Taman Inquiry
into the investigation and prosecution of Derek Harvey-Zenk
Honourable Roger Salhany, Q.C., Commissioner

PROSECUTORIAL STANDARDS AND ETHICS

TAB 8

THE PROSECUTOR and PLEA BARGAINING

Taman Inquiry
into the investigation and prosecution of Derek Harvey-Zenk
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TAB 8A

General Duties (and Plea Bargaining)

Manitoba
Department of Justice

Guideline No. 2:PLE:1

Public Prosecutions

Policy Directive

Subject: Plea Bargaining
Date: October 10, 1990

POLICY STATEMENT:

In order to minimize public expense, inconvenience to witnesses and the backlog of Criminal Prosecutions, Crown counsel should facilitate discussions with defence counsel with a view to avoiding unnecessary litigation. Such discussions may result in Crown counsel and defence counsel reaching an agreement respecting the charge or charges to which an accused person will plead guilty and/or the sentence that will be recommended to the Court. In arriving at such agreements, Crown counsel must balance the rights of the accused, the public interest, and the interests of the victim. The following principles should govern plea bargaining:

1. The institution of criminal proceedings should involve the selection of the appropriate charge or charges based upon a consideration of the legal requirements of same and the availability of admissible evidence in support thereof. Thus a careful examination of the police investigation reports and the provisions of the relevant charging legislation is required. Crown counsel should not approve excessive counts in an information merely to influence an accused to plead guilty to some of the counts, nor should charges be laid where it is known that the evidence in support thereof is of an unreliable nature or where the jurisprudence clearly indicates that the facts will not support the charges.

2. Crown counsel should only accept pleas of guilty to offences supported by the facts established by the police investigation.

3. A plea bargain may involve acceptance by Crown counsel of offers of guilty pleas to lesser charges or withdrawal of some charges in exchange for guilty pleas to the balance of charges where such agreements are based on proper consideration

of the nature and quality of the evidence available in support of the prosecution of a multiplicity of charges which have been laid as a result of a single delict.

4. Crown counsel may agree with defence counsel to adopt a particular position on the matter of sentence. This may involve agreeing to make no recommendation respecting sentence; agreeing to recommend a certain kind of sentence, i.e. fine or imprisonment; agreement to recommend a sentence within a certain range, i.e. respecting the severity of a fine or the length of a term of imprisonment; or agreeing to recommend a specific sentence, such as a fine in a specified amount or a specified term of imprisonment. Other kinds of agreements may be made as well depending upon the circumstances of the case.

5. No agreements should be made on the basis of convenience or expediency. Nevertheless, Crown counsel may enter into an agreement in order to avoid a trial where this is done for the purpose of limiting the backlog of criminal prosecutions. Such an agreement may expose the offender to a lesser penal sanction than he might otherwise face upon conviction at trial provided the agreement involves a result which is reasonable in light of the circumstances of the offence or offences and of the background of the offender.

6. It is proper for Crown counsel to make agreements respecting pleas or sentence with a view to avoiding an unsuccessful prosecution. Thus, for example, where deficiencies in the available evidence create a substantial likelihood of acquittal, it is appropriate for Crown counsel to agree to pleas of guilty to lesser but related charges, or agree to recommend a less severe sentence than would otherwise be sought, provided such agreement does not tend to bring the administration of criminal justice into disrepute. **Note that this mode of conviction is no more foolproof than full trials in the Courts,** and there is an over-riding duty of fairness in the prosecutor. The accused should not be overcharged, or a plea extorted on the basis of a more serious charge, which may have a skimpy factual underpinning. See: S. Cohen, Due Process of Law (1977) "Overcharging, at pp.182-3, and Brady v. U.S. 397 U.S. 742 (1970), per White, J. at pp.757-8.

7. Though very rare, there are situations where Crown counsel may properly decide to stay proceedings or withdraw charges on compassionate or humanitarian grounds or in cases where the system of criminal justice would be brought into disrepute by the furtherance of a particular prosecutions.

8. Crown counsel should not agree not to appeal whatever sentence the Judge imposes in exchange for a plea of guilty.

9. Crown counsel should not agree to sanitize or play down certain facts in exchange for a guilty plea. All of the facts relating to the incident which can be proved and which are of significance must be disclosed to the Judge.

10. Crown counsel should not agree to withhold information regarding the offender's criminal record in exchange for a guilty plea.

11. Crown counsel should not agree to deal with a matter at a time other than the normal Court time in order to avoid media coverage.

12. Crown counsel prosecuting in Provincial Court should not attempt to bind the Crown Attorney prosecuting the matter in Court of Queen's Bench on matters of plea or sentence. Crown counsel prosecuting in Provincial Court may, however, agree to the commital of an accused to Queen's Bench without a preliminary hearing where defence counsel undertakes that the accused will plead guilty to an agreed charge or charges. In such cases, no agreements can be made respecting sentence by the Provincial Court Crown Attorney.

13. Crown counsel should not agree to recommend a specific sentence where it is understood that a pre-sentence report will be ordered. Crown counsel may, however, agree to make no specific recommendation as to sentence or to not recommend a sentence more severe than the circumstances of the offence and the known background of the offender would warrant, even where a pre-sentence report is to be ordered.

14. The judiciary should not generally be brought into the bargaining process. Thus, it is generally not appropriate for counsel for the Crown and the accused to make representations jointly outside of Court. Rare exceptions may exist where information critical to the sentencing process should not be subjected to the scrutiny of an open courtroom. Such situations might include instances where a psychiatric report respecting the accused contained information which could adversely affect innocent persons or the accused, where there is medical information which should remain confidential, such as the existence of a terminal illness of the accused, et cetera.

15. Crown counsel who are doubtful about the appropriateness of a contemplated agreement should consult with senior prosecutions staff. In particular, all homicide cases in which a reduction of charge is sought must be first discussed with the appropriate Senior Crown Attorney.

Relevant Passages from the Ontario *Crown Policy Manual* (2005), "Resolution Discussions"

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A resolution agreement with respect to charges and/or sentence should adequately reflect the public interest and the gravity of the provable offence or offences. Crown counsel should ensure that the interests of the victim are considered in reaching a resolution.

There are some fundamental principles of resolution discussions that are binding directives:

- Crown counsel must not accept a guilty plea to a charge knowing that the accused is innocent

- Crown counsel 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

- Crown counsel must not purport to bind the Attorney General's right to appeal any sentence

- Unless there are exceptional circumstances, Crown counsel must honour all agreements reached during resolution discussions

...

Relevant Passages from the *Federal Prosecution Service Deskbook*, ch. 20, "Plea and Sentence Discussions and Issue Resolution" (2005)

20.1 Introduction

Discussions between Crown and defence counsel which are intended to lead to a narrowing of the issues at trial, or which may avoid unnecessary litigation altogether, form an important and necessary part of the criminal justice system. Discussions of this nature will be referred to throughout this chapter as "resolution discussions". Though not defined in the Criminal Code, resolution discussions embrace several practices: which charges an accused may plead guilty to, how the case may proceed, what an appropriate sentence might be, what the facts of the offence are for the purposes of a guilty plea, and, if the case is to proceed to trial, how the issues might be narrowed so as to expedite the trial. Counsel are to make their best efforts to reach agreements on such issues as soon as possible. It must be emphasized, however, that any recommendations made to the court as part of a plea or sentence discussion are subject to the overriding discretion of the court to accept or reject any submission by counsel.

20.2 Statement of Policy

Crown counsel's approach to resolution discussions must be based on several important principles: fairness, openness, accuracy, non-discrimination and the public interest in the effective and consistent enforcement of the criminal law.

Crown counsel may participate in resolution discussions where:

* the case meets the charge approval standard set out in Part V, Chapter 15, "The Decision to Prosecute";

* the accused is willing to acknowledge guilt unequivocally; and

* the consent of the accused to plead guilty is both voluntary and informed

Because of the importance of such discussions, Crown counsel should keep a record in respect of any offers made, or agreements reached.

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20.3.1 Charge Discussions

Charge discussions may properly include the following:

* reducing a charge to a lesser or included offence;

* withdrawing or staying other charges;

* agreeing not to proceed on a charge or agreeing to stay or withdraw charges against others (for example, friends or family of the accused, or individual corporate officers);

* agreeing to reduce multiple charges to one all-inclusive charge (where permitted by law); and

* agreeing to stay certain counts and proceed on others, and to rely on the material facts that supported the stayed counts as aggravating factors for sentencing purposes5. (This may not be done, however, where the counts to be stayed are serious charges unrelated to the charges for which guilty pleas are entered6.)

The following practices are not acceptable:

* instructing or proceeding with unnecessary additional charges to secure a negotiated plea;

* agreeing to a plea of guilty to an offence not disclosed by the evidence; or

* agreeing 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.

20.3.2 Procedural Discussions

Procedural discussions may properly include the following:

* agreeing to proceed summarily instead of by indictment;

* agreeing to dispose of the case at a specified future date if, on the record and in open court, the accused is prepared to waive the right to a trial within a reasonable time; and

* agreeing to the waiver of charges to or from a particular province or territory, or to or from a particular jurisdiction in a province or territory.

20.3.3 Sentence Discussions

20.3.3.1 Scope of Sentence Discussions

Sentence discussions may properly include the following:

* a recommendation by Crown counsel for a certain range of sentence or for a specific sentence;

* a joint recommendation for a range of sentence or for a specific sentence;

* an agreement by Crown counsel not to oppose a sentence recommendation by defence counsel which has been disclosed in advance;

* an agreement by Crown counsel not to seek additional optional sentencing measures (for example, prohibition orders, preventive detention, forfeiture). However, Crown counsel cannot negotiate sentencing measures which apply by operation of law;

* an agreement by Crown counsel not to seek more severe punishment by proceeding with a Notice of Intention to Seek Greater Punishment;

* agreement by Crown counsel not to oppose the imposition of an intermittent sentence rather than a continuous sentence; and

* the type of conditions to be imposed on a conditional sentence.

The following practice is not acceptable:

* a promise in advance not to appeal the sentence imposed at trial.

20.3.3.2 Conduct of Sentence Discussions

The following principles should inform Crown counsel's approach to sentence negotiation:

* Because 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. Absent a significant change in circumstances, the offer should not be repeated at later points in the process.

* Crown counsel should initiate, as well as respond to, plea discussions;

* Crown counsel who conduct sentence negotiations shall have full authority to enter into binding agreements;

* FPS Directors shall ensure that counsel are made available to conduct plea and sentence discussions; this may include, for example, the court where accused persons make their first appearance; and

* Where an accused changes counsel, Crown counsel should advise the new counsel of previous offers and our present position.

* Before recommending that a fine be imposed, Crown counsel should take every reasonable measure to ensure that the fine is an appropriate disposition, which will

necessarily include forming an opinion as to whether an offender is capable of paying the fine. Where possible, Crown counsel should, as part of the negotiations for resolving the file by way of a fine, arrange with the defence for the payment of the fine on the day of sentencing; if the money to pay is not immediately available, but will be in the near future, Crown counsel should seek to have the sentencing proceedings take place on that day.

20.3.4 Agreements as to the Facts of the Offence

Where an accused decides to plead guilty, Crown counsel should agree to put before the court those facts that could have been proved by admissible evidence if the matter went to trial. Discussions regarding the facts may properly include the following:

* agreeing not to include in representations to the court embarrassing facts which are of little or no significance to the charge; and

* agreeing to rely on an agreed statement of facts.

The following practices are not acceptable:

* an agreement respecting facts which results in or gives the appearance of misleading the court, such as:

a. an agreement not to advise the court of any part of the accused's provable criminal record which is relevant or could assist the court;

b. an agreement not to advise the court of the extent of the injury or damages suffered by a victim;

c. an agreement to withhold from the court facts that are provable, relevant, and that aggravate the offence; or

d. an agreement to outline facts to the court which, when measured against the essential elements of the offence to which the accused has pleaded guilty, would cause the presiding judge to reject the plea in favour of a plea of not guilty.

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20.3.7 Accuracy

Crown counsel should maintain a complete record of all plea and sentence discussions or agreements on the file. This will promote a consistent and informed practice.

20.3.8 Openness and Fairness

The general principles of openness and fairness apply to all forms of discussions referred to above. Both principles are explained here.

20.3.8.1 Openness

Crown counsel should, where reasonably possible, solicit and weigh the views of those involved in the Crown's case -- in particular, the victim (where there is one) and the investigating agency. However, after consultation, the final responsibility for assessing the appropriateness of a plea agreement rests with Crown counsel. If a plea agreement is reached, counsel should try to ensure that victims and investigating agencies understand the substance of the agreement and the reasoning behind it. The scope of this discussion may, in unusual circumstances, have to be limited by privacy or secrecy considerations in the accused's interest or in the general public interest.

Where a plea or sentence agreement has been reached, counsel should present the proposal to the trial judge in open court and on the record. In certain circumstances, it may be necessary to discuss some aspects of the agreement with the trial judge privately. This should be done only in rare and compelling situations involving facts which in the interest of the public or the accused ought not to be disclosed publicly. Common examples include cases where the accused is terminally ill, or has acted as a confidential informer for the police. It is not acceptable, however, to discuss a plea agreement privately with the trial judge in advance of the hearing to determine the court's reaction to it. This does not, however, prevent counsel's participation in a pre-trial conference conducted under section 625.1 of the Criminal Code. Counsel may conduct sentence proceedings before the judge who presides over the pre-trial conference.

20.3.8.2 Fairness

All negotiated plea or sentence agreements should be honoured by the Crown unless fulfilling the agreement would clearly be contrary to the public interest. For example, Crown counsel must not proceed with an agreement if counsel has reason to believe that the criteria set out in Part V, Chapter 15, "The Decision to Prosecute" have not been met. Additionally, Crown counsel may be justified in refusing to fulfil an agreement if misled about material facts. The decision not to fulfil an agreement should only be made after consultation with, and approval of, the Senior Regional Director.

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ESSENTIALS OF
CANADIAN LAW

ETHICS AND CANADIAN CRIMINAL LAW

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CHAPTER 8

PLEA DISCUSSIONS

A. INTRODUCTION

Aside from instances where the prosecution stays or withdraws all charges, every accused person shares a common experience: entering a plea of guilty or not guilty to a charge. A large majority of these accused, easily upwards of 60 percent, pleads guilty.[1] For this majority, the plea has an immediate and dramatic impact on the proceedings. A conviction is recorded, there is no trial on the issue of culpability, and the matter proceeds to sentencing. Deciding how to plead in response to a charge is thus the key decision for many, many accused, and not surprisingly the law accords the accused total freedom of choice in this regard. At the same time, however, defence counsel fre-

1 Statistics Canada does not track the proportion of accused that pleads guilty: see, for example, Canadian Centre for Justice Statistics, *The Juristat Reader: A Statistical Overview of the Canadian Justice System* (Toronto: Thompson Educational, 1999). Figures compiled by the Ministry of the Attorney General for Ontario, current to 1998, suggest that 75.5 percent of criminal cases are resolved prior to the day of trial, another 15.8 percent are resolved on the day of trial, and 8.7 percent proceed to trial: see Ontario Criminal Justice Review Committee, *Report of the Criminal Justice Review Committee* (Toronto: Queen's Printer, 1999) (Co-chairs: H. Locke, J.D. Evans, & M. Segal) [Criminal Justice Review Committee] at 56. Based on the available statistics, it has been said, *ibid.* at 55, that "the vast majority of criminal cases are resolved by way of guilty plea."

quently plays a central role in advising the accused with respect to the plea. A common and crucial aspect of counsel's role in this regard is participation in resolution discussions with the Crown, also sometimes known as plea discussions or plea bargaining.

Plea discussions, if properly conducted by defence counsel, thus involve respecting the client's freedom of choice in entering a plea, all the while fulfilling the lawyer's professional obligation to provide the client with competent advice. The very essence of the client-lawyer relationship is caught up in this mix and permeates any analysis of counsel's ethical duties when engaging in plea discussions. Counsel walks a fine line in undertaking plea discussions and advising the client. He or she must avoid adopting the role of the "player," who dominates the client and imposes a course of action without much regard for the client's wishes.[2] Nor should counsel act as a "double agent," who facilitates "assembly-line justice" while appearing to help his or her clients.[3] No matter which pejorative moniker one uses to describe unprofessional behaviour during plea discussions, the underlying message is clear: the lawyer's duty is to support the client's freedom of choice through the provision of quality legal advice.

B. TERMINOLOGY

We should discuss terminology, as well as some of the limits of our ethical inquiry, before going any further. A potentially confusing feature of the literature on plea discussions is the failure to articulate exactly what process is being studied. Moreover, certain phrases tend to raise the public's hackles, especially those employing the term "bargaining," and have thus taken on a distasteful meaning in some quarters. We will follow the lead of the Martin Committee and use the term "resolution discussions" to refer to "any discussions between counsel aimed at resolving issues that a criminal prosecution raises."[4] The

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2 See A. Alschuler, "The Defence Attorney's Role in Plea Bargaining" (1975) 84 Yale L.J. 1179 at 1306.

3 See R. Uphoff, "The Criminal Defense Lawyer: Zealous Advocate, Double Agent, or Beleaguered Dealer?" (1992) 28 Crim. L. Bull. 419; and A. Blumberg, "The Practice of Law as Confidence Game: Organizational Cooptation of a Profession" (1967) 1 L. & Socy Rev. 15.

4 Ontario, Attorney General's Advisory Committee, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Queen's Printer, 1993) (Chair: G. Arthur Martin) at 282 [*Martin Committee Report*].

scope of resolution discussions is very wide, encompassing not only negotiations concerning a possible plea of guilty but almost any other aspect of the criminal proceeding, including an agreement to admit evidence, the adoption of an informal discovery process, or the scheduling of the trial itself. The primary focus of this chapter is plea discussions, or plea negotiations, by which we mean "discussions directed toward a plea of guilty by the accused in return for the prosecutor agreeing to take or refrain from taking a particular course of action."[5] We are therefore confining ourselves to a particular aspect of resolution discussions.

We should add that, while our focus is upon instances where negotiations occur between lawyers for the defence and the Crown, many of the obligations discussed in this chapter apply equally to any circumstance where an accused is considering whether to plead guilty. That is to say, the bulk of the duties discussed in this chapter apply any time an accused person pleads guilty or considers doing so, whether or not plea discussions have occurred between the defence and the Crown. Also, our discussion at times includes circumstances where no charges have been laid or where counsel's aim is to have the case diverted.

C. CONSTITUTIONAL AND OTHER LEGAL FACETS OF A GUILTY PLEA

It is worth looking more closely at the impact that a guilty plea can have upon an accused's constitutional and other legal rights, in order to understand better the great detriment that can flow from a hasty or ill-advised plea. When an accused pleads guilty, he or she is ostensibly admitting to the crime.[6] There will be no trial on the general issue of culpability, and the Crown is not required to make its case on a standard of proof beyond a reasonable doubt.[7] The accused no longer asserts the right to make full answer and defence (including the right

5 This definition is adapted from the Law Reform Commission of Canada, *Plea Discussions and Agreements* (Working Paper No. 60) (Ottawa: The Commission, 1989) at 40 (Recommendations 1 and 2).

6 See, for example, *R. v. Gardiner* (1982), 68 C.C.C. (2d) 477 at 514 (S.C.C.) [*Gardiner*]. The relationship between a plea of guilty and an admission of culpability is not completely straightforward and is discussed in much more detail in section M, "The Client Who Maintains Innocence," in this chapter.

7 See, for example, *R. v. Lucas* (1983), 9 C.C.C. (3d) 71 at 76 (Ont. C.A.) [*Lucas*]; *R. v. T.(R.)* (1992), 17 C.R. (4th) 247 at 252 (Ont. C.A.) [*T.(R.)*]; *R. v. C.(W.B.)*

to test the Crown case), abandons the rights to silence and non-compellability as a witness, and foregoes the presumption of innocence.[8] In short, a guilty plea operates to waive many of the most sacrosanct rights afforded an accused.

Flowing naturally from these observations is the proposition that the accused has complete control and freedom of choice over the decision as to whether to enter a guilty plea. This proposition is well established by Canadian case law[9] and commentary.[10] It also has constitutional dimensions, derived from the fundamental principle of justice that demands that an accused be permitted to control the conduct of the defence.[11] Counsel who improperly pressures the accused to plead guilty or not guilty, so as to negate this freedom of choice, has thus undermined an important constitutional right.[12]

It is apposite to mention several attributes of a guilty plea that are perhaps not so immediately obvious. A guilty plea may also be used in subsequent proceedings to the disadvantage of the offender, for instance, in civil litigation commenced by a victim, to attack credibility in a subsequent and otherwise unrelated criminal prosecution, or as similar fact evidence.[13] Moreover, the accused who pleads guilty will likely be prevented from challenging on appeal any adverse rulings that

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(2000), 142 C.C.C. (3d) 490 at 508 (Ont. C.A.) [*C.(W.B.)*]; *Korponey* v. *Canada (A.G.)* (1982), 65 C.C.C. (2d) 65 at 74 (S.C.C.).

8 See *R.* v. *Adgey* (1973), 13 C.C.C. (2d) 177 at 182–83 (S.C.C.) (per Laskin C.J.C.) and 190 (per Dickson J.). In more serious cases, the accused who pleads guilty is also waiving the right to a jury trial.

9 See, for example, *R.* v. *Laperrière* (1996), 109 C.C.C. (3d) 347 (S.C.C.) [*Laperrière*], affirming the dissent of Bisson J.A. in (1995), 101 C.C.C. (3d) 462 at 470–71 (Que. C.A.); *R.* v. *Lamoureux* (1984), 13 C.C.C. (3d) 101 at 105 (Que. C.A.) [*Lamoureaux*]. The many cases that elucidate the test to be applied where an appellant seeks to have a plea struck or withdrawn on appeal implicitly confirm this point, given that the plea must be voluntary and unequivocal: see the case law cited at note 19, below. In the United Kingdom, the right of an accused to decide how to plead in response to criminal charges is recognized in *R.* v. *Turner*, [1970] 2 All E.R. 281 at 285 [*Turner*].

10 See, for example, A. Hutchinson, *Legal Ethics and Professional Responsibility* (Toronto: Irwin Law, 1999) at 166; G. Arthur Martin, "The Role and Responsibility of the Defence Advocate" (1970) 12 Crim. L.Q. 376 at 387; D. Heather, "Pleas and Elections" in Law Society of Upper Canada, *Defending a Criminal Case*, Toronto: R. De Boo, 1969) 69; *Criminal Justice Review Committee*, above note 1 at 64–65; and *Martin Committee Report*, above note 4 at 284–85.

11 See *R.* v. *Swain* (1991), 63 C.C.C. (3d) 481 at 504–07 (S.C.C.) [*Swain*].

12 See the further discussion in section K(3), "Respect for the Client's Freedom of Choice," in this chapter.

13 See, for example, *R.* v. *C (W.B.)*, above note 7 at 510.

occurred prior to the plea.[14] Perhaps most important, the ability to appeal the conviction following a guilty plea is greatly curtailed. A change of heart or dissatisfaction with the sentence meted out is not, on its own, sufficient.[15] The appellant must employ more compelling arguments to convince the appeal court to set aside the guilty plea, and the test for doing so is quite stringent.[16] Valid grounds for setting aside a guilty plea include: the plea was not voluntary, unequivocal, and informed; the judge failed to make an adequate inquiry before accepting the plea; the judge should not have accepted the plea in light of the factual inquiry; or the accused was denied constitutional rights during the course of the plea hearing itself. It has also been suggested that the appellant stands a better chance of success if he or she can point to a valid defence at trial.[17]

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14 See, for example, *R.* v. *Fegan* (1993), 80 C.C.C. (3d) 356 at 359 (Ont. C.A.) [*Fegan*]; *R.* v. *Roberts* (1998), 106 O.A.C. 308 (C.A.) [*Roberts*]; and *R.* v. *Davidson* (1992), 110 N.S.R. (2d) 307 (S.C.A.D.). A possible method for preserving the right to appeal a prior adverse ruling, without the necessity for a full-blown trial, is discussed in section K(8), "A Possible Alternative: An Attenuated 'Fegan' Trial," in this chapter.

15 See, for example, *R.* v. *Antoine* (1984), 40 C.R. (3d) 375 (Que. C.A.), aff'd [1988] 1 S.C.R. 212; and *R.* v. *Lyons* (1987), 37 C.C.C. (3d) 1 at 53 (S.C.C.) [*Lyons*].

16 See for example, *Adgey*, above note 8 at 189; *Lyons*, above note 15 at 52–53; *R.* v. *Rajaeefard* (1996), 104 C.C.C. (3d) 225 at 230–31 (Ont. C.A.) [*Rajaeefard*]; *T.(R.)*, above note 7 at 252; *Lamoureux*, above note 9 at 104; *R.* v. *Hirtle* (1991), 104 N.S.R. (2d) 56 (S.C.A.D.).

17 See *R.* v. *G.(A.M.)* (1997), 36 W.C.B. (2d) 419 (B.C.C.A.), leave to appeal to S.C.C. refused (1997), 227 N.R. 290n (S.C.C.).

D. SOME BACKGROUND CONSIDERATIONS

There are several considerations that, while not strictly speaking concerned with lawyers' ethics, deserve mention as constituting an important part of the contextual background for any examination of plea discussions and guilty pleas.

1) Plea Discussions are Privileged

Communications between defence counsel and prosecutor during plea discussions are confidential and privileged.[23] Public policy encourages full and candid discussion between the parties, and what has been revealed during those discussions is not admissible at trial. However, there may be circumstances where the privilege is set aside, most particularly where the client later waives privilege by alleging a denial of the right to the effective assistance of counsel.

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23 See, for example, *R. v. Pabini* (1994), 89 C.C.C. (3d) 437 at 443 (Ont. C.A.), leave to appeal to S.C.C. refused (1994), 91 C.C.C. (3d) vi (S.C.C.); *R. v. Goland* (1999), 133 C.C.C. (3d) 251 (Ont. Prov. Div.); *R. v. Larocque* (1998), 124 C.C.C. (3d) 564 (Ont. Gen. Div.) (QL); *R. v. Lake*, [1997] O.J. No. 5447 (Gen. Div.) (QL); *R. v. Bernardo*, [1994] O.J. No. 1718 (Gen. Div.) (QL); and J. Sopinka, S. Lederman & A. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999) at §14.202.

2) Judges Are Not Obligated to Conduct a Plea Inquiry

Canadian law does not require judges to conduct an inquiry into the accused's understanding of the nature and circumstances of a plea every time a guilty plea is entered.[24] Nevertheless, there may be circumstances where such a plea inquiry is required, for instance, where the circumstances suggest that the plea may be equivocal or involuntary.[25] Moreover, some judges engage in plea inquiries as a matter of course, even though not required to do so.[26] Indeed, the *Martin Committee Report* recommends that the judge always question the accused to ensure that the latter appreciates the nature and consequences of the plea, has voluntarily entered the plea, and (if applicable) understands that a joint submission is not binding on the court.[27] Counsel should therefore always canvas this possibility with the client, so that he or she is not taken by surprise during the plea process.

3) Plea Agreement is Not Binding on the Court

A plea agreement is not binding upon the court. While a judge should give serious consideration to a joint submission from counsel, he or she has a discretion to depart from the recommended sentence in the interests of justice.[28] The exact circumstances in which a court can

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24 See, for example, *R. v. Brosseau* (1968), [1969] 3 C.C.C. 129 at 138–39 (S.C.C.) [*Brosseau*]; *Adgey*, above note 8 at 188; *Lamoureux*, above note 9 at 104; and *R. v. Hechavarria* (1999), 42 W.C.B. (2d) 301 (Ont. C.A.).

25 See for example, *R. v. K.(S.)* (1995), 99 C.C.C. (3d) 376 at 382 (Ont. C.A.) [*K.(S.)*]; and *Brosseau*, above note 24 at 137–38.

26 See for example, *R. v. Ceballo* (1997), 14 C.R. (5th) 15 at 17–18 (Ont. Prov. Div.) [*Ceballo*]. In the United States, detailed plea inquiries are required in federal courts (see C. Wright, *Federal Practice and Procedure*, 3d ed. (St. Paul: West, 1999); and Federal Rules of Criminal Procedure, Rule 11(c)) and also under state procedure (see W. LaFave, J. Israel, & N. King, *Criminal Procedure*, 2d ed. (St. Paul: West, 1999) at §21.4(c)).

27 *Martin Committee Report*, above note 4 at 317–23.

28 See, for example, *R. v. St. Coeur* (1991), 69 C.C.C. (3d) 348 at 355 (Que. C.A.); *R. v. Vaudreuil* (1995), 98 C.C.C. (3d) 316 at 322 (B.C.C.A.); *R. v. Rubenstein* (1987), 41 C.C.C. (3d) 91 at 94 (Ont. C.A.), leave refused (1988), 41 C.C.C. (3d) vi (S.C.C.); *R. v. Hoang* (2001), 153 C.C.C. (3d) 317 at 318–20 (Alta. C.A.); *R v. Carder* (1995), 174 A.R. 212 at 213 (C.A.); *R. v. Pashe* (1993), 100 Man. R. (2d) 61 at 62–63 (C.A.); and *R. v. C.(G.W.)* (2000), 150 C.C.C. (3d) 513 at 519–23 (Alta. C.A.). Also see s. 606(4) of the *Criminal Code*, R.S.C. 1985, c. C-46, which gives the court a discretion as to whether a plea will be accepted to any other offence arising out of the same transaction (s. 606(4) is discussed in *R. v. Naraindeen* (1990), 80 C.R. (3d) 66 (Ont. C.A.)).

depart from a joint submission are not discussed in every case, but we favour the view of the *Martin Committee Report* that a judge should reject counsels' recommendation only where the proposed sentence "would bring the administration of justice into disrepute, or is otherwise not in the public interest."[29] This judicial power must be expressly brought to the attention of the client whenever a plea proposal is being considered.

E. PLEA DISCUSSIONS AND AGREEMENTS: AN INTEGRAL PART OF THE SYSTEM

In the not too distant past, there was considerable controversy in Canada as to whether plea agreements should be employed in the ordinary course of the criminal justice process. Some commentators argued against plea agreements,[30] and the Law Reform Commission of Canada took this view in one of its working papers.[31] The respective advantages and disadvantages of plea discussions continue to spark debate today.[32] However, it is now generally accepted that discussion and agreement between defence counsel and the Crown on the matter of the accused's plea constitutes an important part of our justice system.[33]

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29 *Martin Committee Report*, above note 4 at 327–30.

30 Most notably, see the influential article written by G. Ferguson & D. Roberts, "Plea Bargaining: Directions for Canadian Reform" (1974) 52 Can. Bar Rev. 497.

31 Law Reform Commission of Canada, *Criminal Procedure: Control of the Process* (Working Paper No. 15) (Ottawa: The Commission, 1975) at 45. To similar effect, see the Law Reform Commission of Ontario, *Report on Administration of Ontario Courts, Part II* (Toronto: Ministry of the Attorney General, 1973) at 119–25.

32 Concise and current overviews of the arguments and literature are provided in J. Palmer, "Abolishing Plea Bargaining: An End to the Same Old Song and Dance" (1999) 26 Am. J. Crim. L. 505 at 512–28.

33 See, for example, *R. v. Burlingham* (1995), 97 C.C.C. (3d) 385 at 400 (S.C.C.); *Fegan*, above note 14 at 361–62; *K.(S.)*, above note 25 at 382; and *Santobello v. New York*, 404 U.S. 257 at 260 (1971). Recent expressions of support for resolution discussions include Department of Justice, Research and Development Directorate, *Plea Bargaining and Sentencing Guidelines* (Research Report of the Canadian Sentencing Commission) by S. Verdun-Jones (Ottawa: Department of Justice, 1988); Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Supply and Services, 1987) at 404–29; Nova Scotia, *Report of the Royal Commission on the Donald Marshall, Jr., Prosecution*, vol. 1 (Halifax: The Commission, 1989) (Chair: T.A. Hickman) at 244–46; *Martin Committee Report*, above note 4 at 281; and *Report of the Criminal Justice Review Committee*, above note 1, c. 6.

It is especially instructive to note that the Law Reform Commission of Canada has changed its view and now approves of plea negotiations.[34] Support for plea discussions within the legal profession is reflected in the rules of professional conduct proffered by the CBA and the various Canadian governing bodies.[35] Because of this widespread acceptance, our discussion will focus upon defence counsel's ethical responsibilities in the plea-negotiation process, and will not delve more deeply to consider whether such a process should occur in the first place.

It is nonetheless helpful to review briefly some of the reasons why an accused might wish to make a plea agreement with the Crown.[36] Only by appreciating the full scope of possible benefits for the accused can we understand the importance of counsel's role in the process and formulate appropriate ethical guidelines. Most obviously, the accused can obtain concrete concessions from the Crown in exchange for the plea, including a promise to recommend a particular sentence, the withdrawal of a charge, or an acceptable stipulation as to the facts upon which the plea will be based.[37] There are also other benefits, sometimes less concrete, that can flow from a plea agreement. The agreement will often lead to a much faster resolution of the case, minimizing the uncertainty and stress that accompany pending charges. Avoiding a trial will spare an accused substantial legal costs, where he or she retains a lawyer privately. An accused may also desire to admit guilt quickly and publicly as a genuine expression of remorse, and to make amends with a victim. The result may be a faster and more successful path towards rehabilitation. Finally, plea discussions arguably allow the accused, through counsel, to play an active role in the process and actually influence the outcome, to an extent not always matched at trial.[38]

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34 See *Plea Discussions and Agreements*, above note 5.

35 See the discussion in section F, "Related Rules of Professional Conduct," in this chapter.

36 We are restricting ourselves to the benefits to be gained by an accused. The advantages of resolution discussions from the perspectives of the Crown and the system more generally are canvassed in the *Martin Committee Report*, above note 4 at 281–91.

37 The panoply of possible concessions is large, and S. Cohen & A. Doob, "Public Attitudes to Plea Bargainin" (1989–90) 32 Crim. L.Q. 85 at 86–87, set out fourteen areas that could conceivably form the subject of a plea-resolution agreement.

38 See S. Clark, "Is Plea Bargaining a Short Cut to Justice?" *Lawyers Weekly* (1 March 1985) at 4. This "empowerment" justification for plea bargaining is at odds with the view taken in M. McConville, "Plea Bargaining: Ethics and Politics" (1998) 25 J. L. & Soc'y 562. See also R. Weisberg, "The Impropriety of Plea Agreements: An 'Anthropological' View" (1994), 19 L. & Soc. Inquiry 145

F. RELATED RULES OF PROFESSIONAL CONDUCT

Given that plea agreements are commonly reached and generally accepted in the criminal justice system, and can afford substantial benefits to an accused, it is not surprising that Canadian ethical rules invariably address the topic of plea discussions. Many governing bodies have adopted the provision found in Commentary 12 to Chapter IX of the CBA Code, which reads as follows:

> Agreement on Guilty Plea
>
> 12. Where, following investigation,
>
> (a) the defence lawyer *bona fide* concludes and advises the accused client that an acquittal of the offence charged is uncertain or unlikely,

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(noting that plea bargaining "is both more choice and less freedom" for the accused).

> (b) the client is prepared to admit the necessary factual and mental elements,
> (c) the lawyer fully advises the client of the implications and possible consequences of a guilty plea and that the matter of sentence is solely in the discretion of the trial judge, and
> (d) the client so instructs the lawyer, preferably in writing,
>
> it is proper for the lawyer to discuss and agree tentatively with the prosecutor to enter a plea of guilty on behalf of the client to the offence charged or to a lesser or included offence or to another offence appropriate to the admissions, and also on a disposition or sentence to be proposed to the court. The public interest and the client's interests must not, however, be compromised by agreeing to a guilty plea.[39]

The Alberta Law Society's Code of Professional Conduct, while generally to the same effect, warrants special mention, because the commentary to the applicable ethical rule emphasizes that "a plea agreement may not involve a misrepresentation to the court."[40] Additionally, the Alberta commentary stipulates that a plea agreement "is not considered a usual lawyers' undertaking," and that either the defence or prosecution may withdraw from the agreement prior to performance.[41]

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39 CBA Code ch. IX, comm. 12. Footnote 24 to Commentary 12 makes reference to guidelines set out in *Turner*, above note 9 at 285, as well as two articles on the subject. The same provision is found in the rules of professional conduct adopted by numerous provincial governing bodies: see, for example, Sask. ch. IX, comm. 12; Man. ch. IX, comm. 12; Nfld. ch. IX, comm. 12. The applicable Ontario and Nova Scotia rules are quite similar to Commentary 12, though there are some distinctions, as will be discussed further below: see Ont. r. 4.01(8) & (9); and N.S. ch. 10, r. 10.8 & 10.9. The same can be said for British Columbia, though the provision is quite brief and hence less comprehensive: B.C. ch. 8, r. 20). In Quebec, the Code of Ethics of Advocates deals with the topic only in so far as s. 3.02.10 requires a lawyer to inform the client of any settlement offer.

40 Alta. ch. 8, r. 27 & commentary.

41 *Ibid.*