UNIFORM LAW CONFERENCE OF CANADA

JOINT CIVIL AND CRIMINAL SECTIONS

PROGRESS REPORT

OF THE WORKING GROUP

ON

THE COLLATERAL USE OF CROWN BRIEF DISCLOSURE

By DENISE DWYER

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PROGRESS REPORT OF THE WORKING GROUP ON THE COLLATERAL USE OF CROWN BRIEF DISCLOSURE

By Denise Dwyer*

I. INTRODUCTION

[1] At the Uniform Law Conference of Canada Conference in 2007, in Charlottetown, PEI, the Working Group's Report on Collateral Use of Crown Brief Disclosure, was presented at the Joint Session of the Civil and Criminal Sections and was vigorously debated by the conference attendees. Based on those discussions, the Working Group has proceeded to assess additional legal and policy issues that must be considered and analyzed as a precursor to the actual drafting of a uniform model provision and civil rules codifying the *Wagg* screening mechanism. The Working Group has also looked at the issue of access to Crown Brief materials under access to information legislation, and is working on a model provision.

[2] The review arises from the recommendations of the 2007 report and the resolution adopted by the ULCC. The 2007 Report contained five recommendations:

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Recommendation 1

[3] The *Criminal Code* or the Rules of Criminal Practice should be amended to create an undertaking of confidentiality that applies to all persons, including third parties, who receive Crown disclosure. Such persons may only use the Crown disclosure for the making of full answer and defence on behalf of the accused and have a legal responsibility not to use it for improper or collateral purposes.

[4] The amendment should provide for an explicit power on the part of the superior court of the province to set aside or vary the undertaking and make any other order with respect to disclosure materials that it deems fit, whether the materials are in the hands of counsel, the accused, or third parties; the order should be made in the interests of justice or to protect the privacy of those affected by the proceedings, but subject to the right of an accused person to make full answer and defence.

Recommendation 2

[5] The provinces and territories should uniformly legislate amendments to their rules of civil procedure to codify the *Wagg* screening process in those rules.

a) The codified *Wagg* rule should be the exclusive provision in the rules which governs production of Crown Brief materials, whether those materials are in the possession or control of the Crown, the police or a third party.

b) The codified rule should contain a presumption that production of Crown Brief materials for use in collateral proceedings should be delayed until the criminal proceeding is complete unless there are special circumstances.

c) The codified rule should not circumscribe the use that the Crown and police services make of Crown Brief materials to initiate or respond to legal proceedings, such as defending against civil actions and responding in freedom of information requests.

Recommendation 3

[6] Where feasible, Protocols and Memoranda of Understanding between key stakeholders such as the police and child protection agencies, and disciplinary tribunals, should be established to regulate the sharing of vital information in urgent cases and in particular types of proceedings. These agreements should be used to facilitate the consensual production of Crown Brief materials or production pursuant to a consent order.

Recommendation 4

[7] The provinces and territories should uniformly codify the *Wagg* screening process in the enabling legislation of their child protection agencies and their legislation governing the procedures and processes that apply to administrative tribunals. The production regimes in both types of proceedings must yield to the *Wagg* screening mechanism where the information being sought is in the Crown Brief.

Recommendation 5

[8] Freedom of information legislation throughout Canada should be uniform in its treatment of access requests for Crown Brief materials.

a) All freedom of information legislation should contain a provision that excludes the Crown Brief from the scope of the statute until the prosecution is complete

b) **Freedom of information access requests for Crown Brief materials made after the completion of the criminal prosecution should be dealt with under the legislation in a manner which incorporates the consideration of the serious policy and public interest concerns addressed in the *Wagg* screening process.**

c) **A litigation privilege exemption should be provided for which is sufficiently broad to protect from disclosure, the contents of the Crown Brief. Disclosure of Crown Brief materials by the Crown to the accused as required by law should not constitute waiver of litigation privilege. The freedom of information legislation should be amended to provide permanent protection to materials subject to litigation privilege. Section 19 of Ontario's *Freedom of Information and Protection of Privacy Act* provides a model that could be adopted for this purpose.**

[9] The resolution of the ULCC with respect to the recommendations were as follows:

1. That recommendation number one of the Report, as amended, be adopted.

2. That the Joint Civil/Criminal Working Group continue and that it consider the issues raised in the Report and the directions of the Conference and:

   (a) prepare model uniform rules of civil procedure to codify the Wagg screening process in those rules;

(b) prepare uniform provisions to codify the Wagg screening process to govern production of Crown Brief materials in the child protection and administrative tribunal regimes; and

(c) prepare uniform access to information provisions governing access requests for Crown Brief materials.

[10] In moving forward, the Working Group expanded its membership to further broaden its expertise in the areas of criminal law and privacy law. The new members were: Gail Mildren, Civil Legal Services at Manitoba Justice; Andy Rady, Criminal Defence Lawyer, London Ontario; Chief Superintendent Susan Dunn, Ontario Provincial Police; Ursula Hendel, Public Prosecutions Service of Canada, Ottawa; Mark Prescott, Information Law and Privacy Section, Justice Canada, Ottawa; and Gail Glickman also joined the Working Group, representing the Ministry of the Attorney General of Ontario Criminal Law Division, replacing her colleague Elise Nakelsky.

[11] The original members of the Working Group, along with the author, have continued their membership from the year before, including: Gregory Steele, Steele Urquhart, Vancouver; Abi Lewis, Ministry of the Attorney General of Ontario, Policy Division; Nancy Irving, Public Prosecutions Service of Canada, Ottawa; Christopher Rupar, Civil Litigation Section, Justice Canada; David Marriott, Justice and Attorney General, Edmonton, Alberta.

II. SPECIFIC AREAS OF REVIEW

[12] The Working Group examined discrete issues that relate to collateral use of the Crown Brief materials. The first issue addressed is whether the use of the materials by the Crown and the police in non-criminal proceedings should be curtailed. This was a view voiced at last year's conference. Second, the Working Group focused on the challenges of developing a framework for dealing with

Crown Brief production issues in the context of child protection and professional disciplinary proceedings. Both of those issues impact on Recommendation 2 and 4. Finally, in accordance with Recommendation 5, the Group sought to develop an access to information draft provision which offers broad protection against the disclosure of Crown Brief records.

[13] For the purpose of this Progress Report, the Working Group concentrated on Recommendations: (A) 2 (codified rules of civil procedure), (B) 4 (codified provisions for (child protection litigation and administrative tribunals) and (C) 5 (freedom of information). The legal and policy issues which arise in the process of developing draft civil rules and codifying the screening process required the Working Group to focus closely on establishing foundational principles, as opposed to proceeding with drafting at this stage. The concerns addressed in each of the three areas stemmed from not only debates at the ULCC Conference in 2007, but also the competing interests in the areas of third party privacy, public interest privilege and the scope of the application of the implied undertaking in criminal law. The Working Group wishes to continue its work to resolve a number of issues and has amended some of the recommendations from the 2007 Report for consideration and, hopefully, adoption by the Conference members this year.

A) Collateral Use of the Crown Brief by the Crown and Police

[14] At the Joint Criminal and Civil Section of the Uniform Law Conference in 2007, a concern was raised in relation to the intention to provide full access to the police and crown counsel to Crown disclosure materials in collateral proceedings.

[15] Specifically, Recommendation 2(c) was the focus of extensive debate and there was a general apprehension expressed by some attendees of the

recommended access by the Crown and police services to the Crown Brief to "initiate or respond to legal proceedings." In part, this recommendation mirrored the conclusion of Rosenberg J. of the Ontario Court of Appeal in *D.P. v. Wagg*[1] that the screening mechanism should not apply to a police service when it is required to defend itself against a civil action, such as an action for malicious prosecution. The Honourable Justice found:

> I can see nothing in the decision of the Divisional Court that was intended to circumscribe the use that a police service may make of its own documents and other materials merely because copies of those materials found their way into the Crown Brief and were disclosed to the defence. This material is essential to permit the police service to defend itself against lawsuits arising out of their investigations.
>
> The question of use by a former accused of material in the Crown brief in an action against the police was not before the court in this case. Accordingly, I would leave that issue for another day, where the matter is directly raised.
>
> To conclude, in actions against the police the screening process discussed in this case does not apply to the original materials prepared by the police during their investigation. The police would only require the consent of the Attorney General in respect of the use of materials created by Crown counsel. [2]

[16] As a result of the 2007 Conference, a subcommittee was formed to examine the issue of whether use of the Crown Brief, by the Crown or police, in civil and administrative should be subject to special limits. The subcommittee

included representatives from the civil and criminal sections, including Crown and defence counsel.

[17] Their first task was to examine the nature of the concern in greater detail. Briefly put, the concern was that it may be unfair for police officers and Crown Attorneys to be able to freely use prosecution file materials in collateral proceedings when none of the other parties who had previously accessed the file could do the same.

[18] As a result of ensuing discussions, it became apparent that the principle concern is that members of the police service and the Crown Attorneys should not personally benefit from their access to the Crown Brief. The records belong to the law enforcement agency and/or the prosecution service as a whole and not to the individual officers or prosecutors. These agencies do have protections in place against the misuse of information, including privacy laws and internal rules, such as police orders, circumscribing use. The subcommittee generally agreed that there was something counterintuitive about requiring a prosecution or police service to screen their own materials to limit production to themselves. Given that the agency is the author and owner of the materials, it was not inconsistent with the principles of *Wagg* to treat the agencies in a different fashion than other litigants, including prosecutors and police officers acting in a personal capacity.

[19] An additional concern was expressed about the power of the agency itself to collect materials for a criminal law purpose and then convert the use of those materials to further a collateral purpose. As the Working Group recognized that, in part, this was a concern related to an appearance of fairness and the avoidance of an appearance of an abuse of process. In order to address this concern, the Group debated whether access to the materials ought to be curtailed where the police or Crown want to *initiate* collateral litigation. Under those circumstances, should the *Wagg* screening process have to apply?

[20] The Group tested this distinction against a number of scenarios to see if it was comfortable with the results. The subcommittee contemplated the scenario where the Attorney General wanted to defend a malicious prosecution suit arising out of the very file at issue. It agreed in this case that applying the *Wagg* screening mechanism to the Attorney General disclosure would operate as a barrier to production and would tend to frustrate the interests of the plaintiff more than those of the defendant.

[21] The subcommittee also considered the scenario where a Crown or police officer wanted to sue a party opposite in the criminal prosecution for libel (assuming for the purpose of this example that the defence of qualified privilege is not available). The Group agreed that in this scenario, it was appropriate for the Crown or police officer to be treated as being distinct and separate from the organization and to require them, to apply for access to the Crown Brief under the *Wagg* screening process.

[22] The subcommittee also considered various scenarios where a police officer or prosecutor wanted to use the materials to sue, for example, for job-related injuries. Again it was agreed that they would need to apply to the service for access to the Brief under the normal *Wagg* screening process.

[23] There was however, one example which called for an exception to the restriction on use of the prosecution or police records by the Crown to initiate collateral proceedings - actions brought under provincial legislation seeking civil relief, such as forfeiture of property, from persons who engage in unlawful activity. Ontario's statutory framework for non-conviction based forfeiture is found in the *Civil Remedies Act* (*Remedies for Organized Crime and Other Unlawful Activities Act*, S.O. 2001, c.28). Manitoba, Saskatchewan, British Columbia, Alberta and Quebec have all passed civil asset forfeiture legislation which is

similar to Ontario's and it is expected that almost all the remaining provinces will follow suit. Proceedings under the *Civil Remedies Act* are commenced under the authority of the legislation and the applicable *Rules of Civil Procedure.* While the legislation is currently being constitutionally challenged as a "colourable attempt by the province of Ontario to legislate in respect of criminal law", the state of the law as of the completion of this Report was that this type of proceeding is civil in nature[3]. To ensure that the civil forfeiture legislative scheme continues to operate as it did before without inference with its use or reliance on Crown Brief materials, the Working Group proposed that this type of action be exempted.

[24] In conclusion, the subcommittee recommends the following rewording of Recommendation 2(c) of the 2007 Working Group Report:

The codified rule should not circumscribe the use that the Crown and police services make of Crown Brief materials to respond to or to defend in any proceedings brought against them. In addition, the codified rule should not circumscribe the use that the Crown makes of Crown Brief material to initiate proceedings under a provincial civil asset forfeiture scheme.

[25] In the end, the subcommittee was satisfied that, with the exception of actions brought pursuant to provincial civil forfeiture legislation, the proposed modified wording of Recommendation 2(c) addresses the concerns raised and does not constitute an undue limit on the right of police services and the Crown to access their own records in appropriate circumstances.

[26] The Working Group also examined the potential effect of the restriction on the use of Crown Brief material to initiate proceedings in the context of administrative tribunals, per Recommendation 4. The first concern was that this limitation would frustrate the ability of police services to commence disciplinary

proceedings. It was agreed that it would be undesirable to hinder the access of the prosecution and police services to its own materials to monitor and address deficient performance or misconduct of its employees.

[27] The second concern was related to two very unique types of administrative law proceedings, coroner's inquests (also known as fatality inquiries in some provinces) and public inquiries. The use and production of Crown Brief materials is an integral part of inquests and frequently plays a significant role in public inquiries as well. Given the special function inquests and inquiries carry out in the administration of justice, the Working Group considered whether an exception ought to be made to accommodate use of police and prosecution records in this context. This is an issue the Group wishes to continue to analyze and will report back on our conclusions next year.

[28] Accordingly, the following modification to Recommendation 4 is proposed.

The provinces and territories should uniformly codify the *Wagg* screening process in the enabling legislation of their child protection agencies and their legislation governing the procedures and processes that apply to administrative tribunals. The production regimes in both types of proceedings must yield to the *Wagg* screening mechanism where the information being sought is in the Crown Brief.

> **a) The codified provision should not circumscribe the use that the *prosecution* and police services make of the Crown Brief to initiate disciplinary, criminal, or quasi-criminal proceedings, against one or more of their members.**

[29] Concerns were also expressed by the defence bar at last year's conference about the lack of clarity of the applicability of the implied undertaking

rule to criminal defence lawyers. The Group agreed that the current state of the law is confusing and may present difficulties for defence counsel. Clarification is clearly needed, and the Group is hopeful that it will be achieved through the codification of the implied undertaking rule.

III. PRODUCTION OF CROWN BRIEF MATERIALS IN CIVIL AND ADMINISTRATIVE LAW PROCEEDINGS

A) The Application of the *Wagg* Screening Process

[30] The administrative and civil law subcommittee of the Working Group was tasked with developing draft legislation, which codifies the screening process for the production of Crown brief materials upheld by the Court of Appeal for Ontario in *D.P. v. Wagg.* The screening process, as endorsed by Rosenberg J., contemplated involvement by the Attorney General and the police, as non-parties, in any motion seeking production of Crown Brief materials. The procedure was described by the Honourable Justice as including these steps:

- A party in possession or control of the "Crown Brief" or materials contained in the Crown Brief must disclose its existence in the party's affidavit of documents and describe in general terms the nature of its contents;

- The party should object to producing the documents in the Crown Brief until:

  (1) the appropriate state authorities have been notified, namely, the Attorney General and the relevant police service and the parties to the action**;** and

  (2) either those agencies and the parties have consented to production or, on notice to the Attorney General and the police service and the

parties, the Superior Court of Justice has determined whether any or all of the contents should be produced;

- The judge hearing the motion for production will consider whether some of the documents are subject to privilege or public interest immunity and, generally, whether "there is a prevailing social value and public interest in non-disclosure in the particular case that overrides the public interest in promoting the administration of justice through full access of litigants to relevant information".[4]

[31] As part of the process of developing draft rules and provisions, it was important to give consideration to the nature of the records the Attorney General would not be consenting to produce as part of the screening process. Ontario's experience in responding to "*Wagg* motions" is instructive that regard. The Ministry of the Attorney General takes the lead in dealing with these production motions in Ontario by screening the responsive records with a view to redacting any information that is privileged, confidential or raises public interest concerns. Lessons learned from the high volume of Crown Brief production motions answered by Ministry counsel has enabled the subcommittee to comprise a list of records and information that the Attorney General will, generally speaking, resist producing, bearing in mind that these assessments are made on a case-by-case basis.

1. *Records Subject to Privilege*

   The Attorney General will uphold the privilege that applies to any of the Crown material including but not limited to solicitor client privilege, informer privilege, litigation privilege, the privilege that attaches to records related police investigative techniques, ongoing police investigations, police intelligence and any other privilege protected under section 37 of the *Canada Evidence Act*.

2. *Wiretap, DNA Warrants and Orders and Warrants*

The Attorney General will object to the production of documents or items related to or seized under a *Criminal Code* warrant or produced pursuant to a criminal court production order (e.g. information, warrant, DNA orders, DNA warrants, production orders, wiretap etc.). In fact, section 193 of the *Criminal Code* creates an indictable offence for disclosing the existence of or any part of a private communication intercepted electronically by the authorities. All documents related to a wiretap application are confidential and must be placed in a sealed packet and kept in the custody of the court. Access to the contents of that packet is exclusively governed under Part VI of the *Criminal Code*, Invasion of Privacy.[5] Similarly, the *Criminal Code* contains strict statutory limitations on the use of forensic DNA analysis results with corresponding offence provisions if those parameters for disclosure are contravened. Production orders and warrants authorized under the *Criminal Code* are further examples of the powerful and intrusive evidence gathering tools the police may legally use. It is questionable whether private litigants should be permitted to gain access to the resulting evidence through the civil courts, or whether they ought to resort to the criminal court to seek production. For the reasons cited, the Attorney General would resist production of this category of record.

3. *Third Party Names and Personal Information*

Depending upon the facts of the case, information such as social insurance numbers, dates of birth, license plate information, driver's license numbers, employment information , addresses and other personal identifying information, may be redacted to maintain the privacy interests and confidentiality of persons involved or identified in the criminal investigation or prosecution. At times, the names of witnesses or other

persons are also removed from the Crown Brief materials for the same purpose. Where, for example, the litigation involves a motor vehicle accident, the release of witness information would not trigger any significant security or privacy issues that would warrant redacting those details. In comparison, where a civil action arises from an offence of violence, production of names and contact information may be resisted by the Attorney General based on the strength of the security and privacy concerns. Again, these are fact-driven decisions.

4. *Records Subject to a Court Order or Where Production is Prohibited at Law*

This category of records may overlap with warrant, DNA and wiretap records since it refers to items or documents subject to publication ban, sealing order or any other type of court order or statutory bar to disclosure.

5. *Youth Court Records*

Production must first be authorized by Youth Court pursuant to the *Youth Criminal Justice Act* for youth records to be produced.

6. *Records Belonging to Third Parties*

The Attorney General would not consent to production of records produced under section 278.3 of the *Criminal Code* (production of the sexual assault victim's records like diaries, psychiatric records) or pursuant to a third party records *(O'Connor*) application (e.g. police disciplinary records). Such records have an inherent privacy interest and are ordered produced by a judge according to statutory and common law regimes, respectively, where the court must give due consideration to those privacy rights. Records of this sort become part of the Crown Brief through the dynamics of trial process and the Attorney General is not

properly positioned to present informed privacy arguments to the court concerning them. The appropriate and fairer route is for the party seeking the records is to obtain them directly from their source.

Documents belonging to other institutions or persons, gathered or provided to the police often make their way into the Crown Brief. These records are not the Attorney General's to disclose and the Crown is not in a position to speak to any privacy interests that may attach to such records. Depending on the nature of the records and the facts of the case, the Attorney General may not consent to their production. It is always open to the moving party to seek production from the original record holder.

The Crown Brief may contain other types of third parties records that were obtained through the cooperation of witnesses or the public with the criminal investigation process such as highly sensitive medical records. Once the Crown becomes the holder of these third party records, it is incumbent upon the Crown to protect any privacy interests that attach to them. Further, as emphasized in the Working Group's 2007 Report, the information contained in the Crown Brief, including information obtained from witnesses and other persons, is gathered in confidence to further a criminal investigation and not for use outside the ensuing criminal proceeding. The cooperation of witnesses and other persons who provide information to the police is critical to the future viability of police investigations. With a view to protecting that vital relationship, the Attorney General is not inclined to consent to the production of third party records.

7. *Court Exhibits and Victim Impact Statements*

While there is presumption of openness in court proceedings, access by the public to criminal court exhibits is not necessarily unrestricted. At

times, judicial approval for public inspection will be required.[6] The stage of related criminal proceedings is one factor that will influence the public's access to court exhibits. Accordingly, this type of record is identified as one which the Attorney General may not consent to produce but would direct the moving party to seek production from the court or the original holder of the record. With respect to victim impact statements, their production can give rise to very sensitive privacy issues, whether or not such a statement is also a court exhibit. As a consequence, the Attorney General will typically resist their production.

B) Statement of Principles

[32] The civil law and administrative law subcommittee developed a Statement of Principles regarding Crown Brief disclosure for use in collateral matters to guide the drafting of the uniform draft civil rules and provisions.

1. Notwithstanding any provision to the contrary in any enactment or rule of procedure of a court or tribunal, no order shall be made or subpoena or summons issued in a civil law or administrative law proceeding requiring the production of all or part of the Crown Brief without the consent of the Attorney General or applicable police service except in accordance with this provision.

2. No person who is in possession of a copy of the Crown Brief, who would be otherwise required pursuant to an enactment or rule of procedure of a court or tribunal to produce the copy of the Crown Brief, shall rely on, or produce or otherwise make available for inspection the copy of the Crown Brief in that person's possession without the consent of the Attorney General except in accordance with this provision.

3. If the Attorney General refuses to consent to the production of all or part of the Crown Brief, the person seeking its production may apply to a judge of the [Superior Court of the Province] for a determination of the production issue. A judge shall not make an order requiring or authorizing the production of the Crown Brief unless the judge has conducted the *Wagg* public interest balancing, i.e. whether there is a prevailing social value and public interest in non-disclosure in the particular case that overrides the public interest in promoting the administration of justice through full access of litigants to relevant information.

4. In conducting the *Wagg* public interest balancing test to determining whether or not it is in the public interest to require the production of the Crown Brief, a judge shall apply the following principles:

   a. if production of the Crown Brief is sought for use in a civil proceeding, or in a proceeding before an administrative tribunal, in the absence of special circumstances (e.g. a party or witness is seriously ill) production should only be ordered to occur after the conclusion of any criminal proceedings relating to the matter;
   b. Not withstanding a), there are certain type of administrative proceedings such as child protection litigation and professional disciplinary proceedings, in which there is a public interest to proceed expeditiously in order to protect the public. With respect to these proceedings, the presumption would not apply

   c. in considering the public interest in non-disclosure in the particular case a judge hearing the application shall have regard to the following:

      i. the right of an accused person to a fair trial;

ii. the stage of the criminal proceedings as an indication of how great the risk is of damaging the integrity of the proceedings;
iii. the critical need to foster and maintain witness cooperation with police investigations;
iv. whether the integrity of the evidence of a witness or any other evidence on which the Crown intends to rely will be jeopardized if production of the Crown Brief is ordered;
v. whether the information in the Crown Brief may have been obtained in contravention of a statute or the *Charter* and the extent to which that violation should affect the decision to order production in civil proceedings;
vi. the relationship of the party seeking production of the Crown Brief to the criminal proceedings, e.g. the complainant;
vii. the stated purpose of the party seeking production of the Crown Brief;
viii. whether the defendant, particularly if he or she was the accused in the criminal matter, already has possession of the Crown Brief;
ix. the position taken by the Crown on production of the Crown Brief;
x. the position on production taken by the person who is the subject of the records being sought;
xi. third party privacy interests; and
xii. the stage of the civil proceedings: e.g. discovery versus trial.

[33] While simple in its expression, the Statement of Principles addresses some complex issues related to the collateral use of Crown Brief materials. The first principle entrenches the *Wagg* screening process that must be undertaken by the Attorney General. (The proposed exceptions to this principle are set out in

the amended Recommendations.) The second principle is meant to address the lack of clarity about the application of the implied undertaking to Crown disclosure provided to criminal defence counsel. Even if Crown disclosure materials are transferred from the accused's criminal counsel to his civil lawyer, by application of principle #2, the records could not be produced or relied upon in the civil proceeding. The third and fourth principles are meant to offer guidance to a Court tasked with conducting the *Wagg* public interest balancing test by specifically identifying factors that may affect the integrity of the criminal justice system and which are not typically analyzed in the context of civil or administrative proceedings.

[34] The drafting of the provision to codify the *Wagg* screening process is more difficult than the discrete task of developing a rule of civil procedure. The objective of the subcommittee was to create a statutory provision, which would apply to administrative tribunals, and child welfare proceedings where the parties are seeking production of all or part of the Crown Brief. Each province would have to determine the appropriate statute in which to house such a provision to ensure it applies to the tribunal or particular proceeding bring targeted. For example, in Ontario, a codified *Wagg* provision could be added as an amendment to the *Statutory Powers Procedure Act,* which is legislation that governs procedure for most, but not all, administrative tribunals in the province. To ensure its application to child protection proceedings, the *Wagg* provision could be added to a province's family law rules or a specific provision of the act governing production of records in those proceedings (e.g. section 74 of Ontario's *Child and Family Services Act*).

[35] Developing a uniform draft provision that would apply to the disciplinary colleges, child protection proceedings, and labour arbitrations is made complex because the legislation in which it will be housed will be different for each type of proceeding and for each province. In particular, child protection regimes differ

across the country. Therefore, the subcommittee determined that the best strategy was to develop a roadmap for drafting the civil rule first. In turn, it would instruct the subcommittee in its approach to creating the draft provision.

IV. UNDERLYING CONSIDERATIONS FOR DRAFTING A MODEL RULE

[36] With the assistance of a legislative drafter, the Group were able to create this framework for the drafting of a rule of civil procedure codifying the *Wagg* screening process.

(i) Underlying considerations for drafting an amendment to the rules of civil procedure, other than for family law or child protection proceedings:

- Meaning of Crown Brief (or some other similar term, such as “prosecution file”) would be clarified or defined. Crown Brief” is a term used in Ontario but is unfamiliar to those in other provinces. “Prosecution File” would be a more universal term. In practice, civil counsel rarely ask for production of the Crown Brief or the prosecution file. Rather they usually seek production of all records in the possession of the Crown and/or police. In this Progress Report, it is used without definition, to refer generally to material obtained or prepared by police, in the course of investigating a possible crime and material obtained or prepared by prosecutors in relation to anticipated or actual prosecution. The definition should be inclusive so that litigants seeking Crown Brief materials cannot circumvent the *Wagg* screening process. Any prosecution or police investigation related records or information that we exclude from the definition would merely be sought under another rule or provision, which does not expressly provide for the Attorney General’s role to screen all documents prior to release. If the federal government

legislates in this area, it would be best if Ontario's definition matched the federal definition as closely as possible.

- An amendment to the rules of civil procedure would be premised on the existence of a legal obligation on a person in possession of a document that is part of a Crown Brief not to use that document for any purpose other than that of the criminal proceeding to which the Crown Brief relates. The existence or extent of such a legal obligation is not clear. To clarify its existence and scope, federal legislation would be required.
- For the purpose of amending the civil procedure rules, the legal obligation would apply only where the possession is as a result of the person's direct or indirect access to the Crown Brief. For example, a plaintiff who possesses his or her own diary is not under an obligation to limit use of the diary because that possession did not arise directly or indirectly as a result of access to a Crown Brief. The plaintiff could provide and use the diary in a civil proceeding even if the diary is part of a Crown Brief related to a criminal proceeding in respect of alleged conduct that is also the basis of the civil proceeding. In the same vein, a party to litigation who wished to access the diary from its owner could seek production under the rules without resort to *Wagg.*
- The term "document" is used here in an expanded manner, similar in scope to the definition of "document" in Rule 30.01(1)(a) of Ontario's *Rules of Civil Procedure:*

  "document" includes a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account, and data and information in electronic form.
- For the purposes of amending the civil procedure rules, possession of a document should be understood broadly. For example, Rule 30 of Ontario's Rules of Civil Procedure deals with possession, power or control over a document. As well, a document is deemed to be in a person's possession if the person is entitled to obtain the original or a

copy of the document. See clause 30.01 (1) (b) of Ontario's *Rules of Civil Procedure*.

- In Ontario, authority for a draft regulation governing use of a document from a Crown Brief would be found in the Courts of Justice Act, section 66. See in particular clause 66 (2) (f):

  (2) The Civil Rules Committee may make rules under subsection (1), even though they alter or conform to the substantive law, in relation to,

  (f) discovery and other forms of disclosure before hearing, including their scope and the admissibility and use of that discovery and disclosure in a proceeding.
- An amendment to the rules governing family law or child protection proceedings respecting use of part of a Crown Brief might require a different substantive test, since the policy considerations in such cases tend to raise concerns that are both more urgent and more personally critical than is the case with most other civil cases.

(ii) Comments on potential amendments to provide for procedural rules governing use of Crown Brief in Civil proceedings:

- The rule would work in conjunction with the existing rules for production of documents from parties or from non-parties. The normal rules would apply to parties' obligations to disclose the existence and general nature of documents that are in their possession, control or power. In the case of documents from the Crown Brief, however, additional steps must be taken to obtain production.
- The rule would contain a presumption that production of any or part of a Crown Brief could not be ordered until the related criminal proceedings had been completed.
- The party seeking production of a document that is from the Crown Brief would serve notice on the Attorney General.

- The Attorney General's decision would be based on a review of the documents in question and any further information obtained from the party, applying the test set out in the Wagg case. This involves balancing the interest in ensuring that all relevant evidence is available in a civil proceeding against the interest in ensuring the integrity of the administration of criminal justice and not unduly breaching privacy interests.
- The written consent of the Attorney General to the disclosure of a document in the Crown Brief would authorize the production of the document by the person with possession, whether a party or a non-party. This authorization would not interfere with the normal operation of the rules regarding production, such as rules respecting claims of privilege or relevance or rules providing judicial discretion respecting production.
- If the party seeking production of documents from the Crown Brief wants more than is covered by the consent of the Attorney General, the party would be entitled to make a motion to the Superior Court, on notice to the Attorney General, every other party and, if production is sought from a non-party, the non-party.
- The court would decide the motion applying the test set out in the Wagg case. Again, this involves balancing the interest in ensuring that all relevant evidence is available in a civil proceeding against the interest in ensuring the integrity of the administration of criminal justice and not unduly breaching privacy interests.

V. PRODUCTION IN CHILD WELFARE PROCEEDINGS

[37] The competing interests between maintaining the integrity of a criminal prosecution and meeting the urgent needs to protect the welfare of children have proven to be a difficult balance when it comes to requests for production of Crown Brief materials. The policy considerations inherent in dealing with production of prosecution records in civil litigation are starkly different from those that arise in child protection or custody and access proceedings. First, the most glaring difference is found in the urgency with which child welfare proceedings must move forward since they are subject to tight statutory timelines. Second, by their very nature, these proceedings support an important public interest, child protection, rather than advancing a financial dispute between parties in the civil context. Third, civil litigation involves balancing the competing the interests of two private parties while child welfare proceedings weigh the interests of the state, and the parent with the best interests and liberty of the child and also involve *Charter* considerations. Fourth, because the Crown, child welfare agencies and child representatives all work within the administration of justice, achieving cooperation in the production of documents is a greater priority than for it is private litigants. However, when Crown Brief materials are produced for the purpose of advancing a child welfare proceeding, the danger is that the prosecution may be faced with *Charter* arguments brought by the accused during his or her criminal case alleging a breach of the right to a fair trial because those very documents were released.

[38] The Working Group posed two questions meant to address the urgency and the public interest in meeting the document production needs in child protection litigation: (1) Should the presumption (found in Recommendation 2b) that litigants will not be able to obtain production of Crown Brief records until the prosecution has been completed apply in this context? and; (2) What

recommendations can be made to streamline the way in which the Crown responds to motions for production brought in child protection litigation?

[39] The reasons for the presumption not to apply are evident and are described earlier in this Progress Report. However, there was some hesitation expressed within the Working Group about making this a recommendation based upon concerns the manner in which prosecution materials are actually used and interpreted in the child protection proceedings. In the experience of criminal defence counsel, the allegations contained police and witness statements and other materials in the Brief are effectively taken to be true despite the fact that the criminal trial has not been completed. In sum, the concern is that the presumption of innocence is not given it proper weight when materials containing allegations damaging to the accused are in the hands of the child welfare counsel and social workers. The Working Group sees the need to continue this debate and intends specialist(s) in child protection to bring their perspective and knowledge to the discussion. The objective is to be able to reach a middle ground.

[40] With respect to streamlining the process for responding to production motions, the Ontario experience is helpful again. (Ontario family courts have continued over this year to interpret the *Wagg* decision as it relates to child protection proceedings[7]) The Working Group is not at the point where the process discussed in this Report can form the basis of a recommendation. However, we are interested to receive feedback on it at this year's conference.

[41] As preliminary consideration, the Group thought that any codification of the *Wagg* screening process that relates to child protection proceedings should provide for distinct inspection and production phases. At stage I, the provision should provide Attorney General with the authority to permit access to the contents of the Crown file by counsel for the child welfare agency and /or the

child on a confidential basis and for inspection purposes only. Records would not be made available for inspection at this initial phase if they were: subject to privilege; prohibited at law from being produced; subject to a production regime under the *Criminal Code* (e.g. wiretap and items seized under warrant); belong to another institution (this depends on the nature of the records), or are youth court records. As a further stipulation, the provision should state that no party to the proceeding may produce or rely upon Crown Brief materials except with the consent of the Attorney General or by order of the court. That condition is significant because it relieves the child welfare agencies of any real or perceived obligation to disclose to the other parties information in the Crown Brief records they have merely been permitted to inspect at stage 1.

[42] Once provided an opportunity to inspect the file contents, counsel for the child welfare agency or child would be able to make an informed request for production, stage 2. Similar to the procedure proposed under the codified civil rule of procedure, the Attorney General could consent to production. Accordingly, documents could be expeditiously released, on consent, and on the basis that the records would be used solely in relation to the child protection at hand. The implied undertaking would apply. Finally, only where the Attorney General's consent was not forthcoming, would counsel for the child welfare agency need to bring the matter before a Court for the *Wagg* public interest weighing test to be conducted.

[43] There are separate provisions under the Family Rules for other parties to access third party records, such as the Crown Brief. A request for production under those Rules would be handled in a manner akin to production in the civil context.

VI. PROFESSIONAL DISCIPLINARY PROCEEDINGS

[44] While not explored extensively in this Progress Report, professional disciplinary proceedings aimed at addressing the conduct of members charged with criminal offences can also present urgent and significant safety concerns similar to those inherent to child protection proceedings. There is a public interest in ensuring that doctors, nurses, teacher sand other professionals who are charged or convicted of crimes of violence, crimes against children, pornography or other offences that raise safety concerns, are expeditiously restricted in their practice to the degree seen fit by their professional governing body. Not surprisingly, the competing interests of the disciplinary colleges and the professionals facing criminal prosecution have already clashed in one case litigated in Ontario.

[45] In May of this year, the Ontario Superior Court of Justice released its decision in *Kelly v. Ontario*[8]. Doctors Kelly, Sazant, Proulx and Beitel were being investigated by the College of Physicians and Surgeons ("the College") for allegations of professional misconduct. In each of the matters, the College investigator issued summonses to a police service and/or the Crown for production of Crown Brief materials pursuant to the investigator's authority under a regulation under the *Regulated Health Professionals Act*. Each of the doctors brought applications in Superior Court challenging the constitutional validity of the section of the regulation which authorized the summonses, asserting that it violated their section 7 and 8 *Charter* rights. Their position was that there was no authority under the provincial regulation to compel the production of Crown Brief materials prepared in criminal proceedings. (In Dr. Kelly's case, he asserted that the search warrants used by the police in its investigation of him were unlawful and the evidence seized under warrant ought not be used by the College to further the disciplinary proceedings against him.) Among the remedies the doctors sought, they asked for a declaration that the Crown must comply with the

principles set out in *D.P. v. Wagg* when it is dealing with a summons issued by the College.

[46] Both the College and the Attorney General of Ontario brought a motion to strike out the doctors' applications on the basis that the proper forum for challenging the section of the regulation relied upon by the College investigators to compel production was in a disciplinary hearing before the Discipline Committee, where a full factual record may be established.

[47] The Court rejected the jurisdictional argument raised by the College and the Attorney General and declined to strike the doctors' applications. Himel J. was not persuaded that allowing the doctors' applications to be heard by Superior Court would result in fragmented disciplinary proceedings. After examining the statutory framework governing the authority of the Disciplinary Committee, the Court concluded the Committee lacked the authority to declare a provision unconstitutional under section 52 of the *Charter*. The Court found that all four applications should be heard together in the Superior Court which has the inherent jurisdiction to consider direct constitutional challenges to a legislative scheme. Himel J. went on to make an important observation about the nature of the doctors' applications.

> The applications before me involve important issues concerning the conduct of investigations in the health professions field. The court will have to consider a balancing of privacy rights and the delegated power of professional bodies to regulate their members while protecting the public. Because of the difficulty inherent in this sort of balancing of interests, it is important to have available the full panoply of constitutional remedies.[9]

The College has brought a motion for leave to appeal the decision of Himel J. to be heard this summer in the Divisional Court.

[48] The outcome of the *Kelly* case will inform the direction the Working Group ought to take in developing a draft provision which will apply the *Wagg* screening process to production regimes for disciplinary tribunals. It is a complex undertaking since the Group must consider some fundamental, practical and jurisdictional issues. These issues were accurately projected in the 2007 Report:

1. Does an administrative tribunal or regulatory agency have the power to order disclosure/production of documents created or gathered pursuant to *Criminal Code* provisions that require judicial authorization, such as search warrants or documents whose use and dissemination may be restricted by non-publication or sealing orders made by the criminal courts?

2. To what extent does section 490 of the *Criminal Code* which sets out the procedure to be followed when items are seized by the police, apply where a party is seeking access to materials seized pursuant to a *Criminal Code* warrant and the party is not the person from whom the materials was seized?

3. Where evidence is obtained contrary to the *Charter*, can its production be compelled under a provincial statute and used in any administrative law proceedings?

4. Does a Superior Court have the power under the *Rules of Civil Procedure* to order the destruction of evidence seized pursuant to a *Criminal Code* warrant?

5. Does the *Wagg* screening mechanism apply to provincially legislated schemes for production, such as the powers of a disciplinary college investigator?

[49] The Working Group will continue to monitor this litigation and debate its implications.

VII. ACCESS TO THE CROWN BRIEF UNDER FREEDOM OF INFORMATION/ ACCESS TO INFORMATION LEGISLATION

[50] As highlighted in the 2007 Report of the Working Group, Ontario's *Freedom of Information and Protection of Privacy Act* contains specific provisions --exemptions from access– that offer protection of Crown Brief materials from being disclosed to members of the public. In particular, the combination of the personal information exemptions (s. 21), the law enforcement exemption (s. 14), and the solicitor client privilege exemption (s. 19), create an effective scheme for ensuring that there is no backdoor access to the Crown Brief through the freedom of information process. The other Canadian jurisdictions rely on a similar combination of exemptions from access to protect these materials.

[51] A preliminary question considered by the subcommittee looking at the issue of access to Crown Brief materials under access to information legislation was whether such records should be 'excluded' from the operation of the legislation entirely – meaning that Crown Brief records could not be accessed at all through access to information legislation. The subcommittee recognized that it could be very difficult for jurisdictions to entirely exclude Crown brief materials from their legislation, but also noted that many jurisdictions do have a 'temporary' exclusion respecting 'prosecution records'. An example is clause 3(h) of the British Columbia *Freedom of Information and Protection of Privacy* Act:

> Scope of this Act
>
> 3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:
>
> > (h) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.

[52] Those jurisdictions that currently do not have such a provision could be encouraged to consider this approach.

[53] The subcommittee focused its attention on the exemption provision protecting 'privileged' information. It recognized that jurisdictions may not have the appetite to implement expansive amendments to their freedom of information/ access to information and privacy legislation, but all jurisdictions have some form of exemption protecting 'solicitor-client privileged' information. The subcommittee sought to develop an expanded single-model 'privilege' exemption from access for the provinces and the federal government, building on existing provisions (including section 19 of Ontario's legislation), that would, in combination with other existing exemptions, afford broad protection for Crown brief materials.

[54] In developing the model, several issues arose which need further consideration. It was noted that the 'solicitor-client privilege' exemption in access to information legislation has recently been the subject of litigation. In *Blank* v. *Canada (Minister of Justice)*, 2006 SCC 39, the Supreme Court of Canada considered the issue of litigation privilege in the context of the federal *Access to Information Act* exemption, and held that, unlike 'legal advice privilege', litigation privilege may not be permanent in duration. This raises a question that requires

further discussion: should the model 'privilege' exemption modify what the common law and specify that litigation privilege is 'ongoing'? Also there is a threat to the scope of the protection afforded by litigation privilege as a result of a recent decision of the Ontario Court of Appeal in *Criminal Lawyers Association v. (Ontario) Ministry of Public Safety and Security*[10]*.* This decision has been appealed to the Supreme Court of Canada, and needs to be monitored.

[55] Another issue: should the 'privilege' exemption be mandatory or discretionary? The discretionary nature of current exemptions protecting solicitor-client privileged information is of particular concern in the context of 'informer privilege'. We also focused our discussion on how broadly the privilege clause should be framed.

[56] Working from current provisions, the subcommittee developed the following draft model for discussion purposes:

1. (1) The head of a public body may refuse to disclose to an applicant

(a) information that is subject to any type of legal privilege[11], including (without limitation) solicitor-client privilege, legal advice privilege or litigation privilege;[12]

(b) information prepared by or for an agent or lawyer of the Minister of Justice and Attorney General or the public body[13] in relation to a matter

(i) involving the provision of legal advice or legal services;

(ii) in contemplation of or for use in litigation; or

(iii) in relation to the investigation or prosecution of an offence; or

(c) information exchanged between an agent or lawyer of the Minister of Justice and Attorney-General or the public body and any other person in relation to a matter
   (i) involving the provision of legal advice or legal services;
   (ii) in contemplation of or for use in litigation; or
   (iii) in relation to the investigation or prosecution of an offence.

1. (2) The head of a public body shall refuse to disclose to an applicant information that is subject to informer privilege.

VIII. RECOMMENDATIONS

[57] The following are the Recommendations being proposed by the Working Group.

RECOMMENDATION 1

[58] That Recommendation 2(c) from the 2007 ULCC Report on Collateral use of Crown Brief Disclosure is amended as indicated by the underlined text.

The provinces and territories should uniformly legislate amendments to their rules of civil procedure to codify the *Wagg* screening process in those rules.

a) The codified *Wagg* rule should be the exclusive provision in the rules which governs production of Crown Brief materials, whether those materials are in the possession or control of the Crown, the police or a third party.

b) The codified rule should contain a presumption that production of Crown Brief materials for use in collateral proceedings should be delayed until the criminal proceeding is complete unless there are special circumstances.

c) The codified rule should not circumscribe the use that the Crown and police services make of Crown Brief materials to respond to or to defend in *any* actions brought against them. In addition, the codified rule should not circumscribe the use that the Crown makes of Crown Brief material to initiate proceedings under a provincial civil asset forfeiture scheme.

RECOMMENDATION 2

[59] That Recommendation 4 from the 2007 ULCC Report on Collateral use of Crown Brief Disclosure is amended to add subsection (a) as indicated by the underlined text.

The provinces and territories should uniformly codify the *Wagg* screening process in the enabling legislation of their child protection agencies and their legislation governing the procedures and processes that apply to administrative tribunals. The production regimes in both types of proceedings must yield to the *Wagg* screening mechanism where the information being sought is in the Crown Brief.

a) The codified provision should not circumscribe the use that the *prosecution* and police services make of the Crown Brief to initiate disciplinary, criminal, or quasi-criminal proceedings, against one or more of their members.

RECOMMENDATION 3

[60] That the Working Group continue to develop draft uniform freedom of information/ access to information and privacy legislation in accordance with Recommendation 5 from the 2007 Report of the Working Group on the Collateral Use of Crown Brief Disclosure.

RECOMMENDATION 4

[61] That the Working Group will continue to develop uniform draft rules and provision to codify the *Wagg* screening process with particular emphasis on determining whether:

a) The codified provision should apply to the use and production of Crown Brief materials made in coroner's inquests and public inquiries.

b) The codified provision that relates to child protection proceedings should contain a presumption that production of Crown Brief materials be delayed until the criminal proceedings are complete.

IX. CONCLUSION

[62] To continue with our task, the Working Group requires an endorsement from the Conference of the direction our drafting discussions have taken us thus far as reflected in the Recommendations. It will become the roadmap for the legislative drafter and the policy framework for the Group during the next year.

[63] Developing a legislative solution to the issue of collateral use of Crown Brief materials presents special challenge because it intersects with several with different areas of law. Experts from each area must be engaged to achieve

uniformity in the application of the *Wagg* screening process. We expect be expanding the Working Group accordingly. In the interim, the litigation in Ontario continues to interpret the *Wagg* decision in ways not anticipated by Ontario or the members of Working Group. In the same manner that the development of this area of law is a work in progress, so is the Working Group's assignment to develop draft a models rule and provisions to codify the *Wagg* process.

END NOTES

[1] *D.P. v. Wagg,* (2004), 239 D.L.R. (4th) 501 (Ont. C.A.), aff'g [2001] O.J. No.3082 (Ont. Ct. Gen Div.)
[2] *D.P. v. Wagg,* (2004), 239 D.L.R. (4th) 501 (Ont. C.A.) at paras. 84-86

[3] *Chaterjee v. Ontario (Attorney General)* [2007] O.J. No. 2102 (Ont. C.A.), leave to appeal to SCC granted December 20, 2007.

[4] *D.P. v. Wagg, supra* at para. 17

[5] See *Law Society of Upper Canada v. Canada (Attorney General)* [2008] O.J. No. 210. (Ont. S.C.J.) where the court granted a motion brought by the Law Society for an order to authorize its investigator to seize a Crown Brief which included wiretap evidence in the possession the RCMP.

[6] See: CTV Television inc. v. Ontario Superior Court of Justice (Toronto Region) (Registrar) et al [2002] O.J. No. 1141 (Ont. C.A.). Court found that the court has jurisdiction to determine access to court records (including exhibits) even if it is shown those exhibits were filed in open court and even after the criminal proceedings have ended.

[7] For example, see *Children's Aid Society of Algoma v. Ebony Rose Aiken, David Christiansen, Kimberly Rose MacNeil, and William MacNeil* (16 June, 2008), Sault Ste. Marie, Ontario 61/05 (O.C.J.); *Children's Aid Society of Algoma v. D.P.*, [2007] O.J. No. 3601, 42 R.F.L. (6th) 144, 160 A.C.W.S. (3d) 608, 2007 Carswell Ont 5971, aff'g [2006] O.J. No. 3570; 2006 ONCJ 330; 28 R.F.L. (6th) 410, 153 A.C.W.S. (3d) 817, 2006 Carswell Ont 5412; *Catholic Children's Aid Society of Toronto v. L.R.*, [2005] O.J. No. 336; 2005 ONCJ 19; 13 R.F.L. (6th) 100; 136 A.C.W.S. (3d) 1019.

[8] *Kelly v. Ontario* [2008] O.J. No. 1901 (Ont. S.C.J.)
[9] *Kelly,* supra at para. 50.

[10] In that decision, the Court found that s. 23, the public interest override, applies to s. 14 and 19 of *FIPPA*. It is currently under appeal.

[11] The term "legal privilege" could include solicitor-client privilege, (legal advice privilege), litigation privilege, settlement privilege, common interest privilege, parliamentary privilege, and other privileges recognized at common law.

[12] A jurisdiction whose ATIP legislation applies to its legislature may want to include a specific reference to "parliamentary privilege" in order to ensure that records subject thereto are protected by this provision.

[13] The term "public body" is intended to be equivalent to the terms "government institution", "public institution", and such terms as are used in each jurisdiction's ATIP legislation to encompass all institutions subject thereto.