



Director of Military Prosecutions

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DMP Policy Directive

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Cross Reference: Post-Charge Review, Sexual Misconduct Offences

Subject: Plea, Trial and Sentence Resolution Discussions

APPLICATION OF POLICY

1. This policy applies to Prosecutors¹ when engaging in resolution discussions with defence counsel, or an unrepresented accused, in order to reach an agreement on a guilty plea and/or sentencing as well as to narrow the issues to be determined at trial.
2. Any reference in this policy to “Regional Military Prosecutor (RMP)”, “Prosecutor” or “Prosecutors” shall be deemed to refer to any officer or officers who have been authorized by the Director of Military Prosecutions (DMP) to assist or represent the DMP pursuant to section 165.15 of the *National Defence Act* (NDA) in preferring charges to court martial and in conducting prosecutions at courts martial.

INTRODUCTION

3. Resolution discussions refer to any discussions between the Prosecutor and defence counsel that are aimed at resolving issues that may arise during the court martial process. Such discussions form an important part of the military justice system as they help to narrow the issues at trial or may resolve a matter without having to go through a full court martial.
4. Though not defined in the *National Defence Act* or the *Criminal Code*, resolution discussions generally fall into one of three types: plea negotiations, narrowing issues at trial and sentencing negotiations.
5. Prosecutors are encouraged to use resolution discussions as a file management tool. Properly used, resolution discussions reduce court martial delay as they permit a matter to progress through the military justice system in an efficient and expedient manner.
6. It must be emphasized, however, that any recommendations made to the court as part of any resolution discussion are subject to the overriding discretion of the court to accept or reject any submission by counsel.

¹ Any reference in this policy to “Prosecutor” or “Prosecutors” shall be deemed to refer to any officer or officers who have been authorized by the Director of Military Prosecutions to assist or represent the DMP pursuant to section 165.15 of the *National Defence Act*.

STATEMENT OF POLICY

7. Prosecutors may initiate and engage in resolution discussions with defence counsel or an unrepresented accused in a cooperative non-adversarial manner and in the interests of the Canadian Armed Forces (CAF) to reach an agreement on the terms of a guilty plea, to narrow the issues to be determined at court martial or to reach an agreement on sentencing.

PRACTICE/PROCEDURE

8. Before the Prosecutor can enter into resolution discussions, he or she must first be satisfied at the post charge review stage that there is a reasonable prospect of conviction and that the public interest requires that the matter be prosecuted. Only once the Prosecutor is satisfied that these standards have been met can he or she engage in resolution discussions.
9. Prosecutors should maintain a complete record of all resolution discussions in the file. Such notes should include the date when the discussions were held, the nature of all charges discussed, the terms of any agreement with respect to each charge, any contingencies such as whether the agreement is subject to approval by DMP, the regional Deputy Director of Military Prosecutions (DDMP) or the DDMP – Sexual Misconduct Action Response Team (SMART) for serious sexual misconduct cases and any matters left unresolved and how they will be addressed.
10. When an accused decides to plead guilty, he or she is essentially admitting commission of the service offence. Such a decision by an accused waives many of his or her rights and eliminates the need for a court martial on the issue of culpability. The prosecution is no longer required to prove its case beyond a reasonable doubt and the accused has lost his or her right to make full answer and defence. Where the accused indicates his or her desire to plead guilty the Prosecutor must be satisfied that the accused has made a voluntary and informed choice to unequivocally acknowledge guilt.

Unrepresented Accused

11. Resolution discussions with an unrepresented accused call for extreme care. Although Prosecutors may engage in resolution discussions with an unrepresented accused, it is essential that any such discussions proceed only where it is clear that the accused is acting voluntarily and has made an informed decision to represent himself or herself.
12. Prosecutors should first encourage the accused to consult counsel. If the accused declines to instruct counsel and wishes to engage in resolution discussions, Prosecutors should arrange for an impartial observer to be present during the discussions. A detailed record must be kept of all discussions and all agreements reached with the accused must be reduced to writing. When the case is disposed of in accordance with a resolution discussion, Prosecutors should tell the judge about the existence of the agreement and that the accused was encouraged to retain counsel but declined to do so.
13. Prosecutors should not conduct resolution discussions with an unrepresented accused unless satisfied that the accused has been given full disclosure or has waived the right to full disclosure.

Views of Affected Parties

14. Prosecutors should, where reasonable, seek and weigh the views of those involved in the prosecution's case such as the victim and the investigating unit with respect to resolution discussions, especially where the alleged offence involves the violation of the victim's personal integrity (e.g. physical, sexual, emotional). However, after consultation the final responsibility for assessing the appropriateness of any agreement, subject to DMP or appropriate DDMP approval, rests with the Prosecutor. Should a plea agreement be reached, the Prosecutor should ensure that victims, investigating units and the chain of command understand the substance of the agreement and the reasoning behind it.
15. Where applicable, the Prosecutor shall present all resolution agreements to the trial judge in open court and on the record. In certain circumstances, it may be necessary to discuss some aspects of the agreement with the trial judge privately due to privacy considerations or for classified information. However, such a measure should always be done in the presence of defence counsel.
16. The Prosecutor shall honour all negotiated resolution agreements unless fulfilling the agreement would clearly be unconscionable. Additionally, Prosecutors may be justified in refusing to fulfill an agreement if misled about material facts. The decision not to fulfill an agreement should only be made after consultation with, and approval of the DMP.
17. If an accused enters a guilty plea based on a negotiated plea or sentence agreement and the court disposes of the case on those terms, no appeal will be undertaken by DMP unless exceptional circumstances exist.

Content of Negotiations

18. In exchange for a guilty plea, the Prosecutor may properly discuss reducing a charge to a lesser or included offence, withdrawing additional charges and agreeing to reduce multiple charges to a lesser number of all-inclusive charges (where permitted by law).
19. The Prosecutor may not agree to a plea of guilty to an offence not disclosed by the evidence nor agree to a plea of guilty to a charge that inadequately reflects the gravity of the accused's provable conduct. The Prosecutor may not mislead the court by agreeing to minimize provable facts in exchange for a guilty plea. Additionally, the Prosecutor may not agree to withhold a relevant criminal record or conduct sheet in exchange for a guilty plea.

Privileged Communications

20. The Prosecutor must be aware that all communications between the Prosecutor and defence counsel or an unrepresented accused during plea discussions are privileged. Public policy encourages full and candid discussion in the course of such negotiations and what has been discussed during those discussions is not admissible at trial.

Agreement as to facts

21. Where an accused agrees to plead guilty, the Prosecutor must put before the court those facts that could have been proved by admissible evidence if the matter went to trial. Discussions regarding the facts may properly include an agreement not to make representations to the court concerning those facts that are of little or no significance to the charge.

22. The Prosecutor may not agree to represent the facts in a manner that will mislead the court, such as agreeing not to advise the court of any part of the accused's provable criminal conduct or record that is relevant or could assist the court.
23. Prosecutors should advise the court of the extent of the injury or damages suffered by a victim (whether the victim is an individual or an institution) and shall not withhold from the court, facts that are provable and relevant.

Narrowing Issues for Trial

24. Discussions intended to narrow the issues for trial may occur throughout the pre-trial process and may be done informally by counsel or with a judge during the pre-trial conference. Such a practice may greatly reduce the length of trial.
25. Prosecutors are encouraged to initiate or engage in pre-trial discussions with defence counsel in an attempt to narrow the issues to be litigated as much as possible. Such conversations need not always be formal but Prosecutors should maintain the practice of taking detailed notes of such discussions and including these notes as a part of the working file.

Sentencing Negotiations and Guilty Pleas

26. Sentencing negotiations is the process whereby the Prosecutor and defence counsel attempt to reach an agreement as to the sentence of an accused. Such agreements are not necessarily determinative of the issue as they are always subject to the concurrence of the court.
27. When entering into sentencing negotiations, Prosecutors must consider the gravity of the offence and the degree of responsibility of the offender as well as any aggravating and mitigating factors that may have a bearing on sentence. Sentencing discussions may properly include a recommendation by the Prosecutors for a certain range of sentence or for a specific sentence.
28. A guilty plea should generally be regarded as a mitigating factor in sentencing negotiations as such a plea indicates that the accused has accepted responsibility for that conduct. When there is a display of remorse and the guilty plea is offered at the first reasonable opportunity, it is particularly mitigating.
29. Following a guilty plea, Prosecutors may make specific recommendations to the court as to the terms, length and conditions of the sentence as well as agree to participate in a joint recommendation in regard to sentence or resolution.

AVAILABILITY OF THIS POLICY STATEMENT

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