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COLLATERAL USE OF CROWN BRIEF DISCLOSURE – A STUDY PAPER

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Overview

[1] The purpose of this study paper is to examine the legal and policy issues arising out of the collateral use of prosecution materials, discuss the different policies and procedures adopted by some of the provinces and provide suggestions for possible reform. The collateral use and disclosure of Crown Brief materials in collateral proceedings impacts a number of legal rights and interests, including solicitor client privilege, litigation privilege, public interest privilege, protection of privacy rights, Crown immunity, criminal disclosure, implied undertakings, jurisdiction and overarching concerns regarding the administration of justice and the integrity of the prosecution.

[2] This paper will examine the May 2004 Ontario Court of Appeal decision in ***D.P.*** v. ***Wagg***[2] and the principles underlying the obligation placed on the Crown to screen Crown Brief documents prior to use in the collateral proceeding. The screening mechanism is required so that disclosure in a civil context will not adversely affect privacy rights of individuals, the public interest or the administration of justice. In this analysis, the rights and interests at stake will be discussed, including the impact on the criminal justice system, the concern for a chilling effect on witness cooperation, privacy rights, safety concerns and the public interest. The paper will examine the current restrictions on the use of criminal disclosure materials for purposes other than making full answer and defence and the legal issues which govern such disclosure.

[3] The discovery process in civil litigation and the common law and statutory rules of privilege will be briefly canvassed. The paper will also examine the commonality of the common law confidentiality concerns and the principles raised in ***Wagg*** and subsequent cases.

[4] A brief summary of the various approaches to the disclosure of crown brief materials in some of the provinces and a more detailed description of the experience in Ontario will be provided. As well, the procedures and policies developed to respond to the increasing number of requests in Ontario and statistics will be set out. This discussion will include Ontario's approach to the unique issues raised by various types of proceedings, such as child protection proceedings.

[5] The interplay freedom of information and protection of privacy legislation will be discussed, including two important decisions of the Ontario Divisional Court and the Ontario Court of Appeal regarding the exclusion of Crown Brief documents from an FOI request. The appellate courts in Ontario have provided protection from the public dissemination of prosecution materials and have made a clear delineation between FOI requests and "***Wagg***" motions.

[6] As stated by the Ontario Court of Appeal, the screening mechanism and protection of third party and public interests will require additional time and resources. The paper will conclude with suggestions for reform and a consistent approach.

D.P. v. Wagg

[7] In ***D.P. v. Wagg*** (hereinafter "***Wagg***"), the plaintiff brought a civil action for damages arising out of an alleged sexual assault by the defendant. The plaintiff sought production of statements the defendant/accused gave to the police and were contained in the Crown disclosure the defendant had received in the criminal prosecution. At the criminal trial, the statements were held to be inadmissible pursuant to s. 24(2) of the ***Charter*** on the basis of a violation of the accused's right to counsel and the prosecution was ultimately stayed due to unreasonable delay.

[8] At first instance, the plaintiff's (victim) motion for production of the statements was denied by the Master on the basis that the implied undertaking rule in the criminal proceeding prohibited the defendant (accused) from disclosing the statements in the civil matter. On appeal, the Superior Court ordered disclosure. On further appeal to the Ontario Divisional Court, Justice Blair held that before Crown Brief materials could be disclosed and used for a collateral purpose, the public interests at stake must be considered. The Divisional Court held that disclosure of Crown Brief materials in civil proceedings could not be subject to ordinary civil rules regarding production, and that the civil discovery principle of relevance alone was insufficient to determine what documents should be produced.[3] Justice Blair set out a screening process to determine whether Crown Brief materials should be disclosed in a collateral proceeding and determined the statements were not to be disclosed in that case.

[9] On further appeal to the Ontario Court of Appeal, Justice Rosenberg upheld the screening mechanism established by Justice Blair to protect the variety of interests which may be affected by disclosure of Crown Brief materials, but ordered the statements to be disclosed.[4] Justice Rosenberg confirmed that if one of the parties to any collateral proceeding had possession of the Crown Brief as a result of disclosure in a criminal prosecution, the party must disclose the existence of the documents in the Affidavit of Documents, but must not produce them until the Attorney General consented or an order was obtained. The Court of Appeal also concluded that the deemed undertaking rule in civil proceedings (Rule 30.1–Ontario) did not protect the interests at stake.[5] The Court of Appeal confirmed that if Crown Brief materials are sought to be disclosed or used in a collateral proceeding, notice must first be provided to the Attorney General and the appropriate police service. The Attorney General must review the documents with a view to ensuring that disclosure issues are determined with a consideration of the public

interest. If there is a dispute regarding production, the matter ought to be heard by the appropriate court.[6]

[10] The screening mechanism mandated by the court involves an analysis of the circumstances and interests at stake in the collateral proceeding, a balancing of any potential harm on the disclosure of information versus the potential harm in denying disclosure, and whether disclosure should only be made with conditions. The Divisional Court emphasized that the balancing exercise was fraught with difficulties given the many different and public interests involved and the many unforeseeable problems dissemination of the Crown Brief may cause.

[11] The Court of Appeal acknowledged that the screening mechanism would require additional resources and increased costs. Justice Rosenberg concluded however, that there was no other option to adequately protect the important interests. This raises very practical implications for stakeholders such as the Crown, the police, the various Children's Aid Societies and civil litigants.

[12] It is important to remember that it is the principles at issue which are important, not the particular facts or the documents that were at issue in ***Wagg***. The analysis below will focus on the legal principles and interests discussed by the Court of Appeal and the application to various circumstances and proceedings.

[13] One of the difficulties that arises in the course of a ***Wagg*** request and analysis of the case law is the meaning of the term "Crown Brief." In Ontario, the Crown has been required to respond to requests for the Crown Brief in its broadest terms, namely, the entire police investigation file and the entire file held by the prosecuting Crown, not just the criminal disclosure provided to an accused. This is the definition used in this paper, unless otherwise identified. It is in this broader context which privilege, work product and private information of witnesses and other non-accused is discussed. The issue is compounded by the fact that in many cases, an accurate listing or description of the materials provided to criminal defence counsel is not available to assist in responding to the motion.

[14] Crown Brief materials arise from the investigative process and many of the documents are created or gathered by the police for use by the Crown in the criminal prosecution. Regardless of whether the Crown or the police create or are in possession of the documents, once criminal charges are laid the documents are considered Crown Brief materials, and constitute the "fruits of the investigation." Often, these materials are gathered by legal compulsion and the use of legitimate coercive force, such as warrants. The brief may contain such documents as the statements of an accused or complainant,

the "will say" summaries of witnesses, incident reports, information concerning police informants, graphic photographs and videotapes, wiretap evidence, DNA records, autopsy reports, police notes, surveillance reports, and medical or psychiatric records of victims and accused.

[15] While the Crown does not have a proprietary interest in the Crown disclosure materials in the customary sense, the Attorney General, in the role as protector of the public interest has a unique status and responsibility regarding the use that is made of these materials outside the criminal prosecution. In the criminal context, the Supreme Court of Canada held that it is attendant upon the Attorney General, as chief law officer of the Crown, to ensure that such materials be used only in a way that protects the public interest. This concept has been adopted to apply to motions for production of the Crown Brief in civil matters. The Supreme Court of Canada in ***R. v. Stinchcombe*** noted

> …that the 'fruits of the investigation' in the possession of the Crown ***'are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done.'*** This approach changes the nature of the Crown's interest in disclosure materials from one of a simple proprietary right, with the corollary right to control how the document is used, to that of a more complex nature with the predominant purpose being the furtherance of the public interest in the pursuit of justice.[7]

[16] Pursuant to ***Stinchcombe***[8] the accused has a constitutional right to disclosure in order to make full answer and defence. The Crown retains some degree of discretion, and the duty to make full disclosure can be limited with the proper exercise of Crown discretion regarding relevance and statutory exemptions in the ***Criminal Code***. Production can be delayed for reason of concern for the security or safety of witnesses or persons who have supplied information to the investigation. As stated by Sopinka J in ***Stinchcombe***:[9]

> …In such circumstances, while much leeway must be accorded to the exercise of the discretion of the counsel for the Crown with respect to the manner and timing of the disclosure, the absolute withholding of information which is relevant to the defence can only be justified on the basis of the existence of a legal privilege which excludes the information from disclosure.

[17] The improper disclosure of Crown brief materials can lead to serious and often unforeseeable consequences. Of particular concern is the impact on investigations and

prosecutions and the safety of informants and witnesses. The disclosure of personal information concerning an accused, witnesses or third parties (in a collateral proceeding) which is provided to the police in the course of investigating criminal matters should be cautiously guarded from the improper dissemination and the harm which may result. As stated in the Ontario, Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions (the "Martin Committee Report"),[10] "These values include the public safety, the privacy interests of victims or witnesses, and the need to maintain the integrity of the administration of criminal justice. These important values must be accommodated to the greatest extent possible."[11]

[18] Of significant concern is the production of documents in collateral proceedings during the investigation or prosecution. There are many administration of justice and public interests at stake during this period. It is important for investigation purposes that the accused or witnesses not be provided with information in the related civil proceeding which would negatively impact the investigation or prosecution. Pursuant to the ***Canada Evidence Act*** and common law as discussed above, disclosure in a criminal matter may be denied or delayed for a myriad of reasons.

[19] During the course of an investigation and criminal prosecution, witnesses are not provided copies of other witness statements. One purpose of withholding witness statements from other witnesses is to protect against contamination of witnesses. Witness testimony is susceptible to inadvertent or intentional contamination. Through the process of time, and the learning additional information, it becomes difficult for witnesses to recall with certainty, what information they knew when and from what source. If witnesses have prior access to other witness statements in the course of a criminal prosecution through the collateral proceeding, their credibility and testimony could be open to serious challenge under cross examination. This is one of the underlying principles behind witness exclusion orders when oral testimony is received by the court. Prior disclosure of witness statements in a collateral proceeding would be in direct conflict with the foregoing principles.

[20] In a British case, ***Greene v. Prosecution Service*** [2002] EWCA Civ 389, the Court of Appeal approached the issue of the necessity of protecting the criminal trial process and the adversarial system of criminal justice from the same perspective, namely the doctrine of contamination of witnesses. The complainant, who was run over by a police officer, sought access to witness statements given in an internal police investigation. No criminal charges had yet been laid, but were possible. The Court of Appeal ruled that the statements should not be released on the basis that witnesses in a possible future criminal prosecution could be tainted. The rationale was the protection of the integrity of the

criminal system of justice and therefore it was in the interests of the administration of justice to deny access.

[21] The public interest and privacy rights require the protection of witness safety and avoiding unnecessary invasion of the privacy and confidentiality of persons who provide information to law enforcement officials and of persons to whom such information refers. The public interest requires that those involved in criminal investigation and law enforcement should be able to communicate freely from the inhibiting effect of the collateral use of this material. As stated by the House of Lords:[12]

> The risk to the administration of justice lies in the inhibiting effect of collateral use of this material. A criminal investigation may travel in various directions before it settles down and concentrates on the activities of those against whom the prosecutor believes there is sufficient evidence. Those who provide information to investigators usually do so in the belief, which may or may not be expressed by them, that the information is being given out of a sense of public duty and in confidence. . . . I do not think it is possible to overstate the importance, in the public interest, of ensuring that material which is disclosed in criminal proceedings is not used for collateral purposes.

[22] Cooperation between civilian witnesses and the police is essential to the administration of justice. In Canada, our criminal justice system is dependant upon witnesses coming forward to provide information that will lead to the proper conviction and punishment of those who have committed crimes. The possibility for disclosure in collateral proceedings beyond the purposes for which a witness provides information to police should be approached with caution. If witnesses have to be concerned with the misuse or unauthorized disclosure of personal or confidential information provided by them to police, a real potential exists for a chilling effect on the willingness of civilians to come forward in the context of a criminal investigation.[13] This concern is of course very dependant on the circumstances of the criminal investigation. For example, these concerns may not be present in a drinking and driving investigation, however, they may be significant in a murder or organized crime context.

[23] It should also be noted that witness statements often contain opinions, not just facts. Indeed, some criminal courts have characterized identification evidence as a form of opinion evidence.[14] As such, the "chilling effect" on the willingness of witnesses to come forward relates not only to personal or confidential information which they may

provide, but also to their willingness to express opinions which may compromise their personal safety or expose them to threats of civil litigation.

[24] Criminal law policy, and case law in criminal and civil cases, supports the existence of obligations of confidentiality at common law with respect to documents and information generated in criminal proceedings. The notion of confidentiality plays a very significant role in criminal proceedings and supports the continuation of litigation privilege in the civil context after the conclusion of a prosecution. In contrast to the deemed undertaking provided for by Rule 30.1, the implied undertaking at common law survives both the use of documents in open court and the termination of the criminal proceedings. The reason is that the use of documents disclosed for the purpose of legal proceedings should remain under the control of the court as a necessary tool for preventing its process from being abused.[15] The Martin Committee's concerns about the dissemination of witness statements to the public apply equally where the prosecution has ended.

[25] In 1993, the Martin Report set out serious concerns about the sensitive nature of the records in the possession of Crown counsel and the harm that could result to the administration of justice if "disclosure materials" are improperly disseminated or used. The commentary to the Recommendation 34 in The Martin Report at p. 180 states, in part, as follows:

> "The administration of justice is highly dependent upon witnesses coming forward to provide information that will lead to the proper conviction and punishment of those who have committed crimes. For a witness, courtroom proceedings may be inconvenient, or even traumatic, in the best of circumstances. Therefore, even occasional misuse of disclosure materials could potentially persuade large numbers of already reluctant witnesses to refrain from co-operating for fear that they will suffer the consequences of similar misuse."

[26] As outlined in the Martin Report, the Committee received evidence of instances where disclosed documents containing highly sensitive material have been made public. One example cited was the circulation of child's statement in a sexual abuse case in the child's school. The other example was during the course of a penitentiary investigation disclosed, witness statements were posted on a general inmate bulletin board. The Committee stated "Occurrences of this type are, in the Committee's view, flagrant abuses of the right to disclosure. The devastating effect which such conduct can have on the privacy or safety of the victims or witnesses concerned is obvious."

[27] Disclosure in a collateral proceeding of material collected in the course of criminal investigations is of concern in many circumstances where third party witnesses who gave information for the purpose of the criminal investigation have not been given notice of the motion and, therefore, have not been given an opportunity to make submissions respecting any concerns they may have regarding the potential disclosure of the material. Where disclosure of the identity is at issue, the Crown is obligated to make submissions to protect that interest.

[28] The Court of Appeal confirmed that while there was no absolute ban preventing disclosure of documents from the Crown Brief in a civil proceeding, the Ministry of Attorney General is required to review the contents of the Crown Brief and consider whether any public or private interests militate against disclosure in the collateral proceeding. Justice Blair of the Divisional Court stated: [16]

> Just as I believe there should not be a blanket rule prohibiting disclosure and production of the contents of the Crown Brief, I also believe that a blanket rule requiring production on the simple grounds of relevance goes too far. In my opinion, production should not be compelled….until the appropriate state agency has been given an opportunity to assess the public interest consequences involved and either a court order or the consent of the state and all parties is obtained. Upon examination of the Crown Brief, other public policy issues – both from the perspective of the state and of the competing interests of the individual litigants – must be balanced in order to determine whether, and to what extent, production should take place.

[29] Further, the Divisional Court decision stated that the public interest consideration must be weighed against the public interest consideration in favour of full production and disclosure of a Crown Brief. Justice Blair stated:

> There may be circumstances in which the public interest in protecting legitimate privacy concerns and the integrity of the criminal investigation process itself outweigh the value we attribute to full production in a civil proceeding. The system cannot afford that protection where "relevance" alone is the sole criteria and disclosure and production are unchecked.

[30] In ***Catholic Children Aid Society of Toronto v. T.K.***,[17] Justice Jones of the Ontario Court of Justice recognized the concerns outlined by the Court of Appeal and applied them to a child protection proceeding. Justice Jones stated that while it might seem

revolutionary to consider factors other than "relevance" or "legal privilege" in a civil litigation matter, in the criminal law context, it is now taken as a matter of course that such factors such as "public safety, the privacy interests of victims or witnesses and the need to maintain the integrity of the administration of criminal justice" may, in appropriate cases, limit the right to disclosure.

[31] Justice Jones also concluded that when the public interest or Charter values were engaged, factors other than "relevance" and "legal privilege" may determine discoverability of documents, even in civil litigation, such as child protection. The decision required a consideration of the Attorney General's submissions, and it was important that the court be made aware of instances in which these or other issues might impact on disclosure.[18]

[32] The Court of Appeal determined in ***D.P. v. Wagg*** that they did not need to decide in that case whether or not there was an implied undertaking rule applicable to Crown criminal disclosure. Justice Rosenberg, however, in writing for the court stated that there were important and compelling reasons for recognizing an implied undertaking rule with respect to disclosure materials provided to the defence in a criminal case.[19] The underlying public policy rationale for the implied undertaking not to disclose documents obtained in a criminal proceeding for a collateral purpose protects fundamental interests in the administration of criminal justice and the public interest.

[33] In Ontario, the Ministry of the Attorney General, Crown Law Office - Criminal has issued a policy to Crown Attorneys to advise defence counsel that they are bound by an implied undertaking not to use the material disclosed for purposes other than the defence of the criminal charges. In some cases, express undertakings from criminal defence counsel or trust conditions can be obtained prior to disclosure. This approach was approved by the Alberta Provincial Court in ***R. v. Little***[20] and by Justice Ewaschuk of the Ontario Superior Court of Justice in ***R. v. Schertzer.***[21] Justice Ewaschuk stated that it was highly likely that defence counsel was bound by an implied undertaking not to use the disclosure for a collateral purpose, however, the court still had the inherent power to require counsel to give an express undertaking not to use disclosure for a collateral purpose where risks to the privacy, safety and security interest of potential witnesses and third parties are at stake. With respect to trust conditions, the court concluded that the nature and extent of the conditions had to be decided on the merits and facts of the particular case.

[34] There may also be legal issues which arise if the information or documents are governed by specific legislation such as the ***Youth Criminal Justice Act*** ("***YCJA***"), or any

documents or materials seized under compulsion pursuant to warrant provisions of the ***Criminal Code***. In these circumstances, the legislative requirements must also be satisfied.

[35] The ***YCJA*** governs the disclosure of youth records for any purpose. The party seeking disclosure must comply with the procedures and requirements set out in Part 6, sections 110 to 129 of the ***YCJA***. The status of the requesting party and the timing of the request will determine which sections apply for access to the youth records. Recently, the Ontario Court of Appeal has confirmed that an order must be obtained from a youth court judge, not a civil court.[22] In some circumstances, the requesting party has the onus of establishing that disclosure of the documents is required in the interests of justice. Documents such as psychiatric records and pre-disposition reports can be excluded from production. All third party private information, and info which may disclose police investigative techniques, and internal police codes/CPIC codes is redacted prior to disclosure. After an order is obtained from a youth court judge pursuant to the ***YCJA***, the matter then proceeds before the civil court to determine relevance and any other public issues for production in the civil litigation.

[36] The ***Criminal Code*** also places specific restrictions on the release of any evidence obtained by compulsion of a warrant. This includes seized materials such as documents or DNA evidence.[23] Such evidence may only be released pursuant to an order of a court with criminal jurisdiction under the relevant sections of the ***Criminal Code***. Another issue that must be considered is whether or not a publication ban was ordered in the criminal proceeding. In many sensitive prosecutions, there may be strict confidentiality orders, sealing orders and in rare cases, ***in camera*** proceedings. Further, the existence of and the identity of any confidential informant is steadfastly guarded. These orders continue to govern the evidence after the completion of the criminal proceeding.

[37] Where the disclosure of Crown disclosure materials is in dispute, the Divisional Court recognized that the Court is the proper custodian and arbiter. The Attorney General's legal interest in the Crown Brief includes the right to make submissions to the Court regarding public interest considerations that may militate against production.

[38] In some circumstances, disclosure to counsel subject to strict conditions is an alternative to full disclosure. The court ordered restrictions can provide reasonable protections in some circumstances. As well, vetted production in civil proceedings pursuant to court orders should protect the relevant stakeholders from suit in the event an individual litigant disseminates the information further.

[39] In the vast majority of cases responded to at the Ontario Ministry of Attorney General, Crown Law Office Civil (the "CLOC"), the consent of the Attorney General and

the police is provided and documents are produced in an edited form pursuant to an Order. The nature and extent of the redactions will depend on the particular circumstances of the case. The Court made it clear that where a party unreasonably withholds their consent, the matter can be taken into account in fixing costs. This argument should also be applied in the reverse, and costs should be assessed against parties who unreasonably demand access. In Ontario, Rule 30.10 of the ***Rules of Civil Procedure*** which governs access to documents from a third party was recently amended to expressly provide that the third parties' reasonable costs are recoverable from the moving party. Specifically, Rule 30.10(5) states:

> The moving party is responsible for the reasonable cost incurred or to be incurred by the person not a party to produce a document referred to in subrule (1), unless the court orders otherwise. R.R.O. 1990, Reg.194, r. 30.10(5).

Civil Disclosure and Privilege Principles

[40] This section will briefly examine the common law and statutory rules of disclosure and privilege in a civil context, and the privilege that attaches to documents disclosed by compulsion of law.

[41] There are inherent difficulties in applying civil concepts of privilege to materials gathered and created for a criminal investigation and prosecution. This issue is complex and a complete analysis is outside the scope of this study paper. The following discussion is the application of the traditional notions of privilege within the context of requests for Crown Brief materials in a civil proceeding.[24]

[42] Parties to a civil proceeding must produce documents that are relevant to the issues and factual determinations in question. The test for disclosure in Ontario is the "semblance of relevance" and the tendency is for full disclosure. In Ontario, production from a non-party is governed by Rule 30.10.[25] Rule 30.10 is intended to address the situation where it would be unfair for a party to proceed to trial without production from the non-party. The Rule states:

> 30.10(1) The court may, on motion by a party, order production for inspection of a document that is in the possession, control or power of a person not a party and is not privileged where the court is satisfied that,
>
> a) the document is relevant to a material issue in the action; and

> b) it would be unfair to require the moving party to proceed to trial without having discovery of the document. R.R.O. 1990, Reg. 194, r. 30.10 (1).

[43] Sharpe J.A., delivering the judgment of the Ontario Court of Appeal in ***Franco et al. v. White,***[26] stated as follows:

> A party does not have an unrestricted right to open-ended production of documents in the possession of third parties. "Fishing expeditions" are not permitted and orders for production of documents should not be made as a matter of course…

[44] Where privilege is claimed, or where there is some uncertainty as to relevance of or necessity for discovery, Rule 30.10(3) allows the court to inspect the document to determine the issue.

[45] The plaintiff must satisfy both branches of the test as established by Rule 30.10. The first part of the test is relevance to a material issue in the action. Relevance is determined by the issues as set out in the pleadings as of the date that the rule 30.10 motion is heard. The assessment of the second part of the test is only made after the documents are found to be relevant to a material issue. The Ontario Court of Appeal has stated that the following factors, among others, are guides to the exercise of the Court's discretion under Rule 30.10:

> (a) the position of the non-parties with respect to production;
> (b) the availability of the documents or their informational equivalent from some other source which is accessible to the moving parties; and
> (c) the relationship of the non-parties from whom production is sought to the litigation and to the parties to the litigation. Non-parties who have an interest in the subject matter of the litigation and whose interests are allied with the party opposing production should be more susceptible to a production order than a "stranger" to the litigation.[27]

[46] Importantly, Rule 30.10 does not apply to privileged documents. Even in civil litigation, the privilege in confidential statements taken from a party and a witness does not lapse when the litigation is over:

> These are not medical or professional reports prepared for litigation as contemplated in ***Meaney v. Busby*** ... They are the very confidential statements taken from a party and a witness for the purpose of the litigation. Therefore, their privilege does not lapse once the litigation is over.[28]

[47] Indeed, prior to the ***Wagg*** decision, the Divisional Court in ***Price Waterhouse*** held that a transcript of a police interview taken as part of a criminal investigation was privileged.[29] The Court decided the issue in the following terms:

> We agree that cooperation between police and citizens making statements to police should be fostered. Confidentiality is essential to the relationship. It is probable that civil proceedings were not contemplated by the parties to the interview. Nevertheless, we believe that a fair interpretation of the circumstances favours privilege.

[48] In ***N.G. v. U.C.C.,***[30] Justice Lang of the Divisional Court was reluctant to accept that Crown work product in criminal proceedings could qualify for litigation privilege. She held that even if it could, it "surely" could not apply where the complainant consented to release of the videotape and where it had already been disclosed to the accused in the criminal proceeding. On motion for a stay before a single judge of the Court of Appeal, Justice Sharpe relied on a decision in the FIPPA context and stated:

> Litigation privilege may attach to some materials prepared by the police for the purpose of a criminal trial, but I fail to see any basis for its application in the circumstances of this case. The purpose of litigation privilege, as distinct from solicitor-client privilege, is to protect work product in the adversarial litigation process: see Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer) (2002), 62 O.R. (3d) 167, 220 D.L.R. (4th) 467 (C.A.). It follows that production to the opposite party in the litigation effectively ends the privilege. The videotape has already been produced to the accused in the criminal proceedings and hence in that litigation, privilege no longer attaches to the videotape. Litigation privilege, unlike solicitor-client privilege, does not survive the litigation in which it arose, although legislation may extend broader protection to material prepared for the purposes of litigation: Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer).[31]

[49] The view expressed by Justice Sharpe is not supported in the case law. There is case law in the civil context in Canada and elsewhere to the effect that compulsory disclosure as opposed to voluntary disclosure, does not lead to waiver or loss of litigation privilege in the FIPPA context. The Divisional Court has very recently stated in ***Ontario (Attorney General) v. Big Canoe*** [2006] O.J. No. 1812 (Div.Ct.) that documents disclosed by the Crown pursuant to ***Stinchcombe*** are only disclosed under compulsion of law and privilege is not necessarily waived. As a matter of logic and principle, Crown disclosure to the accused is mandated by the Charter and should not lead to waiver or loss of privilege vis-à-vis strangers to the prosecution. The implied undertaking rule at common law fortifies this view as the accused is bound to the criminal court to use disclosure materials only for his defence in the criminal proceeding and is not at liberty to disseminate them any further.

[50] If disclosure to the accused constitutes waiver of litigation privilege, this privilege could never attach to Crown Brief materials and the Crown would never be able to oppose production sought by third parties on the basis of litigation privilege. Such a result is contrary to case law that states that solicitor-client privilege is available to the Crown. It would place the Crown at a very serious disadvantage and deprive it of basic protections accorded other counsel in the adversarial system, and undermine Crown counsel's ability to prepare for trial and prosecute effectively. Indeed, the underlying rationale of litigation privilege is protection of the adversary mode of trial, whether civil or criminal, and litigation privilege is therefore just as important to the functioning of the judicial system as is legal advice privilege.

[51] There is no doubt that the Crown may rely on solicitor-client privilege in both civil and criminal proceedings, including both legal advice privilege and litigation privilege. See for example the comprehensive survey of Canadian, British and U.S. law of Wood J.A. in ***Canada (AG) v. Sander*** (1994), 90 C.C.C. (3d) 41 (B.C.C.A.).

[52] The novel issue that arises is the scope of the Crown's litigation privilege and whether the Crown, as a non-party, can assert full litigation privilege for Crown work product outside criminal prosecutions. This is an important question of the substantive law of solicitor-client privilege. The fact that it arises in the context of a civil procedural rule does not take away from the substantive significance of this privilege as privileged material is expressly excluded from the ambit of Rule 30.10.

[53] It could be argued that full litigation privilege should be available to the Crown to protect work product from non-parties to the prosecution. In this context, work product is also considered to be the Crown's own preparation notes, strategies, research etc. From a policy point of view, work product protection is necessary vis-à-vis complainants and the

public to protect the criminal trial process. While some Crown work product may have to be disclosed to the accused under the ***Charter***, the Crown does not have to disclose their work notes, strategies or legal advice in the criminal proceeding. Where civil litigants seek access to Crown work product from the Crown as a non-party in a civil case, fruits of a police investigation and witness statements risk being released to witnesses and complainants before it is even used in the criminal trial. There could be harm to the integrity of a criminal trial since collateral use that may be prejudicial to a criminal trial is almost impossible to predict and assess in advance.

[54] It has also been argued that privilege attaches to information relied upon by prosecutors as the basis for an exercise of prosecutorial discretion. In Alberta, such information is specifically protected from release by section 20(g) of ***FOIPP***. The need to protect the privilege which attaches to the exercise of prosecutorial discretion is analogous to the privilege which judges enjoy in relation to the process of judicial decision-making.[32] Such decisions are an area of criminal litigation in which the Crown has traditionally sought a "zone of privacy".[33] It may also be viewed as covered by the work product privilege, since often what is being protected are the notes, strategy discussions and legal opinions relating to the exercise of discretion.

[55] The traditional Anglo-Canadian approach to common law solicitor-client privilege is that there is one comprehensive privilege consisting of 2 components, confidential legal advice privilege and litigation privilege (papers and materials created or obtained especially for the lawyer's litigation brief, whether existing or contemplated. Witness statements fall into this category.) The American approach, however, sees two distinct privileges with distinct rationales. The rationale for litigation privilege is said to be protection of the civil adversarial system by allowing counsel a zone of privacy to prepare for trial, free from incursion by one's adversary. (***Hickman v. Taylor*** 67 S.Ct. 385 1947). Therefore, litigation privilege generally terminates along with the litigation unless there is a continuing rationale for its application in any given case.

[56] There are at least four different approaches to the question of non-party work product in the U.S. One approach excludes work product protection for non-parties because the underlying rationale of providing a zone of privacy for trial preparation from one's adversary does not exist. At the other end of the spectrum is an inclusive approach that considers litigation work product always privileged, particularly where production would prejudicially impact the morale of counsel or otherwise adversely affect trial preparation in subsequent litigation.[34]

[57] The ***Hickman*** approach to litigation privilege is still relatively new in Canada. It was recently adopted by the Ontario Court of Appeal in civil litigation (***Chrusz***) and by

the Supreme Court in criminal cases (***R. v. O'Connor***, per Justice l'Heureux-Dube). The scope of litigation privilege is narrower in criminal proceedings, however, due to the Crown's mandatory disclosure obligations under the ***Charter***. In addition to confidential legal advice privilege, the Crown enjoys a truncated version of litigation privilege protecting mainly deliberative material and "opinion" work product from its adversary in the criminal proceeding.

[58] If not covered by a specific ground of privilege, in some circumstances, information given to the police by civilians in an investigation has the hallmarks of confidentiality at common law. A communication will be considered privileged where the following four conditions of the Wigmore test are satisfied:

> a) the communication originated in a confidence that the communication would not be disclosed;
> b) the element of confidentiality is essential to the full and satisfactory maintenance of the relationship of the parties;
> c) the relationship is one which, in the opinion of the community, ought to be sedulously fostered; and
> d) The injury that would inure to the relationship by the disclosure of the communication would be greater than the benefit thereby gained for the correct disposal of litigation.[35]

[59] It is suggested that the relationship between the police and civilian witnesses is one in which confidence is essential and should be "sedulously fostered".

[60] There is one pre-Wagg case from the B.C. Superior Court, ***J. (P.) v. Canada (A.G.) et al.,***[36] affirming the narrow point that both the RCMP and provincial Attorney General could, in theory, assert a general litigation privilege for police investigation materials, including witness statements, in a multi-party civil institutional abuse case, since these materials had been gathered in anticipation of the criminal litigation. In this case, however, it was held that the privilege was waived when the RCMP gave unedited copies of the investigation materials to the federal Crown, as a defendant in the civil action. The Attorney General of B.C. also relied on potential prejudice to the ongoing police investigation and this public interest immunity issue was referred back to another Superior Court Judge for screening of the documents and weighing of the public interests.

[61] One question which is important to raise is how Crown Briefs were used prior to ***Wagg***. It is now apparent that prior to ***Wagg***, Crown brief materials were being requested and used in a variety of collateral proceedings without the knowledge or consent of the Ministry of the Attorney General. It is suspected that the most common occurrences of

the use of Crown brief documents in civil proceedings were requests and motions for production directed at police forces and by disclosure from criminal defence counsel or the accused. The screening mechanism approved and mandated by the Ontario Court of Appeal does represent a change and requires the development of policies and procedures by the various stakeholders.

Jurisdictional Responses

[62] In the course of preparing this study paper, a questionnaire was sent to the jurisdictional representatives in an effort to determine how the different jurisdictions were handling requests for the production of Crown Brief materials in collateral proceedings.

[63] Not all jurisdictions have faced motions or applications for the production of Crown Brief materials, or at least not a significant number of requests to require standard policies or procedures.[37] As expected, from the responses that were received it became clear that each jurisdiction has a different approach to the issue. Importantly, however, is that regardless of how the requests were handled, each jurisdiction recognized the sensitivity of the information contained in Crown Briefs and prosecution documents and made efforts to redact information.

[64] The typical redactions include confidential informants, private information of non-parties, information in an on-going investigation or prosecution, law enforcement techniques or other private law enforcement information, privileged information or other public interest concerns such as the administration of justice, governmental relations and national defence or security.

[65] The most significant difference in approach is whether the provincial Crown responds to such motions as a non-party and whether access to Crown Brief documents is permitted through the courts or under the applicable freedom of information and protection of privacy legislation.

[66] The jurisdictional responses received were quite varied and too lengthy to set out in detail in this paper, however, a brief description of the responses received is set out below.

British Columbia

[67] The B.C. Crown responds to motions both as a party and non-party and the Crown has been receiving notice of motions against the police more frequently. Privileges and immunities similar to that of Ontario are asserted, however, the BC Court has not yet adopted the formal process outlined in ***Wagg***.

[68] In the case of civil proceedings, little documentation is provided to the litigants and usually only a copy of the Information and a brief summary of the allegations along with any documents that are already in the public domain. Requests for records in an on-going prosecution or investigation are opposed.

[69] A summary of information is provided to professional licensing/disciplinary bodies in appropriate cases. The Vancouver Police Department requires child protection agencies and tribunals to demand the records under the relevant legislation.

[70] Requests for Crown Brief and police criminal investigation materials are also processed under the applicable FOI legislation and persons will be able to obtain documents with third party information redacted.

Alberta

[71] The Alberta Crown does not respond to motions for the production of documents as a non-party based on the wording of the ***Alberta Rules of Court***, ***Proceedings Against the Crown Act***, and the ***Interpretation Act***.

[72] The Alberta Crown will respond however where a party seeks to use the Crown Brief disclosure already provided to an accused in a collateral civil proceeding on formal notice in accordance with ***Wagg***. As well, requests for Crown Briefs are permitted, with some restrictions, under Alberta's FOIPPA legislation. Any information sought in relation to a young offender is released only in accordance with the provisions of the ***Youth Criminal Justice Act***. Requests for disclosure of documents in an on going investigation or prosecution are opposed.

Saskatchewan

[73] The Crown will provide victims/witnesses copies of their own statements or documents; however, further disclosure is only done in response to a motion for production of documents from a third party pursuant to the Queens Bench Rules of Court. Sensitive and confidential information is redacted. The requesting party is advised of the existence of the material and the court decides any disputes. A standard condition placed on the disclosure is that the materials not be used for any other purpose. Additional conditions may be placed in the order depending on the circumstances.

[74] Crown Brief materials may be released under the applicable FOI legislation, subject to redaction of certain information. It is important to note that the police are not covered by the applicable FOI legislation and accordingly there is no ability to make a formal access request for documents in police control.

Nova Scotia

[75] The Nova Scotia Department of Justice advised that the provincial Crown continues to take a hard line regarding disclosure. The Cape Breton Regional Police Service responds to subpoenas, orders and FOI requests. Conditions may be placed on the disclosure. The RCMP in Nova Scotia respond and contact their Division Criminal Operations if the responsive records reveal confidential sources, relate to an on going prosecution or investigation, disclose investigative techniques or procedures, reveal legal advise or instructions or harm international or federal/provincial relations.

Northwest Territories

[76] Occasional requests are received from the public, victims, outside agencies and other government departments. Traditionally the position taken is that the materials are the "fruits of the investigation" of the RCMP and suggest that the request be made directly to the RCMP. In the context of civil litigation, Justice Vertes of the Northwest Territories Supreme Court in ***Fullowka v. Royal Oak Mines Inc*** (1998) N.W.T.J. No. 11 and (1998) N.W.T.J. No. 45 determined that the Crown could not purport to limit the use of the information and had no proprietary interest in the materials. The Ontario Court of Appeal in ***D.P. v. Wagg***, mentioned Justice Vertes' decisions, but did not adopt the same approach.

[77] Requests for Crown Brief materials are permitted pursuant to the applicable FOI legislation after the investigation is complete and the release conforms to the protection of classified information.

The Crown as a Non-Party

[78] Both the Alberta and Nova Scotia Courts of Appeal have held that the provincial Crown, as a non-party is immune from pre-trial disclosure and that the court rules do not apply to the Crown where the Crown is a non-party. The rationale is that the Crown's common law immunity is only vitiated by express legislation. Pre-trial discovery against non-parties is only permitted pursuant to the applicable rules of civil procedure.

[79] At common law, there was no legal right to production and inspection of documents held by third parties prior to trial. Further, at common law, the Crown was immune from discovery and production obligations, even when a party to the litigation.

[80] Based on the provincial ***Proceedings Against the Crown Act*** in Alberta and Nova Scotia, the courts have held that the Rules do not apply to the Crown as a non-party. The Nova Scotia ***Proceedings Against the Crown Act*** states as follows:

> s. 10 In proceedings against the Crown, the rules of court in which the proceedings are taken as to discovery and inspection of documents, examination for discovery, and interrogatories apply in the same manner as if the Crown were a corporation, except that the Crown may refuse to produce a document or make answer to a questions on discovery or interrogatories on the ground that the production thereof or the answer would be injurious to the public interest

Section 13 of the Nova Scotia ***Interpretation Act*** states:

> No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner unless it is expressly stated therein that Her Majesty is bound thereby.

[81] The Nova Scotia court has concluded that the PACA only applies where the Crown is a party with the clear implication being that the Crown is not bound to submit to discovery in any other situation. The Interpretation Act provides a complete answer that the Rules do not apply to the Crown when not a party. This rule has applied where non-parties have sought investigation materials, Crown Attorney files and Crown Briefs.

[82] The Ontario ***Proceedings Against the Crown Act*** is almost identical to the Nova Scotia Act and states:

> s. 8 In a proceeding against the Crown, the rules of court as to discovery and inspection of documents and examination for discovery apply in the same manner as if the Crown were a corporation, except that,
>
> a) the Crown may refuse to produce a document or to answer a question on the ground that the production or answer would be injurious to the public interest
> b) the person who shall attend to be examined for discovery shall be an official designated by the Deputy Attorney General; and
> c) the Crown is not required to deliver an affidavit on production of documents for discovery and inspection, but a list of the documents that the Crown may be required to produce, signed by the Deputy Attorney General, shall be delivered.

[83] The Ontario ***Interpretation Act*** is also almost identical to Nova Scotia's. The Ontario legislation is very similar to Alberta's where the Alberta court has made the same determination. In ***Temelini v. Wright***, (1999) O.R. (3d) 609, the Ontario Court of Appeal

held that the Rules of Civil Procedure did apply to the Federal Crown as a non party because the specific terms of the federal ***Crown Liability and Proceedings Act***, section 27 states:

> Except as otherwise provided by this Act or the regulations, the rules of practice and procedure of the court in which proceedings are taken apply in those proceedings

[84] This was interpreted broadly because it was not limited to 'proceedings against the Crown', and 'proceedings' were interpreted to include proceedings where the federal Crown is not a party. This issue was raised by the Crown Law Office - Civil in ***Harris v. Bell Globemedia Publishing Inc. et al***. Madame Justice Epstein decided the motion on other grounds and it was unnecessary for her to consider whether 30.10 applied to the Crown.

[85] While this position does have significant appeal and merit, reliance on this line of cases should be carefully considered as it does not prevent the same materials from being sought and obtained from the police or criminal defence lawyers/accuseds. There will be no real practical difference in Rule 30.10 situations because the police would invariably be served pursuant to ***Wagg*** in any event. The advantage of responding to such motions directly is that it provides the Attorney General notice and an opportunity to review the documents and make submissions regarding any appropriate conditions or limits on disclosure.

The Ontario Experience

[86] The number of motions where Crown Brief documents are sought have steadily increased since the 2004 Court of Appeal decision. Since 2004, the Crown Law Office Civil has responded to almost 750 motions for production of prosecution materials, and from January to June 20, 2006 CLOC has received more than 250 requests. The level of docketed time increased substantially from 2004 to 2005. In 2004 the time docketed to "Wagg" motions at Crown Law Office - Civil was approximately 2400 hours. This increased to approximately 9000 hours in 2005. This time does not include general committee time, consultation time or the hours spent by the Criminal Law Division. Through changes in policy and the creation of a team and appointment of dedicated counsel, the number of hours has decreased substantially even though the number of files has increased dramatically. The Ontario Ministry now has appointed one criminal counsel, one appointed civil counsel and three law clerks working full time on "Wagg" motions. It is expected that the number of requests will continue to rise, particularly as more litigants become aware that it is possible to obtain the material.

[87] While there are a vast variety of circumstances in which materials are sought there a few identifiable categories.[38] Requests in the context of motor vehicle accident litigation represent the largest percentage of cases and represents approximately 40% of all requests. The second largest category is child protection proceedings which represents approximately 20% of all requests. The remaining 40% of cases are divided amongst many other circumstances including civil damage claims (assault and sexual assault the most common), labour arbitrations and disciplinary tribunals.

[88] One of the most important issues is the timing of the request for the Crown brief. If the prosecution is ongoing, the Crown is quite resistant to production. Generally, some information will be released after the preliminary inquiry. It is recognized that certain types of documents, particularly accident reconstruction reports from motor vehicle cases, are required early in civil litigation. These requests are usually resolved with consent orders and do not generally involve security or privacy concerns, even before the completion of the criminal process. In some cases, the circumstances will warrant a denial of disclosure or strict conditions.

[89] Recently, in a motion regarding the production of Crown Brief materials in the course of an on going prosecution, Master Haberman stated that the Crown was required to provide affidavit evidence in support of the argument that it was in the public interest that the documents not be produced in the related civil action while the prosecution was on going.[39]

[90] Requiring the Crown to justify non-disclosure in the collateral civil context may be highly prejudicial in itself because it requires deposing in a supporting affidavit those aspects of the Crown's case that may be harmed by disclosure in the civil action and could lead to disclosure of strategic trial considerations that could make their way back to the defence in the criminal proceedings.

[91] It is suggested that the requirement that the Crown submit evidence of actual harm is inconsistent with comments by Justice Blair that disclosure may result in many unforeseeable consequences. It is impossible to predict exactly how disclosure may prejudice the Crown or fair trial of the accused.

Child protection

[92] Disclosure in child protection proceedings are given a high level of priority and importance. It is recognized that the Children's Lawyer and the relevant Children Aid Societies require as much information as possible to fulfill their mandates to protect and represent children. The most significant issue with respect to disclosure of Crown Brief documents in this forum is not a concern with the Children's Lawyer counsel improperly

using the information, but the risks regarding disclosure of unedited documents to the parties in the proceedings. If Crown Brief materials are being sought it is because one or more parent involved with the child does have a criminal history and in practical experience, many have significant criminal histories. There is concern that there will be misuse and improper dissemination of confidential, sensitive and private information.

[93] Section 74 of the Ontario ***Child and Family Services Act*** permits the CAS to bring a motion for records from a non-party. Where the non-party does not or can not consent, the court determines whether or not the requested materials may be relevant after hearing submissions from the party and reviewing the materials if necessary.

[94] In many child protection cases, strict conditions are more common to prohibit the parents' access to unedited documents. A common order sought by the Attorney General is that while unredacted documents may be provided to the applicable CAS or Children's Lawyer, the unredacted documents may not be provided to the parents. The Ontario Court of Justice adopted such an approach in ***CCAST v. T.K.*** In CLOC's experience and discussions with CAS counsel, third party information is generally not required. Where such third party information is relevant and required and the balance lies in favour of production, however, such information is disclosed pursuant to strict conditions and restrictions.

[95] In the typical child protection proceeding, upon receipt of a motion pursuant to the ***Child and Family Services Act***, the responsive records are requested from the relevant police service and local Crown Attorney. The materials are reviewed and the usual redactions include, third party names and private information, dates of birth, personal information of officers, social insurance numbers, drivers license numbers, finger print service numbers, all internal police codes and unrelated matters from any officer's notebooks. If there are responsive Young Offender records, the appropriate order pursuant to the ***YCJA*** is required.

[96] In ***Children's Aid Society of Algoma v. D.P.,*** [2006] O.J. No. 1878, the CAS Algoma had taken the position that the screening mechanism described by the Court of Appeal in ***Wagg*** should not apply to child protection matters, and that the CAS should be entitled to unredacted documents upon request, which could then be further disseminated at their discretion.

[97] Justice Keast ruled that ***Wagg*** does not apply to protect third party privacy rights in child protection proceedings. He held that the ***Wagg*** screening mechanism is not applicable to child protection proceedings, unless there is a public interest value in the criminal justice system to be protected, such as the protection of the integrity of ongoing

criminal proceedings. In his view, the interests of children automatically trump privacy interests of any third parties in child protection proceedings.

[98] Justice Keast also created a new procedure to follow in section 74 motions in child protection proceedings and ordered that all materials sought by the CAS are to be produced in unedited form upon simple request, without a court order, and without the need for the CAS to establish the relevance of the documentation. Following its review of the unedited documents, the CAS is to advise the party holding the records of the documents they think are relevant. If the parties are unable to agree on the relevance of any documents, they are to provide written submissions to the court for determination of the issues. Justice Keast also ordered that privacy rights of non-parties were not to be considered in this analysis, either directly or indirectly.

[99] Currently the Ontario Ministry of Attorney General is working with the Office of the Children's Lawyer and representatives from municipal and provincial police forces to draft a protocol to expedite the release of redacted materials for child protection matters. While the protocols are not yet finalized, in principle they will permit the Children's Lawyer to obtain orders as against the relevant police force for the production of redacted occurrence reports and CPIC reports on an ex parte basis. The police will produce the documents upon being served with the court order. This will not be permitted with respect to on-going prosecutions. If further documents from the Crown Brief are required, or if it is an on-going prosecution, a motion brought on notice to the Crown will be required. The parties to the proposed protocol anticipate that in the vast majority of matters, the redacted occurrence and CPIC reports will be sufficient. Once this protocol is finalized, it is hoped that similar agreements can be made with the various CAS agencies in the province.

[100] Motor vehicle litigation represents the most significant number of requests for the use of Crown Brief materials in a collateral proceeding. If the charges involved are provincial offences under the Ontario ***Highway Traffic Act***, the relevant police force responds and provide the materials. The Ministry takes the lead on the response if criminal charges are involved. Most materials, including witness names and addresses are typically released to requesting counsel on consent. If the prosecution is on-going, the Crown typically consents to the release of any technical reports, and will release witness statements only after the preliminary inquiry.

Disciplinary Tribunals

[101] Other forums which represent important public interests are the various professional disciplinary tribunals, such as the College of Physicians and Surgeons, the College of Nurses and the College of Teachers. In Ontario, these disciplinary tribunals

have the statutory powers granted under the Ontario ***Public Inquiries Act***, R.S.O. 1990, c. P.41 to compel the production of relevant information. Section 7(1) of the Public Inquiries Act provides

> 7. A commission may require any person by summons,
>
> a) to give evidence on oath or affirmation at an inquiry; or
>
> b) to produce in evidence at an inquiry such documents and things as the commission may specify,
>
> relevant to the subject-matter of the inquiry and not inadmissible in evidence at the inquiry under section 11.

Section 7 is qualified by section 11 which provides:

> 11. Nothing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence.

[102] Therefore, the ***Public Inquiries Act*** and disciplinary tribunals are also subject to the Court of Appeal decision and the principles regarding the collateral use of Crown Brief documents. Certainly the analysis will be modified for the circumstances, and the role of tribunal in protecting the public interest will also be considered. For example, the procedural rules for the Ontario College of Physicians and Surgeons tribunal do not provide for motions to be brought at the investigation stage, however, it is during the course of the investigation when the materials are sought. In response to these requests, some redacted documents are generally provided with express written undertakings obtained from counsel regarding their use and restrictions.

Freedom of Information and Protection of Privacy

[103] As can be seen from the discussion regarding the different approaches in various provinces, the interplay between ***Wagg*** and Freedom of Information requests is complicated and treated differently across the country. In Ontario, the appellate courts have confirmed that there is a distinction between the two types of requests, and more importantly, most Crown Brief materials will not be available in a FOI request.

[104] The first significant decision on this issue is the Court of Appeal decision in ***Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner, Inquiry Officer),***[40] which involved a request for Crown Brief materials under the Freedom of Information legislation. The Court of Appeal held that work product from a Crown Brief in a concluded prosecution was created in contemplation or anticipation of litigation and fell within the solicitor-client exemption under section 19 of FIPPA. More recently, the

Ontario Divisional Court, on another appeal from the Information and Privacy Commissioner (IPC) confirmed that the exemption applied to Crown Brief materials. Importantly, the Divisional Court confirmed that disclosure to an accused in the criminal matter pursuant to ***Stinchcombe*** obligations was not a waiver of the privilege because it was disclosed under compulsion of law.

[105] It is the position of the Ontario Attorney General that requests for Crown brief materials should not be processed under FOI legislation. The issues require the Attorney General as chief law officer and the courts to consider the public interest, not the IPC. Further, disclosure pursuant to an FOI request is considered disclosure to the public and no conditions can be placed on further dissemination. If the materials are disclosed within the course of a proceeding, restrictions can be obtained and there are some remedies available for non-compliance with a court order.

[106] Currently, there is a decision pending in the Supreme Court of Canada[41] on the issues as to whether Crown litigation privilege of the Federal Crown survives the completion of the prosecution, and whether the documents are available under the relevant federal FOI legislation. As of the date of this paper, the decision was under reserve.

Charter Application

[107] In ***Wagg***, Justice Rosenberg of the Ontario Court of Appeal stated that for the purposes of that case, he was prepared to assume that the Divisional Court was correct that ***Charter*** values inform the discovery process. The Court of Appeal, however, also decided that a statement which was excluded from the criminal proceeding on the basis of a ***Charter*** violation was still required to be produced in the related civil action. The analysis of a section 8 violation will be different in civil and criminal matters.

[108] If the ***Charter*** does apply to the disclosure of private information contained within a Crown Brief, this would support a requirement that disclosure in a collateral proceeding should be by way of court order. If pursuant to a court order, the court must be satisfied that the information is relevant and the interests of justice support production in the collateral proceeding. In such a case, it may be very difficult for an individual to challenge the production or establish a ***Charter*** claim.

[109] This issue of the application of the ***Charter*** is extensive and outside the limited scope of this study paper. This analysis would have to examine not only the development of the section 8 jurisprudence and the differences in application between civil and

criminal proceedings, but also whether or not disclosure pursuant to the applicable legislation or rules could establish a ***Charter*** violation.

Suggestions for Reform

[110] It is suggested that there should be a consistent approach across the country in responding to requests for disclosure of Crown Brief and criminal investigation documents for use in a collateral proceeding. This is important due to the fact that the documents at issue usually arise from investigations of violations of federal legislation (i.e., the ***Criminal Code***). Specifically, many documents contained within a Crown Brief may be subject to particular disclosure rules as set out in the ***Criminal Code***, such as materials seized under warrant, wiretap evidence, DNA evidence, and the ***O'Connor*** provisions. As well, where young offenders are involved, the provisions of the ***YCJA*** must be complied with and the procedures set out therein must be followed.

[111] As set out in the paper, while the procedures for responding to such requests are different in the jurisdictions, the type of information protected and the rationale is relatively consistent. Consistency in the protections afforded to certain types of documents and the timing of any disclosure is also desirable, as it will lend further support and predictability to the Crown when responding to such motions before the courts.

[112] Protocols and Memorandums of Understanding between key stakeholders such as the police and child protection agencies and disciplinary tribunals can be drafted to assist in the sharing of vital information in urgent cases and in particular types of proceedings. These types of agreements can be entered into with relative ease, and this approach is less time consuming than legislation or regulatory steps.

[113] There are possible avenues for legislative or regulatory steps which can be considered to bring clarity and consistency in this important area. The difficulty will be addressing the jurisdictional concerns regarding which court or forum has the ability to hear any motions or applications for particular documents and which level of government will be required to make the necessary changes. For example, the ***YCJA*** requires that any requests for access to youth records must be before a youth court judge. In Ontario, a youth court judge is a judge of the Ontario Court of Justice ("OCJ"). The OCJ however, has no jurisdiction over civil litigation and therefore no experience with issues of civil relevancy or civil trials. Another example is the provisions of the ***Criminal Code*** which require applications in the criminal court before certain materials can be released. In Toronto and Ottawa, Masters, who do not have the jurisdiction of a criminal court judge, hear motions for production of documents of non-parties in civil matters.

[114] The difficulty with amending rules of court is the forum in which they are amended. In Ontario, the ***Rules of Civil Procedure*** are amended by way of Committee pursuant to the ***Courts of Justice Act***. The Ontario Ministry of the Attorney General can only make recommendations for rules changes, but the ultimate decision is with the Rules Committee. As well, amendments to rules of civil procedure/court rules cannot enter into the jurisdiction of criminal law, the ***Criminal Code*** or the ***YCJA***.

[115] One possible approach would be to govern the issue of disclosure in the civil matter by way of regulation, which may be easier and timelier than legislative reform. It may be possible to regulate what information must be redacted from documents prior to release in a collateral proceeding, and the timing of the release. For example, in Ontario, regulation could be created under the authority of section 135 of the ***Police Services Act***. The difficulty will be ensuring that there is sufficient authority in the governing legislation to make the necessary regulations regarding document disclosure.

[116] Legislative reform is a preferable option to amend many different pieces of legislation at once, including any necessary changes to FOI legislation. As indicated, one of the rationales in Ontario in prohibiting the release of Crown Brief documents through an FOI request is that once a document is released through FOI it is deemed to be released to the public and conditions cannot be placed on the disclosure. If however, disclosure is obtained through an order of the court, conditions can easily be placed on the disclosure and there are avenues of redress for failing to comply with the court order. Court orders will also protect the Crown and police from any subsequent complaints regarding the release of information.[42] Further, given the diverse and complicated issues that may be at issue, it is suggested that the court, as opposed to Information Privacy Commissioners, should consider these issues.

[117] Legislation and/or regulatory enactments will also help reduce the number of different judicial decisions and judge created procedures which have very practical implications for all stakeholders.

Conclusion

[118] The law regarding criminal disclosure and the protection of privacy has undergone significant change. Prior to the seminal decision in ***R. v. Stinchcombe***, these issues would likely not have developed. As well, privacy rights and the protection of those rights have developed substantially in the last few years by legislation and developments in the common law. It is suggested that the Ontario Court of Appeal decision in ***D.P. v. Wagg*** is neither a departure from the law nor the development of new principles, but represents a shift in the application of fundamental principles in Canadian

law. The legal issues in this growing body of law are important and the rights at stake require attention and resources for protection.

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[2] D.P. v. Wagg (2004), 239 D.L.R. (4th) 501 (C.A.)

[3] D.P. v. Wagg, (2002), 222 D.L.R. (4th) 97 (Div. Ct.), para. 14

[4] The Ministry of Attorney General, Crown Law Office – Civil only received notice of this matter after the decision of Justice Blair was released. At the Court of Appeal, the Attorney General (Ontario) and the Toronto Police Services sought and obtained intervener status.

[5] Wagg, supra, (C.A.), para. 49

[6] The jurisdiction of appropriate court will be dependant on the circumstances and which legislation governs the documents and proceedings in question, for example, the Criminal Code, the Youth Criminal Justice Act, and in Ontario the Rules of Civil Procedure or the Child and Family Services Act.

[7] (1991), 68 CCC (3d) 1 (S.C.C.)

[8] Ibid.

[9] supra, page 12

[10] Toronto, Queen's Printer for Ontario, 1993 (Chair: The Honourable G. Arthur Martin)

[11] Martin Committee Report, page 175

[12] Taylor v Serious Fraud Office, [1998] 4 All ER 801 (H.L.) at paras. 61-62. This position was expressly adopted by the Saskatchewan Court of Appeal in R. v. Lucas [1996] S.J. No. 55 (Sask. C.A.) at page 3 (QL)

[13] Wagg, supra**,** at page 8, para. 25 (Div. Ct.)

[14] See for example, Graat v. The Queen (1982), 2 C.C.C. (3d) 365, at page 378

[15] Taylor v. Serious Fraud Office, supra; Goodman v. Rossi (1995), 24 O.R. (3d) 359 (Ont. C.A.)

[16] D.P. v. Wagg, supra, (C.A.); at para. 19, adopted by Justice Rosenberg

[17] CCAST v T.K, (2004) 50 R.F.L. (5th) 285; [2004] O.J. No. 61, at para.37. See page 125 of the Report of the Attorney General's Advisory Committee on Charges, Screening, Disclosure and Resolution Discussions (Toronto: Queen's Printer for Ontario, 1993), as quoted at paragraph [25] of the decision in Wagg, supra.

[18] CCAST v T.K, supra, para.35.

[19] Wagg, supra, (C.A.), paragraphs 41-47

[20] [2001] A.J. No. 69 (Prov. Ct.)

[21] [2004] O.J. No. 5879 (S.C.J.)

[22] In Ontario, the youth court is typically the Ontario Court of Justice, however, sometimes the Superior Court of Justice is deemed to be a youth court. The civil and criminal superior court is the Ontario Superior Court of Justice.

[23] Sections 490(15) and 487.08(2) of the Criminal Code

[24] The concepts of solicitor client relationships with respect to the Crown and police are quite complicated and outside the scope of this paper. There is case law which supports such a privilege.

[25] Rules of Civil Procedure**,** R.R.O. 1990, Reg. 194, as am., Rule 30.10

[26] Franco et al. v. White, (2001) 53 O.R. (3d) 391 at para. 63

[27] Ontario (Attorney General) v. Stavro (1995), 26 O.R. (3d) 39; [1995] O.J. No. 3136 at page 7 (C.A.)

[28] Meaney v. Busby (1977), 15 O.R (2d) 71 (H.C.); Regina v. Westmoreland (1984), 48 O.R. (2d) 377 at p. 379 (H.C.)

[29] Consolidated NBS Inc. v. Price Waterhouse (1994), 24 C.P.C. (3d) 185 at 189-190 (Ont. Div. Crt.). This decision was not followed in Wagg with respect to the statements at issue; it is not clear whether or not the Court of Appeal was overturning the Divisional Court in Price Waterhouse. Wagg, supra, (C.A.), at para. 72.

[30] [2004] O.J. No. 1011, (Div Ct), para 13.

[31] 70 O.R. (3d) 312 (C.A.)

[32] See McKeigan v. Hickman [1989] 2 S.C.R. 796, 61 D.L.R. (4th) 688, 100 N.R. 81, 94 N.S.R. (2d) 1, 50 C.C.C. (3d) 449, 72 C.R. ((3d) 129 (S.C.C.)).

[33] See R. v. Ng (2003), 18 Alta.L.R. (4th) 77, 327 A.R. 215, 296 W.A.C. 215, 173 C.C.C. (3d) 349, 12 C.R. (6th) 1, 105 C.R.R. (2d) 315 (Alta.C.A.) at paras. 37 – 68).

[34] Federal Trade Commission v. Grolier Inc. 103 S.Ct. 2209 (1983)

[35] Slavutych v. Baker, [1976] 1 S.C.R. 254 at 260 (S.C.C.)

[36] J.(P.) v. Canada (A.G.) et al. (2000) 198 D.L.R. (4^{th}) 733

[37] As discussed elsewhere in the paper, in Ontario, prior to the Wagg decision, Crown Brief materials were being used in collateral proceedings, however, without the knowledge or consent of the Ministry of the Attorney General. The extent that this was occurring is impossible to measure, however, it is thought to be extensive given the number of comments we have had from requesting counsel that it was much easier to obtain the Crown Brief prior to Wagg. This is mentioned because it should be understood that such documents are likely being disseminated even in those jurisdictions that have not faced such formal requests.

[38] CLOC has also recently implemented new case management software systems which will permit the tracking of more detailed statistics.

[39] Aylmer Meat Packers Inc. v. Ontario, [2006] O.J. No. 2296

[40] (2002), 62 O.R. (3d) 167, leave to appeal refused [2003] S.C.C.A. No. 31

[41] Blank v. Canada (Minister of Justice),[2004] S.C.C.A. No. 513

[42] The Ministry of the Attorney General in Ontario is now defending claims regarding the improper dissemination of Crown Brief materials and recently received notice of a constitutional claim pursuant to section 8 of the Charter.