FIELD FILES
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MCNEIL UPDATE: UNDERSTANDING ITS IMPLICATIONS

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It has been over a year since the Supreme Court of Canada released its decision in *R. v. McNeil,* 2009 SCC 3. Police services, the Crown, and the courts continue to grapple with its meaning, consequences and implementation.

Prior to the S.C.C.'s decision in *McNeil* there were conflicting decisions in Alberta regarding the extent of the Crown's obligations to disclose criminal and disciplinary records relating to allegations of misconduct against police officers. The S.C.C. attempted to tackle this issue in *McNeil* and provide guidance to police services and the Crown. Police services left with the task of implementing the decision have begun to wonder if the court's decision created as many questions as answers.

Disclosure of Police Disciplinary Records Prior to *McNeil*

Prior to *McNeil*, the majority of Alberta courts and a number of courts in other provinces held that police disciplinary records were not discloseable pursuant to the Crown's *Stinchcombe* obligations, but were instead "third party records" that could only be disclosed if the accused followed the procedure established by the S.C.C. in *R. v. O'Connor*.

The *O'Connor* procedure is the mechanism by which an accused may seek production of any records beyond the possession or control of the prosecuting Crown. Where a record is a "third party record", the onus is on the accused to establish that the record is likely relevant and that the accused is entitled to disclosure. In *O'Connor,* the Court held that the burden of establishing likely relevance is "significant but not onerous." The purpose for establishing such a burden is to prevent "speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming" requests for disclosure.

The distinction between finding that a record is a third party record instead of a "first party record" is significant. If a record is a first party record, then disclosure is governed by *Stinchcombe,* which requires the police and the Crown to disclose the record to the accused, unless it is "clearly irrelevant." If a record is a third party record, there is no obligation on the Crown or a police service to disclose the record, unless the accused brings an *O'Connor* application, and the court, after hearing submissions from the parties, orders production of the record to the accused.

The S.C.C.'s Decision in *McNeil*

Notwithstanding that courts have held, in a number of instances, that police disciplinary records are third party records, defence counsel continued to argue that the *O'Connor* regime was not sufficient to deal with disclosure of police disciplinary records. Defence argued, in a number of cases, that such a regime could result in non-disclosure of potentially relevant materials since the accused would not necessarily have sufficient knowledge of police misconduct to lay the foundation required to meet the burden of establishing likely relevance required in an *O'Connor* application.

The difficulty in erecting a strict *O'Connor* regime when dealing with access to police disciplinary records is exemplified by the facts in the *McNeil* decision itself. In that case, *McNeil* was convicted of various drug-related offences, including possession of cocaine for the purposes of trafficking. Prior to sentencing, the accused learned, as a result of a press release issued by the Barrie Police Service, that the OPP were investigating the arresting officer for various drug related offences, including purchasing drugs while on duty. Prior to sentencing, the accused sought to re-open the trial, however, subsequently withdrew

the application and proceeded directly to sentencing. The accused then appealed the findings of guilt and the sentence. On appeal, the accused sought further disclosure of the disciplinary information relating to the arresting officer. On further appeal to the S.C.C., the court was asked to consider whether the allegations against the arresting officer ought to have been disclosed by the Crown, without the necessity of an *O'Connor* application.

The S.C.C. considered whether disclosure of police disciplinary records should be governed by *O'Connor,* or whether such records should be discloseable to an accused as part of "first party disclosure." In considering the issue, the Court recognized the contentious nature of police work, pointing out that it often leads to public complaints – "some legitimate and some spurious" – and recognized the need to guard against trials being sidetracked by irrelevant allegations or findings of police misconduct. Accordingly, the S.C.C. held that the majority of police disciplinary records are third party records, which are only producible in accordance with the *O'Connor* procedure.

Nevertheless, the Court did hold that there are some police disciplinary records that should be disclosed in accordance with the police and Crown's "first party" *Stinchcombe* obligations. The S.C.C. noted two situations where disclosure ought to occur without prompting:

- Where the police misconduct concerns the same incident that forms the subject matter of the charge against the accused; and
- Where there are "findings of police misconduct by a police officer involved in the case against the accused that may have a bearing on the case against the accused."

The S.C.C. provided further guidance regarding what information should be included in the "first party" disclosure package by adopting the recommendations contained in the 2003 report by Justice George Ferguson Q.C. entitled "Review and Recommendations Concerning Various Aspects of Police Misconduct, Vol I". The Ferguson Report recommended that the following five items (commonly called the "Ferguson Five") be disclosed by the police to the Crown:

- Any conviction or finding of guilt under the Canadian *Criminal Code* or the *Controlled Drugs and Substances Act* for which a pardon has not been granted.
- Any outstanding charges under the Canadian *Criminal Code* or the *Controlled Drugs and Substances Act*.
- Any conviction or finding of guilt under any other federal or provincial statute.
- Any finding of guilt for misconduct after a hearing under the *Police Services Act* or its predecessor Act.
- Any current charge of misconduct under the *Police Services Act* for which a Notice of Hearing has been issued.

Although the Ferguson Report recommended disclosure of the items referred to above, the Ferguson Report expressly stated that any other information sought by the accused should not be provided in the absence of a court order.

The Ferguson Report and by adoption, the S.C.C., contemplated that the Crown would then act as "gate-keeper" sorting out what parts of the material, if any, should be disclosed to the accused pursuant to *Stinchcombe*. The Report further recommended that the affected officer be notified in writing and given the opportunity to make submissions to the Crown regarding what should and should not be disclosed.

Post-*McNeil* Applications for Police Disciplinary Records

In the 18 months since *McNeil* was released, the courts in Alberta have been busy interpreting the decision. A number of decisions have been issued in response to applications by accused for disclosure of police disciplinary records in addition to those items enumerated in the "Ferguson Five". Additional records sought in accordance with the "spirit of *McNeil"* include records relating to ongoing investigations where no finding has been made, complaints that have been resolved informally, complaints that were dismissed due to the limitation period in s. 43(11) of the *Police Act,* and records that

have been expunged pursuant to the *Police Act.*

The courts in Alberta have almost uniformly rejected applications for disclosure of additional records. In a number of decisions, including *R. v. Polny* [unreported], *R. v. Letourneau,* 2009 ABPC 222 and *R. v. Steele,* 2010 ABQB 39*,* the courts have confirmed that in the normal course, *McNeil* does not mandate disclosure of the following:

- official warnings issued pursuant to section 45(4) of the *Police Act* and section 19 of the *Police Service Regulation* do not form part of the "first party" disclosure package and therefore need not be provided by the police to the Crown in the absence of a court order;
- Findings of misconduct removed from a police officer's record pursuant to section 22 of the *Police Service Regulation* do not form part of the "first party" disclosure package and therefore need not be provided by the police to the Crown in the absence of a court order;
- Unfounded allegations only form part of "first party" disclosure when a Notice of Hearing has been issued; and
- Dismissed complaints do not form part of the "first party" disclosure package and therefore need not be provided by the police to the Crown in the absence of a court order.

The only decision in Alberta where a different approach has been taken is Judge Myers' decision in *R. v. Perreault*, 2010 ABPC 104. In that case, the court expressly refused to follow the decisions noted above instead finding that, pursuant to *McNeil,* both official warnings and expunged records must be disclosed by the police to the Crown who, in turn, must disclose them to the accused. The Chief of the Police Service has filed an application to have the decision quashed. The application is scheduled to be heard in the Court of Queen's Bench October of 2010. The decision of the Court of Queen's Bench will be the first post-*McNeil* decision issued by a court in an appellate role, and thus will be binding in future matters.

Although the majority of Alberta courts have restricted disclosure to the "Ferguson Five", the courts have consistently cautioned that there may be circumstances where information other than the Ferguson Five may be discloseable. Police services will have to continue to consider, on a case-by-case basis, whether there are other records in their possession that ought to be disclosed. Examples include serious investigations of drug related misconduct arising while an officer was on duty, as was the case in *McNeil.*

Application of *McNeil* to Records Other than Police Disciplinary Records

Some accused are using the *McNeil* decision as a springboard to argue an expanded disclosure obligation on the part of the police and Crown more generally. This is especially being seen in the context of impaired prosecutions where accused are relying on *McNeil* to support applications for records related to the Intoxilyzer used to sample the accused's breath. Similar arguments are starting to be made regarding records in relation to radar.

Although the *McNeil* decision created a new regime for disclosure of police disciplinary records, the policy rationale underlying the decision to expand the first-party disclosure regime to require disclosure of records other than the "fruits of the investigation" was driven, in part, by the fact that accused could not meet the burden of establishing likely relevance under *O'Connor* without having knowledge about the existence of the records.

It is hoped that the courts will recognize *McNeil* for what it is - a narrow decision specific to police disciplinary records, which was not intended to change the general principle established in *Stinchcombe* that requires the Crown to disclose the "fruits of the investigation."

Peace Officers and *McNeil*

Judge Myers' decision in *Perreault* was issued as a joint decision with *R. v. Bone*. In *Bone*, the accused sought disciplinary records of Corrections Officers. Judge Myers ordered the Crown to seek from the Corrections Officers' supervisors information from their personnel

files relating to formal or informal discipline. This aspect of Myers' decision is not being appealed. Peace officer employers may thus find themselves facing requests from the Crown or court applications for the discipline records of peace officers involved in the arrest of an accused.

Implementing *McNeil*

By now, most police services in Alberta will have created policies and procedures to give effect to the *McNeil* decision. Peace officer employers will have to consider doing so.

Going forward, police services and peace officer employers can expect further applications for disclosure of various types of information, "in the spirit of *McNeil.*" As the jurisprudence continues to develop, police services and peace officer employers will have to re-examine their policies and procedures to ensure compliance. In the mean time, police services and peace officer employers who are faced with difficult issues concerning *McNeil* disclosure should not hesitate to discuss the issues with other organizations who are dealing with the issue, or to seek legal counsel. ▲

COURT DECISIONS TO WATCH FOR

There are a number of appeals to the Court of Appeal this year that will be of interest to police services in Alberta.

In *Calgary Police Service v. Alberta (Information and Privacy Commissioner)* the Alberta Court of Appeal will confirm the limits of the public's right to information about police disciplinary decisions.

In *Newton v. Criminal Trial Lawyers Association* the Court of Appeal will examine the *de novo* nature of appeals to the Law Enforcement Review Board, the ability of public complainant appellants to call new evidence, and the appropriate standard of review to be applied to a Presiding Officer's decision. The factual framework grounding the appeal is a public complainant's appeal of a Presiding Officer's decision. ▲

NEW MEMBER OF FIELD'S POLICE SERVICES GROUP

We are pleased to welcome Bonnie Bokenfohr to the firm as the newest member of Field's Police Services Group.

Bonnie returned to private practice after five years as as in-house counsel with the Edmonton Police Service including being general counsel to the Chief of Police and Director of Legal Services. She brings a broad range of experience in a variety of legal matters including third party record applications, human rights complaints, civil actions, Law Enforcement Review Board appeals, privacy and access to information, labour and employment matters and the police discipline process. Bonnie has acted as counsel in administrative hearings and appeared before various levels of court including the Supreme Court of Canada. Bonnie is a perfect compliment to our Police Services Group.

We remain committed to ensuring that we have the necessary depth of legal resources available to continue to provide effective and timely legal assistance. ▲

The lawyers in Field's Police Services Group have a broad range of experience in acting on behalf of major municipal police services. We have appeared before the Law Enforcement Review Board, have acted as Presenting Officer in disciplinary hearings, and have acted as counsel in matters involving the Privacy Commissioner. In addition, we have appeared on behalf of police services and their members in all levels of court in Alberta in civil matters, third party records applications, and judicial reviews.

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