UNIFORM LAW CONFERENCE OF CANADA

JOINT CIVIL AND CRIMINAL SECTIONS

REPORT OF THE WORKING GROUP

ON

THE COLLATERAL USE OF

CROWN BRIEF DISCLOSURE

By DENISE DWYER*

Readers are cautioned that the ideas or conclusions set forth in this paper, including any proposed statutory language and any comments or recommendations, have not been adopted by the Uniform Law Conference of Canada. They do not necessarily reflect the views of the Conference and its Delegates.

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I. INTRODUCTION

[1] The ultimate aim of any trial, criminal or civil, must be to seek and ascertain the truth[1]. As the Supreme Court of Canada puts it, in a criminal trial, "[t]he search for the truth is undertaken to determine whether the accused before the court is, beyond a reasonable doubt, guilty of the crime with which he is charged. The evidence adduced must be relevant and admissible. That is to say, it must be logically probative and legally receivable"[2]. To that end, the courts and litigants must have full access to relevant information. However, that requirement becomes more complex when litigants in the civil system seek to use information gathered for the purpose of advancing a criminal investigation and prosecution. It results in a clash of competing interests that can frustrate the search for the truth in both arenas. It follows that the public interest in ensuring all relevant evidence is available to parties and to the court ought to be tempered by other public interest considerations, e.g., the protection of privacy and confidentiality. This balancing is essential to preserve the integrity of the criminal and civil processes and ultimately, the administration of justice.

[2] From a criminal law perspective, there are compelling arguments in support of the proposition that the use of Crown Brief materials in collateral proceedings can compromise the Court's truth finding function and can run contrary to its duty to protect the public interest. There is a real risk and fundamental concern that the prosecution's evidence could become tainted or inadmissible because of the dissemination of information from the Crown Brief outside of the criminal proceedings. The collateral use of prosecution materials also gives rise to other broader public interest concerns, such as

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the protection of privacy and confidentiality. Notably, 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.

[3] The importance attributed to truth inquiry in the civil context is equally as high. As in the criminal system, the civil courts have a duty to protect the public interest. The rules governing civil procedure are designed to facilitate that protection by enabling full and frank disclosure and production of relevant information between parties. As Justice Cory emphasized in *Cook v. Ip et al.*:

> There can be no doubt that it is in the public interest to ensure that all relevant evidence is available to the court. This is essential if justice is to be done between the parties….It is also important to the parties that they have early production of these documents. Settlement of disputes at an early date is of great benefit to the parties and to the judicial system.[3]

[4] As a general principle, a judge presiding over a civil trial is less likely to exclude evidence than his counterpart in criminal court. The difference flows from the fact that the accused's right to remain silent and right against self-incrimination are concepts that are foreign to the civil law system where, in fact, the rules are reversed. Parties in civil proceedings are compelled to testify both at examinations for discovery and at trial to answer any relevant question posed to them unless the response is protected by privilege. A civil court trial judge is encouraged to cast a wide net when considering the admissibility of relevant evidence in order to ensure that he or she has a complete record upon which to base his or her final decision.

[5] The competing interests between parties in the civil and criminal law systems concerning the collateral use of Crown Brief disclosure was discussed at length in the study paper entitled *Collateral Use of Crown Brief Disclosure*[4]. The paper was the impetus for establishing this Working Group to consider the issues raised and to make

recommendations to the Uniform Law Conference of Canada in 2007 "respecting the desirability and feasibility of legislative or non-legislative initiatives to promote uniformity in the use of Crown Brief material in collateral proceedings". The members of the Working Group, in addition to the author, are: Nancy Irving, Public Prosecution Service of Canada; David Marriott, Department of Justice Alberta; Greg Steele, Law firm of Steele, Urquart, British Columbia; Christopher Rupar, Justice Canada, Civil Litigation Branch; Elise Nakelsky, Ministry of the Attorney General of Ontario, Criminal Law Division; and Abi Lewis, Ministry of the Attorney General of Ontario, Policy Division.

[6] In this Report, the Working Group examines the impact of the decision in *D. P. v. Wagg*[5] ("*Wagg*") on civil production, as well as similar Crown Brief production issues currently being argued in the context of child protection litigation and administrative law proceedings. The Working Group discusses the primary sources from which Crown Brief contents may be obtained for use in collateral proceedings and outlines guiding principles and recommendations for implementing fair and consistent control over those sources. Specifically, the Working Group examines the need for an undertaking of confidentiality to govern the production of Crown Brief documents in collateral proceedings, the idea of codifying the *Wagg* screening process within legislation in the provinces and territories, and the need for all provinces to have an expanded protection for Crown Brief materials in their freedom of information legislation.

[7] While the recommendations in this Report were reached by consensus, not every member of the Working Group supports every recommendation. Our objective was to offer a practical roadmap for protecting Crown Brief material while satisfying the requirement of full production in the pursuit of justice in both civil and criminal litigation.

II. GUIDING PRINCIPLES FOR THE COLLATERAL USE OF CROWN BRIEF MATERIALS

[8] Drawing from the legal principles discussed in *Wagg*, the lessons learned from the experience in Ontario with *Wagg* motions and related caselaw, the Working Group developed a set of guiding principles. These principles are not exhaustive. They have

informed our approach to drafting recommendations, which we hope will achieve, at the very least, uniformity in the use and production of Crown Brief information for collateral purposes. In these guiding principles, we address an overarching public interest, namely, preserving the administration of justice and, more specifically, the integrity of criminal proceedings. This requires a consideration of whether privilege, public interest immunity or any other public interest factor overrides the public interest in promoting the administration of justice through full access of litigants to relevant information[6]. The Working Group has established the following guiding principles:

1. Generally, it is in the public interest to control disclosure and use of Crown Brief materials for collateral purposes in order to maintain the integrity of criminal investigation and prosecution processes, and to protect third party privacy and confidentiality concerns.

    (a) Effective investigation of crime depends in large measure on the support and cooperation of the public.[7] Information collected by the police from the public for the purpose of a criminal prosecution is presumptively confidential and private. A witness has no expectation that the information he or she provided will be used outside of the criminal proceedings.

    (b) Disclosure given to criminal defence counsel is solely for use in making full answer and defence. Defence counsel must maintain care, custody and control of the disclosed material so that copies of such materials are not disseminated for collateral use. This is an implied undertaking of confidentiality that binds defence counsel, the unrepresented accused and third parties who receive Crown Brief disclosure.

    (c) An accused has a constitutional right to a fair trial and to make full answer and defence at every stage of the criminal process. Where production of Crown Brief materials is sought for use in related civil proceedings during the criminal prosecution, the paramount consideration must be maintaining the integrity of the prosecution. This includes preserving the

presumption of innocence, protecting third party confidentiality and privacy and generally not bringing the administration of justice into disrepute.

(d) As the representative of the public interest, the Crown has an obligation to ensure a fair trial, a duty to protect the administration of justice and a legitimate interest in protecting the privacy of witnesses and suspects.

2. There is a public interest in protecting the administration of civil justice by ensuring that the parties in a civil proceeding have full access to all relevant information.

(a) Parties to civil proceedings have a legitimate interest in accessing information contained in the Crown Brief in seeking to obtain civil remedies flowing from the conduct of the accused; these include victims of crime, cases involving children, professional disciplinary matters and sexual harassment cases.

b) The Crown Brief is a special category of record and its production for collateral use raises serious public interest concerns. The screening mechanism formulated in *Wagg* must be applied so the public interest concerns may be properly balanced.

3. The screening mechanism formulated in *Wagg* applies in quasi-criminal and civil proceedings, including child protection agencies, labour arbitrations, and administrative law proceedings.

4. The public interest balancing test which is part of the *Wagg* process must be conducted in a fair and consistent manner. This requires that the decision-maker have the requisite legal expertise to recognize administration of justice concerns that are critical to the protection of integrity of the criminal and civil law systems.

5. Freedom of information legislation should not be used to access Crown Brief materials in circumstances where the public interest in confidentiality should

prevail. The principles and considerations in *Wagg* should inform the freedom of information process.

III. BACKGROUND

Terminology Explained

[9] As a preliminary matter, the Working Group thought it beneficial to clarify the meaning attributed to the terms "Crown Brief", "production", "disclosure", "implied undertaking", "public interest immunity" and "public interest privilege" as used in this Report.

[10] The term, "Crown Brief" does not have a universally accepted meaning, but is generally understood by prosecutors to have a broader meaning than the criminal disclosure provided to an accused person pursuant to the Crown's obligation in *Stinchcombe*[8], and in its broadest sense to encompass the entire police investigation file and the complete file held by the Crown Attorney, including notes made by Crown counsel in its assessment and preparation of the file. However, it does not appear to have been used in this broad sense in the case law. Accordingly, for the purposes of this Report, the Working Group will use the term Crown Brief interchangeably with the concept of the materials disclosed to the accused.

[11] The contents of the Crown Brief typically include the synopsis of allegations, police notes and occurrence reports, will say statements of witnesses and police officers, signed statements of witnesses, videotaped or audio-taped witness statements, exhibits such as photographs, medical reports, and the criminal record of the accused. In more complex cases, search warrant information, surveillance reports, wiretap evidence and scientific reports such as DNA, toxicology, pathology reports may be included. In addition, the police investigation portion of the Crown Brief may contain information gathered throughout their inquiry which is irrelevant to the prosecution.

[12] The terms "disclosure" and "production" may cause confusion because of their differing interpretations in civil and criminal law. In the civil context, disclosure refers to the disclosure of the existence of a document in the affidavit or list of documents that

each party must prepare. Disclosure routinely includes a description, in general terms, of the document being identified. This is commonly referred to as listing documents. Production in civil proceedings is the act of physically handing over a document to the opposing party. It is usually triggered by the opposing party's request to view a document that has been disclosed.

[13] In contrast, disclosure in the criminal context refers to the obligation of the Crown to provide to the accused all relevant evidence in its possession, whether or not it is admissible and whether or not it will be relied upon at trial. The Crown has a discretion to withhold or delay disclosure where necessary to protect the identity of an informer or a continuing investigation or to uphold some other rule of privilege. The Crown may also withhold material which is clearly irrelevant but must err on the side of inclusion. The discretion of the Crown to withhold or delay disclosure is reviewable by the trial judge[9].

[14] The term "implied undertaking" refers to a rule of common law that imposes the giving of an undertaking to the court by a party to whom information or documents are provided in the civil or criminal litigation process that the party will not use the information or documents for any collateral or ulterior purpose, and that any such use is a contempt of court[10].

[15] Immunity and privilege are dealt with under different sections in this Report but the two terms are closely linked in their meanings when used in the context of public interest. In the Divisional Court decision in *D.P. v. Wagg*[11] ("*Wagg*"), Blair J. refers to "The Law of Evidence in Canada", 2nd ed. (Toronto: Butterworths, 1999) by Sopinka, Lederman and Bryant for its discussion of privilege and public interest immunity. An excerpt from paragraph 14.7 of the text and quoted in the decision, states that while privilege concerns "[i]tself with the protection of confidential communications within certain important societal relationships, privilege may also be invoked to preserve society as a whole when disclosure may jeopardize the national security of the country or impair the expeditious administration of government or hinder police authorities in obtaining information from sources…". That class of privilege, the authors note, is more accurately known as *public interest immunity*.

[16] Sopinka et al., *supra* state that the government may assert immunity from disclosure where public interest favours non-disclosure. At paragraph 15.2, the authors explain, "This government right, where it can be successfully asserted, is more appropriately labelled an 'immunity' rather than a privilege. The assertion of the immunity claim may result in the non-disclosure of reports, memoranda and communications, just as in the case of a traditional privilege." In sum, the terms "public interest privilege", "public interest immunity" and "Crown immunity" as used in this Report are synonymous.

A. *D. P. v. Wagg*

[17] The issue regarding the production of Crown Brief for collateral purposes was debated in both Canadian and British jurisprudence before the release of the decision in *Wagg*. In the Canadian authorities, the courts analysed the issue based on the central principle underlying civil discovery: if the information is relevant, in the control or possession of the non-party and not subject to privilege, it must be produced. The discussion in the Canadian cases centred on the application and scope of the implied undertaking attaching to the Crown Brief disclosure provided to an accused by the prosecution. In the foundational English case of *Taylor v. Serious Fraud Office*, the House of Lords focussed on the same issue. It held that two documents forming part of the disclosure package were subject to an implied undertaking at common law. It found, therefore, that the records could not be relied upon by a witness (to whom the accused had shown the records) in his subsequent lawsuit against the prosecutor and police for libel[12].

[18] This and other attendant issues were amplified by the court in *Wagg* and subsequently in other cases in Ontario, Alberta and British Columbia. The parties in *Wagg* litigated the issue of collateral use of Crown Brief material up to the Ontario Court of Appeal. That litigation resulted in the creation of a mandatory common law screening mechanism to control production of the content of the Crown Brief.[13] The defendant in this case, a gynecologist, was charged with sexually assaulting the plaintiff during a medical examination. He received disclosure of the Crown Brief, which included a

statement he had given to the police during the criminal investigation. The criminal trial judge held that the police had obtained the statement in violation of the defendant's *Charter* right to counsel and thus found it inadmissible under section 24(2) of the *Charter*. The criminal charges were ultimately stayed for unreasonable delay.

[19] The plaintiff brought an action for damages against the defendant. She sought disclosure and production of the Crown Brief contents, including the statement, under the *Rules of Civil Procedure.* The defendant was successful in resisting production at first instance. On appeal, the Superior Court ordered that the Crown Brief be disclosed and produced. The matter was appealed to the Divisional Court.

[20] The Court held that a party in possession or control of a Crown Brief had to disclose the existence of the Brief in his or her affidavit of documents and describe its contents in general terms. Regarding production, the Court held that the Attorney General and the relevant police may consent to production without need for a Court Order. However, where consent is withheld, a Superior Court must screen the documents at a hearing on notice to all parties, the Attorney General and the relevant police service. Blair J., writing for the Court, made several observations about the need to restrict the dissemination of the contents of a Crown Brief:

1. While there should not be a blanket rule prohibiting disclosure of the Crown Brief in collateral proceedings, given the myriad of documents at issue in criminal proceedings, including sensitive information about third parties and witnesses, mere relevance is an insufficient basis on which to compel production of those materials in companion civil proceedings;

2. Material in a Crown Brief may be subject to privacy concerns and other interests that civil litigants will not necessarily have an interest in safeguarding; and

3. A screening mechanism must be applied where production of Crown Brief material is sought for use in collateral proceedings, and within that process the state should be " 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"[14].

[21] Blair J., as he then was, stated that the authority for formulating the screening mechanism was derived from the Superior Court's inherent jurisdiction to control its process and to protect that process from being abused. Describing the rationale for exercising such authority in this case, he stated:

> The rationale rests, in my opinion, in the protection of the public interest as I have outlined it above and in the promotion of the effective administration of justice in that context. There are aspects of both the notion of "privilege" (i.e., the protection of confidential communications within the context of Crown disclosure and *Stinchcombe*) and the notion of "public interest immunity" (i.e., the right of government and its agencies to assert an immunity from disclosure in the public interest) underlying this thinking. However, whether the exercise of the authority is founded upon one or the other of such concepts is less important than the underlying premise behind both. That underlying premise is -- as I understand the concepts -- that 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.[15]

[22] The Court considered the defendant's position that the implied undertaking rule prevented him from providing criminal disclosure material to the plaintiff. The defendant argued that this implied undertaking precluded him from even disclosing the Crown Brief in his affidavit of documents as a document that he was objecting to producing. Rejecting the defendant's argument, Blair J. expanded on the scope of the implied undertaking in the criminal context. He affirmed the existence of:

> [a]n implied undertaking which binds Dr. Wagg from using any documents produced to him in criminal proceedings for any purposes collateral to the criminal proceedings…that implied undertaking has no application because

> Dr. Wagg is not seeking to use the Crown productions against the Crown or anyone else (including the plaintiff/complainant).[16]

[23] Having decided there was a need to create the screening process, the Court found that the defendant was not required to produce his statement to the plaintiff. Blair J. reasoned that the defendant's statement was obtained in violation of the *Charter* and the subsequent remedy of exclusion of that evidence under the *Charter* precluded its use in the subsequent civil action. He concluded that the *Charter* considerations applied equally to the production stage of the civil proceedings, such that requiring the defendant to produce the statement would bring the administration of justice into disrepute[17].

[24] The Ontario Court of Appeal wholly endorsed the screening process developed by the lower court. Nonetheless, it disagreed with the result and held the defendant's statements should be produced. Specifically, Rosenberg J. summarized the operation of the screening mechanism in the following manner:

- The party in possession or control of 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; 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.[18]

[25] Rosenberg J. acknowledged there are compelling policy reasons for recognizing that there is an implied undertaking rule that applies to Crown disclosure. However, he declined to decide that issue, noting that those who have an interest in the outcome of that debate were not before the Court.

[26] In determining whether the defendant's statement ought to be produced, Rosenberg J. held that the Divisional Court made two errors of law. He observed that the Divisional Court did not have a record on which to determine the seriousness of the *Charter* breach. Further, he found that the law in *R. v. Stillman,* as it relates to the test for excluding evidence, had been applied to the civil context without regard for the different purposes and values that underlie civil and criminal proceedings. Summarizing his findings, he stated:

> Where I part company with the Divisional Court is in their finding that the production of the statement would bring the administration of justice into disrepute. First, the determination could only be made by a court that had been apprised of all the circumstances under which the statement was made. Second, I disagree with the Divisional Court that the same considerations that would lead to exclusion of the statement in the criminal context apply in the civil context. If the statement could be admitted in the civil trial, I do not see any basis for preventing its production at the discovery stage. Third, even if a court could determine at this early stage that the statement would not be admissible at trial, in my view, it should still have been ordered produced.[19]

[27] The decision in *Wagg* crystallised the need to consider public interest factors in the Court's balancing of whether Crown Brief information should be produced in related civil proceedings. Justice Blair recognized that the balancing exercise that must be undertaken by the court necessitates an analysis of more than just the relevance of the Crown records being sought. It must include an examination of legitimate privacy

concerns and the need to preserve the integrity of the criminal investigation and trial. The objective of the screening process is to strike a balance in preserving the integrity of the administration of criminal justice and ensuring a civil litigant's right to obtain production of relevant information.

[28] The underlying public policy rationale for the *Wagg* screening process is to protect two fundamental interests in the administration of justice. First, the public interest requires avoiding an unnecessary invasion of privacy and protecting the confidentiality of persons who provide information to law enforcement officials and of certain persons to whom such information refers. Second, the public interest requires that those involved in criminal investigations and law enforcement be able to communicate freely, without the inhibiting effect of the collateral use of materials containing such communications. The House of Lords in *Taylor v. Serious Fraud Office*, *supra*, expressed the rationale in these terms:

> 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 the 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 no 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.[20]

[29] The mandatory common law screening process developed in *Wagg* provides some functional and practical solutions to the challenges faced by the Crown in resisting the production of Crown material in civil proceedings. First, the Court distinguished the Crown Brief from the other types of information routinely sought from non-parties in civil litigation. Specifically, the Court recognized the serious public policy issues triggered by the collateral use of criminal investigation or prosecution materials. Second,

the Court defines and legitimizes the special role of the Attorney General on motions for production of Crown Brief information by placing the obligation on the Attorney General to screen all such material before it is disseminated. There is no doubt that these developments have provided greater protection against the improper circulation of the Crown Brief contents. However, the jurisprudence that has developed since *Wagg* indicates that this protection may not be adequate because the screening process does not capture other aspects of the administration of justice.

B. Decisions on Crown Brief Production post-*Wagg*

[30] The legal principles discussed in *Wagg* have been referred to and applied by courts in Ontario, Alberta and British Columbia. A review of those decisions is instructive in identifying the challenges inherent in applying the screening process. Further, a review of the cases amplifies potential challenges that arise where the screening process is not in place. Of the four decisions that will be examined in this Report, only that of the British Columbia Supreme Court was delivered after the Court of Appeal decision in *Wagg* in May 2004.

[31] In *Dixon v. Gibbs*, [2003] O.J. No. 75 (S.C.J.)[21], the respondent sought disclosure of the Crown Brief on the basis that its contents were relevant to issues of custody of and access to the child she shared with the applicant, Dixon. Dixon was facing criminal charges for allegedly hiring a hit man to kill the respondent and uttering threats to her. He had already obtained a copy of the Crown Brief as part of the criminal disclosure process and consented to its release to the respondent. The Crown objected to disclosure on the ground that the production of the Crown Brief to a potential witness would jeopardize the prosecution. A critical fact was the timing of the request: the preliminary hearing had not begun.

[32] In applying the public interest balancing test prescribed in *Wagg*, Smith J. found that preserving the integrity of the criminal prosecution necessitated a delay in the release of the Crown Brief until, at minimum, the completion of the preliminary inquiry[22]. In accordance with *Wagg* procedure, the Court ordered the Crown to produce to the court its Brief for judicial review within 30 days after the completion of the preliminary inquiry,

with submissions on which documents the Crown objected to disclosing. It is likely the case that the Court's ruling reflected the position taken by the Crown that concerns about jeopardizing the integrity of the criminal proceedings may diminish once the witnesses' evidence has been tested at the preliminary inquiry. Further, it is reasonable to conclude that the plaintiff's request for production appealed to the Court's fundamental sense of fairness. It would have been a perverse result if the plaintiff, who is the complainant in the criminal proceedings, were barred from accessing the information, which forms the basis of her action and is already in the possession of the defendant, the accused – even where the defendant consents.

[33] In *N.G. v. Upper Canada College* (2004), 70 O.R. (3d) 312 (C.A.), the Court of Appeal of Ontario reached a similar conclusion based on different reasoning[23]. In that case, the Attorney General for Ontario appealed a lower court decision requiring production in a civil action of the videotaped statement given by the plaintiff in a related criminal proceeding. The subject of the criminal prosecution was a former teacher at Upper Canada College who was charged with sexually assaulting the plaintiff. The Crown had disclosed to the accused teacher a copy of the videotaped statement, along with the rest of the Crown Brief in the criminal proceedings. The plaintiff commenced an action against Upper Canada College stemming from the conduct of the teacher. The school brought a motion, which was successful at first instance, to obtain a copy of the plaintiff's videotaped statement in order to defend itself against the civil suit. The plaintiff consented to the production of his statement. The former teacher being prosecuted took no position on the release of the information. The Attorney General moved for a stay of the Master's production order.

[34] Significantly, the criminal proceedings were ongoing while the litigation involving production of the Crown Brief was progressing through the courts. By the time the Attorney General's motion to stay the production order was being heard in Divisional Court, the preliminary inquiry had been held and the plaintiff had testified. However, the civil trial was scheduled to commence almost six months before the criminal trial.

[35] At the Divisional Court, Lang J. upheld *the* decision of the Master to release the statement despite the fact that the criminal trial had not yet commenced[24]. Lang J. rejected the Crown's argument that the Brief was protected by litigation privilege. She concluded that litigation privilege did not apply where the accused had been given disclosure of the tape and the plaintiff was consenting to its production. As well, Lang J. remained unconvinced that there was a risk of jeopardizing the integrity of the ongoing criminal prosecution against the teacher through the disclosure of the videotaped witness statement.

[36] The Attorney General sought leave to appeal and moved for a stay of the order requiring production in the civil action of the videotaped statement. Sharpe J.A. was unconvinced by the Attorney's General's argument that there would be irreparable harm to the criminal prosecution if the videotape were used in the civil trial before the criminal trial had commenced. The Justice found that the risk that other Crown witnesses would become tainted if they were given access to the contents of the plaintiff's statement in advance of giving their testimony was speculative. In addition, he concluded that the confidentiality conditions imposed on the production order by the Master and modified slightly by Lang J. sufficiently safeguarded against witness tainting.[25] The Attorney General's motion for a stay was dismissed. The Attorney General abandoned its appeal of Lang J.'s decision after the parties in the civil action settled.

[37] In *Dixon v. Gibbs* and *N.G. v. Upper Canada College*, the preliminary inquiry appeared to be viewed as a stage in the criminal proceedings when the risk of harm to the ongoing prosecution is sufficiently low that a court can reasonably grant a request for production of the Crown Brief for use in collateral proceedings. That conclusion is inherently flawed. An accused person's constitutionally protected right to a fair trial continues throughout every stage of the criminal prosecution. It does not end with the preliminary inquiry. Interference with that right could reasonably jeopardize the integrity of the criminal proceedings. One tool that criminal court routinely uses at the preliminary hearing stage to protect the accused's right to a fair trial is the publication ban. As a usual practice, the court orders a ban at the request of counsel. The ban preserves the integrity of the evidence adduced at the preliminary hearing and safeguards the

impartiality of potential jurors whose views about the accused's guilt or innocence could be influenced if there were media recounts of the preliminary inquiry testimony. While the existence of a publication ban was mentioned by the Divisional Court in *N.G. v. Upper Canada College*, its significance to the administration of criminal justice was not discussed in either case.

[38] In *Bourgeois v. Bolen*, [2004] A.J. No. 50, the Alberta Court of Queen's Bench considered the propriety of ordering production of Crown Brief materials for use in civil litigation[26]. The plaintiff in that case brought a motion to compel production by a non-party, the defendant's criminal defence lawyer, pursuant to Rule 209(1) of the *Alberta Rules of Court*. She sought production of records pertaining to the defendant driver's blood alcohol level at the time of a fatal motor vehicle accident in which the plaintiff's relative was killed. The defendant was charged but not convicted of drinking and driving offences stemming from the collision.

[39] The defendant's criminal defence counsel refused to release the Crown disclosure to the defendant's civil lawyer, citing the implied undertaking of confidentiality as his authority for withholding the documents. The Crown declined to deliver the defendant's blood alcohol analysis on the ground that Rule 209 did not bind the Crown[27]. However, the Crown took no position on the plaintiff obtaining the records from some other source, including the defendant's criminal lawyer.

[40] Relying upon the Divisional Court decision in *Wagg*, Greckol J. found that an implied undertaking applied to the criminal disclosure, but was prepared to override it to permit the disclosure and production of the Crown Brief materials to the defendant's civil counsel. The court held that in circumstances such as this case, namely, where the Crown Brief information being sought (i.e. the blood alcohol analysis) was produced to the Crown under statutory compulsion, the defendant may assert a claim of public interest privilege or immunity. Greckol J. rejected the defendant's argument that the Wigmore test applied to the communication of the Crown disclosure from the prosecution to the accused. She was reluctant to accept the proposition that the sharing of Crown disclosure constituted a confidential communication between the prosecution and defence in the

context of a special relationship. In applying the public interest balancing test set out in *Wagg*, Greckol J. discussed the application of *Charter* values to civil litigation. Because there had not been a trial, there was no ruling on whether the state's action in obtaining the blood sample from the defendant met the requirements of the *Criminal Code* and the *Charter*. With respect to this issue, Greckol J. stated:

> I conclude that the net effect of *Dolphin Delivery*, *Ryan*, and *Wagg* is that in a civil lawsuit, where the party seeks production of records revealing blood alcohol readings derived from a *Criminal Code* demand, *Charter* considerations arise…When the court makes a determination as to the disclosability of evidence obtained by the state through compulsion of statute, *Charter* values must inform the decision.[28]

[41] Greckol J. ordered the defendant's criminal defence counsel to provide the blood analysis records to the defendant's civil counsel. He further ordered that after reviewing the records, the defendant must assess whether to advance a claim for privilege or public interest immunity. The Court was prepared to hear any application arising from the claim in a pre-trial motion or at trial.

[42] In *Huang (Litigation Guardian of) v. Sadler et al.*[29], the British Columbia Supreme Court also dealt with the issue of whether to compel production of Crown Brief material while the criminal prosecution was still in progress. The defendant Sadler brought a motion pursuant to Rule 26(11) of the *British Columbia Rules of Court* to compel production of police investigation records from the Vancouver Police Department. The civil suit in this matter arose from a motor vehicle accident in which the plaintiff, an elderly person, had suffered significant brain injury. The defendants Sadler and Tidbury, an ambulance driver, were operating vehicles involved in the collision. At the time of the motion, both were both being prosecuted for various quasi-criminal offences. Her Majesty the Queen in right of the Province of British Columbia (HMQRBC) and the provincial agency were named as defendants in the action. Civil counsel had obtained possession of the Crown Brief disclosure related to the prosecution of Sadler and Tidbury from criminal counsel. When civil counsel sought the permission

of the Attorney General of British Columbia and the police to use the prosecution materials in the civil proceedings, it was refused and this application was brought.

[43] Both defendants had some, but not all, of the records being sought from the police, having obtained them through the criminal disclosure process. The defendants received the criminal disclosure documents under conditions of an express undertaking to the Crown: the disclosure could only be used for the purpose of making full answer and defence and could not be used for any other purpose; additionally, any request for access to the disclosure should be referred to the investigating agency. On this application, the defendants were requesting production of documents arising from the police investigation which they had not received including: traffic investigation reports, witness statements, seat belt use reports, drug and alcohol testing reports, training records related to Tidbury, physical evidence collected at the scene, forensic analysis reports, reports resulting from scene testing and re-enactment, expert reports, and notes beyond contemporaneous records. The Attorney General of British Columbia had not released any of these records to the HMQRBC or the provincial agency, even though they were part of the same provincial Crown. Significantly, the civil trial was set to commence three months before the criminal trial.

[44] The plaintiff supported the motion for production. Due to her age and the nature of the injuries she had suffered, she argued an adjournment of the motion would be prejudicial to her case. She stated that it was only fair for her to have access to the documents already in the possession of the defendants. The Attorney General of British Columbia opposed the motion on three grounds: (1) as a general rule, to the production of criminal investigation material, and, more particularly, to witness statements and expert reports in this case; (2) there was an implied or express undertaking of confidentiality that applied to the materials; and (3) the civil proceedings should be adjourned until the completion of the criminal proceedings. As an alternative argument, the Attorney General submitted that there should be a specific process outside the Rules of Court to deal with requests for production of these types of documents.

[45] Guided by the reasoning in *N.G. v. Upper Canada College*, Dillon J. applied the public interest balancing test to the facts of the case and concluded that "fairness of the civil trial clearly overweighs any concern for the criminal proceedings when the two defendants already have most of the material, the documents are relevant, and no specific interest is in need of protection through non-disclosure."[30]. Accordingly, the Court ordered the police to produce all of the documents sought. Dillon J. did not impose any conditions of confidentiality on the disclosure of the police files and instead relied on the strength of the implied undertaking to protect against improper dissemination of the Crown materials. The Court ordered that "counsel and parties shall take all reasonable steps to ensure that potential witnesses are not exposed to other witness statements, subject to a ruling on admissibility in the trial and the imposition of specific safeguards."[31]. She concluded that the public interest balancing test endorsed in *Wagg* should be considered if the disclosure matter went to hearing. It is noteworthy that in a recent Ontario case where production of Crown Brief materials was sought in civil litigation to which the Crown was a party and where the preliminary hearing had not commenced, the Court also ordered the documents disclosed[32].

[46] Bearing in mind that the decision in *Wagg* has only persuasive value outside Ontario, it is encouraging that in the British Columbia and Alberta cases, the courts demonstrated a willingness to endorse the *Wagg* screening process, or at least conduct the public interest balancing test. The courts' application of the public interest balancing test differed, however, based on their general appreciation of criminal law process and issues. Generally, the courts did weigh and examine common factors, which appeared to influence the outcome of the public interest balancing test, namely:

1. The stage of the criminal proceedings as an indication of how great the risk exists that the prosecution will be jeopardized if production of the Crown Brief is ordered;

2. 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;

3. The relationship of the party seeking production of the Crown Brief to the criminal proceedings, e.g. the complainant;

4. The stated purpose of the party seeking production of the Crown Brief;

5. Whether the defendant, particularly if he or she was the accused in the criminal matter, already had possession of the Brief;

6. The position taken by the Crown on production of the Brief;

7. The position on production taken by the person who is the subject of the records being sought;

8. The stage of the civil proceedings: discovery versus trial.

[47] While this list is not exhaustive, it is informative. Significantly, the factor that was not considered in the post-*Wagg* decisions was whether production of the Crown Brief for use in collateral proceedings would infringe upon the accused's right to a fair trial. This is an important aspect of assessing whether production of the Crown Brief will compromise the ongoing criminal proceeding. The decision in *N.G. v. Upper Canada* has influenced subsequent courts to order production of materials from the Crown Brief during the criminal process. The concern with this pattern is expanded upon further in this Report.

C. The Impact of *Wagg* – The Ontario Experience

[48] Conflict over the production of the Crown Brief has fuelled litigation in other fora including child protection proceedings, professional disciplinary matters and labour arbitrations. An examination of Ontario's experience with *Wagg* motions in the context of civil litigation, including these other fora, provides a practical perspective on the challenges to the application of the *Wagg* screening mechanism, as well as insight into the unanticipated impact of *Wagg* on their proceedings.

i) Motions for Production from a Non-Party under the Civil Rules

[49] Counsel in the Crown Law Office – Civil , the central litigation office within the Ministry of the Attorney General ("the Ministry"), represents the interests of the Attorney General on motions brought pursuant to Rule 30.10 of the *Rules of Civil Procedure* for production of Crown Brief documents ("*Wagg* motions"). Rule 30.10 governs production from a non-party and 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) a 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.[33]

[50] The rule does not apply to privileged documents and provides for an inspection by the court of the records in issue where uncertainty as to relevance or the necessity for discovery arises.[34]

[51] Crown Law Office – Civil represents the Criminal Law Division of the Ministry on *Wagg* motions. The Office works in cooperation with the Criminal Law Division and various police services in Ontario, to ensure that the Attorney General's obligations under the *Wagg* screening process are satisfied. Crown Law Office – Civil has opened approximately 992 files related to *Wagg* motions since January 2005[35]. Responding to these matters requires services of two full-time law clerks and counsel assigned as the *Wagg* Coordinator whose practice is primarily dedicated to Crown Brief production litigation. The Criminal Law Division has added a dedicated lawyer and law clerk to assist in the processing of *Wagg* motions and they shoulder the task of reviewing and vetting all documents as required under the screening regime.

[52] Typically, when the relevant police service and the Attorney General are both served with a *Wagg* motion[36], the Attorney General takes the lead in responding. The

responsive records from the police service are reviewed by the Ministry with a view to redact any information that is privileged, confidential or raises public interest concerns [37]. The factors considered in the review process include:

1. *The existence of ongoing criminal proceedings*

   The Attorney General resists production of any Crown material where the prosecution is incomplete to ensure the integrity of the prosecution is not compromised[38].

2. *Youth Court records*

   The *Youth Criminal Justice Act* provides an exclusive regime for the disclosure of youth records. The moving party must apply for an order from the Youth Court permitting production of the responsive records to the Attorney General for reviewing and vetting as required under the *Wagg* process. The order obtained from Youth Court must also authorize the subsequent release of the vetted records by a civil court judge pursuant to *Rule 30.10*[39].

3. *Third party names and personal information*

   This type of information, such as social insurance numbers, dates of birth, licence plate information, driver's license numbers, employment information and addresses, is typically 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.

4. *Information that may compromise law enforcement interests*

   Internal police codes, Finger Printing Services ("FPS") numbers, dates of birth of police officers and similar information are removed from the Crown disclosure.

5. Privileged information

The Ministry edits the Crown documents to remove any information over which privilege is claimed. The types of privilege that may be claimed include solicitor client privilege, Crown work product/litigation privilege, informer privilege and the specified public interest privilege that applies to ongoing police investigations, police investigative technique, material that would affect the safety of individuals, and police intelligence.

6. Video, audio or other multimedia information

Because this material cannot often be practically edited, the Ministry will exercise a number of options: negotiate the imposition of conditions restricting dissemination on any release order per *Regina v. Blencowe* (1997), 35 O.R. (3d) 536 (Gen. Div.); provide for inspection but not production; or produce the information in a format which lends itself to editing, such as transcripts.

[53] In the majority of *Wagg* motions, orders are issued unopposed by the Attorney General on conditions mutually agreed to by the parties. There are cases, however, where counsel for the Attorney General argues against production. The motions are heard by Superior Court Masters. These Masters have expertise in civil litigation, but they may have varying familiarity with *Charter*, criminal law and criminal disclosure issues. The added complication is that *Wagg* motions are new legal terrain. There is little jurisprudence on which a Master can rely for further direction on the application of the *Wagg* process and, as discussed above, there is no recognized list of factors for a court to consider when applying the screening process. Most importantly, the tendency of the courts to order production of the Crown Brief during the related criminal proceedings has created a heightened concern within the Ministry for the potential harm to criminal cases that may result.

ii) Child Protection Proceedings

[54] It has become a common occurrence for various Children's Aid Societies ("CAS") to bring motions under the *Child and Family Services Act* for orders of the court compelling the production of Crown Brief materials for use in child protection proceedings. There are 53 Children's Aid Societies in Ontario operating under the authority of the CFSA. Every CAS is a separate non-profit corporation and is administered by a volunteer board of directors. Subsection 74(3) of the *CFSA* authorizes the court to compel production to the CAS of information that is relevant to child protections proceedings and which is in the control or possession of any person. Subsection 74(3) states :

> Where the court is satisfied that a record or part of a record that is the subject of a motion referred to in subsection (2) contains information that may be relevant to a proceeding under this Part and that the person in possession or control of the record has refused to permit the Director or the society to inspect it, the court may order that the person in possession or control of the record produce it or a specified part of it for inspection and copying by the Director, by the society or by the court.[40]

[55] The Attorney General and the CAS offices have an established practice for dealing with these production motions, which incorporates the *Wagg* screening process. But there may be cases where that practice can be ignored. The Attorney General is currently involved in litigation with one CAS office on the issue of whether *Wagg* screening procedures apply to the statutory scheme under the *CFSA* governing production by non-parties[41].

iii) Professional Disciplinary Proceedings

[56] There are many regulatory agencies, quasi-criminal and quasi-civil in scope, which conduct professional disciplinary proceedings. More and more, these bodies are seeking production of the Crown Brief. As part of the description of the Ontario experience with *Wagg* related litigation, there is considerable focus on the professional

disciplinary agencies because of the impact on the individuals involved, the likely timing of their proceedings, the scope of their statutory authority to order production and the sensitivity of the materials that may be sought. The Ontario College of Teachers ("OCT"), the College of Physicians and Surgeons of Ontario ("CPSO") and the College of Nurses of Ontario ("CNO") are three regulatory bodies that have resorted to seeking access to Crown Brief materials for use in their disciplinary processes. The discussion concentrates on the CPSO and the CNO. Both Colleges operate under the *Regulated Health Professions Act, 1991* ("*RHPA*")[42]. The RHPA contains the *Health Professions Procedural Code*, which provides authority for investigators at the Colleges to seek the production of records from non-parties. Specifically, section 76 of the *Health Professions Procedural Code* states:

> An investigator may inquire into and examine the practice of the member to be investigated and has, for the purposes of the investigation, all the powers of a commission under Part II of the *Public Inquiries Act.*

[57] The reference to "all the powers of a commission" in this provision includes the authority to summons a person to give evidence at an inquiry or compel the production of specified documents at the inquiry pursuant to subsection 7(1) of the *Public Inquiries Act.*[43]. Significantly, a CPSO or CNO investigator can issue a summons under her or his own signature, which binds a non-party to the disciplinary proceedings and compels that party to produce their records to the investigator. Of concern is that there is no adjudicative process for a record-holder to object to production. The CPSO investigator uses documents from the Crown Brief to establish the evidentiary basis required to refer a complaint against a medical professional to hearing. Historically, these matters have been resolved on a case-by-case basis between the Colleges and the Ministry of the Attorney General. However, as with the CAS, there are instances where custom is disregarded.

[58] The Colleges and the Attorney General have a common interest in ensuring that medical practitioners do not engage in criminal conduct that could harm or injure members of the public, especially children; that suspensions or prohibitions from

practicing are imposed in a timely manner ;and that such persons are prosecuted to the fullest extent of the law. Despite these shared objectives, the production of Crown Brief materials to the Colleges to assist with investigations and discipline creates a risk of jeopardizing any related criminal prosecution. The risk is particularly high given the fact that the related criminal prosecution is usually ongoing when the disclosure of the Crown Brief contents is being pursued for advancing disciplinary proceedings.

[59] These competing interests have resulted in ongoing litigation in Ontario, in which doctors, who have been accused persons in criminal proceedings, are objecting to the jurisdiction of the CPSO to summons Crown Brief materials into their possession for use in disciplinary proceedings[44]. The CPSO cases raise fundamental, practical and jurisdictional issues. They raise some of the same legal issues discussed in the post-*Wagg* authorities and current CAS litigation. It is anticipated that the judges who hear these applications will be asked to address the following issues:

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 CPSO investigator?

iv) Labour Arbitrations

[60] The jurisdiction to compel production of Crown Brief materials is a live concern in the context of labour arbitrations. One such case was an arbitration matter between the Toronto Transit Commission and Amalgamated Transit Union, Local 113 involving the grievances of two employees. The employer and the union appeared before the arbitrator and sought an order for production of the Crown Brief related to the criminal charges against the grievors[45].

[61] Subsection 48(12) of the *Labour Relations Act*[46] sets out the authority of an arbitrator, the chair of an arbitration board and the arbitration board to summons witnesses and to compel them to give oral or written evidence. There is no express authority in that Act for an arbitrator to compel production from a non-party or, specifically, the Crown. In that case, counsel for the Attorney General argued that it would be contrary to the public interest to release the materials because the criminal trial was ongoing. The Attorney General originally objected to the production of the Crown Brief in its entirety. However, on the second day of hearings - by which time the criminal charges against the grievors had been withdrawn, the Attorney General agreed to produce almost all of the screened materials in the Crown Brief pursuant to an order by the arbitrator.

[62] In written reasons released some time after the materials had been produced, the Arbitrator stated, “In this case, there was no dispute as to the jurisdiction of an Arbitrator to order production of the contents of the Crown Brief on the same basis as would a Judge.” In fact, the Attorney General had objected to production, so there was a dispute on this issue. Further, this *obiter* comment demonstrates the failure of the arbitrator to

appreciate the significance of the discussion in *Wagg* regarding the legal foundation for the screening process: the authority to devise the screening mechanism was found in the inherent power of Superior Court to control its process and protect the process from being abused or obstructed[47]. An arbitration board is a creature of statute and, like many similar boards, derives its authority from its enabling legislation and any procedural provisions affecting the tribunal found in other applicable legislation. Its powers are not as broad as those attributed to a Superior Court. Nonetheless, this decision has become an oft-cited authority for that very proposition.

IV. THE CONCEPT OF THE IMPLIED UNDERTAKING

[63] The uncertain state of the law with respect to the application and scope of the implied undertaking to criminal disclosure is regarded by the Working Group as a clear obstacle to controlling the collateral use of Crown Brief disclosure. This section of the Report contains an overview of the development of the law in Canada and the United Kingdom concerning the common law undertaking in the criminal context. Suggestions for reform are included, which forms the basis for our recommendation on this subject.

[64] Both at common law and pursuant to the *Rules of Civil Procedure* of various provinces and territories, civil litigators in Canada have long been subject to an "implied undertaking rule" in relation to material produced on discovery. The rule is variously formulated, but generally operates to limit the litigant and the litigant's counsel from using evidence, information or material for any other purpose than to further their position in the litigation at hand.

[65] However, what is less clear is whether the same or a similar rule applies to limit, in the same way, the use that can be made of material disclosed by the Crown to defence counsel or to an unrepresented accused in a criminal case.

[66] A review of the existing law in Canada and other Commonwealth countries reveals that there is still a conflict in the case law on whether the implied undertaking doctrine applies to disclosure materials. While most courts accept the proposition that the

doctrine does exist in the criminal context, there is considerable debate about the breadth of its application.

[67] The jurisprudence suggests that it is likely that Canadian courts are willing to recognize an implied undertaking rule in the criminal context. What is less certain is how the courts will interpret the common law to determine the scope and application of such a rule. In *Wagg*, Rosenberg J.A. observed that there is still a conflict in the current case law as to whether the implied undertaking doctrine applies to disclosure materials.

A. Canadian Jurisprudence

[68] In *R. v. Little*, [2001] A.J. No. 69, Meagher Prov. Ct. J. made the clearest pronouncement in Canada that the implied undertaking rule applies to criminal defence counsel. In that case, the Alberta Crown had developed a practice of requiring defence counsel to agree to an express written undertaking[48]. Defence counsel (who was from another jurisdiction and unaccustomed to the local practice) took exception to it, refused to agree, and brought a disclosure motion in Court. Meagher J. held that the express undertaking was unnecessary, since defence counsel was already bound at common law by the implied undertaking rule. In *R. v. Schertzer*, [2004] O.J. No. 5879, Ewaschuk J. of the Ontario Superior Court of Justice was asked to impose an express undertaking on the defence not to use disclosure materials for any other purpose. His Honour found that although it is "highly likely" that defence counsel who receives Crown disclosure is bound by the implied undertaking rule, the fact that there were a number of confidential informers discussed in the documents whose safety was potentially at risk justified an express undertaking[49]. Since neither one of these cases involves a subsequent attempt to use the materials, they provide no guidance with respect to the limitations, if any, on the application of the rule.

[69] *Hedley v.* Air *Canada* (1994), 23 C.P.C. (3d) 352 (Ont. Ct. (Gen. Div.)) is one of the first cases do to so. In that case, the plaintiffs had previously been prosecuted for fraud. After the criminal proceedings were stayed, the plaintiffs sued the police, the complainants and their lawyers for malicious prosecution, but not the Crown. Ironically, the proceedings were stayed because the Crown failed to comply with its disclosure

obligations. During the course of the criminal matter, the criminal judge had ordered the complainants to produce material in addition to making disclosure orders against the Crown. At the end of the criminal proceedings, all of the material, including the third-party production material, was ordered to be returned by the accused (now plaintiffs) to the Crown.

[70] In the civil action, the plaintiffs brought an application to get the documents back. Blair J.'s ensuing judgment dealt with the production documents, which were not, strictly speaking, disclosure. Nevertheless, Blair J. found that the documents are covered by the implied undertaking rule[50]:

> I see no policy reason why a party to a civil proceeding should be placed in a favoured position simply because that party happens to have been an accused in a related criminal prosecution – even where that prosecution has been unsuccessful. The principles remain the same: society balances the value of compelling disclosure in criminal and civil matters with a countervailing limit engrafted upon that production; the recipient of the documents is not to utilize them, or the information contained in them, for purposes other than the proceedings in which they have been produced.[51]

[71] In addition, Blair J. recognized that the court had the discretion to grant leave to order the documents produced notwithstanding the undertaking Because he found that issue premature, Blair J. did not decide whether to do so, but presumably he would have balanced according to the factors expressed above.

[72] *Consolidated NBS v. Price Waterhouse* (1994), 111 D.L.R. (4th) 656 was decided by the Divisional Court of Ontario earlier in the same year as *Hedley, supra*. The plaintiff was a corporation and its former president, Howe (a third party in the action), had been charged with fraud in ongoing matters before the criminal courts and the Ontario Securities Commission. The plaintiff alleged that the defendant, Price Waterhouse, was negligent in failing to advise it that its president was dishonest. The plaintiff wanted Howe's disclosure materials.

[73] The Divisional Court appeared to accept that the implied undertaking rule might apply to disclosure materials. However, it held that the rule did not apply in this case, as "Howe is not seeking to use the Crown productions against the Crown; a third party is seeking production of the documents from him", i.e., because Howe was not proactive in the litigation, the use was not for a "collateral or ulterior purpose". However, the implied undertaking rule expressed in the civil case law is not so narrow. Rather, it prohibits subsequent use of the materials for *any other purpose*.

[74] Nonetheless, the same reasoning was applied by Vertes J. in *Fullowka v. Royal Oak Mines Inc.*, [1998] N.W.T.J. No. 45 (S.C.). The defendants in the action before the judge had been tried and convicted in criminal court. Subsequently, they were sued civilly by the complainants in tort based on the very same fact pattern that constituted criminal conduct. Once again, the court appeared to accept that the implied undertaking rule could apply to disclosure materials. However, Vertes J. held that:

> the [implied undertaking] rule could apply to Crown disclosure documents where the party obtaining the disclosure, e.g. the defendant in the criminal proceeding, attempts to use the information in the disclosure to launch new civil proceedings. ... But that is not the situation here. The defendants...do not intend to use the Crown disclosure documents to launch new and different proceedings. They are responding to the obligation in these proceedings to produce all relevant documents in their possession or control. Any attempt as well by the plaintiffs to use the documents so produced for purposes apart from this action would likewise be met by the implied undertaking rule.

[75] Here, the rationale appears different. Vertes J. held that neither the plaintiff nor the defendant could use the material for any other purpose than to attack or defend the criminal action, *or* a civil action based on the same conduct. Unfortunately, the rationale for so doing is not clear.

[76] Another Divisional Court of Ontario case may help shed some light on the desire of the courts to limit the application of the implied undertaking rule. In *Lang v. Crowe*,

[2000] O.J. No. 653 the defendant had previously been prosecuted by the Crown. The prosecution was unsuccessful and the complainant sued in civil court. Crowe was represented by the same lawyer in both the criminal and civil cases, and freely used the disclosure material (much of it relating to the plaintiff) in defending himself in the civil case. The plaintiff did not have access to the material and the defendant resisted production to the plaintiff based on the implied undertaking rule. The Divisional Court had serious reservations about allowing the Crown Brief to be used in a civil matter, but nevertheless, ordered the documents released to the plaintiff on the ground that it was inherently unfair for the defendant to have access while the plaintiff did not.

[77] Interestingly, none of the three previously mentioned cases suggests that the implied undertaking rule does not cover materials obtained in a criminal proceeding. However, they all decline to apply the rule where the civil action concerns the very same conduct at issue in the prosecution. Vertes J. goes so far as to claim that they are not "new and different proceedings" because the defendant was formerly an accused in relation to the same fact pattern. This claim is hardly convincing. However, only Blair J. in *Hedley, supra,* adverts to the fact that the issue is not whether the rule applies, but whether, having regard to the rationale behind the rule, the facts in the civil action militate in favour of exercising judicial discretion and ordering the documents produced.

[78] The recommendations made in the 1993 Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussion (The "Martin Committee Report") should also be factored into the analysis when considering the policy rationale in support of an implied undertaking rule. As Rosenberg J.A. noted in *Wagg*, the Committee did not address whether defence counsel is subject to an implied undertaking not to use disclosure materials for other purposes such as a civil suit flowing out of the same facts as the criminal prosecution. Nevertheless, it did express concerns about inappropriate dissemination of material in the Crown Brief. It made the following recommendations at p. 179:

- The Committee is of the opinion that it is inappropriate for any counsel to give disclosure materials to the public. Counsel would not be acting responsibly as an officer of the Court if he or she did so.

- The Committee is of the opinion that defence counsel should maintain custody or control over disclosure materials, so that copies of such materials are not improperly disseminated. Special arrangements may be made between defence counsel and Crown counsel, with respect to maintaining control over disclosure materials where an accused is in custody, and the volume of materials disclosed makes it impractical for defence counsel to be present while the material is reviewed.[52]

[79] After considering the case law, the Martin Committee recommendations[53] and the rationale behind the rule in the civil context, Rosenberg J.A. stated that "there are important policy reasons for recognizing an implied undertaking rule with respect to disclosure of materials to the defence in a criminal case." However, given that the issue was not squarely before him, he specifically declined to "lay down a rule in this case" and left the matter to another day. As stated above, the application and scope of the rule in the criminal context are matters that need to be resolved.

B. The Development of the Law in the United Kingdom

[80] The United Kingdom has also considered whether, and if so, to what extent, the rule applies to materials obtained in criminal proceedings.

In 1997, the Court of Appeal decided *Mahon v. Rahn*, [1997] 3 All E.R. 687. In that case, the plaintiff sued the defendant for libel. The defendant was the complainant in a criminal fraud matter for which the accused was unsuccessfully prosecuted. In this regard, the fact pattern resembles *Hedley, supra*, more than *Consolidated NBS, supra*.

[81] The plaintiff wanted production of documents from the defendant which the Crown had tendered in open court. Otton L.J., for the Court of Appeal, ordered them produced as he could find "no basis for an implied undertaking in criminal proceedings

on the grounds of privacy and confidentiality." Otton L.J.'s reasoned that matters gathered pursuant to a criminal investigation were expected to be adduced in court and that, accordingly, their authors ought to have presumed that they would become public.[54]

[82] The following year the House of Lords decided *Taylor v. Serious Fraud Office*, *supra*, with a virtually identical fact pattern. The plaintiffs sued the complainants and the Serious Fraud Office for libel on the basis of documents that formed part of a prosecution for fraud. Although the prosecution had been successful against others, Taylor was never charged. He was a witness for one of the defendants, whose counsel had shown Taylor the disclosure materials that he was now seeking in the action for libel.

[83] Lord Hoffman, writing for a majority of the House of Lords, accepted that the implied undertaking in civil proceedings did not permit the use of the materials for any other purpose than the conduct of the litigation. Specifically, the court held that the undertaking excluded all collateral use, whether in other litigation or by way of publication to others.

[84] The court then went on to consider whether the interest in privacy and confidentiality was sufficiently different in the criminal context such that the doctrine did not apply. The court held that the fact that publication was foreseeable at the time the documents were created did not mean that confidentiality and privacy should not be preserved as far as it was possible to do so.

[85] The House of Lords defined the public policy rationale for recognizing an implied undertaking rule in criminal proceedings:

> Many people give assistance to the police and other investigatory agencies, either voluntarily or under compulsion, without coming within the category of informers whose identity can be concealed on grounds of public interest. They will be moved or obliged to give the information because they or the law consider that the interests of justice so require. They must naturally accept that the interests of justice may in the end require the publication of the information, or at any rate its disclosure to the accused for the purposes

> of enabling him to conduct his defences. But there seems to me no reason why the law should not encourage their assistance by offering them the assurance that, subject to these overriding requirements, their privacy and confidentiality will be respected.
>
> One must also consider the interests of persons who are mentioned in the statements. Information given to the police or investigatory authorities will frequently contain defamatory or at least hurtful allegations about other people. That is to be expected in a criminal investigation. Such people may never be charged or know that they were under suspicion or that anything untoward was said about them. If such allegations are given publicity during the course of the proceedings, they will have to suffer the consequences because of the public interest in open justice. Even then, the judge will often be able to prevent the introduction of allegations about third parties which are not relevant to the issues in the case. But there seems to me no reason why the accused should be free, outside court, to publish such statements to the world at large. The possibility of a defamation action is for most people too expensive and impractical to amount to an adequate remedy. [per Lord Hoffman, and cited with approval in *Wagg*, at para. 44]

[86] The House of Lords firmly settled the issue by finding that the common law rule of an implied undertaking applies to material obtained in a criminal trial.

[87] However, the judgment left several important questions unresolved. One was whether the undertaking expired or was obliterated by the fact that the material had already been presented in open court in the earlier proceeding. This had been debated by the courts below[55]. While the House of Lords hinted that "[t]here seems to me much force in [the] view that the court should nevertheless retain control over certain collateral uses of the documents, including the bringing of libel proceedings", it left the matter open.[56]

[88] The Taylor case did, however, decide that the implied undertaking covered not only the recipient of the Crown's disclosure materials (the accused and his defence

lawyer) but also Taylor. There was nothing wrong with the defence lawyer having shared the disclosure materials with Taylor whom he had asked to give evidence on his client's behalf. This was proper use of the material for making full answer and defence. But Taylor, having acquired the information in this fashion, could not then make any further use of it for any purpose by reason of the implied undertaking. Accordingly, the undertaking seems to attach to the material itself, rather than simply the solicitor or litigant receiving the documents in the first instance. This is consistent with the Court's earlier ruling in *Home Office v. Harman*, [1982] 1 All E.R. 532 in which it held that the solicitor must not use or allow the documents or copies of them to be used for any collateral or ulterior purpose of his own, his clients or anyone else.

[89] In *Taylor*, the House of Lords recognized that the court retains discretion, at common law, to release the individual from the application of the undertaking where it is in the interests of justice to do so. For example, in *Mayo Associates v. Anagram* (1998) JLR 411, the Royal Court had no difficulty deciding that a defendant, who was an accused in a criminal trial, should provide the plaintiff (complainant) with the disclosure materials that he was relying on to defend him in the action. Although the fact pattern is similar to that of *Fullowka, supra*, and *Lang, supra*, the analysis is far more nuanced: the undertaking does apply, but balancing the public interest factors militates in favour of requiring production for the purposes of the civil action. The distinction is an important one; if there is no implied undertaking, there are no restrictions on the use that can be made of the material. However, discretionary relief can be afforded on a limited basis to permit production in the civil case but still prevent publication for any other purpose, such as posting on the internet.

[90] In 1996, the U.K. passed legislation relating to the allowable use of disclosure materials and any information contained therein. *The Criminal Procedure and Investigations Act 1996 (UK)*, c. 25, section 17 stipulates that an accused "must not use or disclose it or any information recorded in it" for any other purpose other than the criminal matter, unless he or she obtains an order of the court. Section 18 makes it an offence of contempt of court for any person to knowingly use or disclose an object or information recorded in it if the use or disclosure is in contravention of section 17. However, the

accused, or any person, may use or disclose any information that has been displayed or communicated to the public in open court.[57]

[91] Importantly, documents produced pursuant to a *subpoena duces tecum* are not captured by the legislation, and so the common law rule still applies to them and to third party production.

C. Disclosure Reform in Canada

[92] In November 2004, the Department of Justice released a consultation paper on Disclosure Reform that proposed a legislative response to address improper use of disclosed materials.

[93] The paper noted that amendments could be made to the *Criminal Code* to:

a) Set out that all persons who receive disclosure information – including third parties - have a legal responsibility not to use it for improper or collateral purposes;

b) Set out an explicit power on the part of a court to make any 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 could 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;

c) Create a targeted offence for misuse of disclosure material; the offence could address the use of such materials to help facilitate the commission of a criminal offence, as well as the use of disclosure material with the intention of violating any person's privacy. [Emphasis added][58]

D. Summary and Conclusions on the Implied Undertaking Rule

[94] Canadian jurisprudence on the relationship between the implied undertaking rule and materials disclosed or produced in a criminal trial needs to be clarified. First, the issue of whether the doctrine applies at all needs to be definitively decided. Second, the

issue of whether the undertaking only applies to the accused and/or his criminal counsel or whether it attaches to anyone should be addressed. Third, whether the undertaking survives the introduction of the information in open court also should be debated. Finally, guidelines need to be developed for determining when the public interest requires ordering production notwithstanding the existence of the undertaking.

[95] Clarification can be provided through legislation, or by the development of case law on the implied undertaking rule. However, given the lack of clarity in the jurisprudence on even the most basic question, i.e., whether the rule exists in criminal proceedings, these issues may be better and more quickly addressed by legislation. The Working Group's endorsement of that solution is carried through into the Recommendations.

[96] An amendment to the *Criminal* Code governing the manner in which Crown Brief material is used and accessed outside of the criminal prosecution could be subject to challenge on the basis that it violates the constitutional division of powers. A complete constitutional analysis of the proposed amendment to the *Criminal Code* is complex and outside the scope of this Report. The following discussion contains only a brief outline of the issue.

[97] The question to be explored is whether, based on the pith and substance or essential character of the contemplated legislative initiative, it falls under one of the federal heads of powers under the *Constitution Act, 1867*, namely the head of criminal law and procedure. To be found within the federal Parliament's jurisdiction, the essential character of the legislation will have to be found as facilitating or maintaining the integrity of a criminal prosecution. However, there is a risk that any regulation by the federal Parliament outside of the confines of criminal prosecutions could be viewed as a matter of civil procedure and or evidence. The rules of civil procedure and evidence generally fall within the legislative authority of the provinces under "the administration of justice in the province" a power which expressly includes "procedure in civil matters." The Working Group fully anticipates that the proposed amendment will face

constitutional challenge and leaves it to the expertise of the legislators to craft provisions which can withstand it.

V. PRODUCTION UNDER THE CIVIL RULES

[98] The issue of collateral use of Crown disclosure materials in related civil proceedings is a relatively recent phenomenon that has emerged from creation of disclosure obligations in criminal proceedings under the *Charter in* Canada, and analogous law reform initiatives elsewhere. While the civil rules provide an avenue for private litigants to access the Crown Brief, the application of pure civil discovery principles alone to the sensitive information contained in the Brief would result in its disclosure and production absent any consideration of the other critical public interest concerns recognized by the court in *Wagg.* As noted by Blair J. in the Divisional Court decision in *Wagg*, the touchstone for assessing disclosure and production in civil discovery regimes is relevance. But relevance as a sole criterion to compel production of Crown Brief materials in related civil proceedings is both insufficient and potentially damaging to the administration of criminal justice.

[99] The Working Group recognizes that civil procedure rules governing non-party production and the manner in which Canadian courts have interpreted those rules in the context of Crown Brief production form an impediment to attaining consistent control over the use of the materials for collateral purposes. The rules fail to protect this special category of document which is why the court in *Wagg* created its own rule. The Working Group has formulated the following list of solutions to overcome the barriers presented by the civil law system:

1. The *Wagg* screening mechanism, which is essential to protecting the Crown Brief from unchecked disclosure and production in civil proceedings should be codified in the civil rules of the provinces and territories.

2. The codified *Wagg* rule should be exclusive provision under the civil rules which governs production of Crown Brief materials, whether such materials are in the possession or control of parties to the action or non-parties.

3. Where possible, protocols and Memoranda of Understanding should be negotiated with key stakeholders to provide for a uniform and controlled approach to the sharing of Crown Brief information. These agreements will facilitate the consensual release of documents without the need for a court order or release pursuant to a consent order as envisioned in *Wagg*.

A. The Civil Rules and Crown Immunity

[100] As noted above, the Ontario *Rules of Civil Procedure* provide for the production of documents by non-parties pursuant to Rule 30.10. Similar provisions are found in the civil procedure rules of British Columbia, Rule 26(11); Alberta, Rule 209; Saskatchewan, Rule 236; Manitoba, Rule 30.10; Quebec Code of Civil Procedure s.402; New Brunswick, Rule 31.11; Prince Edward Island, Rule 30.10; and Northwest Territories, Rule 231. Civil procedure in Nunavut is governed by the rules of the Northwest Territories and in the Yukon, it is governed by the rules of British Columbia. Rule 233 of the *Federal Court Rules* also provides for the disclosure of documents in the possession of a non-party.

[101] While the Ontario rule, on which the rules of several provinces, including Prince Edward Island and New Brunswick are modeled, is quite detailed, the rules in Saskatchewan and British Columbia are much less so. Rule 26(11) of the *British Columbia Rules of Court* provides:

> 26(11) Where a document is in the possession or control of a person who is not a party, the court, on notice to the person and all other parties, may order production and inspection of the document or preparation of a certified copy that may be used instead of the original. An order under Rule 41(16) in respect of an order under this subrule may be made if that order is endorsed with an acknowledgment by the person in possession or control of the document that the person has no objection to the terms of the proposed order.

[102] Although some jurisdictions in Canada do not have a rule compelling production of documents by non-parties, the effect of their rules governing examinations for discovery may produce that very result. For example, under Rule 18.01 of the Nova Scotia *Rules of Civil Procedure*, which governs examination for discovery, any person may be examined about any matter relevant to a proceeding. Under Rule 18.11, where persons being examined admit that they have in their custody or power a book, paper, document or record relating to the matters in question, they can be ordered by the examiner or the court to produce those items. Similar provisions exist in Newfoundland and Labrador's rules of civil procedure.

[103] Despite the differences in the formulation of rules regarding the production of documents in the hands of non-parties across the country, as well as the absence of any rule in certain jurisdictions, the law governing such production is essentially the same throughout Canada. There is nothing about the various rules that excludes their application from the Crown Brief. However, jurisprudence has developed in Alberta that has rendered the Crown immune from pre-trial disclosure in proceedings where the Crown is not a party.

[104] In Alberta, Crown immunity was successfully invoked to defeat a claim for production of the Crown Brief in *Rutherford v. Swanson* (1993), 139 A.R. 314 (Alb. Q.B.)[59]. In that case, the plaintiff sought production by the RCMP, which was not a party to the proceedings, of documents created or found by the police service during their investigation into an incident. That incident resulted in two of the defendants being criminally charged and was central to the plaintiff's civil action. The plaintiff applied for the order compelling production under *Rule 209* of the *Alberta Rules of Court* which governs production by non-parties.

[105] The RCMP opposed production based upon Crown immunity. The police service argued that, as a division of the federal government, it enjoys "all of the immunities, privileges and prerogatives of the Crown, including immunity from statute-imposed responsibilities, except where that statute is expressly stated to bind the Crown"[60]. The RCMP asserted that its members, as Crown agents, are exempt from the application of

the *Alberta Rules of Court* in proceedings to which they are not parties. Beilby J. accepted the arguments of the RCMP and held that the Crown was not subject to *Rule 209* when it was not a party to the litigation. The Justice found the RCMP derived the benefit of Crown immunity because it was acting as an agent of the Crown in investigating the incident. In its analysis of Crown immunity, the Court was instructed by section 17 of the *Interpretation Act* (R.S. 1985 c. I21). It provides:

> No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment.

[106] The conclusion in *Rutherford* has not been accepted in other jurisdictions. In *R. v. Campbell*, [1999] 1 S.C.R. 565, Binnie J. stated that the decision suffered from "…the frailty of failing to differentiate the different functions the RCMP perform, and the potentially different relationship of the RCMP to the Crown in the exercise of those different functions."[61] In addition, in *Temelini v. Wright* (1999), O.R. (3rd) 609, the Ontario Court of Appeal noted that the Court in *Rutherford* did not consider section 27 of the federal *Crown Liability and Proceedings Act* which states:

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

[107] Notwithstanding these contrary statements, the *Rutherford* decision has been universally followed by the Alberta bench. The practice of the Alberta Crown remains that there will be no release of information until after the conclusion of any criminal proceedings. This position appears to be accepted by the Alberta bar.

[108] While the discussion in *Rutherford* was centred on Crown immunity principles, the Court also remarked on the undesirability of compelling a police service to disclose potentially sensitive information in a process which does not sufficiently address the public interest concerns associated with the release of police records. In response to the application for production in this case, the RCMP issued a certificate under section 37 of

the *Canada Evidence Act*, R,S.C. 1985, c. C-5 objecting to the disclosure of the information on the basis that it would injure the administration of justice and the sound and effective functioning of the RCMP and its investigation of criminal activity. Bielby J. commented that section 37(1) provides a *better means* of dealing with disclosure requests made to the RCMP because the procedure permits the police to assert their security concerns and a judge may ultimately be required to examine the subject documents before any disclosure occurs. Simple application of Crown privilege to the civil rules in issue, the Court stated, is a blunt instrument when compared to the alternate process. Similar to section 37, the *Wagg* screening process affords the Crown and police an opportunity to assert public interest immunity and, if needed, the Court will review the Crown Brief material before any information is ordered produced.

[109] In light of the reservations expressed in subsequent cases concerning the application of Crown immunity to the civil rules, the Working Group's recommendation in this area is focussed instead on supporting the uniform codification of the *Wagg* screening process in the civil rules of the provinces and territories across Canada. The expectation is that uniformity in process may lead to greater predictability as to outcome.

B. Civil Production and Privilege Principles

[110] There is no doubt the Crown may object to the production of the Crown Brief by asserting solicitor client privilege. In addition, there are specific public interest privileges that have been recognized on a case-by-case basis in the context of application objecting to disclosure brought pursuant to section 37 of the *Canada Evidence Act:* privilege to protect ongoing police investigations, police investigative techniques, intelligence information and witness safety.

[111] Litigation privilege was unsuccessfully claimed by the Crown in *N.G. v. Upper Canada College.* The Court questioned the rationale of the Crown's claim for privilege over a document that had already been released by the Crown to the accused in the criminal proceedings. As discussed in the last year's study paper, the Crown is at a serious disadvantage if disclosure to the accused, a mandatory common law obligation of the Crown, is interpreted to constitute waiver of litigation privilege. It would

compromise the Crown's ability to prepare its case since their work product could be ordered produced to strangers to the criminal prosecution. Additionally, if the Crown is unable to oppose production sought by third parties on the basis of litigation privilege, it would have a serious impact on the Crown's ability to safeguard the integrity of ongoing criminal proceedings. This conundrum stems from the inherent difficulties in applying civil concepts of privilege to materials gathered, created and disclosed in criminal law proceedings. The state of the law is uncertain with respect to the scope of the Crown's litigation privilege. As an alternative manner of protecting Crown work product from production during the criminal proceedings, the Working Group supports the view that there should not be any production of Crown Brief materials for collateral use until the criminal proceedings are completed. A presumption against disclosure before the criminal matter is complete, if added to the *Wagg* screening process, would fortify the protection provided to the integrity of the criminal justice system. It is a logical and practical solution that is captured in the Recommendations.

C. Application of the *Wagg* Screening Mechanism

[112] While the codification of the *Wagg* screening mechanism in the rules of court of the provinces and territories, would require the support of Attorneys General across Canada, the Working Group believes such an initiative provides the most strategically effective plan for protecting the public interest and the administration of justice. The jurisprudence that has developed since *Wagg* has provided some indication of the factors the courts are considering in applying the public interest balancing test. As noted earlier, the list of factors contained in this Report is not complete, but it may offer further guidance to the courts that hear *Wagg* motions and may assist the parties to such motions in fashioning their arguments.

[113] The post-*Wagg* decisions also highlight the difficulty in applying the screening mechanism under circumstances where the request for Crown Brief production is initiated during the criminal proceedings. Once Crown Brief materials are ordered produced for collateral use before the criminal proceedings are complete, there is a risk that the improper dissemination could jeopardize the integrity of the prosecution.

Admittedly, one would have to make further inquiry about the details and status of the prosecution to offer an informed view on the degree of risk. Nonetheless, risk would exist where it had not previously.

[114] In *N.G. v. Upper* Canada *College*, the Crown opposed production of the videotaped statement of the complainant which formed part of the Crown Brief on a number of grounds, including the risk of witness tainting. The Divisional Court was of the view the Crown's concerns about potential jeopardy to the integrity of the trial process through witness tainting were expressed prematurely—witness tainting goes to the issue of admissibility rather then production. The comments of Lang J. on this issue provide insight into the challenge faced when addressing criminal law issues in a civil law forum. On the subject of witness tainting, Lang J. remarked:

> [t]he Attorney General raises concerns about the potential impact of disclosure on potential witnesses and jurors in the criminal trial…The witness concern is this: other UCC students alleging sexual misconduct on Brown's part; their evidence or recollection - or the evidence of the non-complainant witnesses – might be affected or influenced by exposure to the N.G. videotape and may impact on their evidence at a subsequent criminal trial.
>
> This argument does not differentiate between production before trial and admissibility at trial. The Master has ordered production. It will be for the trial judge to determine the videotape's admissibility…

[115] She further stated:

> In any event, the Master was alive to the concerns about the integrity of the criminal process, including the trial, and addressed them in her reasons. She provided safeguards to ensure there would be no misuse of the videotape. She addressed the implied undertaking not to use the produced material for collateral purposes: Rule 30.1. She provided further protections by limiting

> possession of the videotape to counsel in the civil trial and by preventing copying of the tape.[62]

[116] The Court overlooked that production of the statement of the main witness in a prosecution for use in a related civil trial that is scheduled to commence almost six months before the criminal trial, could adversely affect the admissibility of the complainant's evidence or the weight given to the evidence in the subsequent criminal prosecution. Lang J.'s view can be explained by reviewing the differences in the meaning of trial fairness in the criminal and civil law systems. Fairness in civil proceedings requires that all relevant evidence is made available to the parties and to the court to facilitate the search for the truth. Accordingly, information that is potentially inadmissible may still be ordered produced on the grounds that the parties need to access all relevant information to properly enter into settlement negotiations and to prepare for trial. The implied undertaking, which is well recognized by the civil bar, protects against the improper release of all information obtained as part of the civil discovery process. It was logical therefore for the Court in *NG v. Upper Canada College* to conclude that the implied undertaking would offer the same protection from improper circulation to the complainant's videotaped statement.

[117] As discussed by Rosenberg J. in *Wagg*, trial fairness in the criminal law system is meant to encompass the way in which the proceedings are conducted. However, it is also inextricably linked to the accused's right to a fair trial guaranteed under sections 7 and 11(d) of the *Charter* and the corollary, the societal interest in conducting a fair trial[63]. The manner in which the evidence was gathered or treated, e.g. inappropriate dissemination of a witness statement, can have a pejorative effect on its admissibility or its probative value in a criminal trial. Two other aspects of the criminal trial process are important to one's understanding of trial fairness. First, the Crown has a much higher burden of proof to meet in a prosecution than the plaintiff must satisfy in a civil trial. Second, the accused is not required to assist the prosecution in making out a case against him or her and is not required to respond to the prosecution's case until the Crown has made out a case to meet without the compelled participation of the accused.[64] Therefore, the court assessment is of the potential jeopardy to the ongoing criminal proceeding,

necessarily entails an analysis of whether production would affect the accused's right to a fair trial.

[118] Witness tainting is one of the most critical among several harms that may befall a criminal prosecution if the Crown Brief is produced prior to its completion. The seriousness of witness tainting was recognized by the British Court of Appeal in *Green v. Prosecution Service*[65]. The Court in that decision reviewed the principle of non-contamination. The Court stated that, "the essence of this principle is that, in order to preserve the integrity of each witness and the investigation as a whole, no witness or potential witness is to be shown the statement of another."[66]. Lord Justice Brown found support for the principle in British authorities and recognized it was sound in law[67]. The Court went on to approve as a general rule that disclosure of documents in the nature of witness statements ought not be given at least until the final completion of an investigation. Based on this line of reasoning, the Court of Appeal refused to order the disclosure of witness statements to an eye witness of the same incident.

[119] Although witness tainting is a real possibility where witness statements are released to strangers to the criminal prosecution, it is still necessary for the Crown to establish some indicia of harm in asserting that risk. A bald assertion that the integrity of a criminal prosecution will be jeopardized by the collateral use of Crown Brief materials, is likely an insufficient basis on which to resist production[68].

[120] The Working Group identified an array of risks associated with releasing Crown Brief material for collateral use. The risks are heightened when production is ordered before the criminal proceedings are complete. Below is a list of some attendant harms:

- Collusion or collaboration between witnesses
- The appearance of collusion/collaboration
- Erosion or loss of the presumption of innocence for suspects.
- Loss of the accused's right to a fair trial

- Loss of the accused's right to make full answer and defence
- The integrity of the evidence of the victim or other witnesses may be compromised
- The increased likelihood of witness impeachment
- Detrimental effects on pre-trial discussions and negotiations, thereby reducing the possibility of resolution
- Potential reluctance of witnesses to come forward after observing criminal actions in criminal proceedings because their statements could be released for entirely different purposes
- Production before criminal proceedings are complete could render court orders ineffective, i.e. publication bans; orders excluding witnesses; and orders providing for the confidentiality of names
- Privacy considerations may be breached for witnesses with intimate or sensitive evidence to provide in a criminal prosecution
- The risk of compromising provisions in the *Youth Criminal Justice Act*

[121] Even if a codified version of the *Wagg* screening mechanism was in the civil rules of each province and territory, the rules of civil procedure do not provide any safeguards for protecting the integrity of criminal proceedings where the request for production of the Crown Brief is made during those proceedings. The gap in protection needs to be addressed. The Working Group sees merit in the practice of the Alberta Crown, which has had the effect of implicitly creating a presumption that production of Crown Brief materials for use in collateral proceedings should be delayed until the criminal proceeding is concluded unless there are special circumstances. If such a presumption were built into the *Wagg* screening process, the Crown would not need to advance litigation privilege or Crown immunity arguments, both of which have questionable outcomes, in order to resist production.

D. Application of the *Wagg* Screening Mechanism in Other Fora

[122] The Ontario experience with requests for production in the context of child protection proceedings and administrative law proceedings, has demonstrated the need to incorporate the *Wagg* screening process into their production regimes. One way to promote the application of the *Wagg* principles in these fora, is through the establishment of protocols with the agencies and regulatory bodies who frequently seek access to Crown Brief materials. At paragraph 112 of the study paper, its authors suggest:

> Protocols in Memoranda 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.

[123] The position taken by the Working Group on the utility of protocols, however, is slightly different. Rather than viewing them as an alternative to legislation, these agreements on information sharing would provide an excellent foundation for achieving mutually agreeable terms and conditions for the protection of vetted Crown Brief material as encouraged by Blair J. and Rosenberg J. Protocols and Memoranda of Understanding would inject predictability into the *Wagg* process and would presumably decrease the likelihood that the parties, the Attorney General and the police would require the assistance of the court to adjudicate *Wagg* motions. The Working Group's endorsement of this approach is borne out in the recommendations.

[124] In addition to protocols, uniformity in the application of the *Wagg* screening mechanism could be achieved through its codification in the legislation which governs process and procedures with respect to tribunals. For example, the appropriate statute in which to enshrine the *Wagg* screening process in Ontario would be the *Statutory Powers Procedure Act*[69] *("SPPA").* The *SPPA* contains procedural provisions which apply to most, but not all, tribunals and tribunal proceedings exercising statutory powers of decision. Similar statutes exist in other provinces: the *Administrative Procedures and*

Jurisdiction Act, R.S.A. 2000, c.A-3, in Alberta; the *Administrative Tribunals Act*, S.B.C. 2004, c.45, in British Columbia; and the *Administrative Justice Act*, R.S.Q., c.J-3, in Quebec.

[125] As well, for certain agencies such as the Children's Aid Societies in Ontario, it may be preferable to codify the *Wagg* process in their enabling statute, the *Child and Family Services Act*. Admittedly, it is not ideal that, in any given province or territory, it may be necessary to amend two or three pieces of legislation to codify the *Wagg* screening mechanism in order to impose it upon the production procedures of certain tribunals and regulatory agencies. This would have to be a co-ordinated undertaking with the support of the Attorney General of each province and territory. In making the recommendation in support of these legislative amendments, the Working Group reiterates the remark made by Blair J. in *Wagg* about the screening mechanism. He recognized that it may be a "somewhat cumbersome procedure", but expressed the conviction that it was necessary to "ensure the proper administration of justice"[70].

VI. ACCESS THROUGH FREEDOM OF INFORMATION LEGISLATION

[126] Freedom of information legislation is another source from which any member of the public may seek access to Crown Brief materials. Freedom of information and protection of privacy schemes are separate regimes which operate parallel to court proceedings.

[127] A recurrent theme throughout this Report is that the production of the contents of the Crown Brief for collateral use while criminal proceedings are ongoing, elevates the risk to the fair administration of criminal justice. That potential peril is addressed in the Working Group's recommendations. We propose that a presumption be built into the *Wagg* screening process that would require that production of the Crown Brief be prohibited until the prosecution has been completed, i.e., until all appeals have been exhausted.

[128] Several of the provinces have recognized this peril and have already built into their freedom of information legislation what amounts to a delay mechanism. Such

provisions have enhanced their ability to protect the integrity of ongoing criminal proceedings. As a result, requesters are unable to gain access to Crown Brief materials until the criminal proceedings are completed. For example, in the *Freedom of Information and Protection of Privacy Act* of British Columbia, prosecution records have been excluded from the scope of the *Act* altogether. Subsection 3(1)(h) of the legislation states:

> 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.[71]

[129] The term "prosecution" under the *Act* is defined as the "prosecution of an offence under an enactment of British Columbia or Canada". The legislation is silent, however, on the meaning of the phrases "proceedings in respect of" and the "records relating to". There has been some dispute surrounding how broadly those phrases ought to be interpreted; and at what point the prosecution can be said to be "complete"[72].

[130] There are exclusion provisions which are worded identically to subsection 3(1)(h) in the freedom of information legislation in Alberta, Ontario, Newfoundland, Nova Scotia, Nunavut, Northwest Territories and Prince Edward Island[73]. The remaining provinces have exclusion provisions which encompass prosecution materials but are phrased in a different manner. Based on these exclusion sections in the legislation, Crown Brief materials are well protected from disclosure at this most critical time.

[131] Requests for access to Crown Brief materials made after the criminal proceedings are completed present a greater challenge in terms of the diminished level of protection afforded to such materials under the freedom of information statutes within the provinces and territories. In Ontario's *Freedom of Information and Protection of Privacy Act* ("*FIPPA*")[74], there are three exemptions from disclosure that the Ministry of the Attorney

General may assert to resist release of these records: the personal privacy exemption, section 21; the law enforcement exemption, section 14; and the solicitor client exemption, section 19. Typically, a Crown Brief contains information which identifies persons. Thus it is likely that the personal privacy exemption would result in much of the criminal prosecution records being exempt from disclosure. Nonetheless, a claim of the personal privacy exemption can be overridden under section 23 of *FIPPA* where a compelling public interest in disclosure of the record clearly outweighs the purpose of the exemption.

[132] The objective of the law enforcement exemption is to safeguard the integrity of the administration of criminal justice. It applies where the disclosure of the record could reasonably be expected to "interfere with a law enforcement matter"[75]. The provision reads:

> 14.1 A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;
>
> (f) deprive a person of the right to a fair trial or impartial adjudication;

(g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;

(h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;

(i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

(j) facilitate the escape from custody of a person who is under lawful detention;

(k) jeopardize the security of a centre for lawful detention; or

(l) facilitate the commission of an unlawful act or hamper the control of crime[76].

[133] Subsections 14(1)(b) and (f) are commonly claimed as protection against the disclosure of information where there are ongoing police investigations or criminal prosecutions. While the scope of the law enforcement exemption is fairly broad, it is not likely to survive the completion of a criminal investigation or prosecution[77]. This exemption cannot be overridden by public interest under section 23 of *FIPPA*. It is important to note that the law enforcement exemption is not commonly found in other freedom of information legislation.

[134] The best protection within *FIPPA* for the Crown Brief is under the litigation privilege exemption, which is found in section 19, and which is known as the " solicitor-client privilege exemption". That provision provides:

> 19. A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.[78]

[135] In *Ontario (Attorney General) v. Holly Big Canoe*[79], the Divisional Court interprets that section. The Court states that this section is generally regarded as having two branches. The first is the exemption for documents covered by the well-known solicitor-client privilege; and the second is the exemption created by all the words following "privilege" and is similar to the common law "litigation privilege" protecting "solicitor's work product" or the "solicitor's brief".[80] The Ministry argued that all of these records were exempt under section19 of *FIPPA*, because they were created by or for Crown counsel for use a prosecution. The Divisional Court recognized that the Crown Brief represented a special category of document that "may well contain material of a nature which would embarrass or defame third persons, disclose the names of persons giving information to the police, disclose police methods, and so forth". The Court went on to examine and analyze the reasons in *Taylor, supra*, and *Wagg*, noting the policy reasons for protecting the Crown Brief.

[136] Relying on the reasoning of the Court of Appeal decision in *Attorney General of Ontario v. Big Canoe, Inquiry Officer; James Doe, Requester*[81], the Divisional Court concluded that the intent of the legislation was not to impose any temporal limitations on either branch of section 19 because branch two of section 19 merely reflects the absolute protection accorded to the advice and litigation components of solicitor-client privilege, both under common law and under branch one. In other words, section 19 did not import the common law of litigation privilege. Specifically on this issue, the Divisional Court stated:

> If the statute does not import the common law of litigation privilege, what does it do? In my view it creates, for *FIPPA* purposes only, an exemption: a statutory discretionary power in the head to withhold a certain class of document which, at common law, would be protected by litigation privilege, but would cease to be privileged when the relevant litigation terminated. While, as noted earlier, this exemption is similar to common law litigation privilege, they are not identical in origin, content or purpose. The common law litigation privilege exists to protect the lawyer's work product, research, both legal and factual, and strategy from the adversary. By contrast, the

> section 19 exemption exists to protect the Crown Brief and its sensitive contents from disclosure to the general public by simple request. The common law privilege ends with the litigation because the need for it ceases to exist. The statutory exemption does not end because the need for it continues long after the litigation for which the contents were created. The common law privilege can be waived by Crown counsel, as a person having carriage of the matter. If, as *Big Canoe* establishes, the second branch of section 19 is not a mere statement of the common law, but an enactment on its own, the exemption surely would have to be waived by the person having such authority: the head.[82]

[137] With that statement, the Court not only concluded that litigation privilege survived despite the fact that the litigation had come to an end, but also that the Crown's obligation to disclose Crown Brief materials to the accused did not act as a waiver of litigation privilege.

[138] In terms of protecting the Crown Brief and maintaining the integrity of criminal proceedings, the weak link in freedom of information legislation within the provinces and territories is that in some jurisdictions, litigation privilege under such legislation is not permanent. The inconsistency among the jurisdictions is evident in *Blank v. Canada*[83]. In that case, the requester, had been subject to prosecution for regulatory offence and brought a civil action against the federal government when its charges were stayed prior to trial. The requester sought access under the *Access to Information Act*[84] for all records pertaining to the prosecution of himself personally and his company. Access to a portion of those responsive records was denied on the basis of solicitor-client privilege, an exemption set out in section 23 of that *Act*.

[139] The Supreme Court of Canada observed that "the purpose of litigation privilege,… is to create a "zone of privacy" in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose – and therefore its justification[85]. Accordingly, the Supreme Court of Canada dismissed the federal government's appeal. It found that the

Minister's claim of litigation privilege under section 23 of the *Access to Information Act* failed because the privilege had expired, given that the file to which the requester sought access in relation to quasi-criminal proceedings had terminated.

[140] The Working Group believes that if there is to be a robust protection of Crown Brief material from disclosure under freedom of information legislation, the federal and provincial versions of that statute ought to be amended to offer such greater protection. Section 19 of *FIPPA* and its interpretation by the Ontario courts or a modification of both, can be helpful to other jurisdictions in creating a provision to address this issue. The objective is to ensure the freedom of information process is applied uniformly or consistently, using the same weighing that takes place in the *Wagg* screening mechanism. By expanding the scope of litigation privilege, public interest concerns arising from the disclosure of the Crown Brief will be better addressed.

VII. ATTENDANT BARRIERS TO ACHIEVING UNIFORMITY

[141] The barriers faced in achieving uniformity in the production or use of the Crown Brief are readily identified by examining the sources from which such production may be obtained. The Working Group has focussed on four such sources.

A. Criminal: Application of the Implied Undertaking

[142] The subsequent use of criminal disclosure in companion civil proceedings circumvents the *Wagg* screening process and negates the implied undertaking of confidentiality. The application of the implied undertaking to Crown Brief disclosure is a central issue in the Working Group's inquiry as a means of controlling the sharing of Crown information. It is trite law that the Crown is obliged to disclose all relevant information in its possession to the defence[86]. However, there are divergent views among members of the defence bar about the application and scope of an implied undertaking of confidentiality to the materials received by way of disclosure. Some defence counsel believe that the implied undertaking does not exist unless expressed by the Crown. Further, some are of the view that there is no breach of the undertaking, insofar as it exists, if the Crown Brief documents are given to other counsel who is protecting his or

her client's interests in a related civil matter. The law in this area is unsettled and equivocal and, as a result, Crown Brief materials are shared between criminal and civil counsel and produced in civil proceedings without the knowledge of the Attorney General, the police, or the witnesses who provided statements during the criminal investigation.

B. Civil: Limited Application of the Wagg Screening Mechanism

[143] The civil rules also provide an entry point for parties seeking documents contained in the Crown Brief. Currently the *Wagg* screening mechanism is a common law process superimposed upon the civil rules to govern disclosure of Crown Brief material. There is a strong argument that the screening mechanism should be enshrined in the rules, and used as the exclusive process under which civil litigants can seek its production. An additional concern is that the *Wagg* process needs to be "fortified" to better protect the integrity of a criminal proceeding where the request for Crown Brief production is made before the prosecution has been completed. There ought never be an occasion where the administration of justice is brought into disrepute because Crown Brief materials were used in civil proceedings, resulting in the tainting of the evidence in subsequent criminal proceedings.

C. Administrative Law and Quasi-Criminal Sources: Statutory Powers to Order Production from the Crown as a Non-Party

[144] In addition to the civil rules, a third method of compelling production of the Crown Brief is the exercise of legislative power conferred on administrative tribunals or regulatory agencies. There is no universal acceptance in these fora that the *Wagg* screening mechanism applies to their regime of statutory compulsion. It is clear that the screening and weighing required pursuant to *Wagg* does apply to administrative tribunals and regulatory agencies. As evidenced from the Ontario experience, from time to time, the Attorney General has had to respond to these agencies, including labour arbitrations and professional disciplinary proceedings, in order to protect against the production of Crown Brief materials. While the adjudicators in these forums are experts in their fields,

there are concerns that they may not appreciate the scope of the public interest concerns related to criminal law.

D. Freedom of Information: Limited Protection under this Alternate Access to the Crown Brief

[145] Freedom of information legislation is another source for members of the public to gain access to the contents of the Crown Brief. Freedom of information and privacy statues are in place in all of the provinces and territories and at the federal level. The removal of prosecution files from the scope of the various freedom of information statutes for the currency of the criminal proceedings provides strong protection to the integrity of the administration of criminal justice. The weakness lies in the limited protection from disclosure afforded to the Crown Brief under the solicitor-client privilege exemptions which exist in this type of legislation. All jurisdictions have solicitor-client exemptions but the language varies. At issue is whether the solicitor-client privilege exemptions that exist, have been interpreted to include litigation privilege and, if so, does the exemption extend permanent protection to materials subject to litigation privilege.

Each of these sources is discussed in this Report and corresponds with a recommendation of the Working Group as to a feasible method for controlling the source.

VIII. RECOMMENDATIONS

Recommendation 1

[146] **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.**

[147] **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

[148] **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

[149] **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

[150] **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

[151] **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.**

IX. CONCLUSIONS

[152] In this Report, the Working Group has attempted to explore feasible legislative and non-legislative initiatives that can bring clarity and consistency to the Crown Brief production issue. Achieving uniformity in the application of the *Wagg* process through legislative amendment is complicated by the jurisdictional differences, by the high level of co-ordination required to achieve success, and by the differing levels of urgency which provinces and territories apply to addressing the problems in this important area. The Crown Brief is symbolic of the conflict in public interest that can arise when relevant information collected for one purpose, is sought to be used for another. The conflict over Crown Brief disclosure has reminded the legal community of the interconnectedness between criminal and civil law; yet also served to highlight the differences. In the end, the control of the dissemination of Crown Brief materials for collateral use is necessary to preserve the broader administration of justice. It is hoped that the recommendations in this Report will take us closer to meeting that objective.

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1 *R. v. Nikolovski* (1996), 111 C.C.C. (3d) 403 (S.C.C.), at para. 13.

2 *Ibid.*

3 *Cook v. Ip et al.* (1985), 22 D.L.R. (4th) 1 at 4 (Ont. C.A.), aff'd (1986) 68 N.R. 400 n. (S.C.C.).

4 Crystal O'Donnell and David Marriott, *Collateral Use of Crown Brief Disclosure* which was presented at the August 2006 conference of the Uniform Law Conference of Canada (ULCC).

5 *D.P. v. Wagg*, [2001] O.J. No. 595 (S.C.J.), varied (2002), 222 D.L.R. (4th) 97 (Div. Ct.), allowed in part (2004), 239 D.L.R. (4th) 501 (Ont. C.A.).

6 *D. P. v. Wagg* (Div. Ct.) *supra*, at para. 44.

7 Martin Committee Report, *supra*.

8 *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

9 *Ibid.* at para 20.

10 *Goodman v. Rossi* (1995), 24 O.R. (3d) 359 (Ont. C.A.)

11 (2002), 222 D.L.R. (4th) 97 (Div. Ct.) at paras. 54-55.

12 Taylor v. Serious Fraud Office, [1998] 4 All E.R. 801.

13 The Wagg screening process is mandatory only in Ontario, the decision having only persuasive value outside that province.

14 *D.P. v. Wagg* (Div Ct.), *supra*, at paras. 19, 22-24.

15 *D.P. v. Wagg* (Div Ct.), *supra*, at para. 51.

16 *D.P. v. Wagg* (2002), 222 D.L.R. (4th) 97 at para. 41(Div. Ct.).

17 *D.P. v. Wagg* (Div Ct.), *supra*, at para. 8.

[18] *D.P. v. Wagg* (Ont. C.A.). *supra*, at para. 17.

[19] *D.P. v. Wagg* (Ont. C.A.). *supra*, at para. 62.

[20] *Taylor v. Serious Fraud Office*, [1998] 4 All E.R. 801 at 817j-818c (H.L.).

[21] *Dixon v. Gibbs*, [2003] O.J. No. 75 (S.C.J.).

[22] *Ibid*. at paras. 26-29. To a large degree, the ruling reflected the position taken by the Crown that its concerns about jeopardizing the integrity of the criminal proceedings may not exist once the witnesses' evidence had been tested at the preliminary inquiry.

[23] *N.G. v. Upper Canada College* (2004), 70 O.R. (3d) 312 (C.A.).

[24] *N.G. v. Upper Canada College*, [2004] O.J. No. 1011 (Div. Ct.).

[25] *N. G. v. Upper Canada College (C.A.), supra*, at paras. 13, 16-17.

[26] *Bourgeois v. Bolen*, [2004] A.J. No. 50.

[27] The Crown relied upon *Rutherford v. Swanson* (1993), 139 A.R. 314 (Q.B.); *Omega Teehno Ltd. v. East Central Gas Co-op Ltd.*, [1979] A.J. No. 345 (C.A.); and *Barry v. Maartens-Poole* (1992), 4 Alta. L.R. (3d) 330 (Q.B.).

[28] *Ibid*. at para 78.

[29] *Huang (litigaton guardian of) v. Sadler, Tidbury, Her Majesty the Queen in the right of the province of British Columbia and the Emergency Health Services Commission*, [2006] B.C.J. No. 758. (B.C.S.C.).

[30] *N. G. v. Upper Canada College (C.A.), supra*, at para 20.

[31] *Ibid*. at para 20.

[32] *Aylmer Meat Packers Inc. v. Ontario*, [2006] O.J. No. 2296 (Q.L.) (S.C.J.).

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

[34] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 30.10(3).

[35] These are from statistics kept by Crown Law –Office Civil, Ministry of the Attorney General.

[36] Service on the Attorney General of Ontario is effected by leaving a copy with a solicitor at Crown Law Office – Civil in accordance with Rule 16.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[37] The Attorney General takes the lead in responding to motions seeking Crown Brief material where criminal charges have been laid. The individual police services respond to motions seeking production of Crown material where only provincial offences charges have been laid or no charges at all have been laid.

[38] *Green v. Prosecution Service*, [2002] GWCA Civ 389 (C.A.).

[39] *(S.) v. B. (N.)*, [2005] O.J. No. 1411 (C.A.).

[40] *Child and Family Services Act*, R.S.O. 1990, c. C-11.

[41] *Children's Aid Society of Algoma v. D.P.*, [2006] O.J. No. 1878, 2006 ONCJ 170.

[42] *Regulated Health Professions Act*, S.O. 1991, c. 18.

[43] *Public Inquiries Act*, R.S.O. 1990, c. P-41.

[44] There are three cases involving the CPSO which are currently before the courts: *Kelly v. HMQRO and the College of Physicians and Surgeons*, Ont. S.C. J., Court File No. 07-CV-330612PD1; *Sazant v. HMQRO, the College of Physicians and Surgeons and the Toronto Police Services*, Ont. S.C.J., Court File No. 07-CU-335648PD; and *Metcalf v. The College of Physicians and Surgeons of Ontario, Ministry of the Attorney General and Allan Beitel*, Ont. S.C.J., Court File No. 07-CV-38020.

[45] *Toronto Transit Commission v. Amalgamated Transit Union, Local 113*, January 4, 2006, M.K. Saltman.

[46] *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A.

[47] *D. P. v. Wagg (C.A.), supra*, at para 27.

[48] This practice continues in certain jurisdictions to this day, at least in Ontario, Nova Scotia and Manitoba. See, for example, www.gov.ns.ca/pps.publications/ca_manual/Forms/UndertakingMay14.pdf and www.gov.mb.ca/justice/publications/disclosurepolicy.pdf.

[49] Contrast this with *R. v. Masilamany*, [2004] O.J. No. 701 (Ont. Sup. Ct.) a judgment dealing with an application for disclosure in a criminal case resisted by the Crown on the basis of informer privilege. Lalonde J. finds that a statement in *Garofoli* about informer privilege is a basis to hold that the deemed undertaking rule has no place in criminal law. This aspect of the judgment is, like *Schertzer*, *obiter*, and additionally, somewhat bizarre.

[50] He therefore does not deal directly with the issue of disclosure materials, as he finds the issue premature and because he stayed one of the actions for other reasons. He does hold that "[h]ad I not imposed a stay of the Hedley action, however, I would not have been inclined to grant the [motion on the disclosure materials], in any event, for the reasons set out above with respect to the implied or express undertaking and also because, in my judgment, the Motion is premature."

[51] Blair J. refers to *Consolidated NBS* and distinguishes it, borrowing the language of a collateral purpose and finding that Hedley had one. However, Blair J.'s formulation of the test, *infra*, had no such limitation. It is hard to see how Hedley's purpose was collateral, as a plaintiff who wanted the material to advance his case, and Consolidated NBS, who wanted the material to defend their case, was not.

[52] *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions (The Martin Committee Report)*, Queen's Printer for Ontario, 1993.

[53] The Martin Committee recommendations were also endorsed by the Saskatchewan Court of Appeal in *R. v. Lucas* (1996), 104 C.C.C. (3d) 550. While the existence of an implied undertaking was not at issue in that case, Vancise J.A. speaking for the court made the following *obiter* statement: "The material which is disclosed for the purpose of making full answer and defence should not be released to third parties either by the lawyer representing the accused or the accused person himself."

[54] The British Parliament disagreed with this approach and passed legislation in 1996 (discussed *infra*). As it turns out, the House of Lords disagreed as well. See *Taylor v. Serious Fraud Office*, [1998] 4 All E.R. 801.

[55] Both trial courts in *Mahon* and *Taylor* held that the rule still applied even though the material was presented in open court in the criminal matter. Both times, the Court of Appeal disagreed.

[56] Interestingly, Blair J. adverted to this issue in *Hedley*, *supra*, and came to the conclusion that the undertaking continued in force even though the information was made public in a court proceeding. This appears to be the only Canadian pronouncement on the issue Australia, which also has an implied undertaking rule, has decided that it does not survive the material being tendered in open court, both at common law in *Esso Australia Resources Limited. v. Plowman* (1995) 183 CLR 10 and by Order 15 Rule 18 of its Federal Court Rules. A court in Hong Kong has expressed similar skepticism about whether the rule applies once material is read in open court: *Allied Group Ltd. V. Secretary for Justice*, CACV 1/2003.

[57] The UK Crown Prosecution Service has developed extensive guidelines on the production of material to third parties, which may be helpful guidance should Canada decide to adopt legislation: www.cps.gov.uk/lega/section20/chapter_b.html

[58] These proposals for legislative reform are being considered by the Federal/Provincial/Territorial Working Group on Criminal Procedure that reports to the Coordinating Committee of Senior Officials (CCSO). No recommendations have been made yet by this Working Group.

[59] *Rutherford v. Swanson* (1993), 139 A.R. 314 (Alb. Q.B.).

[60] *Rutherford v. Swanson* (1993), 139 A.R. 314 (Alb. Q.B.).

[61] *R. v. Campbell*, [1999] 1 S.C.R. 565 at para. 34

[62] *N.G. v. Upper Canada College*, *supra*, at paras. 16-18.

[63] *D.P. v. Wagg* (Ont. C.A.). *supra*, at para. 64.

[64] *D.P. v. Wagg* (Ont. C.A.). *supra*, at para. 65.

[65] *Green v. Prosecution Service, supra.*

[66] *Ibid.*, at para. 25.

[67] *Ibid.*, at para. 34.

[68] *Toronto Star* Newspapers *v. Ontario*, [2005] No. 2 S.C.R. 188 at para. 39.

[69] R.S.O. 1990, c. S.22

[70] *D.P. v. Wagg* (Div Ct.), *supra*, at para. 46.

[71] *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, ss. 3(1)(h).

[72] Order F05-26, *Forensic Psychiatric Services Commission (Re)*, [2005] B.C.I.P.C.D. No. 35.

[73] Alberta: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c.F-25, ss. 4(1)(k); Ontario: *Freedom of Information and Protection of Privacy Act*, R.SO. 1990, c. F-31, ss. 65(1)5.2; Newfoundland: *Access to Information and Protection of Privacy Act*, SNL 2002 Chapter A-1.1, ss. 5(1)(a). ss. 5(1)(k); Nova Scotia: *Freedom of Information and Protection of Privacy Act*, 1993, c. 5, s. 1, ss. 4(1)(c)(i); Nunavut: *Access to Information and Protection of Privacy Act*, ss. 3(1)(c); Northwest Territories: *Access to Information and Protection of Privacy Act*, SNWT 1994, c.20, ss. 3(1)(c); Prince Edward Island: *Freedom of Information and Protection of Privacy Act*, Chapter F-15.01, s. 4(1)(g).

[74] *Freedom of Information and Protection of Privacy Act*, R.SO. 1990, c. F-31.

[75] *Freedom of Information and Protection of Privacy Act*, R.SO. 1990, c. F-31, s. 14(1)(a).

[76] *Ibid*., s. 14(1)(a).

[77] Order M-773, Metropolitan Licensing Commission, [1996] O.I.P.C. No. 188.

[78] *Freedom of Information and Protection of Privacy Act*, R.SO. 1990, c. F-31, s. 19.

[79] *Attorney General of Ontario v. Big Canoe, Inquiry Officer; John Doe, Requester*, [2006] O.J. No. 1812 (Div. Ct.).

[80] *Ibid*. at para. 4.

[81] *Attorney General of Ontario v. Big Canoe, Inquiry Officer; James Doe, Requester*, 62 O.R. (3d) 167. (Ont. C.A.)

[82] *Attorney* General *of Ontario v. Big Canoe* (Div. Ct.), *Ibid.¸para. 37.*

[83] *Blank v. Canada (Minister of Justice)*, [2006] S.C.J. No. 39.

[84] *Access to Information Act. 1980-81-82-83, c. 111, Sch. I "1".*

[85] *Ibid*., at para. 34.

[86] *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.