Ltd. and McLeod, [1970] 5 C.C.C. 31, 10 C.R.N.S. 229, 73 W.W.R. 221; *Re Regina and Atwood* (1972), 8 C.C.C. (2d) 147, [1972] 5 W.W.R. 600; *Re Lane and Lane* (1973), 15 C.C.C. (2d) 292, 2 O.R. (2d) 224, 14 R.F.L. 130.

Having thus decided that the Courts in Ontario possess an inherent power to prevent an abuse of their process by staying proceedings instituted therein, the next question for resolution is whether the circumstances herein amount to an abuse of the process of this Court?

In *R. v. Agozzino*, [1970] 1 C.C.C. 380, [1970] 1 O.R. 480, 6 C.R.N.S. 147, a decision of the Ontario Court of Appeal, it was held that a pre-trial agreement concluded by a provincial Crown Attorney in relation to the sentence to be suggested to the Court could not be repudiated by the Crown on a subsequent appeal to the Court of Appeal in regards to the agreed sentence so imposed. In *Agozzino*, the accused pleaded guilty to possession of counterfeit money and in return Crown counsel indicated that he would not seek a jail term. This agreement was disclosed to the provincial Court Judge who entertained the plea of guilty. That Judge indicated that he would have sentenced the accused to a jail term had Crown counsel not indicated that he was not seeking same. Accordingly, the accused received a suspended sentence and a fine.

Probably unknown to the Provincial Court Judge, such a sentence was contrary to s. 646 of the *Criminal Code* which in the circumstances of the case required a term of imprisonment in addition to, rather than in lieu of, a fine. Therefore, the Court of Appeal allowed the Crown's appeal as to sentence and imposed a custodial sentence of one day. The monetary aspect of the sentence was not disturbed. With respect to the question of the Crown's purported repudiation of its agreement at trial, Gale, C.J.O., said at pp. 381-2 C.C.C., pp. 148-9 C.R.N.S.:

> We think that the sentence ought to be altered by the addition of a sentence of one day in jail plus the $2,500 fine. We make this variation because prior to the trial Crown counsel intimated that he would not ask for a jail term and on the basis of such intimation counsel for the accused received instructions to plead guilty. There is evidence before us to indicate that had it not been for the position taken by the Crown which was subsequently adopted by the Magistrate, the accused would not have pleaded guilty. The circumstances, therefore, dictate a dismissal of the Crown's appeal as to the sentence even though, had we thought ourselves at liberty to consider its propriety, we probably would have come to a different conclusion. *Crown counsel at the trial represented the Attorney-General . . . We believe it would now be quite unfair, not only to the Magistrate but to the accused, for the Crown by means of this*

appeal, to change its position by asking for a substantial term of imprisonment. In effect the appeal repudiates the position taken by Crown counsel at the trial and we do not care to give effect to that repudiation.

[Emphasis added.]

In *R. v. Brown* (1972), 8 C.C.C. (2d) 227 (Ont. C.A.), the provincial Crown counsel prior to trial consented to the withdrawal of charges other than a possession charge in a multiple count indictment in consideration of a guilty plea to the charge of possession and undertook to seek a concurrent sentence thereon to a sentence already being served by the accused. At the trial, counsel representing the Crown requested a consecutive sentence and the trial Judge so ordered. The Court of Appeal allowed the appeal against the sentence. At p. 228, Gale, C.J.O., said: "We are all of the view that in the circumstances the appeal against sentence ought to be allowed, and the sentence changed to a concurrent term."

In *R. v. Fleury* (1971), 23 C.R.N.S. 164, the Quebec Court of Appeal (Montgomery, Rivard and Turgeon, JJ.A.) dismissed the Crown's appeal against sentence where the trial Judge had acquiesced in the Crown's recommendations as to sentence.

In *A.-G. Can. v. Roy* (1972), 18 C.R.N.S. 89 (Que. Q.B.), Hugessen, A.C.J., held that a Crown appeal against sentence would not be allowed as [p. 93]

> The Crown, like any other litigant, ought not to be heard to repudiate before an appellate court the position taken by its counsel in the trial court, except for the gravest possible reasons.

No such reasons were apparent in the *Roy* case.

Contrary to the conclusions arrived at in the *Agozzino, Brown,* and *Roy* cases are the decisions of the Quebec Court of Appeal in *Kirkpatrick,* [1971] Que. C.A. 337*n,* and *R. v. Mouffe* (1971), 16 C.R.N.S. 257.

I am clearly bound by the judgments of the Ontario Court of Appeal in *Agozzino* and *Brown,* and I am impressed by the comments of D.R.H. Heather in an annotation to the *Agozzino* decision (6 C.R.N.S.) at p. 149, where he writes:

> The judgment of the Ontario Court of Appeal in the *Agozzino* case, *ante, gives at least some authority for the proposition which heretofore was enshrined only in common sense, that the Crown is one and indivisible and must display a consistency in its agents.*

It is clear, in my respectful view, that in the realm of provincial prosecuting authority, an agreement made by a prosecutor at trial may not be repudiated by another prosecutor on appeal. It is also my respectful view, that although the con-

cept of "abuse of process" was not expressly articulated by the Courts in *Agozzino*, *Brown* and *Roy*, in effect, those Courts refused the relief sought by the Crown, since to grant it, would, in fact, constitute an abuse of the process of the Court. The abuse lies in the *Crown reneging on an agreement made and presented to a Court. To renege on such an agreement constitutes an abuse of the process of the Court. The Crown is expected to honour the agreements it has made in relation to prosecutions.*

To this I would add that the Crown is expected to honour such agreements whether presented to the Court or otherwise, as I have already reached the conclusion that the federal Attorney-General's function is to consider, as well as conduct, prosecutions.