NOVA SCOTIA
PUBLIC PROSECUTION SERVICE

DOCUMENT TITLE:

DISCLOSURE BY THE CROWN IN CRIMINAL CASES

NATURE OF DOCUMENT: AG DIRECTIVE

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ADDENDA:

1. Practice Note Re Certain Photographs and Recordings
2. Practice Note Re Police Misconduct (*Regina v. McNeil*)

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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, e.g."SHOULD" and "MUST", HAVE THE MEANINGS ESTABLISHED IN THE **"WORDS & PHRASES"** SECTION OF THIS PART OF THE MANUAL (SEE THE EXCERPT AT THE END OF THIS POLICY).

DISCLOSURE

1. STATEMENT OF PRINCIPLE

There is a duty on the Crown to make full and timely disclosure to the defence of all relevant[1] information known to the investigator and the Crown Attorney in *Criminal Code* prosecutions conducted by agents of the Attorney General. This obligation applies to both inculpatory and exculpatory information. In discharging this disclosure obligation, the Crown must respect the rules of privilege.

2. THE RATIONALE FOR DISCLOSURE

Disclosure by the Crown has three main purposes:

(a) to assist in guaranteeing the accused/defendant constitutional rights to a fair trial and to make full answer and defence;

(b) to resolve non-contentious and time consuming issues in advance of trial in an effort to ensure a more efficient use of court time and avoid unnecessary proceedings; and

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[1] One measure of the relevance of information is its usefulness to the defence. If it is of some use, it is relevant and should be disclosed. Accordingly, information is relevant if it can reasonably be used by the defence either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence [see R. v. Egger (1993), 82 C.C.C. (3d) 193 at 204 (S.C.C.)].

(c) to encourage the resolution of cases including, where appropriate, the entering of guilty pleas or the withdrawal of charges at an early stage of the proceedings.

3. THE ROLE OF THE INVESTIGATOR

Effective disclosure by the Crown to the defence is dependent upon and requires full and timely disclosure by the investigator to the Crown Attorney. It is incumbent upon the investigator to be aware of the duty of the Crown to disclose all relevant factual information to the defence and to cooperate with the Crown Attorney in order that full and timely disclosure can be provided to the defence. The investigator must bring to the attention of the Crown Attorney confidentiality concerns of which the investigator is aware.

4. THE ROLE OF THE CROWN ATTORNEY

The Crown Attorney bears responsibility for the disclosure provided to the defence. While Crown Attorneys must err on the side of inclusion, they need not produce what is clearly irrelevant. The disclosure of relevant information is subject to a discretion with respect to the timing and manner of disclosure as outlined in Sections 7 and 8 below. Further, Crown Attorneys have a duty to respect the rules of privilege and to protect the identity of informers. All decisions by the Crown Attorney not to disclose on grounds of either privilege or relevance are reviewable by the trial judge. Where the defence requests access to material not in the possession of the investigator or Crown Attorney but in the possession of another agency, government department or other person, the defence should be advised that the request can be made directly to the relevant agency, government department or other person.

5. WHAT MUST BE DISCLOSED

As soon as practicable upon request, the Crown Attorney will make available to the defence the following material:

(a) a copy of, or an opportunity to copy, the information or indictment;

(b) a copy of, or an opportunity to copy, a summary of the case, detailing the circumstances of the offence, prepared by the investigating agency;

(c) a copy of, or an opportunity to copy, all written statements in the possession of the Crown made by the accused/defendant and in the case of verbal statements, a verbatim account of the statement or copies of notes or an audio or video recording of the statement whether favourable to the accused/defendant or not;

(d) a copy of, or an opportunity to copy, the criminal record[2] of the accused/defendant and the particulars (offence, date and disposition)

of any other criminal record relied on by the Crown;

(e) copies of, or an opportunity to copy, all written statements made by persons who have provided relevant information to the investigator (where individuals have provided more than one statement a copy, or an opportunity to copy, all statements will be provided). In the case of verbal statements, the investigators' notes or, where there are no notes, a summary prepared by the investigating agency of the relevant information and the name, address and occupation of the person;

(f) where feasible, a copy of any audio or video recording of a witness' statement (if production of a copy of the recording is not feasible, an opportunity to listen to an audio recording or view a video recording, in private, shall be provided);

Note: The privacy of vulnerable witnesses, particularly children and sexual assault victims, must be protected. Where a recording is made of the statement of a vulnerable witness, the provision of a copy of the recording should be subject to an undertaking by counsel for the defence that:

(i) no person other than an expert retained by the defence will be given possession of the recording;

(ii) no further copy of the recording will be made;

(iii) the copy will be viewed or heard only by persons involved in the defence of the accused; and

(iv) the copy will be returned to the Crown at the conclusion of the proceedings.

(g) subject to the provisions of the *Youth Criminal Justice Act*, particulars (offence, date and disposition) of the criminal record of an accomplice or an alleged accomplice, whether that person has been charged or not;

(h) subject to the provisions of the *Youth Criminal Justice Act*, particulars of any information known to the Crown which the defence may legally use to impeach the credibility of a Crown witness, including the criminal record of a Crown witness where the defence requests this information and the record is relevant to an issue in the case or has probative value

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[2] "Criminal record" means the C.P.I.C. CNI Want/Record.

with respect to the credibility of the witness. All benefits or consideration requested, discussed, provided or intended to be provided at any time in relation to a witness or a potential witness must also be disclosed. This direction applies whether or not the request or discussion of benefits was with the witness or potential witness, or with someone on behalf of the witness or potential witness. **[See attached Practice Note re *R. v. McNeil*.]**

(i) subject to the provisions of the *Youth Criminal Justice Act*, the criminal record of a potential defence witness where the defence requests this information;

(j) copies of, or an opportunity to copy, all medical, laboratory and other expert reports in the possession of the Crown which relate to the offence, except to the extent they may contain privileged information;

(k) access to any potential exhibits or other physical evidence in the possession of the Crown for the purpose of inspection, and, where applicable, copies of such exhibits [see Practice Note, below];

(l) a copy, or an opportunity to copy, of any search warrant and information to obtain relied on by the Crown;

(m) if intercepted private communications will be tendered, a copy of the judicial authorization under which the private communications were intercepted; access to the log book of interceptions; access to audio recordings made pursuant to the authorization; and a copy of the transcript of the interceptions made pursuant to the authorization when it is available;

(n) a copy of, or an opportunity to copy, any other document, or portion of a document contained in the investigation file and any notes of the investigator which contain the factual observations of investigators pertaining to the investigation of the alleged offence; and

(o) notice of any evidence which has become lost or destroyed and a summary of the circumstances surrounding such loss or destruction prepared by the investigating agency.

6. ADDITIONAL DISCLOSURE

It is not possible to anticipate the disclosure requirements in every potential case and disclosure additional to that outlined in section 5 above will sometimes be appropriate. The

Crown Attorney has a discretion to make such additional disclosure consistent with the statement of principle and rationale for disclosure expressed above. For example, if information disclosing a violation of the rights of the accused/defendant under the Charter of Rights and Freedoms comes to the attention of the Crown Attorney, it must be disclosed to the defence. The Crown Attorney is not obliged by this directive to make pretrial

disclosure of evidence only relevant in reply unless defence disclosure reveals the relevance of the evidence prior to trial. The obligation upon the Crown is a continuing one and relevant information coming to the attention of the investigator or Crown Attorney following initial disclosure must be disclosed in accordance with this directive. Even after conviction, including after any appeals have been decided or the time for appealing has lapsed, information coming to the attention of the investigator or Crown Attorney which shows an accused/defendant is innocent or which raises a doubt as to the guilt of the accused must be disclosed.

7. TIMING OF DISCLOSURE

The Crown is not obligated to provide any disclosure prior to a charge being laid. After a charge has been laid, initial disclosure should occur before the accused/defendant is called upon to elect the mode of trial or to plead. If the Crown intends to rely on the criminal record of the accused/defendant at a bail hearing, the criminal record information available to the Crown must be disclosed to the defence prior to the bail hearing. The Crown Attorney retains the discretion to delay disclosure where there is a legitimate concern for the safety or security of persons who supplied information or where early disclosure might impede the completion of an investigation (such situations should be rare).

8. LIMITING OR DELAYING DISCLOSURE

Disclosure may only be delayed or limited to the extent necessary:

(a) to comply with the rules of privilege, including informer identity privilege;

(b) to prevent the endangerment of the life or safety of witnesses, or their intimidation or harassment; or

(c) to prevent other interference with the administration of justice.

Where a Crown Attorney limits disclosure to comply with the rules of privilege, the Crown Attorney shall so advise the defence. A Crown Attorney who proposes not to disclose any of the items listed in section 5 above must obtain the prior written approval of the Chief Crown Attorney or other person designated by the Director of Public Prosecutions. Any decision by the Crown Attorney to delay or limit disclosure is reviewable by the trial Judge.

9. THE UNREPRESENTED ACCUSED/DEFENDANT

The judges of the Provincial Court have agreed that the judge presiding at the first appearance of an unrepresented accused/defendant will advise the accused/defendant of the right to obtain disclosure from the Crown Attorneys' office. A written notice to this effect will also be provided to the accused/defendant.

The judges of the Supreme Court have agreed that on first appearance in the Supreme Court a statement will be read to unrepresented accused advising them of the right to disclosure from the Crown. The Court will also request information from the Crown with respect to the status of Crown disclosure.

PRACTICE NOTE* re photographs, digital recordings, etc.:

The subject matter of many current pornography-related prosecutions is “photography” or other material that is digitally created or reproduced. By its nature, there is a real possibility that such material may be inadvertently disseminated, e.g. if cached copies created automatically during the disclosure process are retained or delivered to unknown persons. For that reason, disclosure of photographs, video tapes, digital recordings, electronic depictions or reproductions of any sort **which are the subject matter of the offence itself**, is subject to further restrictions:

(i) an unrepresented accused shall be given a reasonable opportunity to view the subject matter of the offence in private, in circumstances approved by the prosecutor, but the accused shall not be given a copy of such subject matter; and

(ii) defence counsel shall be given a reasonable opportunity to view the subject matter of the offence in private, in circumstances approved by the prosecutor. Defence counsel should not be given a copy of the material that is the subject matter of the offence unless the prosecutor, in consultation with his/her Chief Crown Attorney or designate, is satisfied that adequate steps have been taken to ensure that no inappropriate dissemination, unintentional or otherwise, of the material will occur.

* Practice Note approved by the PPS Executive Committee on February 19, 2010

PRACTICE NOTE RELATING TO *R. v. McNEIL* (Issued Nov. 19, 2009)

The Supreme Court of Canada decision in *R. v. McNeil*, [2009] S.C.J. No. 3, is significant for Crown Attorneys in that it impacts the disclosure obligations of the Crown with regard to police disciplinary matters, and it clarifies the regime established in *R. v. O'Connor*.

THE *McNEIL* CASE

Some Context:

McNeil had been tried on numerous drug charges and after conviction (but before sentencing) he learned that the main investigator had been involved in drug related misconduct leading to disciplinary proceedings and criminal charges. He sought production of the investigating officer's police disciplinary records and criminal investigation files. Some of the files were held by different police forces, some were in prosecution files of the PPSC, and others were internal to the investigator's force. The Ontario Court of Appeal ordered production of the criminal investigation files.

Rulings:

The Supreme Court of Canada issued guidelines for determining when such records and files are properly disclosed under either *Stinchcombe* or *O'Connor* procedures, and described in detail how the decision to disclose or not disclose is to be made.

- Under *Stinchcombe*, the Crown's "first party" disclosure obligation extends only to material relating to the accused's case in the possession or control of the prosecuting Crown agency. A necessary corollary to the Crown's disclosure duty under *Stinchcombe* is the obligation of police to disclose to the Crown all material pertaining to its investigation of the accused. For the purposes of fulfilling this corollary obligation, **the investigating police force, although distinct and independent from the Crown at law, is not a third party**; it acts on the same first party footing as the Crown.

- Records relating to findings of **serious** misconduct by police officers involved in the investigation against the accused properly fall within the scope of the first party disclosure package due to the Crown from police, where the police misconduct is either **related to the investigation**, or the finding of misconduct **could reasonably impact the case against the accused**.

  Production of disciplinary records and criminal investigation files in the possession of the police that do not fall within the scope of this first party disclosure package is governed by the *O'Connor* regime for third party production.

Leaving the entire process of access to police misconduct records to an *O'Connor* regime would be "neither efficient or justified". Accordingly, the police are to provide the Crown with information regarding police misconduct that goes beyond the primary disclosure obligation, and the Crown is to act as a **"gate-keeper"** in sorting out what parts of this information should be turned over to the defence in compliance with the obligations established in *Stinchcombe*.

- **"Relevance"** for disclosure purposes, as stated in earlier cases, has a wide and generous connotation and includes information in respect of which there is a reasonable possibility that it may assist the accused in the exercise of the right to make full answer and defence. This does not mean that only material that would be admissible at trial should be produced. Material that would not, on its own, be admissible may nonetheless be of use to the defence, for example, in cross-examining a witness on matters of credibility or in pursuing other avenues of investigation.

- If the Crown becomes aware that there is potentially relevant information pertaining to the credibility or reliability of any witnesses, including police officers, the Crown has a **duty to make appropriate inquiries** and to obtain the potentially relevant information. The court makes it clear, however, that the accused has no right to automatic disclosure of every aspect of a police officer's employment history, or to police disciplinary matters with no realistic bearing on the case against him or her.

  It should also be noted that a mere demand letter from defence counsel, absent any foundation for believing that relevant information is actually in the possession of the police or a third party, will not trigger the obligation on the Crown to pursue inquiries.

Police Misconduct

Police officers, like all persons in Canada, are subject to prosecution under the Criminal Code and numerous quasi-criminal statutes if they are involved in illegal activity. Their conduct is also subject to proceedings under other legislation relating specifically to police officers. In Nova Scotia, a wide range of disciplinary matters are dealt with in the *Police Act* and its regulations.

Before the *McNeil* case, there was little expectation that police discipline matters would be referred to in criminal trials. Consequently, the actual compilation of a list of discipline matters may be challenging. The Provincial legislation speaks in terms of "complaints" rather than "charges", and many complaints are often resolved informally. There may not be a clear statement of the findings of fact made by the senior officer or panel dealing with the matter. Sometimes the discipline matter is described as a "dereliction of duty" or "conduct unbecoming an officer". These phrases may encompass a wide variety of delicts of varying gravity. The "charging" thresholds of various police agencies tend to be highly variable. Accordingly, prosecutors may have to carefully review a discipline file in order to properly assess the significance of a discipline matter.

Members of the RCMP are subject to the disciplinary processes set out in the *RCMP Act*, and this legislation, like the Nova Scotia *Police Act,* includes informal procedures as well as formalized hearings relating to complaints and investigations of misconduct.

MATERIAL RELATING TO POLICE MISCONDUCT THAT IS TO BE PROVIDED TO THE CROWN

In order to enable the Crown to meet its disclosure obligations, It is the position of the PPS that the following material must be provided to the Crown by the investigating police agency, in relation to all police officers listed in the prosecution file:

1. Complaints and investigations into a police officer's actions relating to the same incident that forms the subject matter of the charge against the accused. (The police are to provide the Crown with a copy of the investigation file for this particular category of misconduct information).

2. A brief description of all convictions or findings of guilt for an offence under the *Criminal Code* or the *Controlled Drugs and Substances Act* or any other federal or provincial statute (with the exception of convictions or findings of guilt for minor traffic infractions or other minor regulatory offences) except where disclosure is prohibited by the Statutes of Canada e.g. the *Criminal Records Act,* or the *Youth Criminal Justice Act*.

   NOTE: If a pardon has been granted for a conviction, it need not be disclosed (per *McNeil*).

   Pursuant to the *Criminal Records Act*, findings of guilt cannot be disclosed if

   - more than one year has elapsed since the offender was discharged absolutely; or
   - more than three years have elapsed since the offender was discharged on the conditions prescribed in a probation order.

3. A brief description of all outstanding charges under the *Criminal Code* and the *Controlled Drugs and Substances Act* or any other federal or provincial statute.

4. A brief description of all disciplinary misconduct findings under the applicable provincial *Police Act* or the *RCMP Act*;

Words & Phrases

The following words and phrases appear in the PPS directives, guidelines and policies, and have these meanings:

"should": indicates that there is a presumption that prosecutors will carry out the task, but recognizes that it may not always be possible or desirable to do so in the particular circumstances of an individual case. Prosecutors must be able to articulate a reasonable basis for departing from the suggested course of action.

"may": highlights an issue for prosecutors and alerts them to an action or decision which they may or may not take in the exercise of their discretion.

"shall" or "must": signify an unconditional requirement and usually relate to a legal obligation or procedural necessity. These are few in number.