Police Oversight, Accountability and Regulation

Multiple Proceedings – Multiple Issues

Prepared for: CACOLE Conference 2005
For Presentation In: Montreal, Quebec
October 3 - 5, 2005

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Summary

I. INTRODUCTION

Policing in Canada is, arguably, one of the most publicly monitored and highly regulated activities in the country. With few exceptions, most citizens conduct their daily professional and personal activities in relative privacy, unencumbered by public scrutiny. With few exceptions, most police officers, by virtue of their powers and duties, not to mention their uniforms, emergency vehicles and publicly carried firearms, are conspicuous members of the community. Oftentimes uniformed officers cannot even partake in the traditional morning coffee break at the local coffee shop, an activity most citizens take for granted, without garnering the attention, and even criticism, of the public.

One only has to pick up a newspaper or watch the evening news in any city in the country, on any given day, to confirm that policing in Canada is, without doubt, a closely monitored activity. The print media is rife with articles, editorials, columns and letters to the editor relating to any and all issues involving law enforcement in this and other countries around the world. Local and national television news programs provide daily coverage, oftentimes including professional and amateur video footage, on stories relating to all aspects of policing from police interaction with citizens, to police interaction with each other, and to interaction with oversight authorities.

The nature and complexity of policing as well as media coverage and public awareness of policing issues has evolved greatly over the past number of years. Recent years have also seen a significant increase in the number of formal legal processes against the police and a significant number of recent proceedings are unprecedented. Police officers hold a civil office of trust and the high degree of regulation of police activity is justified by the broad duties imposed on constables by both common law and statute, as well as the wide array of powers associated with those duties.[1]

The purpose of this paper is to identify the various modes of police regulation, accountability and oversight and also identify a multitude of issues which typcially flow from the processes used to regulate police activity.

II. MODES OF POLICE REGULATION, ACCOUNTABILITY AND OVERSIGHT

Modes of police regulation, accountability and oversight are numerous and, more times than not, overlapping. The range of forums and processes by which a police officer may face an allegation of wrongdoing is very broad and may include:

[1] Ceyssens, Paul, *Legal Aspects of Policing*, Update 19 June 2004 – Police Civil Liability (3-1)_

- ***Supervision of officer by superiors and fellow officers*** – senior and fellow members supervise, mentor, oversee and report on conduct of other members.

- ***Media*** – "eyes and ears of the public" – general representation of the public interest in policing. Film and print media coverage, as well as attendance, and sometimes intervention, in many court and legal proceedings.

- ***Public complaints process*** – members of the public as well as other officers or the Chief may initiate a complaint regarding conduct of a police officer.

- ***Public Complaints Monitor*** – ensures that the citizen oversight responsibilities regarding public complaints against the police agency or any of its officers is addressed in accordance with existing legislation and for the common good of the citizens of the jurisdiction.

- ***Internal Affairs Investigation*** – IA Section investigates complaints and makes recommendations to Chief.

- ***Outside agencies -*** Oftentimes investigations are conducted by outside police or other oversight agencies.

- ***Crown Review/Opinion*** – Crown Prosecutor's office conducts a review of an investigation and offers an opinion on charges.

- ***Disciplinary hearing*** – Police agency convenes a public hearing into conduct of complained against officer.

- ***Criminal Law process*** – provisions of *Criminal Code*:
  (a) require police to account for substantive enforcement powers
  (b) misuse of police power may affect admissibility of evidence
  (c) police conduct may factor into sentencing process
  (d) police officers themselves may be charged with criminal office (independent review by Crown to determine whether charges should be laid)

- ***Law Enforcement Review Board*** – Public can appeal decision of Chief to LERB for new hearing. LERB will hold public hearing into conduct of responding police officer.

- ***Police Commission*** – general supervision of policing functions, Chief of Police and police agency.

- ***Police Association*** – represents the legal and employment interests of police officers to ensure the police agency governs itself in accordance with the Collective Agreement, legislation and policy with respect to its members.

- ***Charter of Rights and Freedoms*** – failure to comply with *Charter* provisions may jeopardize prosecutions and expose police officers to risk of civil proceedings.

- ***Civil Law process*** – legal accountability of police officers individually and police agency as an organization.

- ***Human Rights Law process*** – legal regulation of police: recruitment, workplace, operational policing.

- ***Fatality Inquiries*** – public inquiry conducted by independent outside agency into circumstances where an individual dies while in police custody or where there is police involvement.

- ***Public Inquiries*** – legal regulation of police conduct – public hearing into police conduct.

- ***Courts*** – Both criminal and civil courts routinely comment on police conduct arising out of evidence presented at proceedings. These comments may result in further investigation by police agency and possible discipline or charges of police officer.

- ***Freedom of Information legislation*** – an individual can make a request for information/records maintained by the police agency about that individual.

While any combination of these processes or proceedings is possible, the most common combination is probably public complaints/civil litigation. The nature of the conduct that can attract concurrent allegations of wrongdoing is also very broad. It can include negligent or substandard performance of police duties as well as intentional wrongdoing.[2]

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[2] Johnson, Simon, *Multiple Jeopardy* – Legal Education Society of Alberta 2004 Banff Refresher Course, Civil Litigation. Simon Johnson is a partner at Bennett Jones LLP in Edmonton, Alberta. Bennett Jones represents the legal interests of many professionals, including medical professionals, police officers and police agencies and enjoys the trust of its clients, the judiciary and the general legal community in the province of Alberta and has a reputation for outstanding legal representation. Not only is the foundation for this paper to be credited to Simon, I have used his ideas and his words almost verbatim throughout most of the remainder of this paper. For the most part, I have simply amended Simon's words to be specific to

In cases of negligence, the most common combination of proceedings is professional discipline proceedings for substandard conduct coupled with a civil action for negligence and/or intentional wrongdoing. The most common situations of intentional wrongdoing are probably those relating to arrest, alleged *Charter* violations, and use of force. This typically gives rise to discipline proceedings for disreputable conduct together with a civil action and perhaps a criminal prosecution.

Finally, there are a range of possible orders to which a police officer or a police agency may be exposed in different forums. These fall into five main categories:

a. loss or restriction of liberty,
b. punitive financial orders,
c. temporary or permanent loss of the rank or engaging in a particular activity,
d. compensatory financial orders, and
e. mandatory skills assessment and/or remediation.

For example, a police officer involved in a fatal motor vehicle accident where there is an allegation of liability may find himself or herself concurrently facing a criminal prosecution, a disciplinary hearing, a fatality inquiry and a civil action by the complainant. In Alberta, the fatality inquiry is usually stayed until the conclusion of all criminal proceedings. The officer faces the risk of imprisonment in the criminal proceedings, termination of employment in the disciplinary proceeding, intense public and media attention and criticism in the public fatality inquiry and an award of damages in the civil action.

III. ISSUES SURROUNDING THE PROCESSES OF REGULATION AND OVERSIGHT

Police officers who are alleged to have engaged in wrongdoing during the course of their duties (and sometimes when off duty) often find themselves facing proceedings in several forums concurrently. The resulting "multiple jeopardy" gives rise to a range of legal and practical issues for defence counsel.

In one sense the use of the term "multiple jeopardy" for these situations is not technically correct. The problem is not that the officer faces multiple sequential proceedings in one forum, which is the classic meaning of "double jeopardy". Rather, the officer faces concurrent proceedings in two or more different forums.

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defending police officers in civil proceedings and he deserves all of the credit for all the good work and ideas in this paper. I am completely responsible for any errors or omissions or misconstruction to Simon's work.

Definitive answers on all the issues raised are not covered in this paper and many of the issues do not have definitively correct answers. Similarly, this paper does not address all of the issues that arise in defending police officers in individual proceedings in isolation. This paper identifies some of the particular legal and practical issues that multiple jeopardy situations raise, and suggests some of the considerations that go into developing strategy in these situations.

IV. STRATEGY IN MULTIPLE JEOPARDY MATTERS

The reason why multiple jeopardy situations are difficult for counsel is that steps taken, and decisions made, in one proceeding can affect other proceedings. To give some examples:

(i) admissions made in one proceeding may be admissible in another proceeding;
(ii) evidence given by an officer in one proceeding may be admissible, or used for cross-examination, in another proceeding; and
(iii) disclosure of a line of defence in one proceeding may permit opposing parties in other proceedings to better meet that line of defence.

The strategic goal in acting for a police officer in multiple jeopardy situations is to achieve the best possible result across all areas of exposure that the officer may face. This generally will involve three elements:

(a) assessing the full range of liability which the officer or police agency faces;
(b) priorizing, from the officer's and police agency's point of view, the potential outcomes; and
(c) adopting strategies to achieve those outcomes.

The most important principle in defending officers facing multiple jeopardy situations is to ensure that the individual proceedings are not looked at in isolation, but rather are considered in light of an overall strategy.

A. ASSESSING THE RANGE OF LIABILITY

While a police officer may be aware from the outset that they are facing multiple proceedings, this is not always true. Commonly, the officer will seek assistance from their supervisor, Association or legal counsel when they are advised of the first proceeding against them, and will only learn of additional proceedings later. In particular, other regulatory bodies may not take any action - or may not notify the officer of any proceeding - until after any criminal proceedings are complete, and civil actions may not be commenced until months or years after other proceedings have begun.

A suggested practice is to advise the officer early on in the first proceeding if there is a significant risk of additional proceedings in other forums. There are two reasons for this. First, the failure to do so may cause some loss of faith in the competence of counsel if further proceedings arise. Perhaps more importantly, it is often prudent to give an officer advice as to how to deal with other investigators, lawyers or process servers with whom they may be dealing if proceedings are brought in other forums.

It is entirely possible that the first time the officer will learn about the other proceedings will be when an investigator or process server shows up on their doorstep. It is important to have the officer prepared for this eventuality.

Sometimes, counsel may be able to inquire if a police officer will be facing additional proceedings. It may not be easy to find out from another agency if a proceeding or inquiry has been ordered or directed without running the risk of triggering an investigation, although on occasion this can be done in a manner that does not reveal the officer's identity (for example, if counsel has a good relationship with a professional regulatory body, some non-specific inquiries can be made to see if there has been a recent direction or order of a particular nature).

If counsel wants to know whether a civil action has been brought, there is always the option of a courthouse search. There is a slight risk that obtaining a statement of claim in this way may defeat any defence based on a failure to properly serve the statement of claim before its expiry. As a practical matter, the importance of knowing of the existence of a civil claim and the issues alleged in that claim will generally outweigh the risks that a civil action will be kept alive in this way.

It is likely prudent to assume that any allegation of wrongdoing during the course of an officer's duties which is reported to the police agency is likely to end up being considered by Internal Affairs and may well end up with criminal charges or as a civil action if any person is alleging harm that would be compensable in damages.

It is also safe to assume that any "threshold" incidents will likely result in a complaint, law suit, charges or public inquiry.[3] Gord Graham describes these Threshold Incidents as follows:

a. Any injury, loss or damage to person, deprivation of liberty, damage to or loss of property or damage to interest in property caused by police, including when they inform police of same.
b. Any major injury requiring hospitalization or death, and the police are on scene.

[3] Graham, Gord, *Tactical Report Writing*, www.gordongraham.com.

c. Anytime someone tells you, “I’ll sue”, or any derivation thereof.

B. PRIORIZING THE OUTCOMES

A key step in any multiple jeopardy matter is to define the police officer’s and the police agency’s strategic agenda. It may not be possible to do this at the outset, because the proceedings that the officer will face and the likelihood of a successful defence will not be clear. However, at a relatively early stage, counsel should review the range of exposure that the officer or agency faces (or may face) and the officer’s and agency’s priorities among those proceedings.

Because an effective defence strategy in a multiple jeopardy matter will often involve trade-offs, with steps taken in one proceeding potentially affecting the outcomes in other proceedings, it is important to know where the police officer’s and the agency’s priorities lie. At a superficial level, the officer’s priorities may seem self-evident. When asked what they want, the officer is likely to say that they are looking for vindication, or at least dismissal of the proceedings against them. This, however, should be the starting point rather than the conclusion of the analysis. In some cases, it may be clear from the outset that this outcome can and will be achieved.

More commonly, the situation will be less clear and the ultimate outcome less certain. In these cases, it is important to go behind this general desire and find out specifically where the officer’s and police agency’s highest priorities lie.

Some examples will illustrate the considerations that may be relevant. A police officer at the early stages of their career may be most concerned about promotion and reputation and less concerned about the possible financial and personal costs of a fight to preserve that right. An officer approaching the end of their career may be less concerned about promotion or their reputation, and more concerned about protecting retirement options. Other members have had a matter “hanging over their heads” for years and just want to be able to “cut the grass” without thinking about it anymore.

An officer facing the likely loss of membership in a police service may be very concerned about the manner in which that right could be lost, and may prefer a quiet resignation to a public hearing even if they have some chance of successfully defending themselves at a hearing. Publicity is often a concern for police officers and police agencies: quite apart from the embarrassment that it brings, it frequently results in further complainants coming forward.

There may well be financial issues or constraints on the police officer’s or police agency’s agenda. The existence of funded legal assistance and indemnification for financial consequences may make an officer relatively less concerned about the outcome in some proceedings than in others where their personal interests

will be affected. Conversely, the possibility of an adverse costs award may be an important consideration for a police agency in deciding whether to contest a particular proceeding.

There may also be timing issues. A professional may be more concerned about the timing of an outcome than the outcome itself. This is particularly true if there are pension entitlements at stake (as, for example, with police officers facing possible dismissal). Very often, the next best thing to dismissal of a proceeding is the delay of the final outcome as long as possible. Counsel must be mindful, however, that delaying proceedings solely in order to obtain some advantage for a client raises ethical concerns.

Police agencies, more so than individual police officers, may also be concerned about setting legal precedent and the potential ramifications of same. Oftentimes a case will be decided on its specific facts and will have little precedential value one way or the other for the agency. Decisions will often be made this basis.

While priorities may vary, there is one that generally overrides all others. In those cases where there are actual or potential criminal proceedings, the successful defence of those proceedings is likely to be the paramount consideration for virtually all police officers. There are several reasons for this. First, in most cases the consequences of a criminal conviction, both in sentence and in stigma, are likely to be the worst possible outcome for the officer. Second, a criminal conviction tends to make it very difficult to defend proceedings arising from the same factual nexus in other forums. Third, the very fact of a criminal conviction may be a ground for professional discipline.

The key is to understand how the police officer's or police agency's interests may be affected by the various proceedings that they face or are likely to face and where the respective priorities lie among those interests. This identification of priorities and interests allows for the development of a strategic agenda best suited to achieving those priorities.

C. EFFECTING THE AGENDA

Once the police clients' strategic agenda has been defined, the next step is achieving that agenda. To an extent, the strategies that are used are no different to those for a client who is facing a single proceeding. However, there are issues that are specific to multiple jeopardy situations. Some of these issues are discussed below.

1. CHOICE OF COUNSEL

A key strategic decision is whether to have one counsel act in all proceedings, or whether to retain separate counsel for different proceedings. The obvious argument for having specialized counsel for different proceedings is expertise

and experience. Relatively few practitioners feel equally comfortable in criminal, discipline, and civil proceedings.

On the other hand, there can be significant advantages to having one counsel acting in all proceedings. This will typically be less expensive for the client, if only because there will be economies in preparation for multiple hearings. There is less chance of a failure to implement a consistent strategy, or a failure to communicate, if there is one single counsel coordinating all of the proceedings.

Also, it may be more important to have counsel who is well-versed in representing police clients than counsel who is well-versed in the forum in which the officer appears. Counsel who appear regularly for clients in a particular profession develop a background in how the world of those professionals operates. For example, counsel who appear regularly for physicians will not only be familiar with medical terminology, but also will know how hospitals and physicians' offices operate, what should be contained in office notes and hospital charts and what omissions are significant, what steps are normally followed in an examination and where there has been a deviation from those steps, and similar matters. The same goes for the practices and policies of policing.

This body of knowledge may be at least as important a part of a successful defence as familiarity with proceedings in a particular forum. In many cases, the most effective representation (if it is financially realistic) may well be a team of lawyers that can combine experience in representing professionals in a particular field with experience in particular types of proceeding.

2. INFORMATION AND STATEMENTS

The issue of providing information or statements to investigators is a classic example of the dilemmas produced by multiple jeopardy situations. The request may come from a regular police investigation or from Internal Affairs. A police officer who is the subject of a complaint will often be faced with a request for an interview or statement. In some circumstances, an officer may be under a statutory obligation to respond. Even where there is no obligation to respond, there may be an opportunity to do so.

The decision whether or not to cooperate and provide information to investigators is always a difficult decision. Specifically in a multiple jeopardy situation, there are circumstances where it may be advantageous to the officer to provide information to investigators. In some cases, the officer may have a persuasive explanation for the allegation that is being made that provides a complete defence in all proceedings. In other cases, there may be an explanation for the allegation that, while it will not provide a complete defence to all proceedings, may move exposure into a less serious proceeding. An example of this latter situation occurs where an officer facing a criminal investigation advances self-defence as an explanation for conduct that, on its surface, may appear to be

intentional (such as explaining allegations of excessive force or assault during an arrest).

There are two problems with giving information at an early stage. The first is that the information is typically sought at a stage in the proceeding where the officer does not have full knowledge of the nature of the allegations they face and the evidence in support of those allegations. There is a risk that information or statements may ultimately end up being inconsistent with other evidence, and may be used for impeachment. This can be contrasted with a civil examination for discovery, where the officer will typically have a much better idea of the case that has to be met before being examined for discovery and having to commit to a detailed version of events.

The second problem is the risk that the information or statement may be available for use in other proceedings than the proceeding in which it was given. This is a classic multiple jeopardy concern. Counsel must not only consider the impact of giving the statement in the particular proceeding, but must also consider its possible impact in other proceedings. This includes the potential for its mandatory production through the civil discovery of records process (this point is discussed further below).

The following issues should be considered in determining whether to provide information or statements to investigators in a multiple jeopardy situation:

> (i) Consider whether there is a mandatory obligation under statute, regulation or policy to provide information or a statement. If there is, consider whether that mandatory obligation is legally valid. Also, consider whether, as a legal and practical matter, a brief denial is preferable to a detailed explanation where there is an obligation to provide information or a statement, even if it opens up the officer to a possible further proceeding for failing to co-operate with the investigation.
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> (ii) Consider what ***Charter***, statutory, and common-law protections are available to prevent the use of the information or statement in other proceedings. In doing so, keep in mind that there are three principal ways in which the information or statement could find its way from one proceeding to another. The first is co-operation among opposing parties, such as the sharing of information between the police and a professional regulatory body. The second is the production obligations in a civil proceeding and/or disclosure obligations in a criminal proceeding, whereby the officer may be required to produce material obtained with respect to other proceedings. This is discussed further below. The third is the use of the statement or information in open court.
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> (iii) Consider the substantive exposure that the content of the information or statement will create. Again, the classic example occurs where a

officer explains away an allegation of apparently willful misconduct as substandard practice. While this may have short-term benefits in bringing any proceeding for willful misconduct to a close, it may have longer-term implications for other proceedings.

(iv) Consider the substantive benefits of providing the information or statement. In particular, where there is an allegation of willful wrongdoing in criminal proceedings, and no fully exculpatory explanation, consider whether the alleged wrongdoing can be sufficiently convincingly explained as substandard practice that the investigating body is prepared to leave the matter to the discipline process.

One word of caution is in order. Police officers providing information or statements to investigators have two choices: they can provide a factually accurate account of the matter, or they can issue a denial. What they cannot do is provide a false statement. This applies whether those investigators are from a police agency or from another regulatory body, and whether the provision of the information or statement is mandatory or discretionary. Providing false information at the investigative stage of either a criminal or a disciplinary proceeding may constitute the criminal offence of obstructing justice under s. 139 of the ***Criminal Code***.

3. SEQUENCE OF PROCEEDINGS

There will rarely be a legal bar to multiple proceedings in different forums. Accordingly, in most situations, the principal concern will not be whether there will be multiple proceedings, but the order in which those proceedings will take place. Typically, the officer will have two concerns with the order in which proceedings are heard:

(i) the officer will want to have the most serious proceeding first, in order to maintain the tactical advantage of not giving the prosecution in that proceeding a preview of the officer's defence in a less serious proceeding; and

(ii) the officer will want to ensure that the key witnesses, and in particular the plaintiff in any civil action, is committed to a version of events prior to the officer being committed to a version of events.

The most serious proceeding usually means the criminal proceeding, if there is to be one, or failing that a disciplinary proceeding. As a practical matter, there is rarely a problem in holding other administrative proceedings, such as disciplinary proceedings, in abeyance until after the conclusion of any criminal proceedings, including appeals.

The problem of ordering proceedings most commonly arises where there is a civil action as well as a criminal charge or discipline proceeding, and the plaintiff in the civil action wishes to have examinations for discovery proceed in the civil action before the criminal trial or discipline hearing (the realities of trial scheduling in Alberta are such that the risks of a civil action proceeding before a criminal trial or discipline hearing are going to be remote). The concern is twofold:

> (a) the transcripts of the examination for discovery may be passed to the Crown or the regulatory body, and used either directly to cross-examine the officer or indirectly to anticipate and prepare to rebut the officer's defence; or
>
> (b) the plaintiff will receive an unfair advantage through hearing the evidence of the officer before testifying for the prosecution in the criminal prosecution or discipline proceeding (or being discovered themselves, given the customary order for discoveries in civil matters), and will have the opportunity to tailor their evidence to meet the evidence of the officer.

The governing legal principles only partially address these concerns. A stay will rarely be available. As a general principle, there is a high threshold for obtaining even a temporary stay of civil proceedings pending a criminal trial, even where the two proceedings arise out of the same facts. The fact that the plaintiff, who may be a key witness in the disciplinary matter and whose credibility may be central to the prosecution, will receive a preview of the defendant's evidence will not necessarily justify a stay.

The implied undertaking rule, however, applies to both production and discovery in the civil proceedings. A party will generally not be entitled to provide civil discovery transcripts or productions to the prosecution in criminal or discipline proceedings for the purpose of furthering those proceedings. There is a reasonable degree of protection from disclosure of information from examinations for discovery to the prosecution in criminal or disciplinary proceedings, but little protection from disclosure to the person who is likely to be the prosecution's key witness.

If counsel wants to ensure that the complainant is committed to a version of events before the police officer gives his or her version, a direct application for a stay of the civil proceeding is unlikely to succeed. Alternative ways of achieving the same goal would include:

> (i) an agreement to postpone discoveries in the civil action until after criminal and/or disciplinary proceedings;

(ii) an agreement, or in the alternative an order, reversing the normal order of discoveries so that the plaintiff is examined before the defendant, and therefore cannot tailor their evidence; or

(iii) if there is a criminal charge, an election for a preliminary inquiry and an early date for that inquiry so that the civil plaintiff is examined at the preliminary inquiry prior to any civil discovery of the officer.

4. PRODUCTION AND DISCLOSURE ISSUES

Frequently, a citizen who has brought a civil action against the police will have received disclosure from the Crown in the case of criminal proceedings, or from a regulatory body in the case of discipline proceedings.

The important question that then arises is whether that disclosure must be produced in a civil action arising out of the same factual situation. This raises the issue of the interaction between the implied undertaking rule and the interests underlying that rule, to the extent that it applies to disclosure, and the duty to produce documents in a civil action.

This is an evolving area of law at the present time. Any entitlement to receive the disclosure is the client's entitlement rather than counsel's. The obligation of confidentiality imposed by the implied undertaking rule binds the client, as well as counsel: the use of the term "undertaking" in this regard is misleading, and the duty is better understood as a duty of confidentiality. As such, the issue should correctly be seen as one of the party's own duty to make production, rather than production from a third party.

The broad view is that no collateral use of the disclosure may be made by any person, while the narrow view is that no collateral use may be made by the person receiving the disclosure (this narrow view would not prevent production in a civil action). A corollary of this holding is that civil defence counsel who wishes to make any use of Crown disclosure in the civil proceeding must seek leave from the court. Crown disclosure may contain material in which different persons have separate privacy interests. As a result, it would likely be prudent to notify the body giving disclosure to the defendant before any application with respect to the production or use of that disclosure in the civil proceeding is made.

While the Alberta case, ***Bourgeois,*** deals with disclosure from the Crown in criminal proceedings, the same principles would presumably apply to disclosure received from a professional disciplinary body in the absence of any statutory provision governing the production or use of such materials in civil proceedings. In such proceedings, it is possible that an express undertaking by counsel may be sought as a condition of receiving disclosure. It is likely prudent to ensure that any such undertaking explicitly contains a reservation that the material will not be provided to other persons "except as required by law".

How, then, should defence counsel handle Crown disclosure, or disclosure from a professional regulatory body, in civil actions in light of the decision in ***Bourgeois*** on the scope of the implied undertaking? Likely, the following principles apply:

(i) the existence of any such disclosure should be set out in an affidavit of records.

(ii) Defence counsel can neither use the disclosure in a civil proceeding in any way, nor produce it to other parties in the civil proceeding, without leave of the court.

(iii) Notice of any application for production, which in most cases is likely to be brought by the plaintiff rather than by the defendant, should be given to the Crown or the professional regulatory body who provided disclosure.

It is important to note that,because the implied undertaking is owed to the court, not the Crown, the consent of the Crown likely cannot relieve a party from the undertaking. This can only be done by an order of the court.

5. PLEA AND SETTLEMENT ISSUES

The situation frequently arises where an officer in a multiple jeopardy situation has the opportunity to settle proceedings in one forum while proceedings in other forums are still outstanding. One common situation occurs where an officer faces both criminal and/or disciplinary proceedings and a civil action for an intentional misconduct and the complainant is willing to settle the civil action. Often in these cases the officer will be keen to settle the civil action, seeing it as a possible solution to all of their problems. There will be cases where resolution of one proceeding is possible, and even advisable, while other proceedings are still outstanding; however, there are a number of issues that must be considered before any such settlement.

The officer will want to ensure that the resolution of one proceeding, or the manner of its resolution, does not compromise other proceedings that the officer still wants to contest. To take the most extreme example, a plea in a criminal or disciplinary proceeding will likely be admissible as an admission in any other proceedings of the facts acknowledged as part of the plea. As a result, the facts that are acknowledged will need to be carefully crafted to avoid, as far as possible, making admissions that could be damaging in other proceedings.

Where a civil action is settled, the officer must understand that a complainant's willingness to settle a civil action does not mean that other proceedings arising from the same facts will automatically vanish. Generally, this will not be the

complainant's decision. The Crown in criminal matters, and professional regulatory bodies in discipline matters, will typically take the complainant's wishes into account in determining whether to commence or continue their proceedings, but this will only be one consideration. As a practical matter, when the officer is advised of this, the desire to settle a civil proceeding while other proceedings continue often evaporates.

If a civil proceeding is going to be settled, it is advisable to make a Release from the plaintiff a condition of settlement. There are several considerations that come into play in drafting a Release in multiple jeopardy situations.

(i) It is oftentimes advisable to include a confidentiality provision. However, it is prudent to advise the client that the protection given by such a provision is limited. Particularly in high-profile matters, there is a high degree of likelihood that the fact of settlement, and even the terms of settlement, are going to emerge. Typically, the confidentiality provision is not drafted to be reciprocal. There may be circumstances where counsel will want to introduce into other proceedings the fact that the complainant has profited from the allegation.

(ii) It is suggested that counsel not include any provision that purports to limit the ability of the complainant to either commence or continue proceedings in other forums (i.e., forums other than civil litigation, such as a criminal complaint or professional discipline proceedings), or to cooperate with other proceedings. There are two reasons for this. First, any such provision is likely void as against public policy. Second, the involvement of counsel in obtaining a Release containing such a provision may violate the lawyer's Code of Professional Conduct. However, it is typical to include a term that prohibits the complainant from bringing any other civil proceeding.

With careful drafting, a confidentiality provision can prohibit disclosure of the fact and terms of settlement without prohibiting disclosure of the underlying conduct. Even though it is likely not an option to include any term that restricts the complainant from commencing or continuing criminal or other proceedings, counsel is well advised to discuss this point with the client to ensure that the client understands why this is not included. You do not want to find yourself in a situation where you are later criticized by your client for not obtaining complete protection through the Release.

V. CONCLUSION

In today's climate it is not unusual for police officers and police agencies to face situations of multiple jeopardy on a regular basis. These multiple jeopardy

situations raise interesting and challenging issues for counsel. They are legally, strategically, and ethically complex. Effective client representation requires careful and creative analysis, strategy, and execution to achieve optimal results.