UNIFORM LAW CONFERENCE OF CANADA

JOINT CIVIL AND CRIMINAL LAW SECTIONS

UNIFORM PROSECUTION RECORDS PRODUCTION ACT

REPORT OF THE WORKING GROUP

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Background

[1] At its meeting in Edmonton, Alberta in 2006, the Uniform Law Conference of Canada received a report authored by Crystal O'Donnell, counsel Ministry of the Attorney General of Ontario, Crown Law Office - Civil, and David Marriott, counsel Alberta Justice, Appeals Branch, Criminal Justice Division, concerning the use in collateral proceedings of materials disclosed by the Crown to an accused pursuant to the disclosure obligations of the Crown in a criminal prosecution[1]. The report examined the decision of the Ontario Court of Appeal in *D.P.* v. *Wagg*[2] and the principles underlying the obligation placed on the Crown to screen Crown Brief documents prior to use in collateral proceeding so that disclosure in a civil context will not adversely affect privacy rights of individuals, the public interest or the administration of justice. The report discussed the rights and interests at stake, including the impact on the criminal justice system, the concern for a chilling effect on witness cooperation, privacy rights, safety concerns and the public interest and examined the current restrictions on the use of criminal disclosure materials for purposes other than making full answer and defence and the legal issues which govern such disclosure as well as the discovery process in civil litigation and the common law and statutory rules of privilege. The report included a summary of the various approaches to the disclosure of Crown Brief materials in some of the provinces and a more detailed description of the experience in Ontario. The report considered the interplay with freedom of information and protection of privacy legislation and concluded with suggestions for reform and a consistent approach.

[2] The Conference resolved that a joint Working Group be established to consider the issues raised in the report and to report and make any recommendations to the Conference 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. Pursuant to this resolution a joint Working Group was established and reports and recommendations were made to the Conference at its annual meetings in 2007, 2008 and 2009. These recommendations included the preparation of legislation to codify the Wagg screening process relating to the use of Crown Brief materials in collateral proceedings, with particular consideration being given to provisions relating to child protection proceedings, the development of model uniform rules of civil procedure to govern the use and disclosure of Crown Brief materials in civil litigation and the

preparation of uniform access to information provisions governing access requests for Crown Brief materials. Most significant was the presentation to the 2009 meeting of the Conference of a Discussion Draft Uniform Prosecution Records Act. Although this draft contained substantive provisions relating to the disclosure and use of Crown Brief materials, it was not intended to form the basis of a final draft for consideration for adoption by the Conference but rather was intended to be illustrative of the legislative scheme contemplated by the Working Group[3].

[3] The 2009 report of the Working Group recommended that it proceed to finalize the drafting of model legislation on the collateral use of Crown Brief disclosure. Further work would include consultations regarding issues related to child protection proceedings and consideration as to 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, if needed. It was 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.

[4] The Working Group was reconstituted with Greg Steele as its chair and Nancy Irving, Gail Glickman, David Marriott, Gail Mildren, Abi Lewis, Ursula Hendel, Chris Rupar, Steve Rooke, Mark Prescott and David Feliciant as its members. Towards the end of its deliberations it was joined by Fateh Salim and Judith Parker, both of the Ontario Ministry of the Attorney General, Crown Law Office – Civil.[4] It was ably assisted in the preparation of the Draft Uniform Prosecution Records Production Act by Tamara Kuzyk, Legislative Counsel, Ontario**.** The Working Group met by a series of regular teleconferences from October to February during which time it prepared revisions to the discussion submitted to the 2009 meeting and drafting instructions.

[5] Although previous recommendations of the Working Group and resolutions of the Conference were for the preparation of a model law and model rules of civil procedure, during the course of its deliberations since the 2009 meeting of the Conference, the Working Group concluded that the best response was the preparation of a uniform act. In March, 2010, Working Group's draft act and drafting instructions were delivered to Ontario legislative counsel who undertook the preparation of a draft uniform act for consideration by the Conference.

[6] The Working Group is indebted to the substantial work carried out by the members of the Working Group from 2006 to 2009 under the chair of Denise Dwyer. The Working Group also wishes to express its gratitude to the Ontario Ministry of the

Attorney General for providing ongoing support to the project and, in particular, making the services of legislative counsel available to draft the uniform act which is submitted for consideration by the Conference this year.

Purpose of the Uniform Prosecution Records Production Act[5]

[7] The Uniform Prosecution Records Production Act is a response to the increasingly prevalent applications that are made seeking production of records in the possession of the Crown or the police as a result of an investigation or prosecution of an offence[6]. Under the normal rules of civil procedure or other legislative enactments, the production of such records may be compelled by subpoena or court order. In certain situations a party to a proceeding may be required to disclose and produce them pursuant to the rules of procedure governing the proceeding. The purpose of the Uniform Prosecution Records Production Act is to provide a legislative scheme for the production of records which are subject to production under existing law. The purpose is not to provide for production of records which are not subject to production under existing law, for example records subject to informer privilege, or of records the production of which is governed by other law, for example records subject to the Youth Criminal Justice Act.

[8] At present, many requests for production of a prosecution record are handled informally. The party seeking to make use of the materials asks the attorney general or relevant police force for permission and it is granted. The Uniform Prosecution Records Production Act is not intended to interfere with such informal arrangements and it is expected that any existing regime by which requests for access to or use of a prosecution record are handled informally and with the consent of the attorney general and police will continue. It is expected that jurisdictions which enact the Uniform Prosecution Records Production Act will continue to develop protocols and procedures for production of such documents and information. The Act is intended to address those instances where this informal regime breaks down and the attorney general or the police refuse to consent to its production. At that point, the Act is meant to provide a mechanism for the resolution of such disputes.

[9] The above reflects the underlying and fundamental purpose of the Act. It is not meant to create new rights of access to documents or impose restrictions on rights of access that presently exist. It is primarily a dispute resolution mechanism to be invoked when disagreements arise as to what those rights are.

[10] Reference in this report is made to both the attorney general and the police. In some jurisdictions, requests for production of a prosecution record are made to and dealt

with solely by the attorney general while in others the police department responsible for the criminal prosecution or investigation is involved as well. It is possible that in the latter jurisdictions a request could be refused by the attorney general but consented to by the police or vice versa. While it is arguable that the practice of allowing both the attorney general and the police to make separate, and possibly conflicting, determinations is not the best approach, that is the preference of those jurisdictions and it is beyond the scope of this project to resolve that issue. The draft Act therefore refers to the consent of both the attorney general and the police make these decisions. Thus, beginning in s.2(1) and onwards, enacting jurisdictions are required to elect between "the attorney general" or "the attorney general and the relevant police force".

[11] The Working Group recommends that those jurisdictions which presently allow for the involvement of both the attorney general and the police consider centralizing decision making with respect to requests for production of a prosecution record with the attorney general to avoid the possibility of conflicting decisions. The draft Act does not deal with the legislative requirements for those jurisdictions that elect to maintain the practice of allowing the attorney general and the police to make separate determinations. It is the Working Group's view that this is an issue that will require specific provisions that are beyond the scope of a uniform act.

Basic Principles

[12] Disputes relating to production of a prosecution record are to be resolved by balancing the public interest in promoting the administration of justice by providing full access to a prosecution record with any public interest that applies to preventing or limiting access to or use of the prosecution record. In the absence of special circumstances, the general rule is that production of a prosecution record should be delayed until the prosecution or investigation to which it relates is completed. This general rule does not apply to instances where production of the prosecution record is sought for use in connection with a child protection proceeding.

[13] The Act prohibits dissemination of a prosecution record beyond those people whom production has been authorized. A person who is in possession of a prosecution record is required to obtain the consent of the attorney general and, in those jurisdictions which elect to require it, the police before making it available to a third party even though they would otherwise be required to do so by, for example, the rules of civil procedure.

[14] It is believed that for most jurisdictions existing freedom of information and privacy legislation adequately protects a prosecution record and other Crown and police

records from unwarranted access. To the extent that it does not, it is that legislation that needs to be amended. It is not the function of this Act to correct any deficiencies in such legislation. The Working Group recommends that the federal government consider an amendment of its access to information legislation to provide for the exemption of Crown and police records in a manner consistent with this Act.

Section 1 - Definitions

[15] As already noted, child protection proceedings are accorded different treatment under the Act in that the presumption that production of a prosecution record should be delayed until the prosecution or investigation to which it relates is completed does not apply. The rationale for this exception is discussed later in this report, however the different treatment of child protection proceedings give rise to a need for a definition. The definition of "Child Protection Proceeding" is intended to capture what may be classified as true child protection proceedings, that is proceedings carried on by a government agency charged with child protection responsibilities. These may include both court proceedings whose objective is to apprehend a child in need of protection as well as investigations and ongoing activities between the agency and the family. The definition is not intended to extend to proceedings in which the agency may be acting as a party on behalf of the child pursuant to its roles as a guardian of the child.

[16] The definition of "Crown" includes the Federal Crown. The Act does not govern the Federal Crown but rather what use people can make of records that they have obtained from the Federal Crown. While the Working Group recognized the potential constitutional issue that arises, it had neither the time nor expertise to deal with this issue further. While the Working Group is of the opinion that inclusion of the Federal Crown does not infringe upon the division of power between the Parliament of Canada and provincial and territorial legislatures, jurisdictions that choose to enact the Act may wish to refer the matter to their constitutional law departments for further consideration.

[17] The reference to anything "under" an Act in the definition of "Offence" includes anything in the Act or any document made or power exercised under the Act, including regulations, by-laws, and directives. Use of "under" in this manner is consistent with Ontario drafting practices. Jurisdictions which choose to enact the Act may require the use of more express language.

[18] The definition of "Person" excludes both the Crown and a police force. In accordance with the underlying principle of the Act that it is intended to deal with disputes arising when third parties seek access to or permission to make use of a

prosecution record, the Act does not limit the Crown's or a police force's ability to make whatever use of their own records they wish.

[19] The Act is directed at records respecting a prosecution or an investigation which a person seeks to obtain from the Crown or a police force or which have come into a person's possession as a consequence of Crown disclosure during the course of a criminal proceeding. A person who possesses a document that also happens to be part of the prosecution record, for example a hospital with respect to its own records, would not be subject to the Act. Therefore "Possession" is defined to mean actual possession or an entitlement to obtain the original prosecution record or a copy of it only if that possession or entitlement arises as a result of the investigation or prosecution to which the prosecution record relates.

[20] The definition of "Proceeding" includes all proceedings other than criminal proceedings, including quasi-criminal proceedings. No distinction is made between different types of proceedings. The Working Group considered whether there were proceedings other than child protection proceedings that merited different treatment but did not identify any.

[21] The Act does not apply to public inquiries and fatal accident inquiries. With respect to the first, the instrument constituting the public inquiry will determine whether the mandate of the person conducting it is to have access to the prosecution record[7]. Fatal accident inquiries are usually conducted by the counsel appointed by the attorney general and it is difficult to imagine that there would be a dispute between counsel conducting such an inquiry and counsel responsible for a relevant criminal prosecution.

[22] The definition of "Prosecution Record" is very broad and is intended to include information that has not been disclosed to an accused as part of the Crown disclosure obligation. It is not intended to capture police intelligence gathering activities.

Section 2 - Production of Prosecution Record

[23] The purpose of section 2(1) is to protect the prosecution record from being compelled to be produced for use in a collateral proceeding without the consent of the attorney general and, in the those jurisdictions that choose to maintain the practice whereby the attorney general and the police may take different positions regarding production.

[24] Section 2(2) imposes an obligation on a person who has received a copy of the prosecution record to keep it confidential, however subsection (3) makes it clear that this is not meant to obviate any of that person's obligations to disclose the existence of the prosecution record as required by the disclosure obligations of another proceeding in which they are involved. It is envisioned that having disclosed both the existence of the prosecution record and the fact that it is in the person's possession, either they or another party to the proceeding will request permission for its use. If that request is refused, an application under the Act would then be made. The Working Group considered whether the Act should include a positive obligation of the person who has possession of the prosecution record to seek consent for its production and concluded that the decision to do so or not is for the jurisdictions enacting the Act to make and would be influenced more by their interest in regulating the procedures of the collateral proceedings than by their desire to regulate access to the prosecution record.

[25] Since the Crown and police forces are excluded from the definition of Person, neither can rely on s.2(3) but rather must rely on general law governing conduct of civil proceedings. It was the consensus of the Working Group that the purpose of the Act is to deal with situations where Crown or a police force is faced with an application relating to the use of a prosecution record in a case in which they are not involved. Where the Crown or a police force are themselves a party to the litigation there will likely be other concerns regarding the conduct of the litigation which would give rise to an application for directions or orders for matters beyond the disclosure of the prosecution record, such as the timing of examinations for discovery or trial dates. It is beyond the scope of this project to deal with these concerns and it was felt that they would be dealt with under the general law governing the conduct of civil proceedings and that production of the prosecution record would be best dealt with under this as well.

[26] The prohibition against a person who has received a prosecution record from disclosing it to another does not apply to disclosure from one child protection authority to another. This applies to both court proceedings and to situations involving the transfer of an open file from one child protection authority to another after the investigation has concluded but service is being provided to a family, even though there are no court proceedings in progress.

[27] The term "child protection authority" is used in s.2(4) to reflect a policy intention for this provision to include transfers within a jurisdiction and between jurisdictions, including between provinces and territories. The Working Group considered whether or not a definition for child protection authority is required and concluded that the term was sufficiently universally understood. If an enacting jurisdiction uses a term or phrasing

that more appropriately reflects the policy intention, that term or phrasing should be used instead.

[28] Pursuant to s.2(5), the prohibitions set out in subsections 1 to 3 apply despite any other enactment. If a specific legislative provision requires or authorizes production of a prosecution record, that provision would only prevail if it expressly stated that it was effective notwithstanding the Act. In cases where there is no such provision, the Act will govern whether or not a prosecution record should be produced.

Application to Court

[29] Section 3 governs the procedure to be followed when the attorney general and, if necessary in the jurisdiction, the police, refuse to consent to a request for production or use of the prosecution record.

[30] In many cases, the person who is the subject of the prosecution record will be easily identifiable. While it is acknowledged that all persons who are the subject of the prosecution record and might be affected by its production should be entitled to notice of and be entitled to participate in an application for production of it, there will often be instances where the number of people is such that a requirement that they all be given notice would result in an excessive burden being imposed. The solution is to allow the court hearing the application to make a determination as to who should receive notice and how that should be given. It is expected that the Crown would give consideration to who should receive notice of the application to allow them to participate in the initial application as a matter of good practice, but the Working Group was of the opinion that it would be unworkable to attempt to include a specific notice requirement in the Act.

[31] Section 4 requires the court hearing the application to decide it by balancing the public interest in promoting the administration of justice by providing full access to the prosecution record or the part of a prosecution record that is relevant to the collateral proceeding against the public interest in preventing or limiting access to or use of the prosecution record. It does not set out a code. Rather, it lists factors that a court is to consider in exercising its discretion.

[32] Subsection 4(3) requires the court to refuse production of the prosecution record if a criminal prosecution or investigation has not been completed unless special circumstances are shown or the case involves a child protection proceeding. Child protection proceedings are given special treatment because of the urgency that generally surrounds such proceedings. Where the well-being of a child is at stake serious harm

could occur if the proceedings were delayed or went ahead without complete information. However, subsection 4(4) still requires the court to consider the right of an accused to a fair trial and the stage of both the criminal and collateral proceedings with respect to applications in cases where special circumstances have been shown or those relating to child protection proceedings.

Section 5 – No New Rights Created

[33] Section 5 is intended to make it clear that the Act is not intended to create a new right of access to records to which access is not already allowed pursuant to existing law. A person seeking production of the prosecution record, or a portion of it, must establish an entitlement to it independently of the Act.

Section 6 – Crown not Bound

[34] Except in British Columbia and Prince Edward Island, the Interpretation Acts of the provinces and territories provide that the Crown is not bound by a statute unless the intent for the statute to apply to the Crown is set out expressly or by necessary implication in the statute. Section 6 is included in brackets to be employed by British Columbia and Prince Edward Island or any jurisdiction which may wish to make this clear.

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[1] Collateral Use Of Crown Brief Disclosure – A Study Paper, Crystal O'Donnell and David Marriott, presented to the Annual Meeting of the Uniform Law Conference of Canada, Edmonton, Alberta, August 2006.

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

[3] The annual reports submitted by the Working Group to the Conference and the resolutions passed by the Conference can be found on the Conference's website at htpp://www.ulcc.ca.

[4] Particulars of the membership of the Working Group from its inception can be found in the annual reports submitted to the Conference which can be found on the Conference's website.

[5] The original terminology of "Crown Brief" has been replaced by "Prosecution Record", a term which is defined in the Act.

[6] Production of a prosecution record includes requests for access to or permission to use all or part of a prosecution record, including permission to provide a copy to another person or agency.

[7] British Columbia (Attorney General) v. Davies [2009] BCCA 337 (C.A.); Picha v. Dolan [2009] BCCA 336 (C.A.).