NOVA SCOTIA
PUBLIC PROSECUTION SERVICE

DOCUMENT TITLE: DISCLOSURE OF POLICE MISCONDUCT

(DISCLOSURE POLICY - AMENDMENTS RELATING TO *R.* v. *MCNEIL*)

NATURE OF DOCUMENT: DPP DIRECTIVE

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NOTE: **This policy document will be amended as particular disclosure issues are litigated and the law in relation to disclosure obligations is clarified by the courts. Those who utilize this policy document should ensure that they have the current edition of this document. The current edition of the document may be found at the PPS website (www.gov.ns.ca/pps).**

NOTE:

THIS POLICY DOCUMENT IS TO BE READ IN THE CONTEXT PROVIDED BY THE **PREFACE** TO THIS PART OF THE MANUAL.

CERTAIN WORDS AND PHRASES HAVE THE MEANINGS ESTABLISHED IN THE **"WORDS & PHRASES"** SECTION OF THIS PART OF THE MANUAL.

The Supreme Court of Canada decision in *R. v. McNeil*, [2009] S.C.J. No. 3, is significant for Crown Attorneys in that it impacts the disclosure obligations of the Crown with regard to police disciplinary matters, and it clarifies the regime established in *O'Connor*.

THE *McNEIL* CASE

Some Context:

McNeil had been tried on numerous drug charges and after conviction (but before sentencing) he learned that the main investigator had been involved in drug related misconduct leading to disciplinary proceedings and criminal charges. He sought production of the investigating officer's police disciplinary records and criminal investigation files. Some of the files were held by different police forces, some were in prosecution files of the PPSC, and others were internal to the investigator's force. The Ontario Court of Appeal ordered production of the criminal investigation files.

Rulings:

The Supreme Court of Canada issued guidelines for determining when such records and files are properly disclosed under either *Stinchcombe* or *O'Connor* procedures, and described in detail how the decision to disclose or not disclose is to be made.

- Under *Stinchcombe*, the Crown's "first party" disclosure obligation extends only to material relating to the accused's case in the possession or control of the prosecuting Crown agency. A necessary corollary to the Crown's disclosure duty under *Stinchcombe* is the obligation of police to disclose to the Crown all material pertaining to its investigation of the accused. For the purposes of fulfilling this corollary obligation, **the investigating police force, although distinct and independent from the Crown at law, is not a third party**; it acts on the same first party footing as the Crown.

- Records relating to findings of **serious** misconduct by police officers involved in the investigation against the accused properly fall within the scope of the first party disclosure package due to the Crown from police, where the police misconduct is either **related to the investigation**, or the finding of misconduct **could reasonably impact the case against the accused**.

  Production of disciplinary records and criminal investigation files in the possession of the police that do not fall within the scope of this first party disclosure package is governed by the *O'Connor* regime for third party production.

- Leaving the entire process of access to police misconduct records to an *O'Connor* regime would be "neither efficient or justified". Accordingly, the police are to provide

the Crown with information regarding police misconduct that goes beyond the primary disclosure obligation, and the Crown is to act as a **"gate-keeper"** in sorting out what parts of this information should be turned over to the defence in compliance with the obligations established in *Stinchcombe*.

- **"Relevance"** for disclosure purposes, as stated in earlier cases, has a wide and generous connotation and includes information in respect of which there is a reasonable possibility that it may assist the accused in the exercise of the right to make full answer and defence. This does not mean that only material that would be admissible at trial should be produced. Material that would not, on its own, be admissible may nonetheless be of use to the defence, for example, in cross-examining a witness on matters of credibility or in pursuing other avenues of investigation.

- If the Crown becomes aware that there is potentially relevant information pertaining to the credibility or reliability of any witnesses, including police officers, the Crown has a **duty to make appropriate inquiries** and to obtain the potentially relevant information. The court makes it clear, however, that the accused has no right to automatic disclosure of every aspect of a police officer's employment history, or to police disciplinary matters with no realistic bearing on the case against him or her.

  It should also be noted that a mere demand letter from defence counsel, absent any foundation for believing that relevant information is actually in the possession of the police or a third party, will not trigger the obligation on the Crown to pursue inquiries.

Police Misconduct

Police officers, like all persons in Canada, are subject to prosecution under the Criminal Code and numerous quasi-criminal statutes if they are involved in illegal activity. Their conduct is also subject to proceedings under other legislation relating specifically to police officers. In Nova Scotia, a wide range of disciplinary matters are dealt with in the *Police Act* and its regulations.

Before the *McNeil* case, there was little expectation that police discipline matters would be referred to in criminal trials. Consequently, the actual compilation of a list of discipline matters may be challenging. The Provincial legislation speaks in terms of "complaints" rather than "charges", and many complaints are often resolved informally. There may not be a clear statement of the findings of fact made by the senior officer or panel dealing with the matter. Sometimes the discipline matter is described as a "dereliction of duty" or "conduct unbecoming an officer". These phrases may encompass a wide variety of delicts of varying gravity. The "charging" thresholds of various police agencies tend to be highly variable. Accordingly, prosecutors may have to carefully review a discipline file in order to properly assess the significance of a discipline matter.

Members of the RCMP are subject to the disciplinary processes set out in the *RCMP Act*, and this legislation, like the Nova Scotia *Police Act,* includes informal procedures as well as formalized hearings relating to complaints and investigations of misconduct.

MATERIAL RELATING TO POLICE MISCONDUCT THAT IS TO BE PROVIDED TO THE CROWN

In order to enable the Crown to meet its disclosure obligations, It is the position of the PPS that the following material must be provided to the Crown by the investigating police agency, in relation to all police officers listed in the prosecution file:

1. Complaints and investigations into a police officer's actions relating to the same incident that forms the subject matter of the charge against the accused. (The police are to provide the Crown with a copy of the investigation file for this particular category of misconduct information).

2. A brief description of all convictions or findings of guilt for an offence under the *Criminal Code* or the *Controlled Drugs and Substances Act* or any other federal or provincial statute (with the exception of convictions or findings of guilt for minor traffic infractions or other minor regulatory offences) except where disclosure is prohibited by the Statutes of Canada e.g. the *Criminal Records Act,* or the *Youth Criminal Justice Act*.

   NOTE: If a pardon has been granted for a conviction, it need not be disclosed (per *McNeil*).

   Pursuant to the *Criminal Records Act*, findings of guilt cannot be disclosed if

   - more than one year has elapsed since the offender was discharged absolutely; or
   - more than three years have elapsed since the offender was discharged on the conditions prescribed in a probation order.

3. A brief description of all outstanding charges under the *Criminal Code* and the *Controlled Drugs and Substances Act* or any other federal or provincial statute.

4. A brief description of all disciplinary misconduct findings under the applicable provincial *Police Act* or the *RCMP Act*;

5. A brief description of outstanding disciplinary matters relating to misconduct under the applicable provincial *Police Act* or the *RCMP Act*. This includes matters that are the subject of both formal and informal disciplinary proceedings.

6. Any other material that is "obviously relevant" to the credibility or reliability of the police witness will be submitted to the Crown for review and vetting to determine if it is relevant to the issues in the prosecution or defence of the accused.

It is expected that the police will initially provide prosecutors with a brief description of the convictions, findings of guilt, and outstanding charges as described above **without prompting**. The prosecutor will then assess whether further particulars, including, where necessary, the entire file underlying the investigation of acts of police misconduct must be produced to the Crown.

With respect to the categories 2 to 6 above, if the prosecutor is of the opinion that the circumstances underlying the misconduct information are required to assist in performing his/her "gate-keeper" role, the prosecutor will make a separate request to the police for this additional information.

THE "McNEIL PACKAGE"

Chief Crown Attorneys (or their designate) are to work with the police agencies within their regions to develop protocols for the delivery to the Crown of material relating to police misconduct. As far as is feasible, there should be an agreement on what is to be included in the "McNeil package". Although the police and Crown may not always agree at the outset on what must be included, it must be emphasized that it is the Crown who is responsible for fulfilling disclosure obligations. Decisions as to what misconduct is "serious" and what is relevant must rest with the Crown and not the police.

McNeil packages should include a form listing of the police misconduct information for all officers involved in the case to which the package relates. The police agency compiling the material and creating the list should indicate whether or not there is an objection to the disclosure of particular items, and the reasons for the objection.

McNeil packages are to be delivered by the police to the Chief Crown Attorney (or their designate) who will work with the prosecutor who has carriage of the case in making decisions as to what will be disclosed. This will help to ensure consistency in the decisions made in regard to disclosure, and it will enable the PPS to monitor developments in this important area of practise.

Screening the McNeil Package

Stinchcombe requires the Crown to disclose any information in respect of which there is a **reasonable possibility** that it may assist the accused in the exercise of the right to make full answer and defence. The following process is intended to assist prosecutors in meeting this obligation:

1. First, the role that the officers played in the investigation must be assessed. If it is determined that an officer played only a peripheral role in the investigation, e.g. the officer was only involved in crowd control at the scene of the crime, the material relating to that officer will not be disclosed.
2. The material must then be reviewed to determine whether or not any of the material is clearly irrelevant to the prosecution or the defence. If the material has no realistic bearing on the credibility or reliability of the witness or on any other issue, it will not be disclosed to the defence.
3. If a decision is made that material in the McNeil Package is relevant to the defence, i.e. it is information concerning serious misconduct related to the investigation against the accused or that could reasonably impact on the case against the accused, the material must be further reviewed to ascertain whether or not any of the material is privileged at common law or by statute. Privileged material cannot be disclosed.
4. An investigative file of police misconduct findings or convictions containing some relevant information may also contain irrelevant, personal information. Personal information, e.g. home addresses and telephone numbers, must be redacted before the material is disclosed. (The Court in *McNeil* recognized that police officers may "make submissions" to the Crown relating to factual matters in order to assist the Crown in identifying information in which the officer has a privacy interest. The “submissions” of the officer should inform the Crown of the basis of the privacy interest and discuss what disclosure restrictions may address that privacy interest.)

McNeil materials that are not disclosed

Where it has been determined that any information in the McNeil package provided by the police is clearly irrelevant (including situations where the officer involved played a peripheral role) or is privileged and, therefore, should not be disclosed, the Crown will inform the accused of the existence of the material and the reasons for withholding the material so that the accused may consider making an *O'Connor* application to access it.

Local protocols relating to police misconduct materials should include a process for documenting which items have been disclosed, and a process for communicating this to the police official who compiled the McNeil package.

Materials that are not disclosed are to be retained in a sealed envelope within the Crown copy of the court file, or in some other secure location readily accessible to the prosecutor. Given the ongoing disclosure obligation of the Crown, prosecutors should maintain an on-going awareness of the issues within the trial, and continuously assess whether relevance is triggered as the case develops. If the prosecutor makes any further disclosure of these materials, he or she should notify the officer who compiled the McNeil package.

Delivering Material from the McNeil Package

Chief Crown Attorneys (or their designate) should oversee the processes for dissemination of materials contained in the McNeil package in order to ensure that no unnecessary invasion of privacy occurs. As noted above, it may be useful to include in the protocol a method of notifying the police official who compiled the McNeil material, which items, if any, were disclosed to the defence.

- After vetting privileged information and personal identifiers, etc., the materials that are required to be disclosed per *Stinchcombe* should be placed in a sealed envelope before being turned over to defence counsel.
- The sealed package of materials should be accompanied by a covering letter stating that the materials are not to be copied or further disclosed to anyone except as is necessary in defending the accused on the charges giving rise to the disclosure of the materials. (A sample covering letter is attached to this policy document as Appendix “A”.)
- The covering letter should also inform defence counsel of any limitations on the gathering, by the police service(s), of McNeil package materials. As noted above, the letter should also specify any items not disclosed by the Crown because of privilege or irrelevance.

Unrepresented accused should not be provided with a copy of materials from the McNeil package. They will instead have to review the materials on-site in the Crown

Attorney's Office, or at some other specified location. Although they make notes, accused persons should not be permitted to take away any portion of the McNeil package.

Other Comments about McNeil Package Materials

- Prosecutors are reminded that disclosure of police misconduct information does not imply that any of that information is admissible. Disclosure occurs because the information is "not clearly irrelevant"; this does not imply that it is relevant. Any attempts to improperly introduce the disclosed information into evidence should be opposed. In particular, prosecutors should bear in mind the important limitations on the admissibility of information relating to collateral matters. [See also *R. v. Stevely*, [2001] S.J. No. 137 (Q.B.) supporting the position that section 12 of the *Canada Evidence Act* does not encompass police disciplinary proceedings.]
- Provincial legislation or regulations may indicate that certain findings of police misconduct are to be "expunged" after a fixed period e.g. 2 years. It is the view of the PPS that such legislative provisions do not override the direction to disclose given by the Supreme Court of Canada in *McNeil*. It is understandable that police agencies may treat the findings of misconduct as "expunged" when applying their internal discipline processes, but the prudent course for disclosure purposes in criminal proceedings is to include all relevant findings of misconduct.
- Presently (November, 2009), the RCMP Operational Manual does not provide for the removal of any conditional discharges or absolute discharges from the McNeil package of materials. Crown Attorneys are reminded that the *Criminal Records Act* precludes disclosure of discharges when the provisions of Section 6 of that *Act* have been met (see page 3, above). Crown Attorneys must scrutinize the McNeil package and remove discharges where necessary to avoid breaching the *Criminal Records Act*.

APPENDIX "A" - SAMPLE COVERING LETTER

To: Michael Defender, Q.C.

Re: R. v. Robert Rounder

Charges: Breaking and Entering (28 counts)

PPS File: HD 32745

Attached, please find a package of materials containing copies of police disciplinary records which **may** be relevant to the above-noted criminal proceedings. These materials are being provided by the Crown in fulfilment of its disclosure obligations. It is understood that these materials are not to be copied or further disclosed to anyone except as is necessary in defending the accused on the stated charges.

The police service(s) involved in this prosecution has(have) been advised to provide all information in respect of which there is a reasonable possibility that it may assist the accused in making full answer and defence. The information provided by the police has been provided to the Crown in accordance with the operational policies and procedures of the police service(s) involved.

It is to be noted that legislation e.g. *The Criminal Records Act*, and *The Young Offenders Act*, may preclude disclosure or reference to certain convictions or findings of guilt. Accordingly, some convictions or findings of guilt may have been omitted from the disclosure package in order to comply with those statutes.

[ ] The Crown has reviewed the materials provided by the investigating police service(s) and is hereby disclosing all of those materials.

[ ] The Crown has reviewed the materials provided by the investigating police service(s) and declines to disclose materials relating to the following officers, for the reasons indicated:

P. C. John Smith - this officer played only a peripheral role in the investigation

Sgt. Jane Brown - the disciplinary matter is not relevant.