UNIFORM LAW CONFERENCE OF CANADA

JOINT CIVIL AND CRIMINAL SECTIONS

STATUS REPORT OF THE WORKING GROUP ON THE COLATERAL USE OF CROWN BRIEF DISCLOSURE

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

By Abi Lewis[1]

1. Introduction

[1] The Uniform Law Conference of Canada (ULCC) at its meeting in Quebec City last year passed a resolution directing the Joint Civil/Criminal Section Working Group on Collateral Use of Crown Brief Disclosure to prepare model rules and legislation in accordance with the recommendations contained in the 2008 Report and report back to the Conference at the 2009 meeting.

[2] To accomplish the task, the Working Group engaged in further policy discussion on some outstanding issues prior to securing the service of the legislative counsel from the Ontario Office of the Chief Legislative Counsel to draft proposed legislation.

[3] The plan of the Working Group was to present model legislation for adoption at this year's Conference. But the drafting process has thrown up more issues that need to be resolved in preparing model legislation and/or rules for the Conference. Instead, Working Group members have agreed to present a status report discussing progress that has been made, issues to be resolved and seeking further direction from the Conference.

Discussion Draft Legislation

[4] The Working Group with the assistance of the legislative counsel has produced the attached Discussion Draft outlining the proposed legislation. The working title of the proposed legislation is the "*Uniform Prosecution Records Act*".

[5] The Discussion Draft provides a legislative framework, which is incomplete, for determining the issue of access to prosecution records in line with the principles espoused in the Ontario Court of Appeal decision in *D.P. v. Wagg*[2]. The Working Group has opted for the more familiar term "prosecution records" as opposed to "Crown Brief records".

[6] Although the Discussion Draft shows substantial work the Working Group has already done, it is still a work-in-progress that will require further changes before it can be recommended for adoption by the Conference.

[7] Notes are included in the Discussion Draft. Depending on the direction taken by the Working Group with respect to the final legislative product, some notes would be retained in the proposed legislation to provide explanation for the benefit of readers.

Other notes indicate issues that the Working Group has to deal with or areas of further consultation before draft legislation can be finalized.

[8] The Discussion Draft includes definitions of some of the terms used such as administrative, child protection and civil proceedings, prosecution record and record.

[9] Though not yet fleshed out, there are place holders for provisions dealing with the application of the legislation and production of a prosecution record. In addition, legislative counsel has provided in section 4 of the Discussion Draft a preliminary and incomplete sketch of how the proposed legislation might apply to child protection proceedings – this is one of the areas where further discussion and consultation is necessary.

[10] For administrative and civil proceedings, the Discussion Draft contains a rebuttable presumption in subsection 5(4) in favour of the court refusing to order disclosure of a prosecution record to a third party if there is an on-going investigation or prosecution unless special circumstances dictate otherwise. Further work respecting how this rebuttable presumption will work in the context of child protection hearings is needed – for example, should child protection proceedings be 'deemed' to be "special circumstances" that would always rebut this presumption?

[11] Where the Attorney General or the police have refused to permit access to a prosecution record, the Discussion Draft outlines the steps the court has to take in determining whether or not to grant access to the record in part or whole.

[12] Section 5 of the Discussion Draft allows a person to file an application with the court, seeking an order requiring or permitting production of the prosecution record. The Attorney General, the parties to the arbitration, administrative or civil proceeding and the person who is the subject of the prosecution record are parties to the application.

[13] Section 6 of the Discussion Draft requires the court to apply the codified *Wagg* test in deciding whether to make an order requiring or permitting production of a prosecution record. The test is: “whether the public interest in promoting the administration of justice by providing full access to a prosecution record that is relevant to the arbitration or proceeding prevails over any public interest that applies in the case in preventing or limiting access to or use of the prosecution record”.

[14] In deciding on the issue, the court is required to consider all relevant factors, including those specified in subsection 6(2). Those factors include the stage in the arbitration, administrative or civil proceeding, whether the data or information in the prosecution record is readily available from another source and the privacy interests of the person who is the subject of the prosecution record.

[15] The Discussion Draft also restricts the scope of the proposed legislation. For instance, it makes it clear that the legislation could not be construed as authorizing, permitting or requiring the production of a prosecution record that is subject to any privilege recognized by law.

Outstanding Issues and Areas of Further Consultation

[16] As evident from the notes accompanying the provisions in the Discussion Draft, the Working Group needs more time to deal with some outstanding issues.

[17] Although the Discussion Draft is conceived as a stand-alone statute, the Working Group may want to explore the option of whether to develop a combination of statutory and regulatory provisions in implementing the ULCC 2008 resolution.

[18] The Working Group has yet to decide whether in conjunction with drafting model legislation, it would go ahead with developing model rules of civil procedure.

Application of the Act

[19] The Working Group has to determine the scope of the application of the proposed legislation, especially the impact of implied undertakings given by defence counsel to the Crown regarding the disclosure and use of prosecution records. For instance, should the application of the proposed legislation be all-encompassing, stating that the issue of producing a prosecution record has to be determined in accordance with the legislation? If not, what are the exceptions that should be included in the proposed legislation?

[20] As legislative counsel has pointed out, the Working Group has to decide whether to include a purpose provision in the proposed legislation.

[21] In addition, the Working Group has to decide whether to include a conflict provision. If so, the question arises as to whether it is sufficient to say that "in the event of conflict between this Act and any other Act or regulation, this Act prevails".

[22] Further discussion is needed on how some categories of records should be treated under the proposed legislation, such as records under the *Youth Criminal Justice Act* (Canada) and criminal records or records of convictions.

Production of prosecution records

[23] Working Group members are unanimous in their opinion that the process for the Attorney General and the police considering requests for access to prosecution records should not be formalized and that there should be no provision in the

proposed legislation for the Attorney General to exercise a statutory power of decision.

[24] The Discussion Draft is silent on this matter, as the focus of the proposed legislation is to codify the *Wagg* principles for the courts in dealing with applications filed as a result of the Attorney General or the police refusing to provide prosecution records.

[25] However, the Working Group is yet to decide on how to draft provisions relating to production of prosecution records. Hence, section 3 of the Discussion Draft is currently blank. One option being considered is to draft this section to direct parties to request police generated records from the proper police service. If there is an ongoing prosecution, the request would be directed to the Attorney General. Also, if the request is for Crown-generated records, it would be directed to the Attorney General.

Child protection proceedings

[26] The Working Group is aware that more analysis of issues pertaining to the treatment of prosecution records in the child protection proceedings context is required in order to complete the drafting of provisions relating to this subject matter.

[27] Legislative counsel has provided a sketch of this statutory provision in section 4 of the Discussion Draft to give some pointers as to issues the Working Group is looking at in this context.

[28] The Working Group plans to consult with the Coordinating Committee of Senior Officials – Family Justice in developing further proposals on access to prosecution records in child protection proceedings and is seeking direction from the Conference as to whether there are other experts or groups of experts who should be consulted on this issue.

Restrictions

[29] The Discussion Draft provides for some restrictions on how the proposed legislation can be interpreted to ensure that it does not have the unintended effect of overriding or negatively impacting other legal principles related to the disclosure and use of prosecution records. Section 7 of the Discussion Draft states that the proposed legislation does not permit or require production of prosecution records that are subject to privilege or that are prohibited from disclosure by law.

[30] But the restrictions contained in the Discussion Draft are by no means exhaustive or complete. As stated in the notes to the Discussion Draft, the Working Group intends to address the following issues:

- The interaction between public interest privilege and the laws of evidence.

- The treatment of third party records in the proposed legislation.
- The interaction between the proposed legislation and the applicable privacy and access to information legislation.

Definitions

[31] Further review of the definitions section of the Discussion Draft is necessary to ensure that the proposed legislation does not overreach into situations not contemplated (over breadth) and that, at the same time, there are no gaps (unintended limitations) created as a result of the language used in the definitions.

[32] Some definitions (e.g. administrative proceeding) are incomplete and others (e.g. prosecution record) may have to be revised to ensure that they are not overly broad.

Recommendation

[33] The Working Group needs more time to finalize the drafting of model legislation on the collateral use of Crown Brief disclosure. Much work has already been done, which is reflected in the Discussion Draft. To complete the project, the Working Group needs to call on more expertise to deal with issues related to child protection proceedings. Also, it is necessary for the Working Group to engage in further discussion on how the proposed legislation would align with freedom of information and privacy legislation, as well as the interface between the proposed legislation and federal laws on evidence.

[34] It is recommended that the current or a reconstituted Working Group be directed to complete the drafting of model legislation and possibly model rules on the collateral use of Crown Brief disclosure for presentation to the 2010 Conference.

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[1] Abi Lewis, Counsel, Policy Division, Ontario Ministry of the Attorney General prepared this Status Report in collaboration with members of the Working Group.

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

APPENDIX

WORKING GROUP MEMBERSHIP

Members of the Working Group were: Denise Dwyer (Chair), Director, Legal Services Branch, Ontario Ministry of Community Safety and Correctional Services; Gregory Steele, Partner of the law firm Steele Urquhart, Vancouver; Nancy Irving, Senior Counsel, Public Prosecutions Service of Canada, Ottawa; Christopher Rupar, Senior General Counsel, Civil Litigation Section, Justice Canada; Ursula Hendel, Counsel, Public Prosecutions Service of Canada; Mark Prescott, Counsel, Information Law and Privacy Section, Justice Canada, Ottawa; David Marriott, Counsel, Criminal Justice Division, Justice and Attorney General, Edmonton, Alberta; Gail Mildren, General Counsel, Civil Legal Services, Manitoba Justice; Andy Rady, Criminal Defence Lawyer, London, Ontario; Chief Superintendent Susan George, Ontario Provincial Police; Gail Glickman, Counsel, Criminal Law Division, Ontario Ministry of the Attorney General; and Abi Lewis, Counsel, Policy Division, Ontario Ministry of the Attorney General.

The Working Group was assisted in the review of the Discussion Draft Legislation by the following: Kim Twohig, David Feliciant, Luba Kowal, Jason Kuzminski, Crown Law Office – Civil, Ontario Ministry of the Attorney General; and Jinan Kubursi, Natalie Osadchy and Marnie Bacher, Ontario Ministry of Community Safety and Correctional Services.

The Working Group also acknowledges the service of the Office of the Ontario Chief Legislative Counsel in producing the Discussion Draft Legislation.

RECOMMENDATIONS OF THE WORKING GROUP ADOPTED AT THE 2008 CONFERENCE

The main recommendations of the Working Group that are pertinent to developing model legislation are as follows:

Recommendation 1

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.

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

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

(a) The codified *Wagg* rule should be the exclusive provision in the rules which governs production of Crown Brief materials, whether those materials are in the possession or control of the Crown, the police or a third party.
(b) The codified rule should contain a presumption that production of Crown Brief materials for use in collateral proceedings should be delayed until the criminal proceeding is complete unless there are special circumstances.
(c) The codified rule should not circumscribe the use that the Crown and police services make of Crown Brief materials to respond to or to defend in *any* actions brought against them. In addition, the codified rule should not circumscribe the use that the Crown makes of Crown Brief material to initiate proceedings under a provincial civil asset forfeiture scheme.

Recommendation 3

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

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.

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

Recommendation 5

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.