



NOVA SCOTIA
PUBLIC PROSECUTION SERVICE

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PROVIDING ADVICE TO THE POLICE

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NOTE:

THIS POLICY DOCUMENT IS TO BE READ IN THE CONTEXT PROVIDED BY THE PREFACE TO THIS PART OF THE MANUAL.

CERTAIN WORDS AND PHRASES HAVE THE MEANINGS ESTABLISHED IN THE "WORDS & PHRASES" SECTION OF THIS PART OF THE MANUAL.

PROVIDING ADVICE TO THE POLICE

Summary:

This Directive provides guidance to Crown Attorneys with respect to one of their core functions: providing advice to the police. It establishes a requirement to document that advice and the circumstances in which it was given. This will better support individual Crown Attorneys in the discharge of their duties by avoiding misunderstandings between the Crown Attorney and police officers. It will also provide colleagues with essential information as to the nature of any previous legal advice provided to the police on the same matter. Careful documentation of the advice given, and the basis upon it was given, will assist prosecutors in recalling and explaining the advice given to the police.

Rationale:

The relationship between investigating police officers and Crown Attorneys in Nova Scotia is characterized by mutual respect and reliance. For many decades the police have depended upon Crown Attorneys for much of the information and advice that they need in regard to criminal law and procedure. The increasing complexity of the law relating to disclosure, searches, and other essential investigative tools has led to an ever greater need for the police to obtain the advice and assistance of prosecutors. In the past, the advice has been given in many forms—sometimes informally or orally, and at other times in writing or through a formal presentation. Today, there is a need for a relatively formal approach to advice-giving and there is need for documentation in regard to the advice given and the circumstances in which the advice was given, particularly when the advice relates to a specific case. The proliferation of civil litigation in which prosecutors must recall and explain their decision-making, the increased number of public inquiries, and aggressive media scrutiny of the work of prosecutors all combine to necessitate careful documentation of decision-making and advice-giving, even in cases which may appear to be routine.

Providing of advice to the police, often when a prosecution file is not in existence, is a significant component of Crown Attorney workloads. Data regarding the extent of advice-giving by Crown Attorneys will aid in the procurement of essential resources. Whether the advice sought by the police¹ is general in nature, or related to a particular investigation or case, there are a number of caveats and best practices which should be kept in mind.

¹ "Police" includes investigators and enforcement officers in all government agencies.

GENERAL LEGAL ADVICE (ADVICE WHICH DOES NOT RELATE TO A SPECIFIC CASE)

When providing a general legal opinion or advice, i.e. information or advice which does not relate to a particular prosecution, the following considerations are relevant:

1. The giver of the advice and the recipient of the advice must clearly recognize that the advice is general in nature and is not meant to apply to a particular current or contemplated investigation. Crown Attorneys must ensure this is clearly communicated.

If the police have a particular investigation in mind and the Crown is unaware of the details, it may turn out that there is an exception to the general advice that may apply and the exception may not have been included in a broad discussion of the issue. Such a mis-communication can have a disastrous effect on the investigation and any subsequent prosecution.

If the police are actually seeking advice or assistance with regard to a particular investigation, the considerations outlined below under Case-Related Advice will be applicable.

2. Crown Attorneys must carefully avoid giving the police advice in regard to civil liability. Although there may be civil implications arising from utilizing the advice given in regard to criminal law and procedure, or from declining to accept that advice, Crown Attorneys have no mandate (and perhaps limited expertise) relating to civil proceedings. Such matters are best left in the hands of civil lawyers retained by the police department, or civil lawyers in other government agencies.
3. Crown Attorneys should be careful to give advice only in regard to matters falling within their level of expertise and experience. Often, advice is sought by the police soon after emerging legislation is announced or a novel point of law is reported in the press. It would be imprudent to provide advice before there has been an opportunity to study the new legislation or jurisprudence, and its implications. Correcting misinformation is often very difficult. In the meantime there may be adverse effects on investigations and prosecutions. Providing sound, reliable advice will enhance the professionalism of Crown Attorneys.
4. Although the prosecution policies of the PPS are public (and are published when finalized), Crown Attorneys should avoid unnecessary public discussion of prosecution policies that are still in the formative stage. Until the policies are solidified and approved, the release of tentative approaches may lead to confusion and inconsistency among police agencies. In some circumstances,

it may be necessary to defer the giving of advice until clarity is provided by the DPP and/or the PPS Executive Committee. A Crown Attorney should never represent that an individual practice represents a policy of the PPS unless such a policy formally exists.

CASE-RELATED ADVICE

The role of the Crown vis à vis the Police

When Crown Attorneys provide advice to the police in regard to specific investigations or prosecutions, a number of other important considerations arise. The nature of the advice the Crown Attorneys give to the police changes when a charge is laid. This change is tied to the complementary but distinct roles that have been established for police and prosecutors in our criminal justice system. In Nova Scotia, the proper relationship between Crown Attorneys and the police at various stages of the criminal process is described at length in the Report of the Royal Commission on the Donald Marshall Prosecution. The Commissioners adopted the principles established in the United Kingdom in the 1981 Commission on Criminal Procedure:

...we would leave with the police complete responsibility for investigating offences and for making the initial decision whether to bring the matter before a court (that is, under present procedures, whether to charge or to apply to the court for issue of a summons or warrant of arrest), or to take no proceedings.....

Once that initial decision has been taken the case is within the jurisdiction of the court. This seems to us to be the clearest point which for the purpose of legislation, can be used to mark the division in responsibilities of the police and the prosecutor. After that point the case should become the responsibility of the latter...; he may then on the information before him decide to proceed as charged, or to modify or withdraw the charges. In practice there is, of course, a variety of decisions taken as a case is being prepared for trial and is being tried. Those decisions will be for the prosecutor; and it is in that sense that he will have responsibility for the conduct of the case once the initial decision to proceed has been taken.

... The police will retain unimpaired their law enforcement role and the primary responsibility for bringing detected offenders before the courts. Because of this the police will have to develop their cases as well as they can..., and where they have any doubt or need guidance on points of law or evidence will consult the local prosecutor before they initiate proceedings

...The prosecutor will have an independent role in the later stages of the process and an enhanced status because of that. His experience of the courts' view of cases that are improperly brought in terms of the public interest will enable him to act as an additional filter on proceeding with such cases and his role and status in the system will add weight to his

advice to the police on these types of case before the initial decision to proceed is taken. The system is, therefore, one which depends upon cooperation, with checks and balances operating within a framework in which all are seeking the same objectives.

As noted several years later in the Martin Committee Report²

As a matter of law, police officers exercise their discretion in conducting investigations and laying charges entirely independently of Crown counsel. The police seek the advice of the Crown only where they think it appropriate. And while it is no doubt prudent to do so in many cases, the police are not bound to follow the advice of Crown counsel as that advice relates to the conduct of the investigation and the laying of charges.

Pre-Charge Advice

The foregoing quotations indicate that, generally, the role of a Crown Attorney at the pre-charge stage is advisory in nature and not directive. An exception exists in regard to those few cases in which the *Criminal Code* requires pre-charge approval by the Attorney General e.g. public nudity and child abduction offences. Other exceptions arise when police consider utilization of procedures that require by statute the involvement of an agent of the Attorney General, such as the interception of private communications.

While it would be generally inappropriate for the Crown to provide the overall direction for an investigation, it is proper for the Crown to advise the police on legal issues, including those which relate to the gathering of evidence. The use of complex search warrants, general warrants, production orders, DNA warrants, agents provocateurs, and in-custody informers all fall within this category.

It would be inappropriate for the Crown to advise the police to discontinue any investigation. The advice to the police may touch upon weaknesses in the case or difficulties with prosecution of the case if charges were laid, but it is entirely up to the police whether or not they discontinue an investigation. As noted below, however, the Crown may recommend or request further investigation with a view to strengthening a case.

Recommended Practices

Today, as legal issues become more complex and litigious, it is essential that there be a written record of the advice which is given, and the basis upon which the advice

² Report of the Attorney General's Committee on Charge Screening, Disclosure and Resolution Discussions, The Hon. G. Arthur Martin, Chair, 1993 (Ontario).

was given. Circumstances will dictate the format of the written record. In some cases, it may be appropriate to open an advice file in relation to a particular investigation; in other cases, the completion of an Advice Form [**Appendix A**] or an e-mail to the officer may suffice. The written record in whatever form should include the facts provided by the police and relied upon by the Crown, and should be prepared as soon as practicable following the advice given.

While the above represents a "best practice" in *all* cases in which case-specific advice to the police is given, certain classes of case **mandate** that there be a comprehensive record of the advice given and the basis upon which it is given. These cases are:

- any case involving a death;
- crimes of violence where the Crown would likely proceed by indictment;
- sexual assaults;
- child abuse cases;
- cases occurring at schools;
- cases otherwise captured by the PPS Case Bulletin policy

The following suggested practices are intended to assist in achieving these objectives:

Preliminary Considerations:

1. When giving advice in regard to homicides, charges involving public officials, and certain other high profile cases, Crown Attorneys should be mindful of their obligation to consult with their Chief Crown Attorney or other experienced colleagues (see the PPS policy entitled "The Decision to Prosecute").
2. The Crown should ascertain whether or not advice has previously been sought from another prosecutor in regard to the same matter or a related matter. If so, that other prosecutor should be contacted and any documentation of the advice retrieved. The police should be discouraged from going from Crown to Crown on the same case.
3. Although it is a relatively rare occurrence, a Crown Attorney who gives advice to the police may become a witness. If charges are laid, the Crown may be subpoenaed to testify on the trial proper, at a *voir dire* held to determine the admissibility of evidence, or on a *Charter* motion. Consequently, it is possible

that the Crown Attorney who gives advice will not be able to prosecute any charges that arise out of the investigation to which the advice relates. While this should not deter a Crown from assisting the police, it should be kept in mind when determining who will give advice to the police if there is a choice in that regard.

4. Where an application is being made to a judge for a wiretap authorization, search warrant, DNA warrant, or other such investigative tools, the police should usually prepare the documents, including any affidavit or information confirmed by oath. The Crown should then scrutinize the documents to ensure that they are factually accurate and legally sound. If the Crown were to prepare the documents, he or she may inadvertently misstate the underlying facts and thus taint the application.

Providing and Documenting Advice:

1. In any meeting between the police and the Crown in relation to a specific case, the purpose or objective of the meeting should be clear to all participants. This clarity of purpose may later be crucial in determining whether, and to what extent, solicitor-client privilege may attach to what is said in the course of the meeting. All participants should clearly understand which decisions are to be made by the police and which are to be made by the Crown. All should understand that, generally, legal advice given by the Crown is not binding on the police. Crown Attorneys should be reminded that they should give advice only in regard to legal issues. Matters such as the deployment of police resources or the timing of police investigative initiatives may not involve legal issues. In such circumstances, the Crown should decline to offer advice.
2. If the advice relates to a case for which a prosecution file has been opened, the letter containing the advice or the detailed summary of the advice should be placed in the file and kept separate from the material to be disclosed to the defence. If the advice is given in a face-to-face meeting and a letter containing the advice is not being prepared, it may also be useful to read the officer's notes or to have them read back before the advice-giving meeting concludes.
2. The Crown should require the police to provide an incident or occurrence number so that the advice to be given can be linked to the Crown file if one is subsequently opened.
3. Advice Forms or Files are to be turned in to staff responsible for records administration in each office.

Privilege and Privacy:

1. Advice given by the Crown to the police has been held in some circumstances to be privileged and thus protected from disclosure to the accused and third parties, except with the consent of the police who received the advice (see *R.v. Campbell and Shirose*). Accordingly, the police should be reminded that inadvertent disclosure of legal advice may vitiate privilege. The Crown should ensure that any legal advice is removed or redacted from the disclosure copy of the officer's notes.
2. The Crown may wish to point out that s.15 of the *Freedom of Information and Protection of Privacy Act* prevents public disclosure of "any information relating to or used in the exercise prosecutorial discretion". Where appropriate, the Crown may require that the police obtain the Crown's consent in writing prior to disclosing the advice to a third-party.
3. Prior to the laying of charges, the Crown should not disclose to persons outside of the Public Prosecution Service that the police have sought advice in regard to a particular incident, or that advice has been given. Documentation relating to advice which is given before charges are laid (or which relates to incidents which do not give rise to charges) is confidential and should be kept in a secure location.

ADVICE IN REGARD TO THE CHARGING DECISION

In difficult cases, police officers may be inclined to seek what amounts to practical direction from the Crown rather than pure legal advice. In particular, police officers may seek a decision from the Crown as to whether sufficient grounds exist to lay a criminal charge. If a charge has not yet been laid, the Crown can give only legal advice. The following recommendations should be followed where the Crown is asked to provide such advice:

1. The Crown should require the police to provide an occurrence or incident number, and a full written investigative brief that will form the foundation for the Crown's advice. If no brief is provided, detailed notes should be made of the facts related by the police and any potential exhibits which were adduced or referred to by the police.
2. Where feasible, the Crown should reply in writing. If a written reply is not feasible or practical in the circumstances, the Crown should prepare and retain a memorandum of the advice given and the information and material provided by the police which was relied upon by the Crown. The written reply or memorandum should address whether there are, in law, grounds capable

of supporting specific criminal charges based on the evidence contained in the investigative brief or the information which has otherwise been provided by the police.

3. When replying by letter, it is prudent to set out the legal test for determining whether the threshold for laying a criminal charge has been met. Both the objective and subjective elements of that threshold test should be noted. A sample letter is attached as **Appendix B**.
4. There are occasions where reasonable grounds exist to support a criminal charge but the Crown will conclude that there is no realistic prospect of conviction due to evidentiary deficiencies or for legal reasons e.g. *res judicata*, *autrefois acquit or convict*, entrapment, etc. The Crown may also conclude that continuing a prosecution would not be in the public interest. As noted in the PPS policy entitled "The Decision to Prosecute", consideration of the public interest includes a consideration of matters such as the availability of alternatives to prosecution, the staleness or triviality of the matter, the need to make responsible use of finite prosecution resources, etc. In such circumstances, it is appropriate to advise the police, that, although the police may determine that reasonable grounds exist, and while the decision to lay the charge rests with the police, absent a material change in the available evidence, the charge laid will be withdrawn by the Crown and the reasons for the withdrawal placed on the record. Where the advice given is that there is or would be no realistic prospect of conviction, such advice must be given in writing, regardless of the type of offence. The facts assumed or relied upon by the Crown in making this determination must be clearly stated.
5. The Crown's letter should clearly indicate that the Crown is providing a legal opinion only and that the legal opinion is not binding on the police. It may be useful to reiterate the fact that the decision to lay a charge or to not lay a charge continues to rest with the police because it is the person who lays the information who must believe on reasonable grounds that the named person has committed the offence.

ADDITIONAL INVESTIGATION

After investigating an incident and laying a charge, the police usually deliver a file to the Crown containing a description of the evidence gathered in support of the charge. It is the duty of the Crown Attorney to review the file and decide on a principled basis [see the policy entitled "The Decision to Prosecute"] whether or not the charge which

has been laid will be prosecuted. If it appears that further investigation is necessary to sustain, strengthen the prosecution or clarify facts, it is appropriate for the Crown Attorney to request that further investigation be undertaken.

Although there is in existence a Directive from the Attorney General requiring the police to carry out any such additional investigation after a charge has been laid and not finally dealt with [see the Directive entitled "Additional Investigation and Reinvestigation"], it is important that Crown Attorneys be tactful when seeking further investigation. If the police decline a request for further investigation, the matter should be brought to the attention of the appropriate Chief Crown Attorney for further direction.

PRIVILEGED & CONFIDENTIAL

NOVA SCOTIA PUBLIC PROSECUTION SERVICE POLICE ADVICE FORM

Crown Attorney	
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Name of Potential Accused	
DOB of Potential Accused	
Incident #	
Officer's Name	
Phone Number	
Date and Time	
<input type="checkbox"/> Telephone Call	<input type="checkbox"/> Office Visit
Have police sought advice from any other Crown Attorney?	

Investigative Agency	<input type="checkbox"/> Municipal Police Force (name) _____ <input type="checkbox"/> RCMP (detachment) _____ <input type="checkbox"/> Other _____
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Nature of Advice Sought

Advice Given

Follow-Up

TURN OVER 

PRIVILEGED & CONFIDENTIAL

Have charges been laid?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Anticipated
Time spent providing advice			
File name and number (if assigned)			

Have police provided investigative material for review?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Anticipated
Specify:			
Have you reviewed this material?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	
What other exhibits or materials have been referenced by police but not provided?			
Specify:			

There may be reason to bring this matter to the attention of the Chief Crown Attorney. Please indicate whether:			
<input type="checkbox"/> The matter is a homicide.			
<input type="checkbox"/> The matter involves a public figure.			
<input type="checkbox"/> The matter involves aboriginal rights.			
<input type="checkbox"/> The matter involves novel charter issues.			
<input type="checkbox"/> The matter involves large number of victims or accused.			
<input type="checkbox"/> The matter has attracted or will attract unusual media attention.			
<input type="checkbox"/> The matter is unusually complex.			
<input type="checkbox"/> Other (specify) _____			
Have you brought or will you be bringing this matter to the attention of the Chief Crown Attorney?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Unsure

Have you attached to this form any additional information or material on this matter?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
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Have you advised police that legal advice provided to them is privileged and not disclosable?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
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Sample Opinion Letter Format

Appendix B

Date

VIA COURIER AND E-MAIL

Cst. [REDACTED]
RCMP – [REDACTED]
[REDACTED]

Dear Cst. [REDACTED]:

Re: [REDACTED].

Introduction

The RCMP are seeking the advice of the Nova Scotia Public Prosecution Service regarding the laying of [REDACTED] [REDACTED] against [REDACTED] for [REDACTED] alleged incidents against the Complainant, [REDACTED] between [REDACTED].

The Nova Scotia Public Prosecution Service has carefully considered all materials provided by the RCMP. As requested, what follows is our opinion on this matter.

Background: The RCMP Request and its Chronology

On [REDACTED], Cst. [REDACTED] of the RCMP provided an investigative package to [REDACTED] of the Nova Scotia Public Prosecution Service, regarding:

[REDACTED]
[REDACTED]

In her letter, Cst. [REDACTED] sought:

*[A]n opinion on the evidence gathered to date [REDACTED]
[REDACTED]*

[REDACTED]
[REDACTED] was asked to review the materials provided by Cst. [REDACTED] on behalf of the Nova Scotia Public Prosecution Service. A series of communications between [REDACTED] and Cst. [REDACTED] occurred in [REDACTED], which resulted in the provision of additional information from the RCMP to the Nova Scotia Public Prosecution Service.

LEGAL OPINION - PRIVILEGED

This letter contains legal opinions provided by the Nova Scotia Public Prosecution Service to the RCMP–Northeast Nova Major Crime Unit in Nova Scotia. Pursuant to the Freedom of Information and Protection of Privacy Act, R.S.N.S. and the Access to Information Act, R.S.C., this legal opinion is privileged and should not be disclosed without the prior written consent of the Nova Scotia Public Prosecution Service.

From [REDACTED] until [REDACTED], Cst. [REDACTED] continued his/her investigation. On [REDACTED], Cst. [REDACTED] wrote Crown Attorney [REDACTED] and provided an update regarding its status. Additionally, Cst. [REDACTED] advised that:

[REDACTED]

The Unique Roles of the Police and the Crown

Before discussing the materials in greater depth, I am mindful of the separate and distinct roles that you as the Police, and I as the Crown, play in the administration of justice.

In particular, I note that you retain independent discretion to lay criminal charges if, among other things, you believe that reasonable grounds exist. The Crown has no authority to direct the exercise of the police’s discretion in this regard. Nevertheless, and despite such clear boundaries, it is standard and acceptable practice for the police to consult with, and obtain the advice of, the Crown as a means of assisting the exercise of their discretion.

When, and if, charges are laid against an accused, the Crown is obligated to independently assess whether to proceed with the prosecution of the charges. Such an assessment entails a multi-factorial approach, utilizing sufficient flexibility to respond to the infinite variety of cases that may be encountered. Two principles which guide the Crown in exercising their discretion are an assessment of the realistic prospect of conviction based on the sufficiency of admissible evidence; and, an assessment of whether the public interest is served by the prosecution of the charges.

A Summary of the Allegations

LEGAL OPINION - PRIVILEGED

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Characterizing the Allegations and Assessing a Realistic Prospect of Conviction

The Public Interest in Proceeding

Concluding Comments

I am hopeful that this letter will be of some assistance to you. Following your review of this letter, if you have any questions, concerns, or comments, please contact me at your convenience. Additionally, if you feel it would be helpful to meet to discuss this matter further, please know that I am willing.

Yours very truly,

Crown Attorney

- c. Mr. Martin Herschorn, Q.C., Director, Public Prosecution Service
Ms. Denise Smith, Q.C., Deputy Director, Public Prosecution Service
Chief Crown Attorney