

Court of Appeal confirms distinct evidentiary rules in criminal vs civil Charter cases

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BLG was recently successful at the Court of Appeal for Ontario in [*McCormack v. Evans*, 2025 ONCA 767](#). *McCormack* was a unanimous decision, upholding the dismissal at trial of the plaintiff's action against several police defendants, including claims for negligent investigation, malicious prosecution, misfeasance in public office, and *Charter* damages. Finding no error in the trial judge's reasoning, the Court reaffirmed and clarified how judges must approach questions of evidentiary admissibility differently in civil versus criminal proceedings, particularly where ss. 8 and 24(2) of the *Canadian Charter of Rights and Freedoms* are invoked. The Court also rearticulated how the existence of reasonable and probable grounds is fatal to various police tort claims.

Background

The appellant was formerly a plainclothes officer with the Toronto Police Service and was the subject of an anti-corruption investigation into Toronto's nightlife scene in the early 2000s. During the investigation, wiretap authorizations were obtained to intercept the appellant's communications. The appellant made multiple incriminating statements on the wires, which were used (along with other evidence) to lay several sets of charges against him.

While many of the charges were committed to trial after a preliminary inquiry, none were ultimately adjudicated on their merits. Most were stayed for delay and the others were later withdrawn by the Crown.

During the preliminary inquiry, the appellant challenged an investigating officer's designation of an individual, represented in the affidavit sworn to obtain the wiretap authorizations, as a confidential informant (CI). The preliminary inquiry judge criticized this designation, finding that the person designated as a CI was actually a police agent. Two other individuals designated as CIs waived their privilege before hearings to determine whether they had been properly designated.

Upon withdrawing the final set of charges, the Crown stated that the intercepted communications related to those charges would have been excluded on a *Garofoli* application for breach of the accused's *Charter* rights under s. 8 given the misrepresentation made in the application to obtain the wiretaps.

The appellant then began these civil proceedings. The appellant claimed that the investigating officers lacked reasonable and probable grounds to lay the charges against him, alleging that the basis for those charges was tainted by *Charter*-breaching conduct in obtaining the wiretap authorizations. At trial in the civil action, the appellant brought a motion to have the wiretap recordings excluded from evidence, relying on the Crown's statements that they would have been excluded if the charges had proceeded to a criminal trial.

The wiretap evidence was properly admitted at civil trial

Given that there had been no determination—in the criminal proceedings or otherwise—that the wiretap authorizations were invalid, they were presumptively valid. The Court of Appeal agreed with the civil trial judge that the fact of the CI mischaracterizations alone was not sufficient to invalidate the authorizations: a full evidentiary hearing involving a *Garofoli* analysis would be required to invalidate the authorizations. The Court further noted that it is possible that the authorizations may still have been issued with the inaccurate information excised or corrected. Accordingly, absent a judicial determination otherwise, the wiretaps did not infringe the appellant's s. 8 *Charter* rights. Neither the Crown's comments nor the criticisms from the preliminary inquiry judge had a bearing on this question.

Moreover, even if the wiretap evidence had hypothetically been excluded in a criminal trial, that does not mean that it must be excluded in related civil proceedings. Fundamentally distinct considerations animate the admissibility analysis between these two contexts. In a criminal proceeding, the *Charter* is engaged to protect an accused and their presumption of innocence in the face of a potential loss of liberty. In the civil realm, the search for truth is the dominant force, without an equivalent counterbalance.

In the civil action, the respondents introduced the wiretaps as probative evidence relevant to their defence of the appellant's claim that he was entitled to compensation for the respondents' wrongdoing. The Court clarified that, in this context, it is not the *Charter* that determines admissibility, but rather statutory and common law rules of evidence (as informed by *Charter* values). The trier of fact weighs the probative value of impugned evidence (i.e., its utility in getting at the truth) against any prejudicial effect it may have on the integrity of the truth-finding process more broadly.

Citing the Supreme Court of Canada in *Hill*, the Court emphasized that evidence going to the factual guilt or innocence of a plaintiff alleging malicious prosecution or negligent investigation will be directly relevant to the trial judge's task. Such evidence—like the wiretaps in this case—are critical to understanding how the charges came to be. Moreover, the wiretaps did not prejudice the fact-finding process: the appellant was not entrapped or coerced into making the statements captured on the recordings, nor did the mischaracterizations regarding CI status have any impact on what he said. The appellant incriminated himself, and the wiretaps reliably captured it. Excluding them **“would have marked a departure from factual reality, common sense, and the pursuit of justice. It would have generated a record that was intolerably distorted. It would have potentially permitted recovery of damages in the absence of civil wrongdoing. It would have been to overshoot the purpose of the *Charter* by permitting its use as a sword, rather than a shield.”**

Reasonable and probable grounds are fatal to the appellant's claims

The Court provided a rearticulation of the principles relevant to police torts such as negligent investigation and malicious prosecution. The standard of care applicable to an investigating officer is informed by the existence of reasonable and probable grounds at the relevant time. The officer must have a subjectively held belief in these grounds, and the belief must be objectively reasonable. This standard does not demand perfection, and the investigating officer is not required to have evaluated evidence to a legal standard, as this is the role of counsel and the courts. Therefore, the fact that the prosecution ultimately failed is not relevant to the question of whether the requisite grounds existed as of the time charges were laid.

The Court agreed with the trial judge's findings that the intentional misrepresentations regarding the CI designations did not undermine the investigating officer's subjective grounds. Further, the grounds for the wiretap authorizations were not the same as the grounds for the charges themselves, which included the appellant's own incriminating statements. The informations charging the offences, sworn by one of the investigating officers, were sufficient to constitute subjective grounds. The Court agreed that the respondents were not required to testify at trial to establish this point, nor should an adverse inference have been drawn from their decision not to do so.

The Court also upheld the trial judge's findings that the grounds for the charges were objectively reasonable. Even if some of the appellant's testimony from the civil trial could have established a successful defence had the charges against him proceeded to a criminal trial, it had no bearing on the grounds that existed to lay the charges. The Court also reiterated that committing an accused to stand trial also offers some indication that the charges were properly laid and is therefore a relevant (though not dispositive) factor. Conversely, the Crown's decision to withdraw the charges was not relevant to the investigating officers' grounds at the time they laid the charges. The Crown's withdrawal in this case—due to what they believed was the likely exclusion of evidence—did not speak to the reliability of evidence, but rather the process through which it was obtained.

Having upheld the trial judge's findings that the investigating officers had reasonable and probable grounds and were not acting with malice, the Court dismissed the appellant's remaining grounds of appeal.

Key takeaways

- The admissibility analysis in the criminal context, including under s. 24(2) of the *Charter*, cannot simply be imported into the civil context. Evidence that might be excluded in a criminal trial still exists for the purpose of a civil proceeding arising from unsuccessful prosecutions. This evidence will be admissible if its probative value (such as establishing reasonable and probable grounds at the time charges were laid) outweighs any prejudicial effect it may have on the truth-seeking function of the civil justice system.
- The existence of reasonable and probable grounds is the bedrock to defending against police tort claims. Committal to trial is a relevant indicator; conversely, the ultimate failure of a prosecution does not speak to whether proper grounds

existed at the time it was commenced. Investigating officers are not required to evaluate or weigh evidence to legal standards, nor explore all possible avenues or explanations, so long as the information they were acting on was reliable at the time.

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