

# Immunity from Prosecution

Director of Military Prosecutions  
Policy Directive

**Directive #:** 013/00  
**Original Date:** 31 Mar 00  
**Subject:** Immunity from Prosecution

1. Any reference in this policy to "Prosecutor" or "Prosecutors" shall be deemed to refer to any officer or officers who are members of the Canadian Military Prosecution Service and have been authorized by the DMP to assist or represent the DMP pursuant to section 165.15 of the National Defence Act in preferring charges to court martial and in conducting prosecutions at courts martial.

2. Any reference in this policy to "immunity agreement" shall be deemed to include an undertaking not to prosecute any charges that might be laid in the future.

3. In rare cases<sup>1</sup>, the interests of military justice may require that a person be granted immunity from prosecution for a military offence: for example, where a person is willing and able to provide information or assistance necessary to prosecute an offence or offences in which that person is also implicated. Immunity should only be granted on limited grounds, and discussion of immunity prospects in a given case shall involve consultation with the DMP or DDMP. This policy identifies relevant considerations and the appropriate procedure to be followed.

## Scope of Immunity

4. This policy deals with an agreement binding Prosecutors to terminate a present prosecution or to undertake not to conduct a future prosecution in respect of a specified offence or offences, in return for information or evidence. This policy does not apply to resolution discussions<sup>2</sup> between prosecution and defence counsel which are intended to narrow issues at trial, or to avoid unnecessary litigation.

5. Prosecutors do not direct what charge will or will not be laid<sup>3</sup> by any person who has authority to do so. Immunity in accordance with this policy shall only affect the manner in which prosecutorial discretion will be exercised in respect of a specified occurrence or sequence of events.

6. Immunity in accordance with this policy shall only affect the prosecution of offences referred to the DMP for court martial<sup>4</sup> and arising from the specified occurrence or sequence of events.

7. In some cases information is provided pursuant to an immunity agreement granted in accordance with this policy that may be of interest to other military personnel (such as, for example, a CO, a Referral Authority, or the CFNIS). Immunity granted in accordance with this policy does not restrict the use of such information for other purposes (such as, for example, administrative action). The Prosecutor should advise a person submitting a request for immunity as soon as practicable that information disclosed in the course of immunity negotiations may be shared by the Prosecutor with other military authorities as the circumstances require and the Prosecutor deems necessary.

8. Often, a person is required to testify at court martial in accordance with an immunity agreement. Once called as a witness any person (including a person granted immunity) is obliged to answer questions properly put to him or her as a witness, failing which he or she may

face consequences for contempt<sup>5</sup>.

9. Any immunity agreement negotiated or executed in accordance with this policy shall only deal with specified past conduct. This policy does not provide for immunity for future conduct, and contemplates that any person seeking immunity must cease and desist from the conduct for which immunity is sought before immunity can be granted.

10. Immunity may be sought discreetly by a person who continues an association with other persons involved in improper conduct. At times, such persons may be asked by investigators to gather further information that might be useful in future prosecution of those persons. Prosecutors are reminded that, once a person has entered into negotiations to secure immunity and is asked by investigators to provide assistance, an agency relationship between the investigators and that person may have been created. Where an agent of an investigative agency participates in conduct, with the full knowledge of that agency, that violates the Code of Service Discipline or is otherwise illegal, then that conduct may be a factor weighed at court martial in support of an application to stay proceedings for abuse of process<sup>6</sup>.

### **Request for Immunity**

11. A request for immunity may be received by a Prosecutor before a charge has been laid against the person seeking immunity, or against any person implicated in the events about which information is offered in exchange for immunity. Prosecutors shall bear in mind that they do not direct investigators in the exercise of their discretion to lay or not lay charges<sup>7</sup> and that a number of persons have power to lay a charge in respect of any given act or course of conduct. Therefore, a pre-charge request for immunity may properly amount only to a request for an undertaking not to prosecute any charges that may be laid in the future in respect of the underlying conduct described. This kind of request may come from a number of sources, but will be considered only when conveyed to the Prosecutor by NIS or by an AJAG/DJA on behalf of another investigative or service authority.

12. An undertaking not to prosecute can only be considered in light of all circumstances surrounding the underlying conduct, and may include aspects of intelligence (military or police) unknown to persons who may request an undertaking in a given circumstance. Further, Prosecutors generally provide advice, in respect of charges, to CFNIS and not to other investigators or service authorities. Therefore, when any request for an undertaking not to prosecute potential future charges is received from a person other than CFNIS or an AJAG/DJA, a Prosecutor shall direct that person to submit his or her request to the CFNIS or an AJAG/DJA. In this manner the Prosecutor will have the benefit of an investigation and recommendations before considering the merits of the request.

13. A request for immunity may be received by a Prosecutor after a charge<sup>8</sup> has been laid and the matter has been referred to the DMP. The request may come from an investigator, the accused, or counsel acting on behalf of the accused. Post-charge requests from other sources should not be considered.

### **Relevant Considerations**

14. Immunity shall be granted only in exceptional cases and only in accordance with the considerations herein described.

15. While the views of CFNIS or AJAG/DJA are relevant and must be heard and considered in every case, the ultimate decision to enter into an immunity agreement rests with the DMP or DDMP. Where a request for immunity relates to a matter not initially investigated by CFNIS, the

Prosecutor may seek out and consider the views and recommendations of CFNIS.

16. The overriding principle governing immunity considerations is that a person who has violated the Code of Service Discipline should be held accountable for his or her conduct. In narrow circumstances, however, the ends of military discipline might best be served by providing immunity to a person who is willing to give material evidence or other assistance in the prosecution of other offences. Immunity should only be granted where the interests of military discipline are better advanced by granting immunity and receiving assistance, on the one hand, than by the prosecution of the person seeking immunity on the other hand.

17. The principal factors to be considered in measuring the relevant interests in a given case are as follows:

- a) the seriousness of the offence or offences that will be prosecuted if evidence or other assistance is secured by granting immunity;
- b) the importance of the evidence or other proffered assistance in respect of that prosecution;
- c) the relative culpability of the person seeking immunity and that person's history of past offences;
- d) the credibility of the person seeking immunity and the reliability of the information he or she offers;
- e) whether protection of the public generally and safety of CF personnel in particular would be better achieved by securing the proffered assistance or by prosecuting the person seeking immunity;
- f) whether the person seeking immunity is an accomplice who will be obliged to testify while charges against him or her are pending; and
- g) the perceived interests of any victims of either a crime for which immunity is sought or a crime about which assistance is proffered in exchange for immunity.

### **Negotiation and Approval Process**

18. All negotiations with respect to immunity and in which a Prosecutor is involved shall be in writing or reduced to writing and all agreements to grant immunity shall be in writing. A sample immunity agreement is attached as Appendix "A" to this Policy.

19. Where a request for immunity is forwarded to a Prosecutor by the accused personally, the Prosecutor shall advise the accused to retain and instruct counsel to act on his or her behalf<sup>9</sup> in the course of the negotiations. Except with the agreement of the DMP or the DDMP, no immunity shall be negotiated with an accused directly.

20. Upon receipt of a request for immunity, submitted in accordance with this policy, the Prosecutor shall be satisfied that all relevant information is in hand before a recommendation is drafted. The Prosecutor must have, in writing, the views and recommendations of the CFNIS or an AJAG/DJA.

21. The Prosecutor may negotiate the terms and conditions of a proposed immunity agreement with counsel for the person seeking immunity. The Prosecutor may seek the assistance of the

investigator or an AJAG/DJA to negotiate these matters and to report the result as a part of his or her recommendations. Any draft immunity agreement submitted for approval must contain the following:

- a) the identity of the person seeking immunity;
- b) the particulars of any outstanding charges that relate in any way to the circumstances in question;
- c) the details of conduct for which immunity is sought;
- d) the identity of any other person to whom immunity has been provided and that relate in any way to the circumstances in question;
- e) the particulars of any charges in relation to which the person seeking immunity shall testify or otherwise provide advice or assistance;
- f) the scope of the immunity, in accordance with the provisions of this policy;
- g) the form of the immunity (that is, a disposition of current charges or an undertaking not to prosecute charges that may be laid in the future);
- h) all forms of information, testimony or other assistance that shall be provided in exchange for immunity;
- i) any other terms or conditions upon which the parties agree;
- j) details of what will be considered a breach of the agreement;
- k) details of what consequences will flow from any breach of the agreement;
- l) a stipulation that all information or other assistance provided in accordance with the agreement must be complete, candid and truthful, and must be fully disclosed within a reasonable time in an interview conducted under oath and recorded by audio and video equipment.

22. The Prosecutor shall then draft for the signature of the DMP or DDMP a letter of response to counsel for the person seeking immunity, or (where the person seeking immunity does not have counsel) to that person directly. The Prosecutor shall submit the draft letter, together with a report summarizing the request, the circumstances and his or her recommendation, and a copy of the draft immunity agreement, to the DMP or DDMP.

23. Immunity agreements may be executed on behalf of the CMPS<sup>10</sup> only by the DMP or DDMP.

24. Where the DMP or DDMP elects to enter into an immunity agreement, he or she shall inform accordingly the Prosecutor with carriage of the matter. The Prosecutor shall inform accordingly the person seeking immunity or counsel for that person, the CFNIS and any AJAG/DJA involved in the request. The Prosecutor shall arrange for execution of the immunity agreement by the parties.

25. Immunity agreements are subject to the guiding principles governing disclosure obligations<sup>11</sup>, save and except for any material that must be withheld to preserve the identity of a

confidential informant.

### **Rescinding an Immunity Agreement**

26. Where a Prosecutor becomes aware of any fact or circumstance that suggests the terms and conditions of an immunity agreement have been violated in a material way, he or she shall report in writing those circumstances to the DMP or DDMP as soon as practicable, and in the report shall make a recommendation whether the immunity agreement should be rescinded.

27. Immunity agreements may be rescinded on behalf of the CMPS only by the DMP. Where an agreement is rescinded, the Prosecutor shall advise the person who sought immunity or his or her counsel, the CFNIS and any AJAG/DJA involved in the matter.

### **Availability of this Policy Statement**

28. This policy statement is a public document. It is to be made available on request to defending officers/defence counsel, accused persons or members of the Canadian Forces and the public.

## **APPENDIX "A"**

### **SAMPLE IMMUNITY AGREEMENT**

NOTE: The contents of an immunity agreement will vary according to the facts of each case.

1. John Doe agrees to testify truthfully and completely at the court martial of [name and rank of accused] concerning the following offence(s):

[Text of charges, including names and ranks of accused and the dates and location of the offence(s); or, alternatively, a general description of the offence for which the accused is being tried.]

and at any other military proceedings that may take place in the prosecution of this accused for the offence described above.

2. The Director of Military Prosecutions agrees not to prosecute John Doe in connection with his involvement in the above described offence [or, in respect of the following circumstances or conduct].

3. It is understood by John Doe and the Director of Military Prosecutions that:

(a) full and frank disclosure by John Doe of all information relevant to the circumstances in relevant to this agreement, and the truthfulness of John Doe's testimony as contemplated by this agreement, form essential terms of this agreement;

(b) where the Director of Military Prosecutions determines that disclosure by John Doe has not been full and frank, this agreement may be rescinded;

(c) John Doe's failure to provide truthful evidence at the court martial of the accused results in the termination of this agreement, and may lead to the prosecution of John Doe for perjury, the giving of contradictory evidence, obstructing justice, making a false statement to a peace officer, or some related Code of Service Discipline offence. It may also result in charges against John

Doe for the offence described above, or for some other offence disclosed by the evidence.

(d) Immunity from prosecution under this agreement is confined to the offence [or circumstances or conduct] described above. It does not extend to offences not disclosed in writing by John Doe to the Director of Military Prosecutions before entering into this agreement. Neither does it extend to offences that John Doe may commit after this agreement is signed. This agreement provides immunity only in respect of prosecutions that might otherwise be conducted by or under the direction of the Director of Military Prosecutions, and does not provide immunity in respect of administrative action, disciplinary action at the summary trial level or in respect of any prosecution that might be contemplated by a competent civilian authority;

(e) any information provided by John Doe may be shared by the Director of Military Prosecutions with other military authorities as the circumstances require and the Director of Military Prosecutions deems necessary.

The understanding described in this memorandum is the complete agreement between the Director of Military Prosecutions and John Doe.

Dated at \_\_\_\_\_, in \_\_\_\_\_, the \_\_\_\_  
day of \_\_\_\_\_, 200\_.

\_\_\_\_\_  
John Doe

\_\_\_\_\_  
DMP or DDMP

\_\_\_\_\_  
Counsel for John Doe

I received a copy of this agreement on the \_\_\_\_  
day of \_\_\_\_\_, 200\_.

\_\_\_\_\_  
John Doe

## Footnotes

<sup>1</sup> In its 1992 Report entitled *Immunity from Prosecution* (Working Paper No. 64), the Law Reform Commission of Canada cautioned that “widespread resort to immunity agreements could dilute whatever deterrent effect our criminal laws might have”. However, “infrequent and carefully considered use of this option” does not pose a risk to societal values.

<sup>2</sup> For a fuller definition of “resolution discussions” and an explanation of the principles applicable to these discussions, see the DMP policy entitled “*Plea, Trial and Sentence Resolution*”

*Discussions*“.

<sup>3</sup> See Q.R. & O. art. 107.02 for an explanation of when a charge is laid.

<sup>4</sup> Immunity granted in accordance with this policy and in respect of certain occurrences or events does not apply to administrative action, summary trial proceedings or prosecution by civil authorities in respect of those same occurrences or events. In cases of concurrent jurisdiction between military and civil authorities, it is the responsibility of the party seeking immunity to identify such other authorities with jurisdiction and to make agreements with those authorities as he or she deems fit. It is not the policy of the DMP to seek out such authorities or to engage in such negotiations on behalf of any person seeking immunity.

<sup>5</sup> However, section 13 of the *Charter of Rights and Freedoms* protects the constitutional right of any person not to have incriminating evidence so given used to incriminate him or her in other proceedings, except in a prosecution for perjury for the giving of contradictory evidence. This policy does purport to deal with this issue.

<sup>6</sup> See Q.R.&O. art. 5.02. See also *R. v. Shirose* (1999), 133 C.C.C.(3d) 257 (S.C.C.).

<sup>7</sup> See paragraph 3 of the DMP Policy entitled *Relationship with the NIS*.

<sup>8</sup> For a definition of “charge” see Q.R.&O. art. 107.15.

<sup>9</sup> In most cases DDCCS will be available to act for the applicant (QR&O 102.20).

<sup>10</sup> In this context CMPS describes collectively the DMP, the Acting DMP, and any other person authorized pursuant to section 165.15 of the *National Defence Act*.

<sup>11</sup> Prosecutors are reminded that, while the negotiation and consideration of immunity requires confidentiality, the interests of justice (and military justice) requires openness to the public. See in particular the 1992 Report of the Law Reform Commission of Canada entitled *Immunity from Prosecution* (Working Paper No. 64), pages 13-14 and 32-33, as well as its recommendations related to the need to make the immunity process transparent.