ONTARIO COURT OF JUSTICE

DATE: 2013·11·29
COURT FILE No.: Central East 12-5442
Citation: *R. v. Megraw*, 2013 ONCJ 666

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

KEVIN MICHAEL MEGRAW

Before Justice G.D. Krelove
Heard on November 13 & 22, 2013
Reasons for Ruling on Disclosure Application released on November 29, 2013

Frank Faveri ..... for the Crown
Douglas J. Spiller ..... for the defendant Kevin Michael MeGraw
Amal Chaudry.....for the Ministry of Community Safety and Correctional Services
James Girvin.....for P.C. O'Grady, P.C. Shantz, P.C. Walton

KRELOVE J.:

[1] The Defendant, Kevin Michael Megraw, is charged that on or about August 30, 2012 at the Town of New Tecumseth he did criminally harass Marianne Malcolm, thereby causing Marianne Malcolm to reasonably, in all of the circumstances, fear for her safety, contrary to s. 264 C.C.C.

[2] The defendant has brought applications seeking disclosure of any and all police complaint files, including all files where misconduct is alleged and all files where a breach of professional standards or a breach of a code of conduct is alleged including breaches of the Police Services Act with respect to O.P.P. Officers Thomas Shantz, Michael O'Grady and Michael Walton.

[3] These disclosure applications are brought on two separate bases – the first

as a first party records application seeking disclosure from the Crown pursuant to the Supreme Court of Canada decision in R. v. McNeil, [2009] S.C.J. No. 3. The second is brought as a third party records application seeking that the O.P.P. be ordered to provide the requested records to the defendant.

[4] The Crown advises that they intend to call Officers Shantz and Walton as witnesses in the trial to deal almost exclusively with the issue of the admissibility of a statement made by the defendant on September 12, 2012. The Crown advises that the police officers did not witness any of the events that gave rise to the charge against the defendant.

[5] I will deal with each of the applications separately.

McNeil Record Application

[6] The defendant asserts that Officers Shantz, Walton and O'Grady showed favouritism and bias in favour of the complainant and her husband in their investigation. For example, the defendant points to the fact that one or more of the officers did not question the complainant's spouse about threats that he made to the defendant after he confronted him and that they did not investigate the fact that the said spouse pursued the defendant in his vehicle at a high rate of speed. The defendant, by way of a further example, asserts that Officer Shantz did not release the defendant after he was arrested and charged but held him for a bail hearing even though the warrant was endorsed for release.

[7] The Crown has responded to the defence request for the police misconduct records of the three officers. By email dated April 23, 2013, Assistant Crown Attorney Frank Faveri advised Mr. Spiller (counsel for the defendant) that he had personally reviewed the McNeil Reports of officers Walton and O'Grady and that there was nothing to disclose. On September 16, 2013, Assistant Crown Attorney M.A. Alexander emailed Mr. Spiller that she had reviewed Officer Shantz's McNeil Report and that there was nothing to disclose.

[8] Mr. Spiller continued his quest for the police misconduct records. As a result, Mr. Faveri sent an email to Mr. Spiller as follows:

> You have a fundamental misunderstanding of McNeil and how it works. This is how it works. Professional Standards supplies a McNeil Report which goes into the Crown brief. A McNeil Report is supplied for every officer involved in the case. The Crown then looks at the McNeil Report(s) and decides whether there is anything to be disclosed. Just because McNeil is generated DOES NOT MEAN THAT ANY RECORDS OR INFORMATION EXIST ABOUT OFFICER MISCONDUCT. A McNeil Report can say THERE ARE NO RECORDS OR INFORMATION ABOUT OFFICER MISCONDUCT. See attached sample McNeil report. None of the officers involved in this case have findings of guilty under the Police Services Act, the *Criminal Code* or the *Controlled Drugs and Substances Act*, nor do they have any charges outstanding under any of those acts, nor do

> any of them face any complaints arising out of this investigation, other than the ones you have invented for your Application. This is not a case where something exists and we are refusing to disclose it. This is a case where there is nothing to disclose under the McNeil regime. (Note: the capitalized sections above are exactly reproduced from the email.).

[9] Chief Superintendent Michael Shard of the O.P.P. testified as to the process created by his force to deal with McNeil Report requests. He is in charge of the Professional Standards Branch of the O.P.P. Complaints made against an officer by a member of the public are received and forwarded on to the Professional Standards Branch. A complaint is investigated and a decision is made whether it is substantiated or not. If a complaint is substantiated, it may be dealt with under the *Police Services Act*. All complaints against an officer are tracked on a database called Internal Affairs Professional. Criminal Code and CDSA charges against an officer are tracked on the database as well.

[10] When there is a request for a McNeil Report, the subject officer is required to go onto the database and print off his McNeil Report. He reviews it, signs it and forwards it to the Crown Attorney's Office. It is important to note that an officer cannot alter any of the information on the database.

[11] There are five categories of misconduct that are dealt with on the O.P.P. McNeil Report. They are:

1. findings of guilt for misconduct under the *Police Services Act* after a plea or a formal hearing before an adjudicator,

2. convictions or findings of guilt under the *Criminal Code*, *Controlled Drugs and Substances Act* or other federal statute, for which a pardon has not been granted and to which the provision of section 6.1 of the *Criminal Records Act* do not apply,

3. outstanding charges under the *Criminal Code*, *Controlled Drugs and Substances Act* or other federal statute,

4. outstanding charges of misconduct under the Police Services Act for which a Notice of Hearing has been issued,

5. a complaint received concerning the same incident which forms the subject matter of the charge(s) against the accused.

[12] Category 5 would not be captured on the database. The officer is required to input this information from his own knowledge.

[13] I have attached a sample O.P.P. McNeil Report to these reasons as Appendix "A". The report form does set out disclosure exceptions on page two.

[14] Chief Superintendent Shard designed this McNeil Report form in consultation with representatives from the Ministry of the Attorney General based upon his understanding of the McNeil decision.

[15] The Supreme Court of Canada in *R.* v. *McNeil* made it clear that the police are required to provide to the Crown upon request two types of disclosure: (1) findings or allegations of serious misconduct by an officer that could reasonably bear on the case against the defendant and (2) findings or allegations of police misconduct that relate to the incident that gave rise to the offence(s) for which the defendant is charged. It is clear that not all types of police misconduct must be disclosed to the Crown. For example, minor misconduct not related to defendant's incident need not be disclosed.

[16] In my view the regime, including the McNeil Report form, established by the O.P.P. satisfies the requirements of McNeil. The database captures most if not all of the type of police misconduct contemplated by McNeil. For police misconduct related to the incident that gave rise to the defendant's charge(s), the officer is required to self report. In any event, the defendant would invariably be aware of such complaints.

[17] I am satisfied in this case that assistant Crown Attorney's Faveri and Alexander received and reviewed McNeil Reports for Officers Shantz, Walton and O'Grady. After reviewing those reports, counsel for the defendant was advised that there was nothing to be disclosed based on those reports.

[18] There is no requirement that the Crown Attorney's office do anything further to fulfill their disclosure obligations. There is no requirement that the actual McNeil Report for each of the officers be disclosed to the defendant. As was emphasized in *R*. v. *Chaplin*, [1995] 1 S.C.R. 727 (S.C.C.) at para. 22, the Crown must "act in utmost good faith" with respect to their disclosure obligations. There is absolutely no indication that Mr. Faveri and Ms. Alexander fell below the standard of "utmost good faith".

[19] The Crown has determined that there are no McNeil documents to disclose with respect to the three officers. The Crown has fulfilled its disclosure obligation. As such, the onus shifts to the defendant to establish that McNeil records exist with respect to the officers (see *R.* v. *Chaplin*, *supra*, at para 30). The defendant has not met that onus.

[20] The defendant's McNeil application is dismissed.

Third Party Records Application

[21] The defendant has also brought a third party records application relating to production of police misconduct records in possession of the O.P.P. relating to Officers Shantz, Walton and O'Grady. The application is opposed by the Crown, the O.P.P. represented by counsel for the Ministry of Community Safety and Correctional Services and by the three police officers who were represented by counsel.

[22] The basis for the defendant's third party record request is the same as set out in the McNeil application.

[23] As the Supreme Court of Canada reiterated in R. v. McNeil, police misconduct records that do not need to be provided to the Crown can be the subject of a third party records application. A two-stage test is to be used by the judge to determine whether production should be compelled. The first stage requires the defendant to establish that the records are likely relevant to the proceedings against the defendant. If the court is satisfied that "likely relevance" has been established, it can order production of the records for its inspection. After reviewing the records, the court determines whether all, some or none of the records should be ordered produced to the defendant.

[24] Concerning the extent of the burden on the defendant to establish "likely relevance", the Supreme Court of Canada stated the following (at paras, 29 and 33):

> [29] It is important to repeat here, as this Court emphasized in O'Connor, that while the likely relevance threshold is "a significant burden, it should not be interpreted as an onerous burden upon the accused" (para. 24). On the one hand, the likely relevance threshold is "significant" because the court must play a meaningful role in screening applications "to prevent the defence from engaging in 'speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming' requests for production" (O'Connor, at para. 24, quoting from R. v. Chaplin, 1995 CanLII 126 (SCC), [1995] 1 S.C.R. 727, at para. 32). The importance of preventing unnecessary applications for production from consuming scarce judicial resources cannot be overstated; however, the undue protraction of criminal proceedings remains a pressing concern, more than a decade after O'Connor. On the other hand, the relevance threshold should not, and indeed cannot, be an onerous test to meet because accused persons cannot be required, as a condition to accessing information that may assist in making full answer and defence, "to demonstrate the specific use to which they might put information which they have not even seen" (O'Connor, at para. 25, quoting from R. v. Durette, 1994 CanLII 123 (SCC), [1994] 1 S.C.R. 469, at p. 499).
>
> [33] "Likely relevant" under the common law O'Connor regime means that there is "a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify" (O'Connor, at para. 22 (emphasis deleted)). An "issue at trial" here includes not only ma-

> terial issues concerning the unfolding of the events which form the subject matter of the proceedings, but also "evidence relating to the credibility of witnesses and to the reliability of other evidence in the case" (O'Connor, at para. 22). At this stage of the proceedings, the court cannot insist on a demonstration of the precise manner in which the targeted documents could be used at trial. The imposition of such a stringent threshold burden would put the accused, who has not seen the documents, in an impossible Catch-22 position.

[25] I am satisfied that the "likely relevance" threshold has been met by the defendant. The records may have some bearing on the reliability of police evidence in the trial and as the nature of the investigation conducted by the police. The records may assist the defendant in making full answer and defence to the charge.

[26] Therefore, I order that the Ontario Provincial Police produce to this court all complaint and misconduct files in its possession relating to Officers Thomas Shantz, Michael O'Grady and Michael Walton for review by the court. The records shall be provided as soon as possible. The said files shall be provided in a sealed envelope to the Ontario Court of Justice at 75 Mulcaster Street, Barrie, Ontario L4M 3P2, Attention: Justice Glenn Krelove.

[27] The court will review the produced records to determine the issue of the true relevance of the records to these proceedings. A further ruling of this court will be forthcoming dealing with the issue of true relevance.

Additional Comments

[28] During the course of his submissions on the McNeil production issue, Assistant Crown Attorney Frank Faveri requested that I admonish defence counsel, Mr. Spiller, for suggesting that the had wilfully failed to disclose relevant information. In this regard, Mr. Faveri made reference to Justice Rosenberg's comments in *R.v. Felderhof,* [2003] O.J. No. 4819 (OCA) at para. 93:

> The trial judge should have instructed [defence counsel] to stop and to reserve his concerns about the conduct of the prosecution until the time came to make the abuse of process motion.

[29] Clearly, a trial judge has a responsibility to require and control civility in the courtroom. This duty includes maintaining that counsel treat witnesses, counsel and the court with fairness, courtesy and respect.

[30] In my view, Mr. Spiller was not taking the position in his submissions that Mr. Faveri was wilfully failing to disclose relevant information. Rather, he was submitting that Mr. Faveri had a duty to provide the actual McNeil Reports and to follow up with each of the police officers concerning any misconduct files. I have now

found that Mr. Spiller was not correct in these assertions. I, therefore, see no requirement to admonish Mr. Spiller.

[31] I do expect counsel to treat all witnesses, other counsel and the court with fairness, courtesy and respect through the balance of these proceedings.

Released: November 29, 2013

"Justice G.D. Krelove"

Appendix "A"

R v. _____

McNeil Report
Confidential Information - For Crown Attorney Use

Surname: SMITH First name: John Rank: Provincial Constable

Police Service: Ontario Provincial Police Badge #: 12345

1. Re findings of guilt for misconduct under the *Police Services Act* after a plea or formal hearing before an Adjudicator which does not fall within the disclosure exceptions on the back of this form.
   There is nothing on file for this officer.

2. Re convictions or findings of guilt under the *Criminal Code, Controlled Drugs and Substances Act* or other federal statute, for which a pardon has not been granted and to which the provisions of section 6.1 of the Criminal Records Act do not apply (see over).
   There is nothing on file for this officer.

3. Re outstanding charges under the *Criminal Code, Controlled Drugs and Substances Act* or other federal statute.
   There is nothing on file for this officer.

4. Re outstanding charges of misconduct under the *Police Services Act* for which a Notice of Hearing has been issued, which does not fall within the disclosure exceptions on the back of this form.
   There is nothing on file for this officer.

5. Re the same incident which forms the subject matter of the charge(s) against the accused:
   a. I have been given notice that I am the subject of a complaint and/or investigation. Yes No
   b. I have agreed to informal discipline without a hearing. Yes No
   c. I have been charged with misconduct under the *Police Services Act*, *Criminal Code*, *Controlled Drugs and Substances Act* or other federal or provincial statute. Yes No

IF YES - ATTACH COMPLAINT NOTIFICATION or INFORMAL DISCIPLINE SUMMARY AS APPROPRIATE

Complete the following information for any qualifying issues:

Date of Finding / Charge or Notification	Nature of offence / Allegation or Details of the Alleged Misconduct	Penalty / Sanction

I have read the instructions on the back of this form and the information I have provided is true to the best of my knowledge and belief. I am aware that I have a continuing obligation to provide up-to-date information should circumstances change.

Signature: _____ Date: _____

The OPP Professional Standards Bureau database was checked on 01 August 2013, and indicates no further qualifying matters.

Chief Superintendent Mike Shard

.....

This part to be completed by the named officer - *CROWN TO REMOVE PRIOR TO DISCLOSURE*

Officer Privacy Interest(s) – Officer's reason(s) that this report should not be disclosed
Be aware that you can consult with the OPPA in relation to these submissions.

If any material will be disclosed, I ask that the Crown return a copy of the relevant material to my attention in a sealed envelope.

Where additional space is required, continue on a blank sheet of paper and attach it to this form.

INTERPRETATION

1. Disciplinary findings of guilt for misconduct resulting from a formal hearing before the OPP Adjudicator (Category 1) are included whether or not the misconduct has been removed from the officer's personnel record, but are not included if the complaint was received by the OPP prior to January 1, 1998.

2. Officers who have worked with another police service are required to report matters from that prior police service, if the matter otherwise qualifies under these guidelines and the complaint was commenced on or after January 1, 1998.

3. Disciplinary findings of guilt for misconduct (Category 1) are those resulting from a plea or formal hearing before an Adjudicator. Discipline matters addressed by way of *informal discipline*, are not disclosed unless it is in relation to the charge(s) against the accused.

PROFESSIONAL STANDARDS BUREAU CHECKS

4. The OPP Professional Standards Bureau database was checked on 01 August 2013, and indicates no further qualifying matters. This database should be considered complete and accurate regarding OPP records Category 1 and Category 4, back to January 1, 1998.

5. The OPP does not check or verify Category 1 as it relates to any service an officer may have had with a prior police service.

6. A criminal record check has been performed on the officer within the preceding 12 months and indicated no further qualifying matters under Category 2 or 3.

DISCLOSURE EXCEPTIONS

This record does not include any disciplinary information relating to the following:

Police Services Act
s. 74(1)(b) contravenes section 46 (political activity)

s. 74(1)(d) contravenes subsection 55(5) (resignation during emergency)

s. 74(1)(f) contravenes section 116 (trade union membership)

O. Reg. 123/98, Police Services Act - Code of Conduct
2. (1)(a)(ix) is guilty of a criminal offence - *if* the officer has been granted a pardon for the underlying criminal offence

2. (1)(a)(ix) is guilty of a criminal offence - *if* the officer was discharged absolutely and more than one year has elapsed since that discharge (section 6.1 Criminal Records Act)

2. (1)(a)(ix) is guilty of a criminal offence - *if* the officer was discharged on the conditions prescribed in a probation order and more than three years have elapsed since the end of that probation period / the date the discharge was effective (section 6.1 Criminal Records Act)

NOTE: When any of the above 3 exceptions apply (pardon, 1 year after absolute discharge, 3 years after conditional discharge) the OPP will not disclose any misconduct based on the same facts as constituted the criminal offence.

2. (1)(c)(ix) is absent without leave from or late for any duty, without reasonable excuse

2. (1)(c)(x) is improperly dressed, dirty or untidy in person, clothing or equipment while on duty

2. (1)(h)(i) *in part, specifically* "wilfully or carelessly causes loss or damage to any article of clothing"