

Policy:

Legal Advice to the Police

Policy Code:

LEG 1

Effective Date:

May 20, 2022

Cross-references:

CHA 1

The relationship between Crown Counsel and the police is defined by mutual independence:

The police role is to investigate crime. The Crown prosecutor's role ... is to assess whether a prosecution is in the public interest and, if so, to carry out that prosecution in accordance with the prosecutor's duties to the administration of justice and the accused. ... "Prosecutors provide the initial checks and balances to the power of the police". ... Independent prosecutorial review of the police's investigative process and decisions helps "ensure that both investigations and prosecutions are conducted more thoroughly, and thus more fairly" ... [T]he relationship between prosecutors and the police is not a "hierarchical" one. In discharging their respective duties, both the police and the prosecutor have a "discretion that must be exercised independently of any outside influence". Cooperation is encouraged, but independence is mandatory.¹

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 charge be approved and a trial ensue.

Scope of Advice

It is appropriate for Crown Counsel to provide legal advice to the police on specific investigations and prosecutions, and on the application of BC Prosecution Service policy. Wherever practicable, advice of this type should be provided by Crown Counsel in the local, regional, or Criminal Appeals and Special Prosecutions office where the investigating agency would ordinarily submit Reports to Crown Counsel for charge assessment.

In some circumstances it may also be appropriate for Crown Counsel to provide legal advice concerning general police investigative practices or techniques which are not

¹ *Ontario (Attorney General) v Clark*, 2021 SCC 18, at paras 41-45

specific to a particular prosecution but are likely to affect the conduct of, and admissibility of evidence in, future prosecutions; but this must be done cautiously keeping in mind the critical dimension of mutual independence between Crown Counsel and police and the different roles they play in the criminal justice system. When the police request advice about general practices or techniques, the request 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. RCMP members making inquiries related to issues of civil liability should be referred to legal counsel at the Department of Justice. Members of municipal police agencies making such inquiries should be referred to their municipal legal counsel.

Applications for Judicially Authorized Investigative Procedures

When requested by police, and subject to operational capacity in the relevant Crown Counsel office, 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 purpose of 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. In weighing whether scarce Crown Counsel resources should be deployed to assist police in the preparation of such applications, Crown Counsel should consider 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 confirm that it fully sets out the relevant facts supporting the application and 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 different. 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.

Preliminary Charge Assessment Opinions

Occasionally, Crown Counsel may be asked by police to provide a prospective opinion about whether a charge would be approved in specific circumstances, before or without the police submitting a Report to Crown Counsel. Crown Counsel should decline to provide an opinion regarding whether the charge assessment standard is or would be met unless and until police provide a Report to Crown Counsel which permits a full review of the case (*Charge Assessment Guidelines* ([CHA 1](#))).

In exceptional circumstances, for example when significant issues of urgency or public safety are at play, it may be appropriate for Crown Counsel to provide a preliminary opinion on the viability of a prosecution prior to the submission of a full Report to Crown Counsel. It will generally not be appropriate to provide a preliminary opinion in cases in which the likelihood of conviction depends either on the evidence of an expert (e.g., a forensic pathologist's opinion on the cause of death) or on the credibility of witnesses. Before providing a preliminary opinion, Crown Counsel should be satisfied that the police have provided all information that is reasonably available and necessary to provide the opinion. In every case, requests for preliminary opinions of this sort should be referred to a Regional Crown Counsel, Director, or their respective deputy, who if they choose to provide an opinion 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. Subject to operational capacity, Crown Counsel may contribute to police training by providing general 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 on a specific file, Crown Counsel should:

- be aware of the risk of being inadvertently drawn into the investigatory process, which may lead to an actual or perceived loss of objectivity² on the part of Crown Counsel or make them a witness and thus unable to prosecute the matter
- ascertain from the police officer making the request whether any other Crown Counsel has already been consulted and, if so, refer the officer back to that other Crown Counsel, as the practice of obtaining advice from multiple Crown Counsel on the same issue should be discouraged
- consider whether the Crown Counsel office has the operational capacity and expertise to respond within a timeframe appropriate to the investigation

2 *R v Regan*, 2002 SCC 12

- ensure the police have provided 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
- provide advice only where the police need it to further the investigation and it would not otherwise be reasonably available to the police agency
- refer the request to the Administrative Crown Counsel where the request for advice is beyond the level of knowledge or expertise of the Crown Counsel
- seek assistance from the appropriate BC Prosecution Service specialized unit or resource person 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

When legal advice is provided, Crown Counsel should:

- specifically confirm that it is legal advice and may be subject to privilege, including solicitor-client privilege or prosecutorial discretion privilege, and must not be further disclosed or disseminated without prior approval of Crown Counsel
- make clear that the police can either accept or reject the advice
- make a detailed record of any information or advice provided

Police Not Following Advice

If Crown Counsel become aware that a police officer or agency is intentionally disregarding or acting contrary to legal advice provided, Crown Counsel must consider the significance of such police conduct, bearing in mind whether it:

- involves wilful failure or refusal to comply with the law
- compromises public safety
- risks serious bodily harm or death
- could bring the administration of justice into significant disrepute
- appears to be the result of a standard practice, policy, or superior order
- is likely to be repeated in the future

If one or more of the above circumstances applies, Crown Counsel must notify a Regional Crown Counsel, Director, or their respective deputy in writing. Upon receiving such a

written notification and confirming that the legal advice given was appropriate and is being wilfully disregarded, the Regional Crown Counsel, Director, or the respective deputy notified, should immediately notify the senior officer in charge, or equivalent, of the officer or agency involved and request an explanation.

The Regional Crown Counsel, Director, or their respective deputy must advise the Assistant Deputy Attorney General (ADAG) whenever they become aware of police intentionally disregarding or acting contrary to legal advice in one or more of the circumstances listed above and provide the ADAG with a copy of the initial written notification from Crown Counsel along with a summary of any explanation provided by the senior officer in charge, or equivalent.

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.”³

*R v Campbell*⁴ clearly establishes that a solicitor-client relationship may arise between Crown Counsel and police. Whether it does 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 given. Unfortunately, *Campbell* does not provide clear 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 police provide to Crown Counsel that is relevant to the case must be disclosed to the defence, subject to Crown Counsel’s right to limit or delay such disclosure in limited circumstances, including on account of privilege.⁵ In any situation where police or Crown Counsel are concerned that their communications may give rise to issues of solicitor-client or Crown discretion privilege, Crown Counsel should consult with a Regional Crown Counsel, Director, or their respective deputy.

3 *R v Zhang*, 2002 ABPC 35 at para 70

4 *R v Campbell* [1999] 1 SCR 565

5 *Stinchcombe v The Queen*, [1991] 3 SCR 32