SCC File No. 41110

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

BETWEEN:

CHIEF OF THE EDMONTON POLICE SERVICE

APPELLANT
(Intervener)

- and -

JOHN McKEE

RESPONDENT
(Applicant)

- and -

HIS MAJESTY THE KING IN RIGHT OF CANADA

RESPONDENT
(Respondent)

- and -

DETECTIVE JARED RUECKER, EDMONTON POLICE ASSOCIATION

INTERVENERS
(Interveners)

- and -

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Parts I. and II. Overview and Position on Questions on Appeal

1. This appeal raises important questions about whether relevant and non-privileged material in the hands of the police or the Crown can be withheld from disclosure in a criminal case. The CCLA's position is that the answer to this question is a clear and obvious "no".

2. This Court should affirm the framework set out in *McNeil*.[1] All relevant and non-privileged material in the Crown's possession must be disclosed. Where the Crown is put on notice that a different government agency, such as a police service, may have relevant material, it must make reasonable inquiries of that agency and attempt to take that material into its possession. The police have a positive obligation to cooperate with the Crown to ensure that all potentially relevant information is collected for relevance review. All relevant information gleaned in this process goes to the defence as first party disclosure, subject only to redaction for recognized privilege.

3. Our submissions focus on how misconduct by a Crown witness—whether police or civilian—can be relevant in a criminal case. The appellant asks this Court to read *McNeil* narrowly and restrict the first party disclosure of police misconduct to "criminal record type information": conviction or charge date, type of offence, and disposition.[2] This "bright line" approach is inconsistent with the case-specific and fact-dependent nature of the relevance inquiry. It further improperly displaces the Crown's gatekeeper function and treats the police as the arbiters of relevance. The CCLA submits that this Court should affirm a broad, flexible, and collaborative approach to disclosure of misconduct records—an approach exemplified by the conduct of defence and Crown counsel in this case.

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[1] *R v McNeil*, 2009 SCC 3.
[2] Factum of the appellant at para 49.

Part III. Statement of Argument

A. The relevance of witness misconduct in a criminal trial

4. The accused's right to disclosure flows from the right to make full answer and defence, a principle of fundamental justice under section 7 of the *Charter*.[3] The purpose of the right to make full answer and defence is to avoid wrongful convictions and miscarriages of justice by equipping defence counsel with the information required to explore and test the Crown's case.[4] The right includes "not only the ability to challenge the Crown's case on the merits but also the ability to advance reasonable *Charter* and/or other process-oriented responses to the charges".[5]

5. For this reason, the right to disclosure is fundamentally a fair trial right. As the British Columbia Court of Appeal held in *Bramwell*, "[t]he goal of the disclosure process is to ensure that the accused is not denied a fair trial".[6] The defendant's right to pre-trial disclosure therefore turns on whether the material sought is potentially relevant to the issues at the trial itself.[7] That is why the test for disclosure is governed by the trial relevance inquiry, regardless of whether the material sought is in the hands of the Crown or the police.[8]

6. "Relevance" simply refers to the tendency of a given piece of information to prove a fact in issue. It is not a static or inherent feature of any item of evidence. It exists as a relationship between an item of evidence and the proposition of fact its proponent seeks to establish. Evidence need not be powerful or unequivocal to be relevant. The threshold for relevance is "not high".[9]

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[3] *R v Mills*, [1999] 3 SCR 688 at para 69; *R v Carosella*, [1997] 1 SCR 80 at para 37.
[4] *R v Stinchcombe*, [1991] 3 SCR 326 at p. 336.
[5] *R v Sandeson*, 2020 NSCA 47 at para 76.
[6] *R v Bramwell* (1996), 106 CCC (3d) 365, 1996 CanLII 352 (BC CA) at para 33.
[7] *R v Gubbins*, 2018 SCC 44 at para 23.
[8] *R v Stinchcombe*, [1991] 3 SCR 326 at pp. 325-326; *R v McNeil*, 2009 SCC 3 at paras 17-27.
[9] *R v Schneider*, 2022 SCC 34 at paras 39-43; *R v Calnen*, 2019 SCC 6 at para 108.

7. It follows that evidence of a Crown witness's misconduct can be relevant to a wide range of potential issues. At the most basic level, a witness with a criminal record may be cross-examined on their convictions to undermine their credibility.[10] But for non-accused witnesses, our law has long permitted "cross-examination to go beyond the bare face of a conviction and to investigate the facts of the witness's bad conduct".[11] The substance of a witness's prior misconduct may show the true extent of a witness's dishonesty,[12] that they had been previously convicted of a crime and tried to blame another person,[13] that their propensity for the crime charged makes them more likely to have committed it than the accused,[14] that they have a specific animus against the accused,[15] or that they have a propensity for violence and are therefore more likely to have been the aggressor in the altercation with the accused.[16] This is by no means an exhaustive list. These are merely a few examples of the many ways a Crown witness's misconduct can be relevant at trial.

8. The right to full answer and defence entails a broad right to challenge the Crown's case through cross-examination on relevant evidence.[17] This right serves the societal interest in truth-seeking while safeguarding against wrongful convictions and miscarriages of justice.[18] Where the defence seeks to elicit relevant misconduct evidence, it can only be excluded where its probative value is substantially exceeded by its prejudicial effect.[19]

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[10] *R v Corbett*, [1988] 1 SCR 670 at pp. 685-686.
[11] *R v Burgar*, 2010 ABCA 318 at para 12.
[12] *R v Miller* (1998), 131 CCC (3d) 141 at paras 15-24.
[13] *R v Burgar*, 2010 ABCA 318 at para 7.
[14] *R v Arcangioli*, [1994] 1 SCR 129 at pp. 139-140.
[15] *Lizotte v The King*, [1951] SCR 115.
[16] *R v Borden*, 2017 NSCA 45 at paras 126-130.
[17] *R v Lyttle*, 2004 SCC 5 at paras 69-70.
[18] *R v Samaniego*, 2022 SCC 9 at para 142, per Brown and Rowe JJ (dissenting, but not on this point).
[19] *R v Seaboyer*; *R v Gayme*, [1991] 2 SCR 577 at p. 611; *R v Shearing*, 2002 SCC 58 at para 76.

B. The right to adduce relevant misconduct evidence entitles the defence to disclosure of relevant misconduct records in police possession for both police and civilian witnesses

9. The defence is not restricted to cross-examining a Crown witness only on misconduct that resulted in a conviction. Non-conviction records may also be relevant, depending on the issues at trial and the centrality of the witness. These can include prior offences for which the witness has received a conditional or absolute discharge,[20] prior charges that resulted in a stay of proceedings or a withdrawal,[21] prior investigations that did not result in a formal charge,[22] and in some cases, the circumstances surrounding charges that resulted in an acquittal.[23] As both respondents rightly point out, a witness may even be cross-examined on misconduct that has been subject to an administrative pardon under the *Criminal Records Act*.[24]

10. For civilian witnesses, these principles have widely been interpreted to give rise to a right to disclosure of all relevant misconduct records in the hands of police, whether or not the misconduct resulted in a conviction. This material has variously included lists of outstanding charges accrued before trial,[25] reports of investigations where no charges were laid or where they were subsequently stayed,[26] and evidence from the disclosure file of other cases depicting the

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[20] *R v Cullen* (1989), 52 CCC (3d) 59 (Ont CA) at p. 463.
[21] *R v John*, 2017 ONCA 622 at para 55; *R v Abdo*, 2016 ONSC 7240 at paras 10-11.
[22] *R v Abdo*, 2016 ONSC 7240 at para 9, citing *R v Gassyt and Markowitz* (1998), 127 CCC (3d) 546, 1998 CanLII 5976 (Ont CA) at paras 34-40 and *R v Miller* (1998), 131 CCC (3d) 141, 1998 CanLII 5115 (Ont CA) at paras 15-25; see also *R v Pascal*, 2020 ONCA 287 at para 109.
[23] *R v Abdo*, 2016 ONSC 7240 at para 22, citing *R v Mahalingan*, 2008 SCC 63 at para 23.
[24] Factum of the respondent His Majesty the King in Right of Canada at paras 58-67; Factum of the respondent John McKee at paras 69-73; *R v Foreshaw*, 2024 ONCA 177 at paras 20-36.
[25] *R v Pascal*, 2020 ONCA 287 at paras 120-122.
[26] *R v MacGarvie et al*, 2017 ONSC 745 at paras 20-22; *R v Koyczan*, 2017 YKTC 30 at paras 52-54; *R v Chaudry*, 2020 ONSC 6022 at paras 18-37; *R v Abdella*, 2021 ONSC 3932 at paras 22-28; *R v Pinacie-Littlechief*, 2022 SKQB 392 at paras 35-36; *R v Day*, 2025 ONSC 2043 at para 35.

misconduct in question, such as CCTV evidence.[27] As Schreck J explained in *Abdella*, relevant non-conviction records are disclosable under *McNeil* because the Crown has a duty to obtain them by making reasonable inquiries of the police and the police have a corresponding duty to comply with those requests.[28]

11. Trial judges have declined to draw a bright line between what kinds of misconduct records must be disclosed under the first party regime as obviously relevant and what kinds require a third party records application. As Kalmakoff J explained in *Pinacie-Littlechief*:

> While each case must be decided on its own particular facts, the general thread I glean from the jurisprudence is that there are not rigid categories into which records that are not held by the Crown, and not fruits of the investigation, invariably fall. **Whether such records are first party or third party records for disclosure purposes depends upon whether the information sought is obviously relevant in the sense that it could realistically have a bearing on the accused's case**. This is a determination which must be made in light of the particular facts of the case, with consideration given to a number of factors, including (i) the nature of the charge(s); (ii) the nature of the defence(s) being raised; (iii) the role that the witness or witnesses to whom the records relate play in the investigation and trial; and (iv) the evidence led on the application.[29]

12. If it is improper to take a bright line approach to disclosure of misconduct records for a civilian witness, then it is improper to take a bright line approach to disclosure of misconduct records for a police witness. In this respect, the CCLA agrees with the appellant's submission that there is "no reason to treat police officers differently from other crown witnesses who are accused or convicted of criminal offences".[30] Where relevant, evidence of police misconduct must be

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[27] *R v Haley*, 2025 ONSC 265 at paras 53-66; *R v Day*, 2025 ONSC 2043 at paras 37-41.
[28] *R v Abdella*, 2021 ONSC 3932 at paras 12-13.
[29] *R v Pinacie-Littlechief*, 2022 SKQB 392 at para 33 [emphasis added].
[30] Factum of the appellant at para 59. To be clear, there are contexts in which it would be entirely proper to hold police to a different and higher standard than untrained civilians.

disclosed—whether or not it resulted in conviction, attracted a particular penalty, or was subsequently "pardoned" under provincial legislation.

C. Illustrating the problem with the bright line approach

13. The facts of this case reveal a troubling gap in the implementation of *McNeil*. Det. Ruecker was a central Crown witness with a serious misconduct finding that was relevant to his credibility. But the "*McNeil* Package Indicators" report that the police provided the Crown said that he had no relevant disciplinary history. If not for defence counsel's discovery of the record by accident, neither the Crown nor the defence would have ever learned about Det. Ruecker's serious misconduct. Relevant evidence in police possession would have been held back from the defence.

14. This state of affairs is unacceptable. It shows that the question of relevance cannot be left to the police, who serve a different function and have different interests than the Crown attorneys who prosecute criminal cases. The CCLA submits that the responsibility for relevance review appropriately rests with the Crown as minister of justice, subject to ultimate supervision by the courts. A complete list of disciplinary investigations and findings for each police witness must be sent to the Crown for relevance review in each case.

15. This list is a floor, not a ceiling. As with non-police witnesses, there will be cases where specific material from a police misconduct file—such as CCTV footage, witness or subject officer statements, or hearing decisions—is relevant to the defence and must be disclosed. Unlike the occurrence reports in *Quesnelle*, Parliament has not placed this material beyond the scope of disclosure through a private records regime like the one provided in s. 278.1.[31] On request, the

[31] *R v Quesnelle*, 2014 SCC 46.

police must provide this material to the Crown for relevance review, to "bridging the gap" between third party production and first party disclosure.[32]

16. It follows that the bright line approach to disclosure proposed by the appellant and some of the interveners must be rejected. Treating expungement from workplace disciplinary history as the equivalent of a legislative finding of irrelevance would yield arbitrary and absurd results. The problem with this approach can be illustrated with a concrete example. Consider the notorious case of the "Neptune Four".[33] On November 21, 2011, two Toronto Police Service officers wrongfully arrested four Black teenagers outside the Neptune housing complex. Without any grounds to suspect or believe an offence had been committed, one officer arrested one of the teenagers and punched him in the head. When the other teenagers protested the abuse, the second officer drew his service weapon and pointed it at them. The officers then arrested the four teens on false charges. Surveillance from the housing complex ultimately vindicated the Neptune Four and resulted in findings of guilt against both officers under Ontario's *Police Services Act.*[34]

17. This misconduct evidence could be highly relevant to the defence in subsequent criminal cases involving either officer. In a case where their credibility is in issue, the misconduct could be relevant because each officer falsely described a "threatening and forceful approach" by the youths in their notes.[35] In a case that engaged questions of excessive force, the misconduct could be relevant to their propensity for violence.[36] In a case that involved racial profiling, the misconduct

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[32] *R v McNeil*, 2009 SCC 3 at para 47.
[33] *Pais v Toronto Police Service*, 2023 ONCPC 14.
[34] *Pais v Toronto Police Service*, 2023 ONCPC 14 at paras 5-15 and 115. The *Police Services Act* has since been replaced by the *Community Safety and Policing Act*, RSO 2019 c 1, Sched 1.
[35] *Pais v Toronto Police Service*, 2023 ONCPC 14 at par 35.
[36] *R v Borden*, 2017 NSCA 45 at paras 126-130.

could be relevant to the attitudinal component of the test—that the officer believes that "race or racial stereotypes are relevant in identifying the propensity to offend or to be dangerous".[37]

18. But under Ontario's *Community Safety and Policing Act* ("*CSPA*"), the officers' misconduct in the Neptune Four case would have been automatically expunged after only two years. Const. Adam Lourenco, whose misconduct findings included unlawful arrest, excessive force, and pointing a firearm, received a penalty of 12 days' forfeited pay.[38] Under the *CSPA*, forfeiture of pay falls on the "less serious end" of the misconduct scale and attracts the shorter period of automatic expungement.[39] Under the bright line test, it would be entirely proper for a police service to presumptively withhold Const. Lourenco's unlawful arrest, excessive force, and point firearm findings from both the Crown and defence after two years and one day had passed.

19. This would be an absurd result that would undermine public confidence in the administration of justice. Relevant material does not suddenly become irrelevant after two years and one day. The question of whether material should be disclosed to the defence should not turn on whether counsel happens to learn about misconduct through other sources. The only system that can vindicate the right to make full answer and defence is the model jointly proposed by the respondents: the Crown must be supplied with a list of all misconduct records for each police witness for relevance review, and may require the police to produce additional records on request.

20. This right is not without limits. As this Court held in *McNeil*, "not every finding of police misconduct by an officer involved in the investigation will be of relevance to an accused's case".[40]

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[37] *R v Dudhi*, 2019 ONCA 665 at para 55.
[38] *Lourenco v Toronto Police Service*, 2023 ONCPC 21 at paras 5 and 18.
[39] *Pais v Toronto Police Service*, 2023 ONCPC 14.
[40] *R v McNeil*, 2009 SCC 3 at para 59.

An officer may only have been briefly and peripherally involved, or the misconduct may be of such a technical or trifling nature that it cannot plausibly relate to their credibility. But it is the Crown, and not the police, who is best positioned to make that initial assessment.

D. Disclosing police misconduct: a collaborative approach to relevance

21. It is well-established that when the defence makes a good faith request for relevant material in the hands of the police, the Crown has a duty to make reasonable efforts to take that material into its possession to safeguard the accused's right to make full answer and defence.[41] But the Crown does not stand alone in this duty: "[t]he fair and efficient functioning of the criminal justice system requires that defence counsel exercise due diligence in actively seeking and pursuing Crown disclosure".[42] As the British Columbia Court of Appeal held in *Bramwell*:

> [T]he disclosure process is one which engages both the Crown and the defence. It is not one in which defence counsel has no role to play except as passive receiver of information. […] Crown counsel must disclose everything in its possession which is not clearly irrelevant to the defence, but the defence must also play its part by diligently pursuing disclosure from Crown counsel in a timely manner.[43]

22. This line of authority is consistent with this Court's direction in *Jordan* that "a level of cooperation between the parties is necessary in planning and conducting a trial".[44] It reflects the practical reality that defence counsel is in the best position to know what material "relates to the accused's ability to meet the Crown's case, raise a defence, or otherwise consider the conduct of the defence".[45] And it promotes a culture of civility and cooperation between the Crown and defence bar to see that "disputes are resolved in a just, peaceful, and orderly way".[46]

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[41] *R v McNeil*, 2009 SCC 3 at paras 50-51.
[42] *R v Dixon*, [1998] 1 SCR 244 at para 37.
[43] *R v Bramwell* (1996), 106 CCC (3d) 365, 1996 CanLII 352 (BC CA) at para 33.
[44] *R v Jordan*, 2016 SCC 27 at para 86.
[45] *R v Gubbins*, 2018 SCC 44 at para 23.
[46] *Groia v Law Society of Upper Canada*, 2018 SCC 27 at paras 1 and 63-68.

23. Accordingly, where the defence takes the view that the police possess material that may be relevant, it has a duty to raise the issue with the Crown in a timely manner. Unless the issue "appears unfounded", this triggers the Crown's duty to take that material into its possession for relevance review.[47] Neither the Crown nor the defence can fulfill these duties in a world where the police are entitled to withhold relevant material simply because it has been subject to administrative expungement under workplace discipline legislation.

24. The collaborative approach to relevance review preserves public confidence in the administration of justice by treating the Crown and defence as partners in the search for truth. It guards against miscarriages of justice and wrongful convictions by equipping the defence with the information needed to test and explore the Crown's case. It is broad, flexible, and engages the supervision of trial courts only where the Crown has already taken material into is possession and determined it is not possibly relevant or is protected by a recognized privilege. It is firmly rooted in *McNeil*. This Court should not depart from this approach.

Part IV. Submissions on Costs

25. CCLA seeks no costs and asks that no costs be awarded against it.

All of which is respectfully submitted this **5th** day of May, 2025.

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[47] *R v McNeil*, 2009 SCC 3 at para 47.

Part VII. Table of Authorities

CASES	PARAGRAPH(S)
Groia v Law Society of Upper Canada, 2018 SCC 27	22
Lizotte v The King, [1951] SCR 115	7
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