Federal Court  Cour fédérale

Date: 20120620

Docket: T-1950-11

Citation: 2012 FC 765

Ottawa, Ontario, June 20, 2012

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

GORDON ANDREW COOK

Applicant

and

ROYAL CANADIAN MOUNTED POLICE

and

PUBLIC PROSECUTION SERVICE OF CANADA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review on behalf of Gordon Andrew Cook (the Applicant), pursuant to section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7, in respect of a decision of the

Royal Canadian Mounted Police [RCMP] to disclose the Applicant's disciplinary record to the Public Prosecution Service of Canada [PPSC] in a criminal matter as per *R v McNeil*, [2009] 1 SCR 66, 2009 SCC 3 [*McNeil*].

[2] For the reasons that follow this application is dismissed.

II. Facts

[3] The Applicant has been employed with the RCMP for fifteen years and is currently in Joint Forces Operation, Drug Unit, Prince District, "L" Division in North Badeque, Prince Edward Island.

[4] In 2001, the Applicant was involved in incidents while posted in British Columbia that lead to two informal discipline charges being placed on his record. These informal discipline charges are related to incidents that occurred on June 1, 2001 and December 18, 2001. Discipline was administered for both charges on February 19, 2002. Section F.1.d of the Commissioner Standing Order provides that informal discipline is spent one year after its administration.

[5] The Applicant grieved the informal discipline administered, but after three years decided to abandon the matter.

[6] On March 18, 2010, subsequent to the Supreme Court of Canada's decision in *McNeil* cited above, part 20.10 of the RCMP Operations Manual and implementation and operations procedure

particular to “J” and “L” divisions on RCMP Employee Misconduct Disclosure (the Policy) was adopted.

[7] The policy sets out how the RCMP intends to comply with its obligations under *McNeil*.

[8] The process, as provided for by the Policy, was applied as follows in the Applicant’s case:

> i) a copy of his discipline file was obtained from Ottawa and reviewed
>
> ii) the “McNeil Compliance Committee” met and decided whether the disciplinary incidents were relevant or not in the Applicant’s case.
>
> iii) Since the Committee found that the disciplinary incidents were relevant, a copy of a draft disclosure sheet was prepared and sent to the Applicant for review and comment.
>
> iv) the Applicant objected to the proposed disclosure and provided comments.
>
> v) further to the Applicant’s comments the document was modified extensively and then finalized.
>
> vi) the result of the process is a systematic disclosure to the PPSC of the two incidents that occurred in 2001, in all cases where the Applicant may be called as a witness. The Applicant’s comments and objections are always included in the Court package. In each such instance the Applicant receives prior notice that his McNeil disclosures are part of the Court package.
>
> vii) the crown attorney receives the Mc Neil disclosure package and then makes a determination after consideration of the facts of the case, whether the applicant’s disclosures are relevant or not and should they be disclosed to the defendant’s attorney. (See page 17 of the Respondents’ motion record on the motion to strike)

[9] On November 29, 2011, Staff Sergeant Jamie George, District Commander, “L” Division informed the Applicant that the RCMP was forwarding his discipline records to the PPSC in regards

to first party disclosure to an accused in a criminal matter where the Applicant was involved as an investigating Officer.

[10] The criminal matter involves charges of possession of cocaine and possession of cocaine for the purposes of trafficking against the accused, Wayne Warren Matheson.

[11] The Applicant was informed that disclosure is mandatory according to the Policy.

[12] The Applicant objected to the release of his discipline records as not being required as part of the *McNeil* package and asserted that the RCMP, by virtue of its Policy, has committed an error of jurisdiction and an error in law in mandating the disclosure of his discipline records to PPSC, as the RCMP's policy fails to properly consider *McNeil* and determine what discipline should be disclosed and when it should be disclosed.

[13] The Applicant filed his Application for judicial review of the RCMP's decision to disclose his *McNeil* package on December 1, 2011.

[14] The Applicant sought, amongst others, a permanent order enjoining and restraining the RCMP from disclosing the Applicant's record to the PPSC.

[15] The Respondents filed a motion to strike, under rule 221(1) of the *Federal Courts Rules*, SOR/98-106, on the basis that this Court does not have jurisdiction to review the RCMP's decision to provide the PPSC with the Applicant's disciplinary record.

[16] The hearing date on the motion to strike was initially set for February 15, 2012 and an order was issued by Justice Beaudry to the PPSC not to disclose the Applicant's record.

[17] On January 25, 2012, the Applicant's counsel confirmed to the Court that Applicant was no longer pursuing injunctive relief (see Mr. Justice Barnes' direction at page 12 of the Respondents' motion record on the motion to strike).

[18] On January 27, 2012, the Court issued a direction in which it noted that the Applicant had withdrawn his request for injunctive relief (see Mr. Justice Barnes' direction at page 12 of the Respondents' motion record on the motion to strike).

[19] After several orders of this Court, Prothonotary Morneau finally set a hearing date for both the motion to strike and the application for leave.

[20] In the interim, the PPSC disclosed the Applicant's disciplinary information to Mr. Matheson's counsel on February 15, 2012, in view of Applicant's decision to withdraw his request for injunctive relief.

[21] At the onset, the Court informed the parties that it would hear them on both the motion to strike and the underlying application.

[22] The Court also allowed the introduction in the record of Jill Thompson's affidavit dated February 14, 2012.

III. Issues

[23] This case raises the following issues:

1. ***Does the Federal Court have jurisdiction to judicially review the RCMP's determination regarding what should be disclosed to the PPSC in a criminal matter in order to meet its constitutional and common law obligations? If it has, should it decline to hear the matter?***

2. ***Is the application for judicial review moot further to the disclosure of February 15, 2012?***

3. ***Did the RCMP commit an error in law in applying its McNeil disclosure Policy to the Applicant?***

IV. Parties' submissions

A. Applicant's submissions

[24] The applicant submits that when the RCMP instituted the *McNeil* Committee and that committee conducted its assessment, it was acting pursuant to the *Royal Canadian Mounted Police*

Act, RSC, 1985, c R-10 and the regulations and policies that flow from the authority there under of the Commissioner to administer the Force.

[25] The RCMP remains a federal institution at all times (see *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc v Canada*, [2008] 1 SCR 383 at para 14).

[26] The Applicant claims that the characterization that the present case is a policing matter ought to be rejected; this is an employment administrative law case infused with legitimate rights and privacy matters.

[27] The issue according to the Applicant, relates to how the Commissioner applies its internal employment/administrative policies to the vetting of spent disciplinary records and how the PPSC decides, in its own exclusive assessment, what to disclose or not.

[28] The relevant policy utilized by the Commissioner at issue is found in Part 20.1 of the RCMP Operations Manual, Section 10, and is entitled "RCMP Employee Misconduct Disclosure". The RCMP policy on member discipline (page 56 of Respondents' motion record on the motion to strike) is given a 'Short Title' "*Commissioner's Standing Orders (Disciplinary Action)*". Subsections 2(2) and 21(2) of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 provide as follows:

Commissioner's Standing Orders	**Consignes du commissaire**
2(2) The rules made by the Commissioner under any provision of this Act	2(2) Les règles à caractère permanent que le commissaire établit en vertu de la présente

empowering the Commissioner to make rules shall be known as Commissioner's standing orders.	loi sont appelées consignes du commissaire.
Rules	**Règles**
21(2) Subject to this Act and the regulations, the Commissioner may make rules	21(2) Sous réserve des autres dispositions de la présente loi et de ses règlements, le commissaire peut établir des règles :
(*a*) respecting the administrative discharge of members; and	*a*) concernant le renvoi, par mesure administrative, des membres;
(*b*) for the organization, training, conduct, performance of duties, discipline, efficiency, administration or good government of the Force.	*b*) sur l'organisation, la formation, la conduite, l'exercice des fonctions, la discipline, l'efficacité et la bonne administration de la Gendarmerie.

[29] Under any reasonable construction of the RCMP Act, the Operations Manual and the Misconduct Disclosure protocols originate from the authority of the Commissioner as set out above according to the Applicant.

[30] The Applicant further claims that the following cases relied on by the Respondents are distinguishable in that one relates to political involvement in the investigative actions of police officers and the other why the work of police officers investigating criminal activity must be kept separate from the influence of prosecution (see *Ochapowace First Nation (Indian Band No 71) v Canada (Attorney General)*, 2009 FCA 124 [*Ochapowace First Nation*]; and *Canada Royal Canadian Mounted Police) v Canada (Attorney General)* (FC), 2007 FC 564).

[31] The Applicant alleges that there are no authorities to support the proposition that the creation by the Commissioner of policies and procedures to assist in meeting the disclosure obligations does not give rise to administrative law issues.

[32] The Applicant also argues that he is placed in an untenable position since a senior Federal Crown Prosecutor has determined, after speaking with other Crown Counsel, that the Applicant's disciplinary record is indeed relevant to any accused against whom he would be testifying. This assessment could signify that he could be barred from testifying indefinitely.

[33] The Applicant concludes that this decision is arbitrary and contrary to the *McNeil* principles, which are more limitative in scope.

B. Respondents' submissions

[34] The Respondents brought forth the motion to strike on the following grounds:

a. The RCMP, when fulfilling its common law and constitutional law obligations, is not acting as a federal board, commission or other tribunal as defined in section 2 of the *Federal Court Act*. Therefore, it cannot be subject to judicial review.

b. The Federal Court does not have jurisdiction to judicially review the RCMP's disclosure of information regarding the Applicant's disciplinary record to the PPSC because that information was provided in fulfillment of the RCMP's disclosure obligations in criminal procedures.

c. The Federal Court, being a statutory court, it has no inherent jurisdiction to intervene in criminal matters.

d. Section 18.1 of the *Federal Courts Act* must provide the authority for an intervention since only a "federal board, commission or other tribunal are subject to judicial review.

e. A federal decision maker can be qualified as a tribunal for some purposes but not for others.

f. The question is therefore according to Respondents whether the RCMP, when making the decision under review, was acting as a federal board commission or other commission as defined by section 2 of the *Federal Courts Act*.

g. The disclosure by the RCMP to the PPSC was not made pursuant to an exercise of jurisdiction or power conferred by or under a federal statute or under an order made pursuant to a Crown prerogative, but under the RCMP's obligation to disclose as set out in the common law and Constitutional law. The jurisprudence of the Federal Court and the Federal Court of Appeal support this latter proposition.

h. In making a McNeil disclosure, the RCMP is exercising its policing function. The fact that a policy and procedure was developed to oversee the proper exercise of this obligation does not change the nature of the function being exercised.

V. Analysis

1. Does the Federal Court have jurisdiction to judicially review the RCMP's determination regarding what should be disclosed to the PPSC in a criminal matter in order to meet its constitutional and common law obligations? If it has, should it decline to hear the matter?

[35] Having reviewed carefully the authorities submitted by both parties and having heard their representations, the Court believes that in the present circumstances the application is moot. Therefore, there is no necessity for the Court to proceed to an in depth analysis of the jurisdictional question raised by the Respondents.

[36] Nonetheless, the Court is not convinced that it is the most suitable forum to review the disclosure of the Applicant's disciplinary record made by the RCMP and the PPSC in the Matheson case which is currently before the Prince Edward Island Provincial Court.

[37] As discussed by Justice de Montigny in *Ochapowace First nation* cited above and confirmed by the Federal Court of Appeal (2009 FCA 124), and Justice D. Tremblay-Lamer in *Canada (deputy Commissioner of Royal Canadian Mounted Police) v Canada (Commissioner Royal Canadian Mounted Police)* cited above, the Court should be reluctant to intervene in cases involving the police's operational discretion.

[38] In essence, the Applicant disputes the RCMP's reading of its obligations under the *McNeil* decision. These disclosures always take place in the context of a criminal proceeding.

[39] Furthermore, in the present application, the provincial trial Judge appears to be much better positioned to weigh whether the Applicant's *McNeil* disclosures were relevant or not in the Matheson case before him, since he can assess their impact on the accused right to a full defense. These facts are not and will never be before this Court.

[40] As the Court reviews the procedure that was followed in the application of the policy to the Applicant's case, there is no breach of procedural fairness to incite this Court's intervention. At each step of the process, the Applicant was allowed to comment. His comments lead to major changes to the scope of the disclosures. The policy also afforded the Applicant prior notice in all instances.

[41] More importantly, the Court has come to the conclusion that the matter is moot.

2. Is the application for judicial review moot further to the disclosure of February 15, 2012?

[42] In *Borowski v Canada (Attorney general)*, [1989] SCJ No 14, [1989] 1 SCR 342 at para 15 [*Borowski*], the Supreme Court of Canada wrote the following remark on the doctrine of mootness:

> [15] The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.

[43] The Court must determine “whether the required tangible and concrete dispute has disappeared and the issues have become academic” (see *Borowski* at para 16). If the answer to the first question is affirmative, the Court must then “… decide if [it] should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy… In the interest of clarity … a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant” (see *Borowski* at para 16).

[44] The Applicant was initially seeking injunctive relief to prevent the RCMP from disclosing any information on his disciplinary record. However, the interim relief was withdrawn by the Applicant (see Direction of Mr. Justice Barnes, dated January 27, 2012 at para 12 of the Respondents' motion record on the motion to strike).

[45] On February 15, 2012, the PPSC disclosed the Applicant's disciplinary record to Mr. Matheson's counsel.

[46] The litigation between the parties has become academic. There is no indication to show that the Applicant's request for an order of the Court nullifying the RCMP'S decision to disclose the Applicant's disciplinary record would have any practical effect.

[47] Having no live controversy between the parties, the Court dismisses the application. On the basis of this conclusion, the Court is in no need to address the third issue.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application for judicial review is dismissed on the basis of mootness;

2. The whole with costs against the Applicant.

"André F.J. Scott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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