Policy of the Department of Justice Canada and the Canadian Security Intelligence Service on the Duty of Candour in *ex parte* Proceedings

This policy, adopted jointly by the Department of Justice and the Canadian Security Intelligence Service, sets out principles that should guide the discharge of the duty of candour by counsel acting for the Attorney General of Canada and Service officers appearing as witnesses, affiants or otherwise providing support in such matters.

1) The Duty of Candour

Both lawyers and witnesses owe important duties to the administration of justice. In their role as advocates, counsel must treat the court with "candour, fairness, courtesy and respect."[1] Witnesses, including affiants, owe similar duties: the Supreme Court has stated that affiants on search warrant applications owe duties of diligence, integrity, candour and full disclosure.[2]

> When seeking an *ex parte* authorization such as a search warrant, a police officer — indeed, any informant — must be particularly careful not to "pick and choose" among the relevant facts in order to achieve the desired outcome. The informant's obligation is to present all material facts, favourable or not.[3]

For counsel representing the Attorney General these duties are also grounded in the special role of the Crown. As the Supreme Court has stated:

> The Attorney General is not an ordinary party. This special character manifests itself in the role of Crown attorneys, who, as agents of the Attorney General, have broader responsibilities to the court and to the accused, as local ministers of justice.[4]

The general duty of candour is heightened in *ex parte* proceedings, where judges do not have the benefit of adversarial submissions. As well, for many national security matters, particularly warrant applications under s. 21 of the *CSIS Act*, the *ex parte* proceedings may never be subject to any sort of subsequent judicial scrutiny, such as an application to quash the warrant.

Both the Department and Justice and the Canadian Security Intelligence Service must take the steps necessary to support and enable the discharge of the duty of candour by counsel and witnesses.

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[1] Federation of Law Societies of Canada, *Model Code of Professional Conduct*, at http://flsc.ca/national-initiatives/model-code-of-professional-conduct/, 2016, ch 5.1, rule 5.1-1.
[2] *R v Morelli*, 2010 SCC 8, [2010] 1 SCR 253 at para. 102.
[3] *R v Morelli*, 2010 SCC 8, [2010] 1 SCR 253 at para. 58.
[4] *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 SCR 3 at para. 37. See also *Cosgrove v Canadian Judicial Council (FCA)*, 2007 FCA 103, [2007] 4 FCR 714 at para. 51.

The discharge of this duty requires considering the question of what *should* the Court know in order to adjudicate this particular warrant application in the context of its overall mandate to maintain a proper balance between state and individual interests under the *CSIS Act*.

While the policy primarily addresses applications for warrants presented to the Federal Court of Canada under section 21 of the *CSIS Act* where highly intrusive powers may be sought, the principles underlying this policy are equally applicable to any *ex parte* national security matter.[5]

2) The Governing Principles

a) Information must be presented completely, accurately, fairly and fully

The purpose of full, fair, and frank disclosure in *ex parte* proceedings is to preserve the integrity of the court's process:

> (…) the law imposes an exceptional duty on the party who seeks *ex parte* relief. That party is not entitled to present only its side of the case in the best possible light, as it would if the other side were present. Rather, it is incumbent on the moving party to make a balanced presentation of the facts in law.
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> The moving party must state its own case fairly and must inform the Court of any points of fact or law known to it which favour the other side. The duty of full and frank disclosure is required to mitigate the obvious risk of injustice inherent in any situation where a Judge is asked to grant an order without hearing from the other side.[6]

Full disclosure will also serve to safeguard the independence of the Court, and its ability to perform the important duties entrusted to it. Those goals cannot be achieved if a court is provided with an incomplete record or insufficient information. A party that selectively shapes the record before the court on an *ex parte* proceeding – even with a good faith belief that its choices are legally defensible –improperly arrogates to itself the role of decision-maker.

The Supreme Court has formulated the duty as follows:

> In all cases where a party is before the court on an *ex parte* basis, the party is under a duty of utmost good faith in the representations that it makes to the court. The evidence presented must be complete and thorough and no relevant information adverse to the interest of that party may be withheld.[7]

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[5] With appropriate adaptations, this would include for instance proceedings under s. 38 of the *Canada Evidence Act*, Division 9 of the *Immigration and Refugees Protection Act*, appeals under the *Secure Air Travel Act* and appeals and judicial reviews under the *Prevention of Terrorist Travel Act*.

[6] *United States of America v Friedland*, [1996] O.J. No. 4399 at para. 27.

[7] *Ruby v Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 SCR 3 at para. 27; *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37, [2014] 2 SCR 33 at para. 101

Satisfaction of this principle requires taking great care in presenting material to the court. It is not just a matter of conveying information accurately. Affiants must clearly distinguish between factual assertions and inferences, conclusions and opinions. Any information affecting the reliability of the information provided, including the credibility of the source of the information, must be made known to the court. Further, care must be taken to provide sufficient context to the facts presented for the court to be able to fully and fairly evaluate the reliability and significance.

> Concision, a laudable objective, may be achieved by omitting irrelevant or insignificant details, but not by material non-disclosure. This means that an attesting officer must avoid incomplete recitations of known facts, taking care not to invite an inference that would not be drawn or a conclusion that would not be reached if the omitted facts were disclosed.[8]

b) Counsel and affiants must be transparent

It is not enough to convey information fully and accurately. Counsel and witnesses such as affiants also must be transparent with the court. "Transparency" is often described as "frankness". The principle of transparency requires that the court be provided with sufficient factual and legal context to properly assess both the strengths and weaknesses of the application, factually and legally. Being transparent also means highlighting anything new or unusual about the application so that the court can properly be attuned to any such aspects.

The relevance of information to the decision the Court has to make on a warrant application cannot be determined solely by reference to the strict statutory requirements for issuance. The exercise of the court's discretion is informed by the broader context in which the warrant is issued. [9] This includes matters such as the potential impact of intrusive measures on third parties, the legal basis for the request (including any change in legal position from previous applications), and the intrusive capabilities of technological devices to be used in carrying out the warrant.

Provision of such information may be important to the court, for example, in determining whether or what kind of conditions should be part of the judicial order. Thus, affiants and counsel must pay particular attention to the need to provide the court with sufficient factual and legal context in which to assess not only whether the application should be issued but also the impact of its execution.

At the same time, the court should not be burdened with irrelevant information:

> Ideally, an affidavit should be not only full and frank but also clear and concise. It need not include every minute detail of the police investigation over a number of months and even of years.[10]

[8] *R v Morelli*, 2010 SCC 8, [2010] 1 SCR 253 at para. 58.
[9] *X (Re)*, 2016 FC 1105 at para. 107.
[10] *R v Araujo*, 2000 SCC 65, [2000] 2 SCR 992 at para. 46.

c) Errors in the authorization or its execution must be brought to the court's attention promptly

Even with meticulous attention to detail, mistakes will happen. Where it is discovered that there was a material error in the application materials or the court's order, or the order has been carried out in a manner that does not comply with the terms of the authorization, the court must be advised promptly. Errors in execution may also require notification of others, such as the Security Intelligence Review Committee, but the duty to report to the court exists independently of any other legal obligation to report. This principle reflects the fact that the duty of candour is a continuous one.

This is a particularly important duty in the national security context. Errors in warrants, or execution errors, which may occur when police officers carry out *Criminal Code* warrants, will usually come to light in the trial process. In the national security context, this may not be true, so the issuing judge must be advised promptly of the nature of the problem, the impact of the error, and any remedial steps taken.

If there is doubt whether an error is material such as to require reporting to the Court, counsel should err on the side of disclosure.

d) The affiant must be experienced, authoritative and independent

The affiant is the person on whose sworn evidence the court acts. If that evidence is not accurate and complete, the ability of the Federal Court to carry out its functions will be compromised.

The affiant's duty of candour is a *personal* obligation he or she owes to the court. To fulfill their obligations, affiants should have sufficient skill, training and experience.

Independence is a quality strongly linked to stature and experience. The affiant must be able to exercise strong independent judgment in deciding whether and how the information can meet the legal prerequisites for issuance. The affiant should also be able to ask difficult questions of colleagues, challenge factual contentions where appropriate, insist that omitted information be included, and diligently ensure that all inquiries are answered to the affiant's satisfaction.

Because the affiant has access to a large amount of potentially relevant information, the affiant must ask himself or herself the following question: what should the Court know, and what would the court want to know, in order to fairly assess this warrant application? As noted above, this should lead the affiant to disclose sufficient context about the nature of the investigation and of the threat to security, the intrusive aspects of the technologies to be employed and the way in which the court's order will be carried out to assist the court in performing its role. This also requires the affiant to have a strong sense of what he or she needs to know – and to make the appropriate inquiries so that she or he is in a position to properly advise the Court.

e) Counsel must understand and carry out the role of the Attorney General

As noted above, counsel representing the Attorney General must bear in mind the special responsibilities they have to the administration of justice. Counsel should receive training in respect of that role. Counsel must act independently of the Service in the preparation of the application. Counsel must zealously maintain their objectivity and independence. Counsel must be confident that the assertions contained within the application are true, and that the application is intelligibly and effectively framed. Where counsel needs access to information in possession of the Service to enable them to perform their duties, the Service must make that information available promptly.

3) Practical Application of the Principles

The policy is not intended to be a comprehensive manual for applications. What follows below are considerations intended to assist affiants and counsel in fulfilling their duty of candour in situations that may commonly arise.

a) The drafting of affidavits generally

In addition to meeting the requirements established by s. 21(2) of the *CSIS Act* and set out in *Atwal*[11], affidavits presented in support of applications:

- must include information relevant to the exercise of the power sought, such as the impact that the execution of the warrant sought may have on privacy of the subject and that of third parties;
- must include information going to reliability of information or source of information, such as the collection technique used, the fact that a human source has passed or failed a polygraph examination, or that a human source had not obtained the information directly;
- must include information that may affect the legality of the collection, such as risks that information was obtained via mistreatment;
- must disclose known information relevant to the exercise of warrant powers, such as identity of persons other than the subjects of the investigation whose information might be intercepted in the course of carrying out the authorization, or any other information relevant to the scope of the authorization;
- must distinguish between facts and assessments and the affiant's opinions and conclusions;
- must err on the side of inclusion of information, when there is doubt about the relevance of information.

b) Providing adequate legal context

Counsel appearing on warrant applications must advise the court of all relevant legal considerations, including:

[11] *Atwal v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 427, [2004] FCJ 2118.

- whether the case raises any legal issue that has been the subject of concern to judges on previous warrant applications;
- whether the case raises a novel legal issue requiring resolution by the court;
- whether there have been any recent decisions from other courts that may be relevant to issues on the warrant application such as to require reconsideration of that case law by the Federal Court;
- whether the application involves a change to a standard clause or condition, particularly where that change is being made to address a concern of a judge on a prior application;
- whether other judges have raised concerns about matters affecting the type of application sought;
- whether the application raises issues that counsel believes might be appropriate for an *en banc* hearing.

c) Providing adequate factual context

Affiants must be conscious of the need to provide information that will enhance the court's ability to fairly consider the request, including information concerning:

- why a usual power is not being sought (whether for legal or operational reasons);
- the technological capacity of the devices being used to carry out the terms of the warrant;
- circumstances affecting the degree of intrusiveness of the warrant
- the use of a new intrusive technique;
- matters affecting the scope, effect and intrusiveness of the powers sought.

4) Relations with the Court Generally

Counsel for the Attorney General must also bear in mind that the duty of candour may involve matters that go beyond individual warrant applications. The Court must be informed when the validity of a CSIS warrant is being litigated in another forum.[12]

As part of this, the Court must be informed of issues of general or specific concern to warrant applications identified through internal audits, reviews conducted by the Security Intelligence Review Committee, the Minister of Public Safety, Parliamentary Committees or other review bodies.

Finally, where counsel for the Attorney General identify new or emerging issues affecting the court's processes, engagement with the court via appropriate mechanisms should be sought.

This policy will be reviewed from time to time and at least every three years.

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[12] This would include, for instance, a challenge to a CSIS warrant via a *Garofoli* application.