

**Director of Military Prosecutions Policy Directive**  
**Directive #: 003/00**  
**Original Date: 1 Mar 00**  
**Update: 18 Mar 09**

**Subject: Post-Charge Review**

**APPLICATION OF POLICY**

1. This policy applies when a referral authority has referred an application for disposal to the Director of Military Prosecutions ("DMP") pursuant to *Queen's Regulations and Orders for the Canadian Forces* ("QR&O") article 109.05 and a Prosecutor<sup>1</sup> has been assigned to conduct the post-charge review of the application.

**INTRODUCTION**

2. Deciding whether to prefer charges to Court Martial is among the most important steps in the prosecution process. Considerable care must be taken in each case to ensure that an appropriate decision is made. An ill-considered decision to prefer or not to prefer may undermine confidence in the military justice system.

3. Fairness and consistency are important objectives in the Court Martial process. However, fairness does not preclude firmness in prosecuting, and consistency does not mean rigidity in decision-making. The criteria for the exercise of the discretion to prosecute cannot be reduced to something akin to a mathematical formula; indeed, it would be undesirable to attempt to do so. The breadth of factors to be considered in exercising this discretion clearly demonstrates the need to apply general principles to individual cases and to exercise good judgment in so doing.

**STATEMENT OF POLICY**

4. When conducting a post-charge review, Prosecutors must conduct a two-stage analysis to determine whether or not to prefer a matter for trial by Court Martial. The Prosecutor must consider whether there is a reasonable prospect of conviction should the matter proceed to trial by Court Martial and whether the public interest requires that a prosecution be pursued.<sup>2</sup>

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<sup>1</sup> 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*.

<sup>2</sup> This policy is consistent with policies applied by Attorneys General throughout Canada and by prosecution agencies elsewhere in the Commonwealth. The strength of this consensus has been recognized by the Martin Committee in Ontario that stated as follows:

"It is a fundamental principle of the administration of justice in this country that not only must there be sufficient evidence of the commission of a criminal offence by a person for a criminal prosecution to be initiated or continued, but the prosecution must also be in the public interest."

## **PRACTICE/PROCEDURE**

5. Often when a Prosecutor is called upon to conduct a post-charge review the file may be less complete as compared to the file at the time of court martial. Although a Prosecutor will require sufficient information to allow them to conduct a proper analysis at the post-charge review stage, it is not always the case that the Prosecutor should require a complete file before conducting a post-charge review. When conducting a post-charge review, Prosecutors are not expected to achieve a standard of perfection. Such reviews are designed to determine whether a matter proceed to Court Martial in an efficient and timely manner and are not meant to require a complete analysis of the evidence to the same standard that is required for complete trial preparation. Therefore, Prosecutors should confidently make the necessary decisions at the post-charge stage based on the available information provided by the investigator.

6. Upon receipt of a referral from a referral authority<sup>3</sup> the applicable regional Deputy Director of Military Prosecutions (“DDMP”) will assign a Prosecutor to conduct the post-charge review. This shall be done in writing and will be sent to the Prosecutor responsible for conducting the post-charge review and copied to the referral authority, the Commanding Officer of the accused, the Director of Defence Counsel Services (“DDCS”), the applicable Assistant Judge Advocate General (“AJAG”) and the Deputy Judge Advocate General Regional Services (DJAG/Reg Svcs). Where possible, the Prosecutor who conducted the pre-charge screening will be responsible for conducting the post-charge review. Except in special circumstances, the Prosecutor shall be from the same region as the accused.

7. Upon receipt of the assignment letter from the regional DDMP, the Prosecutor shall, as soon as practical, request full disclosure from the investigator. Such a request shall be in writing and shall be copied to the investigator’s officer in command. Once the Prosecutor has received the disclosure package he or she must then determine if the matter should be preferred for Court Martial, if it should not be preferred or if it should be returned to the unit for Summary Trial.<sup>4</sup>

8. Once a Prosecutor has received a file, he or she shall determine whether or not to prefer the charge(s) against the accused. His or her decision to prefer or non-prefer shall be reduced to writing and filed in the Prosecution Case File. Where the Prosecutor has final disposition authority this decision shall be recorded in a form as set out in Annex A unless in the opinion of the Prosecutor a more detailed memorandum is required due to the complexity and/or seriousness of the charge(s). Where the Prosecutor does not have final disposition authority a written memorandum shall be forwarded to the applicable Regional DDMP outlining the opinion of the Prosecutor.

9. Prosecutors should also ensure that the accused has been provided with an opportunity to retain legal counsel, either through Defence Counsel Services or at his or her own

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<sup>3</sup> As defined in QR&O article 109.02.

<sup>4</sup> See QR&O article 110.04(1).

expense. If this has not yet been done, the Prosecutor shall contact the unit legal advisor to ensure that this requirement has been met. Once it has been determined that this requirement has been met the Prosecutor should ensure that disclosure is provided to defence counsel as soon as practical.

10. Although a Prosecutor is only required to consider whether there is a reasonable prospect of conviction and whether the public interest requires that a prosecution be pursued at the post-charge stage, he or she should begin to review the file and determine whether any issues may arise as a part of early trial preparation that may affect his or her analysis at the post-charge stage. Annex B sets out those factors that may be considered by a Prosecutor and is meant to serve as a guide for Prosecutors throughout the trial preparation process.

#### Reasonable Prospect of Conviction

11. A prosecution is not legally sustainable unless there is evidence to support the accusation that a person subject to the *Code of Service Discipline* 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 Court Martial 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, and may include the relevancy and admissibility of evidence implicating the accused, as well as the competence and objective credibility of witnesses.<sup>5</sup>

12. 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.

13. 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.

14. 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

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<sup>5</sup> 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.

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.

### The Public Interest Criteria

15. Once satisfied that there is a reasonable prospect of conviction to justify the continuation of a prosecution, the Prosecutor must then consider whether, in light of the provable facts and all surrounding circumstances, the public interest<sup>6</sup> requires a prosecution to be pursued. It is not the case that all offences for which there is sufficient evidence must be prosecuted.

16. The factors that may properly be taken into account when deciding whether the public interest requires a prosecution will vary from case to case. Generally, the more serious the offence, the more likely that public interest will require that a prosecution be pursued. The resources available for prosecution should not be used to pursue inappropriate cases, however the costs associated with the conduct of a Court Martial will never be the determining factor in deciding whether or not to proceed in a case.

17. Public interest factors that may arise on the facts of a particular case include:

- a) the seriousness or triviality of the alleged offence;
- b) significant mitigating or aggravating circumstances;
- c) the accused's background and any extraordinary personal circumstances of the accused;
- d) the degree of staleness of the alleged offence;
- e) the accused's alleged degree of responsibility for the offence;
- f) the likely effect on good order and discipline;
- g) the likely effect on public confidence in military discipline or the administration of military justice;
- h) whether preferring a charge would be perceived as counter-productive, for example, by bringing the administration of justice into disrepute;
- i) the availability and appropriateness of alternatives to preferring a charge;

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<sup>6</sup> Which includes as a primary factor the interests of the Canadian Forces.

j) the prevalence of the alleged offence in the unit or military community at large and the need for general and specific deterrence;

k) whether the consequences of preferring a charge would be disproportionately harsh or oppressive, especially considering how other persons implicated in the offence or previous similar cases have been or likely will be dealt with;

l) whether the alleged offence is of considerable public concern;

m) the attitude of the victim and any evident impact a decision to prefer a charge may have on him or her;

n) the effect on the maintenance of good order and discipline in the Canadian Forces, including the likely impact, if any, on military operations.

18. The application of these factors set out above, other relevant factors, and the weight to be given to each will depend on the circumstances of each case.

19. When a referral authority makes an application for disposal to the DMP he or she will usually express his or her views on public interest based on input from the Commanding Officer of the accused. The Commanding Officer of the accused will normally be in the best position to determine how the unit's disciplinary interests may best be served, and the referral authority will usually be in the best position to determine the broader interests of his or her command.

20. While the views of service authorities are to be considered by the Prosecutor, the ultimate decision to proceed with a prosecution is made by the Prosecutor. In the proper exercise of prosecutorial discretion, a Prosecutor may deem it necessary to dispose of a charge or charges in a manner inconsistent with the views of military authorities as expressed in accordance with QR&O article 109.03(2)(c) or 109.05(1).

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

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

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.

#### Final Disposition by the Prosecutor<sup>7</sup>

22. According to the *National Defence Act* the DMP is responsible for the preferring of all charges to be tried by Court Martial and for the conduct of all prosecutions at Courts Martial. Although the DMP and the regional DDMPs retain authority to exercise prosecutorial discretion in the disposition of certain cases, in the majority of cases the Prosecutor will be responsible for the exercise of such discretion.

23. In respect of the final disposition the DMP shall provide final approval in cases involving:

- a. Murder, manslaughter or other fatality;
- b. Operational offences impacting on other than Canadian Forces members;
- c. An offence under sections 280 to 283 of the *Criminal Code*; and
- d. A serious or sensitive matter that has strategic or national importance.

24. Except as otherwise provided in this Policy Directive, the regional DDMP shall provide final disposition in cases involving:

- a. Offences under any Act of Parliament for which the convicted person may be subject to imprisonment for life except for charges under sections 83, 88 and 98 of the *National Defence Act*;
- b. Offences that require the consent of the Attorney General before proceedings may be commenced;
- c. Offences where there is a minimum punishment under the *Criminal Code*; and
- d. Torture.

25. Except if delegated to the Prosecutor by the regional DDMP, the final disposition in the following matters shall be exercised by the regional DDMP:

- a. Sexual offences;
- b. Weapons offences;
- c. Obstruction of Justice offences;
- d. Operational offences;
- e. Offences under the *Controlled Drug and Substances Act*, other than simple possession;
- f. Fraud or theft in excess of \$5000.00.

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<sup>7</sup> The final disposition of a matter by the exercise of prosecutorial discretion refers to all decisions related to the prosecution of a matter including the decision to prefer or non-prefer a charge, the decision to withdraw a charge, the decision to enter into a binding sentencing agreement and the decision to consent to a particular mode of trial upon request by an accused.

26. Where the Prosecutor does not have final disposition of a matter, he or she shall provide a written recommendation in that respect and shall submit it to the regional DDMP or the DMP.

#### *Preferral/Non-Preferral of Charge*

27. When the Prosecutor prefers a matter he or she shall inform the referral authority, the Commanding Officer of the accused, the DDCS, the applicable AJAG, the DJAG/Reg Svcs, the Judge Advocate General through the Military Justice Policy and Research Directorate of Law as well as the regional DDMP of his or her decision.

28. If the Prosecutor determines that there is not a reasonable prospect of conviction or that the public interest does not require the preferral of the charge, the Prosecutor shall inform the accused, legal counsel for the accused, the referral authority, the Commanding Officer of the accused, the DDCS, the applicable AJAG, the DJAG/Reg Svcs, the Judge Advocate General through the Military Justice Policy and Research Directorate of Law as well as the regional DDMP of his or her decision not to prefer the charge.<sup>8</sup>

29. Before a non-preferral decision is made the Prosecutor should first inform the appropriate AJAG of his or her intention to non-prefer. This provides an opportunity for the AJAG to inform the Prosecutor of any other matters that may require consideration before the charges are non-preferred but also serves to keep the AJAG informed of the decision of the Prosecutor. It should be emphasized that any decisions to non-prefer remain within the scope of prosecutorial discretion and ultimately rest with the Prosecutor.

#### Timelines

30. Although the time required to conduct the post-charge review will be dependent upon the nature and complexity of the case, Prosecutors should complete the review within 30 days of being assigned the file by the regional DDMP. Should the Prosecutor require longer than 30 days to complete the post-charge review he or she shall contact, in writing, the regional DDMP and provide a reasonable estimate as to how much time will be required to complete the review and a brief explanation as to why more time is required.

31. In those cases where the Prosecutor does not have final disposition authority and is required to submit their recommendations to the regional DDMP, the regional DDMP should complete their review within 14 days of receiving the recommendations from the Prosecutor.

#### Additional Investigation

32. A post-charge review requires that a Prosecutor review all available relevant evidence. If such evidence has not been provided to the Prosecutor after his or her

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<sup>8</sup> See QR&O article 110.04(3).

original disclosure request, or if further investigation is required, the Prosecutor shall request in writing such further disclosure and/or investigation from the investigator and his or her officer in command and provide a reasonable deadline for such disclosure after consultation with the investigating officer.<sup>9</sup>

33. When such request is made, the referral authority, the accused's Commanding Officer, the applicable AJAG and the regional DDMP shall be informed that additional disclosure or investigation has been requested and that a specified deadline has been given for the completion of such request.

34. If the investigator is unable to comply with such request the Prosecutor should complete his or her post-charge review on the information made available at that time.

35. The time required for the investigator to complete his or her further investigation at the request of the Prosecutor shall not count towards the 30 day time period set for the Prosecutor to complete the post-charge review.

#### Embedded Prosecutors

36. Embedded Prosecutors shall not normally conduct post-charge reviews nor shall they participate as lead prosecutors in Courts Martial. This does not preclude, however, a Prosecutor seeking the assistance of an Embedded Prosecutor during the post-charge analysis or in assisting the lead prosecutor at trial.

#### **AVAILABILITY OF THIS POLICY STATEMENT**

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

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<sup>9</sup> See QR&O 110.05 for the CFNIS obligation to conduct further investigation upon the request of DMP.

DMP Policy Directive 003 - Annex A

Solicitor/Client Privilege

Classification (as applicable) (when completed)

**POST-CHARGE REVIEW RECORD OF DECISION**  
Canadian Military Prosecution Service

*This post-charge review form shall be completed pursuant DMP Policy Directive 003 when a Prosecutor has final disposition authority. Where the Prosecutor does not have final disposition authority he or she shall complete a formal post-charge memo and provide it to the DDMP. If the Prosecutor is unable to complete the post-charge review within 30 days of receipt of the referral letter he or she should inform the regional Deputy Director of Military Prosecutions one week prior to that deadline.*

**PART 1**

GO number:	Date assigned Post-Charge:
Prosecutor: Telephone: Second Prosecutor: Phone number:	Investigator: Telephone:
Type of investigation: <b>NIS / MP / Unit</b>	Date Accused Charged:
Accused	
Name: Service Number:	Unit: Force: <b>Reg / Res</b>

**PART 2**

Jurisdiction Established: <b>Y / N</b>	Date(s) further investigation requested <i>(if applicable)</i> :
Reasonable Prospect of Conviction: <b>Y / N</b>	
Public Interest: <b>Y / N</b> <i>(if public interest does not require that a prosecution be pursued, list reasons why on a separate sheet)</i>	Date(s) further investigation provided <i>(if applicable)</i> :

It is my decision to **prefer / non-prefer** the charges against the accused as set out in the attached charge sheet.

\_\_\_\_\_  
Prosecutor's signature

\_\_\_\_\_  
Date

Original: Prosecution File

Solicitor/Client Privilege

Classification (as applicable) (when completed)

DMP Policy Directive 003 - Annex B

Solicitor/Client Privilege

Classification (as applicable) (when completed)

**POST-CHARGE TRIAL PREPARATION**

**Canadian Military Prosecution Service**

*This form is meant to serve as an aid to the Prosecutor at, or shortly following, the time of preferral of a charge(s) when making initial preparations for trial. The goal is to cause the Prosecutor to be aware of various issues at the post-charge review stage in order to facilitate trial preparation at a later time. This form should be completed by the Prosecutor and should remain with the Prosecution file. There is no need to submit this form to the applicable Regional Deputy Director of Military Prosecutions.*

GO Number:	Accused:
<u>Pre-trial Matters</u>	
Accused has right to election: <b>Y / N</b>	
Type of Court Martial: <b>SCM / GCM</b>	
List Expected/Potential Pre-Trial Applications: <i>(if applicable)</i>	
Charter Issues: <b>Y / N</b>	
<u>Preliminary Matters</u>	
List Expected/Potential Pleas in Bar of Trial: <i>(if applicable)</i>	
Interpreter required: <b>Y / N</b>	
Public to be excluded for all or parts of Court Martial: <b>Y / N</b> <i>(If yes – List reasons)</i>	
Publication ban to be requested: <b>Y / N</b> <i>(If yes – List reasons)</i>	
<u>Guilty Plea</u> <i>(if applicable)</i>	
Concurrence of Prosecutor: <b>Y / N</b>	
Details of the negotiated agreement: <i>(if applicable)</i>	
Witnesses: <b>Y / N</b>	
<i>(If yes – List)</i>	

Solicitor/Client Privilege

Classification (as applicable) (when completed)

DMP Policy Directive 003 - Annex B

Solicitor/Client Privilege

Classification (as applicable) (when completed)

Trial Matters

List of witnesses (including expert witnesses):

List of other evidence to be introduced:

MRE issues: **Y / N**

*(If yes – List)*

Sentencing

DNA Order: **Y / N**

Weapons Prohibition Order: **Y/N**

SOIRA Order: **Y / N**

Other Issues

Voir-dire required : **Y / N**

*(If yes – List reasons)*

Notice of Certificate of Analyst served to the accused: **Y / N**

Transcripts required : **Y/N**

*(If yes – List)*

Original: Prosecution File

Solicitor/Client Privilege

Classification (as applicable) (when completed)