National Defence / Défense nationale

Director of Military Prosecutions

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DMP Policy Directive
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APPLICATION OF POLICY

1. Any reference in this policy to "Regional Military Prosecutor (RMP)", "Prosecutor" or "Prosecutors" shall be deemed to refer to any officer or officers in the course of assisting or representing the Director of Military Prosecutions (pursuant to section 165.15 of the *National Defence Act*) in matters of preferring charges, conducting prosecutions at courts martial, or acting as counsel for the Minister of National Defence in respect of appeals.

POLICY STATEMENT

2. A Prosecutor has a duty[1] to disclose all information in his or her possession relevant to the guilt or innocence of the accused, unless the information is excluded from disclosure by a legal privilege. All decisions by a Prosecutor not to disclose on grounds of either privilege or relevance are reviewable by a court martial.[2] This disclosure has two main purposes:

   a. to ensure that the defence knows the case to be met, and is able to make full answer and defence; and

   b. to encourage the timely resolution of facts in issue.

3. A Prosecutor has a duty to disclose all information in his or her possession relevant to the sentence an accused might be given in respect of a matter of which he or she is found guilty. In some cases, it may not be appropriate to disclose sensitive matters relevant only to sentence before a finding of guilt is pronounced. Any such information not previously disclosed ought to be disclosed at the time that a finding of guilt is pronounced. The Prosecutor should consent to a request by defence to adjourn sentencing where delayed disclosure is provided.

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1 The right to disclosure has been described as a constitutional right by the Supreme Court of Canada in *R v Carosella* (1997), 112 C.C.C. (3d) 289 and *R v La* (1997), 116 C.C.C. (3d) 97.

2 *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions,* Queen's Printer for Ontario, 1993, Recommendation 41, paragraph 3.

4. Disclosure should be provided as fully and as soon as reasonably practicable[3] before the accused's plea is taken. Disclosure is an ongoing obligation and equally relates to information that comes into the possession of the Prosecution at any time before the proceedings are complete.

5. A Prosecutor shall, subject to review by a court martial:

   a. withhold disclosure where there is reasonable cause to believe that withholding is necessary to protect:

      i. the identity of an informant;

      ii. solicitor-client privilege;[4]

      iii. *Privacy Act* interests;

      iv. a confidence of the Queen's Privy Council for Canada;

      v. international relations or national defence or security; or

      vi. confidential investigative techniques;

   b. delay disclosure where there is reasonable cause to believe that delay is necessary for reasons such as:

      i. protect the safety or security of persons; or

      ii. to protect a current or planned investigation.

6. Any limitation on or delay in providing disclosure contemplated by paragraph 4 of this Policy requires the prior approval of the DMP or the appropriate DDMP. In appropriate cases, directions from a court martial may be required.[5]

7. Prosecutors are not obligated to obtain evidence, records or other information which may assist the accused in his or her defence, where such information is not in the possession or under the control of the DMP or the investigative agency primarily responsible for the laying of charges in a given case. However, Prosecutors having knowledge of the existence of any materials or information tending to show that the accused may not have committed the offence charged shall so advise counsel for the accused.

8. The Prosecutor should endeavour to resolve any disputes concerning disclosure to the defence, governed by the principle that disclosure is to assist the accused pursuant to constitutional rights to a fair trial and to make full answer and defence.

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3 This is the standard adopted in the *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions,* Queen's Printer for Ontario, 1993, Recommendation 41, paragraph 6.

4 Care must be taken in assessing whether the privilege exists and whether it has been waived: see for example *R c Shirose and Campbell,* [1999] S.C.J. No 16.

5 The practical difficulty, of course, is that a court martial will require details of the information in question, whereas release of details to a court martial (and, consequently, the defence) is the problem precipitating the Prosecutor's request for judicial directions. The appropriate manner of addressing this conundrum will depend in part upon the cause for concern in releasing information. In some cases, it may be appropriate for the Prosecutor to advise defence that certain information is being withheld, the basis upon which it is withheld (as a matter of national security, for example), and then to put defence on notice that the prosecution will be placing the issue before a court martial for directions. Upon the hearing of the application, the Prosecutor could adopt a process roughly analogous to that set out in s. 488.1(3) and (4) of the *Criminal Code* by filing with the court the sensitive information or a more detailed summary of it in a sealed packet for the consideration of the court martial only.

9. The Prosecutor is not obliged to disclose any internal prosecution counsel notes, memoranda, correspondence, legal opinions, or communications that are subject to litigation privilege or prosecution privilege. Care must be taken to ensure that a privilege attaches, and that the privilege has not been explicitly or implicitly waived.[6] The Prosecutor must, however, at least inform defence if any of this information contains material inconsistencies or additional facts not already disclosed.[7]

10. Even after conviction, including after any appeals have been decided or the time for appealing has lapsed, the Prosecutor must disclose to the accused or his or her counsel information that gives rise to significant concerns as to an accused's innocence.[8]

11. GUIDELINES FOR APPLICATION OF THIS POLICY

12. The prosecution shall, as soon as reasonably practicable, provide disclosure in accordance with this policy. In most cases, this will mean that the prosecutor will give, or confirm that others have previously given[9] to defence the following:

    a. all relevant Canadian Forces National Investigation Service (CFNIS), MP, civilian police or other investigative reports, including copies of the investigator's notes, pertaining to any investigation conducted pursuant to QR&O Chapter 107 and relative to the matters in issue;

    b. the text of all utterances concerning the offence which has been made by a person with relevant evidence to an investigator including:

        i. a *copy* or transcription of any notes that were taken by investigators when interviewing the witness, or

        ii. if there are no notes, a summary of the anticipated evidence of the witness.

    c. a copy of any relevant written witness statements in the possession or under the control of the Canadian Military Prosecution Service (CMPS) or the investigative agency primarily responsible for the laying of charges in the case;

    d. where an accused makes any utterance to a person in authority concerning the offence alleged and:

        i. if the utterance is a written statement, a copy of the statement in addition to/or a copy of any notes taken by investigators pertaining to the taking of the statement;

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6 See, for example, the circumstances in *R v Shirose and Campbell,* [1999] S.C.J. No 16.

7 See the *obiter* remarks of L'Heureux-Dubé J. in *R v O'Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.). See also *R v Johal* [1995] B.C.J. No. 1271 (B.C.S.C.), where the Crown was ordered to provide a will-say statement summarizing Crown Counsel's notes taken during a witness interview. The will-say was to be limited to new or different information disclosed during the interview, instead of disclosing the actual notes of Crown Counsel.

8 This is the standard recommended by *The Commission on Proceedings Involving Guy Paul Morin*, Queen's Printer for Ontario 1998, Recommendations 84 and 85, pages 1168 to 1171.

9 The Prosecutor should ensure, for example, that (where the accused is a member of the Canadian Forces) the accused's C.O. has provided the accused with a copy of his conduct sheet, certificate of service, pay guide and a statement as to particulars of service of the accused, in accordance with QR&O article 111.17. Note as well that the Prosecutor must provide the names of witnesses he or she proposes to call at a court martial and for each the purpose of calling the witness and the nature of his or her proposed evidence: see QR&O article 111.11, which also governs the course of conduct required of a Prosecutor where he or she calls a witness without notice or fails to call a witness contrary to notice previously given.

ii. if the utterance is recorded by audio or video equipment, disclosure as required by other provisions of this Policy[10], and any notes of the recording taken by investigators during the recording;

iii. if the utterance is not a written statement and is not recorded by audio or video equipment, then a verbatim account, any notes of the statement taken by investigators during the interview, and an account or description of the circumstances in which the utterance was heard;

e. a copy of all expert witness reports relating to the offence, except to the extent that they may contain privileged information;

f. copies of all documents and photographs that the prosecution intends to introduce into evidence during the case-in-chief for the prosecution, and an appropriate opportunity to inspect any case exhibits, whether the prosecution intends to introduce them or not;

g. subject to an order prohibiting access or disclosure, any search warrant relied on by the prosecution and, if intercepted private communications will be tendered, as well as a copy of the judicial authorization or written consent under which the private communications were intercepted;

h. particulars of similar fact evidence that the prosecution intends to rely on at trial;

i. particulars whether positive or negative, of any procedures used outside court to identify the accused;

j. particulars of any other evidence on which the prosecution intends to rely at trial, and any information known to the prosecution which the defence may use to impeach the credibility of a prosecution witness in respect of the facts in issue in the case;

k. where the accused indicates an intention to put his or her character in issue, any information of bad character; and

l. the criminal record and conduct sheet of the accused and the criminal record of any co-accused.

AUDIO OR VIDEO RECORDINGS

13. For the purposes of this Policy, "access" means reasonable opportunity for the accused or his counsel or both to view, see or hear the material in private while supervised in a manner that does not infringe privacy but ensures that the integrity of the material is not violated.

14. Subject to paragraph 12 of this policy, where relevant information is secured by means of audio or video tape recording, disclosure of the recording shall be governed by the following principles[11]:

a. with respect to recordings of statements of witnesses (other than the accused), the prosecution shall provide as disclosure a copy of the recording and access to the original recording;

b. with respect to recordings of statements of the accused, the prosecution shall provide as disclosure a copy of the recording and access to the original recording;

c. with respect to recordings of statements of the accused which the Prosecution intends to introduce as evidence at a court martial, the prosecution shall also provide as disclosure a transcript of the statement; and

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10 See the portion of this Policy entitled *Audio or Video Recordings.*

11 These principles are reflected in the *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions,* Queen's Printer for Ontario, 1993, Recommendation 41, paragraph 12.

d. with respect to recordings of sounds or images which are not statements of a witness or of the accused, the prosecution shall provide as disclosure a copy of the recording and access to the original recording.

15. Notwithstanding subparagraphs 13(a), (b) and (d), this Policy does not require that copies of audio or video recordings must be provided as disclosure if:

    a. the time and cost of reproducing the recordings is unreasonable[12], after consideration of all factors including:

        i. the number of recordings;

        ii. number of disclosure copies required; and

        iii. the degree of relevance of the recordings in the proceedings.

    b. the Prosecutor has reasonable cause to believe that there exists a reasonable privacy or security interest, or any other reasonable public interest.

16. In these circumstances, the Prosecutor shall promptly notify DMP or the appropriate DDMP and defence that the Prosecutor has elected not to reproduce certain recordings, the reasons for so electing, and a proposal for an alternate method to address the right of the accused to disclosure.[13] The Prosecutor shall attempt to achieve consensus in respect of these issues. Where the Prosecutor and defence are not able to agree, the Prosecutor shall place the issue before a court martial at the earliest possible opportunity for direction.

DISCLOSURE IN AN ELECTRONIC FORMAT

17. Technology (including the use of USB keys, CD's, DVD's or database software) allows the Prosecutor to provide disclosure in a manner that is speedy, accurate, secure and cost-effective. In this respect, electronic disclosure enhances the pursuit of many laudatory goals of the disclosure process, and is encouraged.[14] However, in some cases this form of disclosure may be unacceptable to defence. Where disagreement arises in respect of the use of electronic media, the Prosecutor shall attempt to accommodate defence within reason to overcome difficulties. This may involve arranging for a short introduction to the operation of the technology, or even restricted access to hardware necessary to make the technology functional for defence. The goal is to provide disclosure in a manner that respects the rights of the accused, not disclosure that puts defence at a disadvantage. Where difficulties with the media of disclosure cannot be resolved within a reasonable time, the Prosecutor shall bring the issue before a court martial as soon as is practicable for directions.

PROTECTING A WITNESS FROM INTERFERENCE

18. If the defence seeks information concerning the identity or location of a witness, five considerations are pre-eminent:

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12 These situations will be rare. See the *obiter* comments of Watt, J. in *R v Blencowe* (1997), 118 C.C.C. (3d) 529 (Ont. Ct. Gen. Div) at p. 535. Also see *R v Renaud* [1997] O.J. NO. 5589 (Ont. Ct. Gen. Div.).

13 The provisions of this Policy entitled *Measures to Prevent Misuse of Disclosure* apply, with necessary modifications, in these situations.

14 In *R v Blencowe* (1997), 118 C.C.C. (3d) 529 (Ont. Ct. Gen. Div) at p. 535 Watt, J. commented favourably on the use of electronic disclosure in cases where there are a large number of documents.

a. the right of an accused to a fair trial;

b. the principle that there is no property in a witness;

c. the right of a witness to privacy and to be left alone until required to testify in court;

d. the need for the military justice system to prevent intimidation or harassment of witnesses, danger to their lives or safety, or other interference with the administration of justice; and

e. the need to safeguard military security and operations.

19. In balancing these five considerations the following principles apply:

a. Where a witness does not wish to be interviewed by or on behalf of an accused, or where there is a reasonable basis to believe that the fourth consideration referred to above (interference with witnesses, etc.) may arise on the facts of the case, the prosecution may reserve information concerning the identity or location of the witness unless a court martial, or other court of competent jurisdiction orders its disclosure.

b. Where a witness is willing to be interviewed, but there nonetheless exists a reasonable basis to believe that the disclosure of information concerning the identity or location of the witness may lead to interference with the witness or with the administration of justice as described above the prosecution may elect to invoke special arrangements. For example, the prosecution might decide to arrange for an interview by defence counsel at a location and under circumstances that will ensure the continued protection of the witness, while respecting the *Charter* right of the accused to fair trial process, full disclosure and an opportunity to make full answer and defence.

c. Where the witness does not object to the release of this information, and there exists no reasonable basis to believe that the disclosure will lead to interference with the witness or with the administration of justice or military security as described above, the information should be provided to the defence without court order.

UNREPRESENTED ACCUSED

20. If the accused is not represented by counsel, the prosecution shall arrange to have the accused informed that disclosure is available under this policy, and shall determine how disclosure can best be provided.[15] However, because of the need to maintain an arms-length relationship with the accused, discretion should be used when applying this policy to an unrepresented accused. Communications should be in writing or confirmed in writing. It will be appropriate in all cases to provide an accused with disclosure or secure in writing the accused's waiver of his right to disclosure.

15 See the provisions of this Policy entitled *Measures to Prevent Misuse of Disclosure*.

MEASURES TO PREVENT MISUSE OF DISCLOSURE

21. Information disclosed by the prosecution pursuant to this policy is disclosed for the specific and sole purpose of the accused making full answer and defence. This policy should be construed neither to limit or overlook the right of an accused to disclosure; nor to restrict the free flow of information between the accused and his or her counsel, if any. However, there are circumstances in which disclosure includes material of such a nature that is use or dissemination beyond the scope of answering the charges for which it was given could have a deleterious effect upon the CAF, the proceedings, the complainant, a witness or some other person, organization or institution. In these instances, the disclosure of information may be subject to restrictions.

22. Obtaining undertakings from defence counsel to restrict the use and dissemination of disclosure material can be challenging and problematic in some respects. Therefore, the release of disclosed information to defence (the accused and defence counsel, if any) will be controlled by the procedures set out in this policy.

23. Before disclosure is issued, the Prosecutor shall consider what restrictions, if any, ought to be sought in respect of defence's use of the disclosed material. Where restrictions are sought they must be justified by reference to the circumstances of the case.[16] The determination of what restrictions, if any, are required will be governed by consideration of all of the circumstances of the case including:

    a. the degree to which the material is by its nature private or might adversely affect the interests of any person, group, organization or institution other than the accused;

    b. any facts which demonstrate the prevalence of a current problem with the misuse of disclosure material;[17]

    c. the nature of the case;

    d. whether the accused is represented by counsel;[18]

    e. any matters of privilege or confidence that might be adversely affected if the material or any part of it was made public;

    f. any interests of national security, the *Official Secrets Act,* the Government Security Policy, or other regulations or orders governing the security of government and the CAF that might be adversely affected if the material or any part of it was made public; and

    g. evidence that suggests the defence might be inclined to use the material for a purpose other than answering the charges.

24. Where the Prosecutor determines that no undertakings in regard to the use of the material are necessary, then disclosure shall be provided in accordance with the other provisions of this policy.

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16 *R v Petten* (1993), 21 C.R. (4th) 81 (Nfld. S.C., Appeal Division).

17 In *Smith v. The Queen,* January 17, 1994, unreported (Sask. Q.B.), for example, Crown Counsel filed an affidavit setting out circumstances to illustrate recent problems with the misuse of disclosure material in that region. The court relied upon that affidavit in its Reasons to justify restrictions imposed in that case.

18 See *Muirhead v. The Queen*, September 27, 1995, (Sask. C.A.).

25. Where the Prosecutor determines that restrictions on the use of the material are appropriate and the accused is represented by counsel:
    a. the Prosecutor shall advise counsel as soon as practicable:
        i. the nature of disclosure material withheld;
        ii. the restrictions recommended by the Prosecutor in respect of the use of that material; and
        iii. the reasons for seeking each restriction.
    b. the Prosecutor shall seek suitable restrictions by an undertaking of counsel or an agreement with counsel to a suitable alternative; and
    c. where no undertaking or agreement is achieved, the Prosecutor shall advise defence counsel that the Prosecutor intends to seek from a court martial of competent jurisdiction an order restricting the use of disclosure material by defence.
26. Where the Prosecutor determines that restrictions on the use of the material are appropriate and the accused is not represented by counsel, the Prosecutor shall, as soon as practicable, advise the accused in writing of:
    a. his right to disclosure;
    b. the restrictions sought by the Prosecutor in respect of the use of that material;
    c. the reasons for seeking each restriction, and
    d. that the Prosecutor intends to seek from a court martial of competent jurisdiction an order restricting the use of disclosure material by defence.

27. Where the Prosecutor requires restrictions by order of a court martial, he or she shall bring the issue before a court martial of competent jurisdiction at the first reasonable opportunity after notice has been given to the defence, and shall provide a court martial with such material as might be necessary to establish the grounds upon which restrictions are sought.[19]

28. Where necessary the Prosecutor shall either seek declassification of materials or security clearance for defence counsel.

29. Where the Prosecutor has information to suggest that the undertaking of counsel or the order of a court martial has been breached by the misuse of disclosure, he or she shall provide that information to the CFNIS for investigation of contempt of court and shall notify the DMP or the appropriate DDMP. Any investigation undertaken while the initial proceedings are continuing must be handled appropriately, so as not to jeopardize the fairness of those proceedings.

30. In appropriate cases, the Prosecutor may elect to delay disclosure in order to avoid or substantially reduce opportunity for misuse of disclosure material. In no circumstances, however, should the delay improperly infringe upon the right of the accused to make full answer and defence in respect of the charges at hand.

AVAILABILITY OF THIS POLICY STATEMENT

31. This policy statement is a public document and is available to members of the CAF and to the public.

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19 The kinds of restrictions sought are as varied as the cases giving rise to disclosure. This is a clause imposed as a trust condition by Crown Counsel and upheld by the court in the case of *Smith v. The Queen,* January 17, 1994, unreported (Sask. Q.B.):

"(identified disclosure materials) shall not be copied or allowed to leave defence counsel's office in the possession of anyone other than defence counsel or a member of his or her firm, except with the written permission of the Prosecutor."

This is a clause imposed by the court in the case of *Muirhead v. The Queen,* September 27, 1995, (Sask. C.A.):

"the accused (or defence counsel or both) shall not release any document provided by the Prosecutor or any of the witness's statements in his or her possession to any member of the public or press."

These are clauses imposed by the court in the case of *R. v. Blencowe* (1997), 118 C.C.C. (3d) 529 (Ont. Ct. Gen. Div):

1. the material shall be used solely for the purposes of preparing the defence (or appeal) in this case and shall not be reproduced, stored in a retrieval system or transmitted in any form
2. counsel for the accused is to retain in his possession and control, at his place of business or residence the information provided and not release it to anyone other than an expert in accordance with the other terms of this order
3. counsel for the accused is permitted to provide a copy of any material furnished by the prosecutor to any expert retained by the defence in order to prepare the applicant's defence, provided the expert retains the copy in his or her possession and control at his or her place of business or residence, and returns them to counsel for the accused for secure keeping upon completion of his or her examination
4. the accused is not to have possession or control of (identified disclosure materials) for any purpose
5. no one is to be permitted to view (videotape disclosure) except the accused, his or her counsel and any expert retained by the defence for the purpose of preparation of the accused's defence in these proceedings
6. the disclosure (in videotape form) is not to be copied by any one for any purpose
7. the (identified disclosure materials) provided are to be returned to the investigating officer by whom they were disclosed, or his or her designate, immediately upon conclusion of the retainer of present counsel for the accused or trial proceedings, whichever shall first occur.