The Disclosure Conflict: Civil Vs. Criminal Law

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When a person at fault for a car crash is sued by the innocent victims and at the same time faces criminal charges as a result of the accident competing needs for records disclosure arise.

In the course of the criminal defence trial Canadian law requires disclosure of the facts the prosecution has gathered against the accused. This information can be very useful to the Plaintiff in the civil suit against the at-fault motorist. Is the Plaintiff advancing a Civil Injury Claim entitled to this disclosure or does the law limit this disclosure until the criminal trial concludes?

Reasons for judgement were released today by the BC Court of Appeal addressing disclosure rights when there are competing criminal and civil interests.

In today's case (Wong v. Antunes) the Plaintiff's son was struck and killed by a motor vehicle in 2005. A civil lawsuit was started against the alleged driver Mr. Antunes. At the same time the alleged driver was charged with 'criminal negligence causing death'.

In the course of the criminal prosecution the Defendant was provided disclosure by Crown Counsel as required by Canadian law. He refused to provide these documents to the Plaintiff in the civil lawsuit. The Plaintiff brought a motion for production and largely succeeded.

The Attorney General for BC, the creator of the records, appealed this order. In allowing the appeal and in modifying the terms under which a civil litigant is entitled to disclosure of records produced in the prosecution of a criminal offence, the BC Court of Appeal held as follows:

[18] The case at bar is complicated, first, by Mr. Antunes' refusal to even list the VPD documents as being in his possession and, second, by the Crown's concern that some of the documents or information may jeopardize the on-going criminal proceedings.

[19] The chambers judge was alive to the problems associated with disclosure of the VPD documents. It appears that he intended to adopt the approach to disclosure approved by the Ontario Court of Appeal in D.P. v. Wagg (2004), 239 D.L.R. (4th) 501, 71 O.R. (3d) 229, 184 C.C.C. (3d) 321 ["Wagg" cited to D.L.R.].

[20] Wagg bears some resemblance to the case before us. It too concerned the right of a plaintiff to disclosure and production of documents in the possession of the defendant that the defendant obtained as a result of the disclosure process in criminal proceedings brought against the defendant. In particular, the plaintiff was interested in obtaining statements given by the defendant to the police which the trial judge in the criminal proceedings had ruled as inadmissible because the statements were held to be obtained in violation of his Charter rights.

[21] The Ontario Court of Appeal ultimately endorsed the screening process formulated in the Divisional Court, holding, at para. 48-49:

Like the Divisional Court, I can see no practical way of protecting the interests discussed by that court and by the House of Lords in Taylor without giving the bodies responsible for creating the disclosure, the Crown and the police, notice that production is sought. Further, where the Crown or police resist production the court must be the final arbiter.

I do not think that the various interests will be protected because of the implied undertaking rule in Rule 30.1. The fact that civil counsel obtaining production is bound not to use the information for a collateral purpose may

be little comfort for persons who once again find their privacy invaded, this time in civil rather than criminal proceedings. Further, the Stinchcombe obligation on the police and Crown is very broad. Subject to privilege the Crown must disclose all relevant information. If there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence, the information must be disclosed. Crown counsel are urged in Stinchcombe at p. 339 to err on the side of inclusion and refuse to disclose only that which is clearly irrelevant. The courts ought not to apply the discovery rules in civil cases in a way that could have an unintended chilling effect on Crown counsel's disclosure obligations.

[22] The screening mechanism devised by the Divisional Court was summarized (and endorsed) by the Court of Appeal as follows, at para. 17:

· the party in possession or control of the Crown brief must disclose its existence in the party's affidavit of documents and describe in general terms the nature of its contents;

· the party should object to produce the documents in the Crown brief until the appropriate state authorities have been notified, namely the Attorney General and the relevant police service, and either those agencies and the parties have consented to production, or on notice to the Attorney General and the police service and the parties, the Superior Court of Justice has determined whether any or all of the contents should be produced;

· the judge hearing the motion for production will consider whether some of the documents are subject to privilege or public interest immunity and generally whether "there is a prevailing social value and public interest in non-disclosure in the particular case that overrides the public interest in promoting the administration of justice though full access of litigants to relevant information" (para. 51).

[23] The Attorney General identifies a number of practical problems created by the impugned order. The Stinchcombe package is assembled by the Crown, not the VPD. The order, as it currently reads, requires the VPD to produce documents, despite the fact that it will not know whether these documents were part of the Stinchcombe package. More importantly, the Attorney General maintains it is cumbersome in that it contemplates all documents being produced, subject to the police or Crown specifying why a particular document is not required to be produced. Further, the order contemplates that the Crown must assert public interest immunity on a document by document basis. The difficulty posed by effectively ordering disclosure of theStinchcombe package is that it fails to recognize that the disclosure under Stinchcombe serves a different purpose than disclosure in the civil context, and that to meld the two is an unfortunate development in the law. Further, by failing to incorporate the public interest immunity claimed by the Crown in the order, it creates opportunities for unforeseen negative consequences.

[24] The preferable alternative, according to the Attorney General, is for the making of a desk order which recognizes the public interest in maintaining the confidentiality of police — Crown communications as a class, and leaving the parties with liberty to apply as to whether particular documents, or the whole class, should be disclosed in a particular case.

[25] In my opinion, the mischief identified by the Attorney General in the application of the impugned order, namely unfortunate unforeseen consequences that may impair the criminal proceedings, can be rectified by the form of order suggested by the Attorney General, which reads as follows:

ON THE APPLICATION of the [party], without a hearing and by consent;

THIS COURT ORDERS THAT:

1. the [Chief Constable of municipal police force] [Officer in Charge or the Non-Commissioned Officer in Charge of the location Detachment of the Royal Canadian Mounted Police], or his delegate ("the Police") be authorized and directed to, within 35 days of receipt of a copy of this Order, find all documents as defined in the

Supreme Court Rules, including all handwritten notes of all investigating officers, in the possession or control of the Police relating to [incident] ("the Incident") and in particular file number [file number];

2. the Police shall examine the said documents when found, and determine which documents or portions of documents may not be produced because they are:

(a) any correspondence or communications between the Police and Crown Counsel, or between the Police and solicitors advising them, for the purpose of giving or receiving legal advice;

(b) documents which it would be contrary to the public interest to produce, and in particular documents which if disclosed:

(i) could reveal correspondence or communications between the Police and Crown Counsel other than those referred to in subparagraph (a);

(ii) could prejudice the conduct of a criminal prosecution which is anticipated or has been commenced but not finally concluded, where the dominant purpose for the creation of the documents is that prosecution (not including reports, photographs, videotapes or other records of or relating to the Incident created by or for the Police on their attendance at the scene of the Incident or as a contemporaneous record of such attendance);

(iii) could harm an ongoing statutory investigation or ongoing internal Police investigation;

(iv) could reveal the identity of a confidential human source or compromises the safety or security of the source;

(v) could reveal sensitive police investigation techniques; or

(vi) could harm international relations, national defence or security or federal provincial relations;

(c) protected from production by the Youth Criminal Justice Act (Canada), or by any other applicable statute;

3. the Police shall copy the documents which satisfy the criteria for production referred to in paragraph 2 or such portions of the documents as satisfy the criteria for production referred to in paragraph 2;

4. the Police shall make the copies available to the solicitor for the Applicant for inspection or collection at [address];

5. the solicitor for the Applicant shall forthwith enter this Order and deliver a copy to the Police and the solicitors for the parties herein;

6. any reasonable costs incurred by the Police for the retrieval, production, inspection, copying and delivery of the said documents shall be paid forthwith by the solicitor for the party requesting such retrieval, production, inspection and delivery of the said records;

7. within seven days after receipt by the solicitor for the Applicant of the said documents from the Police pursuant to this Order, such solicitor shall provide each of the solicitors for the parties herein with a copy thereof and the solicitors for the parties herein shall be at liberty to examine the copies of the documents received by the solicitor for the Applicant from the Police;

8. any party, the Police and the Attorney General of British Columbia, shall have liberty to apply to the Court to determine which, if any, documents are required to be produced pursuant to this order.

[26] In my opinion, the form of order suggested by the Attorney General balances the plaintiff's need to obtain information in the police file with the Crown's need to preserve the integrity of the criminal prosecution. Further, it permits, in the appropriate case, full debate on the various privilege issues that may arise.

IV. DISPOSITION

[27] It follows that I would allow the appeal and direct that an order in the form referred to above be entered.