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Criminal Law Division**



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PM [2006] No. 7

**PRACTICE MEMORANDUM  
To Counsel, Criminal Law Division**

**Date:** March 31, 2006

**Subject:** **PHYSICAL SCIENTIFIC EVIDENCE**

**Synopsis:** This practice memorandum provides guidance to Crown Counsel regarding the gathering, preparation and presentation of physical scientific evidence. It has been jointly prepared and adopted by the Ministry of the Attorney General and the Ministry of Community Safety & Correctional Services (Centre of Forensic Sciences). It also outlines the Crown's duties of disclosure with respect to such evidence, the nature of the relationship between the Crown and expert witnesses, when and how to obtain forensic evidence and the manner in which such evidence should be presented to the court. **This memorandum replaces Physical Scientific Evidence KAUF-4.**

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## **Opinion/Advice:**

### **1. Introduction**

Physical scientific evidence often plays an important role in the determination of criminal liability. Counsel for both the prosecution and the defence routinely use such evidence in support of their respective cases. For Crown counsel, a number of issues arise in respect of how such evidence is gathered, tested, and presented. These issues include:

- The delineation of the Crown's duties of disclosure;
- The nature of the relationship between Crown counsel and experts providing opinion evidence for the prosecution;
- When and how to obtain forensic evidence; and
- The manner in which such evidence should be presented to the court.

Scientific evidence is categorized as opinion evidence. As such, it is admissible on the basis that it can assist the trier of fact in making findings in areas in which the trier of fact would not otherwise have the ability to draw inferences or reach conclusions.

The ultimate objective of the Crown, in putting forward scientific evidence, is to ensure that such evidence is presented to the court with no more, and no less, than its legitimate force and effect. The scientist should inform the Crown of any limitations on the inferences that can be reliably drawn from such evidence and the Crown must make every effort to ensure that those limitations are fully impressed upon the trier of fact. As in all matters, Crown counsel should be guided by the general duty to see that justice is done in the circumstances of the particular case.

### **2. Relationship between Crown Counsel and Forensic Science Witnesses: The Necessity of Impartiality**

- a. *Role of scientists at the Centre of Forensic Science:*** In the normal course, scientists employed in government sponsored forensic laboratories are exposed more frequently to police investigators and to Crown counsel than to representatives of the defence. Indeed, the function of the forensic scientist is, in part, to assist in the investigation of crime, which is carried out primarily by police officers. The forensic scientist,

therefore, assists police officers.<sup>1</sup> Investigators must necessarily provide background information arising from their investigation in submitting articles for testing so that forensic scientists can determine the most effective and appropriate scientific approach to possible evidence. This gives the scientist a measure of autonomy in making investigative decisions, but also exposes the scientist to the police theory of the case. Finally, where the results of the scientific investigation inculcate the suspect, the scientist becomes a necessary witness for the prosecution and will be exposed to and be part of the development of the Crown's case. All of this is, of course, entirely proper and does not mean that the integrity of the scientist is suspect.

However, because forensic scientists working in government-operated laboratories are more familiar with police and prosecution personnel and with prosecutorial approaches and concerns, there may be a tendency for them to feel 'aligned' with the Crown. In some jurisdictions, this understandable relationship between the prosecution and forensic scientists has resulted in a perception, on the part of the scientists, that their function was to support the police theory. Such a perception is wrong and has the potential to contribute to a miscarriage of justice.

Forensic scientists are subject to their own rules of ethics, which require impartiality. Rules of Professional Conduct of the Canadian Society of Forensic Science are attached (Attachment #1). While it is neither the Crown's nor the scientist's function to supervise or control the professionalism of the other, the purpose of this joint practice memorandum is to reinforce the necessity for a clear and impartial presentation of the evidence to the court. This will protect the integrity of the role of forensic scientists and ensure that their evidence is available with all its legitimate force in the criminal process.

Any concerns that Crown counsel may have relating to a scientist's competence as an expert should be conveyed in writing to the director of the scientist's laboratory.

- b. *Necessity of reporting all results, whether favourable or adverse:*** It is the clear duty of forensic scientists to assist in a neutral and impartial way in criminal investigations. They must act in the interests of justice.<sup>2</sup> In seeking information and advice from forensic scientists, Crown counsel are seeking a candid opinion. Candor is necessary in order to assist the Crown in exercising its prosecutorial discretion and in preparing its case for trial.

The necessity for including in the report any information adverse to the Crown is something that those who prepare scientific or other expert reports should be aware of. Crown counsel should advise all experts that they are not to take an adversarial position, but are to provide the Crown with the results of any tests or information which, arguably, may assist the accused, so that the Crown may make proper disclosure, even though the person preparing the report considers the results of the test or other information to be irrelevant (Pages 233-4 *Martin Committee Report*). Members of the

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<sup>1</sup> See Roger, "Does Forensic Science Have a Future", J. For. Sci. Soc. (1984) 543.

<sup>2</sup> See the decision of the English Court of Appeal in *R. v. Ward*, [1993] 1 W.L.R. 619. See also D.M. Lucas, "The Ethical Responsibilities of the Forensic Scientist: Exploring the Limits" (1989), 34 J. of Forensic Science 719.

Centre for Forensic Science are aware of this duty via this practice memorandum. Scientists from other laboratories should have this duty brought to their attention. An effective way of accomplishing this would be to include a copy of this practice memorandum with the letter of retainer. The information which ought to be provided in the report includes information about all tests conducted by the forensic laboratory in connection with or relevant to the case, including those with inconclusive or negative results. It does not necessarily include generally available background scientific information or opinion relevant to or used in interpreting the results of testing.

- c. **Case-conferencing:** The value of early case conferencing was highlighted by Mr. Justice Campbell in his 1996 *Bernardo Investigation Review*. Participation in case conferencing, where possible, will provide Crown counsel with the opportunity to clarify issues and establish an appropriate relationship with forensic scientists.

### 3. Retention of evidence for replicate testing

The hallmark of scientific reliability is the ability to reproduce a result. Therefore, wherever practicable, and upon completion of all relevant examination, sufficient material should be retained to allow for replicate testing by the defence. In cases where the initial examination has been completed and further examination is likely to consume or destroy the balance of the sample, scientists are encouraged to inform Crown counsel with carriage of the case<sup>3</sup> before embarking on further testing. Where forensic testing is likely to consume or destroy all of the original sample so that replicate testing by the defence will not likely be possible, scientists are encouraged to inform Crown counsel. This will enable Crown counsel to arrange for defence involvement in the examination process. **Where there is no defence representation at the testing (or where no accused has yet been identified) a complete record of the testing process must be maintained. The record must then be disclosed to the defence.** It is recognized, however, that any decisions affecting scientific examination must be subject to the general principle that delay may be detrimental to the examination and investigative processes.

*Reference should also be made to the Practice Memorandum on Defence Applications for Scientific Testing- PM[2006] No. 6.*

### 4. Retaining Other Expert Witnesses

The Centre of Forensic Sciences has expertise in many areas and should remain the laboratory of choice for expert evidence. If a science is not available at the Centre, the experts there will likely be able to direct Crown counsel to appropriate experts elsewhere. As well, the Office of the Chief Coroner is a helpful source of information about medical experts in a wide variety of subjects.

In any case in which it is proposed that the Crown should retain an expert witness (whether scientific or otherwise) for the purpose of giving evidence or assisting the Crown to prepare for

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<sup>3</sup> Where no Crown counsel has yet been assigned, scientists may consult with the Crown Attorney for the jurisdiction in which the offence was committed.

trial, the approval of the Director of Crown Operations for the region in which the prosecution originates, or the Director of the Crown Law Office-Criminal, as the case may be, must be obtained. Directors of Crown Operations may delegate their authority in respect of approving such expenditures to Crown Attorneys within their region. In the case of prosecutions conducted by the Crown Law Office-Criminal, the Director may delegate his/her authority to the appropriate Deputy Director.

## **5. Duty to obtain written record of information provided by scientists**

Where any action<sup>4</sup> taken by Crown counsel that affects an accused or suspect, is based on an opinion or report of a forensic scientist that opinion or report should be reduced to writing, unless it is impractical to await a written record. Where a written record is not obtained prior to any such action, it should be obtained as soon as practicable afterward.

Where Crown counsel takes any action based upon the oral representation of a forensic scientist and the written record subsequently reveals that the action was based on a misapprehension of the available forensic evidence, Crown counsel should take corrective action. The nature of the corrective action will depend on the circumstances, but would include the immediate disclosure of the written record to the defence, in accordance with Crown policy and practice memoranda and, in appropriate cases, to the Court. Crown counsel should also reassess any actions taken in reliance upon the misapprehended evidence.

## **6. Disclosure**

As noted, scientific evidence can play a significant, indeed determinative, role in a criminal trial. The duty of disclosure is, as in other areas, a critical part of the Crown's role in cases where scientific evidence will be adduced as part of the prosecution case, or where it might form part of the case for the defence.

- a. Disclosure of reports and notes of scientists: The reports of forensic scientists, consulted by the police during their investigation or retained by the Crown to give evidence must be disclosed to the defence.** The defence is also entitled to disclosure of any requested underlying materials contained in the case file. In those exceptional cases where the volume of material requested or other considerations make it impracticable to provide disclosure copies, Crown counsel should assist in making satisfactory arrangements for defence access to the material.
- b. Notice of intention to call expert evidence:** Section 657.3 of the *Criminal Code*, found in Part XX under the heading "Expert Testimony", sets out rules for both the

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<sup>4</sup> "Any action" includes, for example, decisions regarding bail, advice on deciding whether to lay a charge, accepting a guilty plea to an included offence and withdrawal of charges.

Crown and Defence regarding their respective obligations to provide notice of an intention to call an expert witness, disclosure of the report or anticipated evidence, and the consequences for non-compliance. A Sample Notice is attached (Attachment #2).

- c. **New or conflicting information arising from interviews with forensic scientists:** Wherever practical, a police officer or other appropriate third person should be present for any interviews conducted with forensic scientists, in preparation for his or her testimony at trial. **If the witness provides new information, or information that apparently conflicts with his or her prior statements or report, that information, along with the general circumstances in which it came to light, should be recorded in writing and must be disclosed.**
- d. **Consultation with Forensic Scientists and Trial Preparation:** The Crown policy and practice memorandum on Disclosure provide that Crown counsel generally need not disclose internal Crown counsel notes, memoranda, correspondence or legal opinions. Such material, reflecting only the thought processes and strategies of counsel, is regarded as work product, and as such as privileged.

Where scientific evidence is adduced at a trial, Crown counsel may retain an expert to provide advice on questions to be asked in cross-examination of defence experts, reference materials to assist counsel, and to advise on the strengths and weaknesses of the opposing expert and the expert's report. Such expert advice need not be disclosed to the defence as it relates to trial strategy and the examination and cross-examination of witnesses. However, an expert witness appearing for either the Crown or the defence may be asked if he or she participated in preparing counsel to examine the opposing expert as it may be relevant to the former's impartiality. (See the *Martin Committee Report*).

Where the Crown is given notice of an intention on the part of the defence to call a particular expert witness, the prosecutor may, as part of her or his preparation, review transcripts of previous testimony in court or treatises or reports authored by the witness. **Transcripts of previous testimony in court, or treatises or reports, authored by an anticipated defence witness, must be disclosed to the defence, if it is proposed to use them to impeach the defence expert.** *Reference should also be made to the Crown policy and practice memorandum on Disclosure.*

## 7. Presenting Forensic Scientific Evidence at Trial

Counsel with carriage of particular prosecutions are responsible for determining how best to present individual cases in a manner consistent with their various duties. The following observations are not intended to limit the otherwise broad discretion vested in counsel in this regard. Scientific evidence should be presented in such a way that everyone involved (witness counsel, judge, jury) understands the evidence and its relationship to the issues in the case. In cases tried by a jury this is particularly challenging for counsel.

- a. **Pre-trial Conferences:** In many cases, much of the evidence to be presented by a scientist will be agreed upon between the parties. The basic science behind DNA testing, for example, is now rarely challenged. Counsel should consider using pre-trial conferences to determine the real areas of dispute with respect to proposed evidence of a scientific nature, so as to focus the presentation of such evidence on those real issues. It

may be that in such pre-trial discussions it will become apparent that further consultation with the scientist might resolve some outstanding issues. It is appropriate in such cases for the Crown to seek such additional consultation. Where there is no real issue respecting aspects of the proposed evidence, those aspects may be presented in the form of admissions or in the form of a report from an expert.

- b. Visual Aids:** The presentation of difficult scientific evidence can be greatly enhanced by the use of visual aids (overhead slides, computer projections, charts, demonstrations, videotaped tours of facilities). It could be dangerous to use a visual aid in court without first reviewing it with the scientist to ensure that it accurately conveys the true force and effect of the evidence. If it is proposed that such aids are to be used to make scientific evidence more understandable to the jury, their use should first be canvassed with the judge out of the presence of the jury, and most often in a pre-trial conference or motion prior to the selection of the jury. Where such aids are used they should be properly exhibited and thereby entered into the record. If aids include audiovisual presentations (overhead projections or slides), Crown counsel should endeavour to preserve the record by attempting to have the material made an exhibit, and where appropriate, making observations on the record.
- c. Technical Terminology:** In presenting expert evidence it is important to remember that many scientific fields use technical terms which may have different meanings or connotations in normal discourse. Counsel presenting scientific evidence to a jury should take care to ensure that the expert's opinion is expressed in terms which permit the jury to either appreciate the significance of such technical language or that these terms are appropriately translated to less technical ones.
- d. Misleading or Inaccurate Impressions:** The objective of the Crown should always be to see that the expert's opinion is presented to the jury with nothing more or less than its legitimate force and effect. It is important that experts understand that, if they are concerned that their evidence has left a misleading or inaccurate impression with the trier of fact, they should relay that concern to Crown counsel, as soon as possible. The expert must take care that Crown counsel understands the nature and significance of his or her concern. Counsel should be aware that scientists from the Centre of Forensic Sciences are alive to this obligation.

Depending on the circumstances, the expert may choose to either provide Crown counsel with a brief, written summary of his or her concerns, or simply initiate a discussion of the issue with Crown counsel. Because such discussions may become matters of evidence, they must take place in the presence of a police officer. **An expert's concerns must be immediately disclosed to the defence and, in appropriate circumstances, conveyed to the Court.**

If the witness is under cross-examination and, therefore, is unable to immediately communicate the concern to the Crown, he or she should raise the issue with the Court, in the absence of the jury.

**Attachments:** Attachment #1 - Rules of Professional Conduct – Canadian Society of Forensic Science

Attachment #2 - Sample Notice

**Contact Person:** Criminal Law Policy Branch  
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**Signed by:**  
Paul Lindsay  
Assistant Deputy Attorney General  
Criminal Law Division

**Practice Memoranda are not considered to be confidential and may be given to defence counsel or other interested parties, upon request.**

#### **MANDATORY LANGUAGE**

**Where there is no defence representation at the testing, (or where no accused has yet been identified), a complete record of the testing process must be maintained. The record must then be disclosed to the defence**

**The reports of forensic scientists, consulted by the police during their investigation or retained by the Crown to give evidence must be disclosed to the defence.**

**If the witness provides new information, or information that apparently conflicts with his or her prior statements or report, that information, along with the general circumstances in which it came to light, should be recorded in writing and must be disclosed.**

**Transcripts of previous testimony in court, or treatises or reports, authored by an anticipated defence witness, must be disclosed to the defence, if it is proposed to use them to impeach the defence expert.**

**An expert's concerns (about whether his/her evidence has left a misleading or inaccurate impression with the trier of fact) must be immediately disclosed to the defence and, in appropriate circumstances, conveyed to the Court.**