Policy: Legal Advice to the Police

Policy Code: LEG 1  Effective Date: March 1, 2018
Cross-references: CHA 1    POL 1

Statement of Principle

The relationship between Crown Counsel and the police is one of mutual independence. The police control the investigation of offences and Crown Counsel control the prosecution. 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 the 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 BC Prosecution Service 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 a Regional Crown Counsel, Director, or their respective deputy for consideration or referral to the appropriate BC Prosecution Service specialized unit or Resource Crown Counsel.

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, except:
• where Crown Counsel exercises charge review responsibilities regarding allegations against police officers pursuant to the policy Police – Allegations Against Peace Officers (POL 1)

• where the lawfulness of police conduct may be a factor in Crown Counsel’s exercise of charge assessment responsibilities in relation to the subject of a Report to Crown Counsel or an investigation by the police

RCMP members making inquiries related to issues of civil liability, or unlawful police conduct, that do not fall into one of the two exceptions above should be referred to legal counsel at the Department of Justice. Members of municipal forces making such inquiries 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 fully sets out the relevant facts supporting the application and clearly meets the statutory criteria for authorizing the investigative step.

Crown Counsel’s role as an agent specially designated for the purpose of applications to intercept private communications pursuant to section 185 of the Criminal Code is unique in this regard. It usually involves a more direct involvement in the drafting 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 (Charge Assessment Guidelines (CHA 1)).

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 dependent upon credibility, because careful scrutiny of witness statements is required in those circumstances. Before providing a preliminary opinion of this sort, Crown Counsel should be satisfied that the police have provided all information necessary to provide the opinion. In every case, Crown Counsel should make clear that the advice provided does not constitute a charge assessment decision and is subject to change upon full review of a complete Report to Crown Counsel.

**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 on investigative procedures as they apply to criminal prosecutions.

Requests by a policing agency for Crown Counsel to participate in police training should be directed to the Administrative Crown Counsel, who will determine whether the requests can be met bearing in mind available resources and expertise.

**Guidelines**

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

- upon being asked for legal advice, Crown Counsel should ascertain, from the police officer making the request, whether any other Crown Counsel has already been consulted. The practice of obtaining advice from multiple Crown Counsel on the same issue should be discouraged

- advice should only be provided if the police need it in order to pursue or complete the investigation and if the information they seek would not otherwise be reasonably available to them from within the police agency involved

- whether the Crown Counsel office has the resources and expertise to respond within a timeframe appropriate to the investigation

- requests for advice which are beyond the level of knowledge or expertise of the Crown Counsel consulted should be referred to the Administrative Crown Counsel for consideration and further referral if appropriate

- where the investigation or prosecution is complex or 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 private communications, Crown Counsel should seek assistance from the appropriate BC Prosecution Service specialized unit or resource person

- the police should provide all information necessary for Crown Counsel to consider and give the appropriate advice, including, where circumstances permit, information in writing and any related audio, video, or electronic materials

- in providing legal advice, Crown Counsel should emphasize that the police are free to accept or reject the advice

- Crown Counsel should make a record of the information provided and, in appropriate circumstances, subsequently confirm in writing the advice given

- 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

- Crown Counsel providing advice to the police on an investigation could potentially become a witness and would not be able to prosecute any charges arising from the investigation

- there is a risk of being inadvertently drawn into the investigatory process in a manner which may lead to an actual or perceived loss of objectivity (R v Regan, 2002 SCC 12)

**Privilege**

Advice given by Crown Counsel to the police may be subject to privilege, including solicitor/client privilege. Traditionally, a solicitor/client relationship is created where there is a communication between a solicitor and client, which entails the seeking or giving of legal advice and is intended to be confidential between the parties. The rationale for extending solicitor-client privilege to the Crown-police relationship usually relates to the importance of ensuring that police “are knowledgeable about the law and act within it” (R v Zhang, 2002 ABPC 35 at para 70).

R v Campbell [1999] 1 S.C.R. 565 clearly establishes that a solicitor/client relationship may arise 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 Crown Counsel.
As a general rule, any information provided to Crown Counsel that is relevant to the case must be disclosed to the defence subject to any reason to limit or delay such disclosure (Stinchcombe v The Queen, [1991] 3 SCR 32). In any situation where police or Crown Counsel are concerned that their communications may give rise to issues of solicitor/client privilege, a Regional Crown Counsel, Director, or their respective deputy should be consulted.