MULTIPLE PROCEEDINGS

IN MULTIPLE FORUMS

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Introduction

A single policing incident can and does frequently give rise to proceedings in a multitude of forums. A member of the public may file a complaint concerning the conduct of an officer with the appropriate civilian oversight body. However, the activity that forms the basis of the complaint may also be pursued as a claim in tort, seeking damages against the officer, the department, and the municipality. The same activity may also have human rights elements, and form the basis of a complaint to a human rights commission. The activity may also have led to criminal charges against the complainant, or even the officer. The issue may be of such a significance that a public inquiry is called.

The problem is not confined to policing, but it is the impact on policing issues that we are examining today.

I have encountered the problem a number of times, as a member of the Nova Scotia Police Review Board, as well as in civil litigation. It can result in conflicting findings of fact in different forums, differing disclosure issues, and multiple or overlapping remedies. Anecdotally, the problem appears to be growing as we perhaps become a more litigious society. As a result, there is a greater assignment of police personnel to attendance to provide evidence before various tribunals.

Conflicting findings of fact

A decision of the Nova Scotia Supreme Court highlights the issue of findings of fact made in two tribunals, applying different tests - **Halifax Regional Police Service v Wilms et al** (1999)177 NSR (2d) 320

In **Wilms**, the officer had been charged with assault on his wife. The matter proceeded in the Provincial Court, and he was found guilty, but was given a conditional discharge. As a result, the officer was also subject to internal discipline, and following the conviction and sentence, he was dismissed from the force. He filed a Notice of Review, and the matter ultimately came to the Police Review Board. The Board was provided with a copy of the transcript of the trial, and also heard extensive viva voce evidence , some of which the which the trial judge did not have until the sentencing phase, and some of which the trial judge did not hear at all. The trial judge commented on sentencing:

> "When you put these two sets of evidence together, that which was adduced at trial and that which has been adduced at the sentencing hearing, one comes to the conclusion that the acts were out of character...it was a sort of assault. The threats were uttered in anger and nothing ensued from this except the charges...I can conclude very easily that a discharge will be in Mr. Wilms' best interest and will immediately be in Mrs. Wilms and the child's best interest"

The Board was of the view that the latter comments were a "strong indication that he believed that

Mr. Wilms would be able to continue to earn an income as a police officer".

The officer was re-instated by the Board.

The department applied to the Nova Scotia Supreme Court to quash the decision of the Board. The department argued, among other issues, that the Board had re-evaluated the underlying circumstances, and had "second - guessed" the decision of the Provincial Court judge. Wright, J. noted the argument of the Department that "...the Board committed a patently unreasonable error by examining and interpreting the facts underlying the criminal charges as it did. " He upheld the decision of the Board in re-instating the officer. However, he went on to comment "I am nonetheless cognizant that there are instances where the Board strayed in it's analysis...it was not for the Board to question or cast doubt upon the conviction entered by Judge Batiot for uttering a death threat. That was of no consequence in the end, however, in light of the Board's recognition in it's Section 5 analysis that there had been a contravention of the Criminal Code in respect of both convictions which on further analysis constituted a disciplinary default. Beyond that, the Board ought not to have attributed to Judge Batiot, by virtue of his sentencing decision, that

> "a)he held the belief that Cst. Wilms would be able to continue to earn an income as a police officer; and
>
> b)as having no concern with Cst. Wilms future credibility as a witness or with respect to his ability to continue as a police officer.

While the decision does not interfere with the conclusion of the Board, it does place limits on the ability of the Board to reach a different factual conclusion, notwithstanding that the Board heard additional evidence**.** It also implicitly limits the ability of the Board to base it's decision on a full review of the facts, and to determine whether the circumstances of the case warranted dismissal - a completely different issue than that to be addressed in a criminal trial.

Conflicting disclosure / evidentiary issues

In Nova Scotia, when an officer is the subject of a complaint, there is no obligation on that officer to provide a statement either internally or, in the event the matter moves to the Police Commission, to a Commission investigator. Indeed there is no obligation on the officer to testify at a Review Board hearing. As well, if the Commission investigates the file, no statement taken or admission made is admissible in any subsequent proceeding "in respect of the complaint". Furthermore, the Commission's investigator "...shall not give evidence nor shall any material in his file be produced at a proceeding in respect of the complaint".

The section is intended, among other purposes, to promote informal resolution. However, in the litigation process, our Civil Procedure Rules permit Notice of Examination to be served, on parties and non-parties to an action, requiring attendance for discovery examination, as well as production of all relevant documents. In the event a tort action is commenced, and a Police Act Complaint is filed, an officer can be compelled to testify, and an investigator's file could be subpoenaed. This may well result in the reluctance of the officer, or any other witness, to co-operate with the Commission investigator. Also, if the civil discovery takes place prior to the hearing of the

complaint, the officer may be put at a considerable disadvantage as unintended disclosure will have taken place.

One solution to this problem would be to pursue a stay of examination pending completion of the complaint, however, a stay is a discretionary remedy, and may not be granted if it would resuult in any significant delay in the tort action.

Very frequently, the complainant is the subject of criminal charges. As an accused person, he / she has the right to be presumed innocent. It is a basic and essential foundation of the criminal justice system that an accused person may remain silent, from the first interaction with the police to the conclusion of trial. However, concurrent proceedings under civilian oversight legislation, and / or tort litigation could necessitate waiving this right. An accused complainant would be obliged at the very least to provide some form of statement to the initial investigator of his / her complaint, and conceivably need to testify at a hearing prior to his / her criminal charge being heard.

Section 13 of the Charter of Rights and Freedoms would offer some comfort to the complainant who actually testifies at a complaint hearing. The section provides that:

> 13.A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except for a prosecution for perjury or for the giving of contradictory evidence."

Section 13, however, would not protect information provided to a complaints officer or an

investigator.

This can and does lead to a reluctance to file an otherwise valid complaint. The problem is compounded in Nova Scotia by a very short limitation period - a complaint must be filed within 30 days of the event. This limitation can be extended by the Review Board, but only to six months.

Similar concerns apply in the event the officer is the subject of criminal investigation. The officer will clearly be unwilling to provide any information in the context of the complaint process.

Multiple remedies

Penalties and remedies for complaints vary from reprimand through to dismissal. Compensation for the complainant does not appear among those remedies, at least in Nova Scotia. Rather, the "sanctions" appear to be designed to correct or punish the officer, and not to in any way benefit the complainant. On the other hand, in tort litigation, the plaintiff is compensated for the harm caused, and the officer is not sanctioned in any way. This conceivably leads a complainant to pursue the matter in two or more forums.

If the complaint also includes human rights issues, the complainant may pursue matters with a human rights tribunal. A different menu of remedies may be available in that forum, including an award of compensation.

In **Kaiser v Multibond** (2003) 219 N.S.R. 83 (C.A.), Kaiser commenced a wrongful dismissal

action against his employer, alleging, inter alia, that he had been dismissed due to a physical disability. His tort action proceeded to trial, and he was awarded compensation. In the interim, he had filed a complaint with the Human Rights Commission; the Commission investigation was ongoing throughout the civil action. Following the conclusion of the litigation, the Commission decided that it would proceed with the complaint, and appointed a Board of Inquiry. The defendant employer in a preliminary motion asked the Board to rule that Kaiser was estopped from proceeding in that forum, and the Board agreed, on the basis that the trial judge in the civil action had been asked to rule on the issue of discrimination, and the remedy in that court had included compensation for any discriminatory conduct. The Commission appealed, but the ruling of the Board of Inquiry was upheld by the Nova Scotia Court of Appeal. The Court based it's decision on the concept of issue estoppel.

The comments of Hamilton, J.A. at the conclusion of her decision articulate the concerns raised by multiple proceedings:

> "Considering the importance of finality in litigation...along with the aim of avoiding duplicity, potential inconsistent results, undue costs, inconclusive proceedings and ensuring just results in the particular case, I am satisfied that the Board did not err in exercising its discretion to estop Mr. Kaiser from proceeding to a full hearing before the Board on Mr. Kaiser's complaint."

Estoppel is a very complex legal concept. However, it can be generally said that the application of the doctrine requires

-commonality of parties

-commonality of issue

-a tribunal authorized to decide the question

These requirements would rarely exist in the case of a public complaint vs a civil proceeding, and would virtually never exist in the case of a public complaint vs. a criminal proceeding. (Although the Court in **Wilms** (supra) came close to estopping the public complaint forum from making it's own finding of facts).

Allocation of resources

In my capacity as a civil litigation lawyer representing a large municipality in tort actions against police officers and departments (which actions are ever - increasing, Canada wide), it has become very apparent that multiple proceedings in multiple forums, whether justifiable or not, constitute a disproportionate allocation of officer time to testimony, diverting officers from their daily responsibilities. It is not at all unusual to see an officer required to testify in discovery examination, before a complaint hearing, at a preliminary inquiry, and at a criminal trial.

Solutions

Some solutions to the problem are identified above - estoppel, stay or delay of proceedings, application of the Charter.

Specialized tribunals can be used in a variety of contexts to deal with particular issues. In the

worker's compensation regime, for example, when an injury occurs in the workplace as the result of a tort by a third party, the worker may elect to accept compensation or pursue civil action. This does not eliminate the civil action, of course, as the worker's compensation fund will pursue the tortfeasor. However, the concept could conceivable be modified in the public complaint process, by, for example, requiring a complainant to elect civil action or public complaint, or providing a greater menu of remedies to the complaint tribunal, to award compensation. The latter would of course require a very high degree of expertise on the part of the oversight body.

This paper is a brief overview of some aspects of a complex issue. It is hoped that it will provide food for thought, debate, and possibly, change.