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PARALLEL CIVIL AND CRIMINAL PROCEEDINGS: THE DISCLOSURE OF CROWN BRIEFS

by Giovanna Asaro

I. Introduction

This article considers one disclosure issue which commonly arises when there are parallel civil and criminal proceedings, namely, the disclosure of Crown Briefs. In particular, this article examines the impact of the recent decision of the Ontario Court of Appeal in *D.P. v. Wagg ("Wagg")*, in which the Court approved a screening mechanism by which Crown Briefs are to be screened for public interest and policy considerations before they are disclosed in the context of civil proceedings.

II. What is a Crown Brief and What Are Its Typical Contents

Where there are parallel civil and criminal proceedings, the accused will have received Crown disclosure in the criminal proceeding in the form of a Crown Brief. A Crown Brief contains essentially all material evidence which the Crown must disclose to an accused pursuant to its duty of full disclosure as defined by the Supreme Court of Canada in *R. v. Stinchcombe*.

Crown Briefs contain a variety of documents with varying degrees of sensitivity. Typical documents include "will say" statements, summaries of potential witnesses' testimony, statements of the accused and the complainant, incident reports, statements of police officers, and police officers' notes. The documents may contain information of a highly sensitive nature, such as information about police informants and witnesses, wiretap surveillance, and DNA testing. The documents may also contain information about third parties, such as child care agencies, support organizations, medical doctors, psychiatrists, and psychologists.

As will be discussed below, the issue in *Wagg* centered on the disclosure of a statement provided by the defendant/accused in the criminal proceeding and contained within the Crown Brief. The Plaintiff believed that this statement would serve to confirm her allegations of sexual assault.

III. The Wagg Decision: Factual Background

The facts of the *Wagg* case are as follows: The Plaintiff alleged that she had been sexually assaulted by the Defendant Wagg, an obstetrician and gynaecologist, during the course of a medical examination. The Plaintiff reported the incident to the police, who conducted an investigation. As part of the police investigation, a statement was taken from Wagg, who was subsequently charged with sexual assault. The trial judge in the criminal proceeding held that Wagg's right to counsel under section 10(b) of the *Charter* had been violated and, as such, the statement he gave should be excluded under section 24(2) of the *Charter*. The criminal charges against Wagg were ultimately stayed because of unreasonable delay.

The Plaintiff commenced a civil proceeding against Wagg, in the context of which, she sought production of the contents of the Crown Brief. The Defendant refused to produce the Crown Brief on the basis that production was precluded by the implied undertaking rule. This rule, he argued, precluded the use of information generated and provided to an accused in the course of criminal investigations to be used for collateral purposes in subsequent civil proceedings.

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At first instance, the Master held that the contents of the Crown Brief were not relevant and therefore not producible. On appeal to the Superior Court of Justice, the Court ordered the disclosure and production of the Crown Brief holding that there is no absolute implied undertaking rule precluding such an order. The case was appealed to the Divisional Court and further appealed to the Court of Appeal.

IV. The Divisional Court: The Screening Mechanism

At the Divisional Court, the Crown Brief was ordered to be disclosed in the Defendant's affidavit of documents. However, the Court held that the production of the Crown Brief contents would be subject to a screening mechanism to protect public interest considerations generated by the information contained within such a brief.

The Divisional Court recognized that on "pure" civil discovery principles, the contents of the Crown Brief should be disclosed and produced: the contents were relevant; they were in the possession and control of the Defendant; and they were not protected by privilege. However, the Court held that these principles could not govern because the disclosure and production of a Crown Brief triggered policy and public interest considerations which must be considered and weighed. In that regard, the Court stated as follows:

> There may be circumstances in which the public interest in protecting legitimate privacy concerns and the integrity of the criminal investigation process itself outweigh the value we attribute to full production in a civil proceeding.

The Court reasoned that, given the varied contents of Crown Briefs – from information provided by police informants to DNA test results – the broadened disclosure of Crown Briefs raised "infinite and unforeseeable public interest considerations" that must be weighed. Those considerations include the protection of police informants; the protection of witness identities; and the protection of other third party sources of information, such as child care organizations and psychiatrists. The Court was cognizant that the disclosure of Crown briefs could lead to serious unforeseeable consequences, such as jeopardizing the safety of police informants.

The Court recognized that the parties to the civil litigation may have no interest in protecting legitimate public policy interests or may not even recognize that such interests exist. As such, the Court concluded that the appropriate state agency should have the opportunity to "assess the public interest consequences involved" and to assert the "public policy viewpoint." The Court articulated a screening mechanism for the production of Crown Briefs, pursuant to which, the appropriate state agencies would have a central role in asserting the public policy viewpoint.

That screening mechanism – which was ultimately affirmed by the Court of Appeal – consists of the following:

- the party who has possession or control of the Crown Brief must disclose the existence of the Brief in Schedule "B" of his or her affidavit of documents and describe in general terms the nature of its contents; and
- the documents in the Crown Brief are not to be produced unless:
  - consent has been provided by the appropriate state authorities – namely, the Attorney General and the relevant police agency; or

- a Court order for production has been obtained on notice to the relevant state authorities and to all parties to the civil proceeding.

V. The Court of Appeal: The Screening Mechanism Upheld

The screening mechanism formulated by the Divisional Court was approved by the Ontario Court of Appeal. The Court agreed that there was no practical way of protecting the public interest without giving the bodies responsible for the Crown disclosure – namely the Attorney General and the police agency – notice that production was being sought, with the Court being the final arbiter should production be resisted.

In its decision, the Court of Appeal expressed the hope that the disclosure of Crown Briefs would be resolved on consent without court intervention and offered the following "comments":

- the Court expects that the parties and the state agents could usually agree to disclosure of the materials in many circumstances;
- the parties and the state agents should agree to produce any information in the Crown Brief that was used in court in the course of the criminal prosecution, subject to some interest of superordinate importance, such as private records of sexual assault complainants or confidential medical records;
- the police and the Attorney General, in considering a request for production, will bear in mind that the Crown does not have a simple proprietary interest in the Crown disclosure, rather such disclosure is the property of the public to be used to ensure that justice is done; and
- where a party has unreasonably withheld its consent, the matter can be taken into account in fixing costs.

The Court of Appeal declined to hold that a Court order would be required at all times before the contents of the Crown Brief are disclosed. However, it recognized that in certain circumstances an order would be required. The Court highlighted the following circumstances:

- where the police or the Attorney General are concerned that third party interests are not being adequately protected, they may give notice to those third parties and refuse to consent;
- where either the Attorney General or the police wish to impose conditions on the use of the documents and the parties cannot agree on those conditions; and
- where conditions have been expressly imposed by or with the agreement of the criminal court, e.g., on the use of videotaped statements by complainants in sexual assault cases.

VI. Impact of *Wagg*

In light of the *Wagg* decision, it is clear that counsel in possession and control of a Crown Brief must strictly adhere to the screening mechanism formulated by the Divisional Court. First, counsel must disclose the existence of the Crown Brief in his or her affidavit of documents with a general description of its contents. While the Court did not specifically address the issue, it is self-evident that the Crown Brief would be disclosed in the party's Schedule "B." Second, the party seeking production of the Crown Brief contents must approach the Attorney General and relevant police agency to obtain their consent to its production.

Third, the Attorney General and relevant police agency will screen the Crown Brief contents for public policy considerations and advise counsel of their position, namely, whether consent will be provided; whether production will be on certain conditions; or whether consent will be withheld. Where consent is withheld or the parties cannot agree on conditions, counsel may seek a court order for production of the Crown Brief contents. That order may be sought from either a Master or a Judge of the Superior Court of Justice.

It is clear from the Court of Appeal's strong language, that parties are to make every attempt to reach an agreement about production of Crown Brief contents before seeking the assistance of the Court. Costs consequences may also be imposed if consent is unreasonably withheld. The Court of Appeal nevertheless recognized that there will be circumstances in which a court order must be sought. Moreover, there are categories of information that the Crown will typically not consent to release. Those categories include the following:

- information relating to a confidential informant in any circumstance;
- information relating to witness protection issues in any circumstance;
- materials that would compromise a sensitive investigative technique;
- medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records;
- records relating to young persons, except as authorized under the Youth Court Justice Act and on the order of Youth Court Judge;
- materials obtained pursuant to a search warrant, including DNA warrants, or a wiretap authorization (an application for any seized material must be brought pursuant to the Criminal Code);
- documents subject to a sealing order; and
- documents that have the potential to impact upon ongoing criminal investigations or prosecutions.

VII. Conclusion

As the Court of Appeal itself recognized, the screening procedure devised by the Divisional Court for Crown Briefs is not "perfect." However cumbersome, the screening procedure provides a practical mechanism for balancing public and private interests in the context of civil proceedings. ■

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