H. PLEA DISCUSSIONS

The chapter devoted to plea discussions focuses on the ethical duties of defence counsel and has much to say that applies equally to prosecutors. In this section, we will briefly examine some of the corollary ethical duties that apply in particular to Crown counsel.

1) A Principled Approach

The FPS Deskbook sets out the following helpful principles that should guide any prosecutor's approach to plea and sentence negotiations: fairness; openness in soliciting and weighing the views of those involved in the Crown's case; accuracy for the development of a consistent and informed practice; and the interest of the public in the effective and consistent enforcement of the criminal law.[221]

2) Duty Not to Delay Resolution Discussions

Crown counsel should act expeditiously in responding to a plea-resolution initiative proposed by defence counsel. Indeed, it is often advisable for prosecutors to take the initiative themselves by contacting defence counsel regarding the possibility of a plea resolution. Overall, Crown counsel should ensure that resolution discussions are undertaken after disclosure has been completed, provided that a plea resolution is in the public interest.

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220 See Rosenberg, above note 24 at 16.

221 *FPS Deskbook*, above note 30 at §§20.2, 20.3.7, & 20.3.8.

3) Overcharging

It is improper for Crown counsel to proceed with more charges than are justified on the evidence, merely as a means of providing extra bargaining power during plea discussions. It is especially improper for Crown counsel to offer expressly to drop a charge in exchange for a concession by the accused, where the charge is not justified in the first place. Similarly, a more serious charge than is warranted on the evidence should not be laid in order to pressure the accused to plead guilty to a less serious offence arising out of the same transaction.[222] However, it is not *per se* improper to lay overlapping charges where all are justified by the evidence, for instance, a charge of "over 80" and impaired driving or theft and possession of proceeds.

4) Misleading the Court

Crown counsel can negotiate with defence counsel regarding the facts to be relied on for the purposes of sentencing. It is not acceptable, however, to reach an agreement respecting facts that amounts to misleading the court. In this respect, the FPS Deskbook offers guidance (and seems to place further restrictions on Crown counsel) by prohibiting the following agreements:

> (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.[223]

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222 See U.K., Crown Prosecution Service, *Code for Crown Prosecutors*, 4th, ed. (London: Crown Prosecution Service, 2000), s. 7.2, and the *FPS Deskbook*, above note 30 at §20.3.1 both state that it is unacceptable to instruct or proceed with unnecessary additional charges to secure a negotiated plea. See also *United States of America* v. *Cobb* (2001), 152 C.C.C. (3d) 270 (S.C.C.), where an American prosecutor threatened sexual violence against fugitives who persisted in opposing extradition from Canada.

223 *FPS Deskbook*, above note 30 at §20.3.4.

5) Non-disclosure to the Accused

We have already discussed the disclosure requirements applicable to prosecutors, including disclosure of matters relevant to plea discussions.[224] To reiterate, disclosure obligations persist despite the fact that plea discussions are ongoing or a plea agreement has been reached. Where Crown counsel becomes aware of facts that could reasonably modify the defence position in negotiating a guilty plea or adhering to a plea agreement, the proper approach is to disclose such information.

6) Misrepresentations Made to the Accused

Crown counsel must avoid the use of deception in dealing with defence counsel during plea discussions. Extensive disclosure obligations drastically reduce the possibility that defence counsel can be misled in this regard. Nevertheless, prosecutors must take care to conduct discussions in good faith and without knowingly misleading the defence lawyer.[225]

7) The Charge Cannot be Reasonably Supported on the Facts

The Nova Scotia rules of professional conduct state that "a prosecutor has a duty not to negotiate and recommend a plea agreement if the defence, by such agreement, is obliged to plead guilty to an offence or charge not reasonably supported by the facts."[226] Similarly, the FPS Deskbook states that a prosecutor must not "agree to a plea of guilty to an offence not disclosed by the evidence."[227] Consequently, where Crown counsel realizes that the charge cannot be supported by the facts, the charge must be stayed or withdrawn. Pressuring the accused to plead guilty based on groundless allegations is unfair and opens the way for the unpalatable possibility that an innocent accused will plead guilty.[228]

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224 See section D(3), "Disclosure and Plea Discussions," in this chapter.

225 ABA Prosecution Standard §3-4.1 (commentary).

226 N.S. ch. 17, comm. 17.2.

227 *FPS Deskbook*, above note 30 at §20.3.1.

228 See *CLA Annual Convention*, above note 105 at 31 (G. Arthur Martin).

8) Duty to Honour Plea Agreement

As the Commentary to ABA Prosecution Standard 3-4.2 states, "a prosecutor's refusal to honour a plea agreement concerning a recommendation to the Court after a guilty plea is made undermines the voluntariness of the plea and results in fundamental unfairness to the defendant."[229] Unless the public interest would be compromised by continued adherence to a plea agreement, it is thus unacceptable for a prosecutor to refuse to honour a completed plea agreement.[230] Moreover, the public interest can operate to release the Crown from an agreement only in rare circumstances, most particularly where the agreement was obtained by fraud or misrepresentation.[231]

I. SUMMARY AND RECOMMENDATIONS

Our summary and recommendations concerning ethics and the prosecutorial function in the criminal justice process are as follows:

1. The prosecutor has a dual role in the justice process. On the one hand, Crown counsel must seek to act fairly and achieve a just result in the furtherance of the public interest. On the other, the prosecutor can legitimately act as an advocate in striving to obtain a just conviction. Probably the greatest challenge for a prosecutor is reconciling the frequent tension involving these duties (section B).
2. The rules of professional conduct adopted by many Canadian governing bodies devote minimal attention to the role of the prosecutor, although the general duties of the advocate are often applicable to Crown counsel. Many prosecution services in Canada have adopted policy manuals that bear upon counsel's ethical duties, one of the most comprehensive being the federal Department of Justice's Federal Prosecution Service Deskbook (section B(3)).
3. A key aspect of the prosecutorial function is the exercise of discretion. While courts are slow to interfere with this discretion, and

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229 ABA Prosecution Standard §3-4.2. See also *FPS Deskbook*, above note 30 at §20.3.8.2.

230 See CBA Code ch. IX, comm. 12. See also *R. v. Pawliuk* (2001), 157 C.C.C. (3d) 155 at 175 (B.C.C.A.).

231 In *R. v. Obadia*, [1998] R.J.Q. 2581 (C.A.), the Crown convinced the Court of Appeal to increase the sentence agreed to at first instance, because of the accused's subsequent failure to fulfil the terms of the agreement.

Report of the Attorney General's
Advisory Committee
on

Charge Screening, Disclosure, and Resolution Discussions

The Honourable G. Arthur Martin, O.C., O.Ont., Q.C., LL.D.
Chair

Ontario

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It is, in the Committee's view, axiomatic that any resolution discussions pertaining to any aspect of a criminal prosecution must lead only to those agreements that are a responsible representation of the public interest in the due enforcement of criminal law. That is to say, each case must be resolved *on its merits* in a manner that is fit and just. For example, in the Australian *Prosecution Policy of the Commonwealth*, the Federal Attorney General has directed that a proposed resolution of a case should not be entertained by the prosecution unless

> (i) the charges to be proceeded with bear a reasonable relationship to the nature of the criminal conduct of the accused;
>
> (ii) those charges provide an adequate basis for an appropriate sentence in all the circumstances of the case; and
>
> (iii) there is evidence to support the charges.[59]

The United States *Principles of Federal Prosecution*[60] have similar requirements of case resolutions, with the additional requirement that an agreed-upon resolution not "adversely affect the investigation or prosecution of others." For example, an agreement as to sentence ought not to be so low that it makes what is otherwise a proper sentence for a co-accused a violation of the disparity principle.

Crown counsel, in particular, must keep this recommendation firmly in view when conducting resolution discussions. Any public perception that resolution agreements result in sentences that are unacceptably low can clearly undermine public confidence in the resolution discussions generally.[61] Further, the need to ensure that the proceedings bear

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[59] s. 5.14, p. 19.

[60] s. 3, p. 25.

[61] See Cohen and Doob, "Public Attitudes to Plea Bargaining", *supra*, at p. 97. The Law Reform Commission of Canada, in Working Paper No. 60, *supra*, concluded at p. 23 that "unduly lenient charge reduction, we believe, can only serve to diminish public respect for our criminal laws and for the administration of justice."

a responsible or reasonable relationship to the nature of the criminal conduct in issue applies to all manner of resolution discussions, not simply those discussions relating to plea and sentence. For example, in a contested trial, the Crown ought not to agree to call only those witnesses that will make out a case of manslaughter when the charge is murder and there exist other witnesses whose anticipated evidence offers a reasonable prospect of conviction for murder.

A case that proceeds to trial creates a record which is subject to careful scrutiny on appeal to ensure that the result at trial was appropriate and just. Resolution discussions, by and large, create a much more limited record. The reasons for a particular conclusion, agreed upon by counsel in perhaps private and informal conversation, are not available in transcript form, as are the evidence and submissions which provide the reasons for any particular outcome at trial. Accordingly, the responsibility of counsel to ensure that the resolutions arrived at by resolution discussions are just and appropriate is heightened by the fact that subsequent review of those resolutions may tend to be less comprehensive.

The requirement that outcomes in resolution discussions be thoroughly just and at all times responsibly reflect the public interest in the administration of justice is a broad requirement having many aspects. The Committee has focused, in its recommendation, upon one very important aspect of just resolution discussion outcomes, namely, the requirement that under no circumstances should Crown counsel agree to a proposed resolution simply as a matter of expediency. Such a course of action can compromise the interests of justice in many 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 upon expediency alone, can undermine public confidence in the administration of justice.

While it is, in the Committee's view, always improper to take a position in resolution discussions based solely on expediency, that is not to say that Crown counsel ought not to consider all of the circumstances of the case, which in some instances may include the need for limited resources available to the administration of justice to be used wisely. For example, if a particular prosecution promises to be lengthy, difficult, and potentially traumatic for the witnesses, and if Crown and defence counsel are not very far apart in their perceptions of what a fit and just sentence would be in the event of a guilty plea, Crown counsel can properly consider whether the public interest is best served by conducting the lengthy trial for nothing more than an opportunity to seek a slightly increased penalty.

The Committee's recommendation on case resolution and expediency clearly places an obligation on Crown counsel not to agree to a resolution simply to clear the court docket. However, Crown counsel is not, for the most part, responsible for the extent to which court dockets are overloaded. Crown counsel may be justified, in exceptional circumstances, in accepting a lenient plea in order to avoid a stay under s. 11(b) of the *Charter*, based on unreasonable delay. However, it is important that appropriate measures be taken to ensure that Crown counsel are not faced with the unfortunate choice of either agreeing to such an unsatisfactory resolution simply to clear the court docket, or having a s. 11(b) stay imposed.

Apart from concerns about resolving cases for expediency alone, there are many other important responsibilities to be kept in mind by Crown counsel during resolution discussions. In short, determining whether, and how, any 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 the case. The United States *Principles of Federal Prosecution* suggest that all the considerations relevant to the desirability of any particular resolution agreement can include, but are not limited to, the following:

(a) the defendant's willingness to cooperate in the investigation or prosecution of others;

(b) the defendant's history with respect to criminal activity;

(c) the nature and seriousness of the offense or offenses charged;

(d) the defendant's remorse or contrition and his willingness to assume responsibility for his conduct;

(e) the desirability of prompt and certain disposition of the case;

(f) the likelihood of obtaining a conviction at trial;

(g) the probable effect on witnesses;

(h) the probable sentence or other consequences if the defendant is convicted;

(i) the public interest in having the case tried rather than disposed of by way of guilty plea;

(j) the expense of trial and appeal; and

(k) the need to avoid delay in the disposition of other pending cases.[62]

These enumerated factors demonstrate clearly that there are many circumstances that may have a bearing upon the decision to either hold a trial, or seek to resolve a case by discussions. Further, the relevant circumstances, and the weight to be accorded to them, may vary from case to case. Thus, the point to be drawn from a list of this type, considering the importance of the items that it contains, is that it is by no means inevitable or even desirable that a criminal charge will always result in a criminal trial. The decision as to whether a trial shall be held is, therefore, another important example of the wide discretion vested in Crown counsel at the early stages of the criminal justice process. It is a discretion that is, perhaps, often difficult to exercise, but which must always be exercised responsibly.

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[62] *Principles of Federal Prosecution*, *supra*, Part D, s. 2. See also the National District Attorneys' Association, *National Prosecution Standards*, s. 68.1, "Factors for Determining Availability and Acceptance of Guilty Plea", for an extensive list of relevant considerations, and the Australian *Prosecution Policy of the Commonwealth*, s. 5.15, at pp. 19-20 for a similarly comprehensive list.

While the foregoing list is a helpful enumeration of some of the considerations relevant to the responsible conduct of resolution discussions, those relating to promptness, expense, and delay, namely, (e), (j), and (k), must be read subject to the Committee's views on expediency and resolution discussions.

In addition to the factors discussed above that apply in varying ways to each individual case Crown counsel handles, it is likewise important to ensure that, on the other hand, resolution discussions are consistent from case to case where appropriate. In essence, Crown counsel must strive to treat accused persons in similar circumstances similarly. This means that accused persons in comparable situations must be afforded both comparable opportunities to engage in resolution discussions, and comparable treatment during those discussions.[63]

It should be clear from the foregoing that the factors relevant to the decision to either hold a trial or resolve a case through resolution discussions, are similar in substance to the public interest factors relevant to continuing or discontinuing a prosecution, discussed above in the context of charge screening. Those factors that are not to be taken into account for purposes of charge screening, for example, the fortunes of the political party in power, should likewise not play any role in resolution discussions. Thus, the chapter on charge screening is, in many respects, instructive on the issue of resolution discussions, remembering, of course, that many decisions in the conduct of resolution discussions are of a more limited and procedural nature, such as agreements on continuity of exhibits, or the need to call particular witnesses.

51. The Committee recommends that the Attorney General should require his or her agents conducting resolution discussions to consider the interests of victims. The Attorney General should require his or her agents conducting resolution discussions to consult with any victims, where appropriate and feasible, prior to concluding such discussions.

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[63] Law Reform Commission of Canada, Working Paper No. 60, at p. 47, Recommendation 8.

The word "victims" in the present recommendation and commentary includes, for example, in homicide and child abuse cases, those close to the deceased or the complainant, respectively.

For the victim of crime, the criminal trial can fulfil a number of important functions apart from the mere fact of leading to a conviction. For example, it can be a public process of denunciation, with appropriate vigour, of the acts of the offender, and thus, a public recognition of the fact that the victim has been wronged. It can satisfy, although only to a limit that is fundamentally just, a victim's personal desire to see such public denunciation visited upon the offender. It can educate the victim as to how the criminal justice system works. And it can be a cathartic, healing process for the victim. Given these and other important functions that a trial may serve from the perspective of the victim, resolution discussions that lead to a trial being dispensed with and an agreed-upon proposed sentence may leave a victim who is not consulted feeling poorly served by the administration of justice, even though the offender is ultimately convicted and an appropriate sentence imposed. The Canadian Sentencing Commission, in their 1988 Report, expressed concern about "the potential which undisclosed plea bargaining arrangements have to obscure for victims the visibility and accountability of sentencing dispositions."[64]

Therefore, in the Committee's opinion, the victim's viewpoint should be, where appropriate and feasible, solicited by Crown counsel. And although the victim's wishes cannot control the prosecution, they should be given due consideration in the resolution discussion process. It is, in the Committee's view, wrong that the criminal process should work itself through to a conclusion without taking appropriate account of the needs and circumstances of the person or persons most directly affected by the crime committed.

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[64] *Sentencing Reform: A Canadian Approach - Report of the Canadian Sentencing Commission* (1988), at p. 415. The Commission recommended that prosecutorial authorities develop guidelines to ensure that victims are kept fully informed of plea negotiations and sentencing proceedings, and that their views are represented in these proceedings. The Law Reform Commission of Canada made similar recommendations. See Working Paper No. 60, *supra*, Recommendations 11(1) and 11(2), at p. 51.

Apart from considering the needs of the victim that the trial itself may serve, there are, in the Committee's view, other reasons that make consideration of the victim's position highly desirable, and often necessary, in conducting resolution discussions. Criminal prosecutions may unfold in unexpected ways. For example, there may be a late offer by an accused to plead guilty, or a key witness for either the Crown or the defence may become unavailable. The victim deserves to be kept apprised of any new developments that might significantly affect his or her expectations of how the prosecution was otherwise to proceed, and of what might be expected of him or her in the conduct of that prosecution. Proposed forensic evidence, such as analysis of bodily fluid in sexual assault prosecutions, may also require consultation with and assistance from the victim. Some issues surrounding proposed testimony at trial may require input from the victim, for example, testimony proposed by the defence relating to the prior sexual conduct of the victim: *R.* v. *Seaboyer*; *R.* v. *Gayme*; (1991), 66 C.C.C. (3d) 321 (S.C.C.). And, of course, the victim often has much to contribute that is highly relevant to sentence, such as a victim impact statement, and, where relevant, information pertaining to compensation and restitution. The foregoing are examples only, that serve to demonstrate, in the Committee's view, that consideration of the victim's circumstances is important to the conduct of a wide variety of resolution discussions. As such, Crown counsel ought to keep the victim's interests in mind throughout the conduct of such discussions.

The victim of crime is uniquely placed among members of the public to assess how effectively the administration of criminal justice responds to the fact of a crime having been committed. No one, with the possible exception of the offender, is closer to the criminal act, and thus, generally speaking, more interested in the response of the criminal justice system to that act. Therefore, satisfying the interests and needs of victims is, along with treating the accused fairly, one of the criminal justice system's most important objectives. However, the victim of crime does not, by the mere fact of having been victimized, necessarily gain any insight into how, criminal law, or the criminal trial process, works. Victims of crime come from all walks of life and, therefore, while the need to have them

understand the workings of the criminal justice system is great, their pre-existing understanding of the system may be quite limited.

In light of the importance of having victims understand the criminal justice process, particularly as it relates to resolution discussions, the Committee has emphasized not just the need to consider the victim's interest, but also the need to consult with the victim, and keep him or her apprised of developments in the case. For example, in a case of impaired driving causing bodily harm, where the prosecution intends to accept a plea to impaired driving alone due to the absence of evidence of causation, it is, in the Committee's view, important that the victim understand why such a course of action is proposed *before* it is a *fait accompli*. The victim in such circumstances should be permitted to understand the proceedings relating to his or her victimization, and be given the opportunity to have input, while such input can still be acted upon if it is appropriate to do so.

Consultations with the victim would, of course, be most important for the most serious offences, such as those involving violence against the person. In busy jurisdictions with large numbers of minor offences, it would be too onerous to require that the victim be consulted in every case, particularly as the investigating officers are invariably able to gain some insight during the course of the investigation into the circumstances and attitude of the victim. Thus, the circumstances in which victim consultation is or is not warranted cannot be spelled out in detail. However, the Committee observes that even some property offences may warrant careful consultation with the victim. One such example would be a hate-motivated act of vandalism of a religious site.

The Committee recognizes that the consultation with the victim that it has recommended during the process of resolution discussions, and where otherwise necessary during the prosecution, may increase Crown counsel's duties in the early stages of the criminal process. However, it is the Committee's view that if this is so, additional resources are necessary to ensure that these consultations occur where warranted. Victim/witness co-ordinators, or other victims' support organizations, can provide a tremendously important

service in this regard. Resolution discussions that dispose of criminal cases in ways that do not meet the victim's legitimate needs and interests, and that the victim does not understand, do not promote public confidence in the administration of justice.

52. *The Committee recommends that the Attorney General emphasize to his or her agents that a plea of guilty is a circumstance in mitigation of sentence, and when the plea of guilty is offered at the first reasonable opportunity it is particularly mitigating.*

The law is well settled that a plea of guilty by an accused is a mitigating factor to be considered by the sentencing judge. An important first step in the rehabilitation process is accepting responsibility for one's conduct. Accordingly, an accused who is prepared to acknowledge his or her guilt, thus accepting responsibility for the criminal acts in question, is properly seen as further along in the rehabilitative process. There is, therefore, correspondingly less need to address rehabilitation in the sentence imposed, which may result in a shorter sentence than would otherwise have been fit.

A plea of guilty is a mitigating factor in sentencing for another important reason. Criminal prosecutions may require of the community considerable expense and inconvenience. The process of testifying at trial may be likewise inconvenient or distressing for the necessary witnesses. Further, trials inevitably occasion delay between the commission of the criminal act and the conviction (if any) which may attenuate the important principle of swiftly and surely denouncing criminal conduct. Such delay may even attenuate the denunciatory aspect of the sentence itself, particularly if an accused, benefitting from the presumption of innocence, is integrated into the community while on judicial interim release for an extended period of time before the trial is completed, during which time the severity of the particular crime in issue fades from memory. A plea of guilty can, however, result in a swift and certain societal reaction to a criminal act with a minimum of expense and inconvenience to the community and the witnesses. When this occurs, therefore, it is appropriate to recognize the extent to which the plea has enhanced the

Applying the Committee's recommendation in everyday practice means that Crown counsel must be diligent in ensuring that a proposed sentence fully accords an accused whatever benefit he or she is entitled to through an early plea, either as an indication of remorse, or as a step that enhances the administration of justice in the particular case. In some cases, this may mean that an appropriate sentence following an early plea may be markedly different than an appropriate sentence for the same offence following a full trial. Crown counsel cannot expect an accused person to waive the constitutional right to a trial, and then forego any benefit that such a waiver should properly accord him or her.

On the other hand, mitigating sentence in exchange for an early plea cannot go so far as to undermine the fundamental duty of Crown counsel to ensure that resolution agreements are at all times a responsible embodiment of the public interest in all of the circumstances of the particular prosecution. An early plea may be an important factor, but it remains only one factor in the invariably multifaceted exercise of arriving at a sentence that is fit and just. Thus, the early plea cannot dominate the sentencing process to the exclusion of either the facts of the case or other important principles such as, for example, general deterrence or denunciation.

53. The Committee recommends that, as a general rule, counsel must honour all agreements reached after resolution discussions. However, on rare occasions, it is appropriate for senior Crown counsel, after reviewing an agreement made by the Crown, to repudiate that agreement if the accused can be restored to his or her original position, and if the agreement would bring the administration of justice into disrepute.

The Committee views the duty of counsel to honour resolution agreements as simply a particular example of the duties of integrity and responsibility discussed in some detail at the outset of this Report. As such, honouring resolution agreements lies at the heart of counsel's professional obligations. Implicit support for the requirement that resolution agreements be honoured can be found in the decisions of the Ontario Court of Appeal in *R.* v. *Brown* (1972), 8 C.C.C. (2d) 227 and *R.* v. *Agozzino* (1970), 1 C.C.C. 380. Agreements

reached following resolution agreements are also, in the Committee's view, in the nature of undertakings. The Law Society of Upper Canada's *Rules of Professional Conduct*, Rule 10, Commentary 8, states that undertakings given in the course of litigation, "must be strictly and scrupulously carried out."

In addition to being ethically imperative, honouring resolution agreements is a practical necessity. Agreements following resolution discussions, be they agreements about the conduct of the trial, or agreements with respect to plea and submissions on sentence, dispose of the great bulk of the contentious issues that come before the criminal courts in Ontario. Thus, the binding effect of such agreements is a matter of the utmost importance. If agreements arrived at during resolution discussions cannot be relied upon, the effort expended in achieving them is for nought, and the great benefits to both the accused and the administration of justice that resolution discussions can produce are rendered unattainable. For these reasons, the situations in which Crown counsel can properly repudiate a resolution agreement are, and should be *very rare.*

While resolution agreements must, as a general rule, be scrupulously adhered to, in rare cases the Crown may not be bound to follow such agreements without any regard to subsequent developments. For example, in *R.* v. *MacDonald* (1990), 54 C.C.C. (3d) 97 (Ont. C.A.), the accused had reached an agreement with Crown counsel whereby he would be charged only with having been an accessory after the fact of a murder, which the Crown repudiated when subsequent events revealed that the accused had been dishonest about his involvement in the killing. The Court of Appeal held that the Crown was entitled to abandon the agreement because MacDonald had failed to give truthful testimony as required, because at the time of the agreement the Crown had no reason to suspect that MacDonald might be guilty of murder, and because MacDonald had suffered no prejudice, in that none of the statements he had given in reliance upon the agreement were used against him at his murder trial. The Court held, at 106, that:

> The integrity of the Court would ... be tarnished in a case such as this, were the Crown to be held to a deal which was struck at a time when the appellant was not a suspect for murder, but where later, facts revealed his involvement. To permit the agreement to stand would permit the appellant to benefit from his incomplete and untruthful statements and from the deal he had struck with the Crown before all the facts were known.

Thus, it is plain that resolution agreements must not undermine the integrity of the court, or otherwise bring the administration of justice into disrepute. While the sanctity of agreements entered into is an important principle of the administration of justice, Crown counsel's primary duty is to the integrity of the system. Accordingly, in the rare cases where these two values clash, the latter must prevail.

Resolution discussions can frequently be complicated, and delicate. Reasonable counsel may often reasonably differ on whether a particular agreement is in the public interest in the circumstances of the case. Therefore, while the Crown may repudiate those agreements that bring the administration of justice into disrepute, this is not a step to be taken lightly. The Committee has recommended that the experience and advice of senior Crown counsel, or perhaps the Regional Director of Crown Attorneys, should be sought beforehand, so that the Crown can be as sure as possible that repudiation is in the best interests of the administration of justice. Clearly, however, the preferred policy during delicate and complicated resolution discussions is for less experienced Crown counsel to seek the advice of senior colleagues *before* concluding any agreement, so that the need to consider repudiation need never arise.

Finally, an agreement may properly be repudiated only where an accused can be restored to his or her original position, i.e., the position he or she was in before beginning to act upon the terms of the agreement. It is noteworthy in this respect that the Court of Appeal in *MacDonald* emphasized the fact that the accused was not prejudiced by the statements he gave to the police in reliance upon the agreement that was later abandoned by the Crown, because those statements were not used against him at his trial. Faced with

the choice between honouring an inappropriate resolution agreement, and causing prejudice to an accused, Crown counsel must opt for the former.[66] The unfortunate choice that such a dilemma poses highlights the importance of ensuring that all resolution agreements entered into are manifestly in the public interest.

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[66] See *R. v. Young* (1984), 13 C.C.C. (3d) 1 (Ont. C.A.), wherein the Court of Appeal imposed a stay of proceedings because the passage of time had obliged the Crown to prosecute the accused for relatively serious *Criminal Code* offences rather than for a less serious provincial offence, due to the expiry of the limitation period under the relevant provincial statute.

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

TAB 8B

Presenting Plea Bargains to the Court

CROWN ATTORNEYS CODE OF PROFESSIONAL CONDUCT

Crown Policy Manual

CROWN ATTORNEYS CODE OF PROFESSIONAL CONDUCT

The Crown Attorney's first obligation is to act as Minister of Justice, and second, as independent adversary within the criminal justice system, and to see that, as far as it is possible for him or her to do so, justice is done, and has appeared to be done.

With Respect to the Public

The Crown Attorney shall:

...foster respect for rights, freedoms, the law and the Constitution of Canada;

...conduct himself or herself in a manner consistent with the public interest;

...attempt to ensure that public money and resources are used in an efficient and economical manner;

With Respect to the Court

The Crown Attorney shall:

...never misrepresent or fail to disclose something that is material to the Court;

...exhibit respect for the Court by:

a) attempting to start on time;
b) having available all relevant information;
c) dressing appropriately for Court;
d) addressing the Bench in a respectful manner;
e) dealing politely and courteously with Court staff;
f) conducting prosecutions in a dignified manner;
g) being as fully prepared for Court as circumstances permit;

Manitoba
Department of Justice

Guideline No. 4:SEN:1.4

Public Prosecutions

Policy Directive

Subject: Sentencing - General
Date: October 10, 1990

POLICY STATEMENT:

General

When making submissions to sentence, it is important that Crown Counsel present a clear, concise statement of facts to the Court. It is also advisable to read in portions of victim or witness statements, if aggravating features are relied on. If the charge is disposed of by way of guilty plea in Queen's Bench, it may be appropriate to file portions of evidence taken at the preliminary hearing. If this procedure is followed, a concise summary of that evidence should be orally placed on the record.

In the case of sentencing after a finding of guilt after trial, problems may be encountered on a sentence appeal only. The findings of fact relied on by the Court, in convicting, will rarely appear on the record of the sentencing proceedings. It is important in such a situation for the Crown Attorney to briefly summarize the facts as found by the Court, or (such as when the sentencing is postponed for material to be filed) to order a transcript of the reasons for decision, and file them as an exhibit on the record at the sentencing.

The above general guidelines will assist in a proper, and complete record in the event of an appeal.

*See also guidelines under topic APPEALS, and further SENTENCE sub-topics below.

The Law Society of Manitoba

La Société du Barreau du Manitoba

CODE OF

PROFESSIONAL CONDUCT

CODE DE

DÉONTOLOGIE PROFESSIONNELLE

Adopted by the Benchers of the
Law Society of Manitoba on February 1st, 1992

Adopté par les conseillers de
la Société du Barreau du Manitoba le 1er février 1992