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Commission de réforme du droit du Canada

CRIMINAL LAW

immunity from prosecution

Working Paper 64

Canada

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IMMUNITY FROM PROSECUTION

Law Reform Commission
of Canada

Working Paper 64

IMMUNITY FROM PROSECUTION

1992

Canadian Cataloguing in Publication Data

Law Reform Commission of Canada

Immunity from prosecution

(Working paper; 64)
Text in English and French with French text on inverted pages. Title on added t.p.: L'immunité contre les poursuites. Includes bibliographical references.
ISBN 0-662-58710-3
DSS cat. no. J32-1/64-1992

1. Prosecution — Canada — Decision making. 2. Evidence, criminal — Canada. 3. Self-incrimination — Canada. 4. Criminal procedure — Canada. I. Title. II. Title: L'immunité contre les poursuites. III. Series: Working Paper (Law Reform Commission of Canada); no. 64.

KE9312.I55 1992 345.71'05042 C92-099531-4E

Available by mail free of charge from:
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130 Albert Street, 7th Floor
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Suite 310
Place du Canada
Montreal, Quebec
H3B 2N2

Catalogue No. J32-1/64-1992
ISBN 0-662-58710-3

Notice

This working paper presents the views of the Commission at this time. The Commission's final views will be presented in its report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

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Editor's Note

In keeping with the proposal advanced in *Equality for All: Report of the Parliamentary Committee on Equality Rights*, we have conscientiously endeavoured to draft this working paper in gender-neutral language. In doing so, we have adhered to the standards and policies set forth in *Toward Equality: The Response to the Report of the Parliamentary Committee on Equality Rights* pertaining to the drafting of laws, since the Commission's mandate is to make proposals for modernizing Canada's federal laws.

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Acknowledgements

We are indebted to all those individuals with whom we consulted during the preparation of this working paper. Members of our standing advisory panels, comprising representatives of the judiciary, the practising bar (both Crown and defence), law teachers and the police, regularly advise us on our work in development. We are truly grateful to them and hereby acknowledge their considerable influence on our work.

We also gratefully acknowledge the contribution of the Montreal Defence Lawyers Association, whose representatives at our consultations were President, Michel Massicotte, Vice-President, Isabel J. Schurman, and Consultant, Guy Cournoyer.

Finally, our thanks go to members of the Working Group on Certain Aspects of the Administration of Criminal Justice, set up by the Quebec Minister of Justice and Attorney General, and chaired by Mr. Justice Guy Guérin, a former Chief Justice of the Quebec Sessions of the Peace Court. We appreciate the group's exemplary co-operation and useful contributions in exchanging information on the difficult and contentious issues dealt with in this working paper.

The views expressed in this working paper are those of the Commission, and do not necessarily reflect those of Parliament, the Department of Justice or any of the individual consultants.

CHAPTER ONE

Introduction

In this working paper, we return to a subject that we alluded to briefly in Working Paper 60 on *Plea Discussions and Agreements*,[1] namely, agreements to confer immunity from prosecution. As in that working paper, we are concerned with the exercise of a particular prosecutorial power; we shall not, therefore, be dealing with non-discretionary forms of immunity from prosecution (such as Crown immunity,[2] consular and diplomatic immunity[3] and so forth) that are premised on unrelated considerations.

As we suggested in Working Paper 60, we consider immunity agreements to be different in nature from plea agreements. We have defined a plea agreement as "any agreement by the accused to plead guilty in return for the prosecutor's agreeing to take or refrain from taking a particular course of action."[4] In the case of plea agreements, therefore, the consideration flowing from the accused is always a guilty plea and the consideration flowing from the prosecutor may vary.[5] With immunity agreements, on the other hand, it is the consideration flowing from the individual that may vary and the consideration flowing from the Crown that remains constant: instead of a guilty plea, it is evidence, information, co-operation, assistance or some other benefit that the individual promises; the Crown, in one manner or another, always promises "immunity."

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1. Law Reform Commission of Canada [hereinafter LRC], *Plea Discussions and Agreements*, Working Paper 60 (Ottawa: The Commission, 1989) at 4.

2. On this subject, see, *e.g.*, *R.* v. *Sellers* (1985), 73 A.R. 274 (Q.B.); *Saskatchewan* v. *Fenwick*, [1983] 3 W.W.R. 153 (Sask. Q.B.); *R.* v. *Eldorado Nuclear Ltd.*; *R.* v. *Uranium Canada Ltd.*, [1983] 2 S.C.R. 551; *Canadian Broadcasting Corp.* v. *The Queen*, [1983] 1 S.C.R. 339; *Freshwater Fish Marketing Corp.* v. *Duchominsky* (1982), 19 Man. R. (2d) 358 (C.A.); *Attorney General of Alberta* v. *Putnam*, [1981] 2 S.C.R. 267; *R.* v. *Forest Protection Ltd.* (1979), 25 N.B.R. (2d) 513 (S.C.A.D.); *Attorney General of Que. and Keable* v. *Attorney General of Can.*, [1979] 1 S.C.R. 218; *Canadian Broadcasting Corp.* v. *Quebec Police Commission*, [1979] 2 S.C.R. 618; *R.* v. *Stradiotto* (1973), 11 C.C.C. (2d) 257 (Ont. C.A.); *Canadian Broadcasting Corp.* v. *Attorney-General for Ontario*, [1959] S.C.R. 188; *R.* v. *Rhodes*, [1934] 1 D.L.R. 251 (Ont. S.C.); *R.* v. *Anderson*, [1930] 2 W.W.R. 595 (Man. C.A.); *R.* v. *McLeod*, [1930] 4 D.L.R. 226 (N.S.S.C.). See also, on the question of Crown immunity and related issues, Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Freedom and Security under the Law*, Second Report, vol. 1 (Ottawa: Supply and Services, 1981) at 378-93 (Chair: D.C. McDonald) [hereinafter McDonald Commission].

3. On these subjects, see generally Sharon A. Williams and J.-G. Castel, *Canadian Criminal Law: International and Transnational Aspects* (Toronto: Butterworths, 1981) at 149-59. See also James E. Hickey, Jr., and Anette Fisch, "The Case to Preserve Criminal Jurisdiction Immunity Accorded Foreign Diplomatic and Consular Personnel in the United States" (1990) 41 Hastings L.J. 351 at 358-62.

4. *Supra*, note 1 at 3-4, 40.

5. See the examples given in LRC, Working Paper 60, *supra*, note 1 at 40.

Immunity agreements may, of course, be combined with plea agreements. In *R.* v. *Ertel*,[6] to take one fairly recent example, it had been agreed that two persons who had been charged along with the accused and who later became prosecution witnesses at his trial "would plead guilty and testify for the Crown"[7] and that "[t]he Crown, in return, would drop the importing charge against them ... and recommend that they receive a six-month sentence on the trafficking charge ... ."[8] In a situation such as this, it is difficult to tell what portion of the consideration that the Crown is providing is attributable to the accused's assistance (in this case, testimony), and what portion is attributable to the accused's guilty plea. Rather than attempt to separate what is often an indivisible "package," therefore, we shall be treating all non-prosecution agreements made "*either wholly or partially* in return for the provision of evidence, information, co-operation, assistance or some other benefit"[9] as immunity agreements for the purposes of our recommendations in this working paper.

Immunity agreements must be distinguished from agreements in which the consideration flowing from the accused (or part of it) is evidence or information but the consideration flowing from the prosecutor relates to a matter other than the accused's exposure to criminal charges. Most commonly, such agreements relate to the influence the accused's co-operation might be expected to have on the matter of sentence. (An example of this type of arrangement is suggested in the case of *R.* v. *Stone*.[10] There, according to Graham J., the accused had been "promised by the prosecution, that if she gave information ... and pleaded guilty, the minimum fine of $50 would be imposed upon her."[11]) Although these agreements are sometimes described as an incomplete form of immunity,[12] the degree to which their effectiveness depends on the courts, rather than on the powers of the prosecutor, makes them qualitatively different.

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6. (1987) 35 C.C.C. (3d) 398 (Ont. C.A.).

7. *Ibid.* at 403, Lacourcière J.A.

8. *Ibid.*

9. See rec. 1 at 45, below (emphasis added).

10. (1932) 58 C.C.C. 262 (N.S.S.C.).

11. *Ibid.* at 267. The nature of any agreement in this case, however, is not entirely clear. According to Mellish J., *ibid.* at 266, there was "some evidence of bargaining with [the accused] and the prosecution as to the punishment she should receive ... ." According to Chisholm C.J., however, *ibid.* at 264, "[i]t ... appeared from the evidence that there was some negotiation between the defendant and the customs officers for a small fine to follow the plea of *guilty*." Paton J. said, *ibid.* at 268: "[C]ounsel for the Crown admits there was some sort of a bargain which he says the accused did not carry out and consequently the prosecution asked for the maximum fine ... ."

12. See A.T.H. Smith, "Immunity from Prosecution" (1983) 42 Cambridge L.J. 299 at 319-21.

In this working paper, we are primarily concerned with immunity from *prosecution*, as opposed to more limited forms of witness immunity.[13] The granting of full immunity appears to be related to the former English practice (originating with the practice of "approvement") of offering pardons to accomplices, and thereby allowing them to avoid being indicted for offences in respect of which their testimony was sought.[14] It may be regarded as being part and parcel of "the power to decide whether or not to charge an accused and what charge or charges to lay."[15] As Graburn Co. Ct J. explained in *R.* v. *Betesh*:

> 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.[16]

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13. See 18 U.S.C. §§ 6001-6005 (Supp. 1991). See the interesting case of *Re Allman and The Queen* (1980), 57 C.C.C. (2d) 146 (B.C. Co. Ct), which involved commission evidence taken in the United States. According to MacKinnon Co. Ct J. at 147-48:

    > At the first hearing in Los Angeles the witnesses refused to answer questions invoking their privilege pursuant to the Fifth Amendment against self-incrimination. Attorneys for the United States of America applied for immunity pursuant to provisions of the United States *Code*. . . . In support of the application counsel for the Attorney-General of British Columbia and counsel for the Attorney-General of Canada filed a memorandum granting the witness immunity from prosecution arising from the use of any compelled testimony. Judge Real ordered the witnesses to answer the questions without raising the privilege against self-incrimination.

14. Smith, *supra*, note 12 at 303, citing *Rudd* (1755), 1 Leach 115; 168 E.R. 160. See also Leon Radzinowicz, *A History of English Criminal Law and Its Administration from 1750*, vol. 2 [*The Clash Between Private Initiative and Public Interest in the Enforcement of the Law*] (London: Stevens, 1956) at 53 (cited by Smith, *supra*, note 12 at 303 n. 17). Although providing an anticipatory pardon for this purpose may apparently still be possible in English law (see Smith, *supra*, note 12 at 303, citing *Halsbury's Laws of England*, 4th ed., vol. 8 at 606), in practice it appears that immunity is no longer conferred by the giving of anticipatory pardons: see Smith, *supra*, note 12 at 303; John Ll. J. Edwards, *The Attorney General, Politics and the Public Interest* (London: Sweet & Maxwell, 1984) at 474. Item XII of the 1947 *Letters Patent Constituting the Office of Governor General of Canada*, R.S.C. 1985, Appendices, Appendix II: Constitutional Acts and Documents, No. 31, authorizes the Governor General, "when any crime or offence against the laws of Canada has been committed for which the offender may be tried thereunder, to grand a pardon to any accomplice, in such crime or offence, who shall give such information as shall lead to the conviction of the principal offender, or of any one of such offenders if more than one . . . ." It goes on, among other things, to authorize the granting of free or conditional pardons "to any offender convicted of any such crime or offence in any Court, or before any Judge, Justice, or Magistrate, administering the laws of Canada . . . ." Subsection 749(2) of the *Criminal Code*, R.S.C. 1985, c. C-46, dealing with pardons, provides only that "[t]he Governor in Council may grant a free pardon or a conditional pardon to any person who has been convicted of an offence." In *R.* v. *Betesh* (1975), 30 C.C.C. (2d) 233 (Ont. Co. Ct), where the prosecutor argued, at 244-45, that "to proscribe this prosecution . . . the federal Attorney-General would either have to enter a *nolle prosequi* or seek a pardon through the Governor-General in Council by virtue of the appropriate provisions of the *Criminal Code*," Graburn Co. Ct J. responded, at 245, that "a pardon is available only following a conviction," and that "[n]o conviction has been registered against Betesh in respect of the offence in question."

15. *R.* v. *Naraindeen* (1990), 75 O.R. (2d) 120 at 127 (C.A.), Morden A.C.J.O. (This case did not involve the subject of immunity.) For examples of "high profile" cases involving the exercise of discretion not to prosecute (and not involving immunity agreements), see LRC, *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor*, Working Paper 62 (Ottawa: The Commission, 1990) at 72, 80 n. 303. For an overview of prosecutorial powers and a discussion of immunity within this context, see Philip C. Stenning, *Appearing for the Crown: A Legal and Historical Review of Criminal Prosecutorial Authority in Canada* (Cowansville, Que.: Brown Legal Publications, 1986) at 243-45.

16. *Supra*, note 14 at 243.

Granting immunity is more, however, than the mere exercise of the prosecutorial discretion described by Graburn Co. Ct J.; it is the promise (itself discretionary) to exercise that discretion in a particular way.

Immunity from prosecution is different from those narrower forms of protection that are concerned only with the evidentiary consequences of a witness's testimony. "Use" immunity, of particular significance in those jurisdictions that retain the right of witnesses to refuse to answer potentially incriminating questions, is essentially no more than a guarantee that the self-incriminating statements of a witness will not be used in subsequent proceedings against that witness. In Canada, as Wilson J. of the Supreme Court of Canada[17] pointed out recently, similar ground is covered *inter alia* by section 5 of the *Canada Evidence Act*.[18]

If a person is statutorily required to give evidence that might incriminate him or her, it is arguable that something more than mere "use" immunity — possibly absolute immunity from future prosecution — is mandated by the *Canadian Charter of Rights and Freedoms*.[19] The argument that an abridgement of the privilege against self-incrimination should be accompanied by the availability of at least "use and derivative use" immunity is

17. *Thomson Newspapers Ltd.* v. *Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425 at 476. See also *Starr* v. *Houlden*, [1990] 1 S.C.R. 1366 at 1442, where L'Heureux-Dubé J. referred to s. 5 of the *Canada Evidence Act*, *infra*, note 18, as a "use-immunity provision[]."

18. R.S.C. 1985, c. C-5. See Ed Ratushny, *Self-Incrimination in the Canadian Criminal Process* (Toronto: Carswell, 1979) at 399 n. 171 on this point. Subsection 5(1) of the *Canada Evidence Act* provides that "[n]o witness shall be excused from answering any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person." Subsection 5(2) further states that:

> Where with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or the provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence.

19. Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11. In *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892), a United States Supreme Court decision dealing with the Fifth Amendment protection against self-incrimination, it was held, at 586, that "a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates." More recently, however, the United States Supreme Court has retreated from this position. In *Kastigar* v. *United States*, 406 U.S. 441 (1972), it was held that while "use and derivative use" immunity (*i.e.*, protection against use of both the self-incriminating testimony and evidence derived therefrom) was mandated by the Fifth Amendment privilege, "transactional" immunity (*i.e.*, the type of immunity required in *Counselman* v. *Hitchcock*) was not.

supportable by the reasoning in various English and Commonwealth cases.[20] It has also received some support in Canada, notably in the judgment of Wilson J. in the *Thomson Newspapers* case.[21]

It is not necessary, for our present purposes, to express an opinion as to whether anything more than simple "use" immunity should be provided in situations where potentially self-incriminating evidence may be compelled by statute. Suffice it to say that we do not consider "transactional" immunity to be required by "the principles of fundamental justice."[22] Notwithstanding our views on this score, however, we regard the Crown's ability to offer "use and derivative use" immunity or full immunity from prosecution as a prosecutorial tool of obvious utility. Section 5 of the *Canada Evidence Act*, after all, does nothing to *obtain witnesses* — that is, to entice them to come forward; it applies only to those who have already *become* witnesses,[23] and provides no immunity whatsoever in respect of offences unrelated to the testimony. Moreover, the limited immunity it does provide (even when combined with the laws relating to contempt, obstruction of justice, perjury and so forth) may fall short of the incentive required by some witnesses to provide evidence that is potentially self-incriminatory. As well, of course, section 5 cannot compel an individual to provide non-testimonial assistance, such as information or undercover co-operation.[24]

The practice of immunizing criminal wrongdoers from prosecution raises ethical and philosophical questions as well as legal ones. Not surprisingly, it has been criticized on a number of grounds. Some, for example, have argued that it is not a fair practice.[25] As

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20. In *Rank Film Distributors Ltd.* v. *Video Information Centre*, [1982] A.C. 380, cited in *Sorby* v. *Commonwealth of Australia* (1983), 57 A.L.J.R. 248 at 253 (H.C.), a civil case decided by the House of Lords, Lord Wilberforce pointed out, at 443, that "whatever direct use may or may not be made of information given, or material disclosed, under the compulsory process of the court, it must not be overlooked that, quite apart from that, its provision or disclosure may set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character." According to His Lordship, at 443: "The party from whom disclosure is asked is entitled, on established law, to be protected from these consequences."

21. *Supra*, note 17. Wilson J., supported by Sopinka J. on this point, accepted that the statutory compulsion of potentially self-incriminating testimony required that more than mere "use" immunity be guaranteed. Wilson J., although joined by Sopinka J., was not supported by the other judges in the *Thomson Newspapers* case. Lamer J. did not believe it necessary to decide the point, while La Forest and L'Heureux-Dubé JJ., who wrote separate opinions, agreed that the protection afforded by s. 20(2) of the *Combines Investigation Act* was adequate for the purposes of *Charter* s. 7.

22. See *Charter* s. 7, *infra*, note 47. For the meaning of "transactional" immunity and "use and derivative use" immunity, see *supra*, note 19.

23. See Marc L. Sherman, "Informal Immunity: Don't You Let That Deal Go Down" (1987-88) 21 Loy. L.A.L. Rev. 1 at 39, where this point is made in the context of American immunity legislation.

24. See *ibid.* at 38, 43, where once again this point is made in the context of American immunity legislation.

25. Paul Byrne, "Granting Immunity from Prosecution" in Ivan Potas, ed., *Prosecutorial Discretion*, Australian Institute of Criminology Seminar Proceedings, No. 6, 155 at 155, quoted in Ian Temby, "Immunity from Prosecution and the Provision of Witness Indemnities" (1985) 59 Aust. L.J. 501 at 510.

Professor Ed Ratushny has suggested, there are those who may see it as a manifestation of unequal treatment: one offender benefits so that another can be successfully prosecuted.[26] It may be argued that the disparate treatment resulting from immunity agreements runs counter to the principle of equality on which subsection 15(1) of the *Charter*[27] is based. (That subsection has been raised in the past by accused persons alleging "selective prosecution" through the operation of prosecutorial discretion.[28]) Without making any blanket pronouncements on this subject, we would caution against over-simplification. In our view, it is one thing to make discriminatory prosecutorial decisions based on the "personal characteristics of [an] individual or group"[29] or to prosecute selectively those in a "discrete and insular minority."[30] It is quite another thing, however, to exercise prosecutorial discretion[31] for valid purposes[32] and on the basis of rational criteria and distinctions. The legitimacy of prosecutorial discretion, notwithstanding that it results in "differential treatment,"[33] has been recognized by the Canadian courts in various contexts. In *Century 21 Ramos Realty Inc. and Ramos* v. *R.; Ramos* v. *R.*,[34] for example, the Ontario Court of Appeal noted that "where a hybrid offence is involved, two virtually identical cases may be treated differently if the Attorney General elects to proceed by indictment in one and by summary conviction in the other."[35] Dealing with section 15 of the *Charter*, however, the Court refused to subscribe to the notion that that provision necessarily

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26. Ratushny, *supra*, note 18 at 400.

27. Subsection 15(1) provides that:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

28. See *R.* v. *Paul Magder Furs Ltd.* (1989), 49 C.C.C. (3d) 267 at 281-83 (Ont. C.A.). Differences in prosecutorial treatment have also been challenged without the invocation of s. 15(1): see *R.* v. *M.(G.G.)* (1991), 5 O.R. (3d) 328 (Prov. Div.), Karswick J.

29. *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 174, McIntyre J.

30. *United States* v. *Carolene Products Co.*, 304 U.S. 144 (1938) at 152-53 n. 4, quoted in *Andrews*, *supra*, note 29 at 152, by Wilson J., speaking for Dickson C.J.C., L'Heureux-Dubé J. and herself, and at 183 by McIntyre J.

31. As we propose in recs 3 at 48 and 5 at 51-52, below.

32. See, however, *Lyons* v. *The Queen*, [1987] 2 S.C.R. 309, where La Forest J., with whom Dickson C.J.C. and Estey, McIntyre and Le Dain JJ. concurred, considered hypothetically, at 348, the situation of a "prosecutor . . . motivated by improper or arbitrary reasons," and *R.* v. *Beare*; *R.* v. *Higgins*, [1988] 2 S.C.R. 387, where the Court likewise, at 411 *per* La Forest J., considered hypothetically "discretion . . . exercised for improper or arbitrary motives."

33. This expression is used *inter alia* in *R.* v. *Turpin*, [1989] 1 S.C.R. 1296 at 1330, 1331, by Wilson J.

34. (1987) 56 C.R. (3d) 150.

35. *Ibid.* at 171.

"prohibits *any* distinction . . . ."[36] In *Lyons* v. *The Queen*,[37] the Supreme Court of Canada considered "whether the lack of uniformity in the treatment of dangerous persons that arises by virtue of the prosecutorial discretion to make an application under Part XXI [now Part XXIV of the *Criminal Code*] constitutes unconstitutional arbitrariness."[38] In disposing of this argument, La Forest J.[39] referred to "the fact that prosecutors always have a discretion in prosecuting criminals to the full extent of the law . . . ."[40] In this general area, it seems that little has changed from the days of *Smythe* v. *The Queen*[41] where the following observations were endorsed:

> I cannot conceive of a system of enforcing the law where someone in authority is not called upon to decide whether or not a person should be prosecuted for an alleged offence. Inevitably there will be cases where one man is prosecuted while another man, perhaps equally guilty, goes free.[42]

There are other arguments against immunity agreements, of course. Current arrangements for providing immunity, in some jurisdictions, have been criticized, for example, for their lack of certainty and their potential for secrecy.[43] Excessive use of immunity agreements, it has also been said, may threaten the rule of law.[44] The contention here is that those who have valuable information (and who are therefore potentially "immune") may feel emboldened to commit new offences.[45] Conversely, it has been feared, resort to immunity agreements may threaten the quality of evidence, and therefore the accuracy of criminal trials, by providing an inducement for criminals to fabricate evidence against

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36. *Ibid.* See also *Re Koleff and The Queen* (1987), 33 C.C.C. (3d) 460 at 464 (Man. Q.B.), where it was said: "Every time any decision is made by any Crown-Attorney or agent of the Crown there exists the possibility of unequal treatment either in the charge that is formulated or the processes that are adopted through the trial process. Such inequalities are implicit in the process and do not constitute discrimination."

37. *Supra*, note 32.

38. *Ibid.* at 347, La Forest J.

39. With whom Dickson C.J.C. and Estey, McIntyre and Le Dain JJ. concurred. Wilson J., who wrote a separate judgment, agreed with La Forest J. on the question of whether *Charter* s. 9 had been infringed in this case.

40. *Lyons*, *supra*, note 32 at 348. See also *Beare*, *supra*, note 32 at 410-11.

41. [1971] S.C.R. 680.

42. *Ibid.* at 686, quoting Montgomery J.A. in *R.* v. *Court of Sessions of the Peace, Ex Parte Lafleur*, [1967] 3 C.C.C. 244 at 248 (Que. Q.B.). See also *R.* v. *Miles of Music Ltd.* (1989), 69 C.R. (3d) 361 at 387 (Ont. C.A.), where Krever J.A. stated for the majority: "It cannot be a defence to a speeding driver that the police did not prosecute all drivers who were speeding on the same highway at the same time."

43. Byrne, *supra*, note 25 at 155, quoted by Temby, *supra*, note 25 at 510.

44. Smith, *supra*, note 12 at 300, citing Joseph Raz, "The Rule of Law and Its Virtue" (1977) 93 Law Q. Rev. 195 at 201.

45. *Ibid.*

others.[46] It could even be contended, we have no doubt, that a conviction resulting from the testimony of an immunized witness would be contrary to section 7 of the *Charter*.[47] Although we offer no prediction as to the success of such an argument, we would consider it regrettable if section 7 were used to prohibit the Crown from using the evidence of immunized witnesses generally and as a matter of principle. Clearly, as Professor David M. Paciocco has suggested,[48] there would be nothing essentially just about a conviction produced by perjury. We must ask ourselves, however, whether the practice of providing immunity ought to be prohibited simply because of the *risk* that some immunized witnesses will perjure themselves. In our opinion, it should not. It is one thing for a prosecutor to present evidence that he or she realizes (or ought to realize) is perjured.[49] However, it is quite another thing for a prosecutor, acting in good faith, to present evidence that is merely apt to be unreliable.[50] In cases pre-dating the *Charter*, as Professor Paciocco's discussion of this area indicates, unreliable evidence has been admitted in a variety of contexts.[51] Commonly, where factors affecting reliability are revealed, our courts have either assumed that triers of fact are capable of weighing Crown evidence that may be untrustworthy (and of according it the value it deserves), or have allowed them to act on it subject to certain corroboration prerequisites.[52] Provided that triers of fact are given the information necessary for them to appreciate any risk of unreliability,[53] therefore, we do not think that admitting the testimony of an immunized prosecution witness should be regarded as contrary to "the principles of fundamental justice"[54] *per se*.

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46. In *People* v. *Brunner*, 32 Cal. App. 3d 908 (1973) at 913-14, quoted by Sherman, *supra*, note 23 at 46, it was said:

> [A] witness may be so influenced by his hopes and fears that he will promise to testify to anything desired by the prosecution in order to obtain a grant of immunity. Because the satisfaction of the prosecutor is the witness's . . . ticket to freedom, the prosecutor, by dangling the promise of immunity, can put the words he wishes into the witness's . . . mouth. This danger is especially grave when the witness knows he is expected to give particular testimony, absent which he will not receive the promised immunity.

See also *United States* v. *Kilpatrick*, 594 F. Supp. 1324 (D. Colo. 1984), rev'd, 821 F.2d 1456 (10th Cir. 1987), cited by Sherman, *ibid.* at 55.

47. *Charter* s. 7 states: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

48. See David M. Paciocco, *Charter Principles and Proof in Criminal Cases* (Toronto: Carswell, 1987) at 336, 339, 382. As subsequent footnotes indicate, we have relied considerably on Professor Paciocco's text in arriving at and stating our position with regard to *Charter* s. 7. We hasten to note, however, that we do not know whether Professor Paciocco would necessarily agree with the specific conclusions we have reached.

49. This issue is discussed, in American and Canadian constitutional contexts, by Paciocco, *ibid.* at 338-39, 344-46, 379-83.

50. As to the general admissibility of unreliable evidence, in cases pre-dating the *Charter*, see Paciocco, *ibid.* at 359, 373.

51. See *ibid.* at 364-65.

52. This is also indicated in Professor Paciocco's discussion of pre-*Charter* cases. For a more detailed and precise analysis, see Paciocco, *ibid.* at 359-91.

53. As to the importance of the trier of fact's capacity to evaluate testimony, see Paciocco, *ibid.* at 359-75. In this connection, see rec. 13 and the commentary thereto at 65-66, below.

54. *Charter* s. 7.

The effect of these and other criticisms, which we will deal with at some length in chapter 2, is perhaps compounded by the sparsity of justification that has been articulated in our jurisprudence for the practice of providing immunity. This sparsity may, of course, be attributable to the fact that decisions in this area are made by prosecutors rather than by judges. In an analogous area of sentencing, where judges have been more involved, the mitigating effect of an offender's co-operation has been explained in some detail.[55]

We do not premise our acceptance of the morality of immunity on any notion that informing or providing evidence for the Crown is a manifestation of contrition or rehabilitation.[56] We are prepared, however, to recognize that the consideration flowing from an immunized offender (regardless of motivation) may, in exceptional cases, be sufficient to counterbalance any debt he or she is thought to owe society as a whole.[57] Nor do we consider it inherently immoral for the system to allow some guilty persons to go free; after all, our system of criminal justice, with its elaborate protections, has always been prepared to do just that in the interest of achieving a greater social benefit. Some inequality, an inevitable by-product of discretion, can be tolerated where larger concerns are at stake. Although we acknowledge that the widespread resort to immunity agreements could dilute whatever deterrent effect our criminal laws might have, we doubt that infrequent and carefully considered use of this option is likely to have significant negative social effects.[58]

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55. The case of *R.* v. *Laroche* (1983), 6 C.C.C. (3d) 268 (Que. C.A.) may be used as an example. See also *R.* v. *Switlishoff* (1950), 9 C.R. 428 (B.C.C.A.); *R.* v. *Alfs* (1974), 17 C.L.Q. 247 (Ont. C.A.); *R.* v. *Twaddell* (18 February 1976), (B.C.C.A.), all cited in Clayton C. Ruby, *Sentencing*, 3d ed. (Toronto: Butterworths, 1987) at 165 n. 191. In *Laroche*, *supra* at 270, *per* Montgomery J.A., the offender "not only admitted his own participation in a series of crimes; he informed the police of the names of his accomplices, some of whom were older and more experienced as criminals, and he gave testimony that led to the conviction of several of them." In supporting his conclusion, at 269, that it was "desirable to display unusual clemency in the case of this young man" and that a custodial sentence "would be contrary to the public interest," Montgomery J.A. said in part, at 270:

> Honour among thieves may appear noble to some, but if it be a virtue it is not one that the police and courts can afford to encourage. Respondent has performed a service to society which may not be without risk to himself. At the very least, it is unlikely that he would henceforth be trusted in criminal circles, and this is in itself some indication that he does not intend in the future to frequent such circles. I can imagine no stronger evidence of a desire to give a new direction to the life of a criminal that the denunciation of his associates, followed by their conviction. With his record of co-operation with the authorities, it is altogether likely that confinement in prison would be extremely unpleasant, if not dangerous, for respondent.

Paré J.A., at 271, added in part:

> [T]he information which he gave with respect to his accomplices will eliminate, or at least reduce, the possibility that he will be able to associate himself with other confederates in crime in the future. Regardless, it will have the effect of necessarily restricting the field of his criminal activities with others, by necessity if not by choice.

56. See Michael Davis, "Sentencing: Must Justice Be Even-Handed?" (1982) 1 Law and Philosophy 77 at 91.

57. *Ibid.* at 92.

58. See Michael Bayles, "Principles for Legal Procedure" (1986) 5 Law and Philosophy 33 at 45-46, where this argument is articulated with reference to the moral price that failure to convict a single guilty individual might have.

We do not deny that the discretion to enter into immunity agreements, like any other form of discretion, may be abused. Certainly, we would not wish to be taken as having endorsed the provision of immunity without reservation. The morality of each particular immunity agreement must surely depend, at least in part, on achieving the right balance. It may be acceptable, for example, to forego a minor prosecution in exchange for information that will save a hundred lives; but it can hardly be acceptable to forego prosecution of a mass murderer in exchange for information that will further a minor prosecution.

We share many of the worries that have been expressed concerning the process of providing immunity and we believe they constitute a cogent argument for regulating it. In particular, we are concerned with ensuring that the process conforms to certain ethical standards, and to the fundamental principles that we have embraced throughout our work in the area of criminal procedure.[59] We do not consider that the practice of providing immunity is inherently immoral or unethical, or that it needs to be abolished. Before embarking on our discussion of the legal issues, and before outlining our proposals for the regulation of immunity discussions and agreements, we shall explain in greater detail our position on the important ethical issues involved.

59. See LRC, *Our Criminal Procedure*, Report 32 (Ottawa: The Commission, 1988).

CHAPTER TWO

Ethical Issues

Granting immunity from prosecution, as we have said, raises issues not only of law but also of ethics. From an ethical standpoint, the practice seems open to several objections: like plea bargaining,[60] it may be argued, the practice commercializes the justice system by opening it up to trade,[61] stifles its openness by allowing secret arrangements behind closed doors,[62] reduces its effectiveness by exempting offenders from its reach,[63] compromises its integrity in the interest of expediency by letting ends justify means[64] and militates against its impartiality by refusing to treat like offenders alike.[65] Ethical discussion of the practice of granting immunity from prosecution, therefore, should focus on these five objections.

I. The Commercialization of Justice

Some analysts criticize grants of immunity as entailing trade in justice. In 1215, they would point out, King John declared in the *Magna Carta*: "To no one will we sell, to no one will we refuse or delay right or justice."[66] For justice requires decisions on the merits. It should not be, as we said in an earlier paper, and should not be seen to be, "something that can be purchased at the bargaining table."[67]

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60. For reasons explained in LRC, Working Paper 60, *supra*, note 1 at 3, the Commission preferred to abandon the expression "plea bargaining" with its negative connotation in favour of the more neutral expression "plea negotiation," "plea discussion" or "plea agreement," since the object of that process is not to give the accused a "bargain" but to reach a satisfactory agreement.

61. *Ibid.*

62. See chap. 1, above, and the sources cited therein.

63. *Ibid.*

64. The doctrine that the end justifies the means was advanced by Machiavelli in *The Prince*, chaps 15 and 18. See also John L. Mackie, *Ethics: Inventing Right and Wrong* (Harmondsworth: Penguin, 1977) at 159-68.

65. The central precept of justice is often formulated as "Treat like cases alike": H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon, 1961) at 155.

66. *Magna Carta* 1215, s. 40. In 1620, Lord Bacon, the Lord Chancellor of England, was impeached for accepting gifts from suitors. For this and other examples of removal from the bench for bribery, see Gerald L. Gall, *The Canadian Legal System*, 3d ed. (Toronto: Carswell, 1990) at 226-45.

67. LRC, *Criminal Procedure: Control of the Process*, Working Paper 15 (Ottawa: Information Canada, 1976) at 46. See also Gall, *supra*, note 66 at 192, for examples of judges removed from office for selling justice.

Yet do not grants of immunity, like plea agreements, involve bargaining for justice? In a plea agreement, the accused promises the Crown to plead guilty in return for the Crown's promise to confer some benefit in return, for example, to agree to a lesser sentence. In a grant of immunity, the Crown promises not to prosecute in return for the offender's promise to confer some benefit in return, such as giving testimony against another offender. In both cases, the outcome for the offender in question is determined not by his or her just deserts but rather by the deal struck between him or her and the Crown — a deal characterized by some critics as improper and degrading to our criminal justice system.[68]

But are such agreements really excluded by the principle against trading in justice? Excluded by that principle are agreements between one party and the judge and preventing the latter from being impartial as between both parties. Plea agreements and grants of immunity, however, are agreements between the parties, that is, between the prosecution and the defendant or potential defendant. Why are these open to objection?

In civil suits, agreements between the parties are totally acceptable. In such lawsuits the conduct of his or her case is entirely a matter for each party: if X sues Y for negligence, no one else can justifiably complain if X abandons the claim, if Y submits to judgment or if the parties settle the case between them. The parties to the suit, and only they, have full rights over the litigation.

Criminal suits are different. Crimes are not only private but also public wrongs, for they cause, as Bentham pointed out, not only primary but also secondary harm — primary harm to the individual victim in terms of bodily injury, loss of property and so forth, and secondary harm to the public in terms of general alarm and apprehension.[69] In criminal suits, therefore, the prosecutor acts less on behalf of the individual victim (who after all retains a right to sue civilly for harm suffered by him or her) than on behalf of the general public. Negotiations, then, between the prosecutor and defendant or potential defendant, whether plea agreements or grants of immunity from prosecution, are not just matters for the parties but matters of general concern and public interest.

Are plea agreements and grants of immunity ever in the public interest? Central to the public interest in a just society, it may be argued, is the pursuit of justice, and justice surely dictates that wrongdoing reap its just reward — come what may, crime must be

68. See LRC, Working Paper 60, *supra*, note 1 at 6-7, for criticism of plea bargaining, and see chap. 1, above, and the sources cited therein.

69. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, ed. by J.H. Burns and H.L.A. Hart (London: Athlone, 1970) chap. 12 at 143-57.

requited. Agreements between the state and the offender that prevent this clearly run counter to retributive justice and therefore to the public interest.[70]

Most people now, however, reject this type of retributivism and take a different view of the role of the criminal process.[71] Commission of a crime, they would argue, is a necessary but not sufficient condition for punishment. Moreover, punishment is not an end in itself but rather a means to a further end, namely, producing a society that is just, safe and fit to live in. To this end there are various means, one being a general reduction of crime and another being reconciliation between the offender, the victim and the public. Such reduction and such reconciliation may often best be fostered by plea agreements, grants of immunity and other negotiations between state authorities and offenders.

Neither plea agreements nor grants of immunity, therefore, need necessarily contravene the principle against trading in justice. Just as a civil plaintiff can legitimately waive his or her strict legal rights against a defendant, so a criminal prosecutor can legitimately waive the state's rights against an offender. The only difference is that while the civil plaintiff can act in his or her own interest and drop a claim in order to save money, time and trouble, the criminal prosecutor cannot act in his or her own interest — cannot drop a prosecution to shorten his or her case-load, for instance — but must act only in the public interest. Hence the need for openness and accountability to ensure that the prosecutor does so act.

II. Secrecy

Plea agreements and grants of immunity, however, may be objectionable on a second ground, namely, their secrecy. They may result from decisions taken in secret behind closed doors instead of in open court and full view of the public. In consequence and unknown to the public, justice may not be done. Alternatively, it may be done but will not be seen to be done. The public has no means of telling. Hence the objection to secrecy in such matters, the need for openness and the importance of the maxim: "[J]ustice should not only be done, but should manifestly and undoubtedly be seen to be done."[72] Hence, too, the need for the sort of principles set out in Report 32, *Our Criminal Procedure*.[73]

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70. This classic retributive theory, chiefly associated with Kant, regards criminal responsibility as not only a necessary but also a sufficient condition for punishment, which society is therefore obligated to impose.

> Even if a civil society resolved to dissolve itself with the consent of all its members — as might be supposed in the case of a people inhabiting an island resolving to separate and scatter themselves throughout the whole world — the last murderer lying in prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds . . . .

Kant, *The Philosophy of Law*, translated by Hastie, 1887, at 194-98, cited by Paul C. Weiler, "The Reform of Punishment," in LRC, *Studies on Sentencing* (Ottawa: Information Canada, 1974) at 140.

71. Weiler, *supra*, note 70; see also LRC, *Our Criminal Law*, Report 3 (Ottawa: Information Canada, 1976).

72. *R.* v. *Sussex Justices*, [1924] 1 K.B. 256 at 259, Hewart C.J.

73. *Supra*, note 59.

In *Our Criminal Procedure*, we discuss the principles that should underline criminal procedure in a fair and just society. That report in hindsight "represents a distillation of the Commission's distinctive approach to the reform of criminal procedure" and articulates the principles that "inform and are reflected in the rules of procedure that [the Commission has] devised."[74] They include the principles of accountability and participation.[75]

Accountability is the mechanism for ensuring that those in authority conform to standards of justice.[76] Given that discretion is essential in the administration of a system of justice, those with authority for its administration must be answerable for its use. Accountability serves to prevent abuse of state power.

Citizen participation in the process also prevents an abuse of state power. But citizens can only participate meaningfully and effectively in criminal proceedings of which they have knowledge and to which they have access. Public scrutiny of official behaviour is a democratic safeguard that can only be effectively employed where the process is an open one.[77] Openness, therefore, is a corollary of the principle of participation.

Openness is contravened, however, when without public awareness law in practice diverges from law laid down by Parliament. Suppose Parliament makes such-and-such an act a crime but those committing that act are not prosecuted because the authorities decide behind closed doors to grant them immunity from prosecution. As a result the public may be deceived, justice turned into a sham and a gap driven between "pure" and "living" law.[78]

In itself, however, this gap is unobjectionable. Resources being limited, no law enforcer can prosecute every offender coming to his or her notice. Prosecutorial discretion is an inescapable and, indeed, a welcome feature on the criminal justice landscape: inescapable for reasons of economics, welcome for reasons of practical morality — it allows play for the principle of restraint in criminal law.[79] It is not the gap between pure and living law that offends the principle of openness but rather its concealment — the hiding of the process. Concealment, however, can easily be excluded by regulations such as those suggested later in this paper.

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74. *Ibid.* at 2.

75. *Ibid.* at 23.

76. *Ibid.* at 26.

77. *Ibid.* at 27.

78. The distinction was drawn by Eugen Ehrlich in *Fundamental Principles of the Sociology of Law* (New York: Arno, 1974).

79. See LRC, Report 3, *supra*, note 71 at 19ff., and LRC, Report 32, *supra*, note 59 at 25-26.

III. The Reduction of Effectiveness

Grants of immunity, like plea agreements, may be open to another objection. Even if made openly and without improper dealing, they may make justice ineffective. In general a decision, and in particular an undertaking, not to prosecute a known offender may run counter to another principle informing our criminal procedure — the principle of protection.

In our view, as set out both in *Our Criminal Law*[80] and in *Our Criminal Procedure*,[81] the ultimate concern of criminal law is the promotion and maintenance of a just, peaceful and safe society. Such a society must be informed by certain basic values, which, as we said in the first of those reports,[82] fall into two kinds: those that are essential to any society because without them social life would be impossible — for example, respect for life and non-violence; and those that, although not essential, are highly prized in a humane, decent society — for example, liberty and privacy. The contribution of the criminal law then is, through prosecution, trial and sentence, to reaffirm those basic values and denounce their violation.[83]

On the face of it, negotiations by way of plea agreements and grants of immunity prevent the criminal law from making that contribution. Typically, when a basic value is violated, its violation results in denunciation through criminal trial and conviction. If instead it results in an undertaking not to prosecute the violator if he or she in some way assists the Crown, then criminal law no longer seems to play its part.

As against this, the ultimate goal remains the promotion of a just and safe society. This goal may sometimes be best achieved not by prosecuting every known offender but by inducing some of them to assist law enforcement against the others. The public may be better protected against evils such as terrorism, espionage and drug trafficking by immunizing some offenders and thus securing the conviction of others than by charging all and failing to bring any to justice.

IV. Compromise of Integrity — Ends and Means

As observed earlier, some analysts view the practice of granting immunity from prosecution as an essential means to a legitimate end, that end being the successful prosecution of organized crime and certain other activities. On this view the decision not to prosecute a known offender and, even more so, an undertaking not to do so may be justified by this ultimate goal.

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80. LRC, Report 3, *ibid.* at 7ff.

81. LRC, Report 32, *supra*, note 59 at 27-28.

82. LRC, Report 3, *supra*, note 71 at 20ff.

83. *Ibid.* at 5ff.; LRC, Report 32, *supra*, note 59 at 27.

But does the end always justify the means? Is it true "that any end which could be seen in itself as good would justify the use, to bring it about, of any means"[84] and is it always right to say: "To do a great right, do a little wrong"?[85] Or, on the contrary, must we say that out of evil good can never come and so hold absolutely that no end, however good, can justify a wrongful means?

Not even Machiavelli, it seems, held the first view.[86] Nor do most other supporters of the doctrine. Their view is rather "that any badness in the proposed means has to be balanced fairly against the expected goodness of the end, with no special weighting for either, but that it is possible even for a means which is in itself very bad to be outweighed and therefore 'justified' by a sufficiently good end."[87]

Conversely, few people would adopt the absolutist stance of holding that the end can never justify the means. On the contrary, most people nowadays believe that sometimes, if not always, an act otherwise wrongful may be justified as a means to a legitimate end. Both morally and legally, they believe, it would be right, for instance, to violate a highway traffic rule (for example, to drive a motor vehicle while disqualified from driving) in order to save life (for example, to take a seriously injured neighbour to hospital when there is no other means of transport). Both morally and legally, they would maintain that it is permissible, for example, for the captain of a sinking ship to jettison the cargo so as to keep the craft afloat and save the crew and passengers.[88] Within limits, as the doctrine of necessity recognizes, it is justifiable to choose the lesser of two evils.[89]

What are the limits to the end justifying the means? In our view, two conditions must be fulfilled. First, there must be no disproportion between the means and the end in question — saving human life may justify property destruction, but never vice versa. Second, there must be nothing intrinsically wrong in the means itself, — no end can justify an act wrongful in itself such as doing a deliberate injustice, as when one would intentionally punish a person known to be innocent of all wrongdoing.

Seen in this light, can immunity agreements be justified as a means to get information about the criminal activity of others, secure evidence against other offenders or in some other way advance the public good? First, is there any disproportion between the grant of immunity and the objective aimed at, such as the getting of information and so forth, or can the grant be justified by such factors as the greater criminality of the party actually prosecuted, the choice of the lesser of two evils or the general promotion of the wider public interest? Second, is there anything intrinsically wrongful — for example, in terms of fairness and justice — in the very grant of immunity from prosecution?

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84. Mackie, *supra*, note 64 at 159.

85. Shakespeare, *Merchant of Venice*, Act IV, sc. i, line 215.

86. Mackie, *supra*, note 64 at 159.

87. *Ibid*.

88. See *Mouse's Case* (1608), 12 Co. Rep. 63, 77 E.R. 1341.

89. See Don Stuart, *Canadian Criminal Law: A Treatise*, 2d ed. (Toronto: Carswell, 1987) at 432ff., and Glanville Williams, *Textbook of Criminal Law*, 2d ed. (London: Stevens, 1983) at 597ff.

First, then, the question of disproportion between means and end — between the grant of immunity and its objective. Suppose, for example, the objective is to get the party immunized to testify against another offender and secure his or her conviction. Here any disproportion will depend on the relative criminality of the two offenders. Securing evidence against, and thereby conviction of, a "major league" criminal may well warrant granting immunity to a minor offender but not vice versa. Ensuring a murderer's conviction, for example, may well warrant immunization of a mere accessory after the fact, but the accessory's conviction will not warrant immunization of the murderer.

In addition, there is the question of the wider social good. Suppose, for example, several parties are involved in an offence but cannot all be convicted: two people jointly commit a crime whose commission can only be proved by the evidence of either of them. The Crown can grant immunity to one, persuade him or her to give evidence against the other and so secure the conviction of that other. Alternatively it can, for lack of evidence, allow both to go scot-free. Faced with such a dilemma, can the Crown not rightly choose the lesser of two evils and prefer the conviction of one offender to the conviction of none?

V. Injustice and Inequality

The question of the morality of the means itself also needs to be considered. Is there intrinsic wrongfulness in not prosecuting a known offender — that is, the party immunized? Granted that it is unjust deliberately to prosecute someone known to be entirely innocent, is it likewise unjust deliberately to forego prosecuting someone known to be wholly guilty? And is it unjust to discriminate against one offender in favour of another — to prosecute one of them and not the other? This brings us to the last of the five objections stated above.

One of the principles highlighted in *Our Criminal Procedure* is that of fairness.[90] Procedures, we argued, should be fair and be perceived as such by those affected by them.[91] In this connection three aspects are particularly relevant: equality of treatment for all persons according to law; legal provision of a remedy for every wrong; and legal guarantee of fair trials for all defendants. How far is a decision not to prosecute a known offender compatible with these three aspects?

90. LRC, Report 32, *supra*, note 59 at 23-24. The principle of fairness in this context overlaps partly with the principles of participation and protection.

91. *Ibid.* at 23.

A. Equality of Treatment

Justice, says H.L.A. Hart, is traditionally thought of as maintaining or restoring a balance or proportion, and its leading precept is often formulated as: "Treat like cases alike and different cases differently."[92] This is the precept of distributive justice: ensure a fair sharing of the benefits and burdens of society among its members.[93] Similar offenders, then, should be similarly prosecuted, convicted and punished. As we said in Report 32, fairness requires that procedures be egalitarian in treatment or application, individuals in similar circumstances should be treated similarly and no class of individuals should be above or beyond the law.[94]

Now this, it may be objected, is exactly what is violated by a grant of prosecutorial immunity. Whenever there is more than one party to a criminal offence, all of the offenders are criminally liable and all should in fairness and justice be subjected to like prosecution. To charge some and not others infringes the principle of treating like cases alike; in fact, it treats like cases differently and privileges some by setting them above the law.

But are the cases always actually alike? What if one offender is more involved in the crime or more culpable than the other? What if, though equally involved and culpable, one offender is more dangerous to society. Or what if, though equally involved, culpable and dangerous, he or she is more co-operative with the authorities?

Take first the difference in involvement or culpability. In our earlier discussion, we saw that such differences had a bearing on the proportion between means and end: securing conviction of a more culpable party can justify not prosecuting one less culpable. But they also bear on the question of justice and equality. Suppose, for example, one offender is a lowly minion of a criminal organization and the other is one of the bosses, one plays a minor role in the crime (keeps watch) and the other does the deed (say, the killing), one acts in fear of the organization and the other generates that fear. Legally such distinctions are of no account: the individual who keeps watch incurs the same liability as the actual committer — they are both parties to the same crime. Morally, however, there is a deal of difference between the mafia boss and the lowly minion, between the actual committer and the aider and abetter, between the wholly free agent and the agent acting under "duress." Morally, the latter merits more lenient treatment, and his or her obtaining this through a grant of immunity will not necessarily violate the principle of equality.

Take next the difference in social dangerousness. Suppose one offender is a contract killer and the others are local mafia bosses for whom the former is acting. Each of the latter taken singly may be less culpable than the former but taken together they may be a greater threat to community well-being. Here the Crown can grant immunity to the

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92. Hart, *supra*, note 65 at 155.

93. The distinction between distributive and corrective justice, *i.e.*, between justice which maintains and justice which restores a balance, was drawn by Aristotle in his *Nichomachean Ethics*, Book 5.

94. LRC, Report 32, *supra*, note 59 at 24.

contract killer, get that offender to testify against the mafia bosses and thus secure their conviction. Alternatively it can proceed solely against the former, forego the evidence against the latter and so leave them beyond the reach of the criminal justice system. In such a situation the greater social danger presented by the mafia bosses surely justifies a grant of immunity to their hireling.

Finally, the difference in co-operativeness. To return to an earlier example, suppose two people jointly and with equal involvement and culpability commit a crime whose commission can only be proved by the evidence of either of them. One, but not the other, is prepared to help the authorities and testify in return for a grant of immunity from prosecution. Such a grant cannot be faulted for inequity in view of the greater co-operativeness of the party immunized — an aspect in which the two offenders are obviously unalike.

What if, in such a case, both offenders are equally ready to help the Crown in return for a grant of immunity? Here nothing distinguishes them in terms of involvement, culpability or co-operativeness. Even so, they may still differ in terms of age, remorse or prospect of rehabilitation, and the Crown can still choose between them on justifiable grounds.

There remains the highly unusual (probably hypothetical) case where the parties are indistinguishable as regards involvement, culpability, dangerousness, co-operativeness and prospect of rehabilitation. The Crown must simply choose between convicting one or neither. Clearly, as far as concerns the public interest, conviction of one is better than conviction of neither — half a loaf is better than no bread. Equally clearly, the choice of which one to convict is, in a limited sense, arbitrary — there is simply nothing to choose between them. This being so, absent improper considerations such as one offender's connection to people in high places, in our view the grant of immunity to one offender rather than the other is justifiable on the ground of public interest. Such matters cannot be resolved by a race to the prosecutor's office. Looking at matters another way, we have little doubt that, if an accused who did not receive an equal benefit in terms of immunity raised a *Charter* challenge involving allegations of infringement of equality guarantees, this objection would not be sustained by Canadian courts.[95]

B. A Remedy for Every Wrong

Laws can be unjust not only by failing to maintain a balance but also by failing to restore it when that balance has been upset, by failing to provide remedies for injuries for which compensation is morally thought due.[96] "[F]airness," we said in Report 32, "demands remedial processes when rights are violated. . . . *Ubi jus, ibi remedium* — where

95. See *Ramos*, *supra*, note 34; see also the discussion in chap. 1, above.

96. Hart, *supra*, note 65 at 160.

there is a right, there is a remedy. . . . [W]here no remedy exists there is, realistically, no right. A major function of much procedural law is the provision of means for vindicating rights.''[97]

On the face of it, the fairness principle is violated by grants of immunity from prosecution. An offender has by his or her wrongdoing upset the just balance of the *status quo* but is allowed to go free instead of paying the price for that wrongdoing. But is this not to remove the remedy for violation of the victim's right?

Further reflection raises two other matters for consideration. First, whether prosecuted or not, an offender who harms an individual victim is probably liable in tort to compensate that victim, who is in no way deprived of his or her private law remedy by the offender's immunity from prosecution. Second, the practice of bringing particular offenders to justice is less an end in itself than a means to a greater end, namely, the promotion of a just society. As we said earlier, this end may sometimes be better achieved — and the public better protected against such social evils as terrorism, espionage, drug trafficking — by immunizing some offenders and convicting others than by indiscriminately and unsuccessfully prosecuting all.

C. A Fair Trial for All Defendants

Fairness further requires justice not only in the laws themselves but also in their application. They must be applied to all persons impartially and objectively. Accordingly, both parties to a dispute — in criminal law the prosecutor and the defendant — are entitled to a fair trial. Hence such procedural standards as ''*audi alteram partem*'' (hear both sides), which are often referred to as principles of Natural Justice because they serve as guarantees of such impartiality and objectivity.[98]

Hearing both sides entails that each party is enabled fully to present its case. In a defendant's case, this means that he or she must have an opportunity of making a full and proper answer to the charge. To do this, the defendant must be fully informed of the prosecution's case against him or her and of its strengths and weaknesses. So, if a witness giving Crown evidence has been guaranteed immunity from prosecution, fairness entitles the defendant to be informed of this and to be thus able to probe the resulting credibility of the testimony of such a witness.

This said, however, there is no necessary bar to immunity agreements. Nothing in such agreements entails their concealment from the defendant. Indeed the practice should be regulated, as we suggest later in this paper, to obviate such concealment, to ensure full information to the defendant and to open the course of justice to public view.

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97. LRC, Report 32, *supra*, note 59 at 24. Be it noted also that the principle of protection requires criminal procedures to enhance the protection of society, the maintenance of its basic values and the safeguarding of its members' individual interests; and the principle of participation requires rules of procedure allowing meaningful participation to citizens in processes that affect them to prevent them from feeling shut out of the process — hence the importance of private prosecutions, victim-impact statements and public access to the criminal process: *ibid.* at 27.

98. Hart, *supra*, note 65 at 156.

VI. The Justifiability of Grants of Immunity

Our overall conclusion, therefore, is that ethically grants of immunity from prosecution can be defended against all of the objections discussed in this chapter. Made genuinely in the public interest, they do not involve commercialization and improper trading in justice. Made openly and subject to regulations ensuring such openness, they do not involve secrecy and improper concealment of the criminal justice process. Made for the ultimate goal of promoting a just and safe society, they do not necessarily reduce the effectiveness of the criminal justice system. Made for legitimate ends and without disproportion between means and end, they do not necessarily involve unprincipled expediency. And made in cases involving moral distinctions between those immunized and those prosecuted, they do not offend on grounds of injustice and inequality.

CHAPTER THREE

The Present Situation

Before outlining the rules that we propose for the regulation of immunity agreements, we should provide a rough picture of the present situation, including the current state of the law in this area.[99] Although it is difficult to assess the extent to which such agreements are utilized (in general, they are not widely publicized[100]) or to discern with confidence the legal rules that govern them in this country (comparatively few reported decisions deal with immunity agreements otherwise than incidentally[101]), it is possible at least to state some general propositions. Those propositions relate, essentially, to six basic issues: the authority to provide immunity; public and judicial perceptions of immunity; judicial supervision; disclosure; the evidentiary implications of immunity agreements; and enforcement. Other issues, which remain largely untouched by Canadian jurisprudence (and with which we shall be dealing later in this working paper), relate to such matters as the factors determining whether immunity should be provided, conduct in concluding immunity agreements, contents of immunity agreements and so on.

I. The Authority to Provide Immunity

Despite the *Criminal Code*'s silence on the subject,[102] the Attorney General's discretion to provide immunity from prosecution in specific instances is an accepted fact in Canada. In *Betesh*,[103] an Ontario case, it was argued among other things that a promise

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99. The body of cases referred to in this paper should not be taken as exhaustive.

100. Ratushny, *supra*, note 18 at 398. Certain agreements with informers (not only immunity agreements) have, of course, received some notoriety in recent times. In Ontario and Quebec, *e.g.*, the arrangements made with, and testimony of, two former motorcycle gang members received widespread news coverage. In British Columbia, the payment of money for information on the location of the bodies of murder victims was the subject of considerable media attention.

101. See Fred Kaufman, *The Admissibility of Confessions*, 3d ed. (Toronto: Carswell, 1979) at 199, where the point is made in a different context. Immunity agreements have been referred to in a number of Supreme Court of Canada decisions: see, *e.g.*, *Amato* v. *The Queen*, [1982] 2 S.C.R. 418 at 420; *R.* v. *Thatcher*, [1987] 1 S.C.R. 652. In *R.* v. *Chambers*, [1990] 2 S.C.R. 1293 at 1300, it is stated, *per* Cory J., with whom Dickson C.J.C., Lamer C.J.C. and La Forest, Sopinka and McLachlin JJ. concurred, that a witness "came to Canada to give evidence for the appellant [*i.e.*, the accused]" and "was given immunity from prosecution."

102. *Supra*, note 14.

103. *Supra*, note 14.

of immunity given by an agent of the Attorney General for Canada was not binding because "there is no provision in the *Criminal Code* authorizing blanket immunity."[104] Rejecting this argument, Graburn Co. Ct J. said:

> [W]hile 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 recognized and adopted through his agent, by a former Attorney-General of this Province in a case involving one Rush and Williams in 1969.
>
> 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.[105]

In *R.* v. *McDonald*,[106] a case of some relevance to the Canadian situation, it was held by New Zealand's Court of Appeal that the power to grant immunity from prosecution, in the form of an undertaking to stay future proceedings if they were commenced, was not affected by the fact that the Attorney General's power to enter stays was statutory.[107] In that case, it had been argued that because "the powers conferred by the Crimes Act and by the Summary Proceedings Act are powers to stay proceedings which have been commenced,"[108] and because "[t]hey do not in terms relate to the giving of an undertaking or promise concerning the entry of a stay of proceedings in certain future events,"[109] the result was that "the Solicitor-General . . . had no power to give the under-

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104. *Ibid.* at 244, Graburn Co. Ct J.

105. *Ibid.* at 245.

106. [1980] 2 N.Z.L.R. 102.

107. Richmond P., who spoke for the Court, summarized in part, at 104, as follows:

> Mr Hart referred us to various authorities which show that in England the admitted power of the Attorney-General to enter a nolle prosequi in criminal proceedings is one well recognised at common law and one which can properly be described as a prerogative power in the sense that it does not depend on a statute but stems from the authority of the Sovereign. It also appears that this power at common law did not extend to summary proceedings and could only be exercised after an indictment had been found. By way of contrast with that situation Mr Hart directed our attention to the fact that in New Zealand the power of the Attorney-General to enter a stay of proceedings, which is the same thing as lodging a nolle prosequi, is governed by statute. So far as proceedings in the High Court are concerned the position is governed by s 378 of the Crimes Act 1961 and in relation to summary proceedings and preliminary proceedings in indictable cases there are powers to be found in ss 77A and 173 of the Summary Proceedings Act 1957. Mr Hart developed an argument, based in particular on what was said by their Lordships in the case of *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508, to the effect that the ground which was covered in England by the prerogative is now covered in New Zealand entirely by the provisions of the Crimes Act to which we have referred and furthermore that in New Zealand certain statutory powers exist in relation to summary proceedings which have no counterpart at common law.

108. *Ibid.* at 104-05.

109. *Ibid.* at 105.

taking which he did give in the present case,"[110] and that "[t]hat undertaking ... was invalid."[111] This argument was, however, rejected. Noting that "[t]he practice of giving immunity in this way has long been accepted in England and has been adopted from time to time in New Zealand," the Court said: "We see no reason to think that it is any the less effective in New Zealand simply because in this country it relates to the exercise of the powers vested in the Attorney-General by statute rather than to the exercise of prerogative powers as in England. It is in our view immaterial whether such an undertaking is one which is as a matter of law strictly binding on the Crown."[112] The Court added that it was "quite unthinkable that such an undertaking would not be honoured ...."[113] When a similar argument against the validity of the Solicitor-General's undertaking was raised on appeal to the Privy Council,[114] Lord Diplock declared that "[t]heir Lordships are in entire agreement with the way in which the Court of Appeal disposed of this ground of appeal."[115]

The power to provide immunity from prosecution includes the power to prevent others from prosecuting an immunized person. This point was made in the English case of *Turner* v. *Director of Public Prosecutions*.[116] There, a convicted accused had attempted to prosecute a prosecution witness privately, notwithstanding that the Director of Public Prosecutions had given the witness "a formal undertaking that he would not be prosecuted for the offences disclosed in his statements."[117] Although it was alleged by the accused that the prosecutor had told the judge and jury at trial that anyone could still prosecute the witness privately, Mars-Jones J. of the Queen's Bench Division held that "[w]hatever counsel said or did not say at the trial, he could not fetter the Director of Public Prosecutions' discretion in deciding whether to intervene if a private prosecution were launched and

110. *Ibid.*

111. *Ibid.*

112. *Ibid.*

113. *Ibid.*

114. *McDonald* v. *R.* (1983), 77 Cr. App. R. 196. Lord Diplock said, in delivering the Board's judgment, at 200:

> Counsel for McDonald ... has argued that the Solicitor-General had no power to give an undertaking that he would direct a stay of any future proceedings against either [immunized witness] which had not already reached the stage of his committal to the High Court for trial or the preferment of an indictment against him. The power of the Attorney-General, and *pro hac vice* the Solicitor-General, to stay proceedings, it was submitted, was statutory only. It was conferred by section 378 of the Crimes Act 1961. Under that section it did not arise until that stage in current proceedings against a defendant had been reached; and no law officer of the Crown could bind himself or his successor as to how the statutory discretion would be exercised on some future occasion.

115. *Ibid.*

116. (1978) 68 Cr. App. R. 70.

117. *Ibid.* at 72, Mars-Jones J.

offering no evidence in those proceedings."[118] In affirming, in these circumstances, the statutory power of the Director of Public Prosecutions to take over a private prosecution for the express purpose of calling no evidence, His Lordship said:

> I do not need to spell out in detail the effect on future criminal investigations or proceedings if a witness giving evidence for the prosecution in these circumstances could not rely upon the undertaking of the Director of Public Prosecutions and his co-operation in ensuring that such a witness would be protected against a private prosecution of this kind.[119]

The power to provide immunity from prosecution in particular instances may be distinguished from attempts, by Crown agents, to suspend certain laws or dispense with their application to particular people. As is evident from the case of *R.* v. *Catagas*,[120] neither of these latter two courses would be open to Crown officials in Canada today.[121] In *Catagas*, the Manitoba Court of Appeal referred to the "dark chapter in English legal and constitutional history"[122] in which "the Crown, as part of the Royal prerogative, suspended some laws and dispensed with obedience to others."[123] As it further explained:

> By virtue of the suspending power the Crown suspended the operation of a duly enacted law of Parliament, and such suspension could be for an indefinite period. . . .
>
> Under the dispensing power the Crown purported to declare that a law enacted by Parliament would be inapplicable to certain named individuals or groups. By virtue of a dispensation in their favour the law would not apply to them, but it would continue to apply to all others.[124]

The *Catagas* case itself involved an effort by government officials, as a matter of policy, "to exempt Indians from compliance with the *Migratory Birds Convention Act*."[125] In the course of allowing the Crown's appeal from the acquittal of an accused whose "defence stemmed from the 'no-prosecution' policy which the Crown had announced in favour of Indians,"[126] the Court said: "[W]hat we have here is a clear case of the exercise of a

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118. *Ibid.* at 76.

119. *Ibid.* at 73. His Lordship went on to observe, at 77-78:

> There is no doubt about the existence or the unfettered nature of the Director of Public Prosecutions' powers in this respect. . . . If [the witness] were brought before the Tottenham justices the date and time of his appearance would be known, and if thereafter he were to be remanded in custody or sentenced to imprisonment he would be exposed to danger which he is entitled to expect he would not have to face. Apart from [the witness's] own position, the Director of Public Prosecutions had to take into consideration the possible effects of such a private prosecution being allowed to proceed upon current and future criminal inquiries and proceedings.

120. (1977) 38 C.C.C. (2d) 296.

121. See McDonald Commission, *supra*, note 2 at 393-95.

122. *Supra*, note 120 at 297. Freedman C.J.M.

123. *Ibid.* at 297-98.

124. *Ibid.* at 298.

125. *Ibid.* at 299.

126. *Ibid.* at 302.

purported dispensing power by executive action in favour of a particular group. Such a power does not exist."[127] However, it added:

> [N]othing here stated is intended to curtail or affect the matter of prosecutorial discretion. 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 any pending charge, a right that is given statutory recognition in s. 508 [now s. 519] . . . 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. But that is a far different thing from the granting of a blanket dispensation in favour of a particular group or race.[128]

Not uncommonly, informal immunity arrangements originate at the police level. From time to time, evidence of such arrangements appears in the reported cases. In *R.* v. *Kalashnikoff*,[129] to take one example, a police officer who had written a traffic ticket testified that he had told the person to whom it related (the accused) "that [he] would not process that ticket if [the accused] was able to obtain some information of value, regarding the Polson Place armed robbery in particular . . . ."[130] Similarly, in *R.* v. *Sayer*,[131] it was reported that a prosecution witness had provided information to the police "having first been assured by the police that he would not be prosecuted for this or the other offences and that he would be given police protection, provided, that is, that he would make full

127. *Ibid.* at 301. Compare *R.* v. *Sioui*, [1990] 1 S.C.R. 1025, however, which involved a treaty that pre-dated the provision under which the accused had been charged. There, the Supreme Court of Canada noted *inter alia* (*per* Lamer J. [as he then was] at 1065) that "[s]ection 88 of the *Indian Act* is designed specifically to protect the Indians from provincial legislation that might attempt to deprive them of rights protected by a treaty." In the course of its decision, at 1033, it referred to the majority opinion of the Quebec Court of Appeal "that s. 88 of the *Indian Act* made the respondents immune from any prosecution for the activities with which they were charged, since the latter were the subject of a treaty whose rights could not be limited by provincial legislation" (*per* Lamer J. [as he then was]). For consideration of immunity from prosecution in similar contexts, see *R.* v. *Paul* (1988), 90 N.B.R. (2d) 332 (Q.B.); *R.* v. *Augustine*; *R.* v. *Barlow* (1986), 74 N.B.R. (2d) 156 (C.A.); *Simon* v. *The Queen*, [1985] 2 S.C.R. 387; *Kruger* v. *The Queen*, [1978] 1 S.C.R. 104; *Myran* v. *The Queen*, [1975] 2 S.C.R. 137. See, on the subject of treaties and the effect of s. 88 of the *Indian Act*, R.S.C. 1970, c. I-6 (now R.S.C. 1985, c. I-5), Peter W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 556-62.

128. *Supra*, note 120 at 301.

129. (1981) 21 C.R. (3d) 296 (B.C.C.A.).

130. *Ibid.* at 299. At other points in his testimony, the police officer is quoted as having said he told the accused, at 298, "that the ticket could possible [*sic*] be erased if information was obtained from the Polson Place armed robbery," at 299, "that if his information was valuable, or did prove to be accurate, that the ticket would not be processed through to the Superintendent of Motor Vehicles . . ." and, also at 299, "that there would have to be further information in order to obtain a — the ticket being destroyed."

131. (1989) 75 Sask. R. 71 (C.A.).

disclosure and testify to the occurrences."[132] In *R.* v. *Voutsis*,[133] which dealt, among other things, with a person's consent to the interception and admission of a private communication, the Saskatchewan Court of Appeal noted that the trial judge was "satisfied she had consented, as she did, in return for a promise made to her by the police to drop a number of outstanding charges against her . . . ."[134]

Reported cases have also indicated, however, that the police, or other peace officers, do not have the authority to make binding immunity agreements on their own. In *R.* v. *Demers*,[135] for instance, the Quebec Court of Appeal suggested that it would be necessary to seek "the Crown's approval . . . for an offer of immunity" since "this is outside the powers of the police." In that case, a Crown prosecutor had also testified: "I presume the police do not make agreements without speaking to us."[136] In *R.* v. *Metro News Ltd.*,[137] the accused, who had been convicted of "distributing obscene material[],"[138] argued on appeal that the prosecution had been an abuse of process. In support of its contention, the accused referred to the fact that the publication in question had been approved by the customs authorities, and to an arrangement it had with the police which enabled it to withdraw certain publications and avoid criminal charges with respect to them.[139] The Ontario Court of Appeal rejected the abuse of process argument, largely on the basis that the appellant knew that his agreement could not insulate him from prosecution under the *Criminal Code*.[140]

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132. *Ibid.* at 71-72, Cameron J.A. As the Court went on to add, however, at 72 *per* Cameron J.A., the witness had later attended a meeting with the police and the prosecutor and "on the eve of the preliminary inquiry, following which meeting . . . had released the police from their undertaking not to prosecute him." According to the evidence, the witness, "having talked to the prosecutors, had decided to release the police from their undertaking and to make a clean breast of everything in order to put his past behind him and get on with his life" (at 72 *per* Cameron J.A.).

133. (1989) 47 C.C.C. (3d) 451.

134. *Ibid.* at 455, Cameron J.A. Compare the slightly different situation in *R.* v. *Mancuso*; *R.* v. *Lee* (1989), 51 C.C.C. (3d) 380, where the Quebec Court of Appeal (*per* Richard J., as translated, at 384) stated that a witness had "agreed to collaborate with the police in return for their intervention on his behalf in order to have the proceedings pending against him suspended." Compare as well the situation in *R.* v. *Wile* (1990), 58 C.C.C. (3d) 85 (Ont. C.A.). There, according to the Court, at 99, "an arrangement was made . . . under which [a person] was to give [a police officer] useful information . . . in exchange, potentially, for immunity from prosecution."

135. (1989) 49 C.C.C. (3d) 52 at 57, Kaufman J.A.

136. *Ibid.*

137. (1986) 29 C.C.C. (3d) 35.

138. *Ibid.* at 39.

139. According to the Court at 42, *per* Martin J.A.:

> [A] member of "Project P" ["a joint forces unit composed of police officers from the Ontario Provincial Police and the Metropolitan Toronto Police" (at 42)] . . . testified that it had an arrangement with the Periodical Distributors of Canada that if "Project P" became involved in the investigation of one of the magazines approved by the committee, the police would notify the Periodical Distributors Association so that it could withdraw the magazine from circulation.

140. The Court went on to say, at 75, *per* Martin J.A.:

> . . . I do not think that the general arrangement which the appellant had with the police of notifying them of the approval of the advisory council and the police, in turn, notifying the appellant of their disagreement with the opinion of the committee as to a particular publication, permitting the appellant to withdraw the publication from circulation, resulted in prejudice to the appellant which rendered a prosecution of the appellant unfair in respect of the particular publication which was the subject of the charge.

II. Public and Judicial Perceptions of Immunity

In our working paper on *Plea Discussions and Agreements,*[141] we noted that the practice of plea negotiation had acquired a bad reputation as far as the Canadian public was concerned. We reported that "[i]n a national survey recently conducted for us by Gallup Canada Inc., more than 68 per cent of those polled (and more than 79 per cent of those respondents having an opinion) expressed either strong or general disapproval of the practice of 'plea bargaining,' as we had defined it."[142] It may be (although we have no empirical evidence on this point) that the Canadian public's perception of immunity agreements is similar.

If this is true, however, it is also true that the practice of providing immunity has its defenders. In its 1976 report,[143] for example, the Quebec Police Commission's Commission of Inquiry on Organized Crime suggested, with some regret, that the offering of immunity was viewed as improper in Canada, and went on to defend forbearance in the initiation of proceedings against persons whose assistance was essential in prosecuting more senior participants in organized crime. It recommended open trade, by the Attorney General, of immunity for truthful evidence — especially in organized crime cases.[144]

Whatever they might think about the merits of particular immunity agreements, or about the quality of evidence that they produce, the courts appear generally to have refrained from condemning the practice of providing immunity itself. In *R.* v. *Turner,*[145] for example (an English case), Lawton L.J. recognized that "[i]t is in the interests of the public that criminals should be brought to justice," and that "the more serious the crimes the greater is the need for justice to be done."[146] Although he said that "[e]mploying Queen's evidence to accomplish this end is distasteful and has been distasteful for at least 300 years to judges, lawyers and members of the public,"[147] he acknowledged that "[u]ndertakings of immunity from prosecution may have to be given in the public interest."[148] As the decision in the *Betesh* case[149] suggests, Canadian courts have, on occasion, taken pains to defend the provision of immunity as a legitimate prosecutorial function. In *Betesh,* it will be recalled, Graburn Co. Ct J. characterized the power to extend immunity as one that was compatible with "the highest traditions of the administration

141. LRC, Working Paper 60, *supra*, note 1.

142. *Ibid.* at 7.

143. Quebec Police Commission, *The Fight against Organized Crime in Quebec: Report of the Commission of Inquiry on Organized Crime and Recommendations* (Quebec City: Quebec Official Publisher, 1977) at 211, cited by Ratushny, *supra*, note 18 at 399.

144. Quebec Police Commission, *ibid.* at 212.

145. (1975) 61 Cr. App. R. 67 (C.A.).

146. *Ibid.* at 79.

147. *Ibid.*

148. *Ibid.* at 80.

149. *Supra*, note 14.

of justice."[150] Other judges, in perhaps less glowing terms, have also signified their approval. In delivering the Quebec Court of Appeal's judgment in the *Demers* case, for example, Kaufman J.A. expressed the opinion that "an offer of immunity, in an appropriate case, is not necessarily a bad thing *per se*."[151]

The courts have been reluctant as well to express disapproval of the financial arrangements that are frequently part and parcel of immunity agreements. In *Palmer* v. *The Queen*,[152] for example, a key prosecution witness stated, at the accused's preliminary inquiry and trial, "that in return for his agreement to give evidence against Douglas Palmer, and for the actual giving of the evidence, he had been promised immunity from prosecution on certain charges which were outstanding against him and protection for himself and his family."[153] Following the accused's conviction, however, the witness had recanted the evidence he had given against the accused Douglas Palmer, alleging that the police had influenced him, that he had been paid a large sum of money, and that more had been discussed. The Supreme Court of Canada acknowledged: "[F]rom time to time the interests of justice will require that Crown witnesses in criminal cases be protected. Their lives and the lives of their families and the safety of their property may be endangered. In such cases the use of public funds to provide the necessary protection will not be improper."[154] *Palmer* did, however, evoke a recognition by the Court of the dangers that are inherent in these arrangements:

> On the one hand, interference with witnesses cannot be tolerated because the integrity of the entire judicial process depends upon the ability of parties to causes in the courts to call witnesses who can give their evidence free from fears and external pressures, secure in the knowledge that neither they nor the members of their families will suffer in retaliation. On the other hand, the courts must be astute to see that no steps are taken, in affording protection to witnesses, which would influence evidence against the accused or in any way prejudice the trial or lead to a miscarriage of justice.[155]

So long as "only reasonable and necessary protection has been provided and ... no prejudice or miscarriage of justice has resulted in consequence,"[156] the Supreme Court concluded, it would not be right to "draw unfavourable inferences against the Crown, by reason only of this expenditure of public funds."[157]

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150. *Ibid.* at 245.

151. *Supra*, note 135 at 56.

152. [1980] 1 S.C.R. 759.

153. *Ibid.* at 765, McIntyre J.

154. *Ibid.* at 779, McIntyre J.

155. *Ibid.* The Court went on to observe, at 779-80:

> It must be recognized that when cases of this nature arise, charges of bribery of witnesses will, from time to time, be made. It is for this reason that the courts must be on guard to detect and to deal severely with any attempt to influence or corrupt witnesses. The courts must discharge this duty with the greatest care to ensure that while no impropriety upon the part of the Crown will be permitted, the provision of reasonable and necessary protection for witnesses is not a prohibited practice. In the United States, there are statutory provisions expressly contemplating such expenditure under the authority of the Attorney General.

156. *Ibid.* at 779, McIntyre J.

157. *Ibid.*

III. Judicial Supervision

Unlike plea agreements, immunity agreements do not lend themselves very readily to judicial supervision (as opposed to judicial enforcement). In the case of plea agreements, the court is frequently asked by the parties, in effect, to "accept" an arrangement that they have worked out, either by sentencing the accused within the range contemplated by the agreement or (under what is now *Criminal Code* subsection 606(4)) by accepting the accused's guilty plea to "an[] ... offence arising out of the same transaction" and finding him or her "not guilty of the offence charged and ... guilty of the offence in respect of which the plea of guilty was accepted ...." With immunity agreements, however, the person who has received immunity may never actually have been charged with the offence to which the immunity agreement relates, and may never appear in court (except, perhaps, as a prosecution witness).[158]

Where a decision of the Attorney General to direct the entry of a stay of proceedings under *Criminal Code* section 579 is involved, the general rule is one of judicial non-interference. As Craig J. of the Ontario High Court said in the case of *Campbell* v. *Attorney-General of Ontario*[159] (which did not itself involve an immunity agreement), "[t]he decision is not reviewable by the courts but is one for which the Attorney-General is accountable to the Legislature or to Parliament ...."[160] Although His Lordship referred to a "possible exception where it can be said that there was 'flagrant impropriety'[161] on the

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158. See Smith, *supra*, note 12 at 311-12. For a fairly recent example, see *R.* v. *Rowbotham* (1988), 25 O.A.C. 321 (C.A.). At 359, the Court referred to "an unindicted co-conspirator" who "[u]pon an arrangement for immunity from prosecution ... gave evidence for the Crown and before testifying gave a sixty-five page statement to the police, sworn to before a Justice of the Peace."

159. (1987) 31 C.C.C. (3d) 289.

160. *Ibid.* at 299, citing *Dowson* v. *The Queen*, [1983] 2 S.C.R. 144 and referring to Eugene G. Ewaschuk, *Criminal Pleadings and Practice in Canada* (Aurora, Ont.: Canada Law Book, 1983) at 295; Connie Sun, "The Discretionary Power to Stay Criminal Proceedings" (1973-74) 1 Dalhousie L.J. 482; *R.* v. *Dube* (1986), 17 W.C.B. 457 (Ont. Dist. Ct).

161. *Campbell*, *supra*, note 159 at 301. His Lordship was referring here to the decisions of *Re Balderstone and The Queen* (1983), 8 C.C.C. (3d) 532 (Man. C.A.) (leave to appeal refused [1983] 2 S.C.R. v) and *R.* v. *Moore* (1986), 26 C.C.C. (3d) 474 (Man. C.A.). In the former case, the Court had said, in another context, *per* Monnin C.J.M. at 539:

> The judicial and executive must not mix. These are two separate and distinct functions. The accusatorial officers lay informations or in some cases prefer indictments. Courts or the curia listen to cases brought to their attention and decide them on their merits or on meritorious preliminary matters. If a judge should attempt to review the actions or conduct of the Attorney-General — barring flagrant impropriety — he could be falling into a field which is not his and interfering with the administrative and accusatorial function of the Attorney-General or his officers. That a judge must not do.

In the *Moore* case, the Court had said, again in a different context, *per* Huband J.A. at 476:

> If the courts have the power to inquire into the exercise of that discretionary authority by the Attorney-General, then I do not see on what basis every exercise of his discretionary powers would not also be reviewable. There would have to be hearings and representations presented and heard before deciding what criminal charges should be laid against whom. The criminal law system would be in a shambles.

part of the Attorney-General in directing the stay,''[162] he added that in the case at bar ''there can be no suggestion that the Attorney-General is failing to uphold the law or that he is acting out of improper motives or for an improper purpose.''[163]

Any attempt by the judiciary in this country to influence the manner or circumstances in which immunity from prosecution is granted would no doubt be frowned upon. In the English decision of *R.* v. *Turner*,[164] Lawton L.J. had stated that he found the Director of Public Prosecutions' promising immunity to a person such as the informer in that case ''distasteful''[165] and that ''[n]othing of a similar kind must ever happen again.''[166] His Lordship went on to say that the Director of Public Prosecutions should dispense promises of immunity ''most sparingly''[167] and that ''in cases involving grave crimes it would be prudent of him to consult the Law Officers before making any promises.''[168] In the course of a subsequent refusal by the House of Lords to grant leave to appeal, Lord Dilhorne expressly disapproved of the practice of issuing judicial instructions to regulate future conduct in such matters.

IV. Disclosure

As one Canadian textwriter has observed, the existence and contents of immunity agreements may be difficult to ascertain.[169] Where immunity agreements involve the giving of evidence by an immunized person,[170] must their existence and contents be disclosed to the accused? Often, of course, they are. In *Turner* v. *Director of Public Prosecutions*,[171] for example, ''the Director of Public Prosecutions decided that it was in the public interest to call [a police suspect turned informer] as a witness for the prosecution rather than prosecute him for the offences he had disclosed in his statements''[172] and thereafter

162. *Campbell, ibid.*

163. *Ibid.*

164. *Supra*, note 145.

165. *Ibid.* at 80.

166. *Ibid.*

167. *Ibid.*

168. *Ibid.*

169. Peter K. McWilliams, *Canadian Criminal Evidence*, 3d ed. (Toronto: Canada Law Book, 1991) at 26-24.

170. In *R.* v. *Turner*, *supra*, note 145, the Assistant Director of Public Prosecutions' undertaking of immunity had included a condition stating that if the informer's information was not sufficiently valuable to be used as evidence in a prosecution, it would be kept secret, neither the Director nor the police would mention it in any prosecution of the informer, and no discussions relating to the possibility of the informer's becoming a prosecution witness would be mentioned. This condition was criticized by Lawton L.J., who stated, at 80, that it ''could have caused both the Director's professional staff and police officers grave embarrassment had it been decided to continue proceedings against [the informer].''

171. *Supra*, note 116.

172. *Ibid.* at 72, Mars-Jones J.

gave that person "a formal undertaking that he would not be prosecuted for the offences disclosed in his statements."[173] As the judgment of Mars-Jones J. goes on to indicate, "Turner's legal advisers, the trial judge and the jury were made aware of the nature of that undertaking."[174]

Non-disclosure of concluded immunity agreements may, however, impair the ability of an accused to "make full answer and defence," guaranteed by *Criminal Code* subsections 650(3) and 802(1), and may require consideration of section 7 and paragraph 11(*d*) of the *Charter*[175] In *X.* v. *The United Kingdom*,[176] one of the accused in *R.* v. *Turner* brought an application before the European Commission on Human Rights asserting that the use of an immunized accomplice's evidence had infringed his rights under article 6(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.[177] (In a manner similar to *Charter* paragraph 11(*d*), that provision guarantees accused persons "a fair ... hearing."[178]) Although it acknowledged that the use of such evidence could bring article 6(1) into play, the European Commission relied heavily on the fact that the agreement had been disclosed to defence counsel and to the jury in arriving at its determination that there had been no infringement.

Clearly, it would be improper for the accused or the court to be misled as to the existence of an immunity agreement. In *R.* v. *Dufresne*,[179] the Supreme Court of Canada allowed the appeal of the accused from a dismissal of his appeal against conviction, citing "grave allegations and evidence to support them which, although not conclusive, nonetheless cast serious doubt on the integrity of the conduct of the Crown and the police in this matter."[180] The Court went on to explain, among other things, that "[t]he allegations include an allegation that one or more police officers and/or the Crown did not reveal to the court the fact that a Crown witness had perjured himself and misled the court by denying the existence of promises of pardon which they had indeed made to him ...."[181]

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173. *Ibid.*

174. *Ibid.*

175. See *Charter* s. 7, *supra*, note 47. Paragraph 11(*d*) provides that "[a]nyone charged with an offence has the right ... to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal ...."

176. (No. 7306/75) (1976) 7 Eur. Comm. H.R.D.R. 115.

177. 4 November 1950, Europ. T.S. No. 5.

178. *Ibid.*

179. [1988] 1 S.C.R. 1095.

180. *Ibid.* at 1095.

181. *Ibid.* Compare *R.* v. *Roy* (1989), 73 C.R. (3d) 291 (Que. C.A.).

V. Evidentiary Implications

Immunity agreements that require the giving of evidence may raise different evidentiary questions,[182] depending on how they are formulated with respect to timing. Where the agreement takes the form of a promise not to prosecute that is conditional on the witness's testifying against the accused, for example, it tends to jeopardize the credibility of the witness and the weight of his or her evidence.[183] The extent of this danger is exemplified in the case of *United States of America* v. *Shephard.*[184] There an application for a warrant under the *Extradition Act*[185] was based on the affidavit evidence of an individual who had been promised immunity in the form of a future dismissal of charges pending against him in the United States. Having stated that the test for issuing the warrant "is whether the evidence is such as would justify ... committal ... for trial"[186] and "is the same test as that which is applied at trial, when, at the conclusion of the Crown's case, a motion is made for a directed verdict,"[187] the extradition judge denied the application on the basis that the immunized person's evidence was so clearly untrustworthy

182. See generally *R.* v. *McNamara (No. 1)* (1981), 56 C.C.C. (2d) 193 (Ont. C.A.) (leave to appeal to S.C.C. dealt with at 193n., 576) at 280-81; *R.* v. *Roach* (1984), 12 W.C.B. 473 (B.C.C.A.). Even in the absence of an agreement, of course, a witness's hope of receiving immunity may affect the way in which his or her evidence is viewed. See *R.* v. *Symonds* (1983), 1 O.A.C. 103 at 106, where the Ontario Court of Appeal, *per* Martin J.A., noted that "[t]he investigating officer and [a prosecution witness] were cross-examined as to whether [the witness] had been promised immunity in exchange for his evidence" and that "[b]oth denied that immunity had been promised to [the witness] in exchange for his testimony." The Court then said, *per* Martin J.A. at 106: "The trial judge's statement that in order to find that [the witness] implicated the appellant in order to obtain immunity from prosecution, they would have to find a conspiracy was unfortunate. The jury could find that [the witness] was giving his testimony in the expectation of obtaining immunity from prosecution even though there was no expressed promise of immunity."

183. See *Ertel, supra*, note 6. There, as the Ontario Court of Appeal noted, *per* Lacourcière J.A. at 404, "[t]he principal witnesses for the Crown were two of the appellant's co-accused ... who ... had made a 'deal' with the Crown." The Court had earlier explained, at 403: "Two of those committed for trial ... made an arrangement with the Crown whereby they would plead guilty and testify for the Crown. The Crown, in return, would drop the importing charge against them (count 1) and recommend that they receive a six-month sentence on the trafficking charge (count 2)." Before they gave their evidence against the accused, the witnesses had "pleaded guilty to count 2 of the preferred indictment ..." (at 403) and "count 1 against them was stayed" (at 403). Neither witness had been sentenced, however, and one "admitted that he believed that, if he were to give evidence that did not incriminate the appellant, the Crown would not recommend a six-month sentence for his part in the conspiracy, and that he might be subject to a minimum sentence of seven years on the importation charge" (at 407). In these circumstances, the Court of Appeal expressed the view that the trial judge (who had adopted the evidence of the two witnesses) had "properly deprecated the 'distasteful procedure', of having [these witnesses] testify before the charges against them had been dealt with" (at 410). See also *R.* v. *Demeter* (1975), 10 O.R. (2d) 321 at 335 (C.A.) (aff'd [1978] 2 S.C.R. 538). Compare *R.* v. *Desgroseilliers*, [1986] O.J. No. 112 (C.A.). See *R.* v. *Rooke* (1988), 40 C.C.C. (3d) 484 (B.C.C.A.), where the issue of timing is not entirely clear from the report.

184. [1977] 2 S.C.R. 1067.

185. Now R.S.C. 1985, c. E-23.

186. *Supra*, note 184 at 1079.

187. *Ibid.* at 1079-80.

"as to justify him in treating it as 'not being sufficient' within the meaning of s. 475(1) [now s. 548(1)] of the *Criminal Code*."[188] When ultimately the matter came before the Supreme Court of Canada, however, a majority of that court held that the judge had erred. In delivering the majority judgment, Ritchie J. noted that the immunity agreement had not affected the competency of the immunized person or the admissibility of his evidence, and that "the credibility of the witness . . . was a matter for the jury or for the trial judge sitting alone if there were no jury."[189] As the Supreme Court later added in *Vetrovec* v. *The Queen*,[190] "[e]ven in cases where a promise of immunity is offered, it should not always be assumed that the accomplice cannot be trusted."

Some immunity agreements are not, by their terms, conditional on the witness's testifying *before* the immunity is conferred on him or her. This was the case in *R.* v. *Turner*.[191] There Lawton L.J. distinguished the case of *R.* v. *Pipe*[192] (in which the evidence of an accomplice was held to be *inadmissible*), saying that "[i]ts *ratio decidendi* is confined to a case in which an accomplice, who has been charged, but not tried, is required to give evidence of his own offence in order to secure the conviction of another accused."[193] *Turner*, on the other hand, was a case in which the witness had already been arraigned on a four-count indictment and been acquitted after the prosecutor declined to call any evidence against him. Noting that "[w]hen [the witness] went into the witness box both before the magistrates and at this trial, there was no real likelihood of his being prosecuted if he refused to give evidence,"[194] and that "[t]he only risk he ran was that the police might have withdrawn the protection which he had had and have refused to conduct him in secrecy to where he wanted to go,"[195] His Lordship expressed the view that "[t]hese facts distinguished this case from *Pipe* . . . ."[196]

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188. *Ibid.* at 1085, Ritchie J.

189. *Ibid.* at 1086-87.

190. [1982] 1 S.C.R. 811 at 821, Dickson J. (as he then was).

191. *Supra*, note 145.

192. (1967) 51 Cr. App. R. 17 (C.A.). In *Shephard*, *supra*, note 184, Ritchie J. (speaking for the majority of the Supreme Court of Canada) expressed the opinion, at 1085, that the extradition judge in that case had been correct when he said "that the case of *Pipe* goes further than the Canadian practice and that, in this country, the mere fact that an accomplice has charges pending against him does not render bad a conviction based upon the testimony of such accomplice." See also *R.* v. *Piercey* (1988), 42 C.C.C. (3d) 475 (Nfld C.A.).

193. *Supra*, note 145 at 78.

194. *Ibid.* at 79. According to His Lordship, at 79:

> When [the witness] decided to give the police information about his partners in crime, the prospect of getting himself immunity from further prosecution was a most powerful inducement. It is necessary, however, to consider [the witness's] position when he gave evidence. All the charges which had been preferred against him had already been terminated in his favour. By means of the absurd conspiracy charge, the prosecution had tried to give him immunity from prosecution for any offences he had disclosed in his statements. If, after verdicts of "not guilty" had been entered in his favour, he had refused to give evidence, and the prosecution had tried by relying on the differences between a charge of conspiracy to rob and one of robbing to prosecute him for any substantive offences which he had disclosed, his statements would have been inadmissible because they had been obtained from him by inducements.

195. *Ibid.*

196. *Ibid.*

As the reasoning in *Turner* suggests, the extent to which a witness has been immunized before testifying may affect the view that is taken of his or her evidence.[197] This fact was recognized by the New Zealand Court of Appeal in the *McDonald* case.[198] There, it was argued on appeal from the accused's conviction that evidence of an immunity agreement between the Solicitor-General and two key prosecution witnesses should not have been admitted at trial. Rejecting this argument, the Court of Appeal analogized to "the long accepted practice whereby the Crown can lead evidence from an accomplice witness that he has been dealt with for his part in an offence."[199] Continuing, it said:

> That evidence is necessarily placed before the jury so that they will know, at any rate to that extent, that the accomplice is no longer dependent on the favour of the Crown or the Court for the treatment which he is to receive for his part in the offence. In our view the evidence which was led in the present case was led for a similar purpose and was properly admissible for that purpose, namely to enable the jury to assess the weight of the evidence given by [the two witnesses] with adequate knowledge of the circumstances under which they had come to give evidence against McDonald.[200]

In *R.* v. *Black*,[201] evidence had been given by a witness who himself had originally faced prosecution with respect to "all the offences described in the present indictment . . . ."[202] At that witness's earlier trial, however, "[t]he Crown submitted no evidence and he was acquitted."[203] In these circumstances, the trial judge had told the jury, after the witness had given his evidence: "You were . . . told that certificate of acquittal was entered against him . . . before he gave his evidence here and the effect of that now is that he is beyond the reach of the Crown. He was beyond the reach of the Crown when he gave his evidence here."[204] The judge went on to say that the witness "admitted that he made a deal with the police"[205] and that "[t]here is nothing illegal with making a deal with the police,"[206] but that "it is for you to consider as to whether or not he was motivated by anything other than by telling the truth when he gave his evidence."[207] The judge then said (in part): "[I]f you have any doubt about any piece of evidence he gave . . . by reason of him being an accomplice then you certainly should not, on a vital issue, accept his word. But the Crown states to you here that the real issue

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197. See *R.* v. *Stevenson* (1971), 5 C.C.C. (2d) 415 (Ont. C.A.). There, a prosecution witness, *per* Gale C.J.O. at 415, "had been charged with the same offence but the Crown withdrew the charge and at the appellant's trial an attempt was made to cross-examine [the witness] with respect to the arrangements made between herself and the Crown Attorney preceding the withdrawal of the charge." Although, at 415, "[t]he trial Judge did not allow the cross-examination," the Ontario Court of Appeal later expressed the opinion, also at 415, that "that evidence was admissible on the question of [the witness's] credibility and it ought to have been admitted."

198. *Supra*, note 106.

199. *Ibid.* at 106, Richmond P.

200. *Ibid.*

201. (1970) 10 C.R.N.S. 17 (B.C.C.A.).

202. *Ibid.* at 29.

203. *Ibid.*

204. *Ibid.*

205. *Ibid.* at 30.

206. *Ibid.*

207. *Ibid.*

here is the guilt or innocence of the accused, not whether the Crown made a deal with this man and he thereby escaped punishment . . . ."[208] Although it was argued on appeal that the witness had not actually been "beyond the reach of the Crown" since "if he were again charged with the offences described in the present indictment the plea of *autrefois acquit* would not be available to him,"[209] Maclean J.A., who spoke for the British Columbia Court of Appeal, declined "to discuss the technical merits of this submission . . . ."[210] It was his opinion that "the real question [was] whether at the time when the witness] gave his evidence . . . he considered that the charges . . . were still hanging over him unresolved."[211] He concluded that "[t]he very fact that [the witness] appeared at the trial and gave the evidence he did, incriminating himself as well as others, indicates that he must have been of the impression that his discharge in the Magistrate's Court removed the risk of being prosecuted for the offences described in the indictment."[212]

Promises of immunity from prosecution are clearly inducements that would vitiate the voluntariness of a confession for the purposes of the *Ibrahim*[213] rule.[214] In *Kalashnikoff*,[215] a statement had been obtained by a police officer who had written the accused a traffic ticket and had told him he "would not process that ticket if [the accused] was able to obtain some information of value, regarding the Polson Place armed robbery in particular . . . ."[216] According to the police officer's testimony, the accused had earlier

208. *Ibid.*

209. *Ibid.* at 29.

210. *Ibid.*

211. *Ibid.*

212. *Ibid.* at 30. Compare *R.* v. *Wilson* (1981), 12 Man. R. (2d) 195 (C.A.). There, according to the Court, *per* O'Sullivan J.A. at 196, the main prosecution witness, "[a]lthough clearly guilty of importing and trafficking, . . . was granted immunity from prosecution . . . in return for his agreement to co-operate in the exposure of other members of the drug ring." Although it was found that there had been "no substantial wrong or miscarriage of justice . . ." (see *Criminal Code* s. 686(1)(*b*)(iii)), the Manitoba Court of Appeal accepted counsel's submission, *per* O'Sullivan J.A. at 196-97,

> that, although the learned trial judge correctly warned the jury of the danger of convicting on the evidence of a co-conspirator without corroboration, he diluted the warning by inviting the jury to consider the accomplice's truthfulness apart from corroboration and by suggesting to the jury that the accomplice had nothing to gain from fabrication since his "deal" had already been worked out.

213. [1914] A.C. 599 (P.C.). Under that rule, *per* Lord Sumner at 609, "no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority." See *R.* v. *Gillis* (1866), 11 Cox C.C. 69 (C.C.A.); *R.* v. *Houghton* (1978), 68 Cr. App. R. 197 (C.A.); *R.* v. *Barker* (1941), 28 Cr. App. R. 52 (C.C.A.); all cited by Kaufman, *supra*, note 101 at 199.

214. See Smith, *supra*, note 12 at 305-06.

215. *Supra*, note 129. Compare *R.* v. *Mathias*, *The Times*, August 24, 1989 (C.A.), discussed in *Archbold: Pleading, Evidence & Practice in Criminal Cases, Eighth Cumulative Supplement to the Forty-third Edition* (London: Sweet & Maxwell, 1990) at 286.

216. *Kalashnikoff*, *supra*, note 129 at 299.

told him "that he couldn't take the ticket, otherwise it would destroy his driver's licence."[217] In these circumstances, the British Columbia Court of Appeal held that "[t]he statement was made under the hope of advantage"[218] and should not have been admitted at the accused's trial for armed robbery.

Because immunity agreements have figured in the obtaining of consent, under what are now *Criminal Code* paragraphs 184(2)(*a*) and 189(1)(*b*), to the interception of private communications and their admission into evidence, a question has arisen as to the voluntariness of such a consent when it has been obtained by the promise of immunity. In *R.* v. *Dass*,[219] for example, the trial judge noted that the person giving the consent required by what is now paragraph 189(1)(*b*) "has not been prosecuted"[220] and that "the charges have been dropped subject to him testifying and consenting to the admission of the intercepted communications."[221] Being of the view that the test of voluntariness articulated in *Ibrahim* applied, and that it had not been satisfied, His Lordship held the consent to be insufficient.

In *R.* v. *Bengert (No. 3)*,[222] on the other hand, a different result was reached. There, the prosecution sought "to introduce certain private communications between alleged conspirators by virtue of expressed consent given in the witness box . . . by some of the alleged conspirators."[223] As Berger J. elaborated, "[t]he witnesses who gave their consent had earlier agreed to co-operate with the police to avoid being charged themselves,"[224] and "[t]he agreement to co-operate with the police . . . entailed the giving of consent to the admission of the private communications . . . ."[225] As His Lordship also stated: "All had been promised immunity. Some are now under police protection; they are not able to be employed, so they are receiving a monthly payment of $800. Some have been promised large amounts of money, $50,000 in two cases, $35,000 in one and $30,000 in one other, to enable them to establish new lives when the trial is over."[226] In these circumstances, His Lordship expressed the view that "the consent of these witnesses was obtained by the threat of prosecution and the promise of immunity and by the money and other consideration"[227] and that, if the confession rule were applicable, "the consents obtained would not render the private communications admissible."[228] Nevertheless, he determined that the consents were valid and the evidence admissible since "[t]he rule relating to confessions is designed to ensure that statements made by accused persons are statements that

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217. *Ibid.* at 298.

218. *Ibid.* at 299.

219. (1977) 39 C.C.C. (2d) 465 (Man. Q.B.), aff'd (1979) 47 C.C.C. (2d) 194 (Man. C.A.).

220. *Ibid.* at 466.

221. *Ibid.*

222. (1978) 15 C.R. (3d) 13 (B.C.S.C.).

223. *Ibid.* at 14, Berger J.

224. *Ibid.*

225. *Ibid.*

226. *Ibid.*

227. *Ibid.*

228. *Ibid.*

can be relied upon"[229] and that "[n]o such issue arises under s.178.16(1)(*b*) [now s. 189(1)(*b*)]."[230] He further explained: "Suffice it to say that in the case at bar the witnesses had to make a choice. They were not compelled to consent. They could have refused to co-operate, could have refused to consent and taken their chances at trial. It can be said of each witness that his mind went with the choice he made."[231]

In *Goldman* v. *The Queen*,[232] which dealt with consent under what is now *Criminal Code* paragraph 184(2)(*a*), a majority of the Supreme Court of Canada later referred to "consent . . . given because of promised or expected leniency or immunity from prosecution" and said that "[i]nducements of this nature or compulsion resulting from threats of prosecution would render inadmissible a confession or statement made by an accused person to those in authority because the confession or statement could be affected or influenced by the inducement or compulsion"[233] but that "[d]ifferent considerations arise . . . where a consent of the kind under consideration here is involved."[234]

VI. The Enforcement of Immunity Agreements

Canadian courts have been prepared to enforce immunity agreements in cases where they have been breached. As Berger J. of the British Columbia Supreme Court said in *Re Smith and The Queen*,[235] when finding an abuse of process in the Crown's attempt to repudiate its agreement not to proceed with charges, "[t]he ordinary man is entitled to expect that the Crown will keep its word."[236]

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229. *Ibid.*

230. *Ibid.*

231. *Ibid.* at 15.

232. [1980] 1 S.C.R. 976 at 1006, *per* McIntyre J., with whom Martland, Ritchie, Pigeon, Dickson, Beetz, Estey and Pratte JJ. concurred. See now *R.* v. *Duarte*, [1990] 1 S.C.R. 30.

233. *Goldman, ibid.*

234. *Ibid.* See also *Rosen* v. *The Queen*, [1980] 1 S.C.R. 961. In *Voutsis*, *supra*, note 133, a more recent case, a witness "gave the police a formal signed consent to intercept her communication with the [accused] and to have the intercepted communication admitted into evidence at any subsequent trial" (*per* Cameron J.A. at 455). Dealing with the way the trial judge had dealt with the issue of consent, the Saskatchewan Court of Appeal said, *per* Cameron J.A. at 455:

> He found that [the witness] understood the nature of her consent: that she was aware of what she was doing when giving it; that she appreciated the significance of her act; that she was aware of the use which the police would make of her consent should an offence be committed in the course of her meeting with [the accused]; and that she had given her consent knowingly, voluntarily, and free from coercion. Though satisfied she had consented, as she did, in return for a promise made to her by the police to drop a number of outstanding charges against her — charges having to do with obtaining narcotics illegally — he concluded that her consent had been made voluntarily and without coercion. He noted, as well, that [the witness], in her testimony, had signified her consent to the admission of the communication into evidence, saying he was satisfied that she knew what she was doing and understood the consequences of it.
>
> Having regard for the whole of the evidence and the way in which the trial judge approached the issues, we can find no tenable basis for interfering with his conclusion that the Crown had satisfied the statutory pre-conditions to the admission of the intercepted communication.

235. (1974) 22 C.C.C. (2d) 268.

236. *Ibid.* at 272.

In the *Betesh* case,[237] referred to earlier, Graburn Co. Ct J. enforced an immunity agreement by staying proceedings against the accused as an abuse of process. In the course of doing so, His Honour referred *inter alia* to the case of *R.* v. *Agozzino*[238] (wherein the Ontario Court of Appeal had enforced a plea agreement by directing a stay of proceedings) and said in part:

> One final word: it may be said that my judgment today deprives a citizen of access to the Courts for redress of a wrong allegedly done to him. Such an assertion is untenable on two grounds. This is a criminal prosecution. Hence it is not the citizen, but the State which has been denied access to the Court. Nor is it the Court which has denied access to the State in that Court. The State has itself denied itself access to the Court by virtue of the agreement of April 26, 1974.
>
> It may be considered by many people, including myself, that the immunity clause in the agreement of April 26, 1974, was most ill advised, excluding as it did a citizen allegedly injured from invoking the machinery of the criminal law.
>
> However, ill advised as I consider it to have been, to permit this prosecution to proceed in the light of the agreement and of . . . *Agozzino* would be contrary to the law.
>
> The Crown is bound in my view by its undertaking . . . , it constitutes an abuse of the process of this Court for the Crown to violate and breach its undertaking.[239]

In *R.* v. *Crneck*,[240] there had been an agreement, before the accused Bradley made a statement in writing to the police, that the statement would not be used in any proceedings against her and that she would be called as a witness against the accused Crneck, rather than be tried as well, if the statement corresponded with an earlier one and was compatible with certain statements by others. Following the giving and assessment of the statement, the prosecutor gave an undertaking to Bradley's lawyer that she would not be tried but would be called as a witness against Crneck. When a new prosecutor decided to proceed against Bradley notwithstanding these arrangements, Bradley applied to have the proceedings stayed on the basis of "manifest prejudice"[241] to her as well as on the ground of an abuse of process of a kind that "brings . . . the administration of justice into disrepute."[242] Allowing the application on the basis that ". . . Miss Bradley would suffer oppression or serious prejudice within the meaning of the words in the doctrine of abuse of process,"[243] Krever J. said, in part:

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237. *Supra*, note 14.

238. [1970] 1 C.C.C. 380.

239. *Supra*, note 14 at 252.

240. (1980) 55 C.C.C. (2d) 1 (Ont. H.C.).

241. *Ibid.* at 10, Krever J.

242. *Ibid.*

243. *Ibid.* at 13.

> If the Crown is permitted to withdraw from the agreement to discontinue the proceedings against Miss Bradley after she has fulfilled her part of the bargain, the Crown, in my opinion, will have caused serious prejudice to her in her defence on this charge. It is important to keep in mind that she is jointly indicted with Miss Crneck, who is not a party to the agreement and cannot, therefore, be affected or prejudiced by it. If Miss Bradley were to take the witness-box in her own defence, as, of course, she has a perfect right to do, at the trial, and were to put the blame for the deed on Miss Crneck, Miss Crneck's counsel would be entitled to cross-examine Miss Bradley on her credibility. He would be entitled, in the course of so doing, to refer to the agreement — I am not now referring to the contents of the statement, but to the agreement with the Crown — and to suggest it was an attempt to obtain immunity from prosecution and thus avoid conviction by blaming Miss Crneck. The jury would thus learn of the agreement, and seeing Miss Bradley in the prisoners' box, might possibly draw an inference that for the Crown to have reneged on the agreements points to her guilt. If that can be overcome by a proper charge, which I doubt, the attack by Miss Crneck on Miss Bradley's credibility by reference to the agreement, which as I have indicated, counsel for Miss Crneck would be entitled to make, could not. Miss Bradley might well thus be deterred from taking the witness-box in her own defence and be deprived of, or suffer a diminution in, a real opportunity of making full answer and defence.[244]

It need not be prosecution of the immunized person that triggers action to have the agreement enforced. The recent decision of the Supreme Court of Canada in *R.* v. *A.*,[245] for example (which does not itself refer to an agreement involving immunity from prosecution), has important implications for agreements that involve protection of the witness or of his or her family. In that case, "[t]he R.C.M.P. undertook to provide protection for A, B and C"[246]; however, "there was a perceived danger to the appellants arising from the testimony to be given by one of them who was subpoenaed to testify at a criminal trial,"[247] and "[a]s a result of the perceived threat, an application by way of *certiorari* was brought to quash the subpoena or, alternatively, for a remedy pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms*."[248] As was also noted, "A specifically swore that he was ready to testify either if protection was provided B and C or in the alternative if the R.C.M.P. satisfied the judge hearing the application that the provision of protection for B and C was no longer necessary."[249] Although the judge to whom the application had been brought "dismissed it on the grounds firstly, that the subpoena was validly issued and secondly, that B and C were out of the country and a s. 24 *Charter* remedy was not available to persons living outside Canada,"[250] a majority of the Supreme Court of Canada found that the judge had erred in so ruling. In the course of giving his reasons, Sopinka J.[251] noted that "clearly the court can control abuse of its own process,"[252] that "[t]he subpoena power can be abused notwithstanding that on its face

244. *Ibid.* at 12-13.

245. [1990] 1 S.C.R. 995.

246. *Ibid.* at 998, Cory J.

247. *Ibid.* at 997.

248. *Ibid.*

249. *Ibid.*

250. *Ibid.* at 998.

251. With whom Wilson, L'Heureux-Dubé and Gonthier JJ. concurred.

252. *R.* v. *A.*, *supra*, note 245 at 1003.

the subpoena is regular,"[253] and that "[i]f ... the conduct of the authorities amounted to an abuse of the use of subpoena powers, some form of relief would have been available."[254] Moreover: "[I]f a breach of s. 7 had been made out, relief could be granted to the applicants. The threat to B and C affected not only them and the security of their persons, but A as well. Protection for them was relief for A even though the actual physical acts might have been required to be performed outside the jurisdiction."[255]

It is not always easy to determine whether there is any immunity agreement to enforce. This difficulty is made clear by the recent case of *Demers*.[256] There, the accused appealed against convictions on several charges, arguing that the trial judge should have stayed the charges against him. In his motion before the trial judge, the accused had alleged that two police officers had promised him that proceedings on charges of this nature would be stayed if he provided information about a homicide, and that he had been told that a representative of the Crown attorney's office had approved of this arrangement. Prosecuting the accused on these charges, it had been argued, was an abuse of process and infringed *Charter* sections 7, 9, 11 and 12. "Unfortunately," as Kaufman J.A. later noted on behalf of the Quebec Court of Appeal, however, "the Crown Attorney in question could not recall with certainty what had occurred ...."[257] In his testimony on the motion, he conceded that "if [Demers] was not involved in the murder"[258] and "if there had been a question of him testifying against the others," then "at that time steps would have been taken."[259] However, he added: " ... I doubt that at the outset I negotiated that with the police officers or said that the proceedings against Demers would be completely stayed in exchange for whatever."[260] He went on to agree with the statement (relating, apparently, to the content of his discussion with the police officers with whom the accused had been speaking[261]) that he had been "in complete agreement that [Demers] remain at liberty in order to collaborate with the police in clearing up the murder of Robert Vallée."[262]

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253. *Ibid.*

254. *Ibid.*

255. *Ibid.*

256. *Supra*, note 135.

257. *Ibid.* at 56. The Crown attorney testified, at 56, in part as follows:

> Q. To your knowledge, was there any undertaking brought to your attention and which you would have acquiesced to, or that you would have refused, to the effect that there would be a stay of the proceedings against Demers on the charge of robbery on October 1st?
>
> A. As I told you before, I do not remember precisely. I strongly doubt undertaking at that time to do something of that nature.

258. *Ibid.*

259. *Ibid.*

260. *Ibid.*

261. As the Court said, *ibid.*, *per* Kaufman J.A.: "We are told that the purpose of this consultation was to obtain a temporary stay of the robbery charges so that Demers could remain at liberty while aiding the police."

262. *Ibid.*

In his efforts to determine whether there had been an immunity agreement and, if so, whether that agreement had been breached, Kaufman J.A. referred to the allegations in the accused's motion and said:

> If I may say at the outset, this is the type of situation which is brought about by "deals" made by suspects and the police. The problem is compounded where, as here, the Crown intervenes. Because of the nature of these "arrangements," nothing is reduced to writing, and it is, therefore, not surprising that undertakings so reached are subject to misinterpretation. This is a risk inherent in the process, and while it may be necessary for the authorities to offer inducements in return for information, it is not easy for the courts to untangle, *ex post facto*, the claims, sometimes sincerely made, of the parties involved.
>
> . . .
>
> I stress again that, in my view, an offer of immunity, in an appropriate case, is not necessarily a bad thing *per se*. Nor am I surprised that the Crown Attorney, giving evidence almost a year and a half after the events, could no longer recall the details.[263]

Even if the existence of an immunity agreement is proved, its contents or interpretation may be disputed.[264] In *Re Smith and The Queen*,[265] Crown counsel had told the accused, who was charged with possession of marijuana for the purposes of trafficking, "that if he did decide to turn in this other marihuana, other than the stuff which had been seized, that no charge would be laid with respect to that marihuana."[266] The accused thereupon turned over the marijuana, but was charged with two additional counts of conspiracy on the footing "that the two counts of conspiracy are not covered by the deal, that [Crown counsel's] promise extended merely to the possibility of a charge of possession or of trafficking being laid, and went no further."[267]

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263. *Ibid.* at 55, 56.

264. See *Re Bruneau and The Queen* (1982), 69 C.C.C. (2d) 200 (B.C.S.C.), where the accused applied for *mandamus* to require an abuse of process argument to be considered. The accused alleged, in effect, that there had been a combined plea and immunity agreement which the Crown had breached. It is unclear from the report, however, whether the Crown was denying the existence of the agreement, its contents, the accused's fulfilment of his obligations under it, or the Crown's breach of it. Spencer J. said in part, at 201, 202:

> The applicant is charged with breaking and entering with intent and with breaking and entering and committing an indictable offence. He alleges that at the time he was first charged the Crown entered into an agreement with him that if he would reveal the whereabouts of a large cache of marijuana and plead guilty to a charge of possession of marijuana for the purpose of trafficking, he would not be proceeded with on these charges, provided also that he would agree to submit to a lie-detector test in connection with their circumstances. He alleges that pursuant to that agreement he revealed the cache to the police, pled guilty to the drug charge and was prepared to undergo the lie-detector test but was unable to keep the appointment fixed by the police for it. He alleges that subsequently he offered to make himself available for the test but that the police refused him a second opportunity and that the Crown has subsequently, based on his refusal to take it, proceeded with these charges. I emphasize that those are allegations.
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> . . .
>
> When this matter first came before me on an application for a writ of prohibition . . . Crown counsel conceded that if the facts were as alleged by the applicant they would amount to an abuse of process by the Crown but the Crown does not admit the truth of the allegations . . . .

265. *Supra*, note 235.

266. *Ibid.* at 271.

267. *Ibid.*

In *R.* v. *Georgiadis*,[268] an Australian case, the Court was required to determine the extent of the immunity that had been provided to the accused notwithstanding that the Attorney General's undertaking to the accused had been reduced to writing. In the course of delivering his judgment, Ormiston J. of the Supreme Court of Victoria stated that the agreement should be construed "in the same way as an ordinary agreement,"[269] but that "it is desirable that it should be given a benevolent construction in favour of the person to whom it is given."[270] Having said "that these undertakings must be . . . construed bearing in mind the public interest in bringing criminals to justice,"[271] His Lordship added: "I do not believe I should read the document narrowly so as to defeat the policy interest in giving such indemnities, whatever might be the precise legal character of the undertaking."[272]

Another difficulty with enforcement of immunity agreements lies in determining whether the informer or witness has fulfilled his or her part of the bargain. This is evident in *Demers*.[273] There, where the accused argued that he had been promised immunity with respect to certain charges in exchange for information relating to a homicide, the police had ended up charging the accused with murder in connection with that killing and had laid the charges to which the alleged immunity related after the accused was acquitted on the murder charge. In disposing of the appeal, the Quebec Court of Appeal said:

> Did the accused aid the police? The evidence is far from conclusive. On the one hand, as the trial judge noted, he failed to keep an appointment with one of the suspects at which the police hoped to record, by means of a hidden transmitter, the conversation which might ensue. On the other hand, Demers did make a declaration in which he incriminated two persons. As the judge said, [TRANSLATION] "That's all, but it is also a lot, that's true." As noted in the motion, these two persons eventually pleaded guilty to reduced charges of manslaughter.
>
> It may, of course, be that the police subsequently discovered that the accused was far more implicated in the murder than was at first believed, and that is why he was charged with the murder. As stated above, he was acquitted on this charge, and it was at that point that he was rearrested and charged in connection with the robbery. The acquittal, incidentally, has been appealed by the Crown.[274]

268. [1984] V.R. 1030.

269. *Ibid.* at 1037.

270. *Ibid.*

271. *Ibid.* at 1038, citing Smith, *supra*, note 12 at 324, and *Turner* v. *Director of Public Prosecutions*, *supra*, note 116 at 73.

272. *Georgiadis*, *supra*, note 268 at 1040.

273. *Supra*, note 135.

274. *Ibid.* at 52, Kaufman J.A.

CHAPTER FOUR

Our Reform Proposals

As we suggested at the beginning of this working paper, we consider that entering into agreements to provide immunity from prosecution may be an appropriate exercise of prosecutorial discretion from time to time. As we also suggested, however, we believe that agreements of this nature need to be regulated. In the interest of advancing the principles we referred to earlier on (particularly those of fairness and efficiency), therefore, and to help ensure that the exercise of prosecutorial discretion in this area is placed on a rational footing, we have developed a number of rules to govern the process of providing immunity.

Our rules are not comprehensive, but are intended to serve as a basic framework. While some of them may be suitable for legislative implementation, others will be more appropriate for adoption in the form of uniform guidelines. Although we have made no firm decision on this question, it strikes us that recommendations 1, 2, 4 and 13 to 16 lend themselves best to legislative expression.

I. Immunity Agreement Defined

RECOMMENDATION

1. The term "immunity agreement" should be defined as any agreement by the Crown to refrain from prosecuting a person or group for a crime or crimes, or to terminate any prosecution of a person or group, either wholly or partially in return for the provision of evidence, information, co-operation, assistance or some other benefit.

Commentary

This recommendation summarizes the exchange of consideration that is the essence of all "immunity from prosecution" agreements. It is worded broadly, in recognition of the various purposes that immunity agreements may serve,[275] and to encompass the various forms of consideration that persons may be required to provide in order to obtain immunity.[276]

The definition deals with both "pure" immunity agreements and hybrid agreements in which immunity and plea agreements are combined. As discussed earlier, we are mindful of the fact that incomplete forms of immunity exist, and that immunity agreements may be combined with plea agreements. Where a guilty plea is involved, it is our position that our proposed regime for plea discussions and agreements should always apply.[277] However, we see nothing inconsistent with having both regimes apply when plea and immunity agreements are made simultaneously, and we believe this can be accommodated. Ultimately, we consider that immunity and plea agreements can be dealt with within the context of a single, comprehensive regime.

The word "terminate," used in this recommendation, must be read in the light of the proposals we have made in another recent working paper (Working Paper 62) entitled *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor*.[278] In that paper, we pointed out that there were various ways in which the Crown could terminate a prosecution at present, and that the consequences of termination depended on the method chosen.[279] We recommended *inter alia* that "[t]he Attorney General's statutory power to stay proceedings and common-law power to withdraw charges should be abolished"[280] and that "[t]hose powers should be replaced by a statutory power to discontinue proceedings, by entering either a temporary or permanent discontinuance."[281] By virtue of the proposals we have made in Working Paper 62,[282] the Crown's ability to prosecute a person who has not lived up to the terms of an immunity agreement may continue to be affected (although somewhat differently) by the method of termination selected or agreed upon.[283]

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275. Our rules do not specifically address immunity for defence witnesses, but are not designed to preclude it. See *Chambers*, *supra*, note 101; Thomas D. Dinackus, "Defense Witness Immunity in New York" (1985-86) 71 Cornell L.R. 890.

276. In *Betesh*, *supra*, note 14, an unusual case that would be covered by our definition, the Crown had agreed not to prosecute any of the members of certain postal unions in order to settle a strike. In holding the prosecution in that case to be an abuse of process, Graburn Co. Ct J. remarked, *supra*, note 14 at 238: "One might very well query the wisdom of the federal authorities in giving an undertaking not to prosecute criminal offences occurring during the strike with the object of terminating it; however, it is not with the wisdom of the undertaking with which the Court is concerned."

277. See LRC, Working Paper 60, *supra*, note 1.

278. LRC, Working Paper 62, *supra*, note 15.

279. *Ibid.* at 99-101.

280. *Ibid.*, rec. 34 at 101.

281. *Ibid.*

282. See *ibid.*, recs 35-45 at 102-14.

283. See rec. 14, below at 66.

II. The Authority to Provide Immunity

RECOMMENDATION

2. Only the Attorney General, the Attorney General's deputy, the Director of Public Prosecutions and their respective agents should have the authority to enter into an immunity agreement on behalf of the Crown.

Commentary

This recommendation establishes who should be permitted to act in providing immunity. It should be read in conjunction with recommendation 3, which requires consideration of the public interest. As this recommendation indicates, we consider the primary guardian of the public interest to be the Attorney General.[284]

Our recommendation does, however, take into account the proposals we have made in Working Paper 62,[285] concerning the creation of the office of the Director of Public Prosecutions. As we stated there, the Director "should be in charge of the Crown Prosecution Service, and should report directly to the Attorney General,"[286] he or she "should have all of the criminal-law-related powers of the Attorney General, including any powers given to the Attorney General personally,"[287] and "[t]he Attorney General should also retain these powers."[288] It was our view that "[t]he Attorney General should have the power to issue general guidelines, and specific directives concerning individual cases, to the Director"[289] and that, in turn, "[t]he Director should have the power to issue general guidelines, and specific directives concerning individual cases, to Crown prosecutors."[290]

By virtue of this recommendation and the recommendations in Working Paper 62, both the Attorney General and the Director would have the power to provide immunity. (In this respect, the situation would be similar to that existing in England.[291]) Both would

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284. See, on this point, Ratushny, *supra*, note 18 at 400-01.

285. LRC, Working Paper 62, *supra*, note 15.

286. *Ibid.*, rec. 1 at 53.

287. *Ibid.*, rec. 9 at 54.

288. *Ibid.*

289. *Ibid.*, rec. 7 at 53.

290. *Ibid.*, rec. 8 at 54.

291. For a discussion of the respective powers of the Director of Public Prosecutions and the Attorney General in this regard, see Edwards, *supra*, note 14 at 459-74.

also have the power to issue guidelines and directives concerning the provision of immunity, and we would expect those guidelines to deal, among other things, with circumstances in which immunity agreements may be entered into by representatives of the Attorney General or Director of Public Prosecutions.

Although we recognize that immunity agreements may originate with discussions between informers and police officers as a matter of practice, we do not believe that the police should be empowered to conclude immunity agreements on their own.[292] The police, in our view, lack the political accountability essential to perform that function; for this reason, "unofficial" immunization of police informers (that is, agreements by the police to refrain from charging) ought to be discouraged as well.[293] We realize that police officers must have a reasonable degree of latitude and discretion in performing their function as enforcers of the law.[294] As the McDonald Commission has suggested, for example, police officers should have the discretion to forego charging some offenders if it would jeopardize the undercover investigation of more serious offences; in these circumstances, selective law enforcement should not be regarded as a "breach of trust."[295] As the McDonald Commission has also suggested, however, different considerations should apply where the police simply fail to uphold the law in order to maintain the flow of information from an informant.[296]

RECOMMENDATION

3. The authority to enter into an immunity agreement on behalf of the Crown should be exercisable when exceptional circumstances require that immunity be provided in the public interest and the benefit of providing immunity clearly outweighs the social cost of doing so.

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292. See, on a related point, *Kirzner* v. *The Queen*, [1978] 2 S.C.R. 487 at 491, *per* Laskin C.J.C., speaking for himself and Spence, Dickson and Estey JJ.: "The police, or the *agent provocateur* or the informer or the decoy used by the police do not have immunity if their conduct in the encouragement of a commission of a crime by another is itself criminal. Of course, whether they are prosecuted is a matter for the Crown attorneys and ultimately, for the Attorneys-General." See also *R.* v. *Ormerod*, [1969] 2 O.R. 230 (C.A.).

293. See, on this question, Joseph Goldstein, "Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice" (1960) 69 Yale L.J. 543 at 562-73. We are supported in our view by input from a number of police representatives with whom we have consulted. We have taken no position as to what would be an effective method for discouraging unofficial immunization by the police, although it strikes us that disciplinary action is one option.

294. See Canadian Committee on Corrections, *Report of the Canadian Committee on Corrections: Toward Unity: Criminal Justice and Corrections* (Ottawa: Information Canada, 1969) at 45-46 (Chair: R. Ouimet).

295. See McDonald Commission, *supra*, note 2 at 315.

296. *Ibid.* See, on the issue of discretion and the use of informers by the police, Stanley A. Cohen, *Invasion of Privacy: Police and Electronic Surveillance in Canada* (Toronto: Carswell, 1983) at 38-43.

Commentary

This recommendation both acknowledges the legitimacy of entering into immunity agreements, in appropriate circumstances, and defines the general circumstances in which doing so should be permissible. The first branch of the test that we propose demands that the power to enter into immunity agreements be used sparingly; it calls for consideration of the public interest and, by using the word "require," makes it clear that necessity, rather than convenience, should govern.[297] Providing immunity may be necessary to achieve a variety of goals that are in the public interest, and it would be impossible for us to enumerate them all in this recommendation. Immunizing certain persons may be necessary to further a particular prosecution; to gain information about particular crimes (for example, the location of bodies) in order to help alleviate suffering; to gain information necessary to protect the public or particular individuals from imminent danger; to help settle a labour dispute or quell civil unrest, and so on. The public interest, of course, must be distinguished from personal advantage;[298] however, it need not necessarily coincide with fluctuating public opinion.

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297. Both necessity and the public interest are referred to in the United States Department of Justice form from which much of rec. 3 is adapted. See *infra*, note 304.

298. Cases dealing with the subject of contracts entered into for private advantage are of interest on this point. See, *e.g.*, *Morgan* v. *McFee* (1908), 14 C.C.C. 308 (Ont. H.C.), where the Court upheld a judgment in which the trial judge had said, at 310, that "[i]t is, of course, against public policy, in all cases where a charge is made involving the public interest, that the prosecution should be dropped by the parties entering into such an agreement, and any contract founded upon such agreement is an absolute nullity." See also *Keir* v. *Leeman and Pearson* (1844), 6 Q.B. 308 at 321, 115 E.R. 118 at 124 (quoted by Walsh J. in *Johnson* v. *Musselman* (1917), 37 D.L.R. 162 at 164 (Alta S.C.A.D.)), where Lord Denman C.J. said that "if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it." In *Windhill Local Board of Health* v. *Vint* (1890), 45 Ch. D. 351 at 363, Cotton L.J. said:

> [T]he Court will not allow as legal any agreement which has the effect of withdrawing from the ordinary course of justice a prosecution when it is for an act which is an injury to the public. It would be the case of persons taking into their own hands the determining what ought to be done; and that ought not to be taken into the hands of any individuals . . . but ought to be left to the due administration of the law, and to the Judges, who can determine what in the particular case ought to be done. I think it goes beyond saying, that in the particular case there can be or cannot be any evil to the public; but you are taking the administration of the law, and the object which the law has in view, out of the hands of the Judge and putting it into the hands of a private individual. That to my mind is illegal.

Similarly, in *Whitmore* v. *Farley* (1881), 45 L.T. 99 at 101, Lush L.J. stated:

> Every agreement . . . by which a prosecutor, in consideration of a private benefit, has consented to compound or withdraw from a charge of felony is one which, on account of its illegality, the court will not enforce. There is certainly no legal obligation on a person who has suffered injury by the commission of a felony to prosecute the person who has committed the crime; but if he has once instituted the prosecution, he has acted on behalf of the public, and used the name of the sovereign as representing the public, and cannot legally enter into an binding agreement to discontinue the prosecution. The cases clearly establish that any such agreement in consideration of a benefit to the prosecutor is illegal and cannot be enforced.

And see *Peoples' Bank of Halifax* v. *Johnson* (1892), 20 S.C.R. 541; *Johnson* v. *Musselman*, *supra*; *Hawkes* v. *Waugh*, [1948] 3. D.L.R. 397 (N.B.S.C.A.D.), all cited in G.H.L. Fridman, *The Law of Contract in Canada*, 2d ed. (Toronto: Carswell, 1986) at 358-59.

In *Hendry* v. *Zimmerman*, [1948] 1 W.W.R. 385 at 391 (Man. C.A.) (also cited by Fridman, *supra* at 358), Coyne J.A. said that an "[a]greement to give compellable evidence . . . was without consideration . . . ."

The second branch of recommendation 3's test demands a clear recognition of the social cost attached to immunity agreements; it requires that any immunity agreement be clearly justifiable, notwithstanding that cost. The more serious a crime is, of course, the more difficult it will be to justify providing immunity for it. If immunity were to be granted for a bank robbery, for example, the benefit to the public would have to be considerable to counterbalance the inevitable frustration of the community's sense of justice. The immunized person's assistance in bringing a minor offender to justice would not tip the scales; however, that person's assistance in neutralizing a threat to national security might.

Recommendation 3 should be read in conjunction with recommendation 5. Both contemplate guidelines rather than legislation. A mere failure by the Attorney General, or his or her representative, to apply recommendation 3's test, or to weigh the factors set out in recommendation 5 in doing so, should not alter the effectiveness of an immunity agreement as a bar to prosecution.[299]

RECOMMENDATION

4. The authority to enter into an immunity agreement on behalf of the Crown should not include the authority to dispense prospectively with the application of laws to particular persons or groups.

Commentary

This recommendation reflects our view that the blanket, prospective exemption of certain individuals or groups from the application of valid laws would amount to a usurpation of the powers of Parliament. It is consistent with the ruling in the *Catagas* case,[300] discussed above. The recommendation would in no way limit the authority of "the Attorney General, the Attorney General's deputy, the Director of Public Prosecutions and their respective agents"[301] to provide immunity to groups for past crimes. Nor would it detract from any power of Parliament to exempt particular persons or groups from the application of the law statutorily.

299. See rec. 14, below at 66.

300. *Supra*, note 120.

301. See rec. 2, above at 47.

III. Whether to Provide Immunity: Factors to Be Considered

RECOMMENDATION

5. In deciding whether to enter into an immunity agreement, the Crown should consider

(a) where evidence or information is involved, whether there are other indicators tending to confirm that the evidence or information is true;[302]

(b) the gravity of any crime concerning which evidence, information, co-operation, assistance or other benefit is to be provided;[303]

(c) the gravity of the crime(s) to which the immunity agreement would relate;

(d) the importance of the evidence, information, co-operation, assistance or other benefit to be provided;[304]

(e) whether it is possible to obtain the evidence, information, co-operation, assistance or other benefit in another manner;[305]

(f) the gravity of the involvement of the person proposed to be immunized in any crime(s) to which the evidence, information, co-operation, assistance or other benefit relates,[306] **and the degree of that person's guilt in comparison to the guilt of any person whose prosecution would be aided by the evidence, information, co-operation, assistance or other benefit;**[307]

(g) the criminal history of the person proposed to be immunized;

(h) the number of occasions on which, and the circumstances in which, the person proposed to be immunized has received immunity in the past;[308]

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302. Adapted from "Decision making" *Evening Post* (25 October 1984) (Wellington, N.Z.), quoted in C.B. Cato, "Queen's Evidence in New Zealand: The Case of *R.* v. *McDonald*" [1984] N.Z.L.J. 398 at 402. See also Richard L. Thornburgh, "Reconciling Effective Federal Prosecution and the Fifth Amendment: 'Criminal Coddling,' 'The New Torture' or 'A Rational Accommodation'?" (1976) 67 J. Crim. L. & Criminology 155 at 158-59.

303. Adapted from: "Decision making," *ibid.*; Thornburgh, *ibid.* at 158.

304. Adapted from: "Decision making," *ibid.*; Thornburgh, *ibid.* at 158; and a 1978 United States Department of Justice compulsion order application authorization request form (Form OBD-111-A) [hereinafter U.S. compulsion order form].

305. Adapted from U.S. compulsion order form, *ibid.*

306. Adapted from: "Decision making," *supra*, note 302; Thornburgh, *supra*, note 302 at 158.

307. Adapted from U.S. compulsion order form, *supra*, note 304.

308. *Ibid.*

(i) whether the goal of public protection would be better served by the obtaining of the proposed evidence, information, co-operation, assistance or other benefit, or by the conviction of the person proposed to be immunized;[309]

(j) the likelihood that, without immunity, the person proposed to be immunized could be convicted of the crime(s) to which the immunity agreement would relate;[310]

(k) the interests of any victims; and

(l) whether other persons, such as the police, oppose the provision of immunity to the person proposed to be immunized and, if so, their reasons.[311]

Commentary

Recommendation 5 adopts as sound a number of considerations that others have articulated from time to time for the purpose of placing immunity decisions on a rational footing. The criteria are not weighted — that is, their importance relative to one another has not been pre-determined; they do not, by themselves (for example, through the application of some mathematical formula), dictate the circumstances under which immunity should be provided or refused. We have refrained from making any hard and fast rules in this respect, although we have asserted a general principle in recommendation 3.

Paragraph (a), like paragraphs (b) and (d), discussed below, relates to the value of the consideration the Crown is to receive. Uncorroborated evidence or information, for example, will be less valuable to the Crown than evidence or information that is corroborated. The word "indicators," in paragraph (a), is a broad term intended to cover more than just evidence (in the strict sense).

Paragraph (b) states a criterion essential to any assessment of the value of the consideration that the Crown will be receiving, namely, the gravity of any offence that the immunity will help to prosecute. (We intend the word "gravity" to allow consideration not merely of the potential penalty attached to the offence in question, but of the circumstances attending its commission as well.) It is clear from recommendation 3 that we regard the power to provide immunity as one that should be exercised sparingly.

Paragraph (c) relates to the consideration flowing from the Crown. It would require that the gravity of the offence for which immunity is asked be assessed and that it be weighed, for example, against the gravity of the offence to which the proffered "evidence,

309. Adapted from statement of Sir Michael Havers, U.K., H.C., *Parliamentary Debates*, 6th ser., vol. 12, col. 12 (9 November 1981), quoted by Smith, *supra*, note 12 at 302.

310. Adapted from "Decision making," *supra*, note 302.

311. Adapted from U.S. compulsion order form, *supra*, note 304.

information . . .'' and so forth relates. We tend to agree with Professor A.T.H. Smith's view that there should, in theory, be no criminal offence for which immunity cannot be granted provided that political accountability for immunity decisions is assured.[312] As Professor Smith has pointed out, there are situations in which persons granted immunity for their participation in even the most grave offences have sometimes been instrumental in securing the conviction of numerous other serious offenders.[313]

Paragraph (d) is self-explanatory. Like paragraph (a), it is concerned with the consideration the Crown will receive.

Paragraph (e) would require that some thought be given to less drastic alternatives to providing immunity. The most obvious alternative, perhaps, would be to use a different source — that is, one who requires nothing in return. Another alternative would be to conclude a plea agreement involving only sentence concessions on the part of the Crown.

Paragraph (f) is concerned with the question of whether the right person is being immunized. Where there are several persons involved in a particular offence, for example, we favour the proposition that it would rarely (if ever) be appropriate to immunize the most guilty offender in order to obtain evidence against the others.[314] Nor, ordinarily, would we consider it appropriate to provide immunity on a ''first come, first served'' basis; we agree with the suggestion of one commentator that, while this approach may be justified where the offenders involved are indistinguishable in terms of their respective degrees of guilt, in other cases determining who (if anyone) should receive immunity requires a global assessment as to which prosecutions advance the interest of the public.[315]

Paragraph (g) relates to paragraph (i) and to the question of how important it is to prosecute the person proposed to be immunized.

Paragraph (h) would demand an examination of the Crown's past relationship with the person seeking immunity. Generally speaking, a history of immunization and repeated offences should operate as a negative factor; a pattern of this sort may indicate that the process of immunization (where this offender is concerned) is taking on the character of a licensing arrangement.

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312. Smith, *supra*, note 12 at 325. Our recommendations do attempt *inter alia* to ensure political accountability. See, *e.g.*, rec. 2, above at 47, and rec. 16, below at 69-70.

313. Smith, *ibid.*

314. See Warren D. Wolfson, ''Immunity — How It Works in Real Life'' (1976) 67 J. Crim. L. & Criminology 167 at 178, where this point is discussed.

315. See William J. Bauer, ''Reflections on the Role of Statutory Immunity in the Criminal Justice System'' (1976) 67 J. Crim. L. & Criminology 143 at 151.

Paragraph (i) relates back to paragraphs (c) and (g) and to the question of what the Crown may be giving up by agreeing to provide immunity from prosecution in a given case. It invokes a principle we have discussed elsewhere in our work on criminal procedure — that of protection.[316] "Public protection" is a concept somewhat narrower than, but certainly related to, "the public interest."

There may be occasions on which, notwithstanding the dangerousness of a particular offender who seeks immunity, the perceived need to protect the public against that offender has been alleviated. This may be the case, for example, where the offender seeking immunity is already serving a substantial term of imprisonment or, perhaps, where the subject of the proposed immunity is in custody awaiting trial for a serious crime in another jurisdiction. The latter scenario is suggested by the relatively recent case of *R.* v. *Branco*.[317] There, the accused and an alleged accomplice had been charged with a number of serious offences after two masked men broke into the complainant's residence, assaulted her sexually and robbed her. Although the accused "denied taking part in any of the alleged offences,"[318] the alleged accomplice "admitted his involvement and testified at the preliminary hearing of the [accused] . . . ."[319] As the Ontario Court of Appeal went on to say:

> He left Canada prior to cross-examination and went to California, where he was charged with murder, robbery and grand auto theft. He agreed to testify in Los Angeles on commission on the undertaking of Crown counsel that the charges arising against him in Canada would be dropped. No such arrangement had been made prior to his testimony at the preliminary hearing, but such an undertaking was given to him with respect to his commission evidence . . . .[320]

Paragraph (j), like paragraph (c), relates to the value of the consideration flowing from the Crown. Where conviction is unlikely, the Crown will be giving up less by providing immunity than it will where conviction is more probable.

Paragraph (k) would require the Crown to consider the interests of victims of the offence in respect of which immunity would be provided, as well as the interests of any victims of an offence that the provision of immunity would help to prosecute.[321] The interests of victims, of course, might not be uniform; some victims might have a greater interest than others in ensuring that the guilty party is convicted, or in avoiding the ordeal of a trial.

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316. See LRC, Report 32, *supra*, note 59 at 27-28, where that principle is explained; LRC, *Compelling Appearance, Interim Release and Pre-trial Detention*, Working Paper 57 (Ottawa: The Commission, 1988) at 29.

317. (1988) 62 C.R. (3d) 371.

318. *Ibid.* at 372, Finlayson J.A.

319. *Ibid.*

320. *Ibid.*

321. We are inclined here to adopt the opening words and paragraph (*a*) of the definition "victim," set out in *Criminal Code* s. 735(1.4). It states:

> (1.4) For the purposes of this section, "victim", in relation to an offence,
>
> (*a*) means the person to whom harm is done or who suffers physical or emotional loss as a result of the commission of the offence, ...

Paragraph (l) is designed to ensure that input from those with a legitimate interest in the decision, where it is available, is given due consideration.

IV. Conduct in Respect of Immunity Agreements

RECOMMENDATION

6. (1) No improper inducement should be offered on behalf of the Crown for the purpose of encouraging a person to conclude an immunity agreement.

(2) The term "improper inducement" should be defined as any inducement that necessarily renders suspect the genuineness of an immunity agreement, and as including the following conduct:

(a) the laying of any charge not believed to be supported by provable facts;[322]

(b) the laying of any charge that is not usually laid with respect to an act or omission of the type attributed to the accused;[323]

(c) a threat to lay any charge of the type described in paragraph (a) or (b);[324]

(d) any offer, threat or promise the fulfilment of which is not a function of the maker's office;[325] **and**

(e) any material misrepresentation.

Commentary

This recommendation is similar to certain recommendations in our working paper on *Plea Discussions and Agreements*.[326] In the present context, the recommendation is designed to guard against practices that are inherently unfair or that might affect the reliability of evidence or information provided as the result of an immunity agreement.

Part (1) recognizes, and attempts to reduce, the possibility of overreaching by the authorities. Paragraphs (2)(a), (b) and (c) are aimed at actual and threatened "overcharging."

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322. Adapted from the American Law Institute, *Model Code of Pre-arraignment Procedure* (Philadelphia: The Institute, 1975), s. 350.3(3)(a) at 244.

323. Adapted from *ibid.*, s. 350.3(3)(b) at 245.

324. Adapted from *ibid.*, s. 350.3(3)(a) and (b) at 244-45.

325. See the definition of plea negotiation in Stanley A. Cohen, *Due Process of Law: The Canadian System of Criminal Justice* (Toronto: Carswell, 1977) at 179.

326. LRC, Working Paper 60, *supra*, note 1, rec. 3 at 40-41, and rec. 5 at 45.

Paragraph (2)(d) would encompass violence, threatened violence and so forth. It would also encompass bribery (the appearance of which may admittedly be difficult to avoid in cases where funds are required to relocate an immunized person or provide him or her with a new identity or both, livelihood and so forth). Under paragraph (2)(d), the expenditure of funds for which the person making the expenditure is accountable, in accordance with established guidelines, would be "a function of [that person's] office"; however, payments from personal or illegitimate funds would not.

Although paragraph (2)(d) is broad enough to cover an inducement that misrepresents the legal authority of the person offering it (for example, an offer or promise by a Crown attorney to grant a pardon personally), it is the broader wording of paragraph (2)(e) that is designed to deal with trickery generally.

RECOMMENDATION

7. (1) A prosecutor should not, when a person has retained counsel, have immunity discussions with the person in the absence of that person's counsel.

(2) A prosecutor with whom an unrepresented person wishes to have immunity discussions should inform the person that

(a) representation by counsel may be advantageous to the person, and

(b) if the person cannot afford to retain counsel, he or she should ascertain from the provincial legal aid plan whether he or she is eligible for assistance,

and should not thereafter have immunity discussions directly with the person unless the person has informed the prosecutor unequivocally that he or she does not intend to retain counsel.

Commentary

This recommendation is similar to a recommendation made in our working paper on *Plea Discussions and Agreements*.[327] Its primary basis is the principle of fairness.[328] As with plea negotiation, immunity negotiation is best conducted through counsel.[329]

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327. LRC, Working Paper 60, *supra*, note 1, rec. 7 at 46.

328. Sherman, *supra*, note 23 at 58, has noted that, although fairness is the more compelling justification for ensuring legal representation at immunity discussions, efficiency has been raised by some as another consideration. Sherman has disputed the argument that legal representation promotes efficiency.

329. See *Mathias*, *supra*, note 215.

We have been informed that, in some circumstances (those related, for example, to the person's concern for personal safety), a prospective informer may wish to keep his or her counsel unaware of ongoing immunity discussions. Although the appropriate solution in these circumstances might be for the informer simply to dismiss counsel, it could also be argued that the informer (who may be happy with his or her choice of counsel) should not have to take this step — that he or she should be entitled, in other words, to separate the purposes for which he or she does and does not wish to retain counsel. Although negotiating with an individual, particularly an accused person, without the knowledge of the individual's lawyer may place Crown counsel in an awkward position, we would be interested in receiving views as to whether it should nevertheless be permissible in certain circumstances (for example, where the individual has informed the prosecutor unequivocally that he or she does not wish to have counsel present).

RECOMMENDATION

8. A prosecutor who concludes an immunity agreement should endeavour to ensure that victims are informed of the agreement and the reasons for it, at an appropriate time, unless circumstances make it impractical to do so or compelling reasons such as a likelihood of serious harm to the immunized person or to another person require otherwise.

Commentary

This recommendation is designed to help maintain respect for the criminal justice system. It is similar to a recommendation made in our *Plea Discussions and Agreements*[330] working paper. It states a general rule that would not have to be complied with if "circumstances make it impracticable" or in cases where it would be unsafe.

In essence, this recommendation would regularize the practice apparently followed in the *Demers* case.[331] There, the accused had faced a number of charges arising out of a robbery, and a Crown attorney had testified that he had "probably approved"[332] an immunity agreement made with someone who, as the Quebec Court of Appeal put it, "was implicated in the robbery"[333] but who "had supplied the police with useful information against [Demers]"[334] — apparently on a murder charge of which Demers was

330. LRC, Working Paper 60, *supra*, note 1, rec. 11 at 51.

331. *Supra*, note 135.

332. *Ibid.* at 57.

333. *Ibid.*, Kaufman J.A.

334. *Ibid.*

subsequently acquitted. In the course of his testimony, the Crown attorney stated that he had discussed the informant's situation "with the victim of the robbery who wanted explanations because he did not understand." He continued: "I explained the system to him and that when there were agreements, that we kept them."[335]

V. The Form and Contents of Immunity Agreements

RECOMMENDATION

9. (1) An immunity agreement that provides immunity in respect of a grave crime or series of crimes, so designated by the Attorney General in guidelines for the purposes of these rules, or that requires a person to provide evidence, should be required to be written or otherwise recorded, and should be required to indicate

(a) the person entering into the agreement to obtain immunity;

(b) the person or persons to whom the immunity is provided;

(c) the person entering into the agreement as a representative of the Attorney General;

(d) the acts or omissions in respect of which the immunity is provided;

(e) the form the immunity will take;

(f) the evidence, information, co-operation, assistance or other benefit to be provided in exchange for the immunity;

(g) any additional commitments made by the parties, including the specifics of any financial expenditures to be made by the Crown; and

(h) what will amount to a breach of the agreement, and the consequences of such a breach.

(2) It should be mandatory that anyone entering into a written or otherwise recorded immunity agreement with the Crown or with anyone on behalf of the Crown be given a copy of the agreement immediately after its conclusion, and be required to provide a written acknowledgement that he or she has received a copy of it.[336]

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335. *Ibid.*

336. Compare the similar proposal by Cato, *supra*, note 302 at 404.

Commentary

This recommendation is designed to alleviate the sort of after-the-fact confusion apparent in many of the reported cases dealing with an alleged failure of one side or the other to live up to the terms of an immunity agreement. It reflects our allegiance to the principles of clarity[337] and efficiency.[338]

An important feature of part (1) is that it would require the Attorney General, in guidelines, to designate crimes of a nature serious enough to require that any agreement providing immunity for them be recorded and reported.[339] (Clearly, in our view, it would be unnecessarily cumbersome to require recording and a report every time a minor charge is dropped — for example, in the course of a combined immunity and plea agreement.) Part (1) would also require the Attorney General to define the circumstances in which a series of crimes, perhaps not grave when considered individually, would amount to a "grave ... series of crimes" for recording and reporting purposes. We recognize that this exercise involves considerable discretion; however, that problem is inherent in guidelines in any event.

Part (1)'s requirement for the recording of any immunity agreement that requires the provision of evidence is not discretionary. The requirement is made mandatory for disclosure purposes.[340]

Paragraph (1)(a) is self-explanatory.

Paragraph (1)(b) recognizes the possibility that third parties may occasionally be involved as recipients of immunity,[341] although we envision that the person with whom the Crown makes the immunity agreement will generally be the person who is to be immunized.

Paragraph (1)(c) is self-explanatory.

Paragraph (1)(d) is concerned with the scope of the immunity envisioned. If the immunized person is to give evidence and receive immunity in respect of offences disclosed by that evidence, the failure to define the ambit of the immunity agreement with precision may have peculiar consequences. As one Canadian textwriter has suggested, such a failure could render the agreement a blank cheque, allowing the person, once in the witness-box, to confer unlimited immunity upon him- or herself by disclosing offences that were not disclosed at the time the immunity agreement was made.[342]

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337. See LRC, Report 32, *supra*, note 59 at 25.

338. See *ibid.* at 24.

339. See rec. 16, below at 69-70.

340. See rec. 13, below at 65.

341. See *R.* v. *Bulleyment* (1979), 46 C.C.C. (2d) 429 at 445 (Ont. C.A.).

342. Ratushny, *supra*, note 18 at 401.

Although we are against providing this type of "blank cheque" immunity, we recognize that the parties may have a legitimate interest in drafting agreements that provide very broad immunity to a prospective prosecution witness. In the Australian case of *Georgiadis*,[343] where the accused faced charges arising out of a "shooting incident,"[344] the issue was whether an undertaking, given to the accused before he testified for the prosecution at another person's trial, had been worded broadly enough to ensure his immunity with respect to all offences he might testify about at that trial. Although the trial at which the accused had testified involved charges of conspiracy to import heroin, the accused had, as Ormiston J. put it, been "cross-examined in some detail about the events giving rise to the ['shooting incident'] charges and in the course of that trial admitted that he had fired the shot . . . ."[345] Under cross-examination, he had, moreover, "alleged that the shooting incident arose out of an attempt by [one of the accused in the drug trial] to have him killed."[346] In the course of holding that the undertaking immunized the accused from prosecution on the shooting charges, Ormiston J. noted the difficulty a party to an immunity agreement faces both in foreseeing the areas that his or her evidence might get into during cross-examination, and in controlling the extent of his or her testimony at that stage. He said:

> The accused was obliged to give evidence and the nature and course of the evidence could not be precisely predicted. In fact counsel for [one of the accused in the drug trial] considered it relevant to cross-examine as to the shooting incident. It was not for the accused to distinguish in the witness box what was relevant and what was not relevant. He might fairly assume that, if questions were asked and not objected to, then they were relevant to the charges then being heard. He knew not the course of the evidence and he was obliged to answer.[347]

Paragraph (1)(e) requires a statement as to how the immunity will be achieved — for example, by discontinuing[348] proceedings on existing charges, where necessary, or undertaking to discontinue future proceedings, should the need arise, and so forth.

Paragraph (1)(f) is concerned with the benefit the Crown will be receiving; it contemplates the recording of whatever detail is required to allow the making of a subsequent determination as to whether that benefit has been received. That paragraph is not intended to require the agreement to specify what a proposed witness will say; however, as recommendation 11 would require agreement that the witness's evidence be truthful, it may be that a recording of the witness's statement would be useful, should a subsequent prosecution for perjury be called for.

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343. *Supra*, note 268.

344. *Ibid.* at 1031, Ormiston J.

345. *Ibid.*

346. *Ibid.*

347. *Ibid.* at 1039.

348. See the commentary to rec. 1, above at 46.

Paragraph (1)(g) refers to promises that may be considered as embellishments on the basic exchange of immunity for assistance. The immunity agreement may, for example, require the Crown to provide protection for the immunized person or his or her family (or both), to relocate the person (and his or her family), to provide changes of identity[349] or to provide material assistance. Or it may require the informant or witness to perform some additional task, such as taking a polygraph (''lie detector'') test.[350]

Paragraph (1)(h)[351] is self-explanatory.

Part (2) is premised, essentially, on the principles of fairness and efficiency.[352] It is designed, in particular, to enhance the value of evidence given by immunized witnesses. Its purpose is illustrated by the *McDonald* case.[353] There, the police had promised two witnesses in a murder prosecution that they would not be proceeded against if they gave truthful evidence at the accused's trial, and provided that they had not shot the victim themselves. Although the promises given by the police were superseded by undertakings given by the Solicitor-General to the witnesses that were not conditional on their not having shot the victim, it seems that these undertakings were not shown to the witnesses until either shortly before or during their testimony.[354] That being so, it was later argued by the accused's counsel that the trial judge had not dealt properly with the possibility that the original arrangement with the police remained ''a continuing inducement to them to swear falsely that McDonald fired the fatal shot.''[355] Although it had been held by New Zealand's Court of Appeal that the jury had been adequately instructed in this case, and this assessment was not disputed by the Privy Council, Lord Diplock made clear the Board's opinion ''that it is to be regretted that the Solicitor-General's undertakings were not shown to [the witnesses] before their depositions were taken and a written acknowledgment of receipt of the undertakings obtained''[356] and ''that this ought to be a routine practice whenever immunity from prosecution is offered in this form to an accomplice by a law officer of the Crown.''[357]

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349. Adapted from U.S. Government co-operation agreement guidelines and non-prosecution agreement guidelines.

350. See *United States* v. *Irvine*, 756 F. 2d 708 (9th Cir. 1985), discussed by Sherman, *supra*, note 23 at 67.

351. Adapted from U.S. Government co-operation agreement guidelines and non-prosecution guidelines.

352. Part (2) may also advance the principle of accountability. For discussion of this principle, see LRC, Report 32, *supra*, note 59 at 26.

353. *Supra*, note 114.

354. As Lord Diplock later said, *ibid.* at 199:

> It would appear that the undertaking to [one witness] was not actually shown to him until the *voir dire* that was held at the outset of the trial before Prichard J. in the absence of the jury, when objection was made to the admission of [these witnesses'] evidence; and that the undertaking to [the other witness] was not shown to him until, after the objection had been overruled, he was in course of giving evidence before the jury.

355. *Ibid.* at 201.

356. *Ibid.*

357. *Ibid.*

RECOMMENDATION

10. It should not be permissible for an immunity agreement to require a person to do anything unlawful, or provide immunity to any person in respect of crimes that he or she might commit in the future.

Commentary

This recommendation is straightforward. It would apply even in situations where undercover activity is thought to require the commission of a particular crime.[358] Although we believe that the Attorney General and his or her representatives must retain the after-the-fact discretion not to prosecute in circumstances where to do so would run counter to the public interest,[359] we consider it neither necessary nor desirable to provide what would amount to a licence to engage in criminal activity. In our view, adopting such a course of action could only be destructive of the rule of law.[360]

Precluding immunity from the prosecution of future crimes would mean, among other things, that an immunity agreement that requires a person to provide evidence could not require the Crown to refrain from prosecuting the person for perjury in respect of that evidence.

RECOMMENDATION

11. It should be mandatory for an immunity agreement that requires a person to provide evidence to require that the evidence so provided be truthful.

Commentary

This recommendation is based, in part, on the principle of fairness. Requiring truthfulness, in our view, is consistent with the state's obligation to ensure fair trials. It is also consistent with the state's obligation to maintain the integrity of the criminal justice system and to uphold the rule of law.

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358. Committing various acts (including acts of violence) may, *e.g.*, be considered necessary in order for an undercover agent to become or remain accepted by a gang: see McDonald Commission, *supra*, note 2 at 304-07. Apparent "crimes" committed by an undercover agent may sometimes be saved by the application of certain defences; but see McDonald Commission, *ibid.* at 360-76.

359. See LRC, Working Paper 62, *supra*, note 15 at 76-84, 109.

360. See McDonald Commission, *supra*, note 2 at 541. We do not, however, preclude specific amendment to the law to exempt certain undercover agents from criminal liability in specific and clearly defined situations. See, on this point, McDonald Commission, *ibid.* at 541-44.

Recommendation 11 is also based on the principle of efficiency. As we suggested in our report on *Our Criminal Procedure*,[361] efficient procedure tends to be accurate procedure. In our view, forfeiting the ability to prosecute in return for deliberately inaccurate testimony, and securing convictions based on such testimony, would be inefficient in the extreme.

The inclusion of a provision requiring that the evidence of an immunized person be truthful no doubt reflects both common sense and standard practice. In the absence of such a provision, there is potential for some embarrassment. In *Turner* v. *Director of Public Prosecutions*, Lawton L.J. criticized the undertaking of immunity given by the Assistant Director of Public Prosecutions, saying in part that "[a]lthough it was implicit in the letter that the statements to be made by [the witness] should be truthful, it was most unfortunate that there was no express reference in the letter for the need for [the witness] to tell the truth."[362]

RECOMMENDATION

12. (1) It should be permissible for an immunity agreement to require the Crown to terminate, without regard to its merit, a private prosecution other than a private prosecution for perjury[363] in respect of evidence required to be provided under that agreement.

(2) It should be permissible for an immunity agreement that requires a person to provide evidence to require the Crown to ensure there is an independent review of any private prosecution of that person for perjury in respect of that evidence, and to terminate that prosecution if the review discloses that it is not meritorious and should not be carried forward.

Commentary

This recommendation recognizes that, to be effective, an immunity agreement may need to include protection against private prosecutions. Part (1) would, in general, enable protection to be provided against a private prosecution "without regard to its merit . . . ." In light of recommendation 11's requirement for immunity agreements to stipulate that evidence provided thereunder must be truthful, however, it would be contradictory to allow the same protection to be afforded against private prosecutions for perjury in respect of that evidence; for this reason, protection against such prosecutions is dealt with separately in part (2).

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361. LRC, Report 32, *supra*, note 59 at 24.

362. *Supra*, note 145 at 80.

363. "Perjury" here refers to the crime contemplated in clause 24(1) in LRC, *Recodifying Criminal Law: Revised and Enlarged Edition of Report 30*, Report 31 (Ottawa: The Commission, 1987) at 111. According to that clause, "[e]veryone commits a crime who makes a false solemn statement in a public proceeding for the purpose of influencing the outcome of such proceeding." Clause 1(2) in Report 31, at 11, defines "false solemn statement" as including "one which contradicts a solemn statement previously made by the same person in a public proceeding or as required by law."

Part (2) recognizes the potentially deterrent effect that the threat of a private prosecution for perjury may have on a person whose testimony the Crown wishes to obtain. We believe that the ability to provide the type of assurance referred to in part (2) is necessary in light of the indication in the reported cases that such a prosecution might be launched by the very person or persons against whom the Crown witness has testified. In *Raymond* v. *Attorney-General*,[364] for example (an English case), one of several accused persons initiated a private perjury prosecution against an individual whom the Court described as being "[a]mongst those implicated in the offences of which the defendants at the trial were accused,"[365] but whose "role was not . . . that of a defendant but of a witness for the Crown."[366] At the time the private prosecution was begun, the witness had testified at the accused's committal proceedings but the trial had not commenced. It was alleged by the accused that the witness "had committed perjury and other criminal offences in relation to the matters which had been the subject of the committal proceedings in which [the witness] had given evidence for the prosecution."[367] According to the Court, however, "[o]ne view of Mr. Raymond's initiative in instituting criminal proceedings against [the witness] at that time was that it was intended to inhibit, or at least to discredit, [the witness] in his role as a witness for the prosecution."[368] In these circumstances, the Director of Public Prosecutions took over the conduct of the accused's private prosecution and elected to call no evidence,[369] and the witness was discharged.

The sort of review that part (2) contemplates is alluded to in a relatively recent decision of the Saskatchewan Court of Appeal (although there is no suggestion that the case involved an immunity agreement). In *Re Osiowy and The Queen*,[370] where a convicted accused began a private prosecution for perjury against a Crown witness, the Attorney General's agent directed a stay only after "[t]he Department of Justice instructed the R.C.M.P. to conduct an investigation into the allegations and in due course received a response that a charge of perjury could not be supported."[371]

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364. [1982] 1 Q.B. 839 (C.A.).

365. *Ibid.* at 843, Sir Sebag Shaw.

366. *Ibid.*

367. *Ibid.* at 844.

368. *Ibid.*

369. As the Court noted, *ibid.*, *per* Sir Sebag Shaw:

> On July 16, 1979, Mr. John Wooler, a senior member of the Director's office, attended the St. Albans Magistrates' Court. He outlined the history of the matter to the bench and explained that it had become apparent from what Mr. Raymond had said when applying for the summonses that the allegations he intended to make against [the witness] had already been canvassed in the earlier committal proceedings. He went on to inform the court that the Director was satisfied in regard to a number of factors which, in his view, showed that the proceedings instituted by Mr. Raymond were vexatious and were designed to discredit [the witness] as a witness and not to bring him to justice in regard to the allegations on which the summonses were founded. Overall, the general public interest, and in particular the ends of justice, would be disserved if the summonses were proceeded with. Accordingly, so Mr. Wooler informed the court, he offered no evidence against [the witness].

370. (1989) 50 C.C.C. (3d) 189.

371. *Ibid.* at 190.

Part (2), we should emphasize, does not *require* that immunity agreements provide the protection it describes. Nor does it dictate the method to be used in terminating a private perjury prosecution once the review is completed.[372]

VI. Prerequisites to the Use of an Immunized Person's Evidence

RECOMMENDATION

13. (1) Where an immunity agreement has been concluded with a person whom the Crown intends to call as a witness, the Crown should be required to

(a) disclose the agreement to the accused so as to enable him or her to "make full answer and defence";[373]

(b) provide the accused, as required by our proposals relating to disclosure by the prosecution, with a copy of any statement made by the witness in relation to the subject-matter concerning which that witness will be testifying;[374] and

(c) disclose to the accused, so as to enable him or her to "make full answer and defence," all occasions, of which the prosecutor is aware, on which the witness has received immunity in exchange for providing evidence.

(2) Before disclosing an immunity agreement to the accused, the Crown should be able to apply for an order permitting specified parts of the agreement to be obscured if

(a) those parts are not essential to enable the accused to "make full answer and defence"; and

(b) disclosure of those parts would pose a danger to any person.

Commentary

Paragraph (1)(a) is based on the principle of fairness and is designed to assist the accused in "mak[ing] full answer and defence." Because disclosure to the accused would be mandated by this recommendation, and in light of the accountability measure contained in recommendation 16 concerning annual reports, it is unnecessary to include a requirement[375] that immunity agreements be disclosed to the court separately. Given paragraph (1)(a)'s requirement, it is safe to assume that the parties themselves will generally bring out the fact that the Crown has made an immunity agreement with a prosecution witness.

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372. See the commentary to rec. 1, above at 46, and see rec. 14(2), below at 66.

373. The expression in quotation marks is that used *inter alia* in *Criminal Code* s. 650(3). (See also *Criminal Code* s. 802(1).)

374. Adapted from a proposal made by Cato, *supra*, note 302 at 404.

375. See LRC, Working Paper 60, *supra*, note 1, rec. 12 at 52.

Paragraph (1)(b) is similarly designed to assist the accused in testing the credibility of the immunized witness.[376] It is made subject to the proposals we have made to govern the disclosure of witnesses' prior statements generally.[377]

Paragraph (1)(c) is self-explanatory.

Part (2) acknowledges that there may be occasions on which agreements will contain certain non-essential details (such as those relating to the place a witness or the witness's family (or both) will be relocated) the disclosure of which might put the witness or others in danger. To deal with this situation, it provides a mechanism (similar to one discussed in our working paper on *Electronic Surveillance*[378]) that would allow courts, on application, to obscure some portions of immunity agreements.

VII. The Enforcement of Immunity Agreements

RECOMMENDATION

14. [(1)] In any case in which a person has substantially fulfilled his or her obligations under the valid terms of an immunity agreement, any proceedings taken subsequently in contravention of that agreement should be prohibited unless the Crown

(a) was, in the course of immunity discussions, wilfully misled by the accused in some material respect; or

(b) was induced to conclude the immunity agreement by conduct amounting to an obstruction of justice.

[(2) Where proceeding against a person is permissible under part (1), neither the passage of time nor the fact that earlier proceedings have been terminated in accordance with an immunity agreement should operate to prevent the Crown from so proceeding.]

376. Cato, *supra*, note 302 at 404.

377. See LRC, *Disclosure by the Prosecution*, Report 22 (Ottawa: Supply and Services, 1984).

378. See LRC, *Electronic Surveillance*, Working Paper 47 (Ottawa: The Commission, 1986), rec. 50 at 65. See also LRC, *Public and Media Access to the Criminal Process*, Working Paper 56 (Ottawa: The Commission, 1987), recs 9(5) and (6) at 60-61 and recs 10(5) and (6) at 64.

Commentary

Part (1) parallels a recommendation made in our *Plea Discussions and Agreements*[379] working paper. It states a basic rule[380] that is premised, in part, on the principle of fairness.[381] We also believe that providing immunity recipients with a statutory protection against prosecutions that contravene the agreement they have made furthers the goal of certainty in the criminal process.[382] In so doing, it may also promote efficiency. As New Zealand's Court of Appeal said with reference to undertakings of immunity in the *McDonald* case, "the importance of such an undertaking in relation to the evidence given by an accomplice lies in the practical effect which it will have both in protecting that accomplice and in bringing about a state of mind on his part wherein as far as possible he is removed from the fear of consequences of giving evidence incriminating himself and knows that he has nothing to gain by giving false evidence."[383]

Paragraph (1)(a) would release the Crown from its obligation where it has been materially misled. An example of such an occurrence is suggested by the recent Ontario case of *R.* v. *MacDonald*.[384] There, it had been agreed that no murder charge would be laid against the appellant, but that he would be charged as an accessory after the fact. For his part, the appellant was required to provide the police with a true account of what he knew about the homicide under investigation, and to testify in conformity with that account at the preliminary inquiry and trial of the individual who was to be charged with murder in connection with the homicide. The appellant would be given the option of entering a program enabling him to be "relocated." Although the appellant provided the police with a statement and testified at the preliminary inquiry, another witness at the preliminary inquiry related a different version of the events, indicating "that the appellant had arranged for [the person charged with murder] to shoot the deceased and was aware that the shooting was to occur when they drove the victim to [the scene of the shooting]."[385] Considering this witness to be "much more credible than the appellant,"[386] Crown counsel decided to call that witness at the accused's preliminary inquiry, and to request that the appellant be committed for trial on a first degree murder charge as well. In dismissing the appellant's motion to have proceedings on the murder charge stayed as an abuse of process, the trial judge reasoned that "it was clearly an element of the agreement that the appellant give a truthful statement and he had not done so."[387]

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379. LRC, Working Paper 60, *supra*, note 1, rec. 22 at 65.

380. The recommendation does not attempt to deal with all possible situations involving partial fulfilment of a person's obligations under an immunity agreement.

381. Although we have made no specific recommendation in this regard, we believe it to be consistent with the principle of fairness that where the Crown intends to withdraw from an immunity agreement before the immunized person provides the "evidence, information, co-operation . . ." etc., notice of some kind should be given.

382. See Smith, *supra*, note 12 at 325-26, where a similar point is made.

383. *Supra*, note 106 at 105. See Cato, *supra*, note 302 at 403.

384. (1990) 54 C.C.C. (3d) 97 (Ont. C.A.).

385. *Ibid.* at 103, Zuber J.A.

386. *Ibid.*

387. *Ibid.* at 104.

Moreover, "[i]t was this lack of truthfulness on the part of the appellant, in the trial judge's opinion, that led to the breakdown of the agreement."[388] This reasoning was supported by the Ontario Court of Appeal in dismissing the appellant's appeal from his conviction on the murder charge. In its view, "because the Crown did not get from the appellant the complete and truthful statement for which it had bargained, it was under no obligation to meet the . . . requirement of the agreement to charge the appellant with the lesser charge of accessory . . . ."[389] Noting that the majority judgment in the Supreme Court of Canada case of *R.* v. *Conway*[390] "speaks of a concern with proceedings which are so unfair and tainted that to allow them to proceed 'would tarnish the integrity of the court,'"[391] the Court went on to add that "[t]he integrity of the court would equally 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."[392] In its view, "[t]o permit the agreement to stand would allow 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."[393] Although it acknowledged that "the Crown extracted some benefit from the appellant (*i.e.*, his testimony at the preliminary hearing . . .) and the appellant forfeited his right to silence,"[394] it considered that "in fact, the appellant suffered no prejudice,"[395] since "[n]one of the statements that he gave to police were used at his trial."[396]

Paragraph (1)(b) would negate any obligation on the part of the Crown where the agreement has resulted from conduct in the nature of threats, bribes or any collusion amounting to an obstruction of justice.

Part (1) does not deal with enforcement of those aspects of an immunity agreement that are subsidiary to the provision of immunity itself. Being entirely peripheral to the rules we have suggested in this document, the consequences of a failure by the Crown to fulfil miscellaneous contractual commitments (concerning relocation, protection, material assistance and so on) are best addressed elsewhere.

Part (2), which appears in square brackets, is very tentative. It is designed to help ensure that criminals do not profit from the type of conduct described in paragraphs (1)(a) and (b).

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388. *Ibid.*

389. *Ibid.* at 105.

390. [1989] 1 S.C.R. 1659.

391. *Supra*, note 384 at 106, *per* Zuber J.A., who was quoting from *Conway*, *supra*, note 390 at 1667.

392. *R.* v. *MacDonald*, *supra*, note 384 at 106.

393. *Ibid.*

394. *Ibid.*

395. *Ibid.*

396. *Ibid.*

VIII. The Exclusion of Evidence

RECOMMENDATION

15. In any proceeding against a person who has entered into an immunity agreement or who has made an offer to provide evidence, information, co-operation, assistance or some other benefit in exchange for immunity from prosecution,

(a) the immunity agreement,

(b) the offer, or

(c) statements made in connection with the agreement or offer

should be inadmissible in evidence on the issue of that person's guilt or credibility.

Commentary

This recommendation, which is similar to a recommendation made in our *Plea Discussions and Agreements*[397] working paper, is designed to facilitate immunity agreement discussions by providing a protection somewhat broader than that afforded by the voluntariness rule. The protection would apply to immunity agreements. It would also apply to offers and statements made in connection with them or with a view to obtaining immunity, but would not extend to evidence (for example, real evidence) derived from such statements; we intend to deal with the issue of derivative evidence separately in our forthcoming working paper on remedies.

Recommendation 15 would apply regardless of which party is responsible for breaking an immunity agreement. Moreover, it would not prevent an accused person from leading evidence of an immunity agreement to bar a particular prosecution.

IX. An Annual Report

RECOMMENDATION

16. (1) The Attorney General should be required annually to make a public report that states

(a) the number of written or otherwise recorded immunity agreements concluded in the past year; and

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397. LRC, Working Paper 60, *supra*, note 1, rec. 23 at 65.

(b) for every such immunity agreement,

(i) the crimes in respect of which immunity was provided,

(ii) the general nature of the benefit agreed to be provided in exchange for the immunity,

(iii) the charges involved in any prosecutions in which evidence or information provided pursuant to the immunity agreement was used, and the outcome of those prosecutions, and

(iv) the amount of any financial expenditures made in connection with the immunity agreement.

(2) Where evidence or information that was provided pursuant to a written or otherwise recorded immunity agreement is used in a prosecution in a year subsequent to the year in which the immunity agreement was concluded, the Attorney General should be required to report the charge(s) involved in that prosecution, and the outcome of that prosecution, in his or her report for the year in which the prosecution was completed.

(3) Where a financial expenditure is made in connection with a written or otherwise recorded immunity agreement in a year subsequent to the year in which the immunity agreement was concluded, the Attorney General should be required to report the amount of that financial expenditure in his or her report for the year in which the financial expenditure was made.

(4) An annual report should not be required to state the charges involved in any prosecution in which information provided pursuant to an immunity agreement was used, or the outcome of that prosecution, where inclusion of such a statement would pose a danger to an informer.

Commentary

This recommendation, which adopts an approach similar to that taken in *Criminal Code* section 195 in connection with electronic surveillance applications, is premised on the principle of accountability.[398] Although implementation of recommendation 13 would result in the public airing of most immunity agreements with persons who give evidence in criminal trials, it would not ensure public disclosure of immunity agreements in all instances — for example, where information, rather than evidence, is provided.

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398. See LRC, Report 32, *supra*, note 59 at 26.

The purpose of paragraph (1)(a) is to provide an overall picture of the extent to which immunity agreements are employed "in respect of a grave crime or series of crimes" or to obtain evidence.[399] As we have already noted, information on this subject is not readily available at present. As we have also stated, the power to provide immunity should be exercised sparingly.

Paragraph (1)(b) is designed to require disclosure of the objective facts in which the public is likely to have the greatest interest. Although we would consider it unduly burdensome to require that each immunity agreement be publicly justified with reference to the considerations set out in recommendation 5, disclosure of the facts referred to in paragraph (1)(b) is necessary to provide at least a rough indication of the cost and value of each immunity agreement.

Parts (2) and (3) take account of the fact that obligations under immunity agreements may be ongoing.

Part (4) is self-explanatory.[400]

399. See rec. 9, above at 58.

400. See LRC, Working Paper 56, *supra*, note 378, recs 9(5) and (6) at 60-61 and recs 10(5) and (6) at 64.

Summary of Recommendations

1. The term "immunity agreement" should be defined as any agreement by the Crown to refrain from prosecuting a person or group for a crime or crimes, or to terminate any prosecution of a person or group, either wholly or partially in return for the provision of evidence, information, co-operation, assistance or some other benefit.

2. Only the Attorney General, the Attorney General's deputy, the Director of Public Prosecutions and their respective agents should have the authority to enter into an immunity agreement on behalf of the Crown.

3. The authority to enter into an immunity agreement on behalf of the Crown should be exercisable when exceptional circumstances require that immunity be provided in the public interest and the benefit of providing immunity clearly outweighs the social cost of doing so.

4. The authority to enter into an immunity agreement on behalf of the Crown should not include the authority to dispense prospectively with the application of laws to particular persons or groups.

5. In deciding whether to enter into an immunity agreement, the Crown should consider

(a) where evidence or information is involved, whether there are other indicators tending to confirm that the evidence or information is true;

(b) the gravity of any crime concerning which evidence, information, co-operation, assistance or other benefit is to be provided;

(c) the gravity of the crime(s) to which the immunity agreement would relate;

(d) the importance of the evidence, information, co-operation, assistance or other benefit to be provided;

(e) whether it is possible to obtain the evidence, information, co-operation, assistance or other benefit in another manner;

(f) the gravity of the involvement of the person proposed to be immunized in any crime(s) to which the evidence, information, co-operation, assistance or other benefit relates, and the degree of that person's guilt in comparison to the guilt of any person whose prosecution would be aided by the evidence, information, co-operation, assistance or other benefit;

(g) the criminal history of the person proposed to be immunized;

(h) the number of occasions on which, and the circumstances in which, the person proposed to be immunized has received immunity in the past;

(i) whether the goal of public protection would be better served by the obtaining of the proposed evidence, information, co-operation, assistance or other benefit, or by the conviction of the person proposed to be immunized;

(j) the likelihood that, without immunity, the person proposed to be immunized could be convicted of the crime(s) to which the immunity agreement would relate;

(k) the interests of any victims; and

(l) whether other persons, such as the police, oppose the provision of immunity to the person proposed to be immunized and, if so, their reasons.

6. (1) No improper inducement should be offered on behalf of the Crown for the purpose of encouraging a person to conclude an immunity agreement.

(2) The term "improper inducement" should be defined as any inducement that necessarily renders suspect the genuineness of an immunity agreement, and as including the following conduct:

(a) the laying of any charge not believed to be supported by provable facts;

(b) the laying of any charge that is not usually laid with respect to an act or omission of the type attributed to the accused;

(c) a threat to lay any charge of the type described in paragraph (a) or (b);

(d) any offer, threat or promise the fulfilment of which is not a function of the maker's office; and

(e) any material misrepresentation.

7. (1) A prosecutor should not, when a person has retained counsel, have immunity discussions with the person in the absence of that person's counsel.

(2) A prosecutor with whom an unrepresented person wishes to have immunity discussions should inform the person that

(a) representation by counsel may be advantageous to the person, and

(b) if the person cannot afford to retain counsel, he or she should ascertain from the provincial legal aid plan whether he or she is eligible for assistance,

and should not thereafter have immunity discussions directly with the person unless the person has informed the prosecutor unequivocally that he or she does not intend to retain counsel.

8. A prosecutor who concludes an immunity agreement should endeavour to ensure that victims are informed of the agreement and the reasons for it, at an appropriate time, unless circumstances make it impractical to do so or compelling reasons such as a likelihood of serious harm to the immunized person or to another person require otherwise.

9. (1) An immunity agreement that provides immunity in respect of a grave crime or series of crimes, so designated by the Attorney General in guidelines for the purposes of these rules, or that requires a person to provide evidence, should be required to be written or otherwise recorded, and should be required to indicate

(a) the person entering into the agreement to obtain immunity;

(b) the person or persons to whom the immunity is provided;

(c) the person entering into the agreement as a representative of the Attorney General;

(d) the acts or omissions in respect of which the immunity is provided;

(e) the form the immunity will take;

(f) the evidence, information, co-operation, assistance or other benefit to be provided in exchange for the immunity;

(g) any additional commitments made by the parties, including the specifics of any financial expenditures to be made by the Crown; and

(h) what will amount to a breach of the agreement, and the consequences of such a breach.

(2) It should be mandatory that anyone entering into a written or otherwise recorded immunity agreement with the Crown or with anyone on behalf of the Crown be given a copy of the agreement immediately after its conclusion, and be required to provide a written acknowledgement that he or she has received a copy of it.

10. It should not be permissible for an immunity agreement to require a person to do anything unlawful, or provide immunity to any person in respect of crimes that he or she might commit in the future.

11. It should be mandatory for an immunity agreement that requires a person to provide evidence to require that the evidence so provided be truthful.

12. (1) It should be permissible for an immunity agreement to require the Crown to terminate, without regard to its merit, a private prosecution other than a private prosecution for perjury in respect of evidence required to be provided under that agreement.

(2) It should be permissible for an immunity agreement that requires a person to provide evidence to require the Crown to ensure there is an independent review of any private prosecution of that person for perjury in respect of that evidence, and to terminate that prosecution if the review discloses that it is not meritorious and should not be carried forward.

13. (1) Where an immunity agreement has been concluded with a person whom the Crown intends to call as a witness, the Crown should be required to

(a) disclose the agreement to the accused so as to enable him or her to "make full answer and defence";

(b) provide the accused, as required by our proposals relating to disclosure by the prosecution, with a copy of any statement made by the witness in relation to the subject-matter concerning which that witness will be testifying; and

(c) disclose to the accused, so as to enable him or her to "make full answer and defence," all occasions, of which the prosecutor is aware, on which the witness has received immunity in exchange for providing evidence.

(2) Before disclosing an immunity agreement to the accused, the Crown should be able to apply for an order permitting specified parts of the agreement to be obscured if

(a) those parts are not essential to enable the accused to "make full answer and defence"; and

(b) disclosure of those parts would pose a danger to any person.

14. [(1)] In any case in which a person has substantially fulfilled his or her obligations under the valid terms of an immunity agreement, any proceedings taken subsequently in contravention of that agreement should be prohibited unless the Crown

(a) was, in the course of immunity discussions, wilfully misled by the accused in some material respect; or

(b) was induced to conclude the immunity agreement by conduct amounting to an obstruction of justice.

[(2) Where proceeding against a person is permissible under part (1), neither the passage of time nor the fact that earlier proceedings have been terminated in accordance with an immunity agreement should operate to prevent the Crown from so proceeding.]

15. In any proceeding against a person who has entered into an immunity agreement or who has made an offer to provide evidence, information, co-operation, assistance or some other benefit in exchange for immunity from prosecution,

(a) the immunity agreement,

(b) the offer, or

(c) statements made in connection with the agreement or offer

should be inadmissible in evidence on the issue of that person's guilt or credibility.

16. (1) The Attorney General should be required annually to make a public report that states

(a) the number of written or otherwise recorded immunity agreements concluded in the past year; and

(b) for every such immunity agreement,

(i) the crimes in respect of which immunity was provided,

(ii) the general nature of the benefit agreed to be provided in exchange for the immunity,

(iii) the charges involved in any prosecutions in which evidence or information provided pursuant to the immunity agreement was used, and the outcome of those prosecutions, and

(iv) the amount of any financial expenditures made in connection with the immunity agreement.

(2) Where evidence or information that was provided pursuant to a written or otherwise recorded immunity agreement is used in a prosecution in a year subsequent to the year in which the immunity agreement was concluded, the Attorney General should be required to report the charge(s) involved in that prosecution, and the outcome of that prosecution, in his or her report for the year in which the prosecution was completed.

(3) Where a financial expenditure is made in connection with a written or otherwise recorded immunity agreement in a year subsequent to the year in which the immunity agreement was concluded, the Attorney General should be required to report the amount of that financial expenditure in his or her report for the year in which the financial expenditure was made.

(4) An annual report should not be required to state the charges involved in any prosecution in which information provided pursuant to an immunity agreement was used, or the outcome of that prosecution, where inclusion of such a statement would pose a danger to an informer.