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Wagg the Dog: A Focused Approach for Regulators Seeking Crown Disclosure

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1. Introduction

As if regulatory investigations were not challenging enough on their own, a host of issues emerge when they take place at the same time as a pending criminal prosecution based on the same underlying facts. Parallel proceedings such as these are not infrequent, given that, in professional regulation, criminal charges trigger a duty to report by a registrant and may, ultimately, also give rise to allegations of professional misconduct. This article is directed at a specific problem that can arise in the context of concurrent regulatory and criminal proceedings: what options are available when a regulatory investigation requires information related to a criminal prosecution, whether from the police, the Crown, or the registrant under investigation? At the crux of the issue is the ability of investigators to obtain the Crown Brief.

The Crown Brief is a document, or suite of documents, created and gathered by government authorities (as representatives of the "Crown") in the exercise of the government's policing and prosecutorial functions. It has been described as containing "a myriad of documents as varied as the fact situations underlying criminal prosecutions."[1] The contents of the Crown Brief typically include the synopsis of allegations, police notes, witness and police officers' statements, exhibits such as photographs, medical reports, and the criminal record of the accused. In more complex cases, search warrant information, surveillance reports, wiretap evidence and scientific reports such as DNA, toxicology, pathology reports may be included. In addition, the police investigation portion of the Crown Brief may contain information gathered throughout their inquiry which is irrelevant to the prosecution.[2]

Crucially, for present purposes, the Crown Brief can be obtained for the purpose of a regulatory investigation only in limited circumstances: namely, with the agreement of the Attorney General or pursuant to a court order. Parties who seek the Crown Brief in ordinary civil proceedings must bring what is called a "Wagg Motion" (discussed further below), but regulators are not required to do so. The law provides many regulators with an expediated route for obtaining production from the Crown.

When Crown Brief requests come from regulators, the Attorney General retains the ability to resist producing of some or all of the brief on grounds that production is contrary to the public interest. Consequently, where the regulator and the Attorney General do not agree, the regulator will still have to resort to the courts. Given that dynamic, it is advisable for regulators to obtain legal assistance and pursue a constructive approach when seeking the Crown Brief while being wary of overly broad or speculative reliance by the Attorney General on the "public interest" to decline production – particularly so since regulators share in the in the mandate of public protection and public interest.

The balance of this article will set out the principles of *D.P. v. Wagg* ("***Wagg***") as they have been modified and applied in the

administrative context before proposing four considerations when dealing with the need for Crown materials: (i) develop a rapport with government authorities; (ii) persist with requests when faced with initial resistance; (iii) remember that certain investigations are backed by summons power; (iv) bear in mind that the public interest will be governing.

2. Requests for the Crown Brief Engage Public Interest Considerations: *D.P. v. Wagg*

The legal principles surrounding disclosure of the Crown Brief in parallel proceedings first developed in the context of civil litigation, most notably in *Wagg*. That case introduced the notion that private litigants cannot be relied upon to consider the public interest when determining whether the Crown Brief should be used in a collateral proceeding. *Wagg* deputized the Attorney General and police to speak to public interest considerations.

Wagg involved a physician who was charged with sexual assault of a patient. The patient then brought a civil action against the physician. Although parties to a civil action are required to produce all relevant documents in their possession, power, or control (subject to claims of privilege), the physician refused to produce the Crown Brief that had been disclosed to him.

The Court of Appeal's decision in *Wagg* held that the physician was required to disclose the existence of the Crown Brief in his affidavit of documents. However, he would be obliged to produce the documents themselves only if either: (i) there was consent from all parties, the Attorney General, and the police or (ii) a screening motion, involving a hearing in the Superior Court of Justice, on notice to the Attorney General and the relevant police service, concluded that documents should be produced.[3]

The screening motion put in place by the Court of Appeal is now commonly referred to a "Wagg Motion". Judges hearing such motions for production will consider whether some of the documents are subject to privilege or public interest immunity and generally whether "there is a prevailing social value and public interest in non-disclosure in the particular case that overrides the public interest in promoting the administration of justice through full access of litigants to relevant information".[4]

The Court of Appeal reserved a role in Wagg Motions for the Attorney General and the police because the two parties to the civil action, the physician and the patient, were not equipped to speak to the public interest considerations involved in the court's determination. Participation by public authorities in Wagg Motions is designed to ensure that the Crown and police have the opportunity to identify public interest concerns that could be resolved by the court, if necessary.

3. *Wagg* Principles Apply to an Investigator's Summons but the Process Does Not

Regulators can dispense with a Wagg Motion, but not notice to the Attorney General, if their duly appointed investigators are statutorily endowed with a summons power. In *CPSO v. Peel Regional Police* ("***Peel***"),[5] the Divisional Court specifically considered the application of *Wagg* in the context of a summons issued pursuant to section 7 (now section 33) of the *Public Inquiries Act, 2009* (the "**PIA**").

Many Ontario regulators' enabling statutes provide for investigatory powers pursuant to the PIA and are therefore captured by the ruling in *Peel*.[6] As a general proposition, investigators should not underestimate the scope of this summons power. In *Sazant v. CPSO* (a case decided after *Peel*), the Court of Appeal held that the summons power should be given a broad and purposive interpretation to enable investigators to carry on their duty to investigate and thereby advance a statutory mandate to properly regulate the profession and protect the public.[7]

In *Peel,* the regulator became aware through media articles that one of its registrants was the subject of criminal charges related to child pornography. The College appointed investigators to investigate whether the registrant has committed an act of professional

misconduct or was incompetent. The investigator issues a summons to the Chief of Peel Regional Police seeking production of the Crown Brief in the registrant's criminal prosecution. At issue was the application of *Wagg* in the circumstances.

The Divisional Court concluded that regulatory investigators empowered under the PIA may issue a summons for all or part of the Crown Brief without having to resort to a Wagg Motion, as long as the Attorney General receives notice: "There is no compelling reason to add a court-imposed vetting process to a broad power conferred by legislature, provided that the College ensures that the Attorney General is given notice and has an opportunity to raise public interest concerns that may militate against production".[8] The court specifically contemplated that the *Wagg* scheme, fashioned in the context of civil proceedings, was neither necessary nor appropriate in the context of an administrative body exercising powers under the PIA.[9]

However, the decision also concluded that the public interest considerations identified in *Wagg* continue to apply.[10] As a result, the Attorney General is not automatically obliged to comply with a summons where it objects to it on public interest grounds. Such an objection "would constitute a lawful excuse justifying the respondent's refusal to comply with the summons issued by the College."[11] When such an objection is raised, the regulator can challenge it with a petition to the Divisional Court pursuant to section 8 (now subsection 33(5)) of the PIA.

In a more recent decision, *College of Physicians and Surgeons of Alberta v. Al-Naami*,[12] the Alberta Court of Queen's Bench agreed, as a general proposition, that *Peel* modified the *Wagg* framework for regulatory investigations backed by powers of compulsion. In *Al-Naami*, the College of Physicians and Surgeons of Alberta asked the registrant to consent to access Crown disclosure in related criminal proceedings so that it could assess whether he could safely return to practice with conditions. Although Alberta's *Health Professions Act*,***[13]*** at section 63(1) granted the College investigator powers of compulsion, the College nevertheless applied to the Court of Queen's Bench for an order directing the physician to produce the relevant evidence, on notice to the Attorney General.

In granting the College's order, the court rejected the physician's submission that in Alberta, unlike in Ontario, "the Court must act as a gatekeeper in every case in which a party seeks Crown production in the regulatory context".[14] Instead, the court agreed with the College that "the *Wagg* framework should be extended to a disciplinary procedure in a modified form, as decided in *Peel*".[15] It concluded that for the College to compel production of Crown disclosure, it need only comply with its existing powers of compulsion under the *Health Professions Act*, with the additional requirement to give notice to the Attorney General.[16] It went on to say that if the Attorney General does raise public interest concerns and an agreement cannot be reached, the dispute must be settled by an application to court.[17]

4. **The Scope of "Public Interest"**

Although *Peel* was decided in 2009, there is a dearth of authority exploring when the Attorney General's reliance on "public interest" will prevail over a regulator's request for documentary production. The lack of case law suggests that, more often than not, regulatory bodies and the Attorney General are able to reach a mutually agreeable compromise on documentary production.

There is no set list of public policy reasons as to why the Attorney General (or police or registrant for that matter) can refuse compliance with a summons. The Divisional Court decision in *Wagg* specifically identified the following public interest categories: police informant privilege, public interest immunity, the privacy interests of third parties (including safety concerns), as well as the concern that disclosure may compromise ongoing criminal proceedings. The court recognized that more public interest concerns may arise depending on the case.[18]

Although limited as a binding authority, a recent decision of Ontario's License Appeal Tribunal ("**LAT**") suggests that adjudicators may defer to assertions by the Attorney General that production of the Crown Brief would be contrary to public interest, particularly when

a criminal matter is ongoing. In *Jarvis v Registrar* (*Real Estate and Business Brokers Act)*,[19] the Registrar revoked a broker's registration and refused to reinstate it because the broker was found to be bankrupt, had made false statements in his registration application and had outstanding criminal charges related to his misappropriation of funds. The broker appealed the decision to the LAT. In preparation for the hearing, the Registrar sought production of the Crown Brief related to the criminal charges against the broker. The Attorney General agreed to produce a redacted Crown Synopsis but not the entire Crown Brief, which it said would jeopardize the integrity of the ongoing prosecution.

The LAT accepted the Attorney General's argument that the public interest in nondisclosure during an ongoing prosecution overrode the interest in access to all relevant materials for the purpose of the LAT hearing. It found, in particular, that disclosure could compromise the criminal prosecution by tainting or giving the appearance of tainting witness evidence.[20] Citing the possibility that the same witnesses would be called at the both the LAT hearing and the criminal trial, the LAT found no basis to increase the risk of exposure and contamination vital to the criminal prosecution.[21]

The LAT did not accept the Registrar's submission that the Attorney General's concerns were speculative. However, it did comment that "[b]lanket statements and broad generalities with respect to risk are not sufficient for the Attorney General to override the public interest in access to relevant information for LAT proceedings". The tribunal's conclusion is an important one given the Attorney General's representation that, where a criminal proceeding is ongoing, it is unlikely to release the Crown Brief except in rare circumstances.[22]

5. **Conclusions and Strategies for Requesting the Crown Brief**

Regulators and their investigators must be able to recognize when an investigation will benefit from evidence contained in a Crown Brief and the avenues for obtaining it. We recommend that the following considerations be kept top of mind when assessing whether to request such documents, whether in the possession of the police, the Attorney General, or the subject registrant:

1. **Develop a Rapport:** The Crown Brief, even if in the possession of the registrant, cannot be obtained, or used, without either the agreement of the Attorney General or a court order. Where the Attorney General does agree to provide documents from the Crown Brief, it will ordinarily stipulate limitations of use in an undertaking. The best and easiest way to obtain information related to a criminal proceeding is by agreement. That being the case, it is advantageous for regulators to develop and maintain good personal relationships with representatives of the Attorney General and, ideally, law enforcement. Having a familiar counterpart on the other side of an information request can streamline the process, build trust, and reduce bureaucratic obstacles. Regulators may wish to explore developing a Memorandum of Understanding with the Attorney General and with frequently encountered police forces.
2. **Persist**: Investigators should not stop their pursuit for necessary information at the first sign of resistance. Police officers and Crown prosecutors are often, reflexively and understandably, reluctant to disclose information forming part of an ongoing case. The recipient of an information request may not appreciate regulators' public interest mandate, their regulatory powers, or the case law governing such requests. When faced with a categorical rejection, consider a more targeted request, a more thorough explanation of the need, or both.
3. **Remember the Summons:** Regulators and their investigators should be aware of the nature of their power to compel information. A regulator will have added leverage to obtain information where summons powers are available, such as pursuant to the *Public Inquiries Act, 2009*. Even if a summons does not result in comprehensive production, it will oblige the receiving party to engage. It is important to remember that summons powers do not carry on indefinitely, and investigators often lose their authority when a matter is referred to discipline. Be sure to consult your authorizing statute and seek legal advice.
4. **Public Interest Governs**: Courts have found that public interest principles arising from the collateral use of the Crown Brief apply to requests from professional regulators. Ultimately, regulators may not be able to obtain Crown Brief materials –

through the courts or otherwise – where there is a *bona fide* risk that doing so might prejudice the prosecution of an ongoing criminal matter. That said, regulators and their investigators should not accept boiler plate statements that production of parts of the Crown Brief will pose a risk to a prosecution. It is important to scrutinize the stated reasons for withholding documents to make sure they apply to the actual request at issue and the intended use of the materials at the time. There is always recourse to the courts: the ability of public interest concerns relied upon by the Attorney General to prevail over a regulator's own public interest considerations remains an under-litigated area lacking in binding authority.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

[1] *D.P. v. Wagg,* 2002, CanLII 49636 (ON SCDC) at para. 22 ["***Wagg* (Div Ct)**"], aff'd 2004 CanLII 39048 (ONCA) ["***Wagg* (OCA)**"].

[2] Denise Dwyer, "Report of the Working Group on the Collateral Use of the Crown Brief Disclosure" (2007: Uniform Law Conference of Canada Joint Civil and Criminal Sections) at page 6.

[3] *Wagg* (ONCA) at para. 17.

[4] *Wagg* (ONCA) at para. 17.

[5] 2009 CanLII 55315 (ON SCDC) ["***Peel***"].

[6] See *e.g.,* Health Professions Procedural Code, being Schedule 2 to the *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18, s. 76; *Ontario Social Work and Social Service Work Act, 1998*, S.O. 1998, c. 31, s. 32(4); *Early Childhood Educations Act, 2007*, S.O. 2007, c. 7 Sch. 8, s.. 39(4); *Ontario College of Teachers Act, 1992,* S.O. 1996 c. 12, s. 36(4); *Professional Engineers Act*, R.S.O. 1990, c. P. 28, s. 33(2.1); *Architects Act*, RSO 1990, c. A. 26, s. 38 (2.1); *Veterinarians Act*, R.S.O. 1990, c. V. 3, s. 36(2.1).

[7] *Sazant v. College of Physicians and Surgeons of Ontario*, 2012 ONCA 727 at para. 99.

[8] *Peel* at para. 75.

[9] *Peel* at para. 76.

[10] *Peel* at para. 76.

[11] *Peel* at para. 75.

[12] 2022 ABQB 438 ["***Al-Naami***"]

[13] RSA 2000, C H-7.

[14] *Al-Naami* at para. 42.

[15] *Al-Naami* at para. 49.

[16] *Al-Naami* at para. 50.

[17] *Al-Naami* at para. 51.

[18] *Wagg* (Div Ct) at paras. 18-38.

[19] 2023 CanLII 7259 (ON LAT) [“***Jarvis***”].

[20] *Jarvis* at para. 14.

[21] *Jarvis* at paras.15-19.

[22] *Jarvis* at para. 22.

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