Taman Inquiry

July 10, 2008

Further Disclosure

Supplementary Expert Witness Report on Prosecution Ethics and Standards has been received by Commission Counsel from Brian Gover.

This supplementary expert witness report will form part of

Volume Y-2 – Expert Opinion of Brian Gover

D. Supplementary Expert Witness Report on Prosecution Ethics and Standards dated July 9, 2008.

STOCKWOODS

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July 9, 2008

Delivered Via E-Mail and Courier

Mr. David Paciocco
Commission Counsel
Taman Inquiry
Room 30 – 200 Vaughan Street
Winnipeg, Manitoba
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Dear Mr. Paciocco:

Re: Taman Inquiry – Supplementary Expert Witness Report on Prosecution Ethics and Standards

Since preparing my report dated June 17, 2008, papers have been published for the Federation of Law Society of Canada's 2008 National Criminal Law Program, ("Criminal Procedure, Advocacy and *Charter* Issues") presented at Charlottetown, Prince Edward Island, July 2008.

In particular, I have reviewed the paper written by Kenneth L. Campbell entitled, "The Crown's Ethical Duties in Resolution Discussions," and consider Mr. Campbell's analysis to be relevant to question (L), as addressed in my report of June 17, 2008. I consider Mr. Campbell's conclusions to be supportive of my opinion in relation to that question, which, as you will recall, was as follows:

> "Whether it is within acceptable general prosecutorial standards to agree or decide not to prove that the accused had consumed alcohol after that allegation fell into issue, on the hypothetical facts".

In section 6 of his paper, Mr. Campbell discusses the prohibition against withholding from the court facts that are provable, relevant and that aggravate the offence, by reference to the *FPS Deskbook* (referred to in my report) and the English Court of Appeal's decision in *R. v. Beswick*[1]. In a footnote, Mr. Campbell refers to the decision in *R. v. J. (E.J.)*[2]. In that case, Nadeau, Prov. Ct. J. expressed the view that where the Crown intentionally suppresses circumstances that

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[1] [1996] 1 Cr. App. R. 427 (C.A.)
[2] (1987) 2 W.C.B. 65 (Ont. Prov. Ct.)

cannot help but aggravate the seriousness of the offence for the purpose of persuading the court of the appropriateness of a joint submission as to sentence, the Crown is "in breach of his [or her] obligation to the court and to the community".

Attached please find a copy of Mr. Campbell's paper, along with a paper by The Honourable Mr. Justice William Smart of the Supreme Court of British Columbia, on the related topic of how trial judges should deal with joint positions.

Yours very truly,

per

Brian Gover
BG/ln

Enclosure

Federation of Law Societies of Canada
2008 National Criminal Law Program
Criminal Procedure, Advocacy and *Charter* Issues
Charlottetown, Prince Edward Island
July, 2008

SECTION 2.1

THE CROWN'S ETHICAL DUTIES IN RESOLUTION DISCUSSIONS

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THE CROWN'S ETHICAL DUTIES IN RESOLUTION DISCUSSIONS

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A. INTRODUCTION

The process of resolving pending criminal cases[1] through the means of private, out-of-court discussions between the Crown and the accused has "not generally enjoyed a very flattering public image".[2] Critics of such discussions have complained that justice should not be (or seen to be) something that "can be purchased at the bargaining table" through some shadowy, secretive, unregulated, parallel justice system that is susceptible to manipulation and abuse.[3] On the other hand, the reality of our current criminal justice system is that heavy reliance is, in fact, placed upon the productive efficiency of resolution discussions[4] to ensure that court dockets do not become impossibly congested.[5] Indeed, without effective and timely plea discussions and agreements, it is likely that our "already overburdened criminal justice system would become hopelessly bogged down".[6] Accordingly, the practical utility of resolution discussions guarantees their continued employment.

In any event, it is clearly now generally accepted that resolution discussions and agreements surrounding the plea to be entered by the accused, and the submissions to be made by the parties on the issue of the appropriate sentence to be imposed, are an "integral element" of our

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1 The views expressed in this Paper are the opinions of the author, and may or may not be shared by the Ministry of the Attorney General (Ontario). On the general topic of resolution discussions, see: Joseph Di Luca, ***"Expedient McJustice or Principled Alternative Dispute Resolution" - A Review of Plea Bargaining in Canada"*** (2005), 50 *Crim.L.Q.* 14

2 Canada Law Reform Commission, ***Plea Discussions and Agreements*** (Working Paper 60, 1989), at p. 7.

3 Canada Law Reform Commission, ***Criminal Procedure: Control of the Process*** (Working Paper 15, 1975), at p. 46; ***Plea Discussions and Agreements***, *ibid*, at p. 3-10

4 The term "resolution discussions" may be taken to refer broadly to any informed discussions between the Crown and the accused about the evidence and the likely outcome of a criminal case, with a view to coming to agreements that advance and benefit the due and efficient administration of criminal justice. However, more frequently, and in the specific context of this Paper, "resolution discussions" refer primarily to informed plea and sentencing negotiations between the Crown and the accused in a criminal case. See generally: D.W. Perras, ***"Plea Negotiations"*** (1979-1980), 22 *Crim.L.Q.* 58, at pp. 58-59.

5 G.Arthur Martin (Chair), ***Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions*** (Toronto: Ontario Ministry of the Attorney General (1993) [hereinafter referred to as the ***Martin Committee Report***], at chapter 6.

6 Canada Law Reform Commission, ***Plea Discussions and Agreements***, *supra*, note 2, at pp. 5-6; H.Locke, J.D. Evans and M.Segal, ***Report of the Criminal Justice Review Committee*** (1999), at pp. 52-62.

criminal justice system.[7] No less an authority than the Honourable G. Arthur Martin, in his capacity as Chair of the Ontario Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions, expressed the opinion that "resolution discussions are an essential part of the criminal justice system" and, when properly conducted, "benefit not only the accused, but also victims, counsel and the administration of justice more generally".[8] Indeed, a variety of Crown policy manuals and practice protocols similarly proclaim that resolution discussions "are an essential part of the criminal justice system" given that the "proper administration of justice, including consideration of the public interest, is the primary concern of any resolution discussion".[9]

As one of the necessary parties to any resolution discussion in a criminal case, the Crown plays an essential role. The fact that such discussions take place privately, between the parties, and often outside even the pre-trial court process, only serves to heighten the need to ensure that the Crown fully understands all of the sometimes subtle nuances of their ethical obligations while engaged in such discussions.[10]

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7 In ***R. v. K.(S.)*** (1995), 99 C.C.C. (3d) 376 (Ont.C.A.) the court stated, at p. 382, that "plea bargaining is an accepted and integral part of our criminal justice system but must be conducted with sensitivity to its vulnerabilities". In ***Santobello v. New York***, 404 U.S. 257 (1971) the United States Supreme Court indicated, at p. 260, that properly administered plea bargaining was to be "encouraged", in light of the fact that, if every criminal charge were subjected to a full criminal trial, the State and Federal governments would "need to multiply by many times the number of judges and court facilities". See also: ***R. v. Burlingham*** (1995), 97 C.C.C. (3d) 385 (S.C.C.) at p. 400; ***R. v. Closs*** (1998), 105 O.A.C. 392 (C.A.).

8 ***Martin Committee Report***, *supra*, note 5, at p. 281.

9 For example, in Ontario, there is a ***Crown Policy Manual*** statement concerning ***Resolution Discussions***, available online at: http://www.attorneygeneral.jus.gov.on.ca/, and a more detailed accompanying ***Practice Memorandum*** on ***Resolution Discussions***. In British Columbia, the ***Crown Counsel Policy Manual***, available on line at: http://www.ag.gov.bc.ca/public/criminal-justice, expressly encourages Crowns to "initiate resolution discussions" as such discussions "often result in a guilty plea or admissions by the accused as to facts which otherwise would have to be proven", and because the early resolution of criminal charges "reduces stress and inconvenience to victims and witnesses" and results in a "more efficient justice system where trials are either not necessary or are shorter".

10 While it is clearly not an ethical obligation, it certainly makes great practical sense for the parties to make some record of their resolution discussions and the details of any agreements that were reached. In Ontario, for example, the ***Practice Memorandum*** on ***Resolution Discussions*** states that, in order to "ensure continuity and efficiency in the management of criminal cases", a "written record of any matter agreed upon as a result of resolution discussions" should be maintained by Crown counsel, including notes as to: (1) the factors underlying the Crown's position in relation to "the charges to be withdrawn and the quantum of sentence suggested"; and (2) if the facts presented to the court are proposed to be any different than those set out in the synopsis in the

event, ***before*** the accused must elect a mode of trial or enter his or her plea.[19] Accordingly, the general rule is that resolution discussions should not be completed until disclosure has been made by the Crown. However, as the Ontario Court of Appeal decision in ***R. v. T.(R.)*** illustrates, where the accused "insists on pleading guilty" and clearly "does not want to make any defence" to the charge, then the matter may still proceed with the guilty plea of the accused, even prior to the accused receiving disclosure from the Crown, and even where the accused is unrepresented.[20]

The Crown's disclosure obligation is clearly a continuing one. It begins with a disclosure request from the defence, and continues throughout the court process, including the appeal process,[21] not abating until the matter is finally at an end.[22] Accordingly, whenever new information relevant to the proceedings comes into the possession of the Crown, it must be disclosed. For example, if a witness, just prior to giving their evidence at trial, discloses "something extra" to the police or the Crown in the context of a witness preparation interview, that new information must be quickly disclosed to the defence.[23]

In the context of resolution discussions, this continuing obligation to make disclosure to the defence means that the Crown must be sure to disclose: (1) any information in the possession of the Crown that may affect the sentencing of the accused;[24] and (2) any subsequent developments

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19 ***R. v. Stinchcombe***, ***supra***, note 12, at pp. 13-14; ***R. v. Pearson*** (1994), 89 C.C.C. (3d) 535 (Que.C.A.); ***Leave denied***: (1994), 90 C.C.C. (3d) vi (S.C.C.). There is, however, no final deadline as to when the disclosure process must be finished. See: ***R. v. Atkinson*** (1991), 68 C.C.C. (3d) 109 (Ont.C.A.) at p. 126; ***Affirmed***: (1993), 76 C.C.C. (3d) 288 (S.C.C.), where the court refused to prescribe a "firm rule" as to when the disclosure practice must be completed, or suggest that it must be completed "when the charges are laid".

20 ***R. v. T.(R.)***, (1992), 17 C.R. (4th) 247 (Ont.C.A.).

21 In ***R. v. Trotta*** (2004), 23 C.R. (6th) 261 (Ont.C.A.) the court observed, at ¶ 22, that the Crown's disclosure obligations continued throughout the appellate process, and commented that the "protection of the innocent" against wrongful convictions is "as important on appeal as it is prior to conviction".

22 In ***A.G. (British Columbia) v. Henry***, [2003] B.C.C.A. 119 (C.A.) the court refused to provide further disclosure to the defence several years after the case had concluded in the criminal courts (including appeals), holding that the only remedy for the defence was a freedom of information request.

23 ***R. v. Leboeuf*** (2003), 190 C.C.C. (3d) 104 (Que.S.C.).

24 The Canadian Bar Association ***Code of Professional Conduct***, chap. IX, commentary 9, states that Crown counsel must make timely disclosure of "all relevant facts and known witnesses, whether tending to show guilt or innocence, or that would affect the punishment of the accused".

in the Crown's case that may impact upon the Crown's ability to establish its case against the accused.[25] Accordingly, where the parties, for example, have concluded their resolution discussions and have reached an agreement that involves a plea of guilty by the accused, if the Crown's case against the accused changes in some significant way (eg. the main Crown witness dies, or disappears, or becomes clearly unwilling to cooperate with the Crown) before the details of the resolution agreement unfold in court, the Crown is obliged to disclose that new development in the case before proceeding to accept the plea of guilty of the accused in court.[26]

2. *The Crown Must Not Delay Resolution Discussions*

Given that one of the great benefits of timely resolution discussions is that pending criminal charges may be efficiently and effectively resolved in accordance with the due and proper administration of justice, it follows that the Crown "should act expeditiously" in pursuing resolution

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25 M.Proulx and D.Layton, ***Ethics and Canadian Criminal Law***, *supra*, note 12, at pp. 659-662, 696. In Ontario, the ***Practice Memorandum*** on ***Resolution Discussions***, *supra*, note 9, states that the Crown "must not knowingly accept a guilty plea to a charge when a material element of that charge can never be proven, unless that fact is fully disclosed to the defence prior to the guilty plea". For a selection of American cases that support this position, see: ***Sanchez v. United States***, 50 F.3d 1448 (9th Cir., 1995) at p. 1453; ***Tate v. Wood***, 963 F.2d 20 (2nd Cir., 1992) at p. 25; ***Fambo v. Smith***, 433 F.Supp. 590 (W.D.N.Y) at p. 598; *Affirmed*: 565 F.2d 233 (2nd Cir., 1997); ***People v. Benard***, 620 N.Y.S.2d 242 (1994), at p. 245.

26 It would seem to be unfair and unethical for the Crown to permit the accused to plead guilty, in accordance with the earlier resolution agreement, without first disclosing to the accused the "unavailability" of a main Crown witness, as such a change in the overall strength of the Crown's case against the accused might well impact upon the accused's decision as to whether or not the follow through with the implementation of the resolution agreement. M.Proulx and D.Layton, ***Ethics and Canadian Criminal Law***, *supra*, note 12, at pp. 660-662. In Nova Scotia, the ***Crown Attorney Manual*** in relation to their policy on ***Resolution Discussions and Agreements***, available online at: http://gov.ns.ca/pps/ca_manual.htm, states that, while Crowns are not required to "warrant the availability of every witness", as a matter of practice, in order to ensure that no one is mislead, it would be "prudent" for a Crown to inform the accused "of the unavailability of an essential witness" if this is "known to the Crown Attorney before or during plea discussions". However, in ***People v. Jones***, 375 N.E.2d 41 (N.Y., 1978) at pp. 43-45; *cert.denied*: 438 U.S. 846 (1978) the New York Court of Appeals held that there had been no denial of "due process" where the prosecutor, in a robbery case, failed to disclose, four days prior to the date the accused pled guilty to the offence, that the complainant had died. The Court of Appeals held that the death of the complainant did not constitute "exculpatory evidence" that was material to either the guilt of the accused or the appropriate punishment, and that there was no obligation on the prosecutor to disclose "non-evidentiary information pertinent to the tactical aspects of the defendant's determination not to proceed to trial". This is not the only American case in support of this position. See also, for example: ***Campbell v. Marshall***, 769 F.2d 314 (6th Cir., 1984) at p. 324; ***United States v. Kidding***, 560 F.2d 1303 (7th Cir., 1977) at p. 1313; ***Virzi v. Grand Trunk Warehouse***, 571 F.Supp. 507 (E.D.Mich., 1983) at pp. 512-513.

discussions in appropriate cases.[27] This means not only that the Crown should respond in a timely way to any resolution proposal made by the accused, but that the Crown, in appropriate cases, should promptly initiate resolution discussions with the accused. As a general rule, this means that, any time after the Crown has provided the defence with disclosure of the case against the accused, either party may properly initiate resolution discussions.[28]

3. *The Crown Must Not Accept Guilty Pleas Not Supported by the Evidence*

Resolution discussions between the Crown and the accused may broadly include a wide variety of topics, and may quite properly include suggestions by the Crown (or the defence) that it might be acceptable: (1) for the accused to plead guilty to a lesser and/or included offence, rather than the charged offence; (2) for the Crown to withdraw and/or stay some of the pending charges against the accused; (3) for the Crown to stay and/or withdraw pending charges against other accused persons (eg. friends or family of the accused, or individual corporate officers);[29] (4) for the accused to plead guilty to one, all-inclusive, "global" charge, as opposed to pending multiple charges; (5) for the Crown to withdraw and/or stay certain charges against the accused, but proceed on other charges, while relying upon the material facts that supported the stayed and/or withdrawn counts as aggravating factors for sentencing purposes,[30] (6) for the parties to agree to dispose of the case at

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27 M.Proulx and D.Layton, ***Ethics and Canadian Criminal Law***, *supra*, note 12, at p. 694.

28 In Ontario the ***Practice Memorandum*** on ***Resolution Discussions***, *supra*, note 9, suggests that the Crown should use his or her "best efforts" to "confer with defence counsel" with respect to matters that "will encourage the efficient use of limited resources", and to do so "***prior to a date being set for trial or preliminary inquiry***". Similarly, the ***FPS Deskbook***, *supra*, note 10, states, at § 20.3.3.2, that, as a result of the "benefits that flow to the administration of justice from early guilty pleas, the Crown should make its best offer to the accused ***as soon as practicable***". [emphasis added throughout].

29 Bruce Green, in his article "***Package Plea Bargaining and the Prosecutor's Duty of Good Faith***" (1989), 25 *Crim.L.Bull.* 507, discusses scenarios involving related accused persons, where the prosecutors may coerce pleas.

30 The ability of the court to hear about the factual details of other outstanding charges against the accused (to which the accused has not pled guilty), for purposes of taking them into account on sentencing, is now governed by s. 725(1)(b.1) of the *Criminal Code*. The enactment of this provision gave detailed legislative effect to the appellate jurisprudence on this topic. See, for example: ***R. v. Garcia and Silva***, [1970] 3 C.C.C. 124 (Ont.C.A.); ***R. v. Ness*** (1987), 77 A.R. 319 (Alta.C.A.); ***R. v. Getty*** (1990), 104 A.R. 180 (Alta.C.A.); ***R. v. Robinson*** (1979), 41 C.C.C. (2d) 464 (Ont.C.A.).

some specified future date if the accused is prepared to expressly waive the right to a "trial within a reasonable time"; and/or (7) for the Crown, and/or the accused, to recommend a certain range of sentence or a specific sentence.

Importantly, on the other hand, the Crown can not properly agree to permit the accused to plead guilty to an offence that has no evidentiary support. The ***FPS Deskbook*** simply states that the Crown must not "agree to a plea of guilty to an offence not disclosed by the evidence".[31] This ethical rule exists, of course, so as to ensure that, through the resolution discussion process, an innocent accused will not be potentially inadvertently pressured into pleading guilty to some baseless criminal allegation.[32]

4. *The Crown Must Not Permit "Overcharging" to Impact Upon Resolution Discussions*

It is improper for the Crown to permit or rely upon the "overcharging" of an accused as a negotiating tactic in resolution discussions. On occasion, the police will "overcharge" an accused, in that the accused will be: (1) charged with a more serious criminal offence than is warranted based upon the underlying evidentiary foundation; and/or (2) charged with multiple offences arising from, essentially, the same criminal offence allegedly committed by the accused. Theoretically, such "overcharging" could potentially be used by a Crown as additional "bargaining chip" in resolution discussions.

For example, in a case where an accused is charged with first degree murder, but the evidence, realistically viewed, only supports a conviction for second degree murder, a Crown could, theoretically, be tempted to offer to permit the accused to plead guilty to second degree murder in

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31 ***FPS Deskbook***, *supra*, note 10, at § 20.3.1.

32 In Ontario, the ***Crown Policy Manual***, *supra*, note 9, and accompanying ***Practice Memorandum*** on ***Resolution Discussions***, make it clear that "Crown counsel must not accept a guilty plea to a charge knowing that the accused is innocent". Professor Fred Zacharias, in his article, ***"Justice in Plea Bargaining"*** (1998), 39 *Wm. & Mary L. Rev.* 1121, states, at p. 1151, that "if a prosecutor knows that a defendant is factually innocent - for example, because another person has confessed to the crime - the prosecutor must, under any [plea bargaining] theory, release the defendant". In Nova Scotia the ***Crown Attorney's Manual***, *supra*, note 26, indicates that Crowns "must not enter into a guilty plea agreement to a charge in regard to which the accused claims to be innocent". See also: Canada Law Reform Commission, ***Plea Discussions and Agreements***, *supra*, note 2, at pp. 22, 48-50.

return for the accused agreeing to a joint submission that the period of parole ineligibility be increased to 15 years. In such a scenario the Crown would be giving up nothing in the negotiation (as the case was never one of first degree murder), but would be improperly using the threat of proceeding with such a charge in an effort to obtain the valuable assurance, from the accused, that the defence would join the Crown in seeking an increase in the parole ineligibilty period for the second degree murder conviction.

Employing this type of improper "scare tactic" in resolution discussions would be unethical on the part of the Crown.[33] The Crown should never attempt to extort a favourable resolution from an accused by impliedly threatening to prosecute the accused (wrongly) on a more serious charge, and/or for a multitude of criminal charges, where there is no sufficient evidentiary basis or principled justification for such charges.[34]

5. *The Crown Must Not Mislead the Accused Factually, or as to the Scope of the Crown's Negotiating Authority*

Crown counsel are, by virtue of their important dual role, obliged to deal honestly, fairly and openly with an accused during the course of any resolution discussions. While the Crown's disclosure obligation provides the accused with a helpful mechanism by which to check any factual or evidentiary representations made by the Crown during the course of the negotiation process, the Crown must, nevertheless, always take care to conduct such resolution discussions "in

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33 For example, the American Bar Association (ABA) ***Standards for Criminal Justice***, § 3-3.9(f), aptly observes that the prosecutor "should not bring or seek charges greater in number or degree than can reasonably be supported with evidence at trial or than are necessary to fairly reflect the gravity of the offence". But see: ***Bordenkircher v. Hayes***, 98 S.Ct. 663 (1978); C.W. Wolfram, ***Modern Legal Ethics*** (1986) at § 13.10.6, at p. 770. The Crown Prosecution Service for England and Wales, in its ***Code for Crown Prosecutors***, available online at http://www.cps.gov.uk/Publications/docs/code2004english.pdf states, at § 7.2, that Crown Prosecutors "should never go ahead with more charges than are necessary just to encourage a defendant to plead guilty to a few" and, in the same way, they "should never go ahead with a more serious charge just to encourage a defendant to plead guilty to a less serious one". See also: Canada Law Reform Commission, ***Plea Discussions and Agreements***, ***supra***, note 2, at pp. 21-22.

34 Significantly, it is not improper for the Crown to pursue "overlapping" criminal charges against an accused. For example, accused persons often, quite properly, find themselves facing charges of both "impaired driving" and driving with "over 80" mgs of alcohol in his or her blood, or charges of theft and the unlawful possession of stolen property.

good faith and without knowingly misleading" the accused.[35]

Similarly, during the course of the resolution discussions, the Crown must take care to make sure that the accused is not misled about the true legal scope of his or her power to negotiate a mutually satisfactory resolution of the criminal charges against the accused. More particularly, by way of example:

(1) ***Agreements Not Always Final:*** The Crown must not lead the accused to think that he or she has complete, total and absolute authority over the resolution of the case. As a matter of law, there are some limited and exceptional circumstances where, even if a clear and unequivocal agreement is reached between the Crown and the accused as to the resolution of the case, the Crown may still properly repudiate the agreement. More particularly, where the accused can be restored to his or her original legal position prior to the agreement, the Crown may properly repudiate the agreement if it is so improvident that its execution would bring the administration of justice into disrepute. In light of that legal reality, it would be wrong for the Crown, during the course of resolution discussions, to suggest that any agreement ultimately reached between the parties was final and could never be repudiated.[36]

(2) ***No Promises Respecting an Appeal:*** The Crown must not lead the accused to think that he or she has the authority to promise that there will not be a Crown appeal against any sentence imposed by the trial Judge. The statutory right of appeal in the *Criminal Code* permits the Attorney General to launch an appeal against sentence. Accordingly, it is not for the Crown involved in the resolution discussions to provide any promises or undertakings as to whether or not the Attorney General will exercise

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35 M.Proulx and D.Layton, ***Ethics and Canadian Criminal Law***, *supra*, note 12, at p. 696.

36 In Ontario, the ***Crown Policy Manual***, *supra*, note 9, and accompanying ***Practice Memorandum*** on ***Resolution Discussions***, make it clear that "Crown counsel must honour all agreements reached during resolution discussions" unless there are "exceptional circumstances" which justify repudiation of such an agreement. The ***Practice Memorandum*** explains that such agreements may be rarely repudiated, with the prior approval of a senior Crown official, where: (1) the agreement "would bring the administration of justice into disrepute"; and (2) the accused can be "restored to his or her original position". The position in British Columbia, according to the ***Crown Counsel Policy Manual***, *supra*, note 9, is very similar, indicating that the repudiation of any resolution agreement should be "extremely rare", and should only be considered where senior Crowns are satisfied that the agreement would "bring the administration of justice into disrepute" and consideration is appropriately given to the extent to which the accused "could be restored" to his or her "original position". The Nova Scotia policy on ***Resolution Discussions and Agreements***, *supra*, note 26, is to the same effect. Formulated somewhat differently, the ***FPS Deskbook***, *supra*, note 10, states, at § 20.3.8.2 , that "all negotiated plea or sentence agreements should be honoured by the Crown" unless it would be clearly "contrary to the public interest" (eg. where the case should not be prosecuted at all, or where the Crown had been "misled about material facts").

that right of appeal in any individual case.[37]

6. *The Crown Must Not Mislead the Court By Accepting a Factual Basis for Sentencing That the Crown Knows Not to be True*

Counsel must not be party to a resolution agreement which contains a statement of facts, for sentencing purposes, that counsel knows falsely represents the material facts of the case to the court. Simply put, counsel should not intentionally include (or refrain from including) any fact in an agreed statement of facts where the effect of that inclusion (or exclusion) will be to knowingly mislead the court. This obligation is as important for Crown counsel as it is for defence counsel, and flows from the more general prohibition against counsel knowingly deceiving deceiving the court, regardless of the context.[38]

In ***R. v. Beswick***[39] the accused was charged with unlawfully causing grievous bodily harm, based upon the fact that Crown witnesses were prepared to testify that the accused had instigated and participated in a vicious attack on the victim, wherein the accused, at one point, kneed the complainant in the face and completely bit off one ear. However, the parties negotiated a plea of guilty by the accused to a reduced charge, and reached an agreed statement of facts indicating that

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37 In Ontario, the ***Crown Policy Manual***, *supra*, note 9, and accompanying ***Practice Memorandum*** on ***Resolution Discussions***, make it clear that "Crown counsel must not purport to bind the Attorney General's right to appeal any sentence". Similarly, the ***FPS Deskbook***, *supra*, note 10, states, at § 20.3.3.1, that it is "not acceptable" for the Crown to "promise in advance not to appeal the sentence imposed at trial". In British Columbia, the ***Crown Counsel Policy Manual***, *supra*, note 9, requires Crowns to "refrain from entering into any arrangement which purports to fetter the discretion of the Attorney General to commence an appeal" without the prior written approval of the Assistant Deputy Attorney General. See also: ***R. v. Dubien*** (1982), 67 C.C.C. (2d) 341 (Ont.C.A.); ***R. v. Wood*** (1975), 26 C.C.C. (2d) 100 (Alta.S.C.); ***R. v. Simoneau*** (1978), 40 C.C.C. (2d) 307 (Man.C.A.); ***A.G. Canada v. Roy*** (1972), 18 C.R.N.S. 89 (Que.Q.B.); ***R. v. Agozzino***, [1970] 1 C.C.C. 380 (Ont.C.A.); ***R. v. Goodwin*** (1981), 43 N.S.R. (2d) 106 (C.A.). For a detailed review of the cases that discuss the legal ability of the Crown to change its position on appeal, see: Canada Law Reform Commission, ***Plea Discussions and Agreements***, *supra*, note 2, at pp. 26-37, 63-65.

38 M. Proulx and D. Layton, ***Ethics and Canadian Criminal Law***, *supra*, note 12, at pp. 459-462, 475. The ***FPS Deskbook***, *supra*, note 10, at § 20.3.1, states that it is "not acceptable" for the Crown to agree to "a plea of guilty to a charge that inadequately reflects the gravity of the accused's provable conduct" unless, in exceptional circumstances, the plea is "justifiable in terms of the benefit that will accrue to the administration of justice, the protection of society, or the protection of the accused".

39 [1996] 1 Cr.App.R. 427 (C.A.)

the accused was not one of the aggressors in the attack, and had only bitten the complainant's ear in an excessive attempt to extricate himself from the fight. Inquiries by the Judge ultimately unraveled the plea arrangement, and the witnesses eventually testified to the more aggravated circumstances inconsistent with the agreed statement of facts offered to the court. On the appeal by the accused against his sentence, the Court of Appeal expressed its dissatisfaction with the conduct of the Crown, stating:

> It is axiomatic that whenever a court has to sentence an offender it should seek to do so on a basis which so far as is relevant to the determination of the correct sentence is true. It follows from this that the prosecution should not lend itself to any agreement whereby a case is presented to the sentencing judge to be dealt with so far as that basis is concerned on an unreal and untrue set of facts concerning the offence to which a plea of guilty is to be tendered.[40]

In an effort to provide detailed guidance concerning the practical operation of this general principle, the ***FPS Deskbook*** indicates that, where an accused pleads guilty, Crown counsel should put before the court "those facts that could have been proved by admissible evidence if the matter went to trial", directing that, while the Crown may properly omit reference to "embarrassing facts which are of little or no significance to the charge", the Crown may ***not*** agree to facts which will potentially mislead the court, such as: (1) agreeing not to advise the court of "any part of the accused's provable criminal record which is relevant or could assist the court";[41] (2) agreeing not to advise the court of the "extent of the injury or damages suffered by a victim"; (3) agreeing to "withhold from the court facts that are provable, relevant, and that aggravate the offence";[42] and/or (4) agreeing to facts which, when measured against the essential elements of the offence to which

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40 ***R. v. Beswick***, *ibid*, at p. 430.

41 Similarly, in Ontario the ***Practice Memorandum*** on ***Resolution Discussions***, *supra*, note 9, states that the Crown "must not agree to withhold information regarding an accused's relevant criminal record in exchange for a guilty plea".

42 In ***R. v. J.(E.J.)*** (1987), 2 W.C.B. 65 (Ont.Prov.Ct.) Nadeau J. expressed the view that, where the Crown intentionally suppresses circumstances which can not help but aggravate the seriousness of the offence, for the purpose of persuading the court of the appropriateness of the sentence that, as a result of a resolution arrangement with the defence, he or she has agreed to advance in the case, the Crown is "in breach of his [or her] obligation both to the Court and to the community".

the accused has pled guilty, would "cause the presiding judge to reject the plea in favour of a plea of not guilty".[43]

7. *The Crown Must Treat Multiple Accused Fairly*

The Crown is ethically obliged to engage in resolution discussions in cases involving multiple accused by treating all of the accused fairly and honestly. Importantly, however, this obligation does not require the Crown to treat all of the accused in exactly the same manner, or make the same individual agreements with each accused.

For example, a Crown responsible for the prosecution of a second-degree murder case against two accused, and who believed there was a reasonable prospect of conviction on the charge of murder, but appreciated that manslaughter was also a realistic verdict, might quite properly try to resolve the case by offering to permit the accused to plead guilty to the included offence of manslaughter (and thereby avoid the potential consequences of a murder conviction) provided that ***both*** of the accused were prepared to do so. In such circumstances, rejecting the plea of guilty to manslaughter voluntarily offered by just one of the accused, simply because the other accused would not also accept this proposal, may seem somewhat unfair to the accused who was inclined to the offer. After all, the completion of the proposed agreement was put beyond his or her reach by circumstances beyond his or her control (ie. by the negotiating conduct of the co-accused). At the same time, however, there is nothing necessarily unethical about this negotiating position taken by the Crown. Simply put, the Crown's "package deal" offer could have been made for a multitude of perfectly appropriate considerations. Perhaps the Crown was willing to make the settlement as: (1) the plea would bring certainty that the accused would be convicted of at least manslaughter, and could not be absolutely acquitted; (2) the plea would bring a speedy and cost efficient resolution of

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[43] ***FPS Deskbook, supra,*** note 10, at § 20.3.4. The Nova Scotia ***Crown Attorney Manual*** on ***Resolution Discussions and Agreements, supra,*** note 26, is to a similar effect. In Alberta, the ***Disposition Agreements Between Crown and Defence Guideline***, available online at: http://www.justice.gov.ab.ca/publications, states that it is "improper" for the Crown to "withhold any material, factual information or evidence, including the accused's criminal record, from the court in exchange for a plea of guilty from the accused", and proclaims that the "court accepting the pleas must be apprised of all the facts if it is to effectively discharge its responsibility to the community in passing sentence".

the case, in that a potentially lengthy trial would be avoided; and/or (3) the plea would obviate the need for witnesses to have to testify about potentially traumatic events, and might provide emotional closure with respect to the killing. The Crown might well see these factors as justification for accepting a plea to the lesser offence of manslaughter in some circumstances. However, if only one of the accused is prepared to plead guilty in this manner, then Crown is unable to achieve the goals sought by the settlement proposal. Accordingly, the Crown is ethically entitled to insist that, if the resolution discussions are to end in agreement, it must be with the agreement of both of the accused.[44]

8. *The Crown Must Keep Privileged Resolution Discussions Strictly Confidential*

The Crown has an ethical duty to keep any privileged resolution discussions with the accused confidential. This duty: (1) requires the Crown to refrain from permitting such privileged discussions from becoming known to the public; (2) requires the Crown to refrain from disclosing such privileged discussions to any other accused persons who may be jointly charged with the same offence; and (3) prohibits the Crown from attempting to subsequently use any aspect of those privileged discussions against the accused as evidence. Of course, this rule only protects the confidentiality of resolution discussions during such discussions, not after an agreement between the parties has been reached. The basis of this ethical obligation is that communications between the Crown and the accused that are part of resolution discussions are ***privileged*** "settlement" discussions.[45] As Proulx and Layton explain:

> Communications between defence counsel and prosecutor during plea discussions are confidential and privileged. Public policy encourages full and candid discussion between the parties, and what has been revealed during those discussions is not admissible at trial.[46]

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44 C.W. Wolfram, ***Modern Legal Ethics***, *supra*, note 33, § 13.10.6, at p. 770; ***In Re Ibarra***, 666 P.2d 980 (1983).

45 As to the general nature of this privilege see: J. Sopinka, S.N. Lederman and A.W. Bryant, ***The Law of Evidence in Canada*** (2nd ed., 1999) at §§ 14.201 to 14.232; ***Wigmore on Evidence*** (Chadbourn Rev., 1972, at § 1061; ***I. Waxman & Sons Ltd. v. Texaco Canada Ltd. et al.***, [1991] 2 S.C.R. 50.

46 M. Proulx and D. Layton, ***Ethics and Canadian Criminal Law***, *supra*, note 12, at pp. 417 [footnotes omitted]. See also: ***R. v. Pabani*** (1994), 89 C.C.C. (3d) 437 (Ont.C.A.) at pp. 442-443; *Leave denied:* (1994), 91 C.C.C.

In this context the privilege is one that is, in effect, shared between the Crown and the accused. Accordingly, for there to be a waiver of the privilege, it must come from both of the parties. In the result, one of the parties can not properly seek to unilaterally take advantage of some aspect of their confidential negotiations by seeking to tender, as evidence, some perceived admission made by the other party. Accordingly, for example, where the Crown and the accused engage in resolution discussions, and eventually reach an agreement as to the precise terms on which the accused will plead guilty to an alleged offence, the accused may subsequently resile from such an agreement and plead not guilty, thereby forcing the Crown to the strict proof of its case, without the Crown being able to tender any evidence of their earlier agreement by the accused to plead guilty to the offence.[47] This position is justified on the basis that the Crown and the accused must be able to candidly engage in full and frank negotiations with a view to appropriately resolving criminal cases to the overall benefit of the due administration of criminal justice. This rule is not absolute, and may admit of certain exceptions, but the general rule requires the Crown to maintain the confidentiality of these resolution discussions.

The operation of this principle is aptly illustrated by ***In Re Ramsay***,[48] where the Judicial Committee of the Privy Council reported to Her Majesty that a lawyers contempt of court citation should be overturned on the basis of the application of this principle. Essentially, a dispute had arisen between a lawyer and Queens Bench Judge about the manner in which a *habeas corpus* application had proceeded. The Judge had made certain remarks, that were reported in the press, that reflected adversely upon the lawyer. The lawyer responded by writing letters to the newspapers, which were reported, and which reflected adversely on the Judge. The Judge required the lawyer to appear and "show cause" why he should not be held in contempt of court as a result of the publication of the letters. He also asked the lawyer, however, by way of written interrogatories, if

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(3d) vi (S.C.C.); ***R. v. Bernardo***, [1994] O.J. No. 1718 (Ont.Ct.Gen.Div.); ***R. v. Lake***, [1997] O.J. No. 5447 (Ont.Ct.Gen.Div.); ***R. v. L.(N.)*** (1998), 124 C.C.C. (3d) 564 (Ont.Ct.Gen.Div.); ***R. v. Goland*** (1999), 133 C.C.C. (3d) 251 (Ont.Ct.Prov.Div.); Canada Law Reform Commission, ***Plea Discussions and Agreements***, *supra*, note 2, at pp. 65-66.

47 ***R. v. L.(N.)*** , *ibid.*

48 (1870), 3 L.R.P.C. 427, at p. 436.

he had been the author of the published letters about the Judge. The lawyer declined to answer the interrogatories, but appeared in Court. During the subsequent court proceedings, when the Judge indicated that he had been misunderstood and that he had not intended his remarks to reflect adversely upon the lawyer, the lawyer indicated that, in that case, he would withdraw his remarks. He then framed a written explanation and retraction to the Judge in which he admitted being the author of the letters. Nevertheless, the Judge, upon receipt of this "apology" and retraction, found the lawyer guilty of contempt of court, relying upon the admission in the apology as proof that the lawyer had written the letters to the press. The Privy Council held that the retraction was clearly written by the lawyer for the purposes of "settling the dispute" between them and that, if the Judge had not been prepared to accept the apology of the lawyer, then the Judge should have treated the apology as if it had been "written without prejudice" and not admissible against the lawyer.

9. *The Crown Must Treat Victims With Consideration and Respect*

Victims of crime are clearly not parties to criminal litigation. Moreover, the Crown in any given criminal case does not act as counsel for the victims, and does not need to seek their approval or guidance with respect to any issue in the case. At the same time, however, the Crown owes an ethical obligation to victims of crime to ensure that their interests have been considered and, to the extent appropriate, communicated to the court as part of the sentencing proceedings. Accordingly, for example, in resolution discussions with the accused, the Crown should: (1) be knowledgeable about the details of any physical, psychological and/or financial harm suffered by the victim as a result of the criminal conduct of the accused; (2) consider the views of the victim in arriving at a just and appropriate resolution agreement; (3) notify the victim of his or her opportunity to complete a ***Victim Impact Statement***; and (4) to the extent possible, inform the victim of the proposed resolution agreement in advance of the matter being heard in court and/or being published and/or broadcast by the media.[49]

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[49] The ***FPS Deskbook***, *supra*, note 10, provides, at § 20.3.8, that, in the interests of "openness", Crown counsel, where reasonably possible, should "solicit and weigh the view of those involved in the Crown's case, including any victim, and, where a plea agreement is reached, the Crown should "try to ensure that victims ... understand the substance of the agreement and the reasoning behind it". Similarly, in England and Wales, the ***Code for***

10. In Resolution Discussions the Crown Must Consistently Consider All Relevant Factors

Whenever engaged in resolution discussions with an accused, the Crown is obliged to try to maintain a consistent and fair approach from case to case. This approach is mandated by virtue of the principle that accused persons "in comparable situations" should be afforded "comparable opportunities" to engage in resolution discussions and "comparable treatment during those discussions".[50]

Further, in all resolution discussions with an accused, the Crown is obliged to consider, in good faith, all of the relevant considerations of the case. Some of the relevant "public interest factors" which the Crown might wish to appropriately consider in the context of any resolution discussions might include: (1) the criminal history of the accused; (2) the nature and gravity of the offences allegedly committed by the accused; (3) the remorse of the accused and his or her willingness to accept responsibility; (4) the desirability of a prompt and certain disposition of the case; (5) the strength of the Crown's case against the accused and the coincident likelihood of obtaining a conviction at trial; (6) the wishes of the victim(s), and the probable effect of a trial on the witnesses; and (7) the probable sentence or consequences if the accused is convicted.[51]

Crown Prosecutors, *supra*, note 32, at § 10.2, states that, in considering whether the pleas offered are acceptable, the Crown "should ensure that the interests of the victim and, where possible, any views expressed by the victim or victim's family, are taken into account when deciding whether it is in the public interest to accept the plea", recognizing that the final decision rests with the Crown Prosecutor. In British Columbia, the ***Crown Counsel Policy Manual***, *supra*, note 9, dictates that, in cases involving "serious injury or severe psychological harm", where practicable, and before concluding a resolution discussion, Crown Counsel "should inform the victim or the victim's family of the proposed resolution" and provide an "opportunity for any concerns to be expressed". Significantly, this ***Manual*** also provides that the Crown "should not conclude resolution discussions" in cases where the victim or the victim's family "indicate a desire to seek a review of the proposed resolution" as this will ensure that the more senior Crowns are "not placed in the position of having to repudiate a concluded resolution agreement" if it is found to be "not appropriate". See also: S.N. Verdun-Jones and A.A. Tijerino, ***"Victim Participation in the Plea Negotiation Process: An Idea Whose Time Has Come?"*** (2005), 50 *Crim.L.Q.* 190; ***Vanscoy v. Ontario***, [1999] O.J. No. 1661 (Sup.Ct. Jus.); Canada Law Reform Commission, ***Plea Discussions and Agreements***, *supra*, note 2, at pp. 51-52

50 In Nova Scotia this principle is clearly outlined in the policy statement in the ***Crown Attorney Manual*** in relation to ***Resolution Discussions and Agreements***, *supra*, note 26.

51 This principle finds clear express in Nova Scotia in the policy statement in the ***Crown Attorney Manual*** in relation to ***Resolution Discussions and Agreements***, *supra*, note 26. In ***United States v. Redondo-Lemos***, 955 F.2d 1296 (9th Cir., 1992), at p. 1299, cited with approval in ***R. v. Power***, *supra*, note 12, at p. 18, the court observed that decisions such as the decision to plea bargain were normally made as a result of "careful

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It is "not appropriate" for the Crown to ever take a position, in the context of resolution discussions, that is "based solely on expediency". While the need to make "effective use of limited resources" is certainly ***one*** proper consideration for a Crown to take into account, the Crown must never lose sight of all of the other relevant factors. For example, if the Crown and the accused, as a result of their resolution discussions, are very close in terms of potentially reaching an agreement as to what the actual sentence should be were the accused to pled guilty to certain offences, the Crown may, quite properly, conclude that the "public interest" would not be best served by conducting a lengthy trial for nothing more than an opportunity to seek a very slightly increased penalty.[52]

D. CONCLUSION

Resolution discussions and agreements between the Crown and the accused play an integral role in the efficient operation of our criminal justice system. In this context, the Crown's dual role requires counsel to represent the interests of the Attorney General as a knowledgeable, skilled and prepared negotiator, while at all times acting fairly, honestly and in good faith. More specifically, in their *quasi*-judicial role, the Crown: (1) must make full disclosure to the accused to ensure the parties are on an equal informational footing in their negotiations; (2) must act promptly in embarking upon resolution discussions; (3) must not accept guilty pleas that are not supported by the evidence; (4) must not permit "overcharging" to impact upon resolution discussions; (5) must not mislead the accused factually, or as to the scope of his or her negotiating authority; (6) must not knowingly mislead the court; (7) must treat multiple accused fairly; (8) must keep resolution discussions confidential; (9) must treat victims with consideration and respect; and (10) must consistently consider all relevant factors.

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professional judgment" as to a variety of considerations, including "the strength of the evidence, the availability of resources, the visibility of the crime and the likely deterrent effect on the particular defendant and others similarly situated".

52 The ***Crown Attorney Manual*** in relation to ***Resolution Discussions and Agreements***, *supra*, note 26, in Nova Scotia clearly articulates this principle.

National Criminal Law Program
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SECTION 2.3

HOW SHOULD A TRIAL JUDGE DEAL WITH JOINT POSITIONS?

The Honourable Mr. Justice William Smart
Supreme Court of British Columbia
Vancouver, British Columbia

I. INTRODUCTION

I expect that there are lawyers who would respond to the question in the title, not entirely facetiously, that judges should simply do what counsel have agreed they should do. I think we all appreciate that the issue is rather more involved.

I do not pretend to write on behalf of other trial judges. The opinions I express are my own. They may change over time with the benefit of further experience, and perhaps, hearing more joint positions.

Joint positions may be presented to a trial judge concerning any number of issues. For example, counsel may advance a joint position concerning bail, fixing a trial date, adjourning a scheduled trial date, jury selection, pre-trial applications, the admissibility of evidence, whether to accept a plea to an included offence, or the judge's charge to a jury.

The more controversial joint position is that made as to what sentence a judge should impose. It is usually referred to as a "joint submission" and will be the primary focus of this paper.

I will first briefly discuss joint positions other than those concerning sentence.

II. NON SENTENCING JOINT POSITIONS

Our criminal justice system is largely an adversarial one that accords the parties considerable discretion in the conduct of proceedings, including advancing joint positions where appropriate. However, as Rosenberg J.A. observed in ***R. v. Felderhof*** (2003), 180 C.C.C. (3d) 498 at para. 45, "we have never had a purely adversary system." The role of the trial judge is not merely that of referee. Ultimately, any decision a judge makes must be within his or her jurisdiction and lawful, whether or not it is the subject of a joint position.

Judges have a responsibility to correctly apply the law. As such, while a joint position from counsel on an issue of law is almost always helpful, it does not relieve the judge of the responsibility to ensure that it is correct. For example, a judge has the duty to charge a jury on all defences that arise on the evidence whether or not they have been raised by counsel for the accused: ***R. v. Esau*** (1997), 116 C.C.C. (3d) 289 (S.C.C.). Similarly, a joint position on an issue that requires an exercise of discretion by the judge still requires the judge to exercise that discretion correctly.

Judges also have a responsibility to protect the broader public interest, an interest which extends beyond simply the interests of the parties presenting a joint position. They must do their best to ensure the system is effective, efficient, and fair to all

participants. They must fulfil their responsibility to manage trials properly. As Rosenberg J.A. explained in ***Felderhof*** at para. 40:

> Whatever may have been the case in the past, it is no longer possible to view the trial judge as little more than a referee who sits passively while counsel call the case in any fashion they please. ... Early in the trial or in the course of a trial, counsel may make decisions that unduly lengthen the trial or lead to a proceeding that is almost unmanageable. It would undermine the administration of justice if a trial judge had no power to intervene at an appropriate time and, like this trial judge, after hearing submissions, make directions necessary to ensure that the trial proceeds in an orderly manner. ... [t]he power is founded on the court's inherent jurisdiction to control its own process.

While ***Felderhof*** did not arise in the context of a joint position, the import of the Court's reasoning is still applicable.

The public expects a judge to make the decisions that a judge is required to make, rather than delegate them to counsel. For example, the public expects a judge, not counsel, to ultimately decide whether a person charged with a serious criminal offence will be released into the community on bail. A joint submission concerning bail does not relieve the judge of the responsibility to ensure that the proposed outcome is appropriate.

A joint position will usually be accorded significant weight and respect by a trial judge, but it is ultimately the judge, as the final arbiter, who has the responsibility to make the decision. This is how our justice system is intended to function. Good

counsel recognize this and provide, with their joint position, the reasons that support it.

III. JOINT POSITIONS ON SENTENCING

I expect that what I have said so far is not controversial. The situation with respect to joint submissions on sentencing, however, is quite different.

I will begin by setting out the test that trial judges in Ontario apply when presented with a joint submission (which I will refer to as the "Ontario test"). I will then briefly consider the 1993 ***Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions***, chaired by the Honourable G. Arthur Martin (the "***Martin Report***"), on which the Ontario test is grounded. I will next review how different appellate courts across Canada have applied the Ontario test. Finally, I will make some suggestions concerning why, at least in some jurisdictions, the Ontario test may not be effective.

The Ontario Test

The test that judges in Ontario are to apply when presented with a joint submission has remained consistent for many years. ***R. v. Dorsey*** (1999), 123 O.A.C. 342, is

the most commonly cited authority in this regard, and the test was articulated as follows at para. 11:

> It is well established that a trial judge is not bound by a joint submission. The trial judge must, of course, give serious consideration and respect to a joint submission. The submission should be departed from only where the trial judge considers the joint submission to be contrary to the public interest and a submission which, if accepted, would bring the administration of justice into disrepute. [emphasis added]

Thus, judges are required to accept the sentence that counsel have agreed upon unless:

1. the sentence would be contrary to the public interest; and
2. the sentence would bring the administration of justice into disrepute.

This remains the test in Ontario: see, for example, ***R. v. R.W.E.*** (2007), 221 C.C.C. (3d) 244 (Ont. C.A.).

The Martin Report

In its Report released in 1993, the Advisory Committee to the Attorney General traced the history of plea bargaining, which it referred to as "resolution discussions". It described the fundamental shift since the late 1970s towards the acceptance of plea bargaining in Canada, and explained the basis of public resistance to the practice in these terms:

> Ultimately, much of the objection to plea bargaining found in the literature is premised on the assumption that bartering and justice are

> two very different ideas: "Justice should not be, and should not be seen to be, something that can be purchased at the bargaining table". (p. 277)

This view is likely still held by some who oppose plea bargaining and joint submissions. It arises, in part, from a misunderstanding of plea bargaining and also, in part, from a misuse of joint submissions. The plea bargaining process described and encouraged in the ***Martin Report*** is quite different in character from how it is usually perceived and, unfortunately, often conducted.

The Committee explained why it endorsed plea bargaining if properly conducted:

> It is the Committee's view that resolution discussions can, in appropriate cases, be an important method of accomplishing the aims of the criminal law. Assuming full disclosure by the Crown, two officers of the Court ... may... be readily able to agree upon a more or less limited range of disposition for such an accused that will responsibly reflect the prevailing sentencing principles, subject, of course, to the fact that the trial judge is the final arbiter of the propriety of both the plea and the sentence to be imposed. ... (p.287)

This reasoning was the basis for Recommendation 46:

> The Committee is of the opinion that resolution discussions are an essential part of the criminal justice system in Ontario, and, when properly conducted, benefit not only the accused, but also victims, witnesses, counsel, and the administration of justice generally.

The Committee went on to discuss at considerable length how resolution discussions ought to be properly conducted. It referred briefly to the need for the accused person to have access to competent counsel, before directing most of its

commentary to the role of the Crown. It is apparent that the Ontario test, which derived from the ***Martin Report***, is grounded in Crown counsel's responsibility to determine whether to proceed with a prosecution in the first instance. When considering the charge approval decision, whether pre- or post-charge, the Crown must take into account both the strength of its case and whether a prosecution is necessary in the public interest. These criteria continue to apply throughout the course of the prosecution, including during resolution discussions.

The Committee recommended that the Crown not enter into resolution agreements "simply for reasons of expediency" (Recommendation 50), as such a course of action could compromise the interests of justice in a number of ways:

> ... Resolution discussion outcomes based primarily upon a desire by the prosecution to be done with a case tend to be too lenient, thereby undermining the important criminal law objectives of denunciation and deterrence. Such outcomes also tend to disregard the very important interest of the victim in seeing the person who victimized him or her dealt with justly. In combination, these two shortcomings of resolution agreements, based on expediency alone, can undermine public confidence in the administration of justice.

Ultimately, any resolution agreement must be a "responsible representation of the public interest in the due enforcement of criminal law" (p. 301).

The Committee emphasized that the need to use the limited resources available to the administration of justice wisely should only be <u>one</u> of the factors that Crown

counsel ought to weigh when assessing the public interest. Determining whether and how a given case can be resolved by resolution discussions in a way that meets the public interest requires a close consideration of all of the circumstances of that case. An additional specific factor the Committee discussed was whether the plea of guilty was offered at the first reasonable opportunity (Recommendation 52). As Recommendation 62 states, "absent exceptional circumstances, there should not be resolution discussions at the trial courtroom door rather than an earlier stage in the proceedings". The Committee also stressed the importance of transparency concerning negotiated resolutions, recommending that Crown counsel "state on the record in open court that resolution discussions had been held and an agreement has been reached" (Recommendation 54).

A proper joint submission, therefore, is one that is based on a negotiated resolution in which the public interest has been carefully weighed by Crown counsel, including the benefits to the justice system generally, witnesses, and victims. It is an agreement negotiated by competent Crown counsel and defence counsel. It is an informed, considered resolution, made generally well in advance of the trial, and with respect to which Crown counsel has determined that it is no longer in the public interest to proceed with the prosecution if a certain disposition and sentence are achieved.

A negotiated resolution that is consistent with these recommendations forms the basis of Recommendation 58, which, in turn, is the genesis of the Ontario test:

> The Committee is of the opinion that a sentencing judge should not depart from a joint submission unless the proposed sentence would bring the administration of justice into disrepute, or is otherwise not in the public interest.

In making this recommendation, the Committee explained its view that while the sentencing judge could not have his or her sentencing discretion removed by the fact of a joint submission, it was appropriate for the judge to have regard for the interests of certainty in the outcome of resolution discussions by giving effect to a joint submission except where to do so would compromise the public interest or the administration of justice.

The Ontario test is best understood when viewed in the context of the Crown's responsibility to weigh the public interest when determining whether to proceed with a prosecution and the Committee's view of the importance of properly negotiated resolutions to the justice system. As it stated at p. 283 of the Report:

> The propriety in principle of resolution discussions flows, in large measure, from the very nature of our justice system. It is, in essence, adversarial, and as such, accords to the parties a large discretion to determine the manner and form of the proceedings. The extent of the discretion inherent in our system, and the corresponding onus on counsel to exercise that discretion responsibly and with integrity, is discussed in detail in Chapter I of the this Report. It is, in the

> Committee's view, only right that a system which affords counsel so much latitude in the presentation of a criminal prosecution to the Court, and expects counsel to meet such a high standard of integrity and responsibility, would extend to counsel the discretion to resolve issues before trial by mutual agreement.

Does the Ontario test require judges to apply a different test for determining an appropriate sentence than they would otherwise apply? To some judges, the Ontario test seems inconsistent with the sentencing provisions of the ***Criminal Code***. Further, it is questionable whether joint submissions are being used in the manner envisioned by the ***Martin Report***. In British Columbia they often are not, and I expect the same may hold true in other jurisdictions.

These are some of the reasons why I believe the Ontario test has been met with resistance by some trial judges and appellate courts in other jurisdictions in the country. The prevailing standards elsewhere appear to provide the sentencing judge with greater latitude in departing from a joint submission. It is also worth observing that some courts, while citing ***Dorsey*** and the Ontario test, refer to the two parts of the analysis disjunctively rather than conjunctively. This, too, would seem to relax the application of the test by requiring that only one of the prongs be satisfied. For purposes of convenience, however, I will refer to both formulations as the Ontario test.

I turn now to canvass some of the appellate authorities that have considered the standard for departing from joint submissions on sentence.

British Columbia

In ***R. v. Koenders*** (2007), 221 C.C.C. (3d) 225 (B.C.C.A.), Ryan J.A. commented as follows at para. 45:

> "Joint submission" has become a term of art. It denotes an agreement made between the Crown and defence, where, in return for a guilty plea, counsel will together urge the sentencing judge to impose a particular sentence. It is clear from the cases that the court is not bound by a plea bargain, or the joint submissions of counsel, although the latter ought to be given appropriate weight. Sentencing judges will not often depart from the recommendation. ...

Ryan J.A. thus emphasized that a true "joint submission" imports more than counsel taking a common position on sentence. She also quoted with approval from an earlier decision of the Court, ***R. v. Bezdan***, 2001 BCCA 215, where at para. 15 Prowse J.A. stated:

> ... It is apparent that the administration of criminal justice requires co-operation between counsel and that the court should not be too quick to look behind a plea-bargain struck between competent counsel unless there is good reason to do so. ... I would not go so far as to say that a sentencing judge can only depart from the sentence suggested in the joint submission if he or she is satisfied that the proposal is contrary to the public interest, or that the sentence proposed would bring the administration of justice into disrepute. It is not clear to me that these two circumstances cover all situations in which a sentencing judge might conclude that the sentence proposed was "unfit". [emphasis added]

Accordingly, the Ontario test is not exhaustive in British Columbia. A sentencing judge can also depart from a joint submission where satisfied that it is unfit.

Alberta and Saskatchewan

The Alberta position is similar to that in British Columbia. In ***R. v. G.W.C.*** (2000), 150 C.C.C. (3d) 513 (Alta. C.A.), Berger J.A., for the Court, stated as follows at paras. 17 and 18:

> The obligation of a trial judge to give serious consideration to a joint sentencing submission stems from an attempt to maintain a proper balance between respect for the plea bargain and the sentencing court's role in the administration of justice. The certainty that is required to induce accused persons to waive their rights to a trial can only be achieved in an atmosphere where the courts do not lightly interfere with a negotiated disposition that falls within or is very close to the appropriate range for a given offence. ...
>
> Joint submissions, however, should be accepted by the trial judge unless they are unfit ... or unreasonable ... [emphasis added]

As in British Columbia, the Court, while approving of the Ontario test, articulated the standard as requiring the sentencing judge to accept the recommended sentence unless it was unfit or unreasonable. The Court also emphasized the importance of the sentencing judge having a full understanding of the circumstances supporting a joint submission. At para. 24 Berger J.A. stated:

> With respect, no one should have a more intimate understanding of the case at bar than the Court itself. The facts that guide the sentence disposition ought not to be "sparse". Crown counsel, at the end of the

> day, ought not to be more familiar with the extenuating or aggravating circumstances of the offence than the sentencing judge. The facts of the case ought to be fully disclosed. Those facts must surely include the circumstances underlying the joint sentencing submission.

The Saskatchewan Court of Appeal adopted the Alberta position in ***R. v. Webster***, 2001 SKCA 72.

Manitoba

The Manitoba Court of Appeal has considered joint submissions in a number of decisions. In ***R. v. Sinclair*** (2004), 185 C.C.C. (3d) 569, Steel J.A., on behalf of the Court, said that a "sentencing judge should normally not deviate from the joint submission unless they have clear and cogent reasons for doing so". She reviewed decisions from across the country and noted that appellate courts had used different language when describing the appropriate test for departing from the joint submission. She also explained that the judge's deference to a joint submission will vary according to the circumstances upon which it is based (para. 13):

> There is a continuum in the spectrum of plea bargaining and joint submissions as to sentence. In some cases, the Crown's case has some flaw or weakness and the accused agrees to give up his or her right to a trial and to plead guilty in exchange for some consideration. This consideration may take the form of a reduction in the original charge, withdrawal of other charges or an agreement to jointly recommend a more lenient sentence than would be likely after a guilty verdict at trial. Evidence always varies in strength and there is always uncertainty in the trial process. In other cases, plea negotiations have become accepted as a means to expedite the administration of criminal justice. ... The clearer the *quid pro quo*, the more weight

should be given an appropriate joint submission by the sentencing judge.

At para. 17, Steel J.A. provided a helpful summary of the law:

> (1) While the discretion ultimately lies with the court, the proposed sentence should be given very serious consideration.
>
> (2) The sentencing judge should depart from the joint submission only when there are cogent reasons for doing so. Cogent reasons may include, among others, where the sentence is unfit, unreasonable, would bring the administration of justice into disrepute or be contrary to the public interest.
>
> (3) In determining whether cogent reasons exist (i.e., in weighing the adequacy of the proposed joint submission), the sentencing judge must take into account all the circumstances underlying the joint submission. Where the case falls on the continuum among plea bargain, evidentiary considerations, systemic pressures and joint submissions will affect, perhaps significantly, the weight given the joint submission by the sentencing judge....

The Court, like those in British Columbia, Alberta, and Saskatchewan, applied the Ontario test but amplified it to include that the recommended sentence be neither unreasonable nor unfit.

Quebec

Fish J.A. (as he then was) explained the Quebec position in ***R. v. Douglas*** (2002), 162 C.C.C. (3d) 37. He reviewed the formulations of the test articulated by various

appellate courts across the country, and referred as well to the ***Martin Report***. He set out his conclusion at para. 51:

> In my view, a reasonable joint submission cannot be said to "bring the administration of justice into disrepute". An unreasonable joint submission, on the other hand, is surely "contrary to the public interest". Accordingly, though it is purposively framed in striking and evocative terms, I do not believe that the Ontario standard departs substantially from the test of reasonableness articulated by other courts, including our own. Their shared conceptual foundation is that the interests of justice are well served by the acceptance of a joint submission on sentence accompanied by a negotiated plea of guilty - provided, of course, that the sentence jointly proposed falls within the acceptable range and the plea is warranted by the facts admitted. [emphasis added]

The Quebec position, therefore, is that while "reasonableness" is the test that sentencing judges should apply, the Ontario test does not depart "substantially" from that test.

The Maritimes

The Nova Scotia Court of Appeal in ***R. v. Cromwell*** (2005), 202 C.C.C. (3d) 310, adopted the Ontario test with the qualification that a joint submission could also be rejected if it was otherwise unreasonable. At p. 321, Bateman J.A., for the Court, explained the rationale behind a joint submission and then stated at paras. 20 - 21:

> Joint sentence submissions arising from a negotiated guilty plea are generally respected by the sentencing judge. Ultimately, however, the judge is the guardian of the public interest and must preserve the reputation of the administration of justice. Where the agreed resolution

> is contrary to the public interest, would bring the administration of justice into disrepute or is otherwise unreasonable the judge retains the discretion to reject the joint submission...[citations omitted]
>
> A trial judge may decline to give effect to a joint recommendation, not simply because she would have imposed a more severe sanction, but where the sentence is clearly unreasonable and then, only if the judge is satisfied there are no other compelling circumstances justifying, as in the public interest, a departure from an otherwise fit sentence.

Webber J. A. of the Prince Edward Island Court of Appeal held as follows in ***R. v. Hatt*** (2002), 163 C.C.C. (3d) 552 at para.15, after quoting extensively from ***G.W.C.***:

> I agree that there is no rigid formula that must be followed when considering a joint submission. However, if a trial judge is considering rejecting that submission, an inquiry must be made as to the reason behind the submission, and clear reasons must be given, after an explanation by counsel of the rationale for the joint submission, as to why it would be contrary to the public interest and why it would bring the administration of justice into disrepute to impose that recommended sentence.

Rowe J.A. for the Newfoundland Court of Appeal in ***R. v. Druken*** (2006), 215 C.C.C. (3d) 394, applied Fish J.A.'s decision in ***Douglas***, and stated at paras.17 - 18:

> To summarize, a sentencing judge should depart from a joint submission by counsel only if accepting the submission would bring the administration of justice into disrepute or would otherwise be contrary to the public interest.
>
> In making this determination, the question of whether the sentence is unreasonable must be considered... .

The lower court in that case had held that a sentencing judge, on a joint submission, must assess the fitness of the proposed sentence by considering whether it falls

within the appropriate range based upon general principles of sentencing. In concluding that this was not the correct approach, Rowe J.A. wrote at para. 26 that:

> While the principles in s. 718 must always guide sentencing, simply to refer to them misses the point. The relevant test is whether the proposed sentence is so lenient that it cannot be accepted as to do so would be "contrary to the public interest and would bring the administration of justice into disrepute." ...

He then provided some assistance as to the meaning of that test at para. 29:

> A sentence could be contrary to the public interest and bring the administration of justice into disrepute in a variety of ways. These it would be unwise to seek to compass. In this case, the proposed sentence would be contrary to the public interest were it so light as to undermine the deterrent effect of the ordinary expectation of a sentence for manslaughter. Similarly, the sentence would bring the administration into disrepute were it so inordinately lenient and markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system. ...

The New Brunswick Court of Appeal in ***R. v. Gulgnard*** (2005), 195 C.C.C. (3d) 145 also endorsed the reasons of Fish J.A. in ***Douglas***, and held, at para. 18, that "a joint recommendation on sentence should be followed unless it is unreasonable."

IV. QUESTIONS AND SUGGESTIONS

The Ontario test raises a number of questions. While the words used in stating the test are not foreign to criminal proceedings, what do they mean in the context of a sentencing hearing? The test has two parts. Is there a difference between them? If

so, what is it? What criteria or factors should a judge consider when applying the test?

Is the Ontario test a different test than that usually applied by judges when sentencing? Is it the sentencing judge's responsibility to impose what he or she believes is a fit sentence or is it to endorse an agreement reached between counsel as to what they believe is a fit sentence unless it would be contrary to the public interest or would bring the administration of justice into disrepute? What if these approaches lead to different outcomes? Does the Ontario test blur the responsibilities of the sentencing judge and Crown counsel? Is the judge, in a sense, reviewing the Crown's exercise of discretion rather than determining what he or she believes is the appropriate sentence?

Further questions arise when considerations of the fitness and reasonableness of the proposed sentence are imported into the analysis. Would it be contrary to the public interest or bring the administration of justice into disrepute for a judge to impose an unfit or unreasonable sentence? If so, then why use the Ontario test when assessing a joint submission? If not, are we trading unfit and unreasonable sentences in return for some other benefit to the criminal justice system? If we are, what is it and is the trade-off worth it?

Judges are required to impose sentences in accordance with the sentencing provisions of the ***Criminal Code***. Section 718.1 states that the fundamental principle of sentencing is to impose a sentence that is "proportionate to the gravity of the offence and the degree of responsibility of the offender." The ***Code*** does not refer to joint positions as a factor that judges should consider when sentencing, nor does it refer to the language used in the Ontario test.

To my mind, the Ontario test imposes a different analysis on the sentencing judge in that it requires the judge to accept the sentence that counsel have agreed upon unless it would be contrary to the public interest and would bring the administration of justice into disrepute to do so.

As can be seen from a review of decisions from across the country, some appellate courts are more deferential to joint submissions than others. I expect this is, in part, a reflection of the culture in the particular jurisdiction towards plea bargaining. I understand, for example, that judges in Ontario actively encourage and assist negotiated resolutions and may meet with counsel for that very purpose. I have been told that counsel may meet with a judge in his or her chambers to determine whether a certain joint submission would be acceptable to that judge. If it would not be, counsel is free to see if another judge would accept it. This practice is unacceptable in British Columbia. I expect the same is true in many other jurisdictions across Canada.

The willingness to facilitate and encourage negotiated resolutions is what underlies the Ontario test and, I expect, the degree to which it is accepted or not across the country. Is there anything wrong with using the Ontario test? Perhaps not and it may be presumptuous for me to suggest otherwise.

However, I question whether the Ontario test works effectively in all jurisdictions. I am concerned that it creates a test that is difficult to reconcile with the sentencing provisions of the ***Criminal Code***. I am also concerned that joint submissions are being used primarily to reduce the volume of cases proceeding to trial for either budgetary purposes or to reduce the workload of individual prosecutors. In other words, they are not being used as intended by the ***Martin Report***.

I am concerned, as well, that some prosecutors are accepting guilty pleas to less serious offences in return for joint submissions for sentences that reflect the gravity of the offences they did not proceed with, rather than the ones they did. I am told that this occurs frequently in British Columbia. I expect it occurs elsewhere in Canada. Is this not contrary to the fundamental purpose of sentencing – proportionality?

Perhaps the ultimate question is this: can we trust judges to respect the benefits to the justice system of negotiated resolutions without importing a different test for

determining an appropriate sentence when it is presented as a joint submission? I suggest that we can and that appellate courts will ensure that we do.

Why not use the same test for determining an appropriate sentence, whether it is presented as a joint submission or not? Let the factors and considerations which led counsel to the negotiated resolution and joint submission speak for themselves. Have counsel explain to the judge the basis for the negotiated plea and joint submission. As stated by the Manitoba Court of Appeal in ***Sinclair***, joint submissions will fall on a continuum. The weight the judge will give to the joint submission will depend, in part, on where on the continuum it falls. The judge will assess the facts and circumstances of the joint submission and the extent to which it is a true negotiated resolution.

I suggest that the appropriate use of joint submissions will be enhanced and the criminal justice system better served by leaving the determination of a fit sentence to the judge, rather than to counsel.