

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

Uniform Law Conference of Canada
Joint Civil and Criminal Sections

Wagg Screening Mechanism

- The party in possession of the Crown Brief must disclose its existence in the party's affidavit of documents.
- The party should object to producing the documents in the Crown Brief until two conditions are met.

Wagg Screening Mechanism

1. notification to the Attorney General and the relevant police service and the parties to the litigation;
2. either those agencies and the parties consent to production or, on notice to the AG, police service and the parties, the Superior Court of Justice has determined whether the contents should be produced.

Wagg Screening Mechanism

- The judge hearing the motion for production will consider whether some of the documents are subject to privilege or public interest immunity
- Balancing Test: 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

Resolution of the ULCC

Adoption of Recommendation 1 which called for the creation of a statutory undertaking of confidentiality that applies to all persons, including third parties who receive Crown disclosure in criminal proceedings.

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:

Resolution of the ULCC

- 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

Specific Areas of Review

1. Collateral use of the Crown Brief by the Crown and Police
2. Underlying legal and policy considerations for drafting a civil rule
3. Production in child welfare proceedings
4. Production in professional disciplinary proceedings
5. Access to the Crown Brief under freedom of Information/access to information legislation

August 12, 2008

Collateral Use by Crown and Police

Referring to use of Crown Brief materials in collateral proceedings by the Crown or police service corporately, not use by individual Crown counsel or police officers

Conclusions of the Working Group:

- members of the police service and the Crown Attorneys should not personally benefit from their access to the Crown Brief.
- where the police service or the Crown want to *initiate* collateral litigation the *Wagg* screening process should apply with some exceptions

August 12, 2008

Collateral Use by Crown and Police

Context of Collateral Use:

- Use by police services to discipline employees
- Use by Crown and police services to defend against proceedings, namely malicious prosecution

Collateral Use by Crown and Police

- Use by the Crown and police services to respond to freedom of information /access to information requests
- Use by the Crown to initiate proceedings under civil asset forfeiture legislation
- Coroner's inquests or fatality inquiries
- Public inquiries

Collateral Use by Crown and Police

Recommendation 1:

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

Collateral Use by Crown and Police

Recommendation 2

- 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.

Considerations for Drafting a Model Civil Rule

1. The effect of the lack of clarity regarding the scope and application of the implied undertaking of confidentiality in criminal proceedings
2. How to define the “Crown Brief”
3. Inclusion of the 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.*

Considerations for Drafting a Model Civil Rule

4. The extent of the review by the Attorney General – what documents or information are the Crown and the moving party most likely going to be litigating about?
5. 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

Production in Child Welfare Proceedings

Policy Considerations:

1. Should the presumption against production until the criminal proceeding is complete apply?
2. What type of information from the Crown Brief can be provided without jeopardizing the prosecution?
3. How can the Attorney General facilitate a speedy response to motion for production given the tight statutory timelines that govern child protection litigation?
4. How will the Crown Brief materials be used in these proceedings?

Production in Professional Disciplinary Proceedings

Policy Considerations:

1. Should the presumption against production until the criminal proceeding is complete apply?
2. What type of information from the Crown Brief can be provided without jeopardizing the prosecution?
3. How will the Crown Brief materials be used in these proceedings?
4. *Kelly v. Ontario* – How will it inform the interpretation *Wagg*?

Development of Draft Uniform Rules and Provision

RECOMMENDATION 4

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.

The Crown Brief and Access to Information

- Should the Crown Brief be excluded from the operation of FOI and Access to information legislation?
- How can an expanded protection “privileged” information be afforded in a single provision?

The Crown Brief and Access to Information

3. Effect of SCC decision in *Blank v. Canada (Minister of Justice)* and Ontario Court of Appeal in *Criminal Lawyers Association v. (Ontario) Ministry of Public Safety and Security* on the strength and scope of litigation privilege in the FOI access to information context
4. Should the “privilege” exemption be mandatory or discretionary?

The Crown Brief and Access to Information Draft of Model Provision

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, including (without limitation) solicitor-client privilege, legal advice privilege or litigation privilege

(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.)

The Crown Brief and Access to Information Draft of Model Provision

- (b) information prepared by or for an agent or lawyer of the Minister of Justice and Attorney General or the public body 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

(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.)

The Crown Brief and Access to Information Draft of Model Provision

- (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.

The Crown Brief and Access to Information

Recommendation 3

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.

Presented on Behalf of the Working Group

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- Andy Rady, Barrister and Solicitor, London, Ontario
- Abi Lewis, Ministry of the Attorney General of Ontario, Policy Division
- Greg Steele, Law Firm of Steele, Urquart, British Columbia
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- Mark Prescott, Information and Privacy Section, Justice Canada , Ottawa
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