Manitoba
Department of Justice
Public Prosecutions

Guideline No. 2:PLE:1

Policy Directive

Subject: Plea Bargaining
Date: May 2015

POLICY STATEMENT

The Supreme Court of Canada has recognized plea bargaining as an essential part of the exercise of Crown discretion; *R. v. Anderson,* 2014 SCC 41. Making an informed decision about which charges are to be proceeded upon and whether to accept a plea to a lesser charge are two examples set out in *Anderson* as being essential roles for a Crown Attorney. Thus, in order to fulfill their role, Crown Attorneys should facilitate discussions with defence counsel concerning potential resolution of a matter.

PRINCIPLES:

The following principles should govern plea bargaining:

1. A Crown Attorney's actions in relation to plea bargaining must always be guided by the public interest and the need to promote confidence in the administration of justice.

2. There is an overarching duty of fairness expected of Crown Attorneys. The accused should never be overcharged or a plea obtained by the threat of the Crown proceeding with a more serious charge for which the factual underpinning does not meet the charging standard; *R. v. Babos*, 2014 SCC 16.

3. A plea bargain may involve acceptance by the Crown of guilty pleas to lesser charges or to the staying of some charges in exchange for guilty pleas to the balance of charges. It may also involve resolving the matter in accordance with the Restorative Justice and Diversion policy (April, 2015).

   Crown Attorneys may also agree with defence counsel to adopt a particular position on the matter of sentence. This may involve agreeing to make no recommendation respecting sentence, agreeing to recommend a certain type of sentence (e.g. a fine), agreeing to recommend a sentence within a certain range or agreeing to recommend a specified term of imprisonment. Plea bargaining may also involve agreements concerning terms of probation.

4. Pleading guilty is a mitigating factor in sentencing as it shows remorse, reduces the strain on resources and lessens the stress/inconvenience to witnesses. Therefore, if an accused wishes to resolve a matter by guilty plea, this warrants consideration when determining the proper disposition. An accused who chooses to plead guilty early in the process, thereby taking responsibility at the first opportunity and minimizing the strain on victims, witnesses and the system as a whole deserves significant consideration in mitigation. On the other hand, an accused who pleads guilty on the eve of trial deserves considerably

less consideration. However, an accused should not be expected to enter into plea negotiations until he/she has received sufficient disclosure to make an informed decision; *R. v. Babos*, 2014 SCC 16.

5. Crown Attorneys are reminded of their statutory obligations under both the federal and provincial *Victims' Bill of Rights* with respect to providing information to victims and receiving input from them. See: Victims' Policy (2:VIC:1) and Prosecution of Offences Against Police Officer (2:PRO:1).

6. It is proper for a Crown Attorney to make agreements respecting pleas or sentence where extenuating circumstances exist or arise in the course of a prosecution with a view to avoiding an unsuccessful prosecution. Examples of such circumstances include witnesses who do not testify as expected, where there is uncertainty as to the admissibility of evidence or where there has been excessive delay in bringing the matter to trial.

7. Facts provided to a court on a guilty plea must be facts, either accepted by defence counsel, or that the Crown can prove beyond a reasonable doubt if disputed; *R. v. Gardiner*, [1982] 2 SCR 368. Crowns must never mislead the court. All facts that are relevant to the disposition must be provided to the judge. Therefore, Crowns must not withhold information such as prior convictions or leave out relevant facts that may reasonably affect sentence including the imposition of mandatory minimum penalties.

8. Once a plea agreement has been reached it can only be repudiated in rare and exceptional circumstances; *R. v. Nixon*, 2011 SCC 34. Therefore, Crown Attorneys should be cautious in making any agreements as to plea on serious matters until all relevant information has been considered.

9. A Crown Attorney should not make any agreement regarding sentence where it is understood that a pre-sentence report or forensic report will be obtained as the information in these types of reports is often vital to determining a fit sentence.

10. The judiciary should not normally be brought into the plea bargaining process but it is recognized that at Case Management or Resolution Conferences, the Crown should be prepared to discuss possible resolution.

11. Though rare, there are situations where a Crown Attorney may properly decide to stay proceedings or recommend a particular sentence based on compassionate grounds.

12. A plea bargain should not include an agreement by a Crown Attorney to forego an appeal of the sentence imposed by the judge.

RATIONALE:

Plea bargaining avoids unnecessary litigation, reduces the strain on resources, minimizes inconvenience to witnesses and increases the timeliness of case resolution. Crown Attorneys should participate in plea negotiations with defence counsel in accordance with the guidelines provided above.

The benefits and practicality of plea bargaining are apparent to those who work in the criminal courts. However, the public and the news media often seem to regard plea bargaining with suspicion and some may even regard it as unseemly. This attitude may be attributable, at least

in part, to the fact that plea bargaining occurs in private and often seems to result in the accused receiving what, at first glance, appears to be an unwarranted benefit (e.g. convicted of a reduced charge or receiving a lenient sentence). Crown Attorneys should, where it is reasonable and appropriate to do so, attempt to make the plea bargaining process more transparent by providing an explanation on the record of the factors that led to the plea bargain. The explanation may involve pointing out the exigencies of the case or explaining what compromises or concessions have been made by the Crown. The explanation need not be lengthy but it should be sufficient for the judge and the public to understand why the Crown is accepting the plea bargain.

Further, an explanation need not be provided every time a case is resolved through a plea bargain. There may be circumstances where disclosing the entire rationale is not in the public interest. Examples may include cases where an explanation would jeopardize the safety of witnesses, reveal sensitive information about organized crime or compromise ongoing investigations.