COURT MARTIAL

Citation: *R. v. Chand*, 2021 CM 2010

Date: 20210520
Docket: 202018

General Court Martial

Asticou Courtroom
Gatineau, Quebec, Canada

Between:

Master Corporal A.Y. Chand, Applicant

- and -

Her Majesty the Queen, Respondent

Application heard in Gatineau, Quebec, on 13 May 2021.
Decision and reasons delivered in Gatineau, Quebec, on 20 May 2021.

Before: Commander S.M. Sukstorf, M.J.

DECISION ON A DEFENCE APPLICATION FOR DISCLOSURE

Introduction

[1] On 13 February 2020, the applicant was charged with five offences, including four charges under section 130 of the *National Defence Act* (*NDA*) for sexual assault causing bodily harm under paragraph 272(1)(c) of the *Criminal Code*, sexual assault under section 271 of the *Criminal Code*, forcible confinement under subsection 279(2) of the *Criminal Code*, and sending harassing communications under subsection 372(3) of the *Criminal Code*. The accused's trial is scheduled to proceed by General Court Martial (GCM) on 31 May 2021 in Toronto, Ontario.

Summary of application

[2] The accused filed a pre-trial application for a court order seeking the prosecution to inquire, via the military police, whether the complainant has filed a claim with the

Canadian Armed Forces (CAF) - Department of National Defence (DND) Sexual Misconduct Class Action Settlement. In her oral submissions, defence counsel further requested the Court to order the prosecution to also inquire whether the complainant has been awarded a Veterans Affairs' settlement with respect to the allegations before the Court. Further to this, the applicant seeks a court order for the prosecution to disclose to him the result of those inquiries.

[3] The applicant states that the allegations before the Court involve a complainant whom he met during his military service and at least one of the allegations occurred on a military base. Although the CAF-DND Sexual Misconduct Class Action Settlement has permitted applications to be filed from 25 May 2020, he states that he just recently became aware of the possibility that the complainant in the case at bar would be entitled to submit a claim. He argues that such a claim would be relevant to his defence.

[4] The applicant acknowledges that a third-party records application is required in order for him to get access to the contents of the claim itself, but he takes the position that section 278.1 of the *Criminal Code* applies only when the accused already has knowledge of the existence of the record.

[5] Consequently, he requests that the respondent honour its "duty to inquire" as established under *R. v. McNeil*, 2009 SCC 3, and ask the military police to investigate and disclose whether or not the complainant submitted a claim to either the CAF-DND Sexual Misconduct Class Action Settlement or Veterans Affairs.

[6] Prior to filing the application, by email, counsel for the applicant requested that the respondent make the above inquiries. In oral submissions, the applicant was forthright in stating that the request was being made to avoid having to ask the complainant on the stand and then seeking an adjournment to request a copy of the record which would lead to a bifurcated trial.

Applicant's position

[7] The applicant argues that there is a reasonable likelihood that the complainant in this matter has submitted a claim to the CAF-DND Sexual Misconduct Class Action Settlement because it specifically invited complainants/victims who suffered sexual assault or sexual misconduct in the course of their military service to file a claim for financial compensation. On the basis of the allegations, he argues that the complainant appears to be entitled to a financial compensation from the CAF-DND Sexual Misconduct Class Action Settlement.

Relevance

[8] The applicant argued that the relevance of the claim comes from the fact that the claimant would have had to provide her personal version of the events in order to be awarded financial compensation. In other words, the complainant would have provided

a statement on the alleged incidents. As such, he argues that the content of the claim is likely to provide the following:

(a) Greater details. It is the applicant's view that a complainant's compensation under the class action agreement depends on the amount of details contained in the claim. As a result of this, he believes that the claim likely contains more details than what was provided in the police interview. He submits that a police interview is a stressful event that could impede memory and recollection due to the stress of the event. He argues that the ability of a complainant to draft a claim in the peace and comfort of their own space will encourage a better memory of the events.

(b) The prospect of financial compensation is a strong incentive to encourage a claimant to exaggerate or otherwise falsify details of the allegations. The accused argues that he should be permitted to explore this possibility as it would be highly relevant to his defence;

(c) Finally, he argues that the existence of an additional statement that explains the incidents alleged in the complainant's complaint to police is likely relevant to her credibility, and would serve as a valuable impeachment tool, whether or not financial compensation was involved. The accused should, in general, be entitled to statements made by the complainant about the allegations against the accused, as per the decision in *R. v. Batte*, [2000] 145 C.C.C. (3d) 449.

Duty of the prosecution to inquire

[9] In light of the above, the applicant asserts that the prosecution has a duty to inquire into information that is relevant to their witness's credibility or reliability. The applicant relies on the following portions of *McNeil* to support this assertion:

> [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.[...]
>
> [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. As the *amicus curiae* rightly states, "[t]he Crown and the defence are not adverse in interest in discovering the existence of an unreliable or unethical police officer" (factum, at para. 62). Doherty J.A. made the point forcefully in *R. v. Ahluwalia* (2000), 138 O.A.C. 154, commenting on the Crown's failure to inquire further when confronted with the perjury of its own witness as follows (at paras. 71-72):
>
> > 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 witness's 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. In my view, the Crown did not fulfill its obligations to the administration of justice by acknowledging the incomplete disclosure discovered by the defence, and after making limited inquiries, professing neither a responsibility for the incomplete disclosure nor an ability to provide any explanation for it. The Crown owed both the appellant and the court a fuller explanation than it chose to provide.
>
> [51] Hence, by properly fulfilling its dual role as an advocate and officer of the court, Crown counsel can effectively bridge much of the gap between first party disclosure and third party production.

[10] The applicant argues that in this case, the complainant is the respondent's primary witness and the strength of the prosecution's case rests almost entirely on the evidence of the complainant. Consequently, he argues that the respondent has a duty as the Crown to inquire into the existence of evidence that is likely to impact on the complainant's reliability and credibility. It is entirely possible that the respondent may learn, as a result of the applicant's disclosure request, and likely subsequent third-party records application, that the complainant either falsified or otherwise significantly exaggerated her allegations for the purpose of financial compensation. This knowledge would have a direct impact on the respondent's reasonable prospect of conviction, or the public interest in pursuing the charges. The respondent should therefore not be permitted to proverbially "stick its head in the sand" and avoid the issue raised by the applicant. It is his belief that the CAF-DND Sexual Misconduct Class Action Settlement is a pertinent issue for both parties and they have a joint interest in ensuring a fair trial for the accused.

[11] In summary, the applicant argues that based on the decision in *McNeil*, the prosecution has a duty to inquire into evidence relevant to the credibility or reliability of one of its key witness, and this duty extends beyond police witnesses. He submits that the ability of the prosecution to "bridge much of the gap between first-party disclosure and third-party production" is important to ensure the proper administration of justice both from a trial fairness perspective, and a trial efficiency perspective.

Respondent's position

[12] Conversely, the respondent argues that the applicant's application seeking the prosecution to inquire as to whether or not the complainant filed a claim under the CAF-DND Sexual Misconduct Class Action Settlement or Veterans Affairs is without merit. They argue that the material sought is not first-party disclosure because the information is not in the possession or control of the prosecuting Crown. Further, it is neither "fruits of the investigation" nor is it "obviously relevant." (*R. v. Gubbins*, [2018] 3 S.C.R. 35 at paragraphs 18-22 and *R. v. Stinchcombe*, [1991] 3 S.C.R. 326).

[13] The prosecution acknowledges that it has a duty to make inquiries of "the existence of relevant information" in the hands of police or other Crown entities, and to try to obtain the information where reasonably feasible. However, it asserts that the applicant's request does not meet the threshold to trigger an obligation on the Crown to conduct additional inquiry. Relying upon the Ontario Court of Appeal (ONCA) decision recently in *R. v. Essel*, [2019] O.J. No. 5867 (C.A.), there is nothing in *R. v. Mills*, [1999] 3 S.C.R. 668, *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66, or *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390 that "requires the Crown to obtain and review the contents of records that do not fall within the ambit of first party disclosure and that have not been shown to be potentially relevant." (see *McNeil* at paragraph 49, *Essel* at paragraph 52)

[14] The respondent asserts the information sought (i.e. declaration or statement made in relation to a claim) is clearly covered by the definition of "records" at section 278.1 of the *Criminal Code* and the applicant must therefore seek the production of the related records under section 278.3 of the *Criminal Code*.

[15] However, the respondent also strongly asserts that even if the complainant did make a claim under the class action, any application for the production of this record related thereto is bound to fail under section 278.3 of the *Criminal Code* for the following reasons:

(a) The applicant has failed to establish any relevance for these records. He argues that the *McNeil* duty to inquire is founded on the desire to streamline production of potential relevant records. He claims that the duty to inquire is not triggered in relation to records that are not relevant;

(b) The applicant has failed to identify any grounds for potential relevance beyond collateral issues which are specifically prohibited by subsection 278.3(4) of the *Criminal Code*;

(c) Relevance cannot be based on speculative or stereotypical assumptions. The nature of the applicant's request is that the subject record may provide inconsistencies that should be explored as they likely provide an impeachment tool. However, he has failed to provide any factual basis for this assertion; and

(d) The applicant's request is essentially an attempt to conscript the prosecution into seeking information beyond what was envisioned in *McNeil*. As noted by the ONCA in *R v. Darwish*, 2010 ONCA 124 at paragraph 30,

> [T]he defence cannot, through a disguised-disclosure demand, "conscript the police to undertake investigatory work for the accused".

Analysis

[16] The request of the applicant relies upon the duty of the prosecution to make third-party inquiries for evidence believed to relate to the credibility of their witnesses. The applicant argues that the complainant in this case is a critical witness and the case will be determined on credibility.

[17] The applicant relies upon the Supreme Court of Canada (SCC) decision in *McNeil* which was an appeal that arose after a motion for production of third-party police disciplinary records and criminal investigation files of the Crown's main police witness in a major drug prosecution.

[18] It is generally understood that the duty to inquire set out in *McNeil* applies to police and civilian members of a police force or law enforcement agency, including translators, forensic analysts and wiretap monitors or any other civilian employees who played a significant role of some type in the investigation. In addition, the SCC made it clear that in the right context, it applies to any department, agency or institution beyond the prosecution. Essentially, *McNeil* set out a new obligation on the prosecution to gather and disclose government information found outside of the investigative file being "Crown entities other than the prosecuting Crown are third parties under the *O'Connor* production regime" (*McNeil* at paragraph 13). In *McNeil*, the SCC effectively removed the obstacles to establishing likely relevance in *O'Connor* applications placing the primacy for relevance over privacy.

[19] Standing in the place of the Minister of Justice, the prosecution has a duty to make reasonable inquiries of other Crown agencies and government departments for relevant information. The duty to inquire applies when the prosecution learns of potentially relevant evidence pertaining to the credibility or reliability of a witness who played a significant role in the investigation which is in the hands of governmental third parties. Therefore the prosecution is responsible not only to hand over the "fruits of the investigation" and pertinent information provided by the police but importantly, where the prosecution has been put on notice of potentially relevant information that could reasonably be considered to be in possession of other Crown agencies or departments, it has a duty to inquire and to obtain that information if it is reasonably feasible to do so. The decision in *McNeil* was the first time that the SCC enunciated a duty on the prosecution to attempt to obtain relevant information that they do not control.

[20] I do not blame defence counsel for their efforts to engage the prosecution in facilitating their access. It is by far the most efficient way to obtain relevant information to further its case. However, the first pragmatic problem with the applicant's argument is based on the fact that I was not provided with any authority to suggest that the *McNeil* inquiry applies to a non-Crown agency, such as a court-appointed claims administrator in a class action settlement. Epiq Class Action Services Canada Inc., which is the administrator in the class action settlement, is not a government or quasi-government entity as envisioned by the SCC in *McNeil*. Further the *McNeil* duty is

focussed on the credibility of prosecution witnesses who actively took part or contributed in some way to the investigation. A complainant holds no such role.

[21] Further, third parties, particularly those outside government control, have no legal obligation to assist either the prosecution or the defence. Consequently, although the prosecution can inquire, neither the complainant nor the claims administrator have an obligation to respond. Under *McNeil*, in a case where the third party does not respond or is unwilling to provide the information, the prosecution must advise the defence and it is then incumbent on the defence to formally file an *O'Connor* application which is not applicable for requests related to an alleged sexual assault.

[22] Ultimately, the next question to be resolved is how the *McNeil* inquiry interacts with the mandated procedure for sexual assault as set out by section 278.1 of the *Criminal Code* which is referred to as the *Mills* procedure. In this Court's view, it would be an error to conflate the two regimes as they both approach the protection of privacy interests in a very different manner. Under *McNeil*, privacy interests are largely reduced in favour of relevancy, whereas the *Mills* procedure extends protection in the opposite direction providing much enhanced protection to the complainant's privacy interests than that flowing from both the *McNeil* and the *O'Connor* regimes. Under section 278.1 of the *Criminal Code* the "likely relevance" test substantially differs from *O'Conno*r and there are special rules embedded into the legislation at section 278.3(4) specifically to avoid discriminatory beliefs (eleven prohibited generic arguments).

[23] Section 278.1 of the *Criminal Code* as interpreted by *Mills* places the privacy interests of a complainant on a much higher stature at stage 1 which has the second order effect of limiting the requests that could pass to a stage 2 analysis. More specifically, at stage 1 of *Mills*, the applicant must prove that "the record is likely relevant to an issue at trial or to the competence of a witness to testify," and "the production of the record is necessary in the interests of justice." So, from the applicant's perspective, either inquiring or attempting to obtain access to third-party records through the *Mills* procedure has been purposefully been made more difficult than through the *McNeil* / *O'Connor* procedure.

[24] Consequently, the *McNeil* disclosure regime refined by the SCC has no effect on *Mills* applications under section 278.1 of the *Criminal Code*. *Mills* remains the decision that interprets the statutory production provisions that apply to sexual offence cases and the two different regimes cannot be relied upon simultaneously. In rendering its decision in *McNeil*, the SCC made it clear at paragraphs 21, 30-32, that third-party records in sexual offence cases stand on a different footing. The SCC also warned at paragraph 32 that "it is important not to transpose the *Mills* regime into the *O'Connor* production hearing". As such, I find that the "duty to inquire and attempt to obtain" as set out in *McNeil* does not apply to trials involving sexual offences and does not apply to the case at hand.

Likely relevance

[25] Although the applicant was only seeking an order for the prosecution to inquire, given this Court's conclusion that the duty to inquire in *McNeil* does not apply to sexual offence allegations, the Court proceeded further to determine if the "likely relevancy" test in *Mills* has been met.

[26] In the simplest terms, relevance means there must be a reasonable possibility that the information sought is logically probative to an issue at trial or the competence of a witness to testify. Relevance is defined in terms of its usefulness to the defence, to either meet the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence.

[27] The ownership of the third-party records covered by section 278.1 of the *Criminal Code* is broader and not limited to governmental entities as identified in *McNeil*. A record may belong to a completely independent third party, yet still contain information that is "personal information" of the complainant that is considered relevant.

[28] I reviewed the class action agreement and detail provided. It is clear that after having obtained the consent of the parties, on 25 November 2019, the Federal Court certified the lawsuits as a class proceeding and approved the settlement agreement that provides financial compensation to current and former members of the CAF and current and former employees of the DND/Staff of the Non-Public Funds (SNPF) who experienced sexual misconduct. In this case, the record holder is the Claims Administrator which is Epiq Class Action Services Canada Inc.

[29] The information in the "Frequently Asked Questions" section assures complainants that:

> "The information and documents you provide in your claim will be kept confidential, except for the purpose of processing your claim. The alleged perpetrators will not be notified that they have been named in your claim. Only those people who need to review your claim will have access to this information. Safeguards have been put in place by Epiq and by CAF/DND/SNPF to ensure that both the information and documents provided by you, and the fact that you have filed a claim under the Settlement Agreement, will not be disclosed to your co-workers, supervisors or DND/CAF/SNPF leadership."

[30] The information website and the documentation in the claim make it clear that any claim filed would not be disclosed to the alleged perpetrators and that only those people who need to review the claim will have access to the information. Based upon this clear articulation of the policy assuring complainant's privacy, I have no trouble concluding that there is a reasonable expectation of privacy in the record that the applicant ultimately seeks if it does in fact exist.

[31] The Court appreciates that the accused is placed in a tenuous situation because the exact content of the claim (if it even exists) is unknown. In conducting my analysis, the Court was attentive to and mindful of the fact that from accused's perspective, he is seeking any information that is capable of forming any reasonable doubt or providing a pathway for him to do so.

[32] The request for production as set out at section 278.3 of the *Criminal Code*, makes it clear at paragraph 278.3(4) of the *Criminal Code* that records sought for one or more of the following purposes are not sufficient:

> [...]
>
> (c) that the record relates to the incident that is the subject matter of the proceedings;
>
> (d) that the record may disclose a prior inconsistent statement of the complainant or witness;
>
> (e) that the record may relate to the credibility of the complainant or witness;

[33] In *Mills*, at paragraph 118, the SCC made it clear that the mere assertion of the items listed in paragraph 278.3(4) without any evidence is not permitted. The case law interpreting the above provision makes it clear that the mere fact that a complainant may have recounted the events related to the allegations before the Court is not sufficient by itself to order production. In considering whether a complainant's counselling records should have been disclosed to an accused in a sexual assault case, in *R. v. W.B.*, 2000 CanLII 5751 (ON CA) at paragraph 77, the ONCA stated:

> The mere fact that a witness has said something in the past about a subject matter on which the witness may properly be cross-examined at trial does not give that prior statement any relevance. It gains relevance only if it is admissible in its own right or has some impeachment value. In my view, the mere fact that a complainant said something about a matter which could be the subject of cross-examination at trial, does not raise a reasonable possibility that the complainant's statement will have some probative value in the assessment of her credibility.

[34] As summarized in the above decision in *W.B.*, the mere fact that there might be a statement made by the complainant to a third party is not by itself sufficient to make it relevant. The duty is on the applicant to demonstrate the potential relevance of the records sought. The applicant cannot suggest that the claim is relevant without establishing the material issue to it applies. In the context of a sexual assault case, a record is never relevant for the sole purpose of impugning a complainant's credibility.

[35] The onus is on the applicant to prove that the record has some relationship to a particular issue in his defence, but that does not mean that he is automatically entitled to receive it. Rather, it simply triggers the next step which requires the Court to balance the rights of the third party with those of the accused.

[36] Importantly, the Court appreciates that the trust of the complainants in the remedial process of the class action may be irreparably damaged by the disclosure of their records to both their perpetrators and potentially as evidence in the public court proceedings. Consequently, the Court must balance the confidentiality of the complainant in the context of the assurances provided to her in making her claim in a legally certified class action agreement with the right of the accused to make full answer and defence.

[37] In oral submissions, counsel for the applicant argued that based on the chronology of the various statements provided by the complainant and the certification date of the class action raises some suspicion. In my view, even if the chronology raises suspicion, without more evidence, it does not justify overriding the significant privacy interests. The applicant can raise questions about the complainant's motive to fabricate or embellish for the sake of her claim from another source and more importantly can address the issue directly in cross-examination. Defence counsel simply needs to put the sequence of events and the dates of the certification of the class action to the complainant and inquire.

[38] In my view, based on the arguments provided, awarding disclosure of the third-party records without specific relevance to an issue at trial would undermine and discourage the achievement of the societal goal that the class action agreement was entered into which was for the sole purpose of compensating complainants for harm suffered. The agreement was specifically structured to ensure that claims were kept private in order to encourage complainants to come forward. The guidelines provided to potential complainants go so far to assure them that their application would never be disclosed to their perpetrator.

[39] In short, the applicant is of the belief that having access to the claim (if it exists) which he believes would be a prior statement on the specific allegations before this Court, will provide him with important additional information which may be necessary for his defence. Essentially, he hopes to discover if exculpatory evidence might exist somewhere within the complainant's claim.

[40] At this stage, I find that there is no factual basis advanced by the applicant to suggest that any claim by the complainant under the class action agreement is even potentially relevant beyond speculation. The arguments put forward are based on the assumption that because the complainant is entitled to file a claim, she did so. Further, because of the financial compensation available, she has financial incentive to exaggerate or falsify allegations. Based on the submissions of the applicant, the Court finds that the possibility that the claim provides more detailed evidence and the there is potential for the complainant to exaggerate her claim are purely speculative. These issues are more appropriately addressed by defence counsel in the cross-examination of the complainant.

Potential privilege

[41] It is also important to keep in mind that the *Mills* procedure is not the exclusive test to be applied in the production of records in sexual offence cases. Given that the claim was filed as part of a class action settlement agreement, depending on how complaints are filed, it is possible the record holder will assert that some records are privileged in some capacity. If they do successfully assert this claim, then this elevates the test for production to an even higher standard.

[42] Upon certification of a class action such as the one before the Court, class counsel are considered to be in a solicitor-client privilege relationship with all members of the class. (see *Ward Price v. Mariners Haven Inc*. 2004, 71 O.R. 664 at paragraphs 7 and 9) Class counsel have the right and duty to communicate with all class members about the merits of their case and depending on the procedures followed, it may or may not be applicable.

[43] If for whatever reason, the record holder asserts that the claims are covered by solicitor-client privilege that by itself adds an additional layer of complexity. In the SCC case of *R. v. McClure*, 2001 SCC 14 [2001] 1 S.C.R. 445**,** which was a sexual offence case, the accused similarly attempted to gain access to the complainant's civil litigation file because it was based on the same alleged incidents before the criminal court, a request which the SCC rejected having determined that the litigation was protected by solicitor-client privilege. Based on *McClure*, the production of any records protected by solicitor-client privilege must be governed by a further enhanced procedure that bars the production of protected records in all but the rarest of cases where the applicant's innocence is at stake.

Conclusion

[44] Even though I find that the applicant is unsuccessful in the current application, depending upon the evidence introduced during the General Court Martial, I must remind him that he is eligible to renew his application if there is evidence admitted that suggests that the information in the claim is specifically relevant to an issue in his case.

FOR THESE REASONS, THE COURT:

[45] **DISMISSES** the application.

[46] **ORDERS** that the trial by General Court Martial begin on the date set out in the convening order.

"S.M. Sukstorf, Commander"
M.J.

Counsel:

Majors F. Ferguson and M. Melbourne, Defence Counsel Services, Counsel for Master Corporal A.Y. Chand, the Applicant

The Director of Military Prosecutions as represented by Majors M. Reede and É. Baby-Cormier, Counsel for the Respondent