SCC File No. 41110

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE ALBERTA COURT OF KING'S BENCH)

BETWEEN:

CHIEF OF THE EDMONTON POLICE SERVICE

Appellant

- and -

JOHN McKEE and HIS MAJESTY THE KING IN RIGHT OF CANADA

Respondents

-and-

DETECTIVE JARED RUECKER and EDMONTON POLICE ASSOCIATION

Interveners

-and-

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Interveners

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(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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PARTS I & II – OVERVIEW AND INTERVENER'S POSITION ON APPEAL

1. Police officers are entrusted with extraordinary powers over their fellow citizens. They "often occupy the centre stage in criminal trials"[1] and their testimony may very well tip the scales of reasonable doubt against an accused. Where a police officer has engaged in past misconduct that is relevant to their credibility and character, an accused should not face unnecessary procedural barriers that prevent or delay them from accessing that information. In this respect, "[t]he Crown and the defence are not adverse in interest in discovering the existence of an unreliable or unethical police officer."[2]

2. *Stinchcombe*[3] remains the starting point for the Crown's disclosure obligations, but the scope of "first party" disclosure has evolved through *McNeil* and its progeny. Pursuant to *McNeil*, information related to findings of serious police misconduct properly falls within the scope of the "first party" disclosure package when the misconduct is either related to the investigation, or could reasonably impact the case against the accused.[4] In accordance with its obligations under both *Stinchcombe* and *Gubbins*,[5] the Crown must disclose such information where it forms part of the "fruits of the investigation" or where it is obviously relevant to an accused's case. Underpinning *McNeil* is the judicial recognition that an accused's *Charter* right to make full answer and defence and the integrity of the justice system requires transparency in favour of the accused with respect to information of relevant police misconduct.

3. This appeal presents an opportunity for this Court to clarify the scope of *McNeil*. The BCCLA advances three submissions in this regard.

4. First, the BCCLA submits that the unique position that police occupy in society and the criminal justice system should continue to inform this Court's interpretation of the scope of disclosure obligations under *McNeil.* The police function as the investigative arm of the state and

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[1] *Ontario (Attorney General) v. Clark*, 2021 SCC 18 at para. 158.
[2] *R. v. McNeil*, 2009 SCC 3 at para. 50.
[3] *R. v. Stinchcombe*, [1991] S.C.R. 326.
[4] *McNeil, supra,* at para. 15.
[5] *R. v. Gubbins*, 2018 SCC 44.

often testify as key Crown witnesses. The law must continue to hold them to a higher standard than the ordinary citizen. *McNeil* is essential to the realization of an accused's *Charter* rights, and to maintaining public confidence in the criminal justice system. *McNeil* does not infuse bias into the disclosure framework. Rather, it functions to ensure that the justice system and the police operate with transparency and accountability.

5. Second, a narrow interpretation of "information of misconduct" would be an unjustified departure from the principled framework set out in *McNeil.* This Court should resist a restrictive view of *McNeil* that gives primacy to the privacy concerns of state actors over the constitutional right of accused persons to make full answer and defence. Any concerns about police privacy are properly mitigated by safeguards in the existing disclosure system.

6. Finally, the scope of *McNeil* and an accused's constitutional right to disclosure should be considered through an anti-racist or critical race lens that considers the impact of police misconduct and changes to the disclosure regime on racialized, Indigenous, and other disadvantaged communities.

PART III - ARGUMENT

A. Disclosure Laws Must be Responsive to the Role of the Police in the Justice System

7. Police occupy a unique role in the criminal justice system. Investigating officers have an inherent interest in a conviction and their evidence will often be central to trial outcomes, particularly in *Charter* cases. As such, it is essential that accused individuals are able to properly scrutinize the credibility of police witnesses in mounting their defence. The disclosure framework regarding police misconduct must continue to develop in a manner that is responsive to this reality in order to zealously safeguard s. 7 and maintain public confidence in the criminal justice system.

i. Police occupy a unique role in society and are not akin to ordinary witnesses

8. Unlike ordinary civilians, police officers are state actors who are given broad and extensive powers over their fellow citizens.[6] Given their function investigating offences and recommending

[6] *R. v. Schertzer*, 2007 CanLII 38577 (ON SC) at para. 16 [*Schertzer ONSC*].

or laying charges, their interests as Crown witnesses will almost always be diametrically opposed to those of the accused. Even where they may have "the best will in the world police officers have a vested interest in establishing their own case and in not assisting the defendants".[7] Given the power that police wield in shaping a case against the accused and their investment in a conviction, having access to all relevant information that bears on an officer's credibility is of the utmost importance to an accused whose liberty may rest on a proper assessment of their truthfulness and reliability.

9. While juries are regularly instructed to treat evidence of police officers as they would any other witness for the purpose of assessing their evidence, in many ways, police officers are not akin to ordinary civilian witnesses. While they are not expert witnesses, "police officers are, unlike most witnesses, professional witnesses."[8] They often have experience testifying and they are allowed to use their notes.[9] Further, by virtue of their experience and training, officers can generally be expected to know more about courtroom procedures than civilian witnesses. Unlike the average civilian witness, police officers will often come to court with experience navigating cross-examination and exposure to lines of questioning aimed at impeaching their credibility.

10. American scholarship indicates that particularly amongst certain juror demographics, police officers' testimony may be viewed as having an air of imbued credibility, which may not be attenuated by a brief caution to jurors not to treat such evidence as unimpeachable.[10] Given the risk that unearned credibility could distort the assessment of an officer's evidence, it is all the more important that evidence of misconduct is disclosed pursuant to the principled framework in *McNeil*.[11]

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[7] Plater, David and Lucy A de Vreeze. "" (2012), 14 Flinders Law Journal 133 at 147, citing Ede, Roger and Eric Shepherd, *Active Defence,* (2nd ed) United Kingdom: Law Society Publishing, 2000 at 1-2.
[8] Tanovich, David M. "" (2013) 100 Criminal Reports (6th) 322 at 327 [Tanovich, David. "Judicial and Prosecutorial Control of Lying by the Police"].
[9] *Ibid.*
[10] Johnson, Visa B. "" (2017) 22 Pepperdine Law Review 245 [Johnson, Visa. "Bias in Blue"].
[11] Warren, Jonathan M. "Hidden in Plain View: Juries and the Implicit Credibility Given to Police Testimony" (2018) 11 DePaul Journal for Social Justice 1 at 6–7.

ii. McNeil is consistent with the high standard of accountability police are subject to in other contexts

11. An interpretation of *McNeil* that provides for principled disclosure obligations regarding police misconduct is consistent with Canadian jurisprudence that has recognized that criminal law and procedure must be tailored to account for "the special role and authority of police in society" which requires "that they be held to a high standard of accountability" in a number of contexts.[12]

12. Police officers are bestowed with "enormous responsibilities" and a "great deal of trust and power".[13] At the same time, they are given special privileges and protections that are not available to ordinary citizens.[14] They assume these responsibilities and their position in the criminal justice system willingly and with full knowledge that "their actions as police officers will be subject to scrutiny in a variety of ways including by their superiors, by their fellow officers, by the public, by the media and by the courts."[15] Police officers take an oath before assuming their duties. For these reasons, they are justifiably held to a higher standard of conduct than ordinary citizens.[16]

13. In the sentencing context, when a police officer commits a crime, the principles of denunciation and general deterrence are magnified.[17] The courts will consider an officer's position of public trust to be an aggravating factor.[18] Recently, the Ontario Court of Appeal clarified that this higher standard of conduct extends beyond the discharge of an officer's duties to their off-duty conduct.[19]

14. Courts have also relied on the broad and extensive powers of police officers to impose heightened requirements on police to take contemporaneous notes of their actions. This requirement is rooted in the position of power that police occupy over their follow citizens and the necessity to have oversight mechanisms in place to ensure those powers are exercised within the

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[12] *Ibid*.
[13] *R. v. Theriault*, 2021 ONCA 517 at paras. 206-207.
[14] *R. v. Forcillo*, 2018 ONCA 402 at para. 198.
[15] *Schertzer ONSC, supra,* at para. 14.
[16] *R. v. Doering*, 2020 ONSC 5618 at paras. 24-25.
[17] *Forcillo, supra,* at paras. 198-199; *Theriault, supra,* at paras. 206-207.
[18] *Theriault, supra,* at para. 205-207; *R. v. Schertzer,* 2015 ONCA 259 at para. 133 [*Schertzer ONCA*]
[19] *Theriault, supra,* at paras. 206-207.

bounds of the law.[20]

15. Having different rules govern the disclosure of information about police misconduct does not amount to discrimination and does not infuse bias into the disclosure framework. Reliance on equality and anti-discrimination principles to justify a narrow interpretation of "information of misconduct" misconstrues the law. The Court in *McNeil* affirmed that "whether production of a record would be premised upon any discriminatory belief or bias" is a relevant factor at the second stage of an *O'Connor* application where a sexual assault complainant's private records are at issue. Relying on this factor to insulate police officers ignores the Court's express limitation that this factor was "tailored to meet the exigencies in sexual assault proceedings and, consequently, [is] unlikely to be of assistance in other contexts".[21] Police officers are not inherently vulnerable participants in the justice system. To the contrary, police hold positions of power and there is a well-established history of discrimination through policing.[22] To invoke anti-discrimination and equality doctrines to protect state actors from having past misconduct exposed is in direct contradiction with the very purpose of such principles. Purported concerns about discrimination and bias against police officers are a red herring.

iii. Disclosure of police misconduct pursuant to McNeil is necessary to maintain public confidence in the criminal justice system

16. Misconduct by an investigating police officer raises systemic concerns that are not engaged by the conduct of ordinary Crown witnesses.[23] Instances of police misconduct do not only raise specific concerns for the integrity of the investigative and court process for an individual accused. At a broader level, they undermine confidence in the administration of justice. Public confidence in the criminal justice system is fundamental for its effective operation.[24] Given what is at stake, this Court should resist an invitation to retreat from the principled approach set out in *McNeil* to insulate police officers from having certain information about past transgressions disclosed. To do so would be incongruent with the judicial acceptance that "[p]ublic confidence in the honesty of

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[20] *Schertzer ONSC, supra,* at para. 16.
[21] *McNeil, supra,* at para. 35.
[22] *R. v. Le*, 2019 SCC 34 at paras. 90-97.
[23] *Doering, supra,* at paras. 24-25.
[24] *Valente v. The Queen,* [1985] 2 S.C.R. 673 at para. 22.

the police is fundamental to the integrity of the criminal justice system".[25]

17. In *Theriault*, the Ontario Court of Appeal held "[p]olice officers are duty bound to serve and protect the community. They are also duty bound to uphold the law. When the conduct of a police officer runs contrary to either of these duties, the legitimacy of the rule of law – a postulate of our constitutional structure – rests on fragile ground."[26] The ground would become even more fragile if *McNeil* is interpreted narrowly, limiting an accused's ability to expeditiously access information they need to challenge the credibility and character of a police officer involved in their case.

18. The impact of police misconduct on the administration of justice is well recognized. In the context of s. 24(2) of the *Charter*, police misconduct can result in the exclusion of evidence, "not because there was police misconduct, but because the administration of justice would suffer from the judicial condonation of such conduct."[27] Sopinka J. emphasized this,[28] stating, "[t]his Court must not be seen to condone deliberate unlawful conduct designed to subvert both the legal and constitutional limits of police power to intrude on individual privacy." The concern animating the exclusionary rule is that "to admit such evidence would send a clear message to the police that the rights set out in the *Charter* are unworthy of protection and thus lack importance."[29] Section 24(2) has a societal focus. It is not aimed at punishing the police, but rather at systemic concerns.[30] These same concerns should influence the Court's approach to disclosure obligations. A reversal or retreat from *McNeil* could be perceived by the public as an indirect condonation – or willful blindness – towards police misconduct and its deleterious impact on *Charter* rights.

19. As is the case with the exclusion of evidence under s. 24(2), the purpose of disclosing relevant police misconduct to an accused is not to punish individual instances of police misconduct. Punishment is distinct from accountability. The BCCLA submits that disclosure laws should ensure that police officers are properly held accountable for relevant misconduct through

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[25] *Schertzer ONCA, supra,* at para. 132.
[26] *Theriault, supra* at para. 206
[27] Peck, Richard C.C. "The Adversarial System: A Qualified Search for the Truth" (2001) 80 Canadian Bar Review 456 at 472 [Peck, Richard C.C. "The Adversarial System"].
[28] *R. v. Kokesch*, [1990] 3 S.C.R. 3 at 29.
[29] Peck, Richard C.C. "The Adversarial System", *supra,* at 472.
[30] *R. v. Grant*, 2009 SCC 32 at paras. 67-70.

fulsome credibility assessments based on all of the relevant evidence.

20. While the decision of *G.(S.)*[31] dealt with a defence disclosure request for police training materials and policy manuals, the Court's analysis of the relationship between police conduct and the public interest is instructive in this context. The Court held:

> [45] It must be emphasized that what is being disclosed are police wide standards, policies, or protocols that govern the behaviour of each individual member. Disclosing such information can only enhance transparency and accountability in policing. Absent privilege concerns, the release of such information can only reinforce the ties between the police and the community it serves. Knowing that such standards, policies, or protocols are followed by individual officers instils confidence in and increases the standing and reputation of the police. When they are not followed, the relationship between the police and the community is strengthened by the knowledge that the police force acts with openness rather than secretiveness with respect to any shortcomings of its members.

21. Similarly, where police engage in serious misconduct that is relevant to an accused's case, not only do *McNeil* and the *Charter* require disclosure, but at a more systemic level, public confidence in the integrity to the justice system is strengthened by that disclosure. Public confidence is bolstered by the reassurance that the system operates with transparency and does not function to shield police officers from accountability for actions that should come to light.

22. Maintaining public confidence in the criminal justice system by ensuring that police misconduct is disclosed in criminal trials is particularly critical given that police misconduct is notoriously difficult to discover, investigate, and address. This is attributable to a myriad of factors including gaps in police oversight,[32] lack of police cooperation with internal investigations,[33] and what has been coined in scholarship as the "blue wall of silence", referring to an unofficial agreement between law enforcement not to disclose or challenge each other's misconduct and a

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[31] *R. v. G.(S.),* 2012 ONCJ 176.

[32] See for example, Tanovich, David. "Judicial and Prosecutorial Control of Lying by the Police", *supra*, at 331-332, for a discussion of the difficulties associated with having police departments responsible for investigating their own officers even where a trial judge made explicit findings of perjury, citing *R. v. Dinh*, 2011 ONSC 5644.

[33] Roach, Kent. *Canadian Policing: Why and How It Must Change*, Toronto: Delve Books, 2022 at 64 ["Roach, Kent. *Canadian Policing*"].

culture of reluctance towards internal whistleblowing.[34] As the former United States Supreme Court Justice, Warren E. Burger, said:

> After the passage of many years, and more than thirty years as a lawyer and a judge, I cannot tell you who, under our existing law and institutions, will watch the watchman – the policeman – in the sense of holding him individually accountable when he breaks one law in his effort to enforce another.[35]

23. This Court should not walk back the progress made through *McNeil* by limiting its scope, reducing the information of police misconduct available to an accused as first party disclosure, particularly when much police misconduct likely never makes it into a police disciplinary record at all.

B. A Narrow Interpretation of "Information of Police Misconduct" Should be Rejected

24. Kent Roach, leading Canadian scholar on criminal law and Canadian policing, states that "we should expect more from the police than conduct that satisfies the minimal requirements of legality".[36] This is true in the context of *McNeil* disclosure.

25. The Court should not find that all information relating to police misconduct beyond "criminal record type" information, including investigative files, are subject to the third-party *O'Connor* application regime. The gatekeeping function of the Crown ensures that the contours of first party disclosure set out in the authorities are not extended beyond the Court's intended scope.

26. The police should not be permitted to declare themselves as a third-party at their own discretion to erect a procedural barrier in response to defence requests for information of misconduct beyond the "Ferguson Five". Redrawing the boundaries of the scope of first party disclosure in this manner disregards the efficacy concerns underpinning *McNeil*. It is also inconsistent with *Stinchcombe* and *Gubbins*. Such an approach would unjustifiably shift the burden to the accused to prove likely relevance even where the Crown considers the information contained therein to meet the relevance threshold. This would create an unnecessary procedural hurdle for

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[34] Johnson, Visa. "Bias in Blue", *supra*, at 254.
[35] Burger, Warren E. "Who Will Watch the Watchman?" (1964) 14 American University Law Review 1 at 2.
[36] Roach, Kent. *Canadian Policing, supra,* at 14.

accused individuals, depleting judicial resources.

27. Where the Crown is of the view that the information contained therein meets the obvious relevance threshold there is no need for the Court to undertake the relevance determination of investigative files. This is particularly so given the Court's clear instruction that subject to limited exceptions, "the accused's right to access information necessary to make full answer and defence will outweigh any competing privacy interest" at the balancing stage.[37]

28. The *McNeil* framework does not provide for the wholesale disclosure of information of police misconduct to the accused. Such disclosure remains subject to the edicts of *Stinchcombe* and *Gubbins*. The Crown is positioned to determine whether the misconduct in question is serious, and whether the information in the investigative files meets the relevance threshold or is properly subject to the third-party record application process.

C. Limiting the Scope of First Party Disclosure of Police Misconduct Will Disproportionately Impact Marginalized Communities

29. Indigenous, racialized, and other disadvantaged communities experience grossly disproportionately high levels of policing and police violence.[38] The BCCLA submits that, correspondingly, if information of police misconduct that falls within first party disclosure is arbitrarily limited to the "Ferguson Five" or "criminal record type" information, minority and Indigenous accused will shoulder a disproportionate burden of bringing costly and onerous *O'Connor* applications in order to access information needed to make full answer and defence. This issue is compounded by the lack of public confidence in the police amongst disadvantaged and Indigenous communities,[39] and by the access to justice issues faced by marginalized communities.

30. David Tanovich, a leading Canadian scholar on criminal law, evidence, and racial profiling, writes that "the Charter must be interpreted with a critical race or anti-racist lens to give effect to systemic racism in the criminal justice system including the over-policing of Aboriginal and

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[37] *McNeil, supra,* at para. 42.
[38] *Le, supra,* at paras. 90-97; Roach, Kent. *Canadian Policing, supra,* at 26-50.
[39] Roach, Kent. *Canadian Policing, supra,* at 11-12, 49.

racialized communities.[40] The BCCLA echoes this recommendation. This Court should adopt these lenses when interpreting the scope of an accused's right to make full answer and defence. This right depends on an accused's ability to call the evidence necessary to establish a defence and to challenge the evidence called by the prosecution. Where this evidence includes information of police misconduct, individuals should be able to access all relevant information without unnecessary roadblocks that serve only to shield police officers from accountability.

PARTS IV & V: COSTS, ORDERS SOUGHT AND CASE SENSITIVITY

31. The BCCLA seeks no costs or orders and makes no submissions on case sensitivity.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of April, 2025.

Caroline Senini

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[40] Tanovich, David M. "Ignoring the Golden Principle of Charter Interpretation?" (2008), 42 The Supreme Court Law Review 441 at 443.

PART VI – TABLE OF AUTHORITIES

Authority	**Paragraph Reference(s) in Argument**
Case Law	
Ontario (Attorney General) v. Clark, 2021 SCC 18	1
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