



NOVA SCOTIA
PUBLIC PROSECUTION SERVICE

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IMPAIRED OPERATION OFFENCES

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OVERVIEW

This policy and all policy documents in the [Crown Attorneys' Manual](#) are intended to assist prosecutors in Nova Scotia in the exercise of their discretion. They do not create any rights, and they do not have the force of law.

This policy is intended to be read in the context of all the policy documents in the Crown Attorneys' Manual, including the "[Words and Phrases](#)" and "[Preface](#)" of the Manual.

INTRODUCTION

Operating a conveyance while impaired by alcohol or a drug is a very serious criminal offence and a prevalent threat to public safety. The purpose of this policy is to ensure impaired operation offences are prosecuted fully and effectively to help reduce the threat they pose to the life, health and safety of Nova Scotians.

For the purposes of this policy, "impaired operation" offences are currently contained in sections 320.14 and 320.15 of the *Criminal Code*.¹ "Conveyance" offences are currently contained in sections 320.13 to 320.18 of the *Criminal Code*.

CONSIDERATIONS PRIOR TO PLEA

As noted in the PPS Policy, "[The Decision to Prosecute](#)", to proceed to trial it is not essential that a conviction be a certainty. What is required is a "realistic prospect of conviction". If the evidence in a case involving an impaired operation offence appears to be weak, the Crown Attorney is expected to work with the investigating officer to ensure all available evidence has been obtained and disclosed, and that the case is legally sound. If the evidence does not provide a realistic prospect of conviction, however, or if there are insurmountable legal or Charter issues, the charge should be withdrawn. Detailed reasons for withdrawing the charge should be recorded in the Crown file wherever possible.

¹ Prior to the coming into force of Part VIII.1 of the *Criminal Code* in December of 2018, impaired operation offences were contained in sections 253, 254, and 255 of the *Criminal Code*.

When there is a realistic prospect of conviction for an impaired operation offence, the public interest will, absent exceptional circumstances, require prosecution of the charge and the Crown Attorney must proceed with the prosecution. It is not appropriate to accept a plea to a *Motor Vehicle Act* charge, other provincial offence, or other conveyance offence to avoid the possibility of an acquittal on an impaired operation charge, a lengthy trial, a novel Charter argument, or a mandatory minimum penalty prescribed for an impaired operation offence. Appellate courts have repeatedly affirmed the constitutionality of these penalties: See [R v Ankur; R v Chandran, 2023 NSCA 55](#).

Current scientific evidence supports the inherent accuracy and reliability of readings obtained from approved instruments and approved screening devices. A reading from an approved instrument showing that the operator of a conveyance had a blood alcohol concentration of at least 80 mg of alcohol per 100 mL of blood within two hours of ceasing to operate the conveyance is evidence capable of supporting a prosecution. The presumption of accuracy contained in s. 320.31(1) of the *Criminal Code* is a rule of conclusive proof that can only be challenged where the Crown cannot prove the statutory preconditions for the presumption. The statutory readback provided for in s. 320.31(4) removes the need to call a toxicologist in most impaired operation prosecutions. This statutory readback is a rule of substantive law that automatically applies where breath samples are obtained more than two hours after operation ceases: [R v Tweedie, 2023 NSCA 11](#), at [para. 22](#).

If a Crown Attorney is of the view that exceptional circumstances exist which might support a deviation from the approach outlined above, the Crown Attorney must consult with their Chief Crown Attorney before taking any action which does not comply with it. It is anticipated such instances will rarely occur.

SECOND AND SUBSEQUENT IMPAIRED OPERATION OFFENCES

The *Criminal Code* imposes mandatory minimum penalties for second and subsequent impaired operation offences. A court will not impose a mandatory minimum penalty unless it is satisfied the accused was notified, prior to plea, that a greater penalty would be sought.

Parliament has placed no restrictions on circumstances in which the Crown can rely on notice to seek an increased penalty, and it is never wrong to rely on notice when the criteria for doing so are met. There may be situations when discretion should be used to not rely on notice. Crown discretion not to rely on notice is circumscribed by this policy to ensure this

discretion is exercised consistently and in ways which appropriately acknowledge the significant threat to public safety which these offences create.

Regardless of whether the Crown Attorney proceeds by way of the second or subsequent offence provisions, Crown Attorneys must still advise the court of the existence and complete extent of any criminal record of the accused of which the Crown Attorney is aware.

Where an accused is convicted of a second impaired operation offence, absent exceptional circumstances the Crown Attorney must proceed by way of the second offence provisions and seek at least the minimum penalty of thirty days imprisonment when the charged offence occurred within five years of the date of sentence for the previous impaired operation offence.

Where an accused has convictions for two or more impaired operation offences, the Crown Attorney must, absent exceptional circumstances, proceed by way of the subsequent offence provisions and seek at least the minimum penalty of 120 days imprisonment when the charged offence occurred within ten years of the date of sentence for any impaired operation offence.

"Exceptional circumstances" cannot be defined in absolute terms, but they are those circumstances where the overall public interest is demonstrably better served by a different approach. The Crown Attorneys' Manual "[Word and Phrases](#)" definition of exceptional circumstances should be consulted and the exceptional circumstances should be noted in the Crown file. Examples of public interest factors which may be considered include the following:

The Crown Attorney is satisfied that:

- Compassionate grounds exist, which may relate to the physical or mental health of the accused; and the accused poses a low risk to commit conveyance offences in the future;
- Significant problems of proof are present, even though a realistic prospect of conviction exists; or
- One or more of the previous convictions was made under the *Youth Criminal Justice Act*.²

² Retainable convictions under [s. 119\(9\)](#) of the *Youth Criminal Justice Act* are deemed to be previous convictions for the purposes of s. 727 of the *Criminal Code*. See e.g.: [R v Hennessey, 2017 NSPC 29](#).

WHERE SECOND OR SUBSEQUENT OFFENCE OUTSIDE 5- OR 10-YEAR PERIOD

It also may be appropriate for Crown Attorneys to proceed by way of the second or subsequent offence provisions when outside the five- or ten-year periods discussed above. The circumstances of the charged offence and the offender are relevant to this decision.

The Crown Attorney should proceed by way of second or subsequent offence provisions where the charged offence includes any of the following circumstances:

- The charged offence involved death, bodily harm, or extraordinary property damage;
- A blood alcohol concentration of at least 160 mg of alcohol in 100 mL of blood is present, or there is evidence of a high degree of impairment; or
- The accused was previously sentenced to incarceration for an impaired operation offence.

The following factors may also be considered:

- The accused's criminal record and the sentences that have been imposed for previous conveyance offences;
- The accused committed other conveyance offences during the same incident as the charged offence;
- The pattern of the previous conveyance offence convictions, including the sentencing dates and any "gaps" in the accused's criminal record;
- The number of previous convictions for impaired operation offences; and
- The presence of any statutorily aggravating circumstance defined in s. 320.22 of the *Criminal Code*.

This is not an exhaustive list, and Crown Attorneys may consider other factors.