



Director of Military Prosecutions

National Defence Headquarters
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DMP Policy Directive

Directive #: 015/04

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Subject: Appeals

APPLICATION OF POLICY

1. Any reference in this policy to “Regional Military Prosecutor (RMP)”, “Prosecutor”, “Prosecutors” or “Canadian Military Prosecution Service (CMPS)” shall be deemed to refer to any officer or officers in the course of assisting or representing the Director of Military Prosecutions (DMP) (pursuant to section 165.15 of the *National Defence Act* (NDA)) in matters of preferring charges, conducting prosecutions at courts martial, or acting as counsel for the Minister of National Defence (MND) in respect of appeals.
2. This policy applies to Prosecutors when:
 - a. considering whether to appeal a decision of a court martial to the Court Martial Appeal Court (CMAC), or a decision of the CMAC to the Supreme Court of Canada (SCC);
 - b. preparing and conducting such appeals; and
 - c. responding to appeals by offenders.

STATEMENT OF POLICY

3. The prosecution may appeal court martial or CMAC decisions when there is a substantial likelihood of success and it is in the public interest to do so. Deciding whether to recommend an appeal is an important step in the disciplinary process. It is not a step to be taken lightly. Not every unfavourable ruling or error in law should be appealed. Proceeding with an appeal that has no merit causes unnecessary hardship to the accused in the disciplinary proceedings and tends to bring discredit upon the military justice system. On the other hand, failure to challenge certain adverse decisions may result in the degradation of discipline and present problematic precedents for the future. The Canadian Armed Forces (CAF) expects and is entitled to a military justice system and *Code of Service Discipline* (CSD) that is applied consistently, is effective in the promotion of discipline, good order, high morale, esprit de corps, group cohesion and operational effectiveness, efficiency and capability.

PRACTICE / PROCEDURE

Decision to Appeal

4. The decision to appeal belongs to the MND by statute (*NDA* section 230.1 and subsection 245(2)). That authority was specifically delegated in writing by the MND to DMP on 7 March 2012 (see letter of delegation at Annex A). No notice of appeal may be filed without the concurrence of the DMP.
5. As the MND's delegate, DMP will decide whether to appeal court-martial decisions to the CMAC. The decision will be based on timely input from the DMP Appeals Committee. The primary criteria will be (a) a substantial likelihood of success, and (b) the public interest. A decision by DMP to appeal to the SCC will reflect the same process, but factor in the legitimate role of the Attorney-General for Canada and the Department of Justice (DOJ).
6. The Canadian Military Prosecution Service (CMPS) will participate as counsel in all appeals initiated by offenders.

Appeals Committee

7. The DMP Appeals Committee is established to assist in the decision to appeal process. The Committee may be assembled when the DMP considers that the Committee's advice may be desirable for any reason. If DMP orders the assembly, it should take place before a Notice of Appeal is filed unless it would be impracticable in the circumstances.¹
8. In the case of an Appeal of a court martial decision to the CMAC, the committee shall consist of at least three members, chosen from among the Assistant Director of Military Prosecutions (ADMP), one or more of the regional Deputy Directors of Military Prosecutions (DDMP), DDMP Sexual Misconduct Action Response Team (SMART), DMP 2, DMP 3 or another person selected by DMP from either CMPS or another prosecution service.
9. In the case of an appeal of a CMAC decision to the SCC, the committee shall consist of at least five members. Members may be chosen from those identified in the preceding paragraph. Consideration may also be given to including as members persons from the Department of Justice and/or a person designated for this purpose by or on behalf of the Judge Advocate General.
10. Normally, at least one of the ADMP, a regional DDMP, or DDMP SMART will be a member of the Committee. When dealing with an appeal related to a serious sexual misconduct case, DDMP SMART must be a member of the Committee. DMP may sit on the Committee as an *ex officio* (non-voting) member and will receive the Committee's recommendation.

1 A Notice of Appeal may be filed prior to the assembly of the Committee in circumstances where the Committee is unable to meet prior to the expiration of the period for filing in order to preserve the Appellant's rights of appeal. As soon as is practical thereafter, the DMP Appeals Committee is to be assembled, and the ordinary appeals policy process followed. Where a decision is subsequently taken not to pursue an appeal that was commenced in such circumstances the appeal will be promptly abandoned.

11. A quorum of three or more members of the DMP Appeals Committee will examine the court martial or CMAC decision and make a recommendation whether or not to appeal based upon:
 - a. a transcript or other suitable record of the reasons for judgment or order;
 - b. a report from the Prosecutor with carriage of the matter except in the case of an appeal to the SCC; and
 - c. a written legal opinion by or on behalf of DMP 3.
12. The DMP Appeals Committee will first consider the prospects for a successful appeal by examining legal merits that include:
 - a. the significance of any error of law;
 - b. the unreasonableness of any finding;
 - c. whether any sentence is manifestly unfit; and
 - d. in sentence appeals, whether the court martial incorrectly applied a sentencing principle, whether the sentence was clearly below the range of appropriate military sentences, was illegal or whether there are exceptional circumstances which require the guidance or direction of an appellate court.
13. If the appeal has a substantial likelihood of success, the DMP Appeals Committee will consider whether it is in the public interest to appeal, including such factors as:
 - a. whether the offence is of widespread importance;
 - b. the seriousness of the offence;
 - c. a lack of clarity or inconsistency in the law;
 - d. the effect on discipline;
 - e. the effect on a declared CF policy, e.g. gender equality;
 - f. whether the issue sought to be litigated is one of importance to the administration of military justice; and
 - g. the possibility of the decision causing a miscarriage of justice.
14. The application of these and other relevant factors, and the weight to be given to them, will depend upon the circumstances of each case.

Additional Considerations Relating to Appeals to the SCC

15. The SCC only grants leave in those cases that raise questions of “public” or “national importance”². Therefore, it is not enough to say that a decision from which leave to appeal may be sought is wrongly decided. Counsel must be able to articulate the public or national importance of the issue. Appropriate cases for appeal to the SCC may be, for example, ones which conflict with other appellate decisions, raise significant jurisdictional or *Charter* questions, or concerns about the scope of police or Crown powers, or which could seriously impact upon the military justice system or the discipline and effectiveness of the CAF as a national institution charged with the defence of Canada.
16. The public or national importance consideration is to be addressed at the stage in the Appeal Committee process when the public interest determination is being examined.

2 *R. v. Gardner*, [1982] 2 S.C.R. 368 at 397; *MacDonald v. City of Montreal*, [1996] 1 S.C.R. 460 at 512; *R. v. Hinse*, [1995] 4 S.C.R. 597 at 610.

17. In deciding whether to appeal a matter to the SCC as of right, the Committee should, in addition to the factors set out at paragraphs 12 and 13, also consider whether the appeal raises an issue of public or national importance.

Counsel

18. Only Prosecutors assigned to the CMPS, or qualified legal officers specifically identified by DMP for a particular appeal will act as counsel on any appeal to the CMAC. Facta must be approved by DMP.
19. It is recognized that the Attorney-General of Canada and the DOJ have a special role and expertise in the matter of carrying appeals to Canada's highest court. Accordingly, DMP will consult and work with the DOJ on the issues of Minister's appeals to the SCC, and responding to defence appeals to the same court.

Appeals by Offenders and Conceding Appeals or Issues

20. CMPS counsel, when responding to an offender's appeal, may be placed in a situation in which an error of law committed by the trial court is so clear, or the findings of fact so patently unreasonable, that it may raise the possibility that the appeal ought to be conceded. The decision to concede an appeal or to concede on a particular issue within an appeal is never one that can be taken lightly. Generally speaking, it is within the discretion of counsel to concede on a particular issue in an appeal without conceding the appeal itself, where there is no reasonable argument to be made on that issue.
21. Where counsel on appeal is of the view that an appeal ought to be conceded, further consultation is necessary. Before making such a recommendation, counsel on appeal may seek additional views from others. The recommendation must be referred to the DMP for decision.

Communication with Service Authorities

22. In applying this policy, and in keeping with spirit and intent of the DMP Policy 005/99 "Communication with Service Authorities", it may be necessary and appropriate for members of the CMPS to communicate with and solicit the views of appropriate service authorities, including the JAG or those who assist the JAG in carrying out his statutory superintendence role and functions. All such consultations must be conducted in recognition of the necessary independence, roles and functions of the DMP and members of the CMPS.

AVAILABILITY OF THIS POLICY STATEMENT

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

APPENDIX A

Authorization

I, Peter MacKay, Minister of National Defence, hereby

- a. revoke all previous ministerial orders authorizing the Director of Military Prosecutions to exercise the right to appeal to the Court Martial Appeal Court under section 230.1 of the *National Defence Act* and to act as counsel for me in respect of any appeal under section 230, 230.1 or 245 of that Act; and
- b. authorize the Director of Military Prosecutions to
- c. exercise the right to appeal to the Court Martial Appeal Court of Canada and to the Supreme Court of Canada under section 230.1 and subsection 245(2) of the *National Defence Act*, respectively;
 - i. exercise the right of appeal for the Canadian Forces under subsection 248.9(2) of the *National Defence Act*;
 - ii. act as counsel for me in respect of any appeal under section 230, 230.1, 245 or subsection 248.9(2) of that *Act*.

Peter MacKay
Minister of National Defence

Date: March 07, 2012