

Director of Military Prosecutions Policy Directive
Directive #: 002/99
Original Date: 1 Mar 00
Update: 18 Mar 09

Subject: Pre-Charge Screening

APPLICATION OF POLICY

1. This policy applies when charges are being considered by a person with the authority to lay a charge under the *Code of Service Discipline* (“CSD”) pursuant to *Queen’s Regulations and Orders for the Canadian Forces* (“QR&O”) article 107.02 and the Prosecutor¹ is giving advice in accordance with QR&O article 107.03.

INTRODUCTION

2. Deciding whether to lay charges is one of the most important steps in the disciplinary process. Considerable care must be taken in each case to ensure that an appropriate decision is made in order to maintain confidence in the military justice system.

3. QR&O article 107.02 sets out the charge laying authorities under the CSD: first, a commanding officer or an officer or non-commissioned member authorized by a commanding officer to lay a charge (“unit charge layer”) and second, a member of the military police assigned to investigative duties within the Canadian Forces National Investigative Service (“CFNIS”).

4. Before a charge is laid there is a requirement to obtain advice from a legal officer.² Prosecutors will provide legal advice to the CFNIS respecting all charges proposed by the CFNIS as well as to unit legal advisors for those charges proposed by unit charge layers that must exclusively be tried by Court Martial.³

STATEMENT OF POLICY

5. When providing pre-charge advice to charge layers, Prosecutors must obtain all relevant available evidence from the charge layer and then determine whether there is a

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 Pursuant to QR&O article 107.03, an officer or a non-commissioned member having authority to lay charges does not have to obtain advice from a legal officer before laying a charge in all cases. QR&O article 107.03 sets out those instances where an officer or a non-commissioned member having authority to lay charges must obtain advice from a legal officer.

³ See QR&O 108.07 for Summary Trial Jurisdiction – Offences for those offences that a commanding officer may try an accused person by summary trial. Those offences that must be exclusively tried by court martial are those offences not listed in QR&O article 108.07.

reasonable prospect of conviction, whether or not in the circumstances a charge should be laid and, where a charge should be laid, the appropriate charge.

PRACTICE/PROCEDURE

6. Often when a Prosecutor is called upon to provide pre-charge advice the file may be incomplete as compared to the file at the time of court martial. It is not always the case that the Prosecutor should require a complete file before giving pre-charge advice. When providing pre-charge advice, Prosecutors are not expected to achieve a standard of perfection. With one important goal of providing advice in an efficient and timely manner Prosecutors should confidently make the necessary decisions at the pre-charge stage based on the limited available information provided by the investigator.

7. The practice and procedure for Prosecutors providing pre-charge screening advice will be different depending upon whether Prosecutors are providing advice to the CFNIS or are providing advice to unit legal advisors.

CFNIS Charge Layers

8. When seeking pre-charge advice, the CFNIS investigator will first submit all the available investigative material such as a summary of evidence with sufficient information to enable the Prosecutor to determine if there is a reasonable prospect of conviction, whether or not in the circumstances a charge should be laid and, where a charge should be laid, the appropriate charge. If the Prosecutor deems the available information is insufficient for this purpose, the file shall be returned to the CFNIS investigator for further investigation or a recommendation that charges do not proceed.

9. When the available investigative material is sufficient, the Prosecutor shall forward the pre-charge advice to the CFNIS investigator in writing as set out in Annex A to this policy directive unless, in the opinion of the Prosecutor, a more detailed memorandum is required due to the complexity and/or the seriousness of the proposed charge(s).

Unit Legal Advisors

10. In most cases, serious offences are investigated by CFNIS investigators but there are occasions where offences investigated by units or by the military police outside of the CFNIS must be tried by Court Martial and not by Summary Trial.⁴ In those cases, the responsible unit will contact their legal advisor who will review the file and determine whether the potential charges would result in an automatic Court Martial. Once such a determination has been made, the unit legal advisor shall forward the file to the applicable RMP office as expeditiously as possible. The Prosecutor from that RMP office

⁴ This is related to the type of offence charged listed in QR&O article 108.07. Summary Trial jurisdiction is generally limited to less serious offences. The requirement for Regional Military Prosecutor (“RMP”) legal advice in respect of a unit investigation does not apply to those cases where there is no jurisdiction to try a person at Summary Trial due solely to the length of time it took for the matter to proceed to trial. See footnote 3.

will then provide advice to the unit legal advisor as to whether there is a reasonable prospect of conviction, whether or not in the circumstances a charge should be laid and, where a charge should be laid, the appropriate charge.

11. This advice shall be forwarded to the unit legal advisor as set out in Annex B to this policy directive unless, in the opinion of the Prosecutor, a more detailed memorandum is required due to the complexity and or the seriousness of the proposed charge(s). If the Prosecutor deems the available investigative material to be insufficient for these purposes, the file will be returned to the unit legal advisor for further investigation or a recommendation that charges do not proceed.

12. Prosecutors shall not provide legal advice directly to unit authorities. All pre-charge screening advice shall be provided to the applicable unit legal advisor.

Reasonable Prospect of Conviction

13. A prosecution is not legally sustainable unless there is evidence to support the accusation that a person subject to the CSD has committed a service offence. In the assessment of the evidence, an actual and reasonable belief that the offence has been committed is not enough. The evidence must be evaluated to determine how strong the case is likely to be when presented at any service tribunal and should be made on the assumption that the trier of fact will act impartially and according to law. This will require a proper assessment on whether all of the elements of the alleged offence have been met, the relevancy and admissibility of evidence implicating the accused,⁵ as well as the competence and objective credibility of witnesses.⁶

14. Prosecutors may also be required to consider any defences that are plainly open to or have been indicated by the accused and any other factors that could affect the reasonable prospect of a conviction, for example, the existence of a potential *Charter* violation that may lead to the exclusion of evidence.

15. The role of the Prosecutor in assessing the reasonable prospect of conviction determination is quasi-judicial in nature. The assessment of the evidence requires a fair evaluation of evidence in all the circumstances of the case. Prosecutors must guard against a perception or view of the case simply adopted from the views or enthusiasm of others. As a case develops and changes during the prosecution process, the Prosecutor must guard and maintain the independence and integrity required to fairly reassess the case as it evolves.

⁵ Rules regarding the admissibility of evidence vary between Courts Martial and Summary Trials. This factor must be kept in mind when the Prosecutor is advising the CFNIS on reasonable prospect of conviction.

⁶ Assessments of demeanor and other subjective characteristics of witnesses are more appropriately considered by the trier of fact. However, in some cases, the distinction between objective and subjective credibility of witnesses may be blurred. For example, a Prosecutor may determine that a key witness, based on their behavior or demeanor, may have very little or no credibility before the trier of fact. Such subjective assessments may be so obvious that they are manifested as an objective factor a Prosecutor may weigh in the course of determining whether there is a reasonable prospect of conviction.

16. In addition to the task of pressing a case vigorously and firmly, the Prosecutor must ensure that every prosecution is conducted fairly. A Prosecutor is not obliged to believe without reservation everything that he or she has been told by each prospective prosecution witness. As a matter of fairness, any reservation with respect to material evidence ought to be investigated and addressed in the context of measuring the reasonable prospect of conviction.

17. Where all CFNIS proposed charges include offences that may be tried by Summary Trial, including electable offences, the reasonable prospect of conviction determination will be based on the assumption that the rules and procedures applicable to Summary Trial will govern.⁷ Where any of the proposed charges must only be tried by Court Martial, the reasonable prospect of conviction determination on all of the proposed charges will be based on the procedures and rules of evidence applicable at Courts Martial.

18. Since Prosecutors will review investigation files by unit authorities that will only result in a trial by Court Martial, the reasonable prospect of conviction analysis in such cases will be based on the procedures and rules of evidence applicable at Courts Martial.

Circumstances Governing Whether or Not a Charge Should be Laid

19. Notwithstanding there may be a reasonable prospect of conviction for an offence it may be appropriate to recommend a charge not be laid where:

- a) it would be more appropriate for the matter to be dealt with by another authority having jurisdiction to so act; or
- b) it is brought to the attention of the Prosecutor some legitimate reason why charges should not be laid in a particular case, such as:
 - i) the triviality of the alleged offence;
 - ii) significant mitigating circumstances;
 - iii) the age, or physical or mental infirmity of the accused;
 - iv) the staleness of the alleged offence;
 - v) the attitude of the victim of the alleged offence to laying a charge.

20. Factors that should not be taken into account when determining whether to lay a charge include:

- a) the rank, status or position of the accused;

⁷ See QR&O 108.07 for Summary Trial Jurisdiction – Offences.

- b) any personal characteristic of the accused, or any other person involved in the investigation, which constitutes a prohibited ground of discrimination under section 3 of the *Canadian Human Rights Act*;
- c) the Prosecutor's personal feelings about the accused or the victim;
- d) possible or perceived political advantage or disadvantage to the Canadian Forces, the Department of National Defence, the government or any political group or party;
- e) the possible effect of the decision on the personal or professional circumstances of those responsible for the investigation or any other member of the Canadian Forces or the Department of National Defence.

Timelines

21. Although the time required to provide pre-charge advice will be dependent upon the nature and complexity of the case, Prosecutors should provide the advice within 14 days of receiving the file when all of the proposed charges, including electable offences, can be tried by Summary Trial and within 30 days in those instances where any charge would result in an automatic Court Martial for the accused.

22. Should the Prosecutor require longer than 14 or 30 days, as the case may be, to complete the pre-charge advice, he or she shall contact the CFNIS investigator or, in the case of unit proposed charges, the unit legal advisor. The Prosecutor will provide such person with a reasonable estimate as to how much time will be required to provide the advice and a brief explanation as to why more time is required.

Disagreement

23. Pre-charge advice on whether to lay a charge can be contentious. A CFNIS investigator is entitled to be informed of the rationale of the Prosecutor when that advice is offered. After consultation, investigators and the Prosecutor will usually agree on pre-charge screening decisions. If there continues to be disagreement, however, the Prosecutor may discuss the matter with the Officer in Command of the applicable CFNIS detachment. If disagreement continues, the matter shall be discussed between the CO of the CFNIS and the regional DDMP. Ultimately, the final decision to lay a charge remains within the discretion of the charge laying authority and not the DMP.

AVAILABILITY OF POLICY

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

DMP Policy Directive 002 - Annex A

Solicitor/Client Privilege

Classification (as applicable) (when completed)

CFNIS PRE-CHARGE SCREENING FORM

Canadian Military Prosecution Service

This pre-charge screening form shall be completed pursuant to QR&O 107.03 and DMP Policy Directive 002. Before completing this form the Prosecutor should ensure that the investigator has provided all available investigative material. If the file is incomplete, the Prosecutor should return the file to the CFNIS for further investigation or a recommendation that charges do not proceed. This form should be completed by the Prosecutor within 14 days if all the proposed charges may be tried by Summary Trial, including electable offences, and within 30 days if any charges would result in an automatic court martial for the accused.

PART 1 – GENERAL INFORMATION

GO number:	Date Received:
Prosecutor: Telephone: Region:	Investigator: Telephone:
Accused	
Name: Service Number:	Unit: Force: Reg / Res

PART 2 – DECISION OF PROSECUTOR

Material Reviewed by Prosecutor:	Comments (attach a separate sheet, if required)
Jurisdiction Established: Y / N	
Reasonable Prospect of Conviction: Y / N	
Should a charge be laid: Y / N	
File returned to CFNIS for further investigation: Y / N	

Solicitor/Client Privilege

Classification (as applicable) (when completed)

DMP Policy Directive 002 - Annex A

Solicitor/Client Privilege

Classification (as applicable) (when completed)

PART 3 – CHARGES

Charges recommended	Particulars
First Charge – Section, Act	
Second Charge – Section, Act	
Third Charge – Section, Act	

PART 4 – REQUIREMENTS OF INVESTIGATOR

NIS to inform RMP when charges to be laid: Y / N (Ex. Likely to raise media interest)	Further evidence required by: (But not required before charges are laid)
CFNIS disclosure to be prepared Immediately: Y / N	
To be sent to:	

Prosecutor's signature

Date

Original: CFNIS

First Copy: File

Second Copy: DDMP

Solicitor/Client Privilege

Classification (as applicable) (when completed)

DMP Policy Directive 002 - Annex B

Solicitor/Client Privilege

Classification (as applicable) (when completed)

UNIT LEGAL ADVISOR PRE-CHARGE SCREENING FORM

Canadian Military Prosecution Service

This pre-charge screening form shall be completed pursuant to QR&O 107.03 and DMP Policy Directive 002. Before completing this form the Prosecutor should ensure that the Unit Legal Advisor has provided all available investigative material. If the file is incomplete, the Prosecutor should return the file to the Unit Legal Advisor for further investigation or a recommendation that charges do not proceed. This form should be completed by the Prosecutor within 30 days.

PART 1 – GENERAL INFORMATION

Date Received:	
Prosecutor: Telephone: Region:	Unit Legal Advisor: Telephone:
Accused	
Name: Service Number:	Unit: Force: Reg / Res

PART 2 – DECISION OF PROSECUTOR

Material Reviewed by Prosecutor:	Comments (attach a separate sheet, if required)
Jurisdiction Established: Y / N Reasonable Prospect of Conviction: Y / N Should a charge be laid: Y / N File returned to Unit Legal Advisor for further investigation: Y / N	

Solicitor/Client Privilege

Classification (as applicable) (when completed)

DMP Policy Directive 002 - Annex B

Solicitor/Client Privilege

Classification (as applicable) (when completed)

PART 3 – CHARGES

Charges recommended	Particulars
First Charge – Section, Act	
Second Charge – Section, Act	
Third Charge – Section, Act	

PART 4 – REQUIREMENTS OF INVESTIGATOR

Unit Legal Advisor to inform RMP when charges to be laid: Y / N (Ex. Likely to raise media interest)	Further evidence required by: (But not required before charges are laid)
Investigator disclosure to be prepared Immediately: Y / N	
To be sent to:	

Prosecutor's signature

Date

Original: Unit Legal Advisor

First Copy: File

Second Copy: DDMP

Solicitor/Client Privilege

Classification (as applicable) (when completed)