

Criminal**Production of police or Crown files not 'Wagg-ing the dog' on criminal files**By **Jessica Parise**

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(August 24, 2021, 2:25 PM EDT) -- You can't use a criminal charge (and an absence of a conviction) against someone as "evidence" in a civil proceeding. Sounds reasonable, and yet, we at Sabsay Lawyers who practise at the intersection of both civil and criminal proceedings, find ourselves defending clients who have been alleged of committing a fraud in civil court, after criminal charges arising from the same allegations have been disposed of, in the client's favour, in criminal court.

It may be a strategic decision for a criminal complainant to pursue a civil action as a plaintiff, even where the criminal charges have been withdrawn, or have resulted in an acquittal. There are many valid reasons why a plaintiff may wish to pursue such a claim, not the least of which is the different standard of proof in criminal vs. civil litigation. What is not necessarily valid, however, is the improper reliance on a failed criminal prosecution to bolster a plaintiff's claim.

So, let's talk about that intersection. There are generally two ways both areas of law intersect:

1. The defendant is either facing a criminal charge and is then sued in civil court over the same allegations, or the defendant is defending allegations in civil court, and is subsequently charged with a criminal offence arising from the same allegations.
2. The matters can proceed concurrently or consecutively — there is no standard practice way to proceed. (In my own practice I have seen both and there are certainly advantages to pursuing either, depending on the stage of litigation, if a receiver has been appointed, etc.)

In the first scenario, if the allegation is a fraud, a civil plaintiff may wish to obtain an *ex parte* Mareva injunction to restrain the defendant from removing or dissipating their assets. The plaintiff might rely on the criminal charge to suggest that it has established a strong *prima facie* case in support of the injunction. Indeed, a strong *prima facie* case is an essential prerequisite to obtaining a Mareva injunction. However, criminal charges, allegations and police theories are not evidence.

If the criminal proceeding is in its infancy, there may only be a Crown synopsis to rely on. [Certainly, even if the matter is at a later stage, the plaintiff would not be privy to criminal disclosure unless of course they obtain a Wagg order (mentioned in further detail below)]. In any event, a Crown synopsis is not evidence either and generally only utilized for the purposes of a bail hearing.

Section 518 of the *Criminal Code* provides:

518 (1) In any proceedings under section 515, ...

- (d) the justice may take into consideration any relevant matters agreed on by the prosecutor and the accused or his counsel;

Section 515 is the section that gives jurisdiction to a justice, holding a bail hearing. The purpose is to determine whether or not an accused person should be released or detained pending his or her trial. Section 518 provides that a bail justice can take into consideration things other than actual evidence.

And most bail hearings usually consist of a prosecutor reading in police allegations with the consent of the defence. Absent such consent, the Crown would have to call actual evidence.

By virtue of subsection 518(1)(d) the justice may "take into consideration any relevant matters agreed to by the prosecutor and the accused or his counsel." If the defence lawyer agrees that the prosecutor can read in allegations of the police, those allegations are only permitted to be heard in the context of a bail hearing. They are not evidence of guilt. Guilt is only established upon proper admissible evidence at a trial, if there is one.

If a criminal charge is withdrawn prior to the commencement of the civil matter, or ex parte motion to obtain a Mareva injunction, it is incumbent upon the plaintiff's counsel to be apprised of the developments in the criminal matter if they intend to rely on it. Failure to do so will mislead the court and not satisfy the requirement to provide full and frank disclosure (which is another prerequisite to maintaining a Mareva injunction).

If the criminal charge is withdrawn after the plaintiff has successfully obtained a Mareva injunction — even in a case where the plaintiff did make full and frank disclosure — may still be vacated where the current facts are substantially different from the facts upon which the original order was granted or have changed so dramatically that the factual underpinnings of the earlier order are no longer valid (*Jack Digital Productions Inc. v. Comex Foreign Exchange Inc.* [2007] O.J. No. 3994).

If the charges are not withdrawn, which is a more probable scenario, the plaintiff may wish to pursue a Wagg motion if disclosure has already been made. Wagg motions refer to a motion for the production of police and Crown disclosure from the criminal matter to be utilized in the civil proceeding. However, it must be understood that a Wagg motion is meant to allow the plaintiff to proceed to trial with Crown disclosure documents, not to permit access to the Crown brief for the purpose of bolstering a Mareva injunction.

It is inappropriate for a plaintiff to equate a criminal defendant's right to disclosure of the Crown brief with the plaintiff's right to pursue a Mareva injunction against the criminal defendant. Accused defendants in criminal cases have a constitutional right to disclosure of the Crown's case against them (*R. v. Stinchcombe* [1991] 3 S.C.R. 326). That is because criminal defendants are at risk of losing their constitutionally protected liberty. The plaintiff has no constitutional right to anything as either a complainant in a criminal case or as a plaintiff in a civil one.

It is precisely because an accused person has a constitutional right to disclosure that they can't just go ahead and use that disclosure in a subsequent, or concurrent, civil proceeding. In obtaining the criminal disclosure, counsel for the accused gave an implied undertaking that they would use it for no other purpose, including a civil trial arising from similar allegations (*D.P. v. Wagg* [2004] O.J. No. 2053).

It is unlikely that a Mareva motion would be adjourned to accommodate an R30.10 Wagg motion. Even where the disclosure is expected to be relevant, the law recognizes no such prejudice if the plaintiff is unable to obtain disclosure to support its Mareva injunction. Once the criminal allegations are removed from the plaintiff's claim against the defendant, what is left of it? The plaintiff requires independent evidence pointing to reason to get a Mareva injunction. They also require evidence of an interest of land if they also wish to obtain a certificate of pending litigation (CPL) on a specific property, but that is an entirely separate issue for another day.

To equate a constitutional right with procedural fairness in enforcing an injunction against a former criminal defendant does violence to our concepts of what fairness is, and what the *Canadian Charter of Rights and Freedoms* represents.

Even where a litigant is successful on a Wagg motion, they are not usually privy to all disclosure, and must specifically identify the disclosure it wishes to obtain (*Aylmer Meat Packers Inc. v. Ontario* 2011 ONSC 4470).

The granting of a Mareva injunction, under special and limited circumstances, requires that the applicant establish a strong prima facie case" (*Chitel et al. v. Rothbart et al.* (1983), 39 O.R. (2d) 513). A criminal charge is not evidence and does not establish a strong prima facie case in a civil matter.

Jessica Parise, an associate at Sabsay Lawyers, is both a Toronto criminal defence lawyer and a Toronto civil litigator.

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