Such sustained misleading actions demonstrate not only the unreliability of SMC Martin's evidence, but their lack of truthfulness, a serious issue in any credibility assessment.
130. SMC Martin minimized his responsibility for the video sharing issues at every turn. His callous equivocation and deflection of responsibility was simply not believable. Rather, it demonstrated the conduct of a person suddenly aware of the grave consequences for the acts he had undertaken and seeking any possible method of avoiding his responsibility.

131. At pages 22-23 and 25-27 of the Discipline Proceeding Transcript, it is clear that the Discipline Authority had some challenges in determining SMC Martin's actual position on the Deceit allegations at the Discipline Proceeding. The evidence had moved from a complete denial, 100%, of sharing the Neighbour video or Prisoner Video recording, to a position that the Member could not recall the event, to a later reluctant acknowledgment that perhaps he did share the videos, but that the incidents held no importance to him, hence were not recalled. None of those stream of consciousness thoughts from SMC Martin bore any indicia of credibility, reliability or trustworthiness.
132. Other factors affecting reliability are the apparent contradictions in SMC Martin's evidence on his recollection of events. As noted above, SMC Martin initially unequivocally denied sharing the Neighbour Video and Prisoner Video with co-workers.
133. Further, at the Discipline Proceeding, SMC Martin ultimately changed his position again admitting the sharing of the prisoner video and did not dispute that SMC Cochrane had been shown the Neighbour Video by him, although denied recalling the events. Both inconsistencies are material and significant in determining the reliability and ultimately credibility of the member.
134. I do not find that there is any legal authority for the Discipline Authority's apparent conclusion that during the Discipline Proceeding, SMC Martin's subsequent admission to the allegation of acts of deceit vitiated his earlier false statements such that it could not establish a finding of Deceit. It was an error not to conclude that the multiple contradictions in SMC Martin's evidence raised significant and fundamental credibility concerns.
135. Nor do I believe SMC Martin's contention that he did not understand the questions of the Investigator concerning videos taken on his phone. SMC Martin unquestionably understood the issue and once again took the opportunity to equivocate and avoid responsibility for his initial answers.
136. SMC Martin's evidence does not have the ring of truth. Rather it reflects a profoundly casual perspective on truth and an immaturity that has resulted in the contradictions, equivocation and uncertainty arising from the Member's evidence.
137. I find that SMC Martin's ability to honestly, objectively, consistently and forthrightly observe, recollect and report on the interactions with the Complainant raises serious concerns as to reliability and credibility of his evidence.
138. In no sense can I find that any of SMC Martin's evidence meets the test in *Farnya & Chorny*. Rather, I find that the preponderance of the evidence of SMC Martin, in the context of the other evidence in the FIR, could not result in a practical and informed person readily recognizing SMC Martin's evidence as reasonable under any circumstances.

139. As a result of the foregoing, I cannot find that SMC Martin was a credible, reliable or trustworthy witness. I reject his evidence where it conflicts with the other witnesses who's evidence I have accepted as credible, reliable and trustworthy.
140. Taking into consideration the foregoing analysis, I am satisfied that the Discipline Decision was incorrect in analyzing the credibility of the various key witnesses and the reliability of their evidence. In particular, I find that the Discipline Authority incorrectly analyzed the credibility and reliability of SMC Martin for the reasons set out above.
141. I am satisfied that the preponderance of the evidence unquestionably establishes that SMC Martin was intentionally misleading and untruthful by saying that it was "100%" certain he did not share the Neighbour Video with SMC Cochrane. The member was similarly misleading with respect to the denial of taking and sharing the Prisoner Video. In no sense were these statements made as an honest lapse of memory, they were made intentionally to deny his involvement in the allegation of sharing the videos in question to co-workers.
142. As a result, I am also satisfied that the findings of the Discipline Authority were, in part, incorrect. I find that the conclusions reached by the Discipline Authority relied on an inaccurate analysis of witness reliability and credibility.
143. Specifically, given the significant credibility issues with the evidence of SMC Martin and the clear credibility, trustworthiness and reliability of the evidence of other witnesses, such as SMC Cochrane, I find the Discipline Authority erred in concluding at paragraph 34 of the Discipline Decision that "*I cannot say that there is clear evidence that SMC Martin was knowingly untruthful.*"

XII Analysis - Misconduct Allegations

144. Final Misconduct Allegation #2 with respect to the allegation of Discreditable Conduct in the taking and sharing of the Prisoner Video has been admitted by the member and proven by the Discipline Authority. I am not satisfied that there is any error in reaching that conclusion.
145. Considering the totality of the evidence in the Record and the foregoing conclusions with respect to findings of credibility, I must now turn to a review of the Member's conduct with respect to the allegations of Deceit.

146. Having considered the totality of the evidence in the Record, the assessment of the credibility of the witnesses noted above, and the submissions of the parties, I find that following facts have been proven beyond a balance of probabilities, on clear and cogent evidence. I also find that such facts are material to a determination of whether or not misconduct has been committed by SMC Martin:

- (a) SMC Martin used his cell phone to record multiple videos of his neighbours engaged in sexual activity within their residences, including the Neighbour Video;
- (b) SMC Martin shared the videos with his friends as a regular part of his activities;
- (c) SMC Martin shared the viewing of the Neighbour Video with SMC Cochrane on his cell phone September 10, 2021 while the two were working the same shift;
- (d) SMC Martin recorded a prisoner in cells engaged in sexual activity in cells and shared that video with co-workers;
- (d) When questioned by the Investigator concerning the sharing of a Neighbour Video, SMC Martin unequivocally denied having done so. He stated that “without a doubt” the alleged interaction did not happen and was false information.
- (e) SMC Martin further confirmed that it would have been impossible for him to share the video with SMC Cochrane and that he knew such sharing had never taken place;
- (f) SMC Martin agreed “100%” that the allegation that he showed a video of his neighbour having sex to SMC Cochrane misrepresented what actually happened;
- (g) In his responses to the Investigator, SMC Martin attempted to deflect responsibility for SMC Cochrane having seen the Neighbour Video by deflecting responsibility to others including SMC Cochrane and seeking further investigation of those concerned;
- (h) The result of the further investigation requested by SMC Cochrane was that no person other than SMC Martin was found to have culpability for the misconduct described;
- (i) At the Discipline Proceeding, SMC Martin conceded that there did not appear to be any evidence to support his earlier theory that SMC Cochrane had seen the Neighbour Video by means other than him showing it to her. However, SMC Martin explained that sharing such a video would not have been a significant event for him, nor did he have any memory of having done so;
- (j) With respect to the taking and sharing the video of a person in custody engaged in sexual activity with co-workers, SMC Martin again initially denied there was any truth to such an allegation;
- (k) Later at the Discipline Proceeding, SMC Martin admitted that contrary to his initial statement, he had in fact recorded a video of himself in jail with a male masturbating in the background and sent that video to “one or two co-workers”; and
- (l) When given an opportunity prior to the Discipline Proceeding to correct or clarify his evidence, SMC Martin chose not to do so.

XIII Legal Framework for analysis of Deceit under the Police Act

147. Section 101(1) of the *Police Act* provides that members are under a legal obligation to “cooperate fully” with officers investigating misconduct allegations under Part X1. Specifically, members are required to provide accurate and complete information to investigating officers.
148. As set out above and as the parties have noted, allegations of misconduct constituting Deceit engage a disciplinary breach of public trust under section 77(3)(f)(i)(A) of the *Police Act*.
149. Deceit allegations require proof beyond a balance of probabilities of both conduct and fault elements.
150. The conduct element requires proof that statements made must be false or misleading.
151. The fault element requires proof that the member concerned knew that the statement or statements were made knowing that they were false or misleading.
152. However, the member’s motive in making a misleading or untruthful statement is irrelevant to proof of Deceit.
153. The legal test for proof of Deceit was set out by Adjudicator Threlfall in Decision of Review on the Record RR18-03. In that case Adjudicator Threlfall found that the member had committed deceit by knowingly writing traffic tickets which did not accord with the presented driving behaviour. Adjudicator Threlfall wrote:

“The Police Act does not require that the member’s actions be either intentional or reckless.

In my view the gravamen of the offence is the making of a false statement in an official document. Here, the fact that Constable R knowingly made false statements in an official capacity is conceded.

In my view, unlike the sections involving abuse of authority, the offence of Deceit is complete when the false entry is made in an official document knowing that it is false”

154. In considering the totality of the evidence I am satisfied on the clear and cogent evidence before me that the elements of Deceit are proven beyond a balance of probabilities.
155. SMC Martin intentionally and unequivocally made SMC Martin's Deceitful Statements in his interviews with the Investigator. In those initial interviews, SMC Martin completely denied responsibility for sharing Neighbour Video with SMC Cochrane and for taking and sharing the Prisoner Video with co-workers.
156. I agree with the submission of Counsel for the Commissioner that all of SMC Martin's Deceitful Statements were categorically untrue.
157. As such, the conduct component of SMC's alleged acts of Deceit are established beyond a balance of probabilities.
158. In terms of the fault component, I am satisfied beyond a balance of probabilities that SMC Martin knew that each of the Deceitful Statements were made knowing that they were intentionally misleading and untrue. I come to that conclusion by noting that:
- (a) SMC Martin was unequivocal in his initial responses to the Investigator denying any possibility that his misconduct may have taken place;
 - (b) However, SMC Martin subsequently tried to deflect responsibility to others and then denied recalling the incidents in question;
 - (c) With respect to the sharing of the Prisoner Video SMC Martin changed position and admitted taking and sharing the video he originally denied in all respect;
 - (d) SMC Martin ultimately changed his position on SMC Cochrane having viewed his Neighbour Video while minimized the incident; and
 - (e) SMC Martin's conduct throughout, as set out above in relation to his credibility, sought to deny, deflect, minimize and equivocate his actions. Without doubt, SMC Martin knew that his original complete denials could not be true, yet chose to make those responses to the Investigator.
159. There can be no doubt that truth is not iterative. Facts are not flexible or negotiable, particularly from the perspective of an officer with policing responsibilities.
160. When asked to honestly respond to questions about an alleged act of misconduct by an Investigator, it is the duty of all members to respond truthfully to those inquiries. Having considered all of the evidence in the Record, there can be no doubt that SMC Martin did not do so.

161. In the circumstances of this case, had SMC Martin genuinely been unable to recall what had taken place concerning both deceitful acts of alleged misconduct, the honest answer would have been to say so.
162. To unequivocally and repeatedly deny that the alleged acts of misconduct had taken place, as evidenced in SMC Martin's Deceitful Statements, while harbouring doubts about those conclusions, clearly establishes that SMC knowingly misled the Investigator by deliberately making a false series of statements on multiple occasions.
163. I conclude that the Discipline Authority erred in not finding that SMC Martin had committed misconduct by way of Deceit, a disciplinary breach of public trust under section 77(3)(f)(i)(A) of the *Police Act*, in orally making SMC Martin's Deceitful Statements to the Investigator knowing that such statements were untrue and misleading.
164. Having considered all of the evidence, I am satisfied that SMC Martin knowingly misled the Investigator in making his Deceitful Statements and in his questioning thereafter.

XIV Analysis and Conclusion

165. Having completed my review of the Record, I find that the Disciplinary Decision made by the Discipline Authority was, in part, incorrect, for the reasons noted above.
166. My core responsibility in conducting this Review on the Record has been to determine whether or not misconduct on the part of SMC Martin has been proven. I have concluded that it has.
167. With respect to Final Misconduct Allegation # 2, the discreditable misconduct alleged pursuant to section 77(3)(h) of the *Police Act*, ultimately admitted by the member at the Discipline Proceeding, has been proven.
168. I am also satisfied that SMC Martin has been proven to have committed two acts of misconduct by way of Deceit pursuant to section 77(3)(f)(i)(A) of the *Police Act*:
- (a) The first acts of deceitful misconduct related to repeated untrue and misleading oral responses given to the Investigator in relation to the sharing of the Neighbour Video; and

(b) The second acts of deceitful misconduct took place in relation to similar repeated untrue and misleading oral responses given by the member to the Investigator concerning the taking of the Prisoner Video, and the subsequent sharing of that video with co-workers.

169. In order to determine what disciplinary or corrective measures are appropriate for SMC Martin, now a former member, I require submissions from the parties based on the findings set out in this decision. This will include consideration of Counsel to the Commissioner's earlier submissions on the sanctions imposed by the Discipline Authority with respect to Final Misconduct Allegation # 2.

170. I am therefore ordering that any submissions, or updated submissions, on the subject of appropriate disciplinary or corrective measures under section 126 of the *Police Act* be made by:

(a) Counsel to the Commissioner, on or before October 20, 2023; and

(b) The Representative on or before November 10, 2023.

Brian M Neal

Brian M. Neal K.C. (rt)
October 4, 2023