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Ontario

GSB#2009-3165
UNION#2010-0999-0008

IN THE MATTER OF AN ARBITRATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE GRIEVANCE SETTLEMENT BOARD

BETWEEN

Ontario Public Service Employees Union
(Union) — **Union**

- and -

The Crown in Right of Ontario
(Ministry of Government Services) — **Employer**

BEFORE	Susan L. Stewart	**Chair**
FOR THE UNION	Kate Hughes Counsel Cavalluzzo Hayes Shilton McIntyre & Cornish LLP Barristers and Solicitors	
FOR THE EMPLOYER	Brian Loewen Senior Counsel Ministry of Government Services Raj Dhir Deputy Director Ministry of Labour, Legal Services Branch	
HEARING	December 21, 2010; January 6 and 13, 2011	

Decision

[1] Initially before me were a policy and individual grievance arising from the Union's allegation that CPIC (Canada Police Information Centre) information was obtained and disclosed without consent in violation of privacy legislation, the Human Rights Code, the OPS Personnel Screening Checks Policy and Guidelines and the Collective Agreement. Also at issue is the release of information relating to internal disciplinary matters. The individual grievance was resolved by the parties, however the policy grievance remains unresolved. Although the policy grievance has application to all of the enforcement ministries, the parties expedited this matter by proceeding on the basis of the events that transpired within the Ministry of Labour.

[2] On February 11, 2010, an Occupational Health and Safety Inspector was contacted by his Director. The Director told the Inspector that she had been contacted by a lawyer at the Legal Services Branch who had advised her that a CPIC check had been conducted on him, that it had come back with a "hit" and that his manager would be contacted about the matter. The Inspector had not been asked to consent to a CPIC check, nor had he been advised that one was being conducted. The Inspector telephoned the lawyer, who called him back, and advised him of the presence of another manager in the room, who would be on the call to take notes of the discussion. The manager was not the Inspector's manager. The Inspector was questioned about the results of the

CPIC check, which relate to events of some years prior while he was in a different job and, at the time of his testimony was the subject of a pardon application. The Inspector was advised that information relating to the results of his CPIC check would be disclosed. The Inspector subsequently requested that the information not be released. Crown Counsel responded to him as follows:

> As Crown counsel we have a legal obligation to provide full and timely disclosure of relevant material. Unless information is clearly irrelevant, it must be disclosed to the defence. Your criminal record is presumed to be relevant to the defendant's right to make full answer and defence. The Crown is therefore required by law to disclose it and any related details.

[3] The Union made reference to the OPS Personnel Screening Checks Policy which contemplates identification of positions requiring screening checks, with notice to employees and their express written consent to obtain a screening clearance involving a police record check. The Union also made reference to the fact that written consent is contemplated by the Toronto Police Services, according to a description on its website. The website also refers to the execution of a memorandum of understanding with agencies for which information will be provided. The OPS Policy contains various measures to preserve confidentiality of information, including the involvement of what is now the Security Services and Contingency Planning Branch. It is the position of the Employer that because the CPIC information is being sought for law enforcement purposes, consent is not required and the OPS Policy has no application. The Employer contends that the obtaining and release of CPIC

information is in accordance with an obligation on the part of the Crown to provide full and timely disclosure to defendants involved in prosecutions under the Occupational Health and Safety Act due to a defendant's constitutional right to disclosure of all relevant evidence in a timely fashion, including evidence that may be used to impugn the credibility of officers involved in the investigation. Reference was made to the decision of the Supreme Court of Canada in R. v. McNeil (2009), 238 C.C.C. 353 ("McNeil") which, in the Employer's submission, clarified the obligation of the Crown to include as part of the first party disclosure any information relating to serious misconduct of an investigating officer and mandated an obligation to make inquiries into the existence of such evidence and a corresponding duty to provide full and timely disclosure. Following McNeil, production requests for CPIC records and disciplinary records of MOL Inspectors have been made by defence counsel.

[4] There is correspondence between Ministry of Labour counsel and the Toronto Police Services that reflects the request for and the obtaining of CPIC information about Inspectors. There is no written protocol setting out the terms of the arrangements with the Toronto Police Services, nor is there any correspondence in regard to general arrangements. Reference was made in the evidence adduced by the Employer to the training provided to Inspectors in relation to disclosure obligations. However, clarification of the obligations as were interpreted to be mandated by McNeil was not communicated to the Inspectors. As well, the Inspectors were neither collectively nor individually

given advance notice of the intention to obtain and disclose CPIC and other information and, as previously indicated, their consent was not sought.

[5] Occupational Health and Safety Inspectors are responsible for administering and enforcing the Occupational Health and Safety Act, and have broad powers of investigation. Inspectors are designated as Provincial Offences Officers under the Provincial Offences Act and are authorized to commence Part I and Part III prosecutions. The testimony of an Inspector is typically required to establish an offence.

[6] The lawyers in the litigation group at the Ministry of Labour are employees of the Ministry of Attorney General, who are seconded to the Ministry of Labour to provide legal services and conduct prosecutions in the name of the Crown on behalf of the Attorney General under the Provincial Offences Act for violations of the Occupational Health and Safety Act and the Employment Standards Act, 2000. They review investigation briefs that are prepared by Inspectors in order to assess whether there is a reasonable prospect of conviction and thus whether or not it would be in the public interest to proceed with a prosecution. At the time of the initial proceedings there were 679 ongoing prosecutions being handled by the litigation group at the Ministry of Labour. Of these, 483 were Part III prosecutions that can result in a corporation being fined up to $500,000 and individuals being fined up to

$50,000 and/or sentenced to 12 months in jail. Fifty of these prosecutions involved workplace fatalities.

[7] According to the declaration of the acting Deputy Director of Legal Services at the Ministry of Labour, the following process was adopted following the January 16, 2009 release of the McNeil decision by the Supreme Court of Canada:

> The MOL-LSB established a process to respond to its McNeil obligations. This process involves responding to specific requests made to Crown Counsel by the defence for disclosure requests relating to inspector misconduct. To further ensure that McNeil obligations are being met, Crown Counsel also make proactive inquiries of inspector misconduct when a matter is set down for trial or when the Crown had information in its possession that indicates the existence of inspector misconduct.
>
> In the above circumstances, Crown Counsel will initiate a Criminal Police Investigation Check ("CPIC") to identify criminal misconduct by the inspector and make a request to the Ministry for internal disciplinary misconduct.
>
> The CPIC is obtained through a written request by a single designated Crown Counsel in the Legal Services Branch to the manager of the Toronto Police Service–Records Management Services Unit.
>
> The CPIC results (positive or negative) are provided by fax to the designated Crown Counsel who then forwards the response to Crown Counsel with carriage of the prosecution file.
>
> Where there is a positive result, the Deputy Director of the Legal Services Branch informs the appropriate Regional Director of the existence of the criminal record. The particular inspector is informed by Ministry management that the Crown Counsel has obtained a copy of the inspector's criminal record. The inspector is provided with the Deputy Director's name and contact information.
>
> The process to obtain the internal disciplinary misconduct is for the Crown Counsel with carriage of the prosecution file to make a written

request to the appropriate Regional Director asking whether or not the particular inspector has been disciplined.

The Crown has a legal duty to continually assess its case; that is, to assess whether there is a reasonable prospect of conviction and, if so, whether it continues to be in the public interest to continue the prosecution.

Accordingly, if there is a positive CPIC or disciplinary result, the Deputy Director will make follow-up inquiries. In the case of a positive CPIC result, the Deputy Director follows-up directly with the inspector to obtain necessary details relating to the criminal record. In the case of a discipline record, the Deputy Director follows-up with the employer to obtain further information regarding the type of discipline imposed, the date imposed and the reason for discipline.

The details relating to the inspector's criminal and/or disciplinary record are provided to Crown Counsel who have carriage of ongoing prosecutions in which the inspector is involved or are reviewing investigation briefs in which the inspector is involved. These details are required to determine whether Crown Counsel in a particular case should proceed with a prosecution in which the inspector is involved.

If the Crown concludes that there is no longer a reasonable prospect of conviction or it is no longer in the public interest to proceed with the prosecution, defence counsel is informed that the charges are being withdrawn. In these circumstances, there is no need to disclose the criminal and/or discipline record and other relevant details to the defence.

If the Crown concludes that the prosecution will continue, the Crown's disclosure obligation requires that relevant information such as the criminal and/or discipline record and other relevant details in the Crown's possession be provided in a timely fashion to the defence.

Disclosure to defence counsel is made with strict conditions –

1) the information is to be used only to make full answer and defence to the charges that are before the court,
2) the information is not to be disseminated or used for any other purpose.

[8] The Supreme Court of Canada's decision in McNeil addresses its previous decisions in R. v. Stinchcombe, [1991] 3 S.C.R. 326 and R. v.

O'Connor, [1995] 4 S.C.R. 411, both of which deal with issues of disclosure in the context of criminal proceedings. Stinchcombe prescribes a duty on the Crown to disclose all relevant information in its possession relating to the investigation against the accused. The O'Connor case dealt with how an accused, charged with sexual offences, could obtain copies of the therapeutic records of the complainants from third party custodians, with the decision providing the accused with a mechanism for accessing third party records that fall outside the disclosure regime contemplated in Stinchcombe. The procedure endorsed to deal with that matter, commonly referred to as an O'Connor application, is for a subpoena duces tecum to be served on the third party record holder and to make a motion for production before the Court with jurisdiction in the matter, to be held before the trial commences. Any person who has a privacy interest in the records targeted for production is given notice of the proceedings and hence an opportunity to have those privacy interests considered.

[9] The factual background giving rise to the decision in McNeil is set out in that decision as follows:

> 4. McNeil was arrested by Constable Rodney Hackett and other members of the Barrie Police Service in respect of an alleged drug transaction. He was subsequently prosecuted by the federal Crown and convicted on multiple drug charges, including possession of marijuana and cocaine for the purpose of trafficking. Hackett was the Crown's main witness in the case against McNeil. He was the only witness who testified to the reasonable grounds supporting McNeil's arrest. In addition, the trial judge's ultimate finding that McNeil's

> admitted possession of marijuana and cocaine was for the purpose of trafficking turned on Hackett's credibility.
>
> 5. After his conviction but before sentencing, McNeil learned that Hackett was engaged in drug-related misconduct that had led to both internal disciplinary proceedings under the Police Services Act [citation omitted] and to criminal charges. Following an aborted application to reopen his trial to introduce evidence about Hackett's misconduct, McNeil chose to proceed to sentence and appeal his conviction instead.
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> 6. In a preliminary motion before the Court of Appeal for Ontario, McNeil sought production of all documents related to Hackett's misconduct, claiming that he required this material to assist him in preparing an application to introduce fresh evidence on his appeal from conviction. The police disciplinary and criminal investigation documents at issue were intermingled and were in the possession of both the Barrie Police Service and the provincial Crown prosecuting the criminal charges against Hackett. Both entities resisted production and the federal Crown supported their opposition to the motion.

[10] It should be noted, for purposes of clarity, that there were two separate Crown offices involved in the matter, with the federal Crown involved in the prosecution of McNeil and the provincial Crown prosecuting Hackett. In her overview of the issues in McNeil, Justice Charron, at paragraph 14, states as follows:

> … this case provides an appropriate context within which to reiterate the respective obligations of the police and the Crown to disclose the fruits of the investigation under R. v. Stinchcombe, [1991] 3 S.C.R. 326, and to consider the extent to which relevant police disciplinary records and third party criminal investigation files should form part of this "first party" disclosure package. The Crown's obligation to disclose all relevant information in its possession to an accused is well established at common law and is now constitutionally entrenched in the right to full answer and defence under s. 7 of the Canadian

> Charter of Rights and Freedoms. The necessary corollary to the Crown's disclosure duty under Stinchcombe is the obligation of police (or other investigating state authority) to disclose to the Crown all material pertaining to its investigation of the accused. For the purposes of fulfilling this corollary obligation, the investigating police force, although distinct and independent from the Crown at law, is not a third party. Rather, it acts on the same first party footing as the Crown.

[11] The nature of the duty under Stinchcombe is described in paragraph 22 of the decision as follows:

> The Stinchcombe regime of disclosure extends only to material in the possession or control of the Crown. The law cannot impose an obligation on the Crown to disclose material which it does not have or cannot obtain: R v. Stinchcombe, [citation omitted]. A question then arises as to whether the "Crown", for disclosure purposes, encompasses other state authorities. The notion that all state authorities amount to a single "Crown" for the purposes of disclosure and production must be quickly rejected. It finds no support in law and, given our multi-tiered system of governance and the realities of Canada's geography, is unworkable in practice. As aptly explained in R. v. Gingras (1992), 120 A.R. 300 (C.A.), at para 14:
>
> If that line of reasoning were correct, then in order to meet the test in Stinchcombe, some months before every trial every Crown prosecutor would have to inquire of every department of the Provincial Government and every department of the Federal Government. He would have to ask each whether they had in their possession any records touching each prosecution upcoming. It would be impossible to carry out 1% of that task. It would take many years to bring every case to trial if that were required.
>
> Accordingly, the Stinchcombe disclosure regime only extends to material relating to the accused's case in the possession or control of the prosecuting Crown entity. This material is commonly referred to as the "fruits of the investigation".

[12] The Crown's obligation to obtain information is further addressed under the heading "Crown Counsel's Duty to Inquire" and states as follows:

> 48. As stated earlier, the suggestion that all state authorities constitute a single entity is untenable and unworkable. In order to fulfill its Stinchcombe disclosure obligation, the prosecuting Crown does not have to inquire of every department of the provincial government, every department of the federal government and every police force whether they are in possession of material relevant to the accused's case. However, this does not mean that, regardless of the circumstances, the Crown is simply a passive recipient of relevant information with no obligation to seek out and obtain relevant material.
>
> 49. The Crown is not an ordinary litigant. As a minister of justice, the Crown's undivided loyalty is to the proper administration of justice. As such, Crown counsel who is put on notice of the existence of relevant information cannot simply disregard the matter. Unless the notice appears unfounded, Crown counsel will not be able to fully assess the merits of the case and fulfill its duty as an officer of the court without inquiring further and obtaining the information if it is reasonably feasible to do so. Ryan J.A. in R. v. Arsenault (1994), 153 N.B.R. (2d) 81 (C.A.), aptly described the Crown's obligation to make reasonable inquiries of other Crown agencies or departments. He stated as follows:
>
> > When disclosure is demanded or requested, Crown counsel have a duty to make reasonable inquiries of other Crown agencies or departments that could reasonably be considered to be in possession of evidence. Counsel cannot be excused for any failure to make reasonable inquiries when to the knowledge of the prosecutor or the police there has been another Crown agency involved in the investigation. …

> 50. The same duty to inquire applies when the Crown is informed of potentially relevant evidence pertaining to the credibility or reliability of the witnesses in a case.

[13] The decision goes on to refer to a decision of the Court of Appeal in R. v. Ahluwalia (2000), 138 O.A.C. 154 where the Court comments at paragraphs 71-72 on the failure of the Crown's failure to inquire further when confronted with the perjury of its own witness as follows:

> For reasons not shared with this court, the Crown does not appear to have regarded itself as under any obligation to get to the bottom of this matter …
>
> The Crown has obligations to the administration of justice that do not burden other litigants. Faced with its own witnesses' perjury and the fact that the perjured evidence coincided with the incomplete disclosure that the Crown says it innocently passed to the defence, the Crown was obliged to take all reasonable steps to find out what had happened and to share the results of those inquiries with the defence.

The decision of the Supreme Court concluded that a proper fulfillment of the dual role of advocate and officer of the court results in Crown counsel being able to "bridge much of the gap between first party disclosure and third party production".

[14] The decision goes on to discuss the obligation of the police to disclose relevant information to the prosecuting Crown in accordance with obligations prescribed by regulation in many jurisdictions, including Ontario, pursuant to the Police Services Act. The decision then states as follows:

> 53. While the obligation itself is firmly established, the difficulty lies in identifying the contours of relevance for the purposes of the police's first and party disclosure obligation. The particular question that this case exemplifies is whether information of misconduct by a police officer involved in the case against the accused should form part of the first party disclosure package provided to the Crown for its assessment of relevance according to the edicts of Stinchcombe. Obviously, the 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. However, where the disciplinary information is relevant, it should form part of the first party disclosure package, and its discovery should not be left to happenstance.
>
> 54. When the police misconduct in question concerns the same incident that forms the subject-matter of the charge against the accused, the police duty to disclose information concerning police disciplinary action taken in respect of that misconduct is rather self-evident. To state an obvious example, if a police officer is charged under the applicable provincial legislation for excessive use of force in relation to the accused's arrest, this information must be disclosed to the Crown. Where the misconduct of a police witness is not directly related to the investigation against the accused, it may nonetheless be relevant to the accused's case, in which case it should also be disclosed. For example, no one would question that the criminal record for perjury of a civilian material witness would be of relevance to the accused and should form part of the first party disclosure package. In the same way, findings of police misconduct by a police officer involved in the case against the accused should be disclosed.

[15] The decision refers to the conclusions of a review conducted by the Honourable George Ferguson, Q.C., that resulted in a 2003 report entitled Review and Recommendations Concerning Various Aspects of Police Misconduct, which concluded that leaving the entire question of access to police disciplinary records to be determined under the O'Connor regime for

third party production was neither efficient nor justified. The Ferguson Report recommended the automatic disclosure by police upon request by the Crown of information relating to certain convictions and outstanding charges as well as findings of guilt for misconduct after a hearing under the Police Services Act and any charges of misconduct under that Act for which a Notice of Hearing has been issued. The Court notes the reference in the Ferguson Report to the Crown's role as "gatekeeper" in paragraph 58 of the decision, which is described as "… sorting out what parts of this material, if any, should be turned over to the defence in compliance with the Crown's Stinchcombe obligation of disclosure". The Court went on to note that: "The Ferguson Report made the further recommendation that any concerned officer who was the subject of disciplinary records produced to the Crown be notified in writing and be given the opportunity to make submissions to the Crown". Justice Charron, for the Court, concluded as follows:

> 59. I agree that it is "neither efficient nor justified" to leave the entire question of access to police records to be determined in the context of the O'Connor regime for third party production. Indeed, as discussed earlier, the disclosure of relevant material, whether it be for or against an accused, is part of the police corollary duty to participate in the disclosure process. Where the information is obviously relevant to the accused's case, it should form part of the first party disclosure package to the Crown *without prompting* [emphasis in the original]. For example, as was the case here, if an officer comes under investigation for serious drug-related misconduct, it becomes incumbent upon the police force, in fulfillment of its corollary duty of disclosure to the Crown, to look into those criminal cases in which the officer is involved and to take appropriate action. Of course, not every finding of police misconduct by an officer involved in the investigation will be of relevance to an 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.

[16] The Court recognizes, however, that even in the case of police in connection with criminal proceedings, there is an important role for the Court in relation to the protection of privacy interests, which can be dealt with by an O'Connor motion. In paragraph 45 of the decision there is reference to the particular importance of ascertaining the true relevancy of documents targeted for production when police disciplinary records are involved. It is noted that police disciplinary records "… may relate to employment issues or other matters that have no bearing on the case against the accused". The decision goes on to state that:

> 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.

[17] The O'Connor regime is specifically preserved by McNeil. That decision notes in paragraph 15 that while records relating to findings of serious misconduct by police officers involved in the investigation must be provided where the misconduct is either related to the investigation or it could reasonably impact on the case against the accused, with the police then obliged to provide this to the Crown to be included in the first party disclosure package; "Production of the disciplinary records and criminal investigation files

in the possession of the police that do not fall within the scope of the first party disclosure package is governed by the O'Connor regime for third party production". The O'Connor test is one of likely relevance, recognizing that a requirement that the defence illustrate the precise manner in which the documents would be used at trial would be unfair, given that the accused would not have seen the documents. Paragraph 33 of McNeil specifically refers to the role of an O'Connor motion in relation to matters of credibility and states, in reference to the O'Connor regime, that:

> An "issue at trial" here 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 and to the reliability of other evidence in the case" (O'Connor at para 22).

In R. v. Dare Foods Limited, [2004] ONCJ 201 (CanLII), O'Connor was applied in connection with a prosecution pursuant to the Occupational Health and Safety Act, with the Court noting that O'Connor gave rise to procedures to deal with: "… confidential medical and other similar records in the hands of a third party" and goes on to note that: "The purpose was to endeavour to find an appropriate balance in each case, between the competing Charter right to privacy and the right to make full answer and defence to a charge". In that case, the disclosure of medical records was ordered.

[18] While McNeil applies to proceedings under the Criminal Code, the Employer points out that in R. v. Vanbots Construction Corp., [1966] O.J. No.

347, the Provincial Court Judge concluded that disclosure obligations existed in connection with a prosecution by the Ministry of Labour under the Occupational Health and Safety Act and at paragraph 16 stated that:

> If convicted, the defendant Preston is liable to a substantial fine or imprisonment or both, and the corporate defendant Vanbots faces a substantial fine. The allegations are serious and the consequences grave. I find that the general principles of disclosure as set out in Stinchcombe would apply to this case, notwithstanding that this matter does not involve an indictable offence.

R. v. Fineline Circuits Ltd. [1991] O.J. No. 3463 is to a similar effect, where, in the context of charges under the Environmental Protection Act, the Court refers to the disclosure obligations on the part of the Crown and determined at paragraph 7 that their breach: "rendered the trial fundamentally unfair, and have caused a breach of the defendant's s. 7 Charter rights".

[19] It is appropriate, at this point, to address the matter of my jurisdiction, a matter that Mr. Dhir focused on in his submissions. He is correct in his observation that the Crown has a position of significant authority and responsibility. Clearly, I have no jurisdiction to control the prosecutions arising under the Occupational Health and Safety Act, or the conduct of the Crown in relation thereto. Those are matters that lie properly within the jurisdiction of the courts that possess the authority to deal with such matters. My jurisdiction arises from the provisions of the Crown Employees Collective Bargaining Act and, more specifically, flows from the Collective Agreement with OPSEU, which

binds the Crown as the Employer. While, as in any case, a decision may have implications in other arenas, it is my obligation to resolve a labour relations matter. In this case, in response to a grievance alleging, inter alia, a breach of privacy rights, the Employer has relied on the McNeil decision as a basis for its actions and, accordingly, it is my obligation to consider its conduct in the context of my jurisdiction to resolve a grievance.

[20] The interest of an individual in protecting the privacy of personal information was addressed in an employment context in Re City of Ottawa and Ontario Professional Firefighters Association (2007), 169 L.A.C. 4th 84 (M. Picher), which dealt with a policy of the City of Ottawa purporting to compel consent of its employees to police record checks. The arbitrator concluded that the policy did not comply with the employer's obligation to act in accordance with an implied principle of reasonable contract administration. As was noted there, employers generally have no difficulty obtaining consent to police and criminal record checks, with such consent becoming a condition precedent to hiring. However, it was concluded that in the absence of consent, an employer does not have access to such information about current employees by virtue of the employment relationship unless the employment is particularly security sensitive. Mr. Picher points out that the Legislature did not carve out any exceptions for employers in establishing a privacy interest in connection with police and criminal records. There is reference at paragraph 36 of that decision to the decision of the Supreme Court of Canada in R. v. Dyment, [1988] 2

S.C.R. 417 where the various privacy interests protected by law are reviewed and the following statement is made:

> Finally, there is privacy in relation to information. This too is based on the notion of the dignity and integrity of the individual. As the Task Force put it (p. 13): "This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit." In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected.

More recently, the Ontario Court of Appeal in Cash Coverters Canada Inc. v. Oshawa (City) [2007] ONCA 502 (CanLII), commented at paragraph 29 as follows:

> The right to privacy of personal information is interpreted in the context of the history of privacy legislation in Canada and the treatment of that right by the courts. The Supreme Court of Canada has characterized the federal Privacy Act as quasi-constitutional because of the critical role that privacy plays in a free and democratic society. In Lavigne v. Canada (Office of the Commissioner of Official Languages), [2002] 2 S.C.R. 773, Gonthier J. observed that exceptions from the rights set out in the act should be interpreted narrowly, with any doubt resolved in favour of preserving the right and with the burden of persuasion on the person asserting the exception (at paras 30-31). In Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403, the court articulated the governing principles of privacy law including that protection of privacy is a fundamental value in modern democracies and is enshrined in ss. 7 and 8 of the Charter, and privacy rights are to be compromised only where there is a compelling state interest for doing so (at paras. 65, 66, 71). And in H.J. Heinz of Canada Ltd v. Canada (Attorney General), [2006] 1 S.C.R. 441 Deschamps stated: "[I]n a situation involving personal information about an individual, the right to privacy is paramount

> over the right of access to information, except as prescribed by the legislation (at para 26).

[21] The Union notes that the matter of CPIC checks for OPS employees is a matter that has arisen between the parties, initially resulting in a grievance but with a Policy and Operational Guidelines ultimately agreed to by the parties. The Union notes the specific reference to "duties associated with the work of law enforcement" under the "Application and Scope" heading in the Policy. It is noted that the OPS Policy provides for a process for employees in certain positions to consent to CPIC checks and a process to ensure the confidentiality of that information.

[22] There was no dispute that the CPIC information sought and obtained here constitutes personal information. However, as previously noted, the Employer's position is that its actions in this regard are not in any way affected by the Policy and are authorized by virtue of the fact that they relate to law enforcement. Reference was made to s. 38(2) of the Freedom of Information and Personal Privacy Act (FIPPA) which provides as follows:

> No person shall collect personal information on behalf of an institution unless the collection is expressly authorized by statute, used for purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity.

In this regard, Mr. Loewen referred me to a report of the Privacy Commissioner, Excessive Background Checks Conducted on Prospective Jurors: A Special Investigation Report, Order PO-2626 dated October 5, 2009. In this report, the

Privacy Commissioner deals with the collection, use and disclosure of personal information relating to prospective jurors. The report considers s. 38 (2) and also made reference to s. 42 (1) of FIPPA, which provides for disclosure from one law enforcement agency to another. The investigation arose from concerns that Crown attorneys were obtaining personal information from police, including CPIC information, about prospective jurors that went beyond what was necessary to determine whether they were eligible for jury duty. Referring to the fact that the Juries Act and the Criminal Code contained juror eligibility criteria which refer to a conviction for an indictable offence, the Privacy Commissioner determined that because there is the right to challenge a prospective juror for cause based on criminal conviction, it was appropriate that the Crown have access to police records. It is concluded at p. 120 of the decision that "A criminal conviction record check is the only reasonably practical and reliable means by which a Crown attorney may obtain information necessary to exercise the right to use this challenge" and further that:

> When Crown attorneys collect personal information from the police about prospective jurors that is relevant to the statutory criminal conviction eligibility criteria, they are collecting this information to be "used for the purposes of law enforcement" under section 38(2). This is consistent with my statement above that in my discussion of section 42 (1)(f)(ii) that the jury selection process is a specific law enforcement matter.

The decision went on at p. 121 to note, in summary, that the collection of personal information beyond that relevant to the conviction criteria is not

permissible but that the collection of information relevant to criminal conviction criteria is because it is "necessary for the proper administration of a lawfully authorized activity" as well as used for the purposes of law enforcement. Mr. Loewen made reference to s. 22 of the Ontario Evidence Act, which provides for the proof of a previous conviction by a record of the charge and conviction and submitted that this provision contemplates access to such information, access which in his submission must properly be provided by the Crown, noting that otherwise defence counsel would not be aware of this information. In Mr. Loewen's submission, the Ministry of Labour's approach falls within the scope of the analysis contained in this decision and, on this basis, ought properly be endorsed.

[23] In the jury selection case, the checks were made in the context of specific statutory provisions relating to criteria for jury selection. Law enforcement is defined in section 2 (1) of FIPPA as including "investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings", a definition which would encompass the proceedings in issue here. However, I agree with Ms. Hughes that the general approach taken in that decision is one that is protective of privacy rights. It does not contemplate a generalized or broad exception for law enforcement. Rather, it endeavours to balance privacy rights with the interests of law enforcement, ensuring that the statutory exception for law enforcement does not erode privacy interests in an unnecessary or inappropriate manner.

The Union argues that the O'Connor process allows for the Court to ensure this balance. As noted below, the O'Connor process specifically contemplates dealing with issues of credibility, which is where s. 22 of the Evidence Act comes into play. It is the Employer's position, however, that the O'Connor process does not allow it to meet its obligations under McNeil.

[24] In McNeil, information about police officer Hackett's criminal activities was in the possession of the Barrie Police and the provincial Crown prosecuting Hackett. The concern was the disclosure of that obviously relevant information to the defence. The obligation of the Barrie Police to disclose relevant information about Hackett is made clear by the Supreme Court of Canada. Had the appropriate disclosure to the Crown been made, the Crown would then have been in a position to be able to disclose that information to the defence.

[25] Does McNeil compel the Crown in these prosecutions to obtain and disclose CPIC information about Inspectors in the manner in which it has? As previously noted, in paragraph 48 of McNeil, the notion that the Crown has a general obligation to search out information from all government departments or agencies is rejected. While, as the Employer emphasized, there is reference in McNeil to the fact that the Crown is not an ordinary litigant and that its ultimate obligation is to the administration of justice, the decision specifically refers to the obligation of the Crown to make reasonable inquiries, not every possible inquiry. In relation to disclosure requests, the decision refers in

paragraph 49 to Arsenault, where the duty to make inquiries of other agencies or departments is said to arise where the prosecutor is aware that there has been another Crown agency involved in the investigation. I am not persuaded that the broad approach taken by the Crown here in obtaining CPIC information from the Toronto Police Services falls within the ambit of that directive. It is clear that there is an obligation to investigate where the Crown is aware of potentially relevant evidence. The case that Justice Charron utilizes to illustrate the point, Ahluwalia, is one in which the Crown was faced with evidence of perjury, where the need to seek further information or "to get to the bottom of the matter", as the Court put it, was blatantly apparent. The cases that I was referred to by the Employer which are critical of the Crown arise in analogous circumstances, where there was information before the Crown that reasonably compelled it to investigate further.

[26] The disclosure obligation under Stinchcombe, which I have noted, has been said in Vanbots to apply to prosecutions under the Occupational Health and Safety Act and in Fineline to prosecutions under the Environmental Protection Act, is characterized in McNeil as requiring the Crown to provide the defence with the "fruits of the investigation". In Stinchcombe, there is a reference to the Marshall Commission report wherein, in connection with criminal proceedings, there is reference to complete disclosure properly including a copy of the criminal record of any proposed witness. That is, of course, in relation to a criminal proceeding where the police will have access to

such information and, as we know from McNeil, act on the same first party footing as the Crown with respect to disclosure obligations. Moreover, the decision notes specifically that the general endorsement of a broad duty of disclosure is not one that can be applied without reference to the nature of the proceedings. At p. 19, Justice Sopinka stated:

> The general priniciples referred to herein arise in the context of indictable offences. While it may be argued that the duty of disclosure extends to all offences, many of the factors which I have canvassed may not apply at all or may apply with less impact in summary conviction offences. Moreover, the content of the right to make full answer and defence entrenched in s. 7 of the Charter may be of a more limited nature. A decision as to the extent to which the general principles of disclosure extend to summary conviction offences should be left to a case in which the issue arises in such proceedings. In view of the number and variety of statutes which create such offences, consideration would have to be given as to where to draw the line.

In Vanbots, the Court endorsed the general [emphasis added] principles of disclosure as set out in Stinchcombe. That was not a case that involved privacy matters, nor was Fineline. Fineline involved the case of an investigator who did not turn over his full investigation file to the Crown, providing the Crown with only the documents that he felt were relevant. The Court found two significant failures of disclosure, one being the considerable volume of materials that the investigator did not turn over to the Crown and the second being the Crown's failure to turn over certain notes, once the Crown became aware of their existence.

[27] Two recent cases, R. v. Ahmed, [2010] ONCJ 130 (Canley) and R. v. Batenchuk, [2010] ONCJ 192 (CanLII), both involve the prosecution of impaired charges and defence counsel seeking historical information relating to breathalyser machinery. As noted in paragraph 7 of Ahmed:

> The Crown strenuously opposes this application. It takes the position that, in accordance with the Supreme Court of Canada's direction in R. v. McNeil [citation omitted] it does not "possess" the impugned items and, having regard to its assessment of the evidence supporting the Crown's theory, together with the absence of any information from the defence which might point to the relevance of the additional items sought, it is not obligated to make further inquiries in relation to the outstanding nine items. Thus, it contends that the impugned items are properly the subject of what is often referred to as an O'Connor third party record application. Within that context, the defence must initially show that the impugned items are "likely relevant" to one or more material issues in the case.

Noting the absence of details as to the basis of defence counsel's assertions of relevance, the Court concluded that there was no obligation on the part of the Crown to make further inquiries and dealt with the matter on the basis of the O'Connor test of likely relevance. A similar approach was taken in Batenchuk, with the Court in paragraph 46 referring to Ahmed and stating that: "… what is referred to as "the fruits of the investigation" should include only such items in the possession and control of the Crown".

[28] The Union referred me to R.v. Collins, [2010] ABPC 19, a decision of the Alberta Provincial Court, wherein the scope of the prosecution's duty in the context of a regulatory offence was addressed. The defence invoked McNeil in a

quest for production of findings of serious misconduct as well as criminal/provincial records of convictions or findings of guilt in relation to a sheriff who had issued a ticket in relation to the Traffic Safety Act. With respect to the matter of records of convictions, the Court states as follows at paragraph 89:

> The Sheriff's Branch has indicated that it does not have access to either of CPIC or JOIN and, accordingly, cannot provide the information relating to the Criminal Code or Controlled Drugs and Substances Act (CDSA) convictions or findings of guilt. Moreover, there is no evidence of a record system designed to record all convictions or findings of guilt for all provincial regulatory offences (including municipal bylaw cases) or that the Solicitor General has access to such a system. Where a particular agency maintains records of convictions or findings of guilt for offences within its jurisdiction (or conscripts or is permitted to conscript similar record-keeping systems such as CPIC or JOIN), any such records relating to a McNeil request ought to be disclosed to an accused charged with an offence investigated in that context. As with records of serious misconduct, production will be required only upon a request pertaining to a specific officer escorted by reasons for the request. When a particular regulatory agency has no such records or ready access to that information it is relieved of any further disclosure obligation in that regard. The Solicitor General, accordingly, has no obligation to "disclose" any record of convictions or findings of guilt relating to Sheriff Klatt kept on CPIC, JOIN or the record-keeping systems of other government agencies to which it has no access.

The Court did, however, conclude that findings of serious misconduct ought to be disclosed, stating at paragraph 85:

> Given that the Solicitor General has (and is mandated by law to keep) formalized records in this regard, it is my view that imposing a first-party disclosure obligation for findings of serious misconduct by sheriffs is appropriate. Recognizing the need to "draw the line' on disclosure obligations in the context of simple and routine regulatory offences, however, it is my view that providing those records is not triggered by a simple or (as will be

> discussed below) an uncalibrated demand for disclosure. In order to trigger the prosecution's duty of disclosure in this context, the accused must expressly request the records of a specific sheriff (i.e. the sheriffs in question must be named) and give reasons why they are required. Crown counsel can thereafter perform the 'gatekeeping' function addressed by the court in McNeil in order to determine which findings meet the test of true relevance.

[29] With respect to the matter of CPIC records, Ms. Hughes emphasized the fact that the Court concluded that there was no obligation on the part of the Solicitor General to seek out that information. Mr. Dhir, on the other hand, argued that the Crown here was in fact able to obtain access to the information and, accordingly, the circumstances fell within the permissive ambit of the Court's conclusion. While he is clearly correct that the information was obtained, I am not persuaded that it was obtained by virtue of "ready access", as contemplated in that decision. It was in the possession of an outside organization. The real question, it seems to me, taking guidance from the decision of the Privacy Commissioner, is whether its seeking and conveyance for purposes of law enforcement in the manner that that the Ministry of Labour has undertaken here was appropriate, given the privacy interests at stake, and the existence of a process to have those interests addressed by the Court.

[30] Unlike the proceedings that the Court in McNeil was referring to, there is, in this matter, no police investigatory body obliged to act on the same first party footing as the Crown with respect to disclosure. The CPIC information sought and obtained here was, as previously noted, third party information

held by an outside organization. The Crown's Stinchcombe obligations here apply to the fruits of the investigation, with a duty to investigate that extends only to making reasonable inquiries in the case of disclosure requests and when the evidence in its possession reasonably compels such a response. I am not persuaded that McNeil required the Crown here to develop what was described as a "workaround" to fulfill a disclosure obligation. Employer counsel is certainly correct in the observation that in paragraph 59 of McNeil, excerpted supra, the Court referred to leaving the entire process of access to police records being determined in the context of the O'Connor regime as being neither sufficient nor justified. However, that comment was made in the context of the legal structure, in its entirety, under which the police operate. While, as Mr. Dhir noted, Inspectors have significant statutory powers, these powers do not equate them to a police force, nor is the entire regime of police proceedings imported into the proceedings in which they are involved. Here, there is a process in which third party information may be obtained by application to the Court, in a process in which privacy rights can be taken into account. Indeed, that approach is reflected in the Dare Foods case that I have referred to.

[31] The Employer emphasized the efficient administration of justice and suggested that the approach that it has taken ensures that important goal. While efficiency is, of course, an important matter, it cannot trump important substantive or procedural interests. Moreover, I note the concern expressed in

McNeil about trials becoming a conglomeration of satellite hearings on collateral matters and I would observe that a process that contemplates tailored disclosure and discourages fishing expeditions is one that is consistent with the efficient administration of justice. I also note that there is nothing that prevents the parties from concluding an agreement that addresses matters of disclosure and consent. Of course, any and all matters relating to disclosure are ultimately subject to the direction of the Court with jurisdiction to hear the matter. There are obviously cases where a criminal record would be relevant. It would seem likely that there would be cases where disclosure and consent would be provided if requested. I would observe that the establishment of a process for submissions to the Crown and safeguards to protect confidentiality would no doubt enhance the likelihood of provision of disclosure and consent. It would be in the interest of no one to unnecessarily expend the Court's time on such matters.

[32] I agree with Mr. Loewen that the Policy, while referring to employees involved in law enforcement, relates to identification of positions requiring security checks and cannot in any way usurp the jurisdiction of the Court in judicial proceedings. It does, however, reflect, in a general way, recognition of the importance of privacy rights and the importance of protection of personal information. The case before me does not turn in any way on an analysis of the precise nature of privacy rights of employees covered by this Collective Agreement. Implicit in the Employer's position in relying on the Privacy

Commissioner's decision is acceptance of the notion that at the very least the Inspectors in this instance are entitled to the protections of members of the public involved in judicial proceedings. Those protections include due regard for privacy interests and recognition of those interests, even when the exception for law enforcement under FIPPA comes into play. There is, as indicated, a process by which the CPIC information can be obtained, a process in which privacy rights can be considered. Also, as indicated, disclosure and consent can be requested of the Inspector. I would note that it is readily apparent that the approach taken by the Crown in this instance was reflective of the highest ethical principles that govern its conduct, principles that compel full disclosure in order that the interests of justice may be served. However, having had the benefit of full argument on this matter, I am not persuaded that McNeil compelled the Crown to take the broad approach and the steps that it did in obtaining CPIC information on a proactive basis.

[33] To turn to the premise of one of Mr. Loewen's submissions, while this matter arose in the context of Inspectors as witnesses, they are witnesses by virtue of their employment. Their managers are involved in the process. The employment nexus is clear. It is in this context that their privacy interests have come into play in connection with the obtaining and disclosure of CPIC information and it is in this context that I have concluded that their privacy interests have not been taken into account in the manner that they ought to have been. Accordingly, it is my conclusion that the Employer's broad

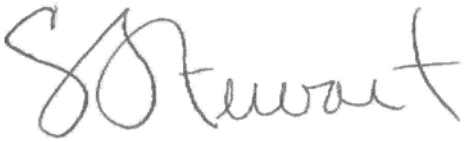
approach in obtaining CPIC checks does not accord with an appropriate exercise of management rights under the Collective Agreement and I so declare. On this basis, the grievance is allowed.

[34] Turning to the issue of disclosure of evidence of internal disciplinary misconduct, I would note that, unlike the issue of CPIC checks, this issue did not directly arise in connection with the individual matter that gave rise to the policy grievance and that the focus of the parties in argument was primarily on the CPIC checks. I would observe that this issue differs from the CPIC issue in that obtaining disciplinary information does not involve going outside of the Ministry of Labour. I would also note that there is an issue between the parties as to whether employment related discipline, as opposed to the kind of charges that police officers face, would fall within the ambit of McNeil. I would further observe that considerations relating to my jurisdiction in connection with this aspect of the matter may well be different. It would seem appropriate for the parties to have an opportunity to consider this matter to determine if this is an issue that they can resolve, and, if they are unable to resolve it, the appropriate forum for its resolution.

[35] I would also note, as I did in my interim relief decision, that the Crown and Inspectors are involved in a partnership in connection with extremely important work. They are to be encouraged to use their best efforts to bring this dispute to a final resolution in order that their partnership can focus

exclusively on that important work. I retain jurisdiction to deal with the implementation of this decision and all other aspects of this matter.

Dated at Toronto, this 28th day of March, 2011.



Susan L. Stewart, Chair