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RESOLUTION DISCUSSIONS AND AGREEMENTS

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NOTE:

THIS POLICY DOCUMENT IS TO BE READ IN THE CONTEXT PROVIDED BY THE **PREFACE** TO THIS PART OF THE CROWN ATTORNEY MANUAL.

CERTAIN WORDS AND PHRASES (SUCH AS "SHOULD" , "MAY" and "MUST") HAVE THE MEANINGS ESTABLISHED IN THE **"WORDS & PHRASES"** SECTION OF THIS PART OF THE MANUAL (SEE THE EXCERPT AT THE END OF THIS DIRECTIVE).

RESOLUTION DISCUSSIONS AND AGREEMENTS

Discussions between counsel aimed at resolving the issues that arise in a criminal prosecution are an essential part of the criminal justice system in Nova Scotia. When properly conducted, these "resolution discussions" benefit the accused, victims, witnesses and the general public. In an environment of comprehensive and early disclosure of evidence, counsel can often resolve issues of procedure, plea, fact and sentence to such an extent that running a case through the full criminal process would add little to what counsel achieve informally. Resolution discussions can also facilitate prompt, just disposition of cases in a manner more sensitive to the circumstances of the participants than would be possible in a formal trial e.g. the privacy of a shy witness can be protected.

The proper administration of criminal justice requires effective participation by Crown Attorneys in resolution discussions. These guidelines are intended to clarify the issues which counsel may attempt to resolve, and to help ensure consistency in approach.

General Principles

1. Any issue that arises in a criminal prosecution may be the subject of discussion and agreement between counsel.

   This broad statement of principle is, of course, subject to the limitations established elsewhere in the Crown Attorney Manual, the rules of criminal law and procedure, and the general rules of conduct applicable to all barristers.

   Crown Attorneys, assuming that they are properly prepared, are encouraged to participate in resolution discussions and to pursue the resolution of issues. It is appropriate for Crown Attorneys to initiate resolution discussions, particularly in the early stages of a criminal case.

2. Any resolution discussion pertaining to any aspect of a criminal prosecution must lead only to agreements that are a responsible representation of the public interest in the enforcement of criminal law. Each case must be resolved on its merits in a manner that is fit and just.

Some of the public interest factors which it is appropriate to consider in regard to resolution agreements are these:

- the history of the accused with respect to criminal activity
- the nature and gravity of the offences faced by the accused
- the remorse of the accused and willingness to assume responsibility
- the desirability of prompt and certain disposition of the case
- the likelihood of obtaining a conviction at trial
- the wishes of victims, and the probable effect of a trial on witnesses
- the probable sentence or consequences if the accused is convicted.

3. It is not appropriate for Crown Attorneys to take a position in resolution discussions based solely or largely on expediency. Crown Attorneys, however, must consider all of the circumstances of the case, which in some instances may include the need to make effective use of limited resources. For example, if Crown and defence counsel are not far apart in their perceptions of what the sentence should be in the event of a guilty plea, Crown counsel can properly consider whether the public interest is best served by conducting a lengthy trial for nothing more than an opportunity to seek a slightly increased penalty.

4. Crown Attorneys must endeavour to ensure that resolution discussions are consistent from case to case where appropriate. Through their counsel, accused persons in comparable situations must be afforded both comparable opportunities to engage in resolution discussions and comparable treatment during those discussions.

5. Counsel must honour all agreements reached after resolution discussions.

   Repudiation of a resolution agreement can occur only if (1) the agreement would bring the administration of justice into disrepute, and (2) the accused can be restored to his or her original position. Any contemplated repudiation by a Crown Attorney must be approved by the Chief Crown Attorney for the region or branch; any contemplated repudiation of an agreement made by a Chief Crown Attorney must be discussed with the Director of Public Prosecutions or his designate.

   Because the honouring of resolution agreements is a practical necessity, Crown Attorneys are strongly encouraged to discuss difficult resolution proposals with supervisors and experienced colleagues prior to entering into an agreement.

   If a Crown Attorney disagrees with an agreement earlier reached by a colleague, the agreement should be carefully and respectfully discussed by the counsel involved. If the disagreement cannot be resolved, the supervisor should be consulted for direction. Unresolved disagreements of this nature should be rare.

   This important issue was commented upon by the Supreme Court of Canada in *Regina v. Nixon*, 2011 SCC 34:

> Of course, there may be instances where different Crown counsel will invariably disagree about the appropriate plea agreement in a particular case. Given the number of complex factors that must be weighed over the course of plea resolution discussions, this reality is unsurprising. However, the vital importance of upholding such agreements means that, in those instances where there is disagreement, the Crown may simply have to live with the initial decision that has been made. To hold otherwise would mean that defence lawyers would no longer have confidence in the finality of negotiated agreements reached with front-line Crown counsel, with whom they work on a daily basis. Further, if agreements arrived at over the course of resolution discussions cannot be relied upon by the accused, the benefits that resolutions produce for *both* the accused and the administration of justice cannot be achieved. As a result, I reiterate that the situations in which the Crown can properly repudiate a resolution agreement are, and must remain, very rare. [Per Charron J., for the Court, para. 48].

6. Crown Attorneys must not purport to bind the discretion of the Attorney General or the Director of Public Prosecutions to appeal.

   It is understood, however, that dispositions flowing from a resolution agreement will only be the subject of an appeal or of a recommendation to appeal where, in the opinion of the DPP. the agreed outcome, if unaltered, would bring the administration of justice into disrepute.

7. When a matter is resolved as the result of discussions between counsel, generally this should be stated on the record in open court. The public interest may occasionally require departure from this principle e.g. when necessary to protect the safety of an informant.

Particular Discussions and Agreements

(a) Charge and Plea Discussions

Crown Attorneys may pursue resolution only of charges which meet the charging standard i.e. sufficient evidence must be available to provide a realistic prospect of establishing the guilt of the accused, and prosecution of the accused must be in the public interest (see DPP Guidelines re the Decision to Prosecute).

If, in the course of discussions, it becomes apparent that evidence necessary to prove a material element of the offence will never become available, this must be disclosed to defence counsel. Crown attorneys are not required to warrant the availability of every witness. As a matter of practice, however, in order to ensure that no one is mislead, it would be prudent for a Crown Attorney to inform the accused or defence counsel of the unavailability of an essential witness if this is

known to the Crown Attorney before or during plea discussions.

Crown Attorneys must not enter into a guilty plea agreement to a charge in regard to which the accused claims to be innocent.

In discussing charges, Crown Attorneys must ensure that

(1) the charges to be proceeded with bear a reasonable relationship to the nature of the criminal conduct of the accused, and

(2) the charges proceeded with provide adequate parameters for an appropriate sentence in all the circumstances of the case.

The following matters, and others, may be included in charge discussions:

- withdrawing charges;
- agreeing not to proceed against certain accused persons;
- combining separate charges into one all-inclusive charge;
- proceeding on only certain counts against one accused and withdrawing other counts against that accused.

Crown Attorneys must be mindful of specific policies relating to particular types of charges, e.g. impaired driving, which may clarify the application of the general principles set out in this policy document.

Crown Attorneys should, where reasonably possible, consult with victims and the investigators in regard to resolution of charges and sentence. If a resolution agreement is reached, counsel should ensure that victims and the investigators understand the substance of the agreement and the rationale for the agreement.

Under the Victim Bill of Rights amendments to the Criminal Code, where a resolution to plead guilty has been reached in a case where an accused is charged with a serious personal injury offence within the meaning of s.752 of the Code, or with murder, or with an indictable offence punishable by five years or more imprisonment, the court is mandated to inquire of the Crown Attorney whether reasonable steps were taken to inform the victim of the resolution. While the amendments do not mandate the court to adjourn proceedings in case where this has not been done, this is a likely potential consequence of a failure to keep the victim informed. The amendments mandate the Crown Attorney to take reasonable steps to inform the victim after the guilty plea has been accepted. The amendments underscore the need for timely victim communication.

(b) Procedural Discussions

It is appropriate for Crown Attorneys to discuss the following procedural matters:

- whether to proceed summarily or by indictment;

- specifying a future date for disposition of the case, assuming that this is being done for legitimate reasons and the accused is prepared to waive the right to a trial within a reasonable time;

- transferring charges to or from another jurisdiction.

(c) Sentence Discussions

Because a public perception that resolution agreements result in sentences that are unacceptably low can undermine public confidence in the justice system, discussions and agreements in regard to sentence must achieve a sentence which is proportionate to the nature of the criminal conduct of the accused.

It is appropriate for Crown Attorneys to discuss the following matters which relate to sentence:

- the specific sentence or range of sentence to be recommended by the Crown;

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

- an agreement by the Crown not to oppose a sentence recommendation by defence counsel which has been disclosed in advance (subject to the specific requirements of other policies e.g. spousal violence);

- conditions to be included in conditional sentences, probation orders, and other orders made at the time of sentencing (but not orders under the DNA Identification Act or other mandatory orders).

In sentence discussions, it is appropriate for Crown Attorneys to acknowledge that a plea of guilty is a circumstance in mitigation of sentence. When there is sincere remorse and the guilty plea is offered at the first reasonable opportunity, it is particularly mitigating. At the early stages of the criminal process, Crown Attorneys should give full and appropriate credit for a guilty plea. When resolution discussions occur at a later stage in the criminal process, particularly when a guilty plea is offered only after ascertaining that all essential evidence has been assembled at court, significantly less credit should be given.

(d) Discussions in Regard to the Facts of the Case

When the accused pleads guilty, Crown Attorneys should put before the court those facts that could have been proved by admissible evidence if the matter went to trial. Ideally, there should be a detailed, agreed statement of facts.

It is appropriate for Crown Attorneys to omit embarrassing facts which are of little or no significance to the charge. It is not acceptable, however, for Crown Attorneys to participate in the presentation of a set of facts which misleads the court. Crown Attorneys must not withhold from the court facts that are relevant, provable and which aggravate the offence. Similarly, Crown Attorneys must not agree to omit a relevant, provable part of the criminal record of the accused.

With respect to cases which proceed to trial, it is appropriate for Crown Attorneys to pursue discussions with defence counsel with a view to resolving issues of fact. If issues cannot be resolved, it is appropriate to pursue discussions with a view to minimizing the number of witnesses which will be necessary and to arrange to present the case in a manner that is convenient to the witnesses. The use of alternatives to *viva voce* evidence e.g. affidavits, certificates, photographs, documents, etc. should be considered and discussed.

(e) Conditional Sentences

Because conditional sentences usually permit the offender to reside at home and to enjoy many of the benefits available to persons at large in the community, they are often viewed by the offender and defence counsel as a very attractive outcome. In resolution discussions, Crown Attorneys are reminded of the importance of ensuring that any agreement in regard to sentence achieves a sentence which is proportionate to the nature of the criminal conduct of the accused [see the foregoing sections of the PPS Policy on Resolution Discussions and Agreements].

When the anticipated evidence in support of a charge is weak or uncertain (even though there is a realistic prospect of conviction), it may be tempting for a Crown Attorney to hastily accept an offer of a guilty plea with a joint recommendation for a conditional sentence. Such decisions must be made carefully, and all of the ramifications of any sentence agreement must be considered. Although the strength of the case is a legitimate factor when sentence is being discussed, Crown Attorneys must not agree to a conditional sentence unless the resulting conditional sentence provides denunciation, deterrence and punitive elements appropriate to the offence and the offender. Resolution agreements which result in inadequate sentences tend to undermine public confidence in the justice system. It is never appropriate to accept an inadequate sentence proposal simply to avoid a trial, or to obtain a guilty plea when the evidential threshold is not met. It is sometimes necessary to take weak cases to trial, if the evidential threshold is met. If the threshold is not met, the case should be discontinued. If a contemplated resolution appears to lie outside the usual range of sentence for a particular charge, consultation with the Chief Crown Attorney for the region or branch should occur prior to finalization.

Consultation/Accountability

The resolution of cases and issues is often a difficult process and it is impossible to prepare precise instructions for prosecutors which predict and address the nuances of every case. The guidance available to prosecutors is necessarily given in general terms with room for adaptability to the actual circumstances with which the prosecutors are faced. This is a process, however, in which experience can be truly valuable. The Law Reform Commission of Canada and the Martin Report have observed that the criminal justice system should not be deprived of this experience in regard to prosecutorial decisions. Continuous consultation between prosecutors, supervisors, and experienced colleagues in regard to the resolution of cases helps to ensure consistency in approach, permits the sharing of knowledge and information, and enhances the professional development of prosecutors.

It is not possible (and probably not desirable) to prepare an exhaustive list of cases and situations which should or must involve consultation and team work. The need to consult will vary to some extent with the type of case, the experience of the persons involved, and the opportunities for consultation. Without limiting the general need for consultation in regard to significant and difficult decisions, the following principles are applicable to consultation in regard to the resolution of cases:

(4) Prosecutors **must** consult with their supervisors in resolution discussions in any case involving:

(a) a death, or

(b) charges against public figures or persons involved in the administration of justice.

(5) Prosecutors **should** consult with their supervisors in regard to the resolution of the following types of cases:

(a) criminal conduct involving gang or group activity;

(b) cases expanding the use of particular Criminal Code provisions, or which raise novel issues relating to any legislation, including the Charter; and

(c) cases which have attracted media attention, or which will likely be of public interest when presented in court.

(6) Prosecutors are strongly encouraged to consult with supervisors and experienced colleagues in regard to the resolution of all other significant or unusual cases. The determination of whether a case is significant requires judgment by the prosecutor involved. If a penitentiary sentence appears to be appropriate for the criminal conduct, that is a strong indicator that the matter is significant enough to involve consultation. Cases with multiple victims, large losses of property, or

which involve criminal activity at several locations are other examples of cases often considered to be significant.

It should be noted that the nature of the consultation that should occur will vary with each case. When the decision to be made in regard to the resolution of a charge is clear, the consultation will mostly involve the prosecutor keeping the supervisor informed of developments. When the factors to be considered are more finely balanced, there is likely to be a fuller discussion, an exchange of views, and perhaps the giving of advice or instructions.

Crown Attorneys who consult with supervisors and colleagues when faced with difficult decisions, and then exercise discretion in a principled way, will be supported in their decision-making.

The PPS recognizes the need to leave generous amounts of discretion in the hands of local prosecutors (see the Preface to this manual). Occasionally, however, the DPP, in fulfilling his responsibilities in regard to accountability, may become directly involved in the decisions arising in extraordinary cases, or may designate senior counsel to consider particular issues. This approach often flows from a need to have decisions of province-wide impact made by those with a province-wide mandate, or the necessity of bringing maximum prosecutorial experience to bear on certain difficult decisions. Such involvement in local decisions will be rare, but it is a necessary phenomenon in any organization with an accountability structure and does not reflect any lack of confidence in local prosecutors.

Crown Attorneys are reminded of the ongoing need to complete Case Bulletins in appropriate cases and to update these Bulletins as cases move forward (see the separate administrative policy re Case Bulletins).

Transparency

It is important to maintain detailed records of resolution discussions and the rationale for agreements. In this way, “Crown-shopping” will be discouraged and continuity in approach will be maintained. Accurate records also enhance the ability of the PPS to provide appropriate information to the public and persons directly involved in a case, thus increasing confidence in the justice system.

In routine cases where the accused pleads guilty early in the criminal process and the prosecutor agrees to a sentence within the usual range for the offence charged, the position of the Crown and its rationale will usually be apparent from the in-court record. In all other instances, careful notes should be made in the prosecution file outlining any discussions which have occurred with defence counsel, any consultations with supervisors or colleagues, and the rationale for the position take by the prosecutor. This is particularly important when the prosecutor has taken an “unusual” position; the case is complex; the file is (or may be) passed on to another prosecutor; or the case is likely to attract public attention.

As noted earlier in these Guidelines (see General Principles, above), when a matter is resolved as a result of discussions between counsel, generally this fact should be stated on the record in open court.

Words & Phrases

The following words and phrases appear in the PPS directives, guidelines and policies, and have these meanings:

"should": indicates that there is a presumption that prosecutors will carry out the task, but recognizes that it may not always be possible or desirable to do so in the particular circumstances of an individual case. Prosecutors must be able to articulate a reasonable basis for departing from the suggested course of action.

"may": highlights an issue for prosecutors and alerts them to an action or decision which they may or may not take in the exercise of their discretion.

"shall" or "must": signify an unconditional requirement and usually relate to a legal obligation or procedural necessity. These are few in number.