Green & Chercover

Police Law Update

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R. v. McNeil: What does it mean? What can you do about it?

BY ANTONY SINGLETON AND GARY HOPKINSON

Earlier this year, the Supreme Court of Canada ruled in *R. v. McNeil* that information about police discipline should be disclosed to the accused in criminal cases.[1] We're aware that this decision has caused considerable anxiety and dismay among Associations' members. In this article, we explain what *McNeil* means, and give some suggestions about how Associations can respond to it.

THE *MCNEIL* DECISION

As you know, in a criminal prosecution, the Crown is obliged to disclose to the accused all relevant information in its possession. By extension, the police are obliged to disclose to the Crown all material pertaining to their investigation of the accused. These obligations arise from the accused's constitutional right to make a full answer and defence to the case against him.

McNeil expands the type of information that must be disclosed to include "records relating to findings of serious misconduct by police officers involved in the investigation of the accused… where the police misconduct is either related to the investigation, or the finding of misconduct could reasonably impact on the case against the accused." It also includes outstanding misconduct charges that are relevant to the accused's case.

The Court gives some examples of information that must be disclosed. Information relating to police misconduct that "concerns the same incident that forms part of the subject-matter of the charge against the accused" must be disclosed (e.g. a *PSA* charge for "excessive use of force in relation to the accused's arrest"). Misconduct that has a bearing on the reliability or credibility of an officer's evidence must be also disclosed (e.g. a criminal conviction for perjury). The Court also reproduces the *Ferguson Report's* recommendations that the following information be disclosed:

> (a) 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].
>
> (b) Any outstanding charges under the *Canadian Criminal Code* of the *Controlled Drugs and Substances Act*.
>
> (c) Any conviction or finding of guilt under any other federal or provincial statute.
>
> (d) Any finding of guilt for misconduct after a hearing under the *Police Services Act* or its predecessor *Act*.
>
> (e) Any current charge of misconduct under the *Police Services Act* for which a Notice of Hearing has been issued.

Significantly, the Court did *not* adopt the *Ferguson Report's* recommendation that these categories of information be disclosed *automatically* to the accused. Rather, the Court provided the categories as "useful guidance" about what could be considered relevant for the purposes of disclosure. *Relevance* is determining factor, and it must be assessed on a case-by-case basis:

> Of course, not every finding of police misconduct by an officer involved in the investigation will be of relevance to the accused's case. The officer may have played a peripheral role in the investigation, or the misconduct in question may have no realistic bearing on the credibility or reliability of the officer's evidence.

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We welcome your ideas, suggestions and feedback regarding this newsletter. Please direct your comments to Barrie Chercover or Natasha De Menna. We also welcome your contributions and will happily consider publishing suitable short pieces.

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RESPONSES TO *MCNEIL*

First, the bad news. Many Associations have provisions in their collective agreements to the effect that discipline records will be "expunged" after a certain period of time, and it's tempting to think that they might offer some protection against *McNeil*: if records have to be destroyed in accordance with the collective agreement, then they won't exist to be disclosed to the accused. However, we think that such provisions may not protect members against *McNeil* disclosure. As *McNeil* is rooted in the accused's constitutional right to make a full answer and defence, the courts may not uphold an arbitrator's award requiring police management to completely destroy information that would otherwise have to be disclosed in a criminal proceeding. Rather, arbitrators and courts will likely interpret such provisions as requiring the records to be "expunged" for employment purposes, but not for the purpose of the administration of criminal justice.

However, Associations can respond in other ways to ensure that *McNeil* is implemented in a manner that respects their members' interests as much as possible.

As described above, decisions about disclosure are made at two levels: the Police Service and the Crown. More than the Crown, whose primary focus is the case against the accused, the Police Service should be alive to, and even share, members' concerns about *McNeil*. For this reason, we advise Associations to focus your attention on influencing police management. There are two areas of management decision-making that Associations might usefully target.

The first is management's decision-making about how to implement *McNeil*. After the Supreme Court delivered its decision, Police Services began drafting policies about how to implement it. We've seen some of those policies, and we're concerned that they require the mechanical application of the *Ferguson Report* categories. Associations should impress upon management that *McNeil* calls for an analysis focused on the *relevance* of the information, rather than the *category* the information fits into. A relevance focused approach involves first identifying what the issues are in the case against a particular accused, and then disclosing only the information that is relevant to those issues. If it's not relevant, it shouldn't be disclosed, even if it falls into one of the *Ferguson Report* categories.

To focus management's mind in this regard, Associations could bargain for a collective agreement provision that prohibits management from disclosing non-relevant information about discipline. Such a provision would be enforceable—because it prevents the disclosure of non-relevant information only, it does not affect the accused's right to make a full answer and defence.

The second area that Associations could target is management's decision-making about how it pursues discipline under the *PSA*. In our experience, for tactical reasons management often lay more serious charges than the factual allegations against an officer warrant. For example, it is not uncommon for management to charge an officer with both "deceit" and "neglect of duty" in order to extract a guilty plea on the neglect of duty charge. Associations need to impress on management that, following *McNeil*, they should be more judicious about the charges they lay and the allegations they include in a Notice of Hearing. For example, if the alleged misconduct really amounts to neglect of duty, adding a tactical "deceit" charge will unnecessarily subject the case to *McNeil* disclosure: "deceit," like perjury, involves dishonesty, so will almost certainly be relevant to the credibility of an officer's testimony, whereas the neglect of duty may not be relevant at all.

McNeil will impact members' and Associations' decision-making too. Individual members should keep *McNeil* in mind when they decide how to respond to discipline proceedings against them, both in terms of whether to accept plea deals and, if they are found guilty of misconduct at a hearing, whether to appeal to OCCOPS. Similarly, *McNeil* should be one of the factors that Associations consider when deciding whether to financially support a member in *PSA* proceedings or in a subsequent appeal.

McNeil disclosure is a new and evolving area of the law. For example, as we prepared this issue of the PLU, we learned that the Nova Scotia Court of Appeal had refused an application to stay the disclosure of the disciplinary files of four police officers[2]. The officers asked for the stay pending the hearing of their application for judicial review of the Deputy Police Chief and Crown's decisions to disclose their records in several criminal cases. If the judicial review goes ahead, the Court may give us further direction about what kind of information must be disclosed, and what legal recourse (if any) members have if they disagree with the disclosure. We'll keep you posted!

[1] *R. V. McNeil*, [2009] S.C.J. No. 3.
[2] *Municipal Assn. of Police Personnel v. McNeil*, [2009] N.S.J. No. 196 (C.A.)

Kelly and *Hall*: Drug-Related Misconduct Gives Rise to the Duty to Accommodate

BY KATIE ROWEN

Many observers were surprised at the Ontario Divisional Court's 2006 decision in *Toronto Police Service v. Kelly*[1] to reinstate an officer who pled guilty to serious drug offences. *Kelly* was seen as the high water mark of the severity of misconduct a uniformed officer could commit and still be reinstated. As a result, it is tempting to view the Court's recent decision in *Hall v. Ottawa Police Service*[2] as the Court's attempt to "backtrack" by taking a harder-line approach to penalizing drug-related misconduct. However, while both *Kelly* and *Hall* involved drug use by uniform officers, there are significant factual differences between the two cases which mean that *Kelly* remains good law. Furthermore, taken together, both cases demonstrate that addiction is a disability which must be accommodated by police employers – with the decisions marking different points on a spectrum of undue hardship.

The facts of the *Kelly* case were remarkable. Kelly was an officer with over 20 years' exemplary service who had worked undercover for some time in the drug squad. His workload in the drug squad was described as "heavy and intense". While on the drug squad, Kelly experienced a series of traumatic events: within a three-year period his father died, his partner was shot in the line of duty, he himself was victimized in the line of duty, his marriage broke down, and he was involved in an extremely serious motor vehicle accident. Kelly had requested a transfer out of the drug squad, but the request had not been followed up on.

The Divisional Court found that,

> all of the above events, combined with the workload at Northwest Drug Squad, caused Constable Kelly to become increasingly depressed. His post-traumatic stress estranged him from others and affected his mood and concentration. He felt helpless and hopeless and began to associate with his false undercover persona as opposed to his true character[3].

As a result of his psychological and emotional stress, Kelly began using cocaine. His undercover work made the drug readily accessible to him. He would buy small amounts, which he would share with a civilian he had previously used as an informant. This civilian was acting as a police agent, and Kelly was arrested and charged with various drug offences. He pled guilty to two counts of possession of cocaine, and a suspended sentence was imposed. It appears that Kelly's drug use was confined to a period of a few months in the Fall of 2001.

Following his arrest, Constable Kelly readily admitted to his cocaine addiction and immediately enrolled in a drug treatment program, and sought psychiatric and psychological counseling to deal with his post-traumatic stress disorder. Following extensive treatment and therapy, he was found to have a "very low risk of relapsing, as he was committed to change and had replaced his negative conditions with positive ones and had significant remorse"[4].

As a result of his otherwise impeccable record of service, as well as his successful rehabilitation, in response to the *Police Services Act* misconduct charges, the Association and the Service were able to put forth a joint submission on penalty, which would have Kelly return to work on a last chance agreement as a fourth-class constable, on an inside assignment, without the ability to carry a weapon. It had been agreed that a position fitting these criteria would be created for him. Kelly would be required to continue substance abuse and psychiatric assessment and treatment, and would be subject to random drug testing at management's discretion for as long as he remained with the police service. Despite the severity of these conditions, the Hearing Officer rejected the joint submission on penalty and ordered Kelly to resign immediately or be dismissed. This decision was based in part on the Hearing Officer's conclusion that Kelly's own deliberate acts led to his addiction, and thus, the need to accommodate was lessened. On appeal, OCCPS reversed this decision and applied the conditions of the joint submission on penalty. The OCCPS decision was subsequently judicially-reviewed.

The Divisional Court upheld the OCCPS decision, finding that there was no basis for many of the conclusions drawn by the Hearing Officer, such as that Kelly's behaviour had placed other officers at risk, and that his failure to disclose where he had obtained the cocaine undermined his expressions of remorse. The Divisional Court also found that the Hearing Officer had failed to appreciate that addiction is a disability, and that the employer bears an obligation to accommodate that disability. The Divisional Court reinstated Constable Kelly pursuant to the terms of the joint submission on penalty.

Like *Kelly*, the *Hall* case also involved a uniform officer who pled guilty to cocaine-related charges arising in connection with his employment. There are, however, significant differences in the facts of the two cases. Unlike Kelly, Constable Hall had a history of drug and alcohol use prior to becoming a police officer. He had also begun using marijuana with increasing frequency to deal with personal problems several years prior to the cocaine use. At the time of his cocaine use, he had been an officer for a relatively brief period of time. Hall was not an undercover drug agent. His cocaine use persisted for over a year, and began when he seized an amount of the drug during a routine traffic stop. He did not report the seizure and kept the drug for his personal use. On subsequent occasions he skimmed amounts of cocaine from evidence in drug cases which he was involved with. In other instances, he purchased cocaine for personal use while working as a plainclothes officer. The theft of evidence is a

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serious aggravating factor, and distinguishes Hall's circumstances from those present in the *Kelly* case. Another aggravating factor was that shortly after beginning to use cocaine, and without informing his employer, Hall had sought and received treatment for his addiction. Despite this treatment, he relapsed and continued to use cocaine. In fact, most of the allegations of professional misconduct dated from after his failed attempt at treatment.

Before the Hearing Officer, counsel for Hall sought to have him reinstated on conditions very similar to those contained in the joint submission in the *Kelly* case, including demotion and reassignment to a desk job without access to firearms, as well as continued treatment and random drug testing. The Hearings Officer declined to reinstate Hall, and this decision was upheld on appeal to OCCPS.

The Divisional Court in *Hall* elaborated on and clarified the fact that in misconduct cases involving drug addiction, the duty to accommodate is triggered. The distinction between the two cases turns on whether allowing the officer to return to work would constitute undue hardship for the employer. In *Hall*, the Court endorsed the conclusion of both the Hearing Officer and OCCPS that Hall's circumstances were distinguishable from the *Kelly* case, insofar as Hall had a prior history of drug use, had not sought a transfer to another work unit, did not have Kelly's lengthy record of "impeccable" service, and engaged in the drug-related misconduct over a longer period of time.

The Divisional Court's decision in both Kelly and Hall make it clear that members with drug addiction are entitled to accommodation, even when the drug addiction gives rise to very serious misconduct. Police Associations should inquire into the issue of addiction and accommodation in all misconduct cases that disclose such issues, as the Kelly case illustrates that, in the right circumstances, accommodation can result in reinstatement.. However, the Kelly and Hall decisions also emphasize that the precise scope of a police force's duty to accommodate remain very specific to the individual member, the nature and circumstance of the misconduct, and the force itself. Courts will be reluctant to overturn the findings of a Hearings Officer or OCCPS as to whether, in all the circumstances, continued employment is possible for officers who have engaged in drug-related misconduct.

[1] [2006] O.J. No. 1758.
[2] [2008], 93 O.R. (3d) 675.
[3] *Kelly*, at para. 13.
[4] *Kelly*, at para. 21

Update on *Renaud v. LaSalle*

BY BARRIE CHERCOVER

We have been trying to keep you posted with the developments in the courts following the decision in *Renaud v. LaSalle (Town) Police Association* [2006] O.J. No. 2842 (C.A.). Two parallel lines of decisions have developed since *Renaud*.

The first of course is the acceptance by the courts that individual grievors have a right to the statutory conciliation/arbitration process under the *Police Services Act* and thus may pursue their grievances to arbitration with or without the support or endorsement of their Association.

The second trend is how the courts have declined jurisdiction to address a claim that an Association has breached its duty of fair representation, because the issues arose out of an employment relationship, governed by the terms of a Collective Agreement. The courts are steering DFR complaints into the arbitration process.

The most recent example of this is *Ali v. Toronto Police Association* [2009] O.J. No. 1727 decided by Kelly, J. on April 20th, 2009. Ali sued the Association for damages for breach of its duty of fair representation. He was a cadet in training with the Toronto Police Service who was terminated after the employer concluded that he had not completed his application for employment accurately. The Association declined to represent him with respect to his termination.

The courts reasoned that the provisions of the collective agreement setting out a grievance procedure and dealing with termination created a forum in which he could bring his complaint that the Association failed to represent him. The court relied on *Renaud v. LaSalle (Town) Police Association* [2006] O.J. No. 2842 (C.A.).

The essence of this decision is that there is no gap between the Collective Agreement and the *Police Services Act*, which would enable the court to hear the matter as a civil cause of action. As Ali's termination was covered by the Collective Bargaining Agreement, a court will not have jurisdiction to deal with the dispute and Ali was required to pursue his claims against his association through grievance and arbitration the same way *Renaud* was found able to pursue his grievance against his employer through grievance and arbitration.

There are reasons to be concerned about the judicial attitude towards individuals having a right to grievance and arbitration against their employer or against their association under the *Police Services Act*. I cannot believe that the legislature intended either of these results when the relevant sections of the *Police Services Act* were passed. Nevertheless, it is important for all of you to understand that this trend has been continuing and will remain in place unless and until the Supreme Court of Canada dictates otherwise.

Benefit Administration: Tips & Traps for Police Associations

BY JOSHUA PHILLIPS

> Health and welfare benefits by their very nature are complex to administer and are unpredictable with respect to their economic impact on a particular employer. It is only the largest of employers who are in a position to provide such administration and assume the risk of loss. For many employers the rational choice is to avoid being involved in the administration and to replace the financial risk with a known premium cost.
> ***Toronto Port Authority* v. *C.U.P.E., Local 416* (2002) 110 L.A.C. (4th) 185 (Kennedy)**

It used to be that Associations would collectively bargain for benefits, with greater or lesser degrees of specificity as to the level of those benefits, with the employer taking more or less responsibility for the administration of the plan. Whatever the employer did not assume would be the responsibility of the insurer. This made sense, for as Arbitrator Kennedy points out above, benefits are a complex and specialized area with unique administrative and legal issues. It is also very high stakes game, with potential benefit payouts in the millions of dollars. We left it to the professionals to handle. But then something happened.

That something was the assumption by police associations and other unions of increasing responsibility for benefit administration. The reasons for this change are varied. Sometimes the Association thought it could better control costs and reflect its members' preferences for coverage levels. Sometimes they wanted to protect members' privacy by keeping confidential medical information out the employer's hands. And sometimes they just wanted to remove employer influence over the adjudication of claims.

Whatever the reason, taking on a new role with respect to benefits also means taking on new responsibilities. Absent a special role in benefit administration, Associations have no legal duty to represent members with respect to benefit matters where those entitlements do not arise out of the collective agreement. But once an Association takes on a role in benefits, it should fulfill those duties with the same prudence, diligence and fairness it applies to its duties as a bargaining agent.

There are a number of roles the Association may take on. What role is best depends on the priorities and resources of the Association. But remember, benefit administration is a specialized and important role. Mistakes can result in millions of dollars of liability. Those roles, and some of the issues which may arise, include the following.

Advocate: The advocate role is the one Associations are most familiar with. However, if you will be representing a member, either yourself or by providing legal counsel, you must be sure that you your decisions to support or not support a member are made in good faith and aren't arbitrary and discriminatory; that you have adequate experience in the area; that all timelines for providing proof of claim, making appeals or starting legal actions are adhered to; and that the member understands the circumstances under which you may withdraw your support.

Policyholder: this is the person who puts the plan in place with the insurer. As policyholder, you are responsible for the contents of the policy and ensuring your members know about their coverage. If for example, the provisions of the policy are found to be discriminatory – such as LTD policies which used to treat those with mental disabilities differently than those with physical disabilities - the policyholder could be held liable for that discrimination. If the collective agreement requires a certain level of coverage, a failure to obtain such coverage could expose the Association policyholder to a claim from members. Have members been adequately and accurately advised of the nature of the coverage so that they can decide whether to obtain supplemental coverage? Another potential problem arises when the policyholder changes carriers and certain members find themselves no longer qualifying for coverage or the same level of benefits because of changes in the policy, exclusions or the failure to be enrolled in a timely manner.

Administrator: most benefit plans refer to an Administrator who is allotted certain responsibilities in the claims process, including enrolment, premium remittance, providing forms, confirming employment information and providing advice with respect to filing claims. The Administrator is sometimes considered an agent for the insurer. While employers have traditionally fulfilled this function, it is common for this role not to be assigned in policy documents or administration agreements.

Performing this role exposes the Association to several potential claims, including:

- failing to enroll or remit premiums on behalf of members resulting in loss of coverage;
- failing to remove members from enrolment when they no longer qualify for the benefit (eg. those who qualify for a full pension often

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Benefit Administration

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do not qualify for LTD);
- failing to advise members of their right to make a benefit claim, at all or in a timely manner, resulting in a denial of benefits;
- providing inaccurate information to the insurer, resulting in a denial of claim or wrongly calculated benefits.

A Word of Advice…

So, if you are going to get into the benefits business, do it right. Some helpful hints that will start you on the right path:

- know your role and communicate it to your members—don't take on more than you can handle;
- develop in-house or outside expertise to assist you with the administrative and legal aspects of your role;
- have the policy, benefits booklets, administration agreement and all other relevant documentation;
- give timely and accurate advice regarding the claims process;
- avoid giving advice about whether a member will qualify for a benefit, how much that benefit will be or what arrangements would be in the member's best financial interest;
- when in doubt, seek expert, professional advice.

RCMP to get collective bargaining

Decision may help provincial and municipal associations too

BY ANTONY SINGLETON

Congratulations are in order for the Mounted Police Association of Ontario, who won an important legal battle in their quest for collective bargaining in the RCMP[1].

The RCMP is excluded from the labour relations scheme that covers most employees of the Federal Government, the *Public Service Labour Relations Act* (PSLRA). Instead, a Regulation provides that RCMP members' interests in "staff relations issues" are represented through the "Staff Relations Representative Program" (SRRP). As RCMP management will only deal with labour relations through the SRRP and refuse to recognize an Association of the officers' own choosing, the SRRP prevents genuine collective bargaining.

In April 2009, Justice MacDonnell of the Ontario Superior Court ruled that the SRRP regulation is unconstitutional, because it breaches the *Charter's* protection of freedom of association. The decision applies in the police context an earlier ruling by the Supreme Court of Canada that the *process* of collective bargaining is protected by the *Charter*. In essence, a government is not allowed to make legislation that interferes with:

- The ability of workers to form an independent association for labour relations purposes, free of management interference or influence; and
- The ability of the association to exert meaningful influence over working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith.

Justice MacDonnell ruled that the SRRP was unconstitutional for two reasons. First, the SRRP is not an independent association, because: (a) it's part of the RCMP chain of command; (b) the members have never been given the opportunity to decide whether the SRRP is the body within which they want to associate for labour relations purposes; and (c) it forces members into an association that contains officers in management positions whose interests

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RCMP to get collective bargaining

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conflict with those of non-commissioned members. Second, the SSRP does not involve genuine collective bargaining; it's restricted to a consultative process, after which final decisions are made by management.

For RCMP members, MacDonnell's decision is an important step along the bumpy road to collective bargaining. MacDonnell suspended the effect of the decision for 18 months, giving the Federal government time to bring in legislation governing collective bargaining for the RCMP. It remains to be seen what the government's response will be. It's fair to say the Harper administration is no fan of unions and, unsurprisingly, they've filed an appeal. If the Feds lose the appeal—and odds are they will lose—they may come up with legislation that tries to comply with the judgement in the most minimal way while greatly restricting the ambit of collective bargaining. That would likely lead to another trip to court. We'll keep you posted.

Provincial and municipal associations may also be encouraged that constitutional status has been accorded to a process of collective bargaining "*conducted in accordance with the duty to bargain in good faith.*" This duty requires parties to make every reasonable effort to come to a collective agreement, including, for example, by setting out all proposals at the outset of negotiations and disclosing all the relevant information about them.

The *Labour Relations Act* (LRA) contains a provision requiring the parties to bargain in good faith, and when an employer bargains in bad faith, a union can apply to the Labour Relations Board for an order compelling the employer to behave itself. The *Police Services Act* (PSA) contains a similar provision (s. 119(3)), but it has never been used to obtain a remedy.

Given the recent trend to interpret the arbitration provisions of the *PSA* liberally (see our articles on *Renaud v. LaSalle* in this and previous editions), an argument could be made that a *PSA* arbitrator has the jurisdiction to enforce the constitutionally recognized duty to bargain in good faith. In a case where an Association can demonstrate that the employer has breached the duty, it may be possible to persuade an arbitrator to provide a meaningful award or direction about the conduct of negotiations. (Of course, as the duty applies to both parties, an Association could face the same thing if it fails to bargain in good faith).

It's a novel argument and there's certainly no guarantee of success. But in a round of bargaining where management isn't playing fairly at the bargaining table and, for strategic reasons, you'd prefer to continue negotiating rather than go straight to interest arbitration, why not try it on?

[1] *Mounted Police Assn. of Ontario v. Canada (Attorney General)*, [2009] O.J. No. 1352.

G & C Profiles... Joshua Phillips

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Prior to practising law, Josh worked as a professional stage manager and production manager for various theatre companies throughout Ontario. He has also worked for the Ontario Ministry of Labour, labour unions and as an advocate for injured workers groups.

Josh's practice is now concentrated in labour law, professional discipline, civil litigation and appellate work, with a particular emphasis in the educational and cultural sectors. Josh has been a featured speaker for the Ontario Bar Association, the Canadian Association of Labour Lawyers (CALL), the Canadian Association for the Practical Study of Law and Education (CAPSLE), Lancaster House and others.

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