



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 who are members of the Canadian Military Prosecution Service (CMPS) and 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.

STATEMENT OF POLICY

2. One can summarize the challenging nature of a Prosecutor’s work in terms of a balance among the competing concepts of accountability, independence and consultation. The interaction of these principles mean that what is protected is a system of prosecutorial decision-making in which the Prosecutor is an integral component. A large measure of independence is conferred on the Prosecutor, but absolute discretion is not.
3. A Prosecutor must practice consistently the highest ethical standards and react appropriately to a real or potential conflict of interest, in addition to knowing and respecting the limits of applicable legal privileges.

APPLICATION OF POLICY

Accountability

4. A Prosecutor must clearly understand to whom he or she is accountable, and for what. The answers to these questions begin with an understanding of the relationship between the Prosecutor; the Judge Advocate General (JAG) and the chain of command.
5. Every Prosecutor is accountable to the DMP for the manner in which each prosecution is conducted.

6. The DMP is appointed by the Minister¹ and is charged with responsibility for functions carried out on a day-to-day basis by Prosecutors on behalf of the Director such as:
 - a. the preferring of all charges to be tried by court martial;
 - b. the conduct of all prosecutions at courts martial; and
 - c. acting as counsel for the Minister in respect of appeals when instructed to do so.
7. In the course of performing these functions, the DMP is accountable to the JAG, who may issue broad instructions or guidelines in respect of prosecutions generally.² The JAG may also issue to the DMP instructions or guidelines in respect of a particular prosecution.³
8. The JAG is appointed by the Governor in Council and serves as legal advisor to the Governor General, the Minister, the Department of National Defence and the Canadian Armed Forces (CAF) in matters of military law.⁴ The JAG also has the responsibility for the superintendence of the administration of military justice in the CAF.⁵ This role of the JAG is not, however, in derogation of the authority of the Minister of Justice and Attorney General of Canada.⁶ The JAG is responsible for regular reviews of the administration of military justice and is accountable to the Minister accordingly.⁷
9. The Minister is accountable to the Governor in Council and, ultimately, Parliament for the management and direction of the CAF and all matters relating to National Defence.⁸ The Minister must place before Parliament the annual report of the JAG in respect of the administration of military justice.
10. In summary, then, the Prosecutor is accountable directly to the DMP. Generally, the conduct of the Prosecutor will be guided by instructions and guidelines from the DMP. Specific instructions in a particular case can be given from the DMP or, through the DMP, from the JAG. The duties of a Prosecutor are carried out under the authority of the DMP and in the performance of those duties the Prosecutor is not subject to the direction of any other officer who is not a legal officer posted to a position within the CMPS.⁹
11. The Minister of National Defence is, as noted above, accountable to Parliament for decisions in his or her Department. This form of public accountability is crucial to a system of open justice, and Prosecutors must be cognizant of this fact. This explains the need to ensure that the Minister is briefed to provide answers to questions that may be posed in Parliament.¹⁰

1 Section 165.1 of the *National Defence Act*.

2 Section 165.17(1) and (2) of the *National Defence Act*.

3 Section 165.17(3) of the *National Defence Act*.

4 Section 9.1 of the *National Defence Act*.

5 Section 9.2 of the *National Defence Act*.

6 Section 10.1 of the *National Defence Act*.

7 Sections 9.2(2) and 9.3 of the *National Defence Act*.

8 Section 4 of the *National Defence Act*.

9 QR&O art. 4.081(1) and (4).

10 Generally, communications to the Minister will be conducted through the DMP and the JAG.

12. An equally important form of accountability is internal accountability. All Prosecutors are accountable to their superiors for decisions taken.¹¹ One of the goals of this and other policies of the DMP is to assist Prosecutors in making the numerous difficult decisions which arise in disciplinary litigation. In so doing, it sets objective standards against which prosecutorial conduct may be measured.
13. Prosecutors are also subject to a form of public accountability through their membership in provincial or territorial law societies.¹² Another form of public accountability occurs through judicial review of a Prosecutor's actions, for example through the abuse of process doctrine, or judicial control of actions which may prejudice fair trial interests. Accountability is also enhanced because of the availability to the public of the instructions or guidelines provided by the DMP.¹³ The public is able to assess the actions of Prosecutors against the standards set out in the policies. Finally, recognition of the importance of public accountability imposes a duty on Prosecutors in certain circumstances to communicate the reasons for certain decisions to the public through the media.¹⁴

Prosecutorial Independence

14. Accountability and independence are corollary principles at work in the military justice system. In respect of justice matters, the JAG enjoys independence from the judiciary, the chain of command and inappropriate forces that might influence such matters. Prosecutors exercise their independence as the representative of the DMP. As such, the "independence" of the Prosecutor is a delegated independence.
15. Prosecutors retain a significant degree of discretion in individual cases.¹⁵ They are, however, obliged to make decisions in accordance with instructions or guidelines issued by the DMP. They act under the direction of the DMP, who in turn acts under the general supervision of the JAG. The concept of prosecutorial independence, then, encompasses the principles of:
 - a. Independence from political or inappropriate interference, accountability to the DMP; and
 - b. independence to make decisions in the conduct of prosecutions, while adhering to policies and direction designed to guide this exercise of discretion.

11 See, generally the discussion in D. Stuart, "Prosecutorial Accountability in Canada", in P. Stenning, *supra*, at pp. 336-339.

12 The extent to which Prosecutors are subject to disciplinary rules is open to question: see e.g. *Krieger v. Law Society of Alberta*, [1997] A.J. No. 689 (under appeal to Alta. C.A.) For example, law societies have at least some jurisdiction to deal with actions of a Prosecutor qua lawyer, such as the duty not to engage in dishonourable conduct: see J.L.I.J Edwards, *The Office of Attorney General – New Levels of Public Expectations and Accountability*" in P. Stenning, *supra*, at pp. 299-304.

13 See s. 165.17(2) and (4) of the *National Defence Act*.

14 See the JAG Policy Directive "Media Relations".

15 Indeed some civilian courts have indicated that policies that completely remove a Prosecutor's discretion are improper: see *R. v. Catagas* (1978), 38 C.C.C.(2d) 296 (Man. C.A.); *R. v. Wood* (1983), 31 C.R.(3d) 374 (N.S. Prov.Mag.Ct.).

Consultation

16. The independence principle does not mean that Prosecutors need not consult. Quite to the contrary: responsible prosecutorial decision-making often requires consultation with colleagues, superior officers within the CMPS, or investigators. Indeed prosecutorial discretion is not exercised in a vacuum. Prosecutors do not take instructions as to how to proceed except from those in the line of authority leading to the Minister of National Defence, namely, the Deputy Director of Military Prosecutions (DDMP) and DMP.
17. Prosecutors and the Canadian Forces National Investigation Service (CFNIS) play complementary roles in the military justice process. Both Prosecutors and investigators have roles to play before and after charges are laid.

After charges are referred

18. The right and duty of the DMP, through the Prosecutor, to supervise prosecutions once charges are referred¹⁶ is a fundamental part of our military justice system. Generally, just as CFNIS personnel are independent from the control of superior officers outside the CFNIS, the Prosecutor is independent from service authorities in the conduct of prosecutions. Once charges are referred, full responsibility for the proceedings shifts to the DMP. On request, investigators have the responsibility to carry out further investigations that counsel believes are necessary to present the case fairly and effectively in court. As well, the DMP has the authority to control the proceedings after charges are referred, including requesting conditions of release from custody¹⁷ or withdrawing charges and representations on sentence. These decisions should, wherever reasonably possible, be made in consultation with the investigators although consultation (much less agreement) is not required as a matter of law.

Investigation vs. Prosecution

19. When advising investigators, the Prosecutor must always recognize the distinction between the role of the investigator and the role of the Prosecutor in the administration of military justice. Given the increasing complexity of law enforcement, counsel may be asked to become involved at the investigative stage. Effective management of complex litigation requires pre-charge co-operation between investigators and Prosecutors. However, the existence of such a relationship does not diminish the desirability of an independent, impartial assessment of the evidence when the decision is made as to whether to prosecute.

Resolving to proceed

20. After consultation, investigators and the Prosecutor will usually agree on pre-charge screening decisions. If they disagree, the issue should be resolved through discussion at successively more senior ranks on both sides in accordance with NIS and DMP policies.
21. Normally, assessments respecting whether charges should be laid are made at the regional level. Access to witnesses, investigators and physical evidence make this a practical reality. Disagreements that are not resolved should be referred to the D/DMP.

16 For the purposes of this Policy the term “referred” means referred in accordance with s. 164.2 of the *National Defence Act*.

17 The DMP represents the Canadian Forces at release hearings: see QR&O art. 105.27.

OTHER CONSIDERATIONS

Code of Ethics

22. The Prosecutor has many responsibilities, including the duty:

- a. to act with integrity and dignity;
- b. to preserve judicial independence;
- c. not to use any violence of language or exhibit a lack of fairness toward the accused;
- d. to preserve and promote values protected by the *Canadian Charter of Rights and Freedoms*;
- e. to exercise independence in decision making;
- f. to provide full disclosure and not to suppress evidence helpful to the accused;
- g. to treat the court, military judges and fellow counsel with respect;
- h. to argue the case vigorously to the full extent of the available evidence;
- i. not to refer to any matter not relevant to proceedings before the court; and
- j. not to direct the attention of the court to the fact that the accused has not given evidence.

23. This list is by no means exhaustive. While each of these duties is significant, a further examination of some follows.

Integrity and dignity

24. Counsel can fulfil this duty:

- a. by complying with applicable rules of ethics established by governing law societies and the Canadian Bar Association;
- b. by exercising careful judgment in deciding the case to be presented for the prosecution, what witnesses to call, and what evidence to tender;
- c. by acting with moderation, fairness, and impartiality;
- d. by not discriminating on any basis prohibited by s. 15 of the *Charter*;
- e. by adequately preparing for each case;
- f. by not becoming simply an extension of an investigative agency; and
- g. by conducting any plea and sentence discussions in a manner consistent with the policy set out by the DMP.¹⁸

Respecting judicial independence

25. Counsel can fulfil this duty:

- a. by not discussing matters relating to a case with any member of the court martial without the participation of defence counsel;
- b. by not dealing with matters in chambers that should properly be dealt with in open court;

18 See *Plea, Trial and Sentence Negotiations Policy*.

- c. by avoiding personal or private discussions within or outside the courtroom with any member of the court martial while presenting a case before that person; and
- d. by refraining from appearing before any member of a court martial on a contentious matter when a personal friendship exists between the Prosecutor and that member.

Fairness toward the accused

26. Counsel can fulfil this duty:

- a. by making disclosure in accordance with the policy set out in this manual;¹⁹
- b. by bringing all relevant cases and authorities known to counsel to the attention of the court martial, even if they may be contrary to the prosecution's position;
- c. by not expressing personal opinions on the evidence, including the credibility of witnesses, in court or in public;
- d. by not expressing personal opinions on the guilt or innocence of the accused in court or in public;
- e. by referring in court martial proceedings to the accused by his or her name or title, rather than "the accused";
- f. by asking relevant and proper questions during the examination of a witness and by not asking questions designed solely to embarrass, insult, abuse, belittle, or demean the witness. Cross examination can be skilful and probing, yet still show respect for the witness;
- g. by respecting the court and the proceedings while vigorously asserting the prosecution's position; and
- h. by never permitting personal interests or partisan considerations to interfere with the proper exercise of Prosecutorial discretion.

Charter values

27. In order to preserve and promote the values in the *Charter*, all participants²⁰ in a criminal proceeding should be treated equitably and reasonable efforts should be made to ensure that they are so treated. Accordingly, Prosecutors should be aware of and sensitive to the cultural background and social context of the main identifiable groups in their respective jurisdictions; and should afford due recognition and appreciation of the participants' personal characteristics, social context and cultural background.²¹ Yet, Prosecutors in taking these factors into consideration, should avoid prejudices, stereotypes, or erroneous generalizations about individuals or groups in Canadian society, in order to safeguard the substantive equality of the outcome of the proceedings. The way to properly take into account cultural background or social context is to ensure that these factors are relevant to the legal issue at hand and to the individual in question.

19 See Part Five, Chapter IV, "Pre-trial Disclosure".

20 "Participant" is defined broadly to include the accused, witnesses, and victims

21 Reference to personal characteristics, cultural background or social context refers to the equality rights recognized in section 15 of the Charter.

Privilege

28. Generally, legal advice given by a Prosecutor to investigative agencies is protected by solicitor-client privilege; a Prosecutor may not release the legal opinion, refer to it, or describe it in any fashion to defence counsel²², a commanding officer of the accused or the public unless the privilege has been waived. There are, however, exceptions to the general rule²³: for example, in the case of *R. v. Shirose and Campbell*²⁴ the Crown sought to defend an abuse of process claim in part on the basis that the police demonstrated good faith by seeking legal advice. The Supreme Court of Canada ruled that the privilege had effectively been waived. General principles with respect to the duty to disclose communications between prosecution and investigation personnel are set out in the policy entitled “Disclosure”.
29. Written legal opinions given by a Prosecutor and communications requesting a legal opinion should, in general, be marked “Protected: Prosecution Privilege.”

Civil Liability

30. Recently, Canadian Prosecutors are finding themselves named in civil tort actions with increasing frequency. The two most common causes of action put forward in these cases are negligent prosecution or malicious prosecution. Where a Prosecutor is put on notice that he or she is or may be named in a civil action arising from or in relation to a military prosecution, he or she shall forthwith notify the DMP.

Liability and indemnification

31. Prosecutors may²⁵ be indemnified for any claims brought against them as a result of their service within the Office of the JAG, save and except for a claim related to conduct which falls outside the scope of duties for a legal officer. In any such action no claim for costs related to independent representation by legal counsel for a Prosecutor will be paid unless prior written approval is obtained from the DMP.

AVAILABILITY OF THIS POLICY STATEMENT

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

22 The question of privilege in matters between prosecutors and investigators is complex. For guidance see paragraph 8 of the Policy entitled *Disclosure*.

23 See *Discretion to Prosecute Inquiry*, (Stephen Owen, Chairman) (1990), Commissioner’s Report at 109 – 110; *R. v. Ovidio Jesus Herrera*, (21 November 1990) (Ont. Ct. G.D.) [unreported]; *Alfred Crompton Amusement Machines Ltd. v. Commissioners of Customs and Excise*, (No. 2), [1972] 2 All E.R. 353 at 373-85 (C.A.); *Waterford v. Commonwealth of Australia* (1987), 71 A.L.R. 673 (H.C.); *Idziak v. Minister of Justice*, [1992] 3 S.C.R. 631; *Canada (Attorney General) v. Sander* (1994), 90 C.C.C. (3d) 41 (B.C.C.A.). There may be situations where there is no privilege: *Re: Girouard and the Queen* (1982), 68 C.C.C. (2d) 261 (B.C.S.C.) regarding pre-trial conversations between Crown counsel and a police officer (witness); or where the privilege must yield: see *R. v. Gray* (1993), 79 C.C.C. (3d) 332 (B.C.C.A.); or there is a recognized exception to the privilege: *R. v. Shirose and Campbell*, [1999] S.C.J. No 16.

24 [1999] S.C.J. No 16.

25 The criteria determining when indemnification is available are determined by Treasury Board guidelines.