
Ethics and Honesty in the Time of *McNeil*

Some questions around police violence
and dishonesty

CACOLE Conference

May 28, 2013

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Scenario

A police officer is a suspect in a criminal offence as a result of an alleged assault. The officer's partner at the time of the incident is interviewed first and tells the investigator that the victim was drunk and that no assault occurred.

The suspect police officer in the assault is then interviewed and admits to a number of stresses in his personal life. He apologizes in the interview and confesses to the assault.

Q What should we do with these officers in a criminal and administrative context?

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McNeil Overview

■ *R. v. McNeil* [2009] 1 S.C.R. 66

Issue

Crown / Police Disclosure Obligations re: Disciplinary Records and Criminal Investigation Files

- Remodel of *Stinchcombe* regime
- Remodel of *O'Connor* regime?

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McNeil Overview

■ The Decision

Production of 3rd party records under *O'Connor*

- “Likely relevant” – first prong
- Weighing the competing interests – second prong
 - Full answer and defence
 - Privacy

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McNeil Overview

■ The Decision

Production of 3rd party records under *O'Connor*

- Weighing the competing interests
 - Focus on “true relevance”
 - Keeps trials focused
 - Where records are, in fact, relevant, balance will tip in favour of production
 - Privacy interests will rarely warrant non-production

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McNeil Overview

■ The Decision

Stinchcombe Remodeled

- *Stinchcombe* relevancy threshold = O'Connor “likely relevance”
- Problem of fairness
- “Bridging the gap” between *Stinchcombe* and O'Connor

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McNeil Overview

■ The Decision

Stinchcombe Remodeled

- “Bridging the Gap”
 - Crown *duty to inquire*
 - Police *duty to disclose*

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McNeil Overview

■ The Decision

Stinchcombe Remodeled

- Police *duty to disclose*
 - Expanded first party disclosure obligation to Crown to now include police misconduct (disciplinary / criminal), previously reserved for *O'Connor* applications

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McNeil Overview

- Duty to disclose
 - Parameters of expanded disclosure duty
 - Limited to “findings” of police misconduct?

NO -	<i>R. v. Cote</i> , [2009] O.J. No. 2040 (C.J.)
YES -	<i>R. v. Steele</i> , [2010] A.J. No. 61 (Q.B.)

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McNeil Overview

- Duty to disclose
 - Parameters of expanded disclosure duty
 - Limited to “serious” police misconduct?
 - Status of “official warnings”

R. v. Perreault, [2010] A.J. No. 556 (P.C.)

 - court decides whether “serious”

R. v. Perreault, [2010] A.J. No. 1347 (Q.B.)

 - can trust police disciplinary system

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McNeil Implications

- Regarding the “honest assaulter”:
 - “finding” of “serious” misconduct
 - regarding victim’s trial
 - police will have to disclose to Crown and Crown will have to disclose to accused
 - regarding other trials where officer is witness / investigator
 - since misconduct is “serious”, there will likely be *McNeil* disclosure obligation, depending on circumstances of case
 - certainly, disclosure duty will arise where officer has used force in the incident

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McNeil Implications

- Regarding the “dishonest” officer:
 - “finding” of “serious” misconduct
 - regarding victim’s trial
 - police will have to disclose to Crown and Crown will have to disclose to accused
 - regarding other trials where officer is witness / investigator
 - since misconduct is “serious”, there will likely be *McNeil* disclosure obligation, depending on circumstances of case
 - certainly, disclosure duty will arise where officer’s credibility is important issue (eg as affiant on search warrant, etc)

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McNeil Implications

- Regarding the “dishonest” officer and the “honest assaulter”:
 - even where no “finding” of “serious” misconduct and, perhaps, no apparent first party disclosure obligation
 - given focus now on “true relevance” of the information in question, at the expense of privacy considerations, *O'Connor* application is more likely, and the possibility of misconduct being produced as a third party record is more likely