CANADIAN DEFENCE LAWYERS
REPORT ON WAGG MOTIONS IN ONTARIO

June 9, 2020

Currently, parties to motor vehicle accident litigation must bring a "Wagg motion" [1] to obtain unredacted accident investigation records. Ontario's Ministry of the Attorney General processed approximately 2,000 Wagg motions in 2019,[2] the vast majority of which related to motor vehicle accident cases. Likely thousands more of these motions are also processed each year by the O.P.P. and by municipal police forces. Invariably, these motions proceed on consent. Invariably, the court grants an access order. But the cost of these motions is both considerable and completely unnecessary. These costs are initially borne by the parties to the litigation but are ultimately borne by the motoring public through their insurance premiums. In addition, court resources are wasted at considerable expense to taxpayers. Lengthy delays are caused while parties wait for these motions to be heard and the records requests processed. Further, the privacy benefits of the current system are non-existent in the vast majority of cases.

Reform is needed.

About us

Canadian Defence Lawyers is a national organization representing the interests of the civil defence bar. We bring a unique perspective from across Canada. In Ontario, Canadian Defence Lawyers provides a counterpoint to the Ontario Trial Lawyers Association.

Background

The current processes for obtaining police and Crown records is informed by the decision of the Court of Appeal in *D.P. v. Wagg*.[3] In that case, the defendant was an obstetrician and gynecologist. The plaintiff was his former patient. She alleged he had sexually assaulted her during an examination. The police investigated her allegation. The defendant was charged by

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1 The term "Wagg motion" has come to mean a motion under rule 30.10 of the *Rules of Civil Procedure* for production of police or Crown records, and in this letter we use the phrase in this sense. However, the *Wagg* case, discussed below, was not a motion under 30.10. In *Wagg*, the Crown brief was already in the possession of one of the parties and the court ordered that the Crown brief should be listed in schedule B of the party's affidavit of documents and screened by the Crown before being disclosed to other parties.

2 According to a response to a freedom of information request that we received, the Ministry of the Attorney General received a total of 1,828 Wagg motions in 2018 and 1,843 from January to November of 2019.

3 (2004), 71 OR (3d) 229.

police. In later civil proceedings, the plaintiff sought production of the Crown brief that was in the defendant's possession because he had received it as part of the disclosure in the criminal proceedings.

The Divisional Court developed a process which required that before a party in possession of a Crown brief could disclose the documents contained in it, the Attorney General and the relevant police service must be notified. On appeal, the Court of Appeal approved the process the Divisional Court had suggested. This created an obligation on the Ministry and on the police to screen their records for private and sensitive information before disclosing them to the parties.

The onerous nature of this obligation appears to have been predicted by the Ministry in its submissions as an intervenor in the *Wagg* case. The Ministry argued that the deemed undertaking rule[4] provided adequate protection for the privacy interests of non-parties. We agree with this position. Unfortunately, the Court of Appeal did not.

> I do not think that the various interests will be protected because of the deemed 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.[5]

However, the court later stated:

> Where production of Crown disclosure is sought, persons other than the person who disclosed the document may have interests that need to be taken into account. Thus, the Divisional Court rightly imposed a requirement that the police and the Attorney General consent to the production of the document. However, *where the parties consent and the police and the Attorney General also consent, I can see no principled basis for requiring the intervention of the court*. The Crown, police or the parties may wish to attach conditions to the consent, although it would seem to me that *once production has been made, the deemed undertaking rule in rule 31.1.01(3) would suffice in most circumstances to protect against improper use of the material*.[6]

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4 Rule 30.1 states that all parties and their lawyers are deemed to undertake not to use evidence or information obtained through the discovery process for any purposes other than those of the proceeding in which the evidence was obtained.

5 *Supra*, note 3, at para 49.

6 *Supra*, note 3, at para 81.

The question of whether a court order is always required before the contents of the Crown brief can be produced was also raised by the Ministry of the Attorney General in its submissions as an intervenor in the *Wagg* case.

> The Attorney General of Ontario takes the position that a party seeking to use the Crown brief outside of the criminal proceedings for which it was produced requires a court order to do so. The Attorney General also submits that the Crown's consent "may be problematic because of confidentiality and privacy concerns belonging to witnesses and other individuals who may [be] identified in Crown disclosure materials". …[7]

The Court of Appeal held that a court order is not always required:

> I agree with the Divisional Court that *if the relevant police service and the Attorney General consent to production, then there is no need for a court order.* While neither the police service nor the Attorney General have a simple proprietary right over the Crown brief, the brief is brought into existence through their efforts. If the police or the Crown are concerned that third party interests in the particular case are not adequately protected, they can give notice to that party and refuse to consent. There may also be cases where an order is appropriate because the Attorney General or the police seek to impose conditions on the use of the documents and the parties cannot agree on those conditions. In those cases, which would probably be rare, the court will then make the final determination. As well, there will be cases where conditions have been expressly imposed by or with the agreement of the criminal court, for example, on the use of videotaped statements by complainants in sexual assault cases. … In those cases, a further order of the court will be required to permit production. *I can, however, see no good reason for always requiring a pro forma order from a court where such concerns are not involved*.[8] [Emphasis added.]

Unfortunately, the Court of Appeal's vision that there is generally no need for a court order has not materialized. Quite the opposite circumstance now prevails. To obtain production of records which have not been redacted of the identifying information of witnesses and other information that is often important to the parties, the Ministry and all police services and fire departments require that the parties obtain a court order. Wagg motions have regrettably become a routine necessity.

In our view, at least with respect to motor vehicle accident cases, the current system is overkill. The privacy interests at play in motor vehicle accident cases are minimal. The deemed undertaking rule provides adequate protection for the protection of privacy interests.

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7 *Ibid*, at para 78.

8 *Ibid*, at para 79.

Furthermore, individuals (such as independent witnesses) who are not parties to the litigation are not given notice of the motion or the court order, so the privacy protections supposedly advanced by the current system are illusory.

Rethinking FOI requests and Wagg motions

When parties to motor vehicle accident litigation want production of police or Crown records, they have two options. They can make a freedom of information (FOI) request[9] or they can bring a Wagg motion. FOI requests are relatively inexpensive for the parties. However, the records received through an FOI request will be redacted of any personal information of any person who has not consented to the production of the records. While the redacted records can be useful, typically the information of non-party witnesses is crucial. For instance, often these non-party witnesses are the most objective observers of an accident and their evidence will be given great weight. Thus, often the results of an FOI request will be insufficient to the parties. Unredacted records will be required.

The Ministry of the Attorney General and the O.P.P. will not disclose personal information contained in accident investigation records without a court order because the Ministry interprets that this would be prohibited by FIPPA. Municipal police services and fire departments take the same approach based on their interpretations of MFIPPA. As such, a court order is required to permit disclosure of unredacted accident investigation records. However, the court never requires the parties or the Ministry to give notice to witnesses before disclosure of this information is ordered. The court order results in no additional privacy protection to anyone. This reality reveals the wastefulness of Wagg motions.

Unnecessary redactions routinely undertaken by records-holders before production of accident investigation records further illustrate the bureaucratic nature of the screening process. The elements that the Ministry spends time redacting from investigation records include: date of birth for witnesses, cell phone numbers (where alternative phone number provided), employment information for accused, vehicle identification numbers, third party information (non-witness), police identifier codes. With respect, few individuals consider this information sensitive. The deemed undertaking rule provides adequate protection for the privacy of this information. This information will not become public unless required in as evidence in a court hearing. Further, information of this nature may be needed in the civil proceedings. For example, sometimes it may be difficult or impossible contact a witness solely from the information provided, and the witness's date of birth or cell phone number may be required. In this circumstance, a second motion may be necessary, wasting further resources.

In our view, there is no need to redact dates of birth or cell phone numbers or any of the information listed above. Again, the deemed undertaking rule provides adequate protection. The effort put into redacting information of this nature is a waste of the Ministry's resources. We note that the Ministry has "six (6) full-time clerks and two (2) full-time administrative

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[9] That is, a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) or the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA).

assistant supporting the Wagg team. In addition, there is currently one counsel who works exclusively on Wagg motions while there are a number of other counsel who respond to Wagg motions as part of their practice."[10] Despite these resources, there remains a delay of three to four months for records screening. Ministry staff and other records-holders might be better able to meet the demand if less exacting redaction is mandated.

We also note that duplication of effort by the Ministry and other records-holders is required in some cases. Separate and duplicate FOI requests for accident investigation records can be made by or on behalf of all the parties involved in an accident, with each request mandating a separate screening review and different redactions depending on who has consented to the request. Then in addition one of the parties might bring a Wagg motion, resulting in further review and different redactions. Our members have noted cases in which four or more requests have been made to the same records-holder for the same records. This represents a significant waste of public resources.

It is time to rethink the bureaucratic and expensive process currently mandated.

Our proposal

There is no benefit to requiring a court order for production of accident investigation records. The records-holders screen the records more than adequately and the orders are invariably granted on consent. In any event, the deemed undertaking rule is the only protection currently afforded to protect the privacy interests of non-parties, as the courts never require notice to non-parties before making production orders. And the deemed undertaking rule *is* adequate protection.

As such, records-holders should be able to produce records relating to motor vehicle accident investigations and charges directly to lawyers representing parties in motor vehicle accident litigation, without a court order. All that should be necessary is:

1. A lawyer writes to the records-holder to request the records and provides a copy of appropriate pleading(s).[11]

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10 The source of this information is a letter from the Ministry dated January 2, 2020 provided in response to a freedom of information request we made.

11 All that should be required is a copy of the statement of claim (to show that the proceeding relates to a motor vehicle accident) and a copy of the pleading prepared by the lawyer requesting the records, if the lawyer is not the plaintiff's lawyer (to show that the lawyer is in fact representing a party in the case). Our members have had the experience of being advised by the Ministry that it requires copies of all the pleadings before the request would be processed, on the basis that this is necessary to determine the relevance of documents. With respect, that is a highly bureaucratic position that unnecessarily delays things until pleadings are closed.

2. The lawyer confirms in writing that the records produced will be treated as confidential in accordance with the deemed undertaking rule.

The records-holder should then be obliged to produce complete copies of the accident investigation records, without a court order, subject to the following:

1. Any charges arising out the investigation have been dealt with.

2. Certain records would not be produced, including:

    a. Any information which could compromise law enforcement interests, including confidential law enforcement material and informant information.

    b. CPIC data.

    c. Records sourced from other institutions (e.g., hospitals). (The parties should obtain these directly from the applicable institution.)

    d. Any information over which privilege is claimed.

    e. Scene or autopsy photographs depicting deceased persons.

    f. Any information subject to the provisions of the *Youth Criminal Justice Act*.

    g. Court documents that can be accessed directly from the courts, such as informations, indictments, court orders, bench warrants and transcripts.

3. The requester will have to pay standardized fees (a standard fee schedule should be developed, with appropriate fees for production of photographs and TTCI reports).

4. To avoid duplication of effort, where a lawyer requests records from a records-holder, the lawyer should be obliged to notify the other parties of the request and send a copy of the request to the other parties. Once the lawyer obtains the records, the lawyer should be obliged to forthwith produce a complete copy of the records to the other parties.[12] Where the records-holder has previously produced the records to any lawyer, the records-holder should not need to produce a copy to the second requester involved

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[12] We predict that lawyers who have paid the fees will withhold production of the materials received to other parties until the other parties pay an appropriate share of the fees. Whether this should be permitted and the mechanics of this if there are multiple parties should be addressed in the procedure.

in the same proceeding, but rather to simply advise to the second requester of the identity of first requester.[13]

5. The records should be provided in electronic form, with appropriate security measures in place.

6. The records-holder should be obliged to provide a listing records responsive to the request that it did not produce, with a general description of these records.

7. Where the party requesting the records is self-represented, additional protections may be appropriate. For instance, you may wish to provide that the records-holder could refuse to produce the records and require a court order which includes a specific indication that the deemed undertaking rule must be complied with by the self-represented party.

All the foregoing would be subject to judicial oversight so that parties could by way of motion request exceptions or clarifications in any case.

It would also be appropriate to expand the foregoing to cover more than just motor vehicle accident investigations. For instance, fire investigations and slip and fall investigations also result in many FOI requests and Wagg motions, and these types of investigations should be within this procedure.

How reform might be achieved

As we understand it, the Ministry requires a court order for production of unredacted records in every case because it is the Ministry's interpretation of the *Freedom of Information and Protection of Privacy Act* (FIPPA) that disclosure of personal information obtained during motor vehicle accident investigations is not permitted. The O.P.P. takes a similar position. All municipal police forces and fire departments take a similar position based on the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA).

Amend FIPPA and MFIPPA

Therefore, one way to address our concern would be to amend FIPPA and MFIPPA to permit disclosure of accident investigation records under the procedure we suggest above.

Create a new form of summons under the Rules of Civil Procedure

A second possible way to address this issue would be to create a new form of summons under the *Rules of Civil Procedure* that would require production of accident investigation records directly to the lawyers for parties to an action, on terms similar to those described above.

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13 To avoid duplicate FOI requests, you may wish to consider permitting lawyers or adjusters to obtain records in advance of litigation subject to appropriate undertakings being provided.

Application or reference to interpret FIPPA and MFIPPA

We do not believe the interpretations being applied are correct. Disclosure of personal information is permitted "for the purpose for which it was obtained or compiled or for a consistent purpose" under s. 42(1)(c) of FIPPA and under s. 32(c) of MFIPPA. Information is collected in motor vehicle accident investigations for many purposes, including:

1. To determine whether an offence has occurred and, if so, to support charges;
2. To assist road authorities with road safety analysis;
3. To assist the insurance industry in making fault determinations under the Fault Determination Rules, R.R.O. 1990, Reg. 668; and
4. To document the drivers and involved vehicles to support insurance claims.

In our submission, disclosure of information from car accident investigations to the parties involved in litigation arising from the accident is permitted because it is disclosed "for the purpose for which it was obtained or compiled or for a consistent purpose." Namely, to support the fair and efficient administration of justice arising from car accidents.

If the Ministry cannot be persuaded to simply change its interpretation of the legislation, and to change its practices, Cabinet could direct a reference to the Court of Appeal for a determination of this issue.

Conclusion

Each year, hundreds if not thousands of Wagg motions are brought by parties to motor vehicle accident litigation. These motions are a waste of resources for the litigants and the court. No material benefit is gained by requiring a court order. In *D.P. v. Wagg*, the courts developed a screening procedure for such records but expected that court orders would not be routinely required. The Ministry of the Attorney General has a different perspective than the court and always requires a court order for production of records that contain the personal information of any person who has not provided the Ministry with a consent to disclose the records. As such, Wagg motions have become routine. With the simple reforms proposed here, the red tape, bureaucracy, and waste of judicial resources caused by Wagg motions could be largely eliminated.

Members of the Canadian Defence Lawyers Task Force on Wagg Motions

Lee Akazaki
David Bertschi
Talaal Bond
Roger Chown
Janet Clark
David Festeryga
Susan Gunter
Elizabeth Harris
Michael Hart
Joshua Henderson
Jonathan Hodes
Max Hufton
John Lea
Stephen Libin
Howard Lightle
Debbie Orth
Lisa Pool
Brett Rideout
Aleksandra Zivanovic