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CRIMINAL JUSTICE BRANCH, MINISTRY OF ATTORNEY GENERAL  
**CROWN COUNSEL POLICY MANUAL**

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| ARCS/ORCS FILE NUMBER:<br><b>55820-00 (and issue specific)</b> | EFFECTIVE DATE:<br><b>November 18, 2005</b> | POLICY CODE:<br><b>LEG 1</b>           |
| SUBJECT:<br><b>Legal Advice to the Police</b>                  |                                             | CROSS-REFERENCE:<br><b>CHA 1 POL 1</b> |

## **POLICY**

### **Statement of Principle**

The purpose of providing legal advice to the police is to: (1) aid in the gathering of evidence in a manner which is respectful of *Charter* rights and other legal principles, in order to enhance the likelihood that such evidence will be admitted at any trial; (2) identify to the police any additional evidence needed to address charge assessment; and (3) present the best possible case should a trial ensue.

### **Scope of Advice - General**

It is appropriate for Crown Counsel to provide legal advice to the police on specific current or potential investigations and prosecutions and also advice on Branch policy. Generally speaking advice of this type will be provided by Crown Counsel in the local office or regional office serving the investigating agency seeking the advice.

It is appropriate for Crown Counsel to provide legal advice concerning general police investigative practices which are not specific to a particular prosecution but are likely to affect the admissibility of evidence in future prosecutions. Where the request is made to a local Crown Counsel office and it can be readily addressed, Administrative Crown Counsel should provide the advice sought. Where the advice cannot be readily provided or has province-wide implications, it should be referred to Regional or Deputy Regional Crown Counsel for consideration or referral to the appropriate Branch specialized unit or resource person.

It is not appropriate for Crown Counsel to provide legal advice to police concerning issues of civil liability. Further, it is not appropriate for Crown Counsel to provide legal advice to police concerning allegations of unlawful police conduct, with the following exceptions:

1. where Crown Counsel exercises charge review responsibilities regarding allegations against police officers pursuant to policy POL 1.

2. where the lawfulness of police conduct is a factor in the exercise of Crown Counsel's charge assessment responsibilities in respect to a subject of an investigation by the police.

RCMP members making inquiries related to issues of civil liability or unlawful police conduct which is not related to a charge assessment by Crown Counsel, should be referred to the RCMP counsel in the Department of Justice. Members of municipal forces making inquiries in the same circumstances should be referred to their municipal legal counsel.

#### Applications for Judicially Authorized Investigative Procedures

When requested by police, providing advice regarding the preparation of applications for judicially authorized investigative steps such as DNA warrants or one-party consent interceptions is appropriate since it advances the goal of ensuring that the evidence is admissible at trial. The extent to which Crown Counsel should assist in the preparation of such applications will turn on such matters as the availability of resources, the nature and complexity of the investigative step being proposed and the seriousness of the offence under investigation. When providing assistance, Crown Counsel should not draft the materials in support of the application, but rather should review what has been drafted by the police in order to ensure that it sets out the relevant facts supporting the application fully and clearly meets the statutory criteria for authorizing the investigative step.

Crown Counsel's role as agent for the purpose of applications to intercept communication pursuant to Section 185 of the *Criminal Code* is of course required by statute and necessarily involves a careful review of the affidavit in support of the application and the proposed terms and conditions of the authorization.

#### Charge Assessment Without a Report to Crown Counsel

Occasionally Crown Counsel may be asked to consider whether a charge would be approved without the submission of a Report to Crown Counsel. Generally speaking, Crown Counsel should decline to provide an opinion applying the charge assessment standard in the absence of a Report to Crown Counsel which permits a full review of the case.

However, in some cases it may be appropriate to provide a preliminary opinion on the viability of a prosecution prior to the submission of a Report to Crown Counsel. It will generally not be appropriate to provide this type of advice in serious or complex cases. An opinion should generally not be given on cases in which the likelihood of conviction is highly dependant upon credibility, because careful scrutiny of witness statements is required in those circumstances. Crown Counsel should be confident that he or she is receiving all information necessary to provide the opinion. In every case, Crown Counsel should confirm with the investigator that the advice provided does not constitute a charge assessment decision.

## **Police Training**

**Crown Counsel may be asked to participate in police training. In responding to these requests Crown Counsel should assume that police members will have been fully trained on basic legal principles and concepts relating to criminal investigations. Crown Counsel are encouraged to contribute to police training by providing guidance on emerging issues and developing areas of the law and in respect to investigative procedures as they apply to criminal prosecutions.**

**Requests for such participation by a policing agency should be directed to the Administrative Crown Counsel who will determine whether the request can be met bearing in mind available resources and expertise.**

## **DISCUSSION**

### **Guidelines**

In considering whether to provide legal advice to the police, Crown Counsel should take into account the following:

1. Upon being asked for legal advice, Crown Counsel should ascertain, from the police officer making the request, whether any other Crown Counsel have already been consulted. The practice of obtaining advice from multiple Crown Counsel on the same issue, should be discouraged.
2. The request for advice should be necessary to pursue the investigation, and the information should not be reasonably available within the police agency involved.
3. The resources should be available within the Crown Counsel office involved to respond within a time frame appropriate to the investigation.
4. The expertise appropriate to respond to the inquiry should be available within the Crown Counsel office involved or otherwise readily obtainable.
5. Requests to Crown Counsel for advice which are beyond his or her level of knowledge or expertise, should be referred to the Administrative Crown Counsel for consideration and further referral if appropriate.
6. Where the investigation or prosecution is complex and involves a specialized area of practice such as commercial crime, organized crime or proceeds of crime, or a specialized investigative technique such as interception of communication, Crown Counsel should seek assistance from the appropriate Criminal Justice Branch specialized unit or resource person.

7. All information necessary to consider and give the appropriate advice should be provided and, where circumstances permit, the information should be provided in writing and include audio, video or electronic materials.
8. In providing legal advice, Crown Counsel should emphasize that the police are free to accept or reject the advice.
9. Where a request for legal advice is made, Crown Counsel should make a record of the information provided and the advice given with appropriate police reference. In some circumstances it will be advisable to subsequently confirm in writing with police the advice given.
10. Mindful of the fact that all Crown Counsel files may ultimately be subject to disclosure to members of the public, Crown Counsel should ensure that the content of the advice given is in a form suitable for public inspection.
11. Where advice is provided to the police on an investigation that subsequently becomes a prosecution, it is possible that the Crown Counsel providing the advice may become a witness and would not be able to prosecute charges arising from the investigation. This should be kept in mind when determining who will give the police advice at the investigatory stage.
12. Crown Counsel should be mindful of the risk of being inadvertently drawn into the investigatory process in a manner which may lead to an actual or perceived loss of objectivity.<sup>1</sup>

### General

*Police and prosecutors are in a symbiotic relationship. Evidence gathered by the police during the investigative stage is the lifeblood of a prosecution. If it is anaemic or tainted, no amount of forensic brilliance can save the prosecution. Conversely, an incompetent prosecutor can render the most probing and meticulous police investigation impotent. For the criminal justice system to fully realize its goal of apprehending, convicting and sentencing the guilty (but not the innocent) by means of a process that complies with the Charter of Rights and Freedoms, police and prosecutors must have an effective working relationship.<sup>2</sup>*

The relationship between Crown Counsel and the police is one of mutual independence. The police have absolute control over the investigation of a criminal offence, and Crown Counsel have absolute control over the prosecution of that offence. This relationship is not only practical (i.e.: the police are trained investigators, and the Crown are trained advocates), but soundly based upon historic principle.

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<sup>1</sup> R. v. Regan [2002] 1 S.C.R. 297

<sup>2</sup> Pearson, John, *The Prosecutor's Role at the Investigative Stage from an Ontario Perspective*, a paper presented at the June 2000 Annual Conference of the Federal Prosecution Service, p.4.

Crown Counsel have a unique and well recognized role. Crown Counsel are not only advocates, but “Ministers of Justice,” whose obligation is not just to secure a conviction, but to place all available evidence before the court in a fair fashion. As stated by the Honourable G. Arthur Martin, part of Crown Counsel’s role as a Minister of Justice is to serve as a “check” upon the power of the police:

*The mutual independence of Crown counsel and the police has many advantages...separating the investigative and prosecutorial powers of the state is an important safeguard against the misuse of both. Such separation of power, by inserting a level of independent review between the investigation and any prosecution that may ensue, also helps to ensure that both investigations and prosecutions are conducted more thoroughly, and thus more fairly.<sup>3</sup>*

Police also have a unique and well recognized role. Historically, the notion that the police make decisions about who, what, and how to investigate, free from government interference, can be traced back over 1000 years. More recently, the Supreme Court of Canada has endorsed the concept<sup>4</sup>. Crown Counsel must therefore exercise caution when providing advice to police regarding their investigations. Crown Counsel must not dictate to, or purport to direct the police during the investigative stage. When legal advice during an investigation is provided to the police at their request, the police may accept or reject the advice as they see fit.

After a Report to Crown Counsel is submitted, Crown Counsel has a duty, pursuant to s. 4(3) of the *Crown Counsel Act*, to examine the report, and approve for prosecution any offence or offences that he or she considers appropriate. To carry out this duty, Crown Counsel commonly liaise with the police regarding further investigation that could be done to bring an investigation to the point where the charge assessment standard might be met. Given that a file at this stage is still at the investigatory stage, Crown Counsel should take care, in their communications with police, not to require or direct that further investigation be done. Rather, suggestions may be made, following which the police may or may not continue their investigation, and resubmit the file for charge assessment.

However, once an Information is sworn, conduct of the case shifts to Crown Counsel and, in furtherance of Crown Counsel’s obligation to continuously evaluate whether the prosecution continues to meet the charge assessment standard, it is appropriate for Crown Counsel to request that any further investigation necessary to sustain or strengthen the prosecution be undertaken. Such requests also enable Crown Counsel to ensure that all relevant evidence is disclosed to defence counsel and ultimately brought before the court.

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<sup>3</sup> *The Martin Report*, supra, p.39.

<sup>4</sup> *R. v. Campbell* [1999] 1 S.C.R. 565 at paras.27-34; *R. v. Regan* [2002] supra at 62-91

### Privilege

Advice given by Crown Counsel to the police may be subject to privilege, including solicitor/client privilege.

R. v. Campbell clearly establishes that a solicitor client relationship is capable of arising between Crown Counsel and police. Whether it does so under a particular set of circumstances must be assessed on a case by case basis having regard to the nature of the relationship, the subject matter of the advice and the circumstances under which it is sought and rendered. Unfortunately, Campbell does not provide guidance on how this framework should be applied to take account of the competing public interest factors that may complicate the relationship between police and provincial Crown Counsel.

Traditionally, whether a solicitor/client relationship is created depends upon the following factor: whether there is a communication between solicitor and client which entails the seeking or giving of legal advice and which is intended to be confidential between the parties.

As a general rule, there is an expectation by both Crown and police that information provided to Crown Counsel that is relevant to the case will be provided to the defence subject to any reason to limit or delay such disclosure (Stinchcombe). On occasion however, notwithstanding this, the police may wish to preserve confidentiality through solicitor/client privilege. When this occurs two options are present. Firstly, the police may choose to seek the advice from legal counsel within their organization. Alternatively, if the police wish to obtain the legal advice from Crown Counsel, Crown Counsel may provide advice on the understanding that, if Crown Counsel concludes that the communication should properly be disclosed, and the police decline to waive solicitor/client privilege, the matter may have to be referred to the Court for resolution or the prosecution may be discontinued at the instance of the Crown. Where these circumstances arise, Region or Deputy Regional Crown Counsel should be consulted.