led by a senior capable of exercising control and leadership was required, but not put in place.

(d) The initial charges were appropriate; the decisions re applications for search warrants, arrest warrants and authorizations to intercept were properly founded on relevant considerations.

(e) Professional standards exhibited by Crown counsel in R. v. Trudel, R. v. Steen and R. v. Gyles fell short of the standards to be expected of counsel serving the public interest.

The conflict noted in paragraph (a) above affected the Trudel and Steen plea bargains. Pure expediency influenced the Crown to participate in the plea bargains, and to employ as bargaining leverage an ability to arrange an enhanced pension benefit in one case and continued employment in the other, both being arrangements made by or through the intervention of senior officials in the Department of the Attorney-General, contacted by solicitors for the accused. Crown counsel in both cases recognized an ethical dilemma, but carried on, their independence compromised. This is only one undesirable feature of the plea bargains. Others have been referred to in Part III of this report. It is concluded here that the Crown's independence and candor were dishonoured in both cases.

(f) The decision to stay proceedings on May 6, 1988 was a decision made by the Attorney-General in the exercise of a constitutional function of that office. It was made on the advice

of senior Crown law officers, was not politically motivated in any partisan sense. The timing was wholly influenced by the requirements of the pending litigation.

(g) The basis for the decision to stay proceedings as expressed in the public statement of May 6, 1988 is supportable. Adverse public perception of or reaction to the decision, although regrettable, does not affect the validity of it.

S.127(2) of the Criminal Code creates a substantive offence [see R. v. May (1984), 13 C.C.C. (2nd) 257 (Ont. C.A.)]. The gravamen of the offence is acting in any manner which has a tendency to obstruct, pervert or defeat the course of justice. Actual obstruction, perversion or defeat of the course of justice need not be shown.

The gravamen of the conspiracy offence is an agreement or common design to do acts which have a tendency to obstruct, pervert or defeat the course of justice. In the first instance, then, the doing of acts which have the required tendency is the distinguishing feature, in the other it is the agreement or common design to do such acts. An actual attempt need not be shown. In either case, of course, the necessary intent must be shown.

Another consideration enters into the selection of the charges:

From the prosecution point of view there can be an evidentiary advantage in charging conspiracy even though the evidence is capable of supporting a charge for the substantive offence. In such circumstances the propriety of charging the conspiracy is not a matter of settled practise although some authorities express a preference for charging the substantive offence. Circumstances of individual cases govern and views differ.

This is not to be taken to mean that the evidence in each instance was equally as strong as in others. There were strong cases, others

of lesser strength, but all met the necessary common test of "reasonable and probable grounds" for laying an information.

Although not a step to be taken lightly, an information charging a criminal offence carries no legal implication of guilt. It is the process whereby proceedings are initiated to bring the accused person and the evidence before a court of competent jurisdiction for a determination of guilt or innocence; there the test becomes "proof beyond reasonable doubt" and, until there is such proof, the law presumes innocence.

Assessing evidence "in the raw" cannot be viewed as a completely objective task, although strictly speaking that is the inherent nature of the task. As every barrister knows from experience, no matter how well briefed on the evidence to be tendered at a trial, where weight and interpretation count heavily, there are many shoals.

Notwithstanding comment made elsewhere in this report on the subject of case-management, and the constrained time period when evaluation of the evidence was undertaken, the initial charges arising out of that evaluation were appropriate.

If the term "initial charges" is understood as including the six charges laid by police investigators on January 15 and 17 without Crown office consultation, the same conclusion applies. They were appropriate.

(d) Stay of Proceedings Decision - May 6, 1988

A review of "the basis for the staying of the charges against the other accused" has been requested.

The stays of proceedings entered on May 6, 1988 brought to an end the remaining prosecutions after the Trudel, Steen and Gyles cases had been determined and the Bebbington case taken to trial.

The reason for this action as stated by the Attorney-General on May 6 was:

> "By prosecuting Steen and Trudel to conviction, the purpose of the investigation - to put an end to corrupt practices in the traffic courts - has been accomplished. It now falls to me and my senior officials to decide what to do with the balance of those charges. It has always been the mark of a responsible Attorney General to decline prosecution when there was no purpose to be achieved by it. Here, I think, is such a case." (APPENDIX D, p.5.)

The decision is one made in the exercise of a discretion conferred by law upon an Attorney-General as the independent keeper of the public interest in such matters. The word "purpose" used in the text quoted above might more properly have been "public purpose" but, apart from that, the reason expressed is the Attorney-General's view of how the public interest was best served at the time.

The statement continues (APPENDIX D, p. 6):

> "While there are concerns about the behaviour of the lawyers charged, I do not think the full weight of prosecution is the proper or fair way to deal with these concerns. I am therefore referring the information gathered on those lawyers to The Law Society of Manitoba for a decision on the acceptability of their behaviour. Similarly, for those charged who were civil servants, the disciplinary procedures of their employers are the best means by which to measure their conduct. As for the others it is hoped that the close proximity to which they came to prosecution will be sufficient to cause them to review their own behaviour and amend it."

The "thoughts of diversion" that surfaced first on January 14 in the minds of Deputy Attorney-General Elton and Assistant Deputy Attorney-General Guy, and, with some metamorphosis during the following two months, had influenced Director of Criminal Prosecutions Whitley's recommendation of March 14 to both of these senior officials, are now seen to have survived and to have played at least some part in the ultimate decision.

In fairness to the Crown office, this was not a suddenly conceived change of course. The proceedings that were stayed had been held in abeyance pending dispositions in the Trudel and Steen cases. This was as much a matter of logistics as anything else.

Had those cases been contested, it is reasonable to assume that some or all of the persons accused in the charges now stayed would have been called as witnesses on behalf of the Crown and stays of proceedings against them may have resulted in any event in return for their testimony. It is impossible to say more about the prospect.

The possibility that charges would be stayed at least as against some of the accused was real throughout. Compassionate grounds, or cases where the evidence supported only a single questionable transaction, or the accused appeared to have acted more with innocent complicity than with criminal intent, were some of the reasons, standing alone or in combination, that were viewed as justification for staying some of the charges. Then there was Mr. Whitley's March 14 suggestion that only some persons had been charged, others had not, so why proceed with pending charges. He was, of course, referring to cases on the Trudel side of the matter. There are cases described as weak in the course of this Review, the troublesome element of the charges being intent.

After R. v. Trudel was disposed of on March 16 and a disposition in R. v. Steen (on April 22) was in sight, the reasoning within the Crown office became firmer and more focussed. It can be summarized as follows: Trudel and Steen, viewed as the principal malefactors, having been convicted and removed from office and steps taken within the Provincial Court to prevent a recurrence, the original public purpose of protecting and preserving the integrity of the justice system process had been, and had been seen to be, fulfilled. Further prosecutions would not enhance what had been accomplished already, and were needless as well as unsupportable on any proper basis. Lawyers and civil servants could be referred to their respective professional or occupational disciplinary processes. All would then have been treated alike in the criminal justice system except Donald Bebbington whose case involves circumstances not common to the others.

As to the timing--following the Steen disposition on April 22, the next remand date was May 6, when it would be necessary to set at least some trial dates for the remaining cases. This crystallized thinking on the question of the public purpose to be served by further prosecutions. The question was a proper one. Messrs. Guy, Whitley and Dangerfield reached the decision that proceedings should be stayed as against all of the remaining accused except Donald Bebbington and that this be done on May 6. The decision was one they could make and it could have been given effect with or without the approval of the Attorney-General. Their reasoning about taking it to him, as they did, was that a public statement should be made and the reasons for the decision explained. Further, the same advice would be given to his successor in office. However, trial dates would be fixed by then, and a successor would not have the knowledge or background of the litigation enabling him to consider the matter at an early date. The Attorney-General accepted the advice and made the May 6 announcement. Mr. Dangerfield attended in court and directed entry of the stays of proceedings.

This Review is satisfied no partisan political interference or influence was exercised on the Attorney-General.

Once litigation has come to an end, but not before, an Attorney-General is answerable to the Legislative Assembly for the exercise of the prosecutorial discretion. The parliamentary process of accountability was frustrated by events in this instance, namely the April 1988 Provincial

general election which saw the government and the incumbent Attorney-General defeated at the polls. On May 6 he was about to leave office.

A prosecution ought not to be initiated, or continued if the public interest is not served. The dominant consideration is the public interest as determined by the Attorney-General, not as a party politician but in a quasi-judicial way, after considering "the effect of prosecution" [or further prosecution] "upon the administration of law and of government in the abstract."

Fuller treatment of the subject of the Attorney-General's responsibility for prosecutions is found in Edwards, "The Law Officers of the Crown" pp. 222-223.

Professor Edwards draws attention to a statement made in 1925 by the Attorney-General of England, Sir John Simon, as he then was, addressing the House of Commons:

> " ... there is no greater nonsense talked about the Attorney-General's duty, than the suggestion that in all cases the Attorney-General ought to decide to prosecute merely because he thinks there is what the lawyers call 'a case.' It is not true, and no one who has held that office supposes that it is."
>
> --H.C. Debates, Vol. 188, Col. 2105, December 1, 1925.

This statement was adopted some years later by Sir Hartley Shawcross, speaking in the same forum as Attorney-General of England (see

H.C. Debates, Vol. 483, Cols. 679-690, January 29, 1951) and in Canada on February 23, 1978 by The Honourable R. Roy McMurtry Q.C., Attorney-General of Ontario in the Ontario Legislature.

The basis of the decision to stay proceedings, namely, that the initial public purpose had been fulfilled and further prosecutions were not in the public interest, is truly reflected in the Attorney-General's statement and the timing, as noted, was to meet the requirements of the pending litigation, as seen by the Crown office prosecutors.

That the Attorney-General had concerns about the behaviour of the lawyers and of the civil servants charged is clear. He notes that these two groups will be referred to other authority for discipline, this latter step to allay the concerns otherwise than by employing the full weight of prosecution. One may question this approach, but not deny that the alternative was considered.

Given the reasons expressed by the Attorney-General on May 6 in the exercise of the responsibilities of his office, the decision is supportable. In that sense the basis is valid. Regrettably, public opinion is not entirely supportive. In the course of this Review strong responsible opinion has been encountered condemning the decision.

An informed public understanding has not been fostered by the disclosures made in R. v. Trudel and R. v. Steen. The stays of proceedings

in other cases has only added confusion. With hindsight, continuing the prosecutions, or some of them, may have avoided this, but to take that step now would invite further confusion by, in effect, substituting for a supportable decision (as seen here) made in the exercise of power vested in the office of Attorney-General, an opposite decision, albeit one made by a successor in office independently applying his mind judicially as sole judge of the relevant considerations.

(e) A Special Prosecutor

The police investigation under review has been described in this report as an investigation involving elements of the Department of the Attorney-General. Being that, it was a proper case in which to consider retaining and instructing a special prosecutor from the private bar, completely independent of the Department, including the Crown office.

In hindsight, it is not difficult to identify areas in which such an arrangement would have made less likely the pressures that began affecting the Crown office on and after January 15, including the unseemly conduct of some Provincial Court staff employees as well as a small rump of disgruntled Crown attorneys who eventually and anonymously resorted to the media to express disloyalty. However, looking at the matter from the front end, consideration was not given to this approach. No one appears to have considered how the public would perceive a police investigation of alleged criminal activity within the Department, and the Crown office acting in the prosecuting role. The wisdom of the Crown

APPENDIX C

PROSECUTORIAL DISCRETION:

The extent to which the courts have accepted a Crown Attorney's right to exercise discretion and the nature of the duties imposed upon him in exercising such discretion must be determined. It is then possible to assess in any particular case whether the discretion when exercised was, firstly, within the power of a Crown Attorney to do so; secondly, whether the exercise of discretion was in breach of any duty imposed upon him; and, lastly, whether, given the circumstances of the case, such discretion was motivated by an oblique motive so as to amount to an improper exercise of the discretion and potentially an abuse of process.

There is a broad statutory basis for the exercise of prosecutorial discretion. The duties of a Crown Attorney, as set out in s.5 of The Crown Attorneys Act, R.S.M. 1988 C-330, require him to "institute and conduct prosecutions, advise and instruct magistrates as to matters brought before them if a magistrate requests assistance in writing and to do all things arising from enforcement of or prosecution of offences." A Crown Attorney's authority and jurisdiction to deal with the initiating, carrying on and staying of prosecutions are, therefore, not questioned, and it remains only to consider the extent of any restrictions imposed at Common Law.

1. THE DECISION TO INSTITUTE PROCEEDINGS:

The absolute discretion to determine

when to institute proceedings and with what charges to proceed is implied within the duty to institute and conduct proceedings. As the specific charges forming the subject of this Review do not require the prior consent of the Attorney-General and considering that anyone, under s.455, may lay an information where reasonable and probable grounds support a belief that an offence has been committed, the Crown Attorney's right to proceed is unfettered (see R. v. Sacobie and Paul (1979), 51 C.C.C. (2nd) 430 (affirmed by S.C.C. (1983), 1 C.C.C (3rd) 446)).

Any use and application of the unfettered right to institute proceedings is guided by the courts and other factual, moral or ethical considerations. The Manitoba Court of Appeal in R. v. Catagas (1978), 38 C.C.C. (2nd) 296 observed:

> "Not every infraction of the law, as everybody knows, results in the institution of criminal proceedings. A wise discretion may be exercised against the setting in motion of the criminal process. A policeman, confronting a motorist who had been driving slightly in excess of the speed limit, may elect to give him a warning rather than a ticket. An Attorney-General, faced with circumstances indicating only technical guilt of a serious offence but actual guilt of a less serious offence, may decide to prosecute on the latter and not on the former. And the Attorney-General may in his discretion, stay proceedings on the pending charge, a right that is given statutory recognition in Section 508 ... of the Criminal Code. But in all these instances the prosecutorial discretion is exercised in relation to a specific case. **It is the particular facts of a given case that call that discretion into play."** (Emphasis added.)

Apart from practical and factual considerations, moral and ethical standards temper what otherwise might become an arbitrary and subjective exercise of power. These standards lend a judicial flavour to a decision which, in many cases, may be viewed as a grant of immunity from suit. The right to grant such immunity to a potential accused was recognized in R. v. Betesh (1975), 30 C.C.C. (2nd) 233 where Graburn, Co. Ct. J. stated at p. 243:

> "The powers of an Attorney-General, whether he be the chief law officer of the Crown for a Province or at the federal level, are those powers long exercised and held by the Attorney-General in England.
>
> It is clear that the Attorney-General in addition to prosecuting someone, has the right to select on what charges that person shall be prosecuted. He has the further right to decide to terminate a prosecution once begun, and the concurrent or analogous right to decide not to prosecute a person at all for offences that that person has allegedly committed."

Graburn, Co. Ct. J. further observed at p. 245:

> " ... while it is true that the Code does not authorize the grant of immunity from prosecution, neither does it exhaust the traditional powers of the chief law officer of the Crown. For example, the Code does not authorize the withdrawal of a charge, once laid, nor does it authorize plea bargaining as to sentence upon a plea of guilty by a co-accused, so that the latter may give evidence against his co-accused. The latter power was recognised and adopted through his agent, by a former Attorney-General of this Province ... Therefore, notwithstanding the lack of any express provision in the Criminal Code allowing a grant of immunity by the Attorney-General for Canada, I am

> satisfied he possesses such a power and that with rare exceptions he can be trusted to exercise it **in accordance with the highest traditions of the administration of justice."** (Emphasis added.)

A Crown Attorney, as prosecutor (see s.2, Criminal Code), included within the definition of Attorney-General where the Attorney-General does not intervene or where his consent is not required, must therefore exercise discretion to commence proceedings in accordance with those same high traditions of the administration of justice.

2. THE CONDUCT OF A PROSECUTION:
(a) STANDARDS OF CONDUCT AND ACCOUNTABILITY;

Generally:

The conduct and actions of Crown Attorneys, after proceedings are commenced, are subject to scrutiny both by the Attorney-General and the court. As officers associated with and directly responsible to the Attorney-General, they are responsible and accountable for the administration of justice generally. As "officers of the court," they remain accountable to and subject to the control of the courts, resulting in a blend and mixing of the lines of control and accountability between the court and the office of the Attorney-General. Noting the requirement pursuant to s.s.3(1) of The Crown Attorneys Act and s.2 of the Criminal Code that Crown Attorneys must be barristers and solicitors in good standing within the Province, they must also conduct themselves within, and are subject to, the Code

of Professional Conduct as applied and interpreted by The Law Society of Manitoba.

As an "officer of the court," a Crown Attorney performs a quasi-judicial function within which, as observed by Taschereau, J. at p. 21 in Boucher v. The Queen, [1955] S.C.R. 16, he must seek to ... "assist the judge and jury to render the most complete justice." The Crown must "expose the evidence" and not so much "seek to obtain a verdict of guilty."

Rand, J. at pp. 23-24 in the same decision observed that the " ... purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. **Counsel have a duty to see that all available legal proof of the facts is presented** ... The role of prosecutor excludes any notion of winning or losing." (Emphasis added.)

Mr. Justice Locke, in R. v. Chamandy (1934), 61 C.C.C. 224 noted at p. 227 that:

> "It cannot be made too clear, that in our law, a criminal prosecution is not a contest between individuals, nor is it a contest between the Crown endeavouring to convict and the accused endeavouring to be acquitted; but it is an investigation that should be conducted without feeling or animus on the part of the prosecution, with the single view of determining the truth."

These standards differ from, and exceed, those imposed upon a barrister and solicitor appearing as defence counsel. The main difference is that the Crown must remain entirely unbiased

and "without feeling or animus" so as to ensure that the truth and all material facts are put before the court. In doing so, a Crown Attorney serves as an aide to the justice, assisting in the administration of justice. Reference has been made in several decisions to a Crown Attorney as a, "minister of justice." Quigley, J., of the Alberta Supreme Court, in Re Forrester and The Queen (1977), 33 C.C.C. (2nd) 221 at p. 328, commented that:

> "It has always been a supposition in the administration of criminal justice that as a general rule 'the prosecuting counsel is in a kind of judicial position'. The idea of a contest between party and party should not be allowed to creep in where the prosecutor in a criminal case is concerned because he might then 'forget that he himself was a kind of minister of justice': R. v. Berens et al (1865), 4 F & F 842, 176 E.R. 815."

Also, in the case of R. v. Savion and Mizrahi (1980), 52 C.C.C. (2nd) 276, Zuber, J.A., observed at p. 289 that:

> "By reason of the nature of our adversary system of trial, a Crown prosecutor is an advocate; he is entitled to discharge his duties with industry, skill and vigour. Indeed, the public is entitled to expect excellence in a Crown prosecutor just as an accused person expects excellence in his counsel. But a Crown prosecutor is more than an advocate, he is a public officer engaged in the administration of justice ... "

The Code of Professional Conduct incorporates the concept that a Crown Attorney must satisfy and conduct himself within a higher or more judicial standard than that of defence

counsel. This Code provides that, "When engaged as a prosecutor, the lawyer's prime duty is not to seek to convict, but to see that justice is done through a fair trial on the merits." ... "The prosecutor exercises a public function involving much discretion and power, and must act fairly and dispassionately." A dispassionate and fair prosecutor, whose words are clothed with authority, must ensure that his words and actions serve to inform the court fully and accurately. Any evidence withheld or shading of the evidence which must ultimately shape the court's decision may only occur within that high moral and judicial standard.

(b) THE DISCRETION TO CALL PROSECUTION WITNESSES (EVIDENCE)

A specific example of prosecutorial discretion, relevant within the context of this Review, is the Crown Attorney's discretion to control calling witnesses or introduce evidence. This discretion is referred to in Lemay v. The King, [1952] 1 S.C.R. 232, which decision recognizes its Common Law basis. It is noted that:

> "The prosecutor has a discretion and ... the court will not interfere with the exercise of that discretion unless perhaps it could be shown that the prosecutor had been influenced by some oblique motive."

Cartwright, J., at p. 257 stated that:

> " ... I do not intend to say anything which might be regarded as lessening **the duty which rests upon counsel for the Crown to bring forward evidence of every material fact known to the prosecution ... "** (Emphasis added.)

It remains to consider what might amount to an "oblique motive," the check and limit to the extent of this discretion. In R. v. Jewell and Wiseman (1981), 54 C.C.C. (2nd) 286, the failure to call witness at a murder trial by the Crown Attorney because his evidence might be used by the accused to set up a defence was viewed as unacceptable and an oblique motive for exercising the discretion. It may be concluded that, whenever evidence is withheld from the court in breach of the duty to act with honesty, fairness and candor (see R. v. Hogan (1980), 50 C.C.C. (2nd) 439, (N.S.C.A.)), or with other than fair and dispassionate objectives, an oblique motive might be found and a Crown Attorney's exercise of discretion found to be unacceptable.

(c) THE DISCRETION TO PLEA BARGAIN:

As the facts disclosed during the course of this Review suggest that the discretion to decide which evidence to put before the court was closely bound up in the plea bargaining embarked upon, observations related to both areas of discretion are considered together.

There are no specific provisions within the Criminal Code and limited reference within the Code of Professional Conduct (see Chap. 8, Rule 10) which provide a statutory basis or frame-work within which the concept of plea bargaining may operate. The existence and acceptance of plea-bargaining is derived from the acceptance by the courts of the broad nature of prosecutorial discretion. The courts rely upon the presumption that Crown Attorneys will exercise their discretion

as agents of the Attorney-General in the best interests of justice within their role as "ministers of justice," above the pressures and objectives seen within an otherwise partisan process. (See Boucher v. The Queen, Supra.).

In Canada, unlike the procedure in the United States, the trial judge, when faced with the entry of a guilty plea, fills a relatively passive role. Provided that he is satisfied that the accused clearly understands the nature of the charge and the implications of and result to follow, the trial judge normally is not bound to further investigate the circumstances surrounding the plea. The role of the Crown Attorney as a "minister of justice" and the presence of defence counsel is seen to ensure that the trial judge is presented with the material facts surrounding the entry of the plea so that a fair and proper judicial determination as to sentence will be made.

In contrast, in the United States the courts, the American Bar Association and the Federal Rules of Criminal Procedure acknowledge the practise of plea bargaining and advocate it as a legitimate process provided it is employed subject to strict regulation. The Federal Rules of Criminal Procedure require that any plea bargain be disclosed to the trial judge, usually in open court. The trial judge is left with the discretion to require production of additional evidence or a "pre-sentence report" before accepting or rejecting the agreement. In any event, and in all cases, any plea bargain must be entirely voluntary and with a factual basis for the plea.

To consider the position on plea bargaining taken in the United States is useful in that it helps to define the nature of a "plea bargain." It would appear that there is a careful distinction to be drawn between a "plea bargain" and what might be otherwise termed "plea discussions or plea negotiations." Provided the discussions or negotiations are fully disclosed to the court, provided there is a factual basis for the plea, and provided that the court retains the jurisdiction to discard or accept the negotiated bargain, the process has achieved a level of legitimacy in that jurisdiction. A "bargain" which fetters the trial judge's ability to adjudicate fairly following the entry of a plea and one which is influenced by partisan or oblique motives is clearly outside the concept of a plea bargain which has been found to be acceptable in that jurisdiction.

In Canada, "plea bargains" achieve their legitimacy through the acceptance by the courts of a broad prosecutorial discretion vested in the Attorney-General or his agents. Given the role to be played by a trial judge upon the entry of a guilty plea, it is fair and proper to expect a Crown Attorney to act within a higher moral and judicial standard and, as a "minister of justice" to ensure that the public interest and faith in an impartial system of justice is preserved. Where, for reasons of expediency or on other grounds, a Crown Attorney grants a concession to an accused and where the result of fulfilling such a bargain requires the Crown to be less than candid, open, and dispassionate in his submission to the court, his motive may be seen to be oblique and in breach of his duty

to the court, the public, the Attorney-General and to The Law Society. The Law Reform Commission of Canada, in its paper entitled "Criminal Procedure: Control of the Process, Working Paper No. 15" (Ottawa: Information Canada, 1975) at Page 46 states that:

> "Justice should not be, and should not be seen to be, something that can be purchased at the bargaining table. Neither the public nor the offender can respect such a system. Once the Crown has decided in the public interest to prosecute a charge, bargaining for a plea should not be used as a substitute for judicial adjudication on guilt or sentence."

The Law Reform Commission of Ontario, in its "Report on Administration of Ontario Courts, Part 2" (Toronto: Ministry of the Attorney-General, 1973) at Page 124, stated that:

> "To accede to the negotiation of pleas of guilty as a method of economizing on means to provide for the proper disposition of case loads in the criminal courts is to resort to procedures that will corrupt the administration of justice and destroy it as an effective power in the regulation of society. It will destroy public confidence in the courts and create distrust and suspicion of favours. The real ligaments that hold society together are to be found in the fair, just and open procedures of the courts."

The Code of Professional Conduct states in Rule 10 that, "It is proper for the lawyer to discuss with the prosecutor and for them tentatively to agree on the entry of a plea of 'guilty' to the offence charged or to a lesser or included offence appropriate to the admissions, and also on a disposition or sentence to be proposed

to the court. **The public interest must not be, or appear to be, sacrificed in the pursuit of an apparently expedient means of disposing of doubtful cases, and all pertinent circumstances surrounding any tentative agreements, if proceeded with, must be fully and fairly disclosed in open court. A judge must not be involved in any such discussions or tentative agreements, save to be informed thereof."** (Emphasis added.)

Clearly the Code contemplates plea discussions or negotiations and perhaps even tentative agreements provided all pertinent circumstances are fairly disclosed in open court and provided that a judge is informed of any such tentative agreements. To act otherwise is in breach of a barrister's and solicitor's duty to the court and to the public generally.

Within the Common Law in the Canadian context, there is no apparent trend of judicial thought finding plea bargaining unlawful or improper despite much comment regarding same with disfavour.

Vanek, J. in his article entitled, "Prosecutorial Discretion," Vol. 30 Criminal Law Quarterly, Page 219, observes at Page 235 that:

> "A Crown prosecutor should be expected to decide upon a course of action based upon his own independent assessment and judgment and not on the basis of a bargain or deal with defence counsel involving a trade-off."

Where an agreement or deal with defence counsel interferes with or restricts a Crown Attorney's duty to the court as a judicial officer,

it may be suggested that the plea bargain is improper and outside the extent of discretion provided to a Crown Attorney.

(d) PLEA BARGAINS AND SUBMISSIONS ON SENTENCE:

With regard to the facts disclosed during the course of this Review, it is clear that the exercise of discretion in connection with the plea bargaining process was inextricably bound and related to the Crown Attorney's ultimate role during the sentencing process.

It is noted as being improper to suggest that the court be bound by a plea bargain (see R. v. Morrison (1982), 63 C.C.C. (2nd) 527). Although the court is not bound by such a bargain, the Crown Attorney must be careful to ensure that his duty to place the material facts before the court is not substantially breached at the time of sentencing. In light of a guilty plea, the Crown Attorney, in speaking to sentence, must act to underline the gravity of the offence, the circumstances of the offender and, perhaps, to recommend a range of sentence based upon prior law. It might be argued that to agree with defence counsel and recommend specific or an exact sentence undermines and compromises the authority and discretion of the court, in breach of the Crown Attorney's duty to the court.

In R. v. Wood (1976), 26 C.C.C. (2nd) 100 (Alta. C.A.), the court observed that the Crown is entitled to make a submission to the court as to sentence but should restrict its submission and use its submission to draw attention

to "customary sentences." In R. v. Simoneau (1978), 40 C.C.C. (2nd) 307, Matas, J.A. observed that the Crown may be specific in recommending sentences where the circumstances call for it. Any recommendations **must be based and founded upon the evidence forming the record** (emphasis added). With respect to "joint submissions," Matas, J.A. viewed the technique favourably, subject always to the court's ultimate discretion. On the other hand, Monnin, J.A., in the same case, was not so much in favour of such submissions, observing and reiterating the Crown Attorney's duty to ... put before the court **all the facts known to him with respect to the crime and the accused. He should stop there."** (Emphasis added.)

The Case Law is conflicting in its approach to the Crown Attorney's discretion to engage in plea bargaining and to make specific recommendations on sentencing. However, the general trend appears to accept the practise, based upon the presumption that the Crown Attorney is fulfilling his duty to consider all the facts and to present a complete and factual scenario to the court. In R. v. Fleury (1971), 23 C.R.N.S. 164, Rinfret, J.A., at pp. 178-179, noted that:

> "The trial judge is inclined, **particularly when faced with a plea of guilty,** to adopt the suggestion put forward by counsel for the Crown, since the latter has received the confidential report of the investigating officer and is as a result familiar with certain extenuating circumstances of which the judge may be totally ignorant." (Emphasis added.)

The court in this situation relies upon the Crown Attorney as an extension of the court's

judicial arm, and the Crown Attorney must ensure all material facts are considered and that any recommendation to the court be solidly anchored within that evidence. Therefore, provided a Crown Attorney ensures that all material facts are before the court, or at least considers every material fact and, in light of same, makes an objective and dispassionate recommendation to the court, he will be seen to be acting within the scope of his discretion. Where evidence is withheld, bargains made and a recommendation made to the court outside of this standard, a Crown Attorney steps beyond the limits of his discretion and is in breach of his duty to the court.

A Crown Attorney must act at all times with honesty, fairness and candor. (R. v. Hogan (1980), 50 C.C.C. (2nd) 439 (N.S.C.A.)). While not intending that the facts of that case be seen to parallel the facts forming the subject of this Review, the statement of the standard of practise to be met by a Crown Attorney is important. At Page 445, Pace, J.A. stated that:

> " ... The administration of justice not only requires but demands that those who practise before the courts must, at all times, act with **honesty, fairness and candor** as, without these qualities, the trial of a criminal case and the sentencing of the convicted would result in a hallow farce. The interest of justice must prevail and those who depart from it, be it the prosecutor or the accused, must do so with the certain understanding that they do so at their peril." (Emphasis added.)

3. THE STAY OF PROCEEDINGS:

The final action which provided a

conclusion to the proceedings forming the subject of this Review is the stay of proceedings directed by the Attorney-General. Sub-section 508(1) of the Criminal Code provides a specific power to the Attorney-General to direct a stay, covering both summary and indictable offences. The Attorney-General may stay proceedings, "at any time after any proceedings ... are commenced and before judgment."

Aside from the statutory right to stay proceedings at any time, where the evidence is insufficient to support the charge the Crown has a duty to, "withdraw the charge" and should seek leave of the court to do so (see R. ex. rel. McNeil v. Sanucci (1974), 28 C.R.N.S. 223, [1975] 2 W.W.R. 203 (B.C. Prov. Ct.). An agent of the Attorney-General may also direct a stay of proceedings without specific instructions from the Attorney-General (see R. v. McKay (1979), 9 C.R. (3rd) 378, [1979] 4 W.W.R. 90 (Sask. C.A.)). The courts have observed that, in the absence of "flagrant impropriety" on the part of Crown officers, a stay is not a violation of an informant's rights under s.7 of The Charter of Rights and Freedoms (see R.E. Hamilton and The Queen (1986), 30 C.C.C. (3rd) 65 (B.C.S.C.)).

In R. v. Osborne (1975), 25 C.C.C. (2nd) 405, 33 C.R.N.S. 211 (N.B.S.C. Appellate Division), the courts, "point out and emphasize that the business of withdrawals is strictly that of the Attorney-General or his agents before the court. They equate the right of withdrawal to the right to grant a stay of proceedings. The Crown prosecutor is in a better position than the judge

to know how serious any particular case is. Further, the prosecutor is the representative of the Queen and it is inconceivable that the court should refuse the right of Her Majesty to withdraw an information or stay a prosecution."

As to whether there is a true distinction between a withdrawal and a stay of proceedings is somewhat academic and is only relevant to this Review to the extent that it might be observed that there is some doubt as to the Crown's absolute right to withdraw a charge where the Crown's motive is oblique. Where such motive is found to be oblique, the subsequent relaying of an information might be viewed to be an abuse of process (see R. v. Waitman and Cunningham (1977), 37 C.C.C. (2nd) 303 (Ont. Prov. Ct).