
To: All Municipal Police Chief Constables

And to: All Professional Standards Officers

From: Office of the Police Complaint Commissioner

Date: September 30, 2015

Re: **Section 179 - Suspensions of *Police Act* Investigations and Proceedings**

LEGISLATION

Section 179 of the *Police Act* provides that the Commissioner or Adjudicator may suspend a *Police Act* investigation or proceeding if they are of the view that to continue the proceedings would prejudice a criminal investigation or prosecution. This section states, in part, the following:

- (4) The police complaint commissioner or an adjudicator may suspend proceedings under this Part if, in the police complaint commissioner's or adjudicator's opinion, continuation of the proceedings would prejudice a criminal investigation or prosecution.
- (5) Without limiting the authority of the police complaint commissioner or adjudicator to reconsider the matter, the complainant or the member or former member whose conduct is the subject of the complaint or investigation may, on written notification to each other, request the police complaint commissioner or adjudicator to reconsider a suspension under subsection (4).
- (6) From the date of giving or receiving written notification of a request for reconsideration, the complainant and the member or former member have 10 business days to make written submissions to the police complaint commissioner or adjudicator in respect of the decision to suspend.
- (7) Any period of suspension under this section must not be counted for the purposes of proceedings under this Act.

PURPOSE

The purpose of this Information Bulletin is to provide an update to police departments of the application of section 179(4) to *Police Act* investigations.

PREJUDICE TO CRIMINAL INVESTIGATION OR PROCEEDING

Consistent with the *Police Act*, it has been the practice of the OPCC to afford priority to parallel criminal investigations and prosecutions. Generally speaking, an important consideration in determining whether to grant a suspension of a *Police Act* investigation is the assessment of whether there exists a legitimate risk of prejudice to a criminal investigation or prosecution. This risk of prejudice applies only to same incident matters where the criminal and *Police Act* investigation (or prosecution) involve the same parties and are based on the same set of facts or circumstances. It is the discretion of the Police Complaint Commissioner or an adjudicator to determine whether *Police Act* proceedings should be suspended.

CONSIDERATIONS

Right to Silence

Bearing in mind that the rights accorded to a member or former member in criminal investigations and proceedings differ significantly from those rights and obligations under the *Police Act*, it is important to avoid any confusion that may occur as result of parallel investigations. For example, cooperation and participation under the *Police Act* is mandatory for police officers, however, subject officers are not required to provide a statement for the purposes of a criminal investigation. Participation by a subject officer in the *Police Act* process by providing a compelled statement could interfere with the accused's right to silence.

Similarly, the participation in a *Police Act* interview by a complainant could create a conflict between the complainant's right to silence and a thorough examination of the complainant's perspective of the material issues if the *Police Act* investigation is examining the same material issues as contained in a criminal proceeding against a complainant.

Examining the Same Issue

In certain cases there exists a real potential that the criminal investigation or proceedings will likely examine the same issues involved in the *Police Act* investigation and factual findings by the court could resolve issues identical to those contained in the *Police Act* proceeding. It is important to note that Professional Standards investigators will be able to have access to the evidence gathered during the criminal investigation, and will have access to the evidence tendered in the court process. These avenues of information will eliminate redundancy in the investigations, and have the benefit of evidence from the court process in the form of admissions and testimony under oath under the scrutiny of cross-examination. The court process will also be able to shed light on evidence in terms of reliability and credibility. In addition, outcomes of same matter criminal proceedings such as criminal convictions can be used to form the basis of a decision under the *Police Act*.

To Avoid Inconsistent Verdicts

The Act contemplates the possibility of dual or parallel proceedings. Section 179(3) of the *Police Act* states that an acquittal or conviction on a criminal charge arising out of the same facts and circumstances as those related to a complaint or investigation does not preclude the continuation or initiation of proceedings under this Act. In order to preserve the integrity of the adjudicative process, it is important for inconsistent verdicts to be avoided. As mentioned earlier, a *Police Act* proceeding may examine the same issue as contemplated in the criminal proceeding, however, in the *Toronto (City) v. C.U.P.E.*¹ case, the Supreme Court of Canada gave particular weight to criminal convictions and considered questioning the validity of a criminal conviction to be a “very serious matter” (para. 54).

The doctrine of abuse of process describes the importance of maintaining the integrity of the adjudicative process by avoiding inconsistent verdicts:

If the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality. Toronto (City) v. C.U.P.E. (para. 51).

This issue is particularly relevant considering that the burden of proof in a criminal proceeding is far higher than that under the *Police Act*. When considering same incident matters, criminal investigations and prosecutions should take precedence over the *Police Act* matter to avoid inconsistent verdicts.

Integrity of Investigations

Interviewing witnesses on more than one occasion regarding the same incident for two separate processes can potentially affect the integrity of the criminal investigation or proceeding by contributing to procedural complexity and/or confusion. Any investigative steps including interviews of witnesses should be avoided if there is a possibility of prejudice to a criminal investigation or prosecution.

PROCEDURAL RECOMMENDATION

1. Section 179(4) applies to both police officers and complainants who are either under investigation or charged criminally.
2. The foundation of a suspension is the concern regarding prejudice to the criminal investigation or prosecution.
3. If a PSS investigator believes that continuation of the *Police Act* proceeding will prejudice the criminal investigation or prosecution involving a member or a complainant, then a

¹ *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 (Canlii), [2003] 3 SCR 77

written request should be sent to the Police Complaint Commissioner via the assigned OPCC analyst outlining the need for a suspension and the reason. The Commissioner or Adjudicator may issue a suspension without a request from the police department.

4. When determining whether continuation of the *Police Act* proceeding would have a prejudicial effect, police departments should consider the following:
 - a. Whether the criminal proceeding or prosecution will examine the same issues as contained in the incident which led to the *Police Act* proceeding.
 - b. The stage of the *Police Act* proceeding. For example, whether the complainant or member has already provided a statement, or whether other investigative steps outside interviewing the member or complainant can be completed without prejudicing the criminal investigation or prosecution.
 - c. The member or complainant's right to silence as guaranteed under section 7 of the *Charter of Rights and Freedoms*.
 - d. The need to use evidence gathered during the criminal investigation or use testimony under oath during the criminal trial.
5. PSS investigators should make an early determination as to whether the complainant or member would likely be interviewed on the matter. If a complainant or member is to be interviewed on the same set of facts or circumstances as that contained in the criminal investigation or prosecution, the criminal matter will take precedence.
6. In order to avoid inconsistent verdicts, *Police Act* proceedings should be suspended pending the disposition of the criminal prosecution.
7. Each request for suspension of an investigation will be determined on the unique circumstances of the case. Every suspension granted is subject to a request for reconsideration by a member, former member or complainant within the parameters establish under the *Police Act*.
8. If the suspension is approved by the Commissioner or Adjudicator, the OPCC will issue a *Notice of Suspension*, formally suspending the *Police Act* proceeding until further notice. The Notice will be sent to:
 - a. The Discipline Authority;
 - b. The Chief Constable (if different from the Discipline Authority);
 - c. The complainant (if applicable);
 - d. The member(s); and
 - e. The assigned PSS investigator
9. Upon the conclusion of the criminal investigation or prosecution in relation to the matter, the assigned Professional Standards Investigator should immediately notify this office so the suspension can be lifted and the *Police Act* proceedings continued. The period the file is suspended will not be counted for the purposes of proceedings under Part 11 of the *Police Act*.

The *Notice of Suspension* will contain the following applicable paragraph:

Without limiting the authority of the Police Complaint Commissioner to reconsider the matter, pursuant to section 179(5) of the *Police Act*, if the complainant or the member(s) disagrees with the granting of this suspension of the investigation, or the need for the suspension to continue, they may make a written request for reconsideration and include submissions to the Office of the Police Complaint Commissioner outlining the basis for the request. The Police Complaint Commissioner will provide notice of the reconsideration request, including any submissions to the remaining parties identified in the original *Notice of Suspension*. The complainant or member(s) may also provide written submissions regarding the request if they so choose within 10 business days of receiving written notification of a request for reconsideration. The address for the Police Complaint Commissioner is:

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