

Director of Military Prosecutions Policy Directive
Directive #: 001/00
Original Date: 1 Mar 00
Update: 18 Mar 09

Subject: Relationship with Canadian Forces National Investigation Service

APPLICATION OF POLICY

1. This policy applies to Prosecutors¹ with respect to their working relationship with the Canadian Forces National Investigation Service ("CFNIS").²

INTRODUCTION

2. Prosecutors and the CFNIS have separate responsibilities in the military justice system, however they are required to work in partnership to effectively enforce criminal laws and military discipline. The working relationship between Prosecutors and the CFNIS should reflect mutual respect and professionalism fostered by appropriate recognition of the boundaries between the investigative and prosecutorial functions.

3. The CFNIS, responsible for laying charges, may seek advice from Prosecutors concerning legal issues arising in the investigation of offences. Prosecutors, responsible for determining whether a charge should proceed once it has been laid, may ask the assistance of the CFNIS in conducting further investigations and providing further information required for prosecution.

4. Both the CFNIS and the Canadian Military Prosecution Service ("CMPS") have a role to play, independent of the other, and neither agency is subordinate. This independence is fundamental to the maintenance of the role of the Prosecutor as a minister of justice, and is essential to the proper administration of military justice.³

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 or 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*.

² Where base Military Police members, other military inquiry authorities or civilian investigative agencies, undertake an investigation the Prosecutor will not be a legal adviser to that entity. In limited circumstances, however, Prosecutors will provide legal advice to unit legal advisors - see Policy Directive 002/99 on Pre-Charge Screening.

³ The role of a prosecutor as a minister of justice is set out in *Boucher v The Queen* (1954), 110 C.C.C. 263 where the Supreme Court of Canada stated at 270: It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

POLICY STATEMENT

5. The relationship between Prosecutors and CFNIS investigators must be consistent with the CFNIS role of charge layer and investigator and the Prosecutor's role as advisor prior to charges being laid and as decision maker after charges have been referred to Director of Military Prosecutions ("DMP").⁴

PRACTICE/PROCEDURE

Pre-Charge Stage

6. At this stage the Prosecutor's role is to assist the investigator by providing a fair and objective assessment of the strength of the case and on the appropriateness of proceeding. Prosecutors should remain available for consultation during an investigation and before the laying of charges to encourage investigators to seek their advice. Although it is inappropriate for Prosecutors to provide overall direction for an investigation, it is proper for them to advise the CFNIS on a variety of legal issues.

7. It is impossible to anticipate all forms of advice that a Prosecutor is able to give during the course of investigation. Although not exhaustive, some examples of general advice include advice on limitation periods for the laying of charges and the renewal or extension of court orders, providing advice concerning agents and informers, providing advice as to whether a search warrant is needed in a particular circumstance and the reviewing of transcripts and videotapes of interviews of key witnesses to provide input to investigators on the quality and reliability of such persons as potential witnesses.

Advice Concerning the Investigative Plan

8. In the early stages of an investigation, an investigator may wish to consult with a Prosecutor and seek advice and guidance as to how the investigation should be structured in order to ensure a sustainable prosecution. However, Prosecutors must ensure that they avoid direct involvement in the investigative process as this may impair their ability to provide independent advice at the pre-charge screening stage.

Preparation of Warrants

9. While investigators are generally versed in the requirements for obtaining warrants, Prosecutors should remain available to assist and advise investigators on the substantive legal requirements and the process for obtaining such warrants, particularly when dealing with novel situations or potentially high profile matters.

10. The nature of assistance will range from advising as to whether a warrant is needed to assisting in the drafting of the application. Actual drafting of the materials by the Prosecutor should be considered only in the most sensitive of cases.

⁴ See *Queen's Regulation and Orders for the Canadian Forces* ("QR&O") article 110.04.

Post-Charge Review Stage

11. At this stage the DMP, through the Prosecutor, has absolute and independent control over the charge, with authority to prefer the charge, or any other charge that is founded on facts disclosed by evidence, to refer the charge for disposal by Summary Trial or to decide not to proceed with the charge. These decisions should, wherever reasonable, be made in consultation with the CFNIS although consultation is not required as a matter of law.

12. At times during the post-charge review, the Prosecutor may uncover weaknesses in the charging decision, the absence of materials required to make full disclosure or aspects of the case that require further investigation. If requested by the Prosecutor, the CFNIS is responsible to carry out further investigations that the Prosecutor believes are necessary to present the case fairly and effectively in court.⁵ Although the CFNIS is not obligated to take direction from the Prosecutor in most cases investigating officers do comply with requests from the Prosecutor for further investigation.

During Prosecution

13. Once a matter has been preferred, the Prosecutor may properly contact the CFNIS to assist in:

- attending proceedings as required;
- serving summonses;
- preparing and making available proof of service of summons;
- maintaining continuity and security of all physical evidence until such items are admitted by the court martial as exhibits, and ensuring all such evidence is available to the Prosecutor for inspection or court martial purposes;
- attending and participating in pre-trial interviews of prospective witnesses as requested by the Prosecutor and maintaining notes of such interviews;
- seeking special security measures required for persons in civil custody who attend the proceedings, and consulting court martial administration personnel in such cases;
- carrying out additional investigative steps that are required by the Prosecutor; and
- maintaining and updating case briefs until Court Martial proceedings are concluded or charges are withdrawn.

14. The Prosecutor may seek the assistance of the CFNIS to accommodate, as much as is reasonably possible, the special considerations that ought to be afforded witnesses who present special physical or psychological needs, including children or victims of domestic violence or sexual offences.

⁵ See QR&O 110.05 for the CFNIS obligation to conduct further investigation upon the request of DMP.

Embedded Prosecutors

15. Increasingly, investigations have become more complex and require legal advice that goes beyond the traditional prosecution/investigator relationship outlined above. As such, an Embedded Prosecutor is assigned to work directly with the CFNIS to provide legal and practical advice. As a general rule, an Embedded Prosecutor should not normally be directly involved in an investigation nor should he or she be involved in any prosecutorial decisions or functions such as post-charge reviews, including interviewing witnesses, or courtroom advocacy.

16. The Embedded Prosecutor will provide legal advice to CFNIS investigators in support of effective and timely investigations. This may include advice on:

- (a) the structure of the investigation to facilitate a sustainable prosecution;
- (b) the lawfulness of any search and seizure; requirements for any search warrants, including the substance of supporting affidavits and the admissibility of any evidence obtained;
- (c) the lawfulness of any investigative activities, including covert techniques and electronic means; the requirements for any judicial authorizations, including the substance of supporting affidavits and the admissibility of evidence obtained;
- (d) the procedural and substantive requirement of any witness statements, including confessions, and the admissibility of any evidence obtained;
- (e) the admissibility of any other evidence, including documentary, images, or real evidence;
- (f) the elements of proof of any proposed offences;
- (g) the application of privilege to evidence, including witnesses, notes, documents, communications obtained or created by the CFNIS investigators;
- (h) the preparation and format of disclosure materials, including will-states, for distribution in conformity with the law;
- (i) pre-charge screening; and
- (j) any other matters agreed upon by the Commanding Officer of the CFNIS and DMP, such as legal education/training for field investigators and the legal review of CFNIS policies and procedures.

AVAILABILITY OF POLICY STATEMENT

17. This policy statement is a public document and is available to members of the Canadian Forces and the public.