



CMLA SEMINAR 2021

THE INTERSECTION OF CIVIL & CRIMINAL DISCOVERY:

O'Leary et al. v. Ragone et al., 2021 FC 185

June 8, 2021

Alan S. Cofman

Fernandes Hearn, LLP

www.fernandeshearn.com



NATIONAL POST

Police documents in Kevin O’Leary boat crash case won’t be given to victims’ families before trial

The families of two people who died when the pontoon boat they were passengers on collided with a speedboat are suing the owners and drivers of both vessels

Adrian Humphreys

Apr 06, 2021 • April 6, 2021 • 4 minute read





Discovery

- Civil Discovery = mostly rules-based (legislative)
- Criminal Discovery = completeness, constitutionally required
 - *R. v. Stinchcombe*, [1991] 3 S.C.R. 326
 - Crown must preserve and disclose all information under its control
 - subject only to relevance and privilege
 - includes all investigations and prosecution documents
 - principle of early and fair disclosure
 - aids in defence preparation
 - encourages plea negotiations



D.P. v. Wagg (2004), 71 O.R. (3d) 229 (C.A.)

- D.P. was allegedly sexually assaulted by her gynecologist, Dr. Wagg
- the criminal charges were stayed
- in her civil proceeding, D.P sought production of the Crown brief



The *Wagg* Process

1. the party in possession of the Crown brief must disclose its existence
2. the party should object to disclosure until the appropriate authorities have been notified – including AG, police, and other agencies – and an SCJ judge has weighed the competing interests
3. the judge ought to consider:
 - whether some portions are subject to privilege or public interest immunity
 - whether there is a prevailing social value and public interest in non-disclosure that overrides the public interest in promoting the administration of justice through full access to relevant information



Wagg Dicta –

Production is Generally Required

“Where the party in possession of the Crown brief has access to the materials, **fairness will generally dictate that they be produced to the other side**”



Wagg Dicta –

Production is Generally Required

“The ‘fruits of the investigation’ in the possession of the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. **Society has an interest in seeing that justice is done in civil cases as well as criminal cases, and generally speaking that will occur when the parties have the opportunity to put all relevant evidence before the court.** The Crown disclosure may be helpful to the parties in ensuring that they secure all relevant evidence.”



General Considerations

- FOI requests can be too slow and are likely redacted
- defence counsel want the redacted personal information of third-party witnesses and other information
- the Crown may be concerned about witness tainting
- delays can cause issues regarding “discoverability” issues under limitations legislation
- in MVA cases under the HTA, there is no jail time and the fines may be minimal
 - the optics may favour civil plaintiffs, whose lives have been altered, in comparison to defendants, who are not facing serious criminal consequences
 - civil cases can be held up (unnecessarily?)



Background - *O'Leary v. Ragone*

- collision between a pontoon and a motor boat
 - two pontoon passengers died
- charges under *Canada Shipping Act 2001*:
 - pontoon – failing to exhibit a stern light on a power vessel underway (Rule 23(a)(iv), Sched. 1, *Collision Regulations*)
 - motor boat – operating a vessel in a careless manner, without care and attention or without reasonable consideration for other persons (s. 1007, *Small Vessels Regulations*)
- the charges are considered criminal in nature (but no prison terms)



Background – *O’Leary v. Ragone*

- wrongful death suits were commenced in Ont. S.C.J.
 - against owners and operators of both vessels
- Federal Court actions were commenced by vessel owners and operators seeking constitution of a limitation fund under Part 3 of the *Marine Liability Act*
 - the court had approved the constitution of the limitation funds
 - enjoined all claimants from proceeding in other jurisdictions pending determination of the Plaintiffs’ entitlement to limit their liability
- one trial was settled, but one was scheduled for this summer



Background – *O’Leary v. Ragone*

- the Defendants sought production of the Crown briefs from the OPP and the PPSC
- the respondents opposed disclosure
 - but undertook to generally make disclosure after conclusion of the last criminal regulatory trial
 - (with some exceptions, to protect privacy)
- the Defendants made motions under Fed. Ct. Rules 233(1) & 238



Rule 233(1)

Production from non-party with leave

233 (1) On motion, the Court may order the production of any document that is in the possession of a person who is not a party to the action, if the document is relevant and its production could be compelled at trial.

Production d'un document en la possession d'un tiers

233 (1) La Cour peut, sur requête, ordonner qu'un document en la possession d'une personne qui n'est pas une partie à l'action soit produit s'il est pertinent et si sa production pourrait être exigée lors de l'instruction.



Rule 233(1) Analysis

- no question that Rule 233(1) is triggered:
 - the briefs were relevant to the charges (negligent operation & failure to display navigation lights)
 - they spoke to issues that would be contested at trial
 - the briefs were in the possession of third parties (OPP & PPSC)
 - no argument was made that they could not be compelled at trial



Rule 233(1) – a discretionary remedy

[14] ... The Federal Court of Appeal has recognized that Rule 233 is a **discretionary remedy**. Merely establishing that relevant and compellable documents are in the possession of a third party does not entitle a litigant to a production order. **Requiring a stranger to litigation to produce documents to a party remains an exceptional remedy and the Court must still exercise its discretion to determine whether it should be granted in the circumstances** (*Hospira Healthcare Corp. v Kennedy Institute of Rheumatology*, 2019 FCA 188).



Rule 233(1) – a discretionary remedy

- *Hospira* = patent infringement case, seeking production of a patient information database, relevant to an anti-inflammatory drug for rheumatoid arthritis
- Fed. C.A. discusses interaction with Rule 238 (re third party examinations)
 - “the mere fact that availability of the documents is not listed in Rule 233 as a relevant factor for the Court to consider, but is listed in Rule 238, does not prevent the Court from considering availability of the documents through the normal discovery process as being a factor that weighs against ordering production from a non-party”



Rule 233(1) – a discretionary remedy

- Factors cited from other Rule 233 cases:
 - whether the information can be obtained from another party or source
 - the necessity of the order
 - whether an order is premature
 - the necessity and probative value of the documents in light of documents already disclosed
 - the privacy interests of, or prejudice to, other non-parties
 - confidentiality concerns
 - public interest in disclosure
 - delay, cost or disruption in the proceedings
 - the non-party's involvement in the matter under dispute
 - the specificity of the request for production
 - any costs to the producing party



Rule 233(1) – a discretionary remedy

- Factors from *Ontario (AG) v. Ballard Estate* (1995), 26 O.R. (3d) 39 (C.A.), under Rule 30.10 of the *Rules of Civil Procedure*:
 - the importance of the documents in the litigation
 - whether production at the discovery stage of the process as opposed to production at trial is necessary to avoid unfairness
 - whether the discovery of the defendants with respect to the issues to which the documents are relevant is adequate and if not, whether responsibility for that inadequacy rests with the defendants
 - the position of the non-parties with respect to production
 - the availability of the documents or their informational equivalent from some other source which is accessible to the moving parties
 - the relationship of the non-parties from whom production is sought, to the litigation and the parties to the litigation. Non-parties who have an interest in the subject matter of the litigation and whose interests are allied with the party opposing production should be more susceptible to a production order than a true "stranger" to the litigation



Decision of Prothonotary Tabib

- *Ballard* is not binding, but the list of factors is an open question
- the *Wagg* process is not binding either



Decision of Prothonotary Tabib

- availability from other sources / necessity / prematurity
 - a lot is available from public sources
 - it is early in the litigation process (pleadings were just closed)
- fairness (whether Defendants should have the same info)
 - criminal and civil lawyers were different
 - lawyers undertook not to disseminate the material outside of their offices
 - the Defendants have other means of lining up witnesses
 - there is no significant prejudice in waiting to do oral XFDs



Decision of Prothonotary Tabib

- *Wagg* / Public Interest Factors:
 - the integrity of the criminal prosecutions is at issue
 - OPP / PPSC evidence suggested a danger of feeding media reports and rumours
 - “the Court is not inclined to minimize the importance of the public interest concerns on account of the regulatory nature of the accusations or the fact that no custodial sentences can result from them. The administration of criminal regulatory justice should not take a back seat to the pursuit of civil compensation for the victims, especially where the criminal proceedings have been proceeding expeditiously and where allowing them to follow their course will not detract from the fair and expeditious determination of the civil recourse”



Decision of Prothonotary Tabib

- other factors were not significant on the facts



Rule 238

- the Defendants did not identify any particular OPP official
 - requested relief was for the OPP itself to nominate a representative
- *Canada v. Thouin*, 2017 SCC 46:
 - common law = Crown immunity
 - so no discovery, even where it is a party
 - Crown immunity can only be overridden by clear legislative intent
 - *Crown Liability and Proceedings Act*, s. 27 – the Crown is subject “to the rules of practice and procedures of the court” where proceedings are taken
 - This is limited to proceedings where the Crown is a party



Rule 238

- Ontario *Crown Liability and Proceedings Act*, s. 19(2):
 - “Nothing in this Act subjects the Crown or an officer or employee of the Crown to the discovery and inspection of documents or to examination for discovery in a proceeding to which the Crown is not a party”
 - the common law applies to the provincial Crown
- no consideration of factors under Rule 238 because it was inapplicable



THANK YOU !

**Alan S. Cofman
Fernandes Hearn LLP**

alan@fhllp.ca

416-203-9548