Citation: *R.* v. *Fotheringham,* 2015 YKTC 1

Date: 20150114
Docket: 12-00448A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Cozens

REGINA

v.

DANIEL ADAM FOTHERINGHAM

Appearances:
Jonathan Gorton — Counsel for the Attorney General of Canada
Leo Lane — Counsel for the Crown
Jennifer Cunningham — Counsel for the Defence

RULING ON APPLICATION

[1] Daniel Fotheringham is charged that, on July 12, 2012, he committed offences contrary to ss. 253(1)(a) and 253(1)(b) of the *Criminal Code*.

[2] On June 5, 2014 counsel for Mr. Fotheringham filed an Amended Notice of *Charter* Application for Exclusion of Evidence and Stay of Proceedings, alleging breaches of ss. 7, 8, 9, 10(b) and 11(d) of the *Charter*. Among other things, the Application alleges that the police acted without reasonable grounds and with excessive force in arresting Mr. Fotheringham. Further, one of the police cruisers attending the scene failed to record the arrest.

[3] On June 9, 2014, counsel for Mr. Fotheringham filed a Notice of Application for disclosure of the manuals, policies and procedures about the use and maintenance of the VICS ["Video in car system"], as well as a Notice of Application for ***McNeil*** disclosure (***R.*** v. ***McNeil***, 2009 SCC 3). These applications were heard on June 10, 2014 and my decision was pronounced on July 4, 2014 (***R.*** v. ***Fotheringham***, 2014 YKTC 32).

[4] In my decision, I found that that the manuals, policies and procedures about the use and maintenance of the VICS were potentially relevant to Mr. Fotheringham's *Charter* arguments.

[5] I further ordered that the Crown disclose the disciplinary record relating to a physical altercation in a bar that Cst. Rouleau, the investigating officer, was involved in and for which he was subjected to informal discipline, as well as a short summary of the conduct underlying five of the public complaints that were made against Cst. Rouleau.

[6] In my decision, I stated that counsel for Mr. Fotheringham, after receiving and reviewing the summaries, could bring the matter back before me if she wished to seek an order for further disclosure.

[7] On November 13, 2014, counsel for Mr. Fotheringham filed a Notice of Application for further ***McNeil*** disclosure. Specifically, counsel is requesting:

- The details concerning four separate public complaints in 2012 against Cst. Rouleau, involving allegations of:

    i) A failure to investigate an offence by not requesting video footage from a third party;

ii) A detention without grounds, and without an explanation of the grounds;

iii) Improper use of force during an arrest; and

iv) Improper use of force, improper arrest, and inappropriate comments.

[8] Counsel's position is that the requested material is first party disclosure in accordance with ***McNeil***. In the alternative, counsel submits that the requested materials be disclosed as third party records pursuant to ***O'Connor*** (***R.*** v. ***O'Connor***, [1995] 4 S.C.R. 411).

[9] This application was heard before me on November 14, 2014 and judgment was reserved to January 14, 2015.

Analysis

[10] The summaries of the four complaints, all made in 2012, provide the following information:

i) It was alleged that several RCMP members, including Cst. Rouleau, failed to procure CCTV footage from an installation not under RCMP control. No disciplinary action was taken and the complaint was resolved through informal disposition. No further action was taken by the Commission for Public Complaints earlier ("CPC").

ii) It was alleged that three RCMP members, including Cst. Rouleau, detained the complainant without grounds and explanation. No disciplinary action was taken and the complaint was found to be unsupported.

iii) It was alleged that Cst. Rouleau committed improper use of force in assisting with the arrest of the complainant, who was resisting arrest at the time. The complaint was resolved through informal disposition and no disciplinary action was taken. No further action was taken by the CPC.

iv) It was alleged that Cst. Rouleau and another RCMP member had demonstrated improper attitude, improper use of force and uttered racial slurs during an improper arrest. Independent evidence did not support the complaint and it was resolved through informal disposition. No disciplinary action was taken. No further action was taken by the CPC.

[11] Counsel for Mr. Fotheringham submits she should receive further disclosure for the following reasons:

- These four incidents all took place in the same year as her client was arrested and charged;
- They are all relevant to an issue at trial as follows:
  - The failure to retrieve the CCTV recording goes to the issue of failing to record with the VICS;
  - The alleged unlawful detention is relevant to the s. 9 issue;
  - The final two complaints are relevant to the use of force issues and the last also to the issue of unlawful arrest;
  - All go to the issue of the reliability and credibility of Cst. Rouleau's testimony;
  - All demonstrate negligence and misconduct on the part of Cst. Rouleau; and
  - All demonstrate a failure by Cst. Rouleau to follow RCMP procedures.

[12] Counsel submits that these records meet the test for true relevance and thus meet the requirements for first party disclosure.

[13] Counsel submits that this is not a "fishing expedition". The fact that there was an informal disposition does not mean that there is no substance to the complaints and, further, that the RCMP internal process in relation to a complaint is not determinative with respect to how the complaint could be relevant to a criminal case.

[14] Counsel for the Attorney General of Canada, acting on behalf of the RCMP, submits that the requested disclosure is not first-party disclosure and, at best although not admitted to, would be disclosure as per ***O'Connor***. Counsel submits that the requested disclosure has no relevance to the criminal proceedings. In any event, to the extent that these complaints may be considered to have some relevance, counsel for Mr. Fotheringham already has sufficient evidence on the basis of the summaries provided for the purposes of conducting a defence at trial.

[15] Counsel for the Public Prosecution Service of Canada submits that these complaints have no bearing on the reliability or credibility of Cst. Rouleau's testimony to be adduced at trial. He further submits that whether there was an unreasonable use of force by Cst. Rouleau can be determined at trial on the evidence, using an objective test, without anything being added by disclosure of the records in relations to any of the use of force complaints. He also submits that Cst. Rouleau was not in fact the actual arresting officer but at best participated in the arrest. To the extent that his participation goes to any issues regarding the arrest of Mr. Fotheringham, these issues can be resolved on the basis of the evidence already disclosed and nothing would be added by the records in regard to any of these complaints. Finally, he submits that the involvement of Cst. Rouleau with respect to the VICS tapes is minimal and that we have the VICS tape from the other attending police cruiser. (I note that in my reasons in ***Fotheringham*** I stated in my reference to the facts in paragraph 3 that Cst. Rouleau was the officer who arrested Mr. Fotheringham. This finding would be at odds with the present submission of the Crown. This said, I do not consider that this apparent

contradiction impacts upon my decision in this Application. It is a matter that will be sorted out at trial I expect).

Case Law

[16] I repeat what I stated in ***Fotheringham*** in paras. 57 – 61:

> 57 In *McNeil*, the Supreme Court of Canada considered when police disciplinary records should be disclosed as part of the Crown's obligations under *R.* v. *Stinchcombe*, [1995] 1 S.C.R. 754. Charron J. considered that, while an 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", any relevant disciplinary information should be disclosed to the Crown with the rest of the police file. Disciplinary material that is not part of the first party disclosure package provided by the police to the Crown may nonetheless make its way into the hands of the defence through the *O'Connor* regime relating to third party records *(R.* v. *O'Connor*, [1995] 4 S.C.R. 411).
>
> 58 The distinction between materials that constitute first party versus third party records is not always clear, however Charron J. quotes from a report prepared by the Honourable George Ferguson, Q.C. that sets out five categories of material that, in his view, should be automatically disclosed to the Crown by the police:
>
> a. Any conviction or finding of guilt under the *Criminal Code* or *Controlled Drugs and Substances Act* (and for which a pardon has not been granted);
>
> b. Any outstanding *Criminal Code* or *CDSA* charges;
>
> 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 relevant statute governing police conduct;
>
> e. Any current charge of misconduct for which a Notice of Hearing has been issued.
>
> 59 I observe that these five categories have been picked up in caselaw as ones that generally require Crown disclosure pursuant to its first party *Stinchcombe* obligations (see e.g. *R. v. Perreault*, 2010 ABQB 714 and

> cases within, *R. v. Schmidt*, 2012 BCPC 111, *R. v. Boyne*, 2012 SKCA 124).
>
> 60 Although these categories provide a useful starting point for the Crown to determine its disclosure obligations, other alleged misconduct that does not neatly fit into any of them may nevertheless be sufficiently relevant to the case at hand such that details should be disclosed to the Crown and ultimately the defence pursuant to *Stinchcombe*.
>
> 61 As well, as noted, conduct or alleged conduct that does not fall under the *Stinchcombe* first party disclosure regime, may still become the subject of a defence third-party *O'Connor* application.

[17] As counsel for the RCMP points out in his written submissions, the Court in ***McNeil*** noted two instances where police misconduct and discipline, falling outside of the *Ferguson* factors, is disclosable under first party disclosure:

- when the misconduct or discipline relate to the conduct of the police officer in the investigation of the case before the court; and
- where there is a finding that the misconduct of the officer in question is, although not directly related to the investigation of the case before the court, nonetheless serious enough that it could reasonably impact on the case of the accused. (paras. 15 and 54, ***McNeil***)

[18] In para. 45 of ***McNeil***, Charron J. considered the difficulty in determining relevance of records of police conduct, noting that:

> …The contentious nature of police work often leads to public complaints, some legitimate and others spurious. Police disciplinary proceedings may also relate to employment issues or other matters that have no bearing on the case against the accused. The risk in this context is that disclosure, and by extension trial proceedings, may be sidetracked by irrelevant allegations or findings of police misconduct. Disclosure is intended to assist an accused in making full answer and defence or in prosecuting an appeal, not turn criminal trials into a conglomeration of satellite hearings on collateral matters.

[19] Counsel for the RCMP submits that none of the disclosure sought by counsel for Mr. Fotheringham is disclosable as first party disclosure as per ***R.*** v. ***Stinchcombe***, [1991] 3 S.C.R. 326 and ***McNeil***. He submits that none of the complaints are obviously relevant to the charges facing Mr. Fotheringham.

[20] Counsel submits that:

- None of these complaints fall within the five areas mentioned in the *Ferguson* Report;
- None relate to the specific arrest of Mr. Fotheringham; and
- There was no disciplinary action taken against Cst. Rouleau and there was no finding of misconduct on his part.

[21] I agree with counsel for the RCMP on this point. These public complaints against Cst. Rouleau do not fall within those listed in the *Ferguson* Report, which, albeit not necessarily exhaustive, are nonetheless a basic guideline. They are also not complaints arising from the arrest and investigation of the offences for which Mr. Fotheringham is charged.

[22] I am cognizant that, while there was no disciplinary action taken or finding of misconduct in regard to any of the four complaints, there was an informal disposition for three of the complaints and not an absolute dismissal of these complaints.

[23] The relevant sections of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 (the *"Act")* have since been amended, but at the time this argument was made, the *Act* dealt with the initial handling of public complaints in ss. 45.35 through 45.4. Under s. 45.36(5) the Commissioner receiving the complaint may:

> …direct that no investigation of a complaint under 45.35(1) be commenced or that an investigation of such a complaint be terminated…

if certain preconditions are met, including a determination that a complaint is "…trivial, frivolous, vexatious, or made in bad faith".

[24] In all cases, s. 45.36(1) directs the Commissioner to consider whether a complaint under 45.35(1) can be disposed of informally and can allow that to happen with the consent of the complainant and the RCMP member.

[25] In the case of three of the complaints made against Cst. Rouleau, these were resolved by informal disposition. It could, perhaps, be argued that it should be presumed, therefore, that these complaints were not "trivial, frivolous, vexatious, or made in bad faith". However, I note that the Commissioner "may" direct that there be no investigation of a complaint in such cases, not that the Commissioner "must" dismiss the complaint. There may be reasons for a Commissioner to attempt to resolve a complaint informally rather than terminating an investigation, as a matter of public policy in a particular set of circumstances. I, of course, cannot speculate or form the opinion that this is what occurred, or likely occurred, in regard to any of these three complaints. I say this, however, to point out that neither can I conclude that there was any particular level of misconduct on the part of Cst. Rouleau. What I do know is that he was not subject to any disciplinary proceedings as a result of his actions in regard to these three complaints.

[26] Counsel for the RCMP has submitted that, if there was found to be a violation by Cst. Rouleau of the Code of Conduct, amounting to a contravention under s. 39 of the

Act, as a general rule an informal disposition is not available. This was a submission only and I note that I do not have before me any further authority or evidence to support, or otherwise contradict, this submission.

[27] While I understand counsel for Mr. Fotheringham's position that how the RCMP handles a complaint internally should not necessarily determine how a court handles the facts of the complaint for disclosure purposes, I find that, in this case, I am not prepared to find that there was misconduct on the part of Cst. Rouleau that was serious enough that it could reasonably impact upon Mr. Fotheringham's case.

[28] In so finding, I am aware that, while a matter may not be considered serious enough by the RCMP to warrant a sanction that amounts to more than a minor career transgression, it may nonetheless be considered serious with respect to how it could impact upon a criminal case, and thus be subject to first-party disclosure requirements. An example of such is apparent in the case of ***R.*** v. ***Melvin***, 2009 NSSC 249. In ***Melvin***, the opening by the police officer of a clandestine bank account raised questions of truthfulness, deceitfulness, exploitation of position, fabrication and misrepresentation which were considered to be relevant to the credibility of the police officer and thus subject to first-party disclosure requirements. I also agree with the comments of Coady J. in ***R.*** v. ***Melvin*** (2), 2009 NSSC 307 at para. 13 where he states:

> …I expect that the majority of "serious misconduct" matters are unlikely to be informally resolved. Disclosure pursuant to *McNeil* should not hinge on whether the resolution is informal or pursuant to internal discipline processes. The focus must be on serious misconduct that relates to a trial issue and could possibly impact on an accused's ability to make full answer and defence.

[29] I find that the complaints in this case do not amount to serious misconduct.

[30] I find, therefore, that the records in relation to these complaints are not first-party disclosure as per ***Stinchcombe*** and ***McNeil***.

[31] I will now consider whether they meet the criteria for ***O'Connor*** disclosure.

[32] In an ***O'Connor*** application, counsel for Mr. Fotheringham is required to demonstrate, on a balance of probabilities, that the records in question are likely relevant to an issue at trial. If I conclude that the records of these complaints are likely relevant, I would order the production of these records for inspection. Following the opportunity for further submissions by counsel, I would then determine to what extent, if any, disclosure of these records should be ordered.

[33] As stated in ***McNeil*** in paras. 28 – 29, the gate-keeper function of the court is reflected in the determination of likely relevance. Judicial resources should not be squandered in allowing or encouraging "fishing expeditions". Therefore the determination of likely relevance is a significant determination. This said, the threshold for determining likely relevance is not an onerous one.

[34] Likely relevance means that:

> ...there is a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify. (***O'Connor***, at para 22)

[35] An issue at trial includes:

> …not only material issues concerning the unfolding of the events which form the subject matter of the proceedings, but also, "evidence relating to

> the credibility of witnesses evidence, and to the reliability of other evidence in the case (***O'Connor***, at para. 22).

[36] Third party records are not presumptively relevant, and do not become relevant by simply suggesting that they relate to credibility "at large". If such records are to be relevant on the basis of relating to credibility, it must be credibility on a specific, material issue. (***R.*** v. ***Worden***, 2014 SKPC 143, paras. 78, 79)

[37] The court, in assessing likely relevance, must not maintain too high a threshold given that counsel for the accused, not having seen the records in question, cannot be expected to show with any degree of precision, exactly how the records would bear on an issue at trial. (***McNeil***, at para. 33)

[38] This said, there is a distinction to be made between what is "likely relevant" (ie. a reasonable possibility of being logically probative), and "possibly relevant". A determination that the record sought may be "possibly relevant" is insufficient, in my opinion, to meet the threshold requirement in ***O'Connor***.

Application to this Case

i) It was alleged that several RCMP members, including Cst. Rouleau, failed to procure CCTV footage from an installation not under RCMP control.

[39] I find that the records in relation to this complaint are not "likely relevant" and thus not subject to the disclosure regime under ***O'Connor***. The link between the circumstances of this complaint and the issue of the alleged failure of Cst. Rouleau to obtain a VICS recording of the arrest of Mr. Fotheringham is too tenuous to meet the

threshold requirement of likely relevance. The circumstances are simply so markedly different on their face that relevance is marginal, at best.

ii) It was alleged that three RCMP members, including Cst. Rouleau, detained the complainant without grounds and explanation.

[40] I find that the records in relation to this complaint are also not likely relevant under the ***O'Connor*** regime. Firstly, this complaint was found to be unsupported. Regardless of this, in the matter before me there is a VICS recording from the other attending police cruiser that captures the approach by Cst. Rouleau to Mr. Fotheringham's vehicle and the detention and arrest of Mr. Fotheringham. In the Amended Notice of *Charter* Application, counsel for Mr. Fotheringham asserts that reasonable grounds did not exist to justify the warrantless arrest of Mr. Fotheringham, thus violating his right not to be arbitrarily detained. Counsel submits that the requirements of s. 495(2) prohibited the arrest and subsequent search of Mr. Fotheringham without a warrant.

[41] Again, I cannot see how disclosure of the record in relation to this complaint would bear in any meaningful and probative way on the right of Mr. Fotheringham to make full answer and defence. I find that the success or failure of the *Charter* challenge will not likely be impacted by disclosure of the record in regard to this complaint. The evidence at trial, arising from the circumstances at the time of the detention and arrest of Mr. Fotheringham, will determine this issue.

iii) It was alleged that Cst. Rouleau committed improper use of force in assisting with the arrest of the Complainant, who was resisting arrest at the time.

[42] The force alleged in the case before me is that Cst. Rouleau approached Mr. Fotheringham's vehicle and smashed his driver side window. This fact is not disputed, in fact, as I understand it, this act is captured on the VICS recording from the other police cruiser.

[43] Again, I find that there is no likely relevance in the record of this complaint to the right of Mr. Fotheringham to make full answer and defence. There is, in my opinion, too tenuous a link between an allegation of use of force by Cst. Rouleau in assisting in the arrest of the complainant, a complaint that was informally disposed of, and the circumstances where Cst. Rouleau broke the window of the vehicle Mr. Fotheringham was in. I am satisfied that counsel for Mr. Fotheringham is properly able to question Cst. Rouleau on his actions in breaking the window without having disclosure of the record in regard to this complaint. I find that disclosure of this record would, in all likelihood, add little if anything to what is already available to counsel in her defence of Mr. Fotheringham. While I find that the record of this complaint may possibly be relevant, I do not find it likely to be relevant.

iv) It was alleged that Cst. Rouleau and another RCMP member had demonstrated improper attitude, improper use of force and uttered racial slurs during an improper arrest.

[44] For the same reasons as stated in regard to iii) above, and further noting from the summary of the complaint that there was independent evidence that the incident did not happen as alleged, I find that there is no likely relevance in further disclosure of the record in relation to this complaint.

Conclusion

[45] In conclusion, I find that the records sought by counsel for Mr. Fotheringham are not disclosable as first-party disclosure pursuant to the ***Stinchcombe*/*McNeil*** disclosure requirements. I further find that these records are not disclosable as third-party disclosure pursuant to the ***O'Connor*** regime as they are not likely relevant to an issue at trial.

[46] Therefore the Application is dismissed.

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COZENS T.C.J.