EXISTING STANDARD	PROPOSED STANDARD	RATIONALE
NEW	**RESOLUTION DISCUSSIONS AND PLEA AGREEMENTS** **STANDARD** Resolution discussions between defence counsel and Crown attorneys leading to plea agreements and joint recommendations on sentence are an accepted and necessary part of the proper functioning of the criminal justice system.[1] A defence counsel who engages in resolution discussions on behalf of their client is required to act in the best interests of their client, which includes ensuring that any proposed plea agreement is voluntary, informed and unequivocal.[2] **NOTES** **The value of resolution discussions** The Supreme Court of Canada in *R.* v. *Anthony-Cook*, 2016 SCC 43 stated the following with respect to resolution discussions between counsel in criminal matters: 1. *MOLDAVER J.: - Resolution discussions between Crown and defence counsel are not only commonplace in the criminal justice system, they are essential. Properly conducted, they permit the system to function smoothly and efficiently.* 2. *Joint submissions on sentence – that is, when Crown and defence counsel agree to recommend a particular sentence to the judge, in exchange for the accused entering a plea of guilty - are a subset of resolution discussions. They are both an accepted and*	The new standard is designed to assist counsel as they engage in resolution discussions leading to agreements on plea and sentence. The standard is designed to inform counsel that such discussions are a necessary and accepted part of the proper functioning of the criminal justice system. The standard is also designed to instruct counsel that when they engage in resolution discussions, they must act in the best interests of their client, which includes ensuring that any proposed plea agreement is

[1] *R.* v. *Anthony-Cook*, 2016 SCC 43; [2016] 2 S.C.R. 204 at paras 1, 2 and 25

[2] S. 606(1.1) *Criminal Code of Canada*

	acceptable means of plea resolution. They occur every day in courtrooms across the country and they are vital to the efficient operation of the criminal justice system. As this Court said in R. v. Nixon, 2011 SCC 34, [2011] 2 S.C.R. 566, not only do joint submissions "help to resolve the vast majority of criminal cases in Canada" but "in doing so, [they] contribute to a fair and efficient criminal justice system." The Nova Scotia Public Prosecution Policy Manual provides the following in the policy "Resolution Discussions and Agreements": *Discussions between counsel aimed at resolving the issues that arise in a criminal prosecution are an essential part of the criminal justice system in Nova Scotia. When properly conducted, these "resolution discussions" benefit the accused, victims, witnesses and the general public.* Plea negotiations leading to resolutions with joint recommendations on sentence can, therefore, be beneficial to both the accused and to the Crown. With respect to the accused, the Supreme Court states the following at para. 36 of *R.* v. *Anthony Cook*, (*supra*): *The most obvious benefit is that the Crown agrees to recommend a sentence that the accused is prepared to accept. This recommendation is likely to be more lenient than the accused might expect after a trial and/or contested sentencing hearing. Accused persons who plead guilty promptly are able to minimize the stress and legal costs associated with trials. Moreover, for those who are truly remorseful, a guilty plea offers an opportunity to begin making amends. For many accused, maximizing certainty as to the outcome is crucial - and a joint submission, though not inviolable, offers considerable comfort in this regard.* For the Crown, joint recommendations on sentence can also be beneficial. Such resolutions guarantee a guilty plea. They avoid the inherent risks with a case where there may be an unwilling witness or evidence that is potentially inadmissible. They may allow for an accused to provide information or testimony which not be forthcoming without a plea agreement. They spare victims	voluntary, informed and unequivocal.

	and witnesses the necessity of enduring a trial and they are an indication of the accused's acceptance of responsibility and remorse.[3] **Voluntary and Informed** The Nova Scotia Code of Professional Conduct provides the following in 5.1-7 and 5.1-8: 5.1-7 Before a charge is laid or at any time after a charge is laid, a lawyer for an accused or potential accused may discuss with the prosecutor the possible disposition of the case, unless the client instructs otherwise. 5.1-8 A lawyer for an accused or potential accused may enter into an agreement with the prosecutor about a guilty plea if, following investigation, (a) the lawyer advises his or her client about the prospects for an acquittal or finding of guilt; (b) the lawyer advises the client of the implications and possible consequences of a guilty plea and particularly of the sentencing authority and discretion of the court, including the fact that the court is not bound by any agreement about a guilty plea; (c) the client voluntarily is prepared to admit the necessary factual and mental elements of the offence charged; and (d) the client voluntarily instructs the lawyer to enter into an agreement as to a guilty plea. Additionally, to ensure that a plea agreement is informed and voluntary, a defence counsel in advising their client, must be aware of and sensitive to cultural factors as potential barriers to	

[3] *R.* v. *Anthony-Cook,* at para 39

meaningful communication[4]. For example, Angela Bressan and Kyle Coady in "Guilty Pleas Among Indigenous People in Canada", Research and Statistics Division, 2017, state at page 7:

> *Indigenous people may have unique cultural considerations for pleading guilty, including language barriers and values around reconciliation and taking responsibility. The words 'guilty' and 'innocent' do not translate in many Indigenous languages, and one can interpret the question "How do you plead" guilty or not guilty?" as "Are you being blamed?"….Other cultural considerations include the Indigenous phenomenon of 'gratuitous concurrence', that is "when a person appears to assent to every proposition put to them even when they do not agree"…*(citations omitted)

The effect of a joint recommendation

Joint recommendations on plea and sentence are given significant weight by courts. Various tests have been developed and used by courts in determining whether to accept or deviate from a joint recommendation.

More recently, however, the Supreme Court of Canada has spoken on this issue. The Supreme Court has instructed that, in determining whether to accept a joint recommendation on plea and/or on sentence, courts must apply a "public interest test". That is, a trial judge, in deciding whether to depart from a joint recommendation, should only do so if the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest. [5]

When will a joint submission on plea and sentence be seen to bring the administration of justice into disrepute or be contrary to the public interest? It will do so if it is so "markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would

[4] See forthcoming NSBS Cultural Competence Standard

[5] *R. v. Anthony-Cook,* at para 32

	view it as a break down in the proper functioning of the criminal justice system" [6] or if it causes an informed and reasonable public to lose confidence in the institution of the courts." [7] **What is a true joint recommendation?** The principles outlined herein relate to *true* joint recommendations. A true joint recommendation is one which results from negotiation between a defence counsel and a Crown attorney. It is one where each party concedes certain things – for example, the Crown attorney may agree not to proceed on certain charges in exchange for guilty pleas by the accused on others or the Crown attorney may agree to a more lenient sentence than otherwise would be recommended in exchange for the certainty of the conviction flowing from a guilty plea. In other words, there is a *quid pro quo*. This is to be distinguished from the situation where counsel coincidentally arrive at the same position independently of one another and without negotiation or concessions by the parties. [8] In situations where counsel coincidentally arrive at the same position without the benefit of negotiation, courts are not bound to give the same deference to the position of counsel on sentence. Counsel should be aware that, in such situations, merely stating that the respective positions constitute a joint recommendation does not make it so and that the court sentencing the accused is not bound by the public interest test enunciated by the Supreme Court in *Anthony-Cook*. [9] **Procedural considerations** 1. Counsel should explore with their client the possibility of entering into plea negotiations with the Crown and take instructions regarding the desirability of such negotiations.	

[6] *R. v. Anthony-Cook,* at para 33*; R. v. Druken,* 2006 NLCA 67 at para 29
[7] *R. v. Anthony-Cook at para 33;* R. v. Oake, *2010 NLCA 19 at para 56*
[8] *R. v. Knockwood,* 2009NSCA 98 at para 15; *R. v. MacIvor*, 2003 NSCA 60 at para 31*; R. v. G.P.*, 2004 NSCA 154, at para 17
[9] *R. v. Knockwood,* at para 17, 18

	2. In advising their client with respect to plea negotiations, counsel should be mindful of the test that must be applied by courts in considering whether to accept a joint recommendation. Counsel should make their clients aware that, while there is likelihood that the sentencing court will accept the negotiated plea agreement, such agreements are not "sacrosanct" [10] and can be rejected by the court. 3. Counsel should review with their client the provisions of s. 606 of the *Criminal Code*, including s. 606(1.1)(b)(iii) which states that a court may accept a plea of guilty only if it is satisfied that the accused understands that the court is "not bound by any agreement made between the accused and the prosecutor." 4. Counsel should be aware of all relevant and applicable mandatory orders that flow from the joint recommendation proposed by counsel. A joint submission cannot exclude an order or aspect of sentencing that is otherwise required by law. Counsel should never negotiate to exclude such an aspect of the sentencing (e.g., a DNA order in the case of a guilty plea to a primary designated offence). A trial judge has a duty to inform counsel where they have neglected to include a mandatory order.[11] 5. Counsel should understand that the court will consider a proposed joint submission on sentence on an "as-is" basis and will not vary the sentence unless it fails the "public interest test" noted above. A court, therefore, will typically not add a discretionary order if the joint submission is silent.[12] 6. If counsel for an accused enters into resolution discussions with the Crown which lead to an agreement, the terms of that resolution should be confirmed in writing with the Crown. This is important for several reasons. While verbal agreements between lawyers in criminal practice are commonplace, there is always the possibility of	

[10] *R. v. Anthony-Cook*, at para 3
[11] *R. v. Anthony Cook*, at para 51
[12] *R. v. Anthony Cook*, at para 51

misinterpretation or miscommunication. Written confirmation of the details of a plea agreement and joint submission on sentence will help to alert counsel of any misunderstandings prior a guilty plea being entered. Written confirmation also serves to ensure that the details of the resolution are not forgotten should another counsel take carriage of the matter.[13]

7. If the proposed joint recommendation arising from plea negotiations would, on its face, seem to be outside of the established range of sentence, counsel should be alive to the need to provide, to the extent possible, some basis to the court for the reasons for the recommendation.

8. That being said, counsel are not required to "reveal their negotiation positions or the substance of their discussions leading to the agreement." [14]

9. If counsel are unable to inform the court of the reasons underlying a joint recommendation due to safety or privacy concerns or due to the risk of jeopardizing an ongoing criminal investigation, they "must find alternative means of communicating these considerations to the trial judge." [15] Counsel need to be mindful of safety considerations as they relate to their clients who, for example, may be assisting in an ongoing investigation and be circumspect in the language they use on the record.

10. For example, the Nova Scotia Court of Appeal states the following in *MacIvor* (*supra*) at para 32 which may provide helpful language for counsel:

> Even where the proposed sentence may appear to be outside an acceptable range, the judge ought to give it serious consideration, bearing in mind that even with all appropriate disclosure to the Court, ***there are practical constraints on disclosure***

[13] Luke J. Merrimen, Esq., "Joint Submissions on Sentence (Part Five)", December 26, 2016, http://merrimenlaw.ca/blog-overview/
[14] *R. v. Tkachuk*, 2001 ABCA 243, at para 34
[15] *R. v. Anthony-Cook*, at para 56

of important and legitimate factors which may have influenced the joint recommendation.

Counsel may simply state that Crown and defence counsel have had meaningful discussions respecting a variety of factors, some of which form part of the submissions of counsel and certain other considerations and facts that counsel have agreed will not be placed before the court.

11. Counsel should be aware that any time a joint recommendation is placed before the court, if the court is unsatisfied with the proposed resolution, it has a duty to alert counsel to this and call upon counsel to provide further submissions.[16] Counsel should be prepared for this eventuality.

12. Counsel should advise their client that if the court ultimately does not accept the joint recommendation, there is the possibility that the accused could be allowed to apply to withdraw their guilty plea. For example, "withdrawal may be permitted where counsel have made a fundamental error about the legality of the proposed joint submission . . ."[17] Counsel should however make it clear to their client that the withdrawal of their guilty plea is not always assured.

13. If the Court indicates its intention to reject a joint recommendation and impose a more lenient sentence than the one negotiated by counsel, defence counsel may be left with a difficult ethical dilemma. In such a circumstance, defence counsel should consider whether it is advisable to seek to withdraw as counsel. Defence counsel may no longer be able to accept instructions from their client if those instructions are to support the more lenient sentence which the court is considering (for, to do so, would be tantamount to reneging on the agreement between counsel which forms the basis of the original joint recommendation).

[16] *R. v. Anthony-Cook*, at para 58; *R. v. G.W.C.*, 2000 ABCA 333, at para 26; R. v. *Sinclair*, 2004 MBCA 48

[17] *R. v. Anthony Cook*, at para 59

	14. Counsel should also be aware that some courts may not accept a joint recommendation or consider themselves bound by the principles and approach herein if counsel have not been able to negotiate all aspects of the proposed sentence. For example, counsel may have agreed that, in exchange for a guilty plea, the Crown will seek a non-custodial sentence but counsel have not agreed on any other aspect of the proposed sentence. While many judges in this circumstance would treat that aspect of the sentence as a joint recommendation and follow it (assuming it meets the public interest test), counsel should be alive to the possibility that some courts may not view this as a joint recommendation in the strict sense and, therefore, may not feel bound by it. 15. Counsel should be aware of and familiarize themselves with *Supreme Court of Nova Scotia, Practice Memorandum #7 – Resolution Conferences – Criminal Trials* which outlines the procedure for the conduct of a resolution conference in a criminal case in Supreme Court. 16. Counsel should also familiarize themselves with *Provincial Court of Nova Scotia, Practice Direction – Complex Cases – How to Identify and Manage Them (PC Rule 4 – Case Management)* which provides for the use of resolution conferences in complex cases in Provincial Court and outlines the procedure to be followed. 17. Principles applicable to Crown attorneys can be found in the Public Prosecution Policy "Resolution Discussions and Agreements".	