Policy:		
Resolution Discussions		
Policy Code: **RES 1**	Effective Date: January 15, 2021	Cross-references: ALT 1 APP 1 CHA 1 CHI 1 DAN 1 DIS 1 FIR 1 HAT 1 IMP 1 INF 1 IPV 1 SEN 1 VUL 1 WAI 1 WAI 1.1

The Supreme Court of Canada has confirmed that resolution discussions between Crown Counsel and the defence are not only common, but "essential." When properly conducted, resolution discussions "permit the system to function smoothly and efficiently."[1]

Principled resolution discussions often result in a guilty plea or lead to the admission of facts which would otherwise have to be proven by the Crown. The early resolution of charges or narrowing of issues can reduce stress and inconvenience to victims and witnesses, and can result in a more efficient justice system in which unnecessary trials are avoided and necessary trials are shorter, focusing on the factual and legal issues that are clearly in dispute.

Whenever possible, Crown Counsel should initiate early, principled, and informed resolution discussions. In so doing, Crown Counsel must always act in the public interest, protecting society while also promoting public confidence in the administration of criminal justice.

Resolution discussions include all discussions between Crown Counsel and defence counsel as to the charges laid and their possible disposition. Examples may include:

- reducing a charge to a lesser or included offence
- accepting a guilty plea to a different offence as authorized by section 606(4) of the *Criminal Code*
- withdrawing or staying other charges

1 *R v Anthony-Cook*, 2016 SCC 43 at para 1

- agreeing not to proceed on a charge or agreeing to stay or withdraw charges against other accused persons
- agreeing to reduce multiple charges to one all-inclusive "global" charge
- agreeing to withdraw or direct a stay of proceedings on certain counts but proceed on other counts relying on the material facts that supported the withdrawn or stayed counts as aggravating factors for sentencing purposes
- agreeing to dispose of the case at a specified future date if, on the record, the accused waives the right to a trial within a reasonable time
- agreeing to the waiver of charges in accordance with the policy on waivers (*Waiver of Criminal Charges Within Province* (WAI 1), *Waiver of Criminal Charges Between Provinces* (WAI 1.1))
- agreeing to take a certain sentencing position

In conducting resolution discussions, Crown Counsel must:

- apply the *Charge Assessment Guidelines* (CHA 1) policy, and only accept a guilty plea if the standard in that policy continues to be met
- make full disclosure to the accused, appropriate to the stage of the proceeding, in accordance with the policy on *Disclosure* (DIS 1)
- apply other BC Prosecution Service policies that could have a direct impact on the resolution discussions (e.g., *Alternatives to Prosecutions – Adults* (ALT 1), *Child Victims and Witnesses* (CHI 1), *Dangerous Offenders and Long-Term Offenders* (DAN 1), *Firearms* (FIR 1), *Impaired Driving Prosecutions* (IMP 1), *Intimate Partner Violence* (IPV 1), *Sentencing – Adults* (SEN 1), *Vulnerable Victims and Witnesses* (VUL 1))
- ensure that any charge to which the accused pleads guilty appropriately reflects the provable criminal conduct of the accused and allows for an appropriate sentencing range
- only present a joint submission as to the exact length or form of sentence or amount of monetary fine if Crown Counsel is satisfied that a joint submission is appropriate in the public interest, will not bring the administration of justice into disrepute, and the principled legal basis for it is recorded on the file
- refrain from entering into any arrangement that purports to fetter the discretion of the Attorney General in regard to an appeal unless the written approval of the Assistant Deputy Attorney General to such an arrangement is obtained in advance (*Appeals by Crown to the Court of Appeal and Supreme Court of Canada* (APP 1))

- record on the file any substantive discussions with defence counsel concerning a potential or actual resolution

Before embarking on resolution discussions, Crown Counsel should:

- determine what the legally appropriate range of sentence would be if the accused were convicted after trial
- recognize that a guilty plea is a mitigating factor on sentence and give the accused the full benefit of mitigation for an early guilty plea
- recognize that after a trial date is set, if the provable facts remain substantially unchanged, the mitigating effect of a guilty plea declines
- adjust the Crown sentencing position upwards as the trial or hearing date approaches, the impact on witnesses and victims mounts, and the legally appropriate range of sentence more closely approaches the after-trial range
- where appropriate, take into account section 11(b) of the *Charter of Rights and Freedoms* and the length of time that the matter has been awaiting trial

In speaking to sentence, Crown Counsel should:

- ensure the conditions for accepting a guilty plea are met, and the court satisfies itself of the requirements in section 606(1.1) of the *Criminal Code*:
  - the accused is making the plea voluntarily
  - the accused understands that the plea is an admission of the essential elements of the offence, the nature and consequences of the plea, and that the court is not bound by any agreement made between the accused and the prosecutor
  - the facts support the charge[2]
- advise the court of all relevant information including any criminal record, agreed facts, and aggravating circumstances (e.g., use of a weapon) that the Crown is able to prove
- identify for the court the legally appropriate range of sentence and, barring exceptional circumstances, make a recommendation within that range, accounting for the relevant aggravating and mitigating circumstances

2 *R v Gates*, 2010 BCCA 378 at para 21

Indigenous Persons

Numerous government commissions and reports, as well as decisions of the Supreme Court of Canada, have recognized that discrimination experienced by Indigenous persons (First Nations, Métis, and Inuit), whether as a result of overtly racist attitudes or culturally-inappropriate practices, extends to all parts of the criminal justice system.

Parliament has recognized an evolving societal consensus that these problems must be remedied by accounting for the unique systemic and background factors affecting Indigenous peoples, as well as their fundamentally different cultural values and world views.[3]

The history of colonialism, displacement, and residential schools continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and higher levels of incarceration for Indigenous peoples.[4] The rates of victimization of Indigenous people, especially for Indigenous women and girls, are also significantly higher than those for non-Indigenous persons.[5]

When developing a sentencing position, Crown Counsel should consider the "detrimental effects of widespread racism against Indigenous people within our criminal justice system".[6]

As noted in CHA 1, at an early stage in the charge assessment process, Crown Counsel should try to determine whether the accused or victim identifies as an Indigenous person and, therefore, whether public interest considerations specific to Indigenous persons apply. To make this determination Crown Counsel should refer to any information contained within the Report to Crown Counsel or otherwise readily available to them.

Indigenous Accused

When engaging in resolution discussions and developing a sentencing position with respect to an Indigenous accused person, Crown Counsel must consider:

- the principles established in *R v Gladue*[7]
- the contents of any available Gladue Report or related information or evidence about the unique or systemic background factors that may have played a part in bringing the Indigenous accused person before the court

3 *Ewert v Canada* 2018 SCC 30 at paras 57 and 58; *R v Barton*, 2019 SCC 33 at paras 198-200
4 *R v Ipeelee*, 2012 SCC 13
5 *Victimization of Aboriginal People in Canada, 2014*, Statistics Canada, 2016
6 *R v Barton*, 2019 SCC 33 at para 199
7 *R v Gladue*, [1999] 1 S.C.R. 688

- the impact these factors, as well as the continuing consequences of colonial history, will have on the Indigenous accused person's ongoing interaction with the criminal justice system

Indigenous Victims

For cases involving Indigenous persons as victims, Crown Counsel should ensure that their sentencing positions reflect the gravity of the problem of violence against Indigenous persons in our society, particularly Indigenous women and girls, and the serious injustices they have faced.[8] Crown Counsel should also recognize that in cases that involve the abuse of a person who is vulnerable because of personal circumstances, including because a person is Indigenous and female, section 718.04 of the *Criminal Code* requires that the court must give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.

For cases involving the abuse of an intimate partner, section 718.201 of the *Criminal Code* also requires a court, when imposing a sentence, to consider the increased vulnerability of female persons who are victims, giving particular attention to the circumstances of Indigenous female victims (*Intimate Partner Violence* (IPV 1)).

Further, where there is evidence that the offence was motivated by bias, prejudice, or hate towards the victim as set out in section 718.2(a)(i), Crown Counsel should refer to *Hate Crimes* (HAT 1) and consider all relevant aggravating circumstances.

Information to Victims and Police

Under sections 14 and 19(1) of the *Canadian Victims Bill of Rights* and sections 606(4.1) to 606(4.4) of the *Criminal Code*, every victim has the right to convey their views about decisions to be made by appropriate authorities in the criminal justice system that affect the victim's rights under the Act, and to have their views considered, through the mechanisms provided by law.

In cases involving serious injury or severe psychological harm, before concluding resolution discussions, withdrawing charges, or directing a stay of proceedings, Crown Counsel should take reasonable steps to inform the victim or the victim's representative and the police or other investigative agency of the proposed resolution and provide them an opportunity to express any concerns they may have. If they express significant concerns about the proposed resolution or wish to have it reviewed, Crown Counsel should consult with a Regional Crown Counsel, Director, or their respective deputy and should not

8 *R v Barton*, 2019 SCC 33 at para 198

conclude resolution discussions, withdraw charges, or enter a stay of proceedings until that consultation has occurred.

For the cases listed below, Crown Counsel should consult with a Regional Crown Counsel, Director, or their respective deputy before concluding any resolution discussion, withdrawing charges, or directing a stay of proceedings:

- when the charge alleges that the accused is responsible for a death
- for any serious charge about which there has been, or is likely to be, significant public concern with respect to the administration of justice

While Crown Counsel should consider any concerns expressed by the victim, the victim's family, or the police or other investigative agency, the final decision as to the appropriate charge or disposition rests with the BC Prosecution Service in accordance with this policy.

Recorded Decisions

Decisions to enter a stay of proceedings or to agree to a negotiated resolution are exercises of prosecutorial discretion. While the reasons for such decisions must be recorded in the Crown file, Crown Counsel should not disclose such reasons to anyone outside the BC Prosecution Service, except in accordance with the policy *Information Requests from Third Parties* (INF 1).

Repudiation

Repudiation of any concluded resolution agreement should be rare. Repudiation should be considered only where the Regional Crown Counsel or Director and the Assistant Deputy Attorney General are satisfied that the resolution agreement would bring the administration of justice into disrepute. If that test is met, the decision whether to repudiate should take into account the extent to which the accused could be restored to their original position, whether the fact of repudiation might reasonably bring the administration of justice into disrepute, and whether there is a realistic potential for a judicial finding of abuse of process.

Unrepresented Accused

Crown Counsel should exercise caution in undertaking resolution discussions with an unrepresented accused. Before doing so Crown Counsel should encourage the accused to seek the advice of counsel to assist in any resolution discussions. However, if the accused declines to seek the advice of counsel and wishes to undertake resolution discussions, Crown Counsel should arrange for a third person to be present during the discussions or conduct the discussions in writing, unless that cannot reasonably be done. Crown Counsel should ensure that a record of the discussions is kept on the file.