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52nd Annual Refresher: Family Law

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ISBN-10: 1-55093-719-7
ISBN-13: 978-1-55093-719-0

Tip, Trips & Traps: The Intersection of Family Law and Criminal Law

Prepared for: Legal Education Society of Alberta
52nd Annual Refresher: Family Law

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Legal Education
Society of Alberta

For presentation in:
Lake Louise, Alberta – May 5 - 7, 2019

TIP, TRIPS, AND TRAPS: THE INTERSECTION OF FAMILY LAW AND CRIMINAL LAW

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INTRODUCTION

This paper is not intended to be an exhaustive dissertation on all possible combinations and permutations of the intersection between family and criminal. Pure volume would prohibit it. This is meant to be a practical guide, a “heads up”, and to promote discussion.

The thrust of the paper is three-fold:

1. If your client is facing a bus, or already under the bus, do not add gas;
2. If your client is under the bus, do not join him or her;
3. If your client is still on the curb, but it seems as though a bus may be coming around the corner, get him or her away from the curb and back to safety. Have the reality chat; curb that enthusiasm!

SCENARIO 1: TROUBLE ALREADY

All too often, we see our clients for the first time after matters have already come to a head. Parties separate, sometimes suddenly, and with hostility.

The Emergency Protection Order (EPO)



I am sure we all agree there is a need for a legislative overhaul. It was never realistic to think that a Justice could plow through 12 or 14 transcripts and deal with all the applications in 30–60 minutes. Even with an overhaul however, one can anticipate that any legislation that involves an “emergency” and a need for “protection” will be fraught with administrative problems and timing nightmares. Very often, matters go over and orders are confirmed out of “caution”. The Respondent is usually not very happy having been ousted from the home, cut off from children, pets or their home office. They usually feel wronged and may be pressing you to respond quickly. Criminal charges may or may not go hand-in-hand with the EPO (or Restraining Order).

In the rush to respond, do not overlook the effect of swearing evidence before your client has received disclosure, at least in the form of the transcript. If there are criminal charges or charges may be laid, ensure the content of any Affidavit is considered by the criminal counsel. If the client does not yet have criminal counsel, “phone a friend”. While there is litigation privilege (meaning, for example, one should not be using questioning in the civil matter for cross-examination in the criminal matter or vice versa pursuant to Rule 5.33 of the Rules of Court), there is certainly other risks. See *Doucette*¹ as opposed to *R v Nedelcu*.² Most practically, while the document (transcript) may not be used, the information can be used. This carries exposure for charges of giving contrary evidence (Sec 136 of the Criminal Code) or, worse, perjury (Sec 131 of the Criminal Code). Serious consideration needs to be given to what is sworn in the Affidavit.

Regarding litigation privilege, your client may come into receipt of information because of the litigation that could negatively impact the other side (dirt for CRA, criminal charges, or the “other” divorce file). There may be a strong urge by counsel or their clients to hand over the “goods” to the police, CRA or the other ex-spouse which they procured through the litigation, but to do so without leave of the court is a breach of the implied undertaking and Rule 5.33. If this is done by the lawyer, it is reportable conduct – more to be said later on this point in scenario 2. Reflect on Rule 5.33 and the implied undertaking at common law.

Cynics may say that people lie with impunity in family matters and law enforcement roll their eyes, hold their nose and do nothing. As lawyers, we cannot knowingly use perjured evidence, or counsel it or counsel breach of the implied undertaking. While charges may be rare, our job is to protect our clients – sometimes from themselves.

Do not be bullied or rushed into being reckless. A week or two for us to craft a response may seem like forever to them, but it is much better than their risk of or actual loss of liberty. If you and/or your client have information as a result of one action, consider its proper use in the other action to avoid being sanctioned for breaching Rule 5.33

Assuming your client is charged already, there are a number of things to consider going forward:

An outstanding charge is quite often used against the client. The charge alone is often enough to have a person removed from the home. If it takes months to resolve the charge, there is little chance of reversing some of the effects like exclusive possession. The client may want to get it “over with”

¹ *Doucette*, 2008 SCC 8 at p 43-45, the implied undertaking applied, however the Court did comment about the police ability to obtain a search warrant

² *R v. Nedelcu*, 2012 SCC 59 at p. 3, Crown was allowed to use a civil transcript