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CHAPTER VII – CHAPITRE VII : Pre-trial, Trial, and Appel Matters Questions avant le procès, pendant le procès et en appel	Readers are referred to the list of Related Documents at the end of this Policy for additional information. Les lecteurs peuvent se référer à la liste des documents connexes notés à la fin de cette politique pour information supplémentaire.	

DISCLOSURE

1. Introduction

The purpose of disclosure is to ensure that the accused can exercise his or her right to make full answer and defence, a common law right enshrined in section 7 of the *Charter of Rights*. The Crown has a duty to disclose all relevant information in the Crown's possession to the accused.

2. Statement of the Policy

Subject to specific exceptions detailed in this Policy, the Crown Prosecutor shall disclose to the accused all information in the Crown's possession that is relevant to the guilt or innocence of the accused for the charge to which he or she is subject.

Information is relevant if it is related to evidence the Crown Prosecutor intends to adduce at trial or if there is a reasonable possibility that it may assist the accused in the exercise of his or her right to make full answer and defence. Information may be relevant regardless of whether it is credible or admissible as evidence. When determining the scope of relevance, the Crown Prosecutor should err on the side of inclusion rather than exclusion and disclose all information unless it is clearly irrelevant.

Information is in the Crown's possession if it is in the Crown's file or in the possession of the police or other investigative agency that conducted the investigation. Where the Crown Prosecutor believes that the police, other investigative agency, or another Crown agency or department is in possession of relevant information that is not in the Crown file, the Crown Prosecutor shall make all reasonable inquiries and requests to ensure that all relevant information is provided to the Crown Prosecutor and subsequently disclosed to the accused. Where the Crown Prosecutor makes a request for information that is refused, the Crown Prosecutor shall so advise the accused.

3. Information to be Disclosed

In general, and subject to the exceptions detailed in this Policy, the Crown Prosecutor shall disclose to the accused a copy of the following:

- (a) the Information or Indictment;
- (b) a summary of the circumstances of the alleged offence, any court briefs and summaries, any police or other investigative agency reports prepared by the police or other investigating agency, and any notes taken by investigators;

- (c) any written statement made by the accused;
- (d) any audio or video recording, notes or transcript of any verbal statement made by the accused;
- (e) any written statement made by a person who provided relevant information to the investigating agency, regardless of whether the Crown Prosecutor intends to call the person as a witness;
- (f) any audio or video recording, notes or transcript of any verbal statement made by a person who provided relevant information to the investigating agency, regardless of whether the Crown Prosecutor intends to call the person as a witness;
- (g) the criminal history of the accused;
- (h) the criminal history of any alleged accomplice, regardless of whether that person has been charged, where the record is requested by the accused;
- (i) the criminal history of any Crown witness, where the record is requested by the accused and is relevant to an issue in the case or to the credibility of the witness;
- (j) the criminal history of a witness for the accused, where the record is requested by the accused;
- (k) any document containing information which the accused may legally use to impeach the credibility of a Crown witness;
- (l) any document containing information regarding any benefits or consideration requested, discussed, provided or intended to be provided to a witness;
- (m) any medical, laboratory or other expert report in the Crown's possession;
- (n) any Information to Obtain a search warrant, any search warrant and any list of items seized pursuant to the search warrant, unless the search warrant has been sealed;
- (o) any list of exhibits seized and in the possession of the police or other investigating agency;
- (p) any intercepted private communications, any judicial authorization under which the communications were intercepted, and, where available, any transcript of the communications, as set out in section 7 below;
- (q) particulars of any similar fact evidence;
- (r) particulars respecting any identification evidence used outside of court to identify the accused;
- (s) any record of police or other investigative agent misconduct as set out in section 9 below;
- (t) any information that may be relevant to the jury selection process; and
- (u) any information that may bear on juror selection.

4. Information Not to be Disclosed

In general, and in accordance with this Policy, the Crown Prosecutor shall not disclose information that

- (a) is protected by informer privilege;
- (b) is protected by solicitor-client privilege;
- (c) is protected by work product privilege;

- (d) is protected by a common law or statutory privilege, unless the privilege has been waived or the disclosure has been judicially authorized;
- (e) may reveal confidential investigative techniques;
- (f) may be considered a cabinet confidence under section 39 of the *Canada Evidence Act*;
- (g) would jeopardize the safety of a witness or third party;
- (h) would be injurious to international relations or national defence or security; or
- (i) cannot otherwise be lawfully disclosed.

Public Prosecution Services has requested that police, or other investigative agents, highlight any part of a document or file they believe should not be disclosed. This practice assists the Crown Prosecutor in vetting information for disclosure.

5. Timing of Disclosure

5.1 Initial Disclosure

Once an Information or Indictment has been laid charging an accused with an offence or the charge has been approved, the Crown's duty to disclose is triggered by a request by or on behalf of the accused.

Where disclosure is requested by the accused, the Crown Prosecutor shall ensure that disclosure is provided promptly.

Where the accused is not represented by counsel and has not requested disclosure, the Crown Prosecutor shall ensure that the unrepresented accused has clearly indicated that he or she does not wish disclosure before a guilty plea is entered. Where an unrepresented accused indicates an intention to plead guilty to an offence for which there will likely be a significant term of imprisonment, the Crown Prosecutor shall consider suggesting that an adjournment may be in order to permit disclosure to the accused.

5.2 Ongoing Disclosure

The Crown's duty to disclose is ongoing. Where a Crown Prosecutor receives relevant information after the initial disclosure has been provided to the accused, the Crown Prosecutor shall disclose that information to the accused promptly. For example, where the Crown Prosecutor acquires previously undisclosed relevant information when interviewing a witness, that information may be disclosed in a letter to the accused.

Where a Crown Prosecutor receives potentially exculpatory information following the conviction of the accused, the Crown Prosecutor shall disclose that information to the accused promptly, regardless of whether an appeal is pending or has been decided.

5.3 Delayed Disclosure

The Crown Prosecutor may delay the disclosure of information to the accused where the Crown Prosecutor believes that it is necessary to do so in order to

- (a) protect the identity of an informant;
- (b) preserve a privilege;
- (c) comply with a court order;
- (d) prevent prejudice to an ongoing investigation;

- (e) prevent investigative techniques from being revealed;
- (f) respect a constitutional, common law or statutory right;
- (g) protect the safety or security of any person;
- (h) protect any person from harassment or threats; or
- (i) seek judicial review of a request for disclosure.

5.3.1 Procedure for Delayed Disclosure

Where delaying disclosure, the Crown Prosecutor shall

- (a) be of the opinion that to do so would not compromise unfairly the accused person's ability to make full answer and defence;
- (b) obtain the informed consent of the Regional Director or the Director of Specialized Prosecutions; and
- (c) advise the accused, in writing, of the nature of the information being withheld and the reason for withholding the information, unless doing so would jeopardize the confidentiality of the information.

Where the Crown Prosecutor has delayed the disclosure of information, the Crown Prosecutor shall disclose the information to the accused as soon as the reason for the delay has ceased to exist and, in any event, before the trial.

5.4 Permanent Non-disclosure

Permanent non-disclosure of relevant information will only be justified where

- (a) a court so orders or, upon judicial review, a court declines to interfere with the Crown Prosecutor's exercise of discretion not to disclose the information; or
- (b) disclosure has been delayed in accordance with this Policy, the accused has been so notified, the conditions justifying non-disclosure continue to exist, and there is no application for judicial review of the prosecution's withholding of disclosure.

6. Manner of Disclosure

The Crown Prosecutor has discretion as to the manner in which disclosure is to be provided. As a general rule, the most common manner of disclosure is by the provision of copies of the required material at no cost to the accused. These copies are typically provided upon conditions that stipulate the use that can be made of the material and restrict its further dissemination. Where information has been requested by the accused, the Crown Prosecutor shall ensure that the Request for Disclosure (Appendix A) has been completed. The Request for Disclosure shall be completed for the initial and all subsequent disclosure.

Where relevant information cannot be disclosed in the manner mentioned above, the Crown Prosecutor shall disclose the material in an appropriate manner as set out below or may exercise his or her discretion to disclose the material in any other appropriate manner.

6.1 Disclosure of Witness Information

Where the Crown Prosecutor withholds from the accused the name, location, telephone number and fax number of any person who has provided a statement containing relevant information, as contemplated in

this Policy, and the accused requests such information for the purpose of conducting a pre-trial interview, the Crown Prosecutor shall

- (a) advise the accused that the witness will be contacted and advised of the request; and
- (b) contact the witness to advise him or her of the request.

The Crown Prosecutor shall advise the witness that he or she has the right to consent to or decline such an interview. Under no circumstances shall the Crown Prosecutor discourage a witness from consenting to such an interview. The Crown Prosecutor shall also advise the witness of his or her rights and obligations as a witness and of the procedure regarding pre-trial interviews outlined in Policy 32, Witnesses.

Where a witness elects not to consent to such an interview, the Crown Prosecutor shall advise the accused.

Where a witness consents to such an interview, the Crown Prosecutor shall

- (a) advise the accused; and
- (b) provide the witness with the contact information of the accused or the accused person's counsel.

6.2 Disclosure by Controlled Access

Where the circumstances warrant as set out below, or the accused is not represented by counsel, the Crown Prosecutor may provide disclosure by means of controlled access to the materials, which means providing access to the materials in a supervised but private setting.

The Crown Prosecutor may also provide disclosure by means of controlled access where the Crown Prosecutor is concerned that providing copies of the materials to the accused would result in the harassment of any person; would jeopardize the safety, security, or privacy interests of any person; and in the specific circumstances enumerated below.

6.2.1 Disclosure of Sensitive Audio and Visual Information

The subject matter of some material engages such extreme personal privacy interests and is so vulnerable to misuse that it merits special consideration and protection in the disclosure process. For example, the risk of harm from the improper use of sensitive materials, such as videotapes or photographs that depict or describe sexual child abuse, is so great that there is a heightened public interest in ensuring that these materials are not improperly disseminated or misused during or after criminal proceedings.

Where the Crown has possession of such material, including a statement made by a potential witness who is a vulnerable person, a child, or a victim of a sexual assault, the Crown Prosecutor shall ensure that the Undertaking and Trust Conditions on Disclosure (Appendix B) has been completed.

Where the Crown has possession of such material and the accused is not represented by counsel, the Crown Prosecutor shall not provide a copy of the material to the accused but shall ensure that the accused has been provided with an opportunity for disclosure by controlled access.

6.2.2 Disclosure of Material That Constitutes the Offence

The manner of disclosure is of critical concern where the material that is to be disclosed is not only evidence, but constitutes the offence itself or constitutes a separate offence (prohibited material). Examples of material that constitute the offence include

- (a) a video recording of the act that constitutes a sexual touching in a prosecution for sexual interference under section 151 of the *Criminal Code*;
- (b) an obscene photograph in a prosecution for distributing obscene material under subsection 163(1) of the *Criminal Code*;
- (c) a pornographic image in a prosecution for possessing, making, or distributing child pornography under section 163.1 of the *Criminal Code*; or
- (d) an audio recording of the accused person's statement in a prosecution for advocating genocide under subsection 318(1) of the *Criminal Code* or promoting hatred under subsection 319(2) of the *Criminal Code*.

Disclosure in such prosecutions requires a careful balancing between the accused person's constitutional right to information required to make full answer and defence, the privacy rights of any person depicted and the public interest in preventing the dissemination or other improper use of the prohibited material.

Where the Crown's obligation to disclose information as outlined in this Policy requires the disclosure of prohibited material, disclosure shall be provided by controlled access, unless prior authorization for an alternative method of disclosure is granted by a court order, the Regional Director, the Director of Specialized Prosecutions, or the Director of Public Prosecutions or his or her designate.

The following criteria shall apply to the consideration by the Regional Director, the Director of Specialized Prosecutions, or the Director of Public Prosecutions or his or her designate, of whether to authorize an alternative method of providing disclosure:

- (a) the nature of the prohibited material;
- (b) the scope of the risk to the privacy interests of any person depicted in any offensive written, audio, or visual material;
- (c) the volume of the material and its direct relevance to the proceedings;
- (d) whether it would result in undue hardship for the accused or counsel; and
- (e) the ability of appropriately crafted trust conditions or technical means to offset privacy and public interest concerns otherwise endangered by disclosure.

6.3 Disclosure Where the Accused is Charged With a Sexual Offence

Sections 278.1 to 278.91 of the *Criminal Code* govern the disclosure of certain records relating to a complainant or witness where the accused is charged with a sexual offence. Under these provisions, where a Crown Prosecutor has possession or control of a record that contains personal information for which there is a reasonable expectation of privacy, the Crown Prosecutor

- (a) must notify the accused that the Crown Prosecutor is in possession or control of the record; and
- (b) must not disclose the record to the accused, unless ordered by the court, or the person to whom the record relates expressly waives the application of sections 278.1 to 278.91 of the *Criminal Code*.

The Crown Prosecutor shall not provide any advice to a complainant or witness regarding the waiver of the application of these provisions, and shall advise the complainant or witness to seek independent legal advice.

Where the complainant or witness decides to waive the application of these provisions, the Crown Prosecutor shall ensure that the complainant or witness has completed a waiver form (see Appendix C) before disclosing the record to the accused.

7. Intercepted Private Communications

All matters concerning disclosure related to intercepted private communications authorized under Part VI of the *Criminal Code* shall be referred to the Director of Specialized Prosecutions for assignment.

1.1 Information to be Disclosed

1.1.1 Disclosure of Intercepted Private Communications

The Crown Prosecutor shall disclose to the accused any intercepted private communications where the private communications are in the Crown's possession and have not been identified as being clearly irrelevant.

The Crown Prosecutor shall disclose to the accused a statement respecting the time, place, and date of any intercepted private communications, where the private communications are in the Crown's possession.

1.1.2 Notice of Intention to Adduce Derivative Evidence

The Crown Prosecutor shall give the accused reasonable notice of an intention to adduce evidence derived from the interception of a private communication together with a transcript of the private communication, or a statement setting out full particulars of the private communication, as appropriate, and a statement respecting the time, place, and date of the private communication and parties thereto, if known, pursuant to section 189 of the *Criminal Code*.

1.2 Information not to be Disclosed

Where the Crown Prosecutor determines that an intercepted private communication is clearly irrelevant, or otherwise exempt from disclosure, he or she shall not disclose the private information, but shall list it, together with a brief description, in the Disclosure Brief under the heading "List of Items Not Disclosed".

1.3 Disclosure by Controlled Access to Counsel for the Accused

Where counsel for the accused identifies information contained in intercepted private communications thought to be relevant, the Crown Prosecutor may either disclose the information to the accused, or refuse to disclose the information and advise counsel for the accused to seek an order for disclosure.

Where the Crown Prosecutor decides, or is ordered by the court, to disclose intercepted private communications to counsel for the accused, the Crown Prosecutor will facilitate the disclosure by controlled access in appropriate situations, as set out in section 6 above, or where disclosure by controlled access is ordered by the court.

8. Third Party Records

Where the accused requests information that is not in the Crown's possession, the Crown Prosecutor shall advise the accused, in writing and in a timely manner, that the information is not in the Crown's possession.

Where the Crown Prosecutor gains knowledge that a third party is in possession of relevant information, he or she shall disclose the fact of the existence of that information to the accused.

Where the Crown Prosecutor gains knowledge of any relevant information that is subject to a recognized privacy right, the Crown Prosecutor shall disclose the fact of the existence of that information to the accused.

Where another Crown agency or department could reasonably be considered to be in possession of relevant information, the Crown Prosecutor shall make reasonable inquiries of the other Crown agencies

or departments and disclose any relevant information so obtained to the accused. Where the Crown Prosecutor makes a request for information that is refused, the Crown Prosecutor shall so advise the accused.

Where a record produced by a third party is in the possession of the Crown, disclosure is not automatic. Unless the person to whom the information pertains has waived his or her rights, that person still has a privacy interest in the records.

9. Misconduct of Police or Other Investigative Agents: *McNeil* Disclosure

In *R. v. McNeil*, 2009 SCC 3, the Supreme Court of Canada established that in certain circumstances the police or other investigative agency must provide to the Crown records regarding police or other investigative agent misconduct, and the Crown must disclose these records to the accused.

In order to enable the Crown to meet its disclosure obligations the police or other investigative agency shall provide to the Crown, in relation to all police or investigative agents listed in the prosecution file, the following information:

- (a) a brief description of any conviction or finding of guilt for an offence under any federal or provincial statute, unless
 - (i) a pardon has been granted with respect to the offence;
 - (ii) the conviction or finding of guilt is for a minor traffic infraction or other minor regulatory offence; or
 - (iii) disclosure is prohibited by a Statute of Canada, such as the *Criminal Records Act* or the *Youth Criminal Justice Act*.
- (b) a brief description of any outstanding charge under any federal or provincial statute, unless the charge is for a minor traffic infraction or other minor regulatory offence;
- (c) a brief description of any finding of misconduct under any federal or provincial statute relating to policing, including the *Royal Canadian Mounted Police Act* and the *Police Act*;
- (d) a brief description of any current complaint of misconduct under any federal or provincial statute relating to policing, including the *Royal Canadian Mounted Police Act* or *Police Act* for which a notice of hearing has been issued; and
- (e) materials relating to complaints and investigations regarding police or investigative agent conduct arising from the same incident that forms the subject-matter of the charge against the accused.

Where the Crown Prosecutor believes that the police or other investigative agency may be in possession of information about a police officer or other investigative agent, relating to misconduct that is not in the Crown's file, the Crown Prosecutor shall request that the police or other investigative agency provide this information.

The Crown Prosecutor shall review any information regarding a police officer or other investigative agent misconduct provided by the police or other investigative agency. If the Crown Prosecutor is of the view that any part of the materials regarding a police officer or other investigative agent is appropriate to disclose the Crown Prosecutor shall notify in writing the peace officer(s) implicated in the misconduct and invite written submissions on the extent of disclosure for consideration by the Crown. If the Crown Prosecutor ultimately decides to disclose any portion of materials relating to prior misconduct of an investigator, said investigator shall be notified in advance of disclosure being made.

When the Crown Prosecutor ultimately makes any such disclosure, the Crown Prosecutor shall require a further written undertaking from defence counsel which is separate and apart from the standard defence counsel undertaking. This undertaking will specify that the information is to be used only to make full answer and defence to the charges before the court, and that the information is not to be disseminated or used for any other purpose whatsoever.

10. Lost or Destroyed Materials

Where any relevant information or potential exhibit or physical evidence has been lost or destroyed, the Crown Prosecutor shall advise the accused of the materials lost or destroyed and summarize the circumstances of the loss or destruction.

11. Disclosure Costs

Each accused is entitled to the provision of one copy of the required disclosure material for which he or she shall not be charged. Where an accused requests an additional copy or copies of the disclosed material, the accused may be charged a reasonable fee for it.

In appropriate circumstances, where it would not cause undue hardship to the accused or counsel for the accused, the Crown Prosecutor may provide disclosure by access rather than producing copies.

12. Translation of Materials

In appropriate circumstances, Public Prosecution Services will arrange and pay for the translation of the information disclosed from French into English or from English into French.

Where a Crown Prosecutor receives a request for the translation of some or all of the information disclosed to the accused, the Crown Prosecutor shall consult with the Regional Director or the Director of Specialized Prosecutions to determine the appropriate course of action.

In general, the most appropriate course of action will be to

- (a) grant the request for translation where the accused cannot understand the language in which the information was disclosed; and
- (b) refuse the request for translation where the accused can understand the language in which the information was disclosed, regardless of whether counsel for the accused can understand that language.

Where the accused requests the translation of a significant volume of information, the Regional Director or the Director of Specialized Prosecutions shall consult with the Director of Public Prosecutions to determine the appropriate course of action.

Where a request for translation is granted, the Crown Prosecutor, the Regional Director, or the Director of Specialized Prosecutions shall forward the request to the Director of Public Prosecutions or his or her designate, who shall arrange for the translation.

13. Record of Disclosure

The Crown Prosecutor shall retain any Request for Disclosure, Undertaking and Trust Conditions on Disclosure and Waiver completed by the accused or counsel for the accused. In addition, the Crown Prosecutor may require the accused or counsel for the accused to provide written acknowledgment of the disclosure materials provided.

Where, upon vetting, the Crown Prosecutor has provided a modified copy of a document to the accused, the Crown Prosecutor shall keep a copy of the modified or “vetted” version of the document as well a copy of the original “un-vetted” version the document.

14. Related Documents

Policy 4	Specific Delegations by the Attorney General
Policy 8	Judicial Pre-authorizations
Policy 28	Juror Eligibility
Policy 32	Witnesses
Policy 47	Language Rights