

NOVA SCOTIA
TESTIMONIAL AIDS PROTOCOL
FOR VULNERABLE CROWN WITNESSES
AND PERSONS PRESENTING IMPACT STATEMENTS

1.0 BACKGROUND

On July 23, 2015 the *Canadian Victims Bill of Rights Act* came into force and expanded the use of testimonial aids for vulnerable witnesses. Section 13 of the *Act* states: Every victim has the right to request testimonial aids when appearing as a witness in proceedings relating to the offence. Under Section 486 of the *Criminal Code*, certain groups of witnesses have the opportunity to access testimonial aids¹, on application to the court by either the Crown Attorney or the witness. The groups of witnesses are:

- a) **All child victims/witnesses under the age of 18 - regardless of the offence involved.**
- b) **All witnesses with a mental or physical disability (including intellectually disabled witnesses) that would make it difficult to communicate evidence.**
- c) **Other witnesses - the court would take into consideration individual circumstances including: age; disability, if any; nature of offence; the victim/accused relationship; security, intimidation and/or retaliation issues; society's interest in encouraging reporting and participation by victims and witnesses; and any other factor that the court considers relevant when determining if a testimonial aid should be used. An example of a vulnerable witness in this category could be a victim of domestic violence, without a disability, aged 18 or over.²**

In the case of a) and b) above, the court shall grant the application unless the use of testimonial aids is deemed to interfere with the proper administration of justice.

In the case of c) above, the court upon application, may order the use of a testimonial aid if the Judge or Justice is of the opinion that the order would facilitate the giving of a full and candid account.

Amendments under the Canadian Victims Bill of Rights legislation also introduced the use of testimonial aids for the presentation of Victim Impact Statements and Community Impact Statements under section 722 of the *Criminal Code*.

¹ While there are other testimonial aids and procedures such as access to a support person and an application so the accused does not personally cross-examine the witness, the focus of this protocol will be on testimonial aids and procedures that require specialized equipment including videoconferencing, testimonial screens and video play-back devices.

² Other possible examples include victims of sexual violence, elderly victims in home invasion cases, witnesses in homicide cases, witnesses in drug offences, witnesses in gang-related crimes, witnesses testifying from outside of the region, etc.

For Victim Impact Statements, it states:

The court shall, on the request of a victim, permit the victim to present the statement by

- a) reading it;
- b) reading it in the presence and close proximity of any support person of the victim's choice;
- c) reading it outside the courtroom or behind a screen or other device that would allow the victim not to see the offender; or
- d) presenting it in any other manner that the court considers appropriate.

For Community Impact Statements, Criminal Code section 722.2 (3) states:

The court shall, on the request of the individual making the statement, permit the individual to present the statement by

- a) reading it;
- b) reading it in the presence and close proximity of any support person of the individual's choice;
- c) reading it outside the court room or behind a screen or other device that would allow the individual not to see the offender; or
- d) presenting it in any other manner that the court considers appropriate.

2.0 PURPOSE

This protocol strives to provide role clarity to Crown Attorneys, Defense Counsel including Legal Aid, Court Services Division, Sheriff Services, Information Technology Services and Victim Services to ensure when an application for testimonial aids has been ordered by the court, that proceedings will not be unduly delayed by uncertainties regarding responsibility, procedure, equipment and/or technology.

The protocol applies to the preliminary hearings, trials and sentencing hearings at the Provincial Court level as well as to trials and sentencing hearings in Supreme Court where a vulnerable witness or victim witness testifies involving:

- 1) Video-recorded evidence (Criminal Code section 715.1 and 715.2);
- 2) Videoconferencing, closed circuit television or similar technology; and/or
- 3) Viva voce testimony in the courtroom behind a screen.

These guidelines, though intended to be addressed and used in every case of a prosecution, are subject to variation and flexibility depending on the circumstances of each particular case.

3.0 GUIDING PRINCIPLES

The over-riding principle associated with this protocol is to encouraging witnesses to participate in the criminal justice system "through the use of protective measures that seek to facilitate the participation of children and other vulnerable witnesses while ensuring that the rights of the accused person are respected....", as stated in the preamble of the earlier amendments regarding testimonial aids in 2006.

This protocol also recognizes that all vulnerable witnesses have the right to apply for testimonial aids that would assist them in providing a full and candid account of the evidence. It should be noted that any reference to witnesses in this protocol includes victim-witnesses.

It is recognized that all victim-witnesses should be referred by Public Prosecutions to Victim Services (see section 5.0 Roles and Responsibilities) as early in the process as possible. This ensures that victims have access to all victim services and that they are well informed about the court process and their rights.

4.0 PROTECTION OF VULNERABLE WITNESSES (GENERAL)

A Crown Attorney will, in every case, consider the appropriateness of calling a vulnerable witness to testify *viva voce* before the court. Regardless of whether or not testimonial aids are used, Sheriff Services will be responsible for ensuring that reasonable efforts are made to protect the vulnerable witness from contact with the accused while inside the courthouse, as well as while inside the courtroom. If Victim Services is aware of a vulnerable witness who will be testifying, then Victim Services will alert Sheriff Services that special provisions are needed on a given court date to avoid such contact.

Outside the Courtroom

Prior to a vulnerable witness arriving outside the courtroom and to whatever extent is considered necessary and practicable in light of all the circumstances in each particular case and location, Victim Services, assuming that they have received a referral regarding the vulnerable witness, will take all reasonable steps to implement the following:

1. Victim Services would liaise with Sheriff Services and Court Services to determine what is available in each court facility in terms of waiting areas.
2. The vulnerable witness should be accompanied to the courthouse by at least one adult who could be a family member³, a police officer, a Victim Services Officer, a professional or other trusted adult, or in the case of a child, a child protection worker, a teacher, any other professional or trusted adult.
3. The accompanying adult should be advised by Victim Services or Sheriff Services to escort the vulnerable witness to a location in the courthouse which has been identified earlier and which is separate from the public areas of the building.
4. Outside the courtroom, direct contact between the vulnerable witness and the accused is to be avoided. Victim Services or Sheriff Services will discuss the best means of achieving this objective with the adult assigned to accompany the vulnerable witness to the courthouse.

Inside the Courtroom

Prior to a vulnerable witness being inside the courtroom and to whatever extent possible in consideration of the circumstances of each particular case and the rulings of the presiding Judge or Justice, the Crown Attorney will take all reasonable steps to implement the following guidelines:

³ In the case of a child, a non-offending parent could serve to accompany the child, if this parent has not be summoned to testify in the case. It should be noted that child protection workers cannot act as support persons if they have been summoned to testify. This also applies to other professionals and law enforcement personnel.

1. Where a vulnerable witness is required to testify inside the courtroom in the presence of the accused with or without a screen or other device, the Crown Attorney conducting the case will raise the issue of the physical location of the accused within the courtroom while the vulnerable witness testifies. This issue will be raised at the pre-trial conference (or the pre-appearance meeting, in the case of a preliminary inquiry)⁴ or with Defence Counsel in advance of the hearing.
2. Where the question of the physical location of the accused has not been ruled upon by the court and it appears that the accused and/or counsel are not cooperating in that regard on request, the Crown Attorney will consider a motion that the accused be directed to sit in a particular area of the courtroom when the vulnerable witness enters and during the vulnerable witness' testimony.

5.0 ROLES AND RESPONSIBILITIES

Court Services Division (Department of Justice)

Court Services Division is responsible to provide the equipment necessary for the viewing of video-recorded evidence in the courtroom, to identify and have available a testimonial room and equipment for use by a vulnerable witness when an application for videoconferencing is approved and to provide and install a testimonial screen when such a device is ordered. In addition, Court Services Division is responsible for all requirements related to court facilities, ie. a private location for a vulnerable witness to meet. Court Services Division is responsible for making the necessary arrangements for ensuring the equipment is available when ordered by the court.

Public Prosecution Service

The Public Prosecution Service is responsible to refer victim-witnesses to Victim Services as early in the process as possible, so Victim Services can discuss the testimonial aids need with the vulnerable witness and support person if appropriate. Victim Services will then advise the Crown Attorney of the testimonial aids being sought by providing written notice so the Crown Attorney can begin its early notifications to the Judge and Defence of the intent to make such applications.

The Public Prosecution Service is also responsible to notify the Court Administrator or designate at the earliest possible date of the intention to present video-recorded evidence in the courtroom. It is also responsible to notify Court Administration of its intention to apply for testimonial aids at the earliest opportunity. As well, the Crown Attorney is responsible to encourage the use of pre-trial conferences (or, in the case of preliminary inquiries, pre-appearance meetings) in order to determine the procedure when videoconferencing is ordered by the court.

Victim Services (Department of Justice)

The Department of Justice Provincial Victim Services Program will, upon receipt of a referral from the Crown Attorney or Court Services, talk with the direct victim and in the case of a child or vulnerable adult, with the appropriate family member or support person to explain the court process, make appropriate referrals and explain the range of victim services available to them. If necessary when the Crown is not agreeable to make an application for use of testimonial aids, the Victim Services staff will assist victim-witnesses in completing court application form 1. In terms of the court process, Victim Services will provide court preparation by explaining the court process and that, in accordance with the amendments, victims can request to testify behind screens, by means of videoconferencing and/or to have

⁴ Crown Attorneys shall inform Victim Services of the results of any conferences that relate to testimonial arrangements (as well as any other relevant matters) so that Victim Services may properly keep victims informed.

a support person with them when testifying. If victims wish to use testimonial aids, the application process will be explained and the Crown Attorney involved in the case will be advised by written notice that the victim wishes testimonial aids and/or a support person to be present. If the Crown Attorney is not agreeable to make the testimonial aid application, Victim Services staff can assist the victim/witness/family in making the court application. Link to website- See rule 2-Notice of Application-Form 1:

http://www.courts.ns.ca/Provincial_Court/NSPC_criminal_rules_forms.htm

Victim Services will attempt to arrange a support person for the victim where a family member as a support person is inappropriate or not possible. Support persons will be fully informed regarding their role with specific information provided regarding where to stand, what can and cannot be done (ie: no coaching, no non-verbal cues such as head nodding, no physical contact with victim-witness, etc.).

Once the victim has testified, the support person will accompany the victim and other family members to the Victim Services Office or to another location within the courthouse for debriefing and explanation of what will happen next in the case. This will include, but not be limited to, the victim and other indirect victims being advised that if the accused is found guilty, they can make victim impact statements and read them in court.

6.0 PRESENTATION OF VIDEO-RECORDED EVIDENCE

1. After the need for testimonial aids has been discussed with the vulnerable witness (and their support person in the case of children), Victim Services, mindful of the fact that the use of video-recorded statements still requires the vulnerable witness to testify and adopt the statement as well as be subject to cross examination, will then advise the Crown Attorney that the vulnerable victim wishes to use their video-recorded statement. The Crown Attorney will then assesses its admissibility as well as other issues to determine if there are any legal barriers to its use which would be explained to Victim Services and in some cases directly to the vulnerable victim and their support person when appropriate. If the Crown Attorney intends to introduce video-recorded evidence in accordance with section 715.1 and/or section 715.2 of the *Criminal Code*, the Crown Attorney is responsible for notifying Defence Counsel of the intention to introduce the recording(s) in evidence at the earliest possible date, as provided for in the Public Prosecutions policy and directives. The Crown Attorney will confirm with the Victim Services Officer at the earliest possible date of the intention to use video-recorded evidence.
2. The use of testimonial aids requires a court application so the Crown Attorney should write to Defence at the earliest possible date to advise what testimonial aids/procedures were being sought and in the absence of Defence agreement, file notice with the court to make application for such testimonial aids. If necessary, the Crown Attorney will request the use of a pre-trial conference (or a pre-appearance meeting in the case of a preliminary inquiry) as a method of seeking agreement on admissibility, procedure, technological requirements and any other preliminary matters.
3. Where the pre-trial conference (or pre-appearance meeting) is not used, the Crown Attorney should nevertheless disclose to the court in a timely fashion prior to the commencement of proceedings, its intention to enter video-recorded evidence at the time of the preliminary hearing or trial.
4. Once a decision has been made by agreement of Crown Attorney and Defence Counsel or by order of the court to enter a video-recording in evidence, the Court Administrator or designate

will be responsible for obtaining and installing the suitable video equipment and a monitor in the courtroom.

5. It is the responsibility of Court Services Division to ensure the functioning of the equipment and the optimum quality of audio and visual reproduction.
6. Where the issue of admissibility of video-recorded evidence has not been determined in advance of a proceeding by agreement of counsel or by a ruling which results from a pre-trial conference or pre-appearance meeting, the Crown Attorney will seek direction from the presiding Judge or Justice as to whether the video equipment should be installed or remain on standby at the time that the proceedings commence.
7. If videoconferencing is used, and the witness is asked to adopt the contents of the videotaped evidence, this will likely take place in the testimonial room, subject to court's preference.

7.0 USE OF VIDEOCONFERENCING

Application to the court for the use of videoconferencing may be made by the Crown Attorney, or in a circumstance where the Crown is not agreeable to make an application, the witness (or counsel) may make an application by completing the court application Form 1. Link to website- See rule 2-Notice of Application-Form 1:

http://www.courts.ns.ca/Provincial_Court/NSPC_criminal_rules_forms.htm

The court will then decide whether or not to approve the application, and if approved, will regulate the associated procedure. Videoconferencing equipment allows the witness (in a testimonial room) and those in the courtroom to engage in simultaneous visual and oral communication.

1. The final decision as to how the videoconferencing equipment will best meet the needs of the court will rest with the presiding Judge or Justice.
2. If the court has approved the application for videoconferencing, the Court Reporter is responsible for notifying the Court Administrator or his/her designate and the Victim Services Officer by email of the scheduled date for the videoconferencing proceeding and the details of the Order regarding how the Judge has ruled that the videoconferencing will work.
3. During the hearing or pre-trial conference, procedural items such as whether or not the witness will be in the testimonial room or in the courtroom for the following events: swearing in of the witness, inquiries under the *Canadian Evidence Act* into the witness' capacity to provide evidence, identification of the accused by the witness and the witness' adoption of the contents of videotape evidence presented in court will be decided by the Judge or Justice. The decision whether or not to invite the participation of the Court Administrator or his/her designate or any other person at the pre-trial conference (or pre-appearance meeting) rests with the Judge or Justice. The Crown Attorney shall inform Victim Services of the results of any pre-trial conferences that relate to testimonial arrangements (as well as any other relevant matters) so that Victim Services may properly keep victims informed.
4. The Court Administrator or his/her designate will be responsible for making space available for a testimonial room for the vulnerable witness. (S)he will also ensure that the proper equipment be in place for the scheduled appearance. A testing of the equipment must precede the actual appearance. At the time of the actual appearance, the testing of the equipment must include ensuring the accused is not visible to the vulnerable witness and the camera in the testimonial

room must be positioned so as to capture both the witness and the support person (if any) in the same frame. It is recognized that the set-up required for a testimonial room will require at **minimum seven working days'** notice to the Court Administrator or his/her designate unless the issues emerges during a late decision by a Judge (eg. Crown Attorney has made the application well in advance but the Judge has set over the decision to the day of preliminary hearing/trial or the issue has arisen mid-hearing with a witness "break-down").

5. The Court Administrator or designate will be responsible for ensuring that the designated space is suitably furnished to meet the needs of the vulnerable witness and any support person in attendance. The Victim Services Officer may request the Court Administrator or designate for a showing of the testimonial room prior to the appearance in order to help prepare the witness for the court appearance. The supervision of the installation of the videoconferencing equipment to whatever extent necessary, will be the responsibility of the Court Administrator or his/her designate (Court Services Division).
6. During the application for the use of videoconferencing equipment, the Crown Attorney will consult with Defence Counsel on the placement of the closed-circuit equipment, particularly in relation to the accused's ability to communicate with counsel while watching the testimony.
7. The Crown Attorney will also seek a consultation with the presiding Judge or Justice if the set up requirements were not fully determined during the application.

8.0 TESTIMONY IN THE COURTROOM BEHIND A SCREEN

1. Application to the court for the use of a testimonial screen may be made by the Crown Attorney, or in a circumstance where the Crown is not agreeable to make an application, the witness (or counsel) may make an application by completing the court application Form 1.
2. When the Crown Attorney intends to make application to use a testimonial screen that would allow the vulnerable witness not to see the accused, then (s)he will notify Defence Counsel, the Judge or Justice, the Victim Services Officer and the Court Administrator or his/her designate in a timely fashion prior to the commencement of the proceeding. Early notice to Defence Counsel can result in an agreement.
3. If as a result of the above notification, an agreement by counsel on the use of such a device does not result, the Crown Attorney will make application for a hearing before the court for a decision.
4. If a screen is ordered for use by the court, the Court Administrator or designate will provide such a device in consultation with the Crown Attorney conducting the case.
5. As appropriate, the roles and responsibilities of the various court system representatives and the process followed for videoconferencing applications will also be followed for testimonial screen applications.

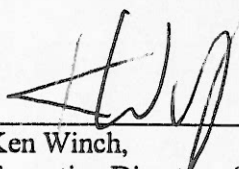
9.0 APPLICATIONS FOR TESTIMONIAL AIDS BY DEFENCE OR NON-CROWN WITNESSES

If applications are made to the court by Defence Counsel or non-Crown witnesses, it is the Defence Counsel's responsibility to make applications, schedule hearings and notify relevant parties of court orders.

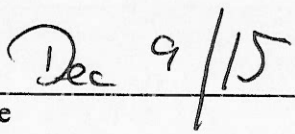
10.0 REQUESTS FOR TESTIMONIAL AIDS BY PERSONS PRESENTING IMPACT STATEMENTS

Persons requesting the use of testimonial aids such as access to a support person, videoconferencing outside of the courtroom, behind a testimonial screen or some combination of these testimonial aids when presenting victim impact statements or community impact statements should inform the court well in advance of the hearing date about the specific request so that the necessary arrangements can be made.


1. The Department of Justice Provincial Victim Services Program will, upon receipt of a referral or upon request by a person wanting to submit a victim impact statement or a community impact statement, inform the person of their rights and the provisions under the *Criminal Code* in relation to presenting an impact statement.
2. The Victim Services Officer will determine whether or not the person wants to read their impact statement in court. If the person wants to read their impact statement and if the person also requests the use of any testimonial aids, the Victim Services Officer, when submitting the completed impact statement package to the court, will include a cover letter with the package to the attention of the Court Administrator or designate, including details regarding the testimonial aids being requested.
3. The Court Administrator or designate will then distribute details regarding the request to the Crown Attorney, the Defence Counsel and the presiding Judge or Justice.
4. Logistics regarding the use of a support person, testimony from outside the courtroom or from behind a screen should be considered prior to the hearing by the Crown Attorney as identified earlier in this document.
5. If testimonial aid equipment is needed as part of the request, the Court Administrator or designate is responsible for making the necessary arrangements for ensuring the equipment is functional and is available for use at the hearing.



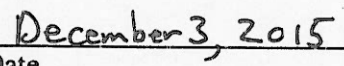
Ken Winch,
Executive Director of Court Services Division



Date



Martin Herschorn,
Director of the Public Prosecution Service



Date



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VIA EMAIL - WHITINDM@gov.ns.ca

Darlean Whiting
A/Manager Special Initiatives for Victims
Justice, Court Services Division
136 Charlotte Street
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Dear Darlean:

RE: Protocol for the Testimony of Vulnerable Crown Witnesses

The Nova Scotia Legal Aid Commission has had an opportunity to review the protocol referred to. As you know there was considerable discussion about whether Legal Aid should be a signatory to the protocol.

We have examined the protocol carefully. It applies, for the most part, to Victim Services and has directions for the Crown and Victim Services when dealing with vulnerable witnesses. There is very little direction, if any, for the defence bar.

Nova Scotia Legal Aid appreciates having been consulted on the process and hope our input has been valuable. As you know, we also attempted to engage the private bar.

Upon final reflection, we have decided that this is a protocol that ought not to be signed by Nova Scotia Legal Aid and we suggest that you move the protocol forward without our signature.

Yours/sincerely,



Peter Mancini, QC
Service Delivery Director

PM/bb
File: 1073