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PLEA BARGAINING AND SENTENCING GUIDELINES

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PLEA BARGAINING AND SENTENCING GUIDELINES

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EXECUTIVE SUMMARY

This paper considers the potential impact that plea bargaining will have on the introduction of sentencing guidelines in Canada. From a consideration of the U.S. literature, it is determined that plea bargaining is a complex and diverse phenomenon that varies between, and even within, jurisdictions. Furthermore, attempts to abolish or restructure it have generally failed or resulted in unintended and undesirable consequences throughout the criminal justice system. Any study of the impact of sentencing reform should, therefore, consider that such a move would have implications for the entire system, from arrest to the parole stage.

Generalization from the American research on plea bargaining to the Canadian situation is not recommended. However, the quality of research into this topic has lagged behind that of the U.S. and so little reliable information concerning the extent and nature of plea bargaining in Canada today is available. Nevertheless, it is possible to adduce that there are several factors that may serve to deter court actors in Canada from engaging in plea bargaining:

1. The almost unlimited sentencing discretion given judges;

2. The ability of the Crown to repudiate a position taken in a plea bargain by an appeal; and

3. The use of concurrent sentences.

There are also factors that would appear to facilitate the practice of plea bargaining in Canada:

1. The on-going relationships and proximity of court actors;

2. Representation by defence counsel;

3. The practice of "overcharging";

4. A tacit guilty plea discount;

5. The judicial acceptance of sentence recommendations; and

6. The ability of the police and prosecution to control the information that is available to the court in the sentencing hearing.

An examination of the U.S. literature on sentencing guidelines revealed that, inexplicably, plea bargaining was not a focus of much research. Many commentators, however, had recognized the potential nugatory effect plea bargaining could have on sentencing guidelines. From consideration of all the sources of information, both hypothetical and empirical, it is concluded that sentencing guidelines *could* be undermined by actors in the criminal justice system with the use of their discretionary power. Several recommendations to mitigate this possibility are presented.

Recommendation 1: Prior to the design and implementation of sentencing guidelines in Canada, explicit consideration should be given to the potential impact of plea bargaining upon sentencing guidelines and vice versa. This should involve an indepth analysis of the nature and extent of plea bargaining in Canada, with specific focus upon this potential impact.

Recommendation 2: That no attempt should be made to "abolish" plea bargaining on the basis that such an attempt is highly likely to be unsuccessful and may well produce undesirable and/or unintended consequences for other actors in the criminal justice system.

Recommendation 3: That the existence of plea bargaining should be explicitly acknowledged in any sentencing guidelines implemented in Canada and that these guidelines should contain explicit mechanisms for judicial control of the

practice.

Recommendation 4: That, if sentencing guidelines are to be implemented in Canada, they should be mandatory in nature.

Recommendation 5: That, if sentencing guidelines are to be implemented in Canada, they should prohibit the practice of "real offence sentencing" and should be predicated on the basis of "convicted offence sentencing."

Recommendation 6: That, whatever form sentencing guidelines take in Canada, efforts should be made to control the occurrence of "fact bargaining."

Recommendation 7: That, if sentencing guidelines are to be implemented in Canada, they should not include an explicit 'discount' for a guilty plea.

Recommendation 8: That, if prescriptive sentencing guidelines are to be implemented in Canada, prior consideration should be given to their potential impact upon plea bargaining practices (and vice versa) and that once guidelines are implemented, there should be close monitoring of adaptive responses on the part of those actors usually engaged in bargaining. If such responses are considered to be undesirable, the guidelines should be modified accordingly by the sentencing commission.

Recommendation 9: That, if sentencing guidelines are to be implemented in Canada, a party independent of the defence and prosecution should be responsible for calculating the offender's score. This might be a probation officer (where appropriate) or a member of the sentencing commission staff.

Recommendation 10: That, if the reduction of plea bargaining is a goal of Canadian sentencing guidelines, the width of sentence ranges should be narrow.

Recommendation 11: That, if sentencing guidelines are to be implemented in Canada, they should contain a limited list of aggravating and mitigating factors that explicitly excludes plea bargaining as a reason to depart from the presumptive sentence.

Recommendation 12: That, if sentencing guidelines are introduced in Canada, explicit consideration should be given to the possibility that there will be fierce plea bargaining in relation to whether the defendant will receive an incarcerative sentence as opposed to a community-based disposition, since it is particularly around the so-called "in/out line" that attempts may be made to subvert the guide--lines.

Recommendation 13: That, the situations when consecutive (as opposed to concurrent) sentences are appropriate should be explicitly delineated in the guidelines.

Recommendation 14: That, because the accumulation of criminal history scores on the same day of sentencing is potentially coercive, these scores should be calculated on the basis of convictions obtained prior to the sentencing hearing.

Recommendation 15: That the possibility of prosecutors manipulating a defendant by overcharging be forestalled by explicit provisions in the guidelines.

Recommendation 16: Participation by the victim in the sentencing process should be encourgaged (either directly through testimony or indirectly through a statement prepared by a probation or police officer).

Recommendation 17: That, because sentencing reform will have consequences throughout the entire criminal justice system, some attention should be paid to the role of parole in order to ensure that sentencing and parole decisions are made on a reasonably consistent basis.

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INTRODUCTION

The focus of this paper is upon the extent to which plea bargaining may be anticipated to affect the implementation of sentencing guidelines. From a consideration of the research which has been published to date, it is apparent that the word "plea bargaining" is really a compendious term used to describe a wide diversity of behaviours which occur among actors in the court system. This being the case, the definition of the phenomenon requires a consideration of pre-trial activities that extends beyond those activities which are usually entailed in a definition of "plea bargaining." For the purposes of this paper, the topic is conceptualized, to borrow a term from Grosman,[1] as the "pre-trial market place" where the actors negotiate using the various commodities at their disposal. Actual bargains need never be made. In fact, Ericson and Baranek[2] feel that even the term "negotiated" is a misnomer within the context of the accused's relationship with the agents of the criminal justice system because there is such a stark imbalance of power between the parties concerned. In particular, these researchers suggested that it is more realistic to view the accused's decisions within the system as being "coerced" and/or "manipulated" and so may be perceived as anything but a bargain by the defendant.

The defendant generally has the fewest commodities with which to bargain, and his/her bargaining strength decreases the further along in the process he/she proceeds. At the police investigation stage, where bargaining may begin, he/she can trade (or choose simply to surrender) cooperation, a confession, the location of evidence (such as stolen property), information on other crimes, or evidence against a coaccused.[3] The police can promise many commodities, such as charge reduction, failing to charge certain counts, not opposing bail, earlier release from police custody, a favourable report to the Crown or in court, or not pursuing further investigations against the accused and/or his/her friends.[4] The outcomes of the decisions that the accused makes at this stage can, ironically, be to give the police and prosecution ammunition that may be used as leverage against him/her later in the criminal justice process.[5]

The more options the accused has, the more commodities he/she has to bargain with. Where available, the election of mode of trial is an important commodity as the Crown may wish to avoid spending the time required for jury selection and trial preparation. An alleged offender may also exchange testimony against a coaccused for immunity under s. 5(2) of the *Canada Evidence Act*.[6] The guilty plea, however, represents the defendant's most powerful bargaining leverage as it is available to all defendants and may be offered in exchange for a number of considerations. The list of such considerations is so diverse that the generic category of "plea bargain" will be divided into the following types of bargaining:

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[1] *The Prosecutor* (Toronto: University of Toronto Press, 1969) at 30.

[2] *The Ordering of Justice: A Study of Accused Persons as Dependants in the Criminal Process* (Toronto: University of Toronto Press, 1982) hereinafter referred to as *Ordering of Justice*.

[3] Ericson & Baranek, *ibid.*, have elaborated on the dynamics of bargaining with the police, noting that the accused is in a disadvantaged position relative to the power of the police and that the decisions made by the police may have serious implications for the accused. The reader is referred to this source for an excellent discussion of this topic.

[4] *Ibid.* at 53.

[5] To the extent that the distribution of prosecutorial discretion is shifted and changed, police practices will be expected to vary after the implementation of sentencing guidelines. While the reader should be aware that guidlelines will have implications in the system from offence to parole, the consideration of police practices is beyond the scope of the present paper.

[6] R.S.C. 1970, c. 307.

Charge Bargaining:

a) reduction of the charge to a lesser or included offence;

b) withdrawal or stay of other charges or the promise not to proceed on other possible charges; and

c) promise not to charge friends or family of the defendant.

Sentence Bargaining:

a) promise to proceed summarily rather than by way of indictment;

b) promise of a certain sentence recommendation by Crown;

c) promise not to oppose defence counsel's sentence recommendation;

d) promise not to appeal against sentence imposed at trial;

e) promise not to apply for a more severe penalty (under ss. 592 or 740 of the *Criminal Code*);

f) promise not to apply for a period of preventive detention under s. 688;

g) promise to make a representation as to the place of imprisonment, type of treatment, etc.; and

h) promise to arrange sentence before a particular judge.

Fact Bargaining:

a) promise not to "volunteer" information detrimental to the accused (e.g., not adducing evidence as to the defendant's previous convictions under ss. 234 and 236 of the *Criminal Code*); and

b) promise not to mention a circumstance of the offence that may be interpreted by the judge as an aggravating factor.

It must be recognized that the dispositional outcome of a case is a reflection of the decisions made at many stages in the system and that judicial sentencing is only one of the factors that influence that outcome. This system-wide perspective has only recently been employed in the empirical research of this area in Canada. It is necessary to turn to research undertaken in the United States to gain an appreciation of the diversity of behaviours which fall into the category of plea bargaining.

PLEA BARGAINING IN THE UNITED STATES

Research on plea bargaining undertaken in the United States has provided the Canadian audience with an opportunity to examine how the extent and forms of plea bargaining can vary among jurisdictions with different court structures and different legal systems. It can be seen that the considerable diversity in the organization of different courts can be reflected in the diverse nature and extent of plea bargaining. Plea bargaining is far from a homologous activity. The U.S. research has also indicated how altering the legal structure under which charging and sentencing decisions are made can alter the patterns of plea bargaining, but never successfully eliminate it.

It is beyond the scope of this paper to list all the empirical research on plea bargaining in the United States (see Appendix B for a bibliography). Suffice it to say that the parsimonious argument that plea bargaining is a necessity arising from heavy court volume has been found to be too simplistic. Researchers have discovered a multitude of variables which are possibly associated with the process of plea bargaining. generally, there appears to be an interaction among the characteristics of the court, the personalities and interpersonal dynamics of the court actors, the legal structure of the jurisdiction, and, to some extent, the type of defendants processed by the court. Such multivariate research has led to a portrait of the process which may be characterized by its *complexity* and *diversity*; as a consequence, there is a marked reluctance to generalize.

Caution must be exercised in the interpretation of the data available from the U.S. While each study of plea bargaining may have some particular methodological problems,[7] the literature in general is characterized by some pervasive problems. The most common problem is the persistent failure to refine and distinguish the varieties of phenomena loosely referred to as plea bargaining. The comparison of results from the empirical study of plea bargaining is thus rendered difficult and may explain some of the conflicting views on the subject.

A second problem is the consistent failure to consider those individuals who are screened out of the system before the laying of a charge, the entry of a guilty plea or the ultimate disposition of a case at trial. This would be of major concern to those interested in the impact upon the system of any reform, such a sentencing guidelines, as any change can have implications for all parts of the system. The institution of sentencing guidelines may well alter the patterns of formal and informal pre-court diversion, ultimately altering the types or numbers of offenders who reach the sentencing stage.

A third problem is the persistent failure to study plea bargaining itself. In many cases, researchers make statements about plea bargaining based upon inappropriate data, such as court

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[7] Most studies of plea bargaining suffer from some general and pervasive problems and in addition, have their own issues. Thus, Heumann's (*Plea Bargaining: The Experiences of Prosecutors, Judges and Defense Attorneys* (Chicago: University of Chicago Press, 1978)) use of interviews to assess the experience of new prosecutors compared with "veterans" is challenged by Barkai ("Review of Heumann's 'Plea Bargaining'" (1979-80) 68 Kentucky L. J. 243) because of possible differential memory effects. Frazier ("Review of Rosset and Cressey and Mather" (1979) 13 L. & Soc. Rev. 597) suggests that Mather's (*Plea Bargaining or Trial? The Process of Criminal Case Disposition* (Lexington, Mass.: Lexington Books, 1979)) "rapport" with court personnel may have resulted in simply getting and observing the party line. Borne ("Book Review of L. Mather" (1979) 7 Amer. J. of Crim. L. 418) points out that Mather's data may be obsolete in that it was gathered prior to the introduction of determinate sentencing practices ("Plea Bargaining Reexamined" (1979) 77 Mich. L. Rev. 885). Pepinsky ("Book Review of Buckle and Buckle" (1978) 69 J. Crim. L. & Criminology 421) suggests that Buckle and Buckle did not observe their subjects' "normal" behaviour or attitudes (*Bargaining for Justice: Case Disposition and Reform in the Criminal Courts* (New York: Praeger, 1977)). Scheingold ("Review of Felony Justice by Eisenstein and Jacob, 1977; and Partial Justice, by Gaylin, 1975" (1977) 15 Criminology 266) raised a series of questions about the Eisenstein and Jacob study, including the small amount of explained variance; their poor mix of qualitative and quantitative data; the possibility that their research was not sensitive enough to probe discretionary decision-making; and their vague use of organizational theory concepts (*Felony Justice: An Organizational Analysis of Criminal Courts* (Boston: Little, Brown, 1977)).

records, guilty pleas and trial rates. Many commentators erroneously assume that 90% of the conviction rates in most jurisdictions are the result of guilty pleas and that almost all of these are the direct consequence of plea bargaining.

In addition, many researchers have failed to recognize that the persons being observed, interviewed or given questionnaires may not report their "real" or "normal" behaviour, but may give researchers a "party line" or say what they believe the researcher wants to hear. A false picture of the nature and extent of plea bargaining can result.[8]

Attempts to Abolish Plea Bargaining

Although the debate on plea bargaining has engendered a substantial literature, there have been relatively few efforts to study the consequences of attempts to abolish or restructure plea bargaining. A few studies have attempted to assess the possibility of banning plea bargaining through administrative rule making.[9] Unfortunately, these studies are so poorly designed and conducted that they provide little reliable information on the consequences of attempts to ban plea bargaining. This is true of studies conducted in Arizona,[10] Oregon,[11] Iowa,[12] and Alaska.[13] These studies do not

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[8] For an extended discussion of the methodological problems associated with research on plea bargaining, see D. Cousineau & S. Verdun-Jones, "Evaluating Research into Plea Bargaining in Canada and the United States: Pitfalls Facing the Policy Makers" (1979) 21 Can. J. Criminology 293.

[9] M. Berger, "The Case Against Plea Bargaining" (1976) 62 A.B.A.J. 621; L. Haas, "High Impact Project Underway in Oregon: No Plea Bargaining, Robbery and Burglary" (1974) 10 Prosecutor 127; and Notes, "The Elimination of Plea Bargaining in Black Hawk County: A Case Study" (1975) 60 Iowa L. R. 1053.

[10] It is claimed that a ban on plea bargaining in Phoenix, Arizona resulted in a continued high level of guilty pleas with no increase in trials (Berger, *ibid.* at 621-624). Unfortunately, this study is very poorly designed and leads only to "impressions." Such poor research provides no basis for reasonable conclusions about the efforts to ban plea bargaining.

[11] In 1973, a High Impact Anti-Crime programme was implemented in order to reduce the specific target crimes of armed robbery, home burglary and theft. As part of this programme it was decided to eliminate plea bargaining practices for these crimes. The project was designed to use pre-trial discovery as a means of confronting defendants with the possibility of a strong case and a long trial in order to induce guilty pleas. Comparing court data on the effects of the programme with the effects of the previous year, preliminary impressionistic interpretations revealed an "encouraging" trend, but this conclusion was based on the consideration of only 38 cases. These data are, of course, totally insufficient to provide any basis for assessing the consequences of attempts to reduce plea bargaining (Haas, *supra* note 9 at 127-128).

[12] An attempt to assess the effects of eliminating plea bargaining is reported in the Iowa Law Review (*supra note 9).* Using data from felony cases only, and comparing a three month time period directly proceeding abolition of plea bargaining with a three month period following such abolition, then comparing these data with figures for the same six month period for the previous year, researchers claimed that a significant decrease in plea bargaining was accompanied by a marked increase in the efficiency of the criminal justice system. This study is not very informative, however. In addition to the very short time periods, the researchers did not consider the consequences of the attempted ban on any other criminal justice agencies, such as changes in police practices. Further, the time period following that ban was characterized by other important changes in criminal justice practices, such as the passage of a "deferred judgement" statute, which increased the possibility of probation dispositions. There were also changes in the level of co-operation between police and prosecutors, with a reduction in "overcharging." Also, the ban period witnessed the creation of a crime commission and an influx of funds for the Department of Community Court Services. Finally, the ban period saw the introduction of a witness immunity statute which allowed the prosecution, instead of engaging in plea bargaining, to offer a valuable witness immunity in exchange for testimony. It was believed that this factor aided in the "elimination" of plea bargaining in this jurisdiction.

[13] Several authors have reported the results of a study that examined the impact of the abolition of plea bargaining in Alaska (D.C. Anderson, "You Can't Cop a Plea in Alaska Anymore" (1979) 2 Police Magazine 4; M.P. Martin, "System Dynamics Evaluation of Alternate Crime Control Policies – An Alaskan Viewpoint" (1978) 3 Just. System J. 281; M.L. Rubinstein & T.J. White, *Plea Bargaining: Can Alaska Live Without It?* (1979) 6 Judicature 266; and M.L. Rubenstein, *Interim Report of the Elimination of Plea Bargaining* (Alaska: Alaska Judicial Council, 1977). These studies assess the 1975 ban by comparing data

provide an adequate basis for reasoned conclusions about the consequences of the curtailment or elimination of plea bargaining. While each study suffers from its own limitations, such as short time spans, a major common limitation is that they are narrowly conceived. The stated possibility that changes in bargaining practices may or may not affect one or two aspects of the criminal justice system, provides no real assessment of the overall consequences of such changes.

To date, only two studies of attempts to ban plea bargaining are sufficiently reliable to permit some reasonable conclusions.[14] In the first, Church was able to study the consequences of an attempt to abolish plea bargaining for drug sales cases on an entire judicial system.[15] The primary pattern of disposition of cases in this criminal justice system was that of guilty pleas negotiated between defence attorneys and assistant prosecutors. Prior to the new plea bargaining policy, charges for drug sales offences were usually reduced to a charge of attempted sale or possession in exchange for a plea of guilty. The bargaining usually took place at the evidentiary hearing or the arraignment.[16]

In January, 1973, a "no plea bargaining" policy, in the form of a ban on charge reductions, was initiated and vigorously enforced on assistant prosecutors. In order to determine the consequences of this policy, Church examined every drug sale warrant issued in 1972, the year preceding the change, as well as those warrants issued in 1973, the year following the new policy. He also interviewed many of the court actors, including defence and prosecuting attorneys, court administrators, and the judiciary. Comparing the time period before and after the policy change, the data revealed a near elimination of pleas of guilty to a reduced charge, a substantial increase in trial rates, and a considerable decrease in the total proportion of cases decided by pleas of guilt. These findings, however, should not obscure the fact that, even after the policy change, about 75% of defendants pleaded guilty to the original charge, which in this case carried a maximum 25 year sentence.

The willingness of defendants to plead guilty to such a serious charge requires explanation, and Church discovered that new patterns of bargaining developed. The most interesting accommodation to the no plea bargain policy was the coopting of judges to a sentence bargaining practice. Despite the wide-spread agreement by members of this court that judicial participation in bargaining was improper, the change in policy resulted in a shift to judicial involvement in, and even

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(cont'd) from 1974 and 1975, preceding the ban, to data following the ban, from 1975 to 1977. Most of the researchers acknowledged that while there was a considerable reduction in plea bargaining, the practice did continue to some extent. Thus, Anderson suggests a reduction of the incidence of explicit sentence bargaining from about 65% of cases to about four to 12% of cases. Guilty plea rates and conviction rates for felonies continued about the same rate while the rates for misdemeanors increased. Further, there was a decrease in the time taken to dispose of felonies. However, the ban had revealed unanticipated and rather deleterious consequences. There was a very dramatic increase in the time taken to dispose of misdemeanors (a 246% increase), an increase in the number of trials by over double the previous rate, and a considerable increase in the number of appeals. Further, relationships between prosecution and the police and defence counsel became very antagonistic.

[14] T. Church, "Plea Bargains, Concessions and the Courts: An Analysis of a Quasi-Experiment" (1976) 10 L. & Soc. Rev. 377, and; C. McCoy, "Plea Bargaining and Proposition Politics: The Impact of California's 'Ban' on Plea Negotiations" (1984) Paper Presented at the Annual Meeting of the American Society of Criminology, Cinncinati, Ohio, November 1984.

[15] His study is of a suburban county criminal justice system considered to be very *unlike* those found in major urban centres which display the worst "pathologies" of criminal justice. The court system was two-tiered, consisting of municipal and district courts and a circuit court. This criminal justice system was well financed, with high salaries for employees, ample office facilities and adequate staff who display high levels of morale and professionalism.

[16] The judges in this system were almost never involved in the negotiation practices but typically ratified the agreement. There was considerable evidence that any participation in these plea bargaining practices by judges was regarded as being very improper.

control over, sentence bargaining. At least half of the judges became personally involved in the sentence bargaining process which took place at the pre-trial conference between the prosecutor, defence attorneys and the judge. The bargaining was not explicit, but took the form of suggesting "hypothetical" cases to which the judge would respond with "hypothetical" sentences.

The behaviour of the judges also changed in that they began to allow defendants to withdraw guilty pleas in the light of unfavourable pre-sentence reports. This was because the pre-trial sessions were conducted before the pre-sentence report was available, and judges began to permit defendants to withdraw their pleas when it became apparent that the information provided by the probation officer would not allow the judge to honour their "hypothetical" sentences.

Judges also began to encourage sentence recommendations from prosecutors and to dismiss a slightly larger percentage of cases. A few judges changed some of the kinds of dispositions they used. Finally, judges who resisted the trend experienced considerable docket problems. The evidence indicated that, after the no plea bargain policy was implemented, the trial rate soared, but it increased primarily for those judges who would not become involved in the sentence negotiation practice.

The behaviour of prosecutors was also observed to change. While the policy resulted in the loss of control over reducing the charge, the prosecutor still retained power over the decision to charge a recidivist defendant as a habitual offender, to drop cases or charges, and to recommend sentence.

Preceding the policy change, the police tended to overcharge and under-prepare drug sale cases. These cases were then plea bargained into guilty pleas on reduced charges. Following the policy change, *nolle prosse* and dismissal of charges increased by about one-third, which was followed by an improvement of charging practices and a subsequent reduction in the number of warrants issued. Thus, during the initial change-over period, despite improved preparation of cases, the prosecutor's office increased their dismissal rate.

Despite the failure of Church to consider all of the possible consequences of attempts to abolish plea bargaining, this study makes a significant contribution to our knowledge of the dangers of simply assuming that "abolition" will have only beneficial results. It would appear that if abolition of plea negotiations at the prosecutorial level leads to sentencing negotiations at the judicial level, that abolition might produce more harm than expected.

McCoy's assessment of plea bargaining practices in California examines the impact of legislation designed to implement a series of criminal justice changes.[17] Proposition 8 was approved by California voters in 1982 and was designed to make changes to existing prosecutorial practices. One component was a limitation on plea bargaining. Bargaining, or negotiations resulting in the agreement of a defendant to plead guilty in exchange for a concession, was prohibited for offences in 25 felony categories. This ban on plea bargaining applied primarily to the Superior Courts for several designated offences and was also designed to standardize the remaining plea bargaining practices.

McCoy points out that this attempt to ban several forms of plea bargaining took place in a context of several changes in criminal justice practices in California, especially the on-going shift, beginning in the late 1970s, from indeterminate to determinate sentencing. McCoy describes some of the possible effects of the legislature's changes and plea bargaining reforms on guilty pleas and trial rates. While overall changes were not dramatic, she notes that complaints and protests came in increasing numbers from the California Department of Corrections about the added burden of

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[17] *Supra* note 14.

increasing numbers of inmates for the state prisons. However, there were apparently few alterations in the ratio of dismissals, guilty pleas or trials.

While the same proportion of cases resulted in guilty pleas, apparently there was a dramatic shift in the locations of and procedures for guilty pleas: i.e., *how* and *where* these cases were processed. Thus, the ban on plea bargaining in Superior Courts resulted in almost all the plea bargaining and case loads shifting to the Municipal Courts. Furthermore, the ban apparently led to changes in the procedures surrounding guilty pleas. Prior to the ban, Minicipal Courts dealt with two kinds of guilty pleas, non-negotiated "held to answer" and "certified guilty" pleas.[18] Following the plea bargain ban, there was a dramatic increase in the negotiated certified guilty pleas and a significant reduction in the non-negotiated "held to answer" pleas in the Municipal Court.

The studies of bans on plea bargaining by Church and McCoy show the extreme adaptability and tenacity of the phenomenon. Clearly, these two important studies indicate that attempts at banning plea bargaining are not likely to lead to its elimination, but only move the practice to different locales and result in changed court processing.

Re-Structuring Plea Bargining

One of the best studies of plea bargaining reforms to date took the form of a field experiment assessing changes in pre-trial settlement conferences in Florida.[19] While there were no overall changes in the rates of trials, dismissals and guilty pleas for the courts using the settlement conferences, there was some evidence of higher levels of satisfaction among the participating victims and police and, most importantly, a reduction in the time to dispose of cases by some three weeks. This well constructed research project lends considerable credence to the possibilty that plea bargaining can be formalized into the pre-trial conference with several very positive benefits.

Hydraulic Theory of Discretion

What the studies on reforms of plea bargaining appear to reveal is that the responses to such changes are considerably varied and diverse. Furthermore, this variability depends, in part, upon the specific nature of the reform, how the reform is introduced, the accompanying incentive structures, if any, and the characteristics of the jurisdiction into which the reform is introduced.

It seems reasonable to conclude also that, on the basis of the few comprehensive studies, while bans may reduce plea bargaining, it is not eliminated and these reforms are also accompanied by unanticipated and undesirable consequences. In addition, it should be noted that the studies of reforms are fraught with problems because it is often difficult to tell if changes are due to the reforms themselves, or are part of overall, general changes, such as California's shift from in-

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[18] Certified guilty pleas were the result of negotiations with defendants, prosecutors, and defence counsel which were then reviewed by a judge who decided if the sentence was appropriate. These cases were then passed on to the Superior Courts where they were reviewed by a Superior Court "certification judge."

[19] A.M. Heinz & W.A. Kersteller, *Pretrial Settlement Conference: Evaluation of a Reform in Plea Bargaining* (1979) 3 L. & Soc. Rev. 349. During the study, all plea negotiations occurred in front of a judge, with all interested parties present, including police and the victim. Following the arraignment of cases, judges held "routine conferences" about one week prior to the scheduled trial, one purpose of which was to attempt to discuss plea settlements. If these settlement conferences resulted in guilty pleas, then these were approved of by the judges and the defendant entered his guilty plea in court. There were also provisions for a second settlement conference on the day of the trial if no prior agreements were achieved. Some judges used these conferences while others did not, thereby enabling the determination of the consequences of the presence or absence of pre-trial settlement conferences.

determinate to determinate sentencing.[20] Further, some responses may be the results of some specific, yet unnoticed, changes such as new calendaring procedures.[21]

What appears to be a reasonable conclusion is that plea bargaining is pervasive, tenacious and very adaptable. It would appear that discretionary decision-making is a necessary part of most, if not all, criminal justice systems in the U.S. Bans and reforms seem to change the forms and locations of plea bargaining, but do not appear to banish it.

Given the fact that criminal justice systems are characterized by attempts to achieve many *varied* and often *conflicting* goals, then it seems reasonable to assume that these systems will always *generate* and *perpetuate* discretionary decision-making processes as adaptions to these multiple ends. Plea bargaining appears to allow and facilitate the accommodation of these multiple purposes of criminal justice systems.

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[20] McCoy, *supra* note 14.

[21] Martin, *supra* note 13.

PLEA BARGAINING IN CANADA

As noted above, examination of the U.S. literature can give the Canadian audience an insight into the complexity of the multi-facted phenomenon commonly termed "plea bargaining." Care should be taken, however, in generalizing results from U.S. studies to the Canadian situation. There are good reasons to believe that the nature and extent of plea bargaining that occurs in Canada vary in many fundamental ways from that which takes place below our border. This is not to say that the same types of pre-trial activities documented by U.S. studies do not occur in Canada, but rather that the relative importance of each type of bargaining varies between the two countries. This view is supported both by the limited empirical evidence available and an examination of the legal structure and judicial opinions that shape both the behaviour and decision-making patterns of court actors.

This section will examine some of the structural constraints placed upon actors engaging in plea bargaining, and will then focus upon the results of the limited number of empirical studies that have been undertaken in Canada. On the basis of this discussion, a number of factors that can serve to either enhance or restrict plea bargaining will be delineated.

Official Standards and Guidelines

There are presently both ethical and administrative constraints upon the nature and extent of bargaining. Although the enforcement of these formal mechanisms could serve to limit or eliminate the practice, no such efforts appear to have been made in Canada. Furthermore, nothing is provided in law that either defines acceptable bargaining or prohibits the practice outright; however, if such action were desired by the judiciary or legislators, then ability exists to take it.

Legislative Guidelines

Plea bargaining is neither legislatively sanctioned nor prohibited in Canada. It has been contended, however, that the practice of at least some types of bargaining could be eliminated by legislation. Invalidating guilty pleas which have resulted from plea bargains could, for example be achieved by a legislative pronouncement, presumably involving an amendment to the *Criminal Code.*[22] Existing legislation could also be adapted for the purpose. It has been suggested that sections of the *Criminal Code* concerning the corruption and disobedience of public officials and the obstruction of justice could be used to restrain plea bargaining.[23]

Verdun-Jones and Cousineau[24] contend that, should the courts wish to do so, the uniform application of the principle found in *Pigeau v. The Queen*[25] would constitute a singularly effective device for decreasing the incidence of some types of plea bargaining, perhaps using s. 534(4) of the *Criminal Code.* This section provides that:

> Notwithstanding any provision of this Act, where an accused pleads not guilty of the offence charged but guilty of an included or other offence, *the court may in its discretion* with the consent of the prosecutor accept such plea of guilty and if such plea is accepted, shall find the

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[22] G.A Ferguson & D.W. Roberts, "Plea Bargaining: Directions for Canadian Reform" (1974) 52 Can. Bar. Rev. 497 at 573.

[23] A.D. Klein, "Plea Bargaining" (1972) 14 Crim. L.Q. 289. He was refering to ss. 108, 109, and 127(2). There is no evidence to indicate that these provisions have ever been used for this purpose.

[24] "Cleansing the Augean Stables: A Critical Analysis of Recent Trends in the Plea Bargaining Debate in Canada" (1979) 17 Osgoode Hall L. J. 227.

[25] [1976] Qué. C.A. 527, 35 C.R.N.S. 222.

accused not guilty of the offence charged. [Emphasis added][26]

In *Perkins and Pigeau v. The Queen* it was held that, at least where offences carrying a *mandatory* minimum sentence are concerned, the Crown should not charge a lesser offence solely to avoid the imposition of the penalty described by statute.[27] It is not clear whether the court wished to establish a general principle restricting the power of the Crown to reduce charges in cases where it has the means to prove the greater offence at trial.[28] To date, there is no evidence to suggest that this section is being used regularly as a means of controlling prosecutorial plea bargaining.[29]

Common Law Guidelines

Although a recognized part of civil procedure, pre-trial discovery, sometimes through the mechanism of the preliminary inquiry, seems to have become increasingly accepted in the criminal courts.[30] The Law Reform Commission of Canada has recently advocated the enactment of statutory rules concerning pre-trial disclosure.[31] In addition, what has been a common law tradition was recently affirmed in a B.C. Court of Appeals ruling that upheld the disciplinary action taken by the B.C. Law Society in sanctioning a prosecutor who failed to inform the attorney for the defence of a witness who could undermine the Crown's case.[32]

Pre-trial disclosure provides a tailor-made opportunity to plea bargain because defence and Crown counsel meet together in an informal setting and discuss evidence and other procedural matters. Each side can assess the strength of the other's case. Napley has noted how this can pave the way for negotiations for a guilty plea -- particularly if the defence is not "airtight."[33] Conversely, the Crown may perceive that its case is weak and offer to reduce the charge(s).

The Law Reform Commission reports the results of a number of pilot experimental projects where pre-trial discovery was formalized. They state that one advantage of the system was that plea bargaining was facilitated. The pilot study, undertaken in Montréal, found that the rate of

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[26] *Criminal Code*, R.S.C. 1970, c. C-34.

[27] See, for example, *R. v. Gray* (1981), 24 C.R. (3d) 109 (Sask. Prov. Ct.), where the trial judge held that, although it was an included offence in the offence of assault causing bodily harm, a charge of common assault cannot be considered by the court if the victim has indeed suffered bodily harm.

[28] The English courts have long exercised a similar power as a means of controlling prosecutorial discretion; in effect, they have insisted that the actual charge laid in a criminal case should reflect accurately the particular factual background to any individual case. See Verdun-Jones & Cousineau, *supra* note 24.

[29] For discussion of section 534(4), see "Panel Discussion on 'Plea and Sentence Negotiations'" in *Proceedings of the Programme on Criminal Law: Representation After Conviction* (Toronto: Law Society of Upper Canada, Department of Continuing Education, October 1970) at 18-19; and Law Reform Commission of Ontario, *Report of Administration of Ontario Courts. Part II* (Toronto: Ministry of the Attorney General, 1973) at 121-122. The Commission indicates its belief that the control of plea negotiations should be a matter for the Attorney General, rather than the courts. For the applicable procedures to be used when a plea to an included offence is not accepted, see *R. v. Pentiluk* (1974), 21 C.C.C. (2d) 87 (Ont. C.A.).

[30] See R. Salhany, "The Preliminary Inquiry: Extension of Pre-Trial Discovery" (1967) 9 Crim. L. Q. 394; A. Hooper, "Discovery in Criminal Cases" (1972) 50 Can. Bar. Rev. 445; J. Wilkins, "Discovery" (1976) 18 Crim. L. Q. 355; A. MacEachern, "The Pre-Trial Conference" (1980) 38 Advocate 299; and D. Napley, "The Preliminary Inquiry as an Aspect of Trial Strategy in *Advocacy -- A Symposium Presented by the C.B.A., Ontario* (Toronto: DeBoo Publishers, 1982).

[31] *Report 22: Disclosure by the Prosecution* (Ottawa: Ministry of Supply and Services, 1984). The Commission had, in 1974, advocated the abolition of the preliminary inquiry in favour of a formal system for disclosure and pre-trial conferences (*Discovery in Criminal Cases* (Ottawa: Information Canada, 1974).

[32] *Cunliffe v. Law Society of B.C.; Bledsoe v. Law Society of B.C.* (1984), 40 C.R.(3d) 67.

[33] *Supra* note 30.

guilty pleas doubled and the number of charges withdrawn by the prosecution tripled.[34] This was touted by the Commission as being both cost-efficient and a benefit to the administration of justice.

Another factor that influences plea bargaining is the common law principle of *res judicata* that was broadened by the *Kienapple* decision.[35] In *Kienapple*, the Supreme Court of Canada appeared to suggest that the doctrine of *res judicata* could be extended to prohibit multiple convictions for different offences that arose out of the same incident. However, according to Salhany,[36] subsequent interpretation of the case has established that the *Kienapple* principle will be restricted to "offences involving not only the same incident or transaction, but also having common elements." Furthermore, in the *Kienapple* case itself, the Supreme Court ruled that, while an offender, in certain circumstances, can only be convicted of one offence arising out of a single incident, it is still legitimate for the Crown to lay more than one charge. The *Kienapple* decision and its subsequent interpretations have, therefore, tacitly endorsed the relatively frequent police practice of laying multiple charges in relation to a single incident.

The ability of the police to lay more charges, than may reasonably be expected to result in conviction, is an important facilitating condition of plea bargaining. Indeed, Brannigan and Levy suggest that:

> Such a looseness of fit between the police latitude in laying charges and limitations on the Crown's ability to secure convictions on them is probably the single most important source of charge reductions and one of the most important factors in so-called plea-bargaining.[37]

Brannigan and Levy, refraining from terming this overcharging, call these extra charges "negotiable cases" or "insurance charges."[38] If the accused is undefended, or represented by an unscrupulous attorney, he/she can be the victim of an illusory bargain if convinced to plead guilty in exchange for the dropping of charges that were going to be dropped anyway.

Professional Guidelines

Ferguson and Roberts have noted that, if plea bargaining were to be declared unethical by bar associations, the enforcement of these ethical standards could be used to control the practice.[39] They further note, however, the limited efficacy of this method as lawyers may be reluctant or unwilling to report their colleagues to the relevant authorities.

It is suggested that it is not bargaining *per se* that is unethical, but rather some of the tactics employed by the bargainers. Ericson and Baranek document some of the strategies used by defence attorneys to induce their clients to plead guilty. Follow-up interviews with the defendants in some cases revealed that they were unsure, not only of their *legal* guilt, but, also of their *factual* guilt.[40] Illusory bargaining is another unethical means of compelling a guilty plea. Tacit plea bargaining may also be unethical if the defendant believes he/she is not guilty or if there is a plausible defence

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[34] M. Rizkella, *Pre-Trial Discovery: Evaluation of the Montreal Pilot Project* (Unpublished, 1980).

[35] *Kienapple v. The Queen* (1974), 15 C.C.C.(2d) 524.

[36] *Canadian Criminal Procedure* Fourth Edition (Aurora, Ont.: Canada Law Book, 1984) at 258-9.

[37] "The Legal Framework of Plea Bargaining" (1983) 25 Can. J. Criminology 399.

[38] *Ibid.* at 403.

[39] *Supra* note 22 at 573.

[40] *Ordering of Justice.*

to the charges. A tacit plea bargain occurs when an accused pleads guilty in anticipation of a less severe sentence than would have been the case after conviction by trial (this is discussed in more detail below).

The conduct of defence attorneys in criminal cases is generally governed by the provincial law associations and societies that are empowered to license and discipline members of the bar. Each member is required to act ethically, as loosely defined in, for example, the *Barristers and Solicitors Act* of British Columbia.[41] Herein is provided a vague definition of "conduct unbecoming a member of the society":

> "conduct unbecoming a member of the society" includes any matter, conduct, or thing that is deemed in the judgement of the benchers to be contrary to the best interests of the public or the legal profession, or that tends to harm the standing of the legal profession

A more specific definition is not provided in the *Professional Conduct Handbook* of the B.C. Law Society. The Society does, however, receive and consider complaints against lawyers who are accused of professional misconduct by a client or a colleague. Conceivably, the term "misconduct" could include illicit bargaining; however, a total of 24 complaints have been laid against B.C. criminal lawyers between January, 1982 and March, 1984. None of these matters has resulted in a finding against a lawyer. As discussed below, a client involved in an enthical plea bargain 44will find it difficult to claim he or she has been wronged.

The Code of Professional Conduct of the Canadian Bar Association provides a more explicit pronouncement of those types of plea agreements that are acceptable. The Code provides that "when acting as an advocate, a lawyer must, while treating the tribunal with courtesy and respect, represent his client resolutely, honourably and within the limits of the law." In commenting upon the this rule, the following guideline is included:

> Where, following investigation,
>
> (a) a defence lawyer *bona fide* concludes and advises his accused client that an acquittal of the offence charged is uncertain or unlikely,
>
> (b) the client is prepared to admit the necessary factual and mental elements,
>
> (c) the lawyer fully advises the client of the implications and possible consequences, and particularly of the detachment of the court, and
>
> (d) the client so instructs him,
>
> it is proper for the lawyer to discuss with the prosecutor and for them tentatively to agree on the entry of a plea of "guilty" to the offence charged or to a lesser or included offence appropriate to the admissions, and also on a disposition or sentence to be proposed to the court. The public interest must not be or appear to be sacrificed in the pursuit of an apparently expedient means of disposing of doubtful cases, and all pertinent circumstances surrounding any tentative agreements, if proceeded with, must be fully and fairly disclosed in open court. The judge must not be involved in any such discussions or tentative agreements, save to be informed thereof.[42]

The conduct of the Crown is often governed by policy guidelines and considerations. The individual Crown Attorneys are agents of the provincial Attorneys or Solicitors General, but, as a matter of practice, these elected officials cannot be expected to monitor the decisions of all prosecutors (although that is generally part of their legislatively defined mandate). Within each province, the Crown Attorneys may be guided by directives concerning the stance they may take in plea

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[41] R.S.B.C. 1979, c. 26.

[42] Canadian Bar Association, *Code of Professional Conduct* (Ottawa: C.B.A., 1974).

bargains. For example, in British Columbia, the *Provincial Crown Handbook* provides the following policies:

> 1. The Crown is not to
>
> (a) compel a guilty plea to a reduced charge,
>
> (b) take a guilty plea on an offence which is banned at law and therefore cannot be prosecuted,
>
> (c) take a guilty plea to an offence when no *prima facie* case exist,
>
> (d) agree to a specific sentence
>
> (e) speak to the judge in chambers without the defence.
>
> 2. Crown is to remind that court that the prosecutor cannot bind the Attorney General in the exercise of his discretion to appeal the sentence.
>
> 3. Crown may, if asked by the court, give views on mitigating or aggravating circumstances, and form and range of sentence.[43]

It is clear that in Canada, there are many institutionalized regulations governing the conduct of criminal justice professionals who engage in plea bargaining. The degree to which these guidelines are followed is not known, but it seems clear that they lack the enforceability necessary to make them an effective deterrent to *illicit* bargaining.

The very existence of such guidelines, however, indicates that the agents of the criminal justice system have acknowledged that plea bargaining does occur in Canada. While it has probably been practised in Canada for many decades, plea bargaining was traditionally frowned upon and most individuals would not admit that it took place. Until relatively recently in this country, plea bargaining was held in such low regard that the Law Reform Commission of Canada commented that it "is something for which a decent criminal justice system has no place."[44] As an indication of how thought has progressed on the matter, the L.R.C.C., in a recent publication, talks about plea bargaining as a routine part of the court process.[45] A similar evolution of thought is evident from the comments of the judiciary, who were initially very critical of the practice but have come more recently to mention the topic in passing, again as a routine occurrence.

The Judicial Response

Pronouncements by the Canadian judiciary regarding the propriety of bargaining are an important indication of the willingness of the Courts to condone or discourage the practice overall. Explicit pronouncements have been infrequent but consistent. In *Perkins and Pigeau v. The Queen*, the Court of Appeal held that it could not accept the practice, whether the initiative for plea bargaining came from the Crown or the defence.[46] Similarly, in *A.G. Can. v. Roy*, Hugessen J. held that: "Plea-bargaining is not to be regarded with favour."[47] In *R. v.*

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[43] Cited in L.S. Goulet, "Prosecutorial Discretion" in S.E. Oxner, ed., *Criminal Justice* (Toronto: Carswell, 1982) at 65-66.

[44] *Fourth Annual Report* (Ottawa: Information Canada, 1974-75) at 14.

[45] *Supra* note 31.

[46] [1976] Qué. C. A. 527 at 528, 35 C.R.N.S. 222 at 226 *per* Rinfret J.A.

[47] (1972), 18 C.R.N.S. 89 at 92 (Qué. Q.B.).

Wood,[48] the Supreme Court of Alberta appears to have adopted a similar position with respect to the propriety of plea bargaining. In this case, McDermid J.A. quotes, with evident approval, the view of the Law Reform Commission of Canada that plea bargaining is incompatible with a "decent system of criminal justice."[49]

To date, these three cases represent the only *explicit* judicial pronouncement as to the propriety of prosecutorial plea bargaining in Canada. In none of these cases did the court attempt to define what it regarded as a "proper" pre-trial relationship between prosecutor and defence. However, an indication of the extent to which the courts have come to accept plea bargaining can be noted in the case of *Zelensky* when the Supreme Court of Canada mentioned, without apparent disapproval and almost as an afterthought, that the guily plea was the result of a plea bargain.[50] In *R. v. Dubien*, the defence contended that allowing the Crown to appeal a sentenced agreed upon in a plea bargain would cause the collapse of the whole system of plea bargaining.[51] That such a defence was presented in a Canadian court is significant, as is the fact that not so much as a judicial eyebrow was raised over the argument.

While most Canadian courts have avoided committing themselves to a firm stand on the propriety of plea bargaining, they certainly have not been able to side-step the unfortunate consequences of those plea bargains that have turned sour. The appellate courts have been confronted with this issue when the Crown either reneged on the agreement during the trial, or appealed the agreed upon sentence.[52]

Broken Bargains: Pre-Adjudication

As discussed below, most Canadian courts are well disposed towards receiving submissions from the Crown, at the sentencing hearing, *provided* the offender has been advised that the Court is not bound by that recommendation. The Crown recommendation of a lenient sentence has, therefore, become a "commodity" in the pre-trial market place. As Ericson and Baranek document, however, the Crown can also agree to withhold information from the judge, such as evidence of a prior record or aggravating circumstances.[53] In the few cases where the Crown has not carried out its part of the agreement at trial, the view of the courts appears to be that the defendant should be entitled (depending on the circumstances) either to specific performance of the agreement,[54] or to withdraw his plea of guilty and undergo a new trial.[55]

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[48] [1976] 2 W.W.R. 135, 26 C.C.C. (2d) 100 (Alta. C.A.).

[49] *Ibid.* at 144-145 (W.W.R.), 108-109 (C.C.C.). Although McDermid J.A. dissented from the actual decision in *Wood*, the principles he expounded were approved by the majority of the Court. (See 147 (W.W.R.), 110 (C.C.C.) *per* Moir J.A.).

[50] *R. v. Zelensky, et al.* (1979), 41 C.C.C. (2d) 97 at 116, *per* Pigeon, J.

[51] 67 C.C.C. (2d) 341 (Ont. Ct. Ap.).

[52] For an American review, see S.H. Perskin & D.L. Lewis, "Enforcing Plea Bargaining Agreements" in M.F. Edwards, ed., *Settlement and Plea Bargaining* (Washington, D.C.: Association of Trial Lawyers of America, 1981) 342.

[53] *Ordering of Justice* at 66, 120-1.

[54] See, for example, *R. v. Brown* (1972), 8 C.C.C. (2d) 227; and *R. v. Smith*, [1975] 3 W.W.R. 454, 8 C.C.C. (2d) 291 (B.C.S.C.). For a discussion of whether undertakings made by federal prosecutors may bind their provincial counterparts, see *R. v. Betesh* (1976), 35 C.R.N.S. 238 (Ont. Co. Ct.).

[55] See *R. v. AhTom* (1928), 60 N.S.R. 1, [1928] 2 D.L.R. 748, 49 C.C.C. 204 (C.A.); and *R. v. Stone* (1932), 4 M.P.R. 455, 58 C.C.C. 262 (N.S.S.C.). This possibility was affirmed in *R. v. Morrison* (1981), 63 C.C.C. (2d) 527, 25 C.R. (3d) 163 (N.S.S.C.) where the accused changed his plea to guilty in exchange for a promise from the Crown of a recommendation of a lenient sentence. A strongly worded request for a substantial

Broken Bargains: Repudiations by Crown Appeal

On occasion, Crown counsel will have agreed to maintain a certain position with respect to sentence; in exchange for a plea of guilty, he/she will have undertaken either to make an active submission in favour of an "agreed sentence" or, alternatively, to indicate at least his/her acquiescence in the contentions advanced by defence counsel. The court is, however, reluctant to allow the Crown to repudiate its position by appealing a sentence that accorded with the recommendation to the trial judge. This is especially so if that sentence was recommended as part of a plea bargain. The Appellate Courts have occasionally refused to vary the sentence, stating that "exceptional circumstances" would have to be present before the Crown will be allowed to break its bargain.[56]

This approach, while treating the defendant with the utmost fairness, may overlook the interests of society, the administration of justice in general, and the victim in particular and, on these grounds, the Crown has occasionally been allowed to repudiate its original position. Nadin-Davis[57] has summarized the four well-recognized circumstances. A repudiation will be allowed where:

> Crown counsel mistakenly agreed to an illegal sentence;[58]
>
> Crown counsel was misled by the accused at trial;[59]
>
> Crown counsel was led into his position by the trial Judge, rather than acting on his own initiative;[60] and
>
> the sentence is so grossly insufficient that the public interest overrides considerations particular to the accused.[61]

In a more recent case, it was held that because the Crown had informed the defendant that the bargained sentence was subject to appeal by the Attorney General, the fact that the Attorney General did ultimately appeal could not be considered a repudiation.[62] In light of the fact that the defendants in some of these cases pleaded guilty primarily as a consequence of their expectations as to the nature of the sentence to be imposed, it is significant that, in at least some of these circumstances, the court has not seen fit to afford the defendant the opportunity to withdraw his/her

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(cont'd) sentence was instead entered.

[56] *R. v. Fleury* (1973), 23 C.R.N.S. 164 (Qué. C.A.). See also *R. v. Christie* (1956), 18 W.W.R. 442, 115 C.C.C. 55 (Sask. C.A.); *R. v. Agozzino*, [1970] 6 C.R.N.S. 147, [1970] 1 C.C.C. 380, [1970] 1 O.R. 480, 11 Crim. L.Q. 332 (C.A.).

[57] *Sentencing in Canada* (Toronto: Carswell: 1982) at 571.

[58] *R. v. Agozzino, supra* note 56.

[59] *A.G. Can. v. Roy, supra* note 47.

[60] *R. v. Cusak* (1978), 6 C.R.(3d) S-48, 41 C.C.C. (2d) 289, 26 N.S.R. (2d) 379 (C.A.).

[61] *A.G. Can. v. Roy, supra* note 61; *R. v. MacArthur* (1978), 5 C.R. (3d) S-4, 39 C.C.C. (2d) 158, 15 Nfld. & P.E.I.R. 72, 38 A.P.R.72 (P.E.I.C.A.); *R. v. Mouffe* (1971), 16 C.R.N.S. 257 (Qué. C.A.); *R. v. Smith* (1981), 25 C.R. (3d) 190 (Alta. C.A.); *R. v. Goodwin* (1981) 21 C.R. (3d) 263, 43 N.S.R. (2d) 106, 81 A.P.R. 106 (C.A.).

[62] *R. v. Dubien, supra* note 51.

plea and undergo a new trial.[63]

The lack of any clear criteria defining when a repudiation is permitted would be of some concern to a defendant who wishes to enter into a plea bargain with the Crown. To those commentators who believe that the plea bargaining process has become "an integral part of the administration of justice," the failure to establish a specific rule as to when the Crown may successfully override a sentence agreement made at trial is regarded as an unjustifiable deterrent to those accused persons who seek to participate in the process.[64] Of course, such an argument has no pervasive force for those who reject the propriety of all plea bargaining.

The Tacit Judicial Response

While the unequivocal pronouncement of judicial disapproval concerning plea bargaining could serve to reduce its occurrence significantly, few such declarations have been made. Conversely, while the judiciary could decide to support the practice, such a commitment has, to date, not been forthcoming. Rather, it is suggested, Canadian Courts have provided more subtle condonation, or even encouragement, of the practice. Of some importance to a defence counsel, who has just struck a bargain with the Crown, is the ability to convince the client that pleading guilty is in his/her best interests. The responses of the courts in the areas discussed below have provided not only persuasive arguments to this effect, but also an atmosphere that allows the practice to flourish unchecked by judicial scrutiny.

Guilty Pleas

Canadian jurisprudence has assigned a relatively passive role to the trial judge faced with the entry of a guilty plea by the defendant. Unlike his/her counterpart in the American federal courts, the Canadian trial judge is not bound by law to investigate the circumstances surrounding all guilty pleas before accepting them.[65] The failure to inquire into such circumstances may result in the reversal of a conviction or the withdrawal of the guilty plea where the appellate court feels that there is some doubt as to whether the defendant "fully" understood the nature of the charge or the consequences of the plea.[66] Where the defendant has been represented by a defence counsel, however, such a reversal of conviction will occur infrequently.[67] In other words, the presence of defence counsel generally will excuse the trial judge from conducting a meticulous inquiry into the circumstances surrounding a guilty plea.[68]

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[63] *R. v. Mouffe, supra* note 61, *R. v. Kirkpatrick*, [1971] Qué. C.A. 337. Cf. *R. v. Wood, supra* note 48.

[64] See "Decision on Sentencing" (1972) 14 Crim. L.Q. 396.

[65] *Adgey v. The Queen* (1973), 39 D.L.R. (3d) 553, 13 C.C.C. (2d) 177 (S.C.C.). Also see the annotations by A.E. Popple in (1946), 1 C.R. 183 at 260.

[66] *Brosseau v. The Queen*, [1969] S.C.R. 181 at 190, 2 D.L.R. (3d) 13 at 147, [1969] 3 C.C.C. 129 at 138. *R. v. Johnson* (1945), 62 B.C.R. 199, [1945] 4 D.L.R. 75, 85 C.C.C. 56 (C.A.). Also see *R.v. Haines* (1960), 127 C.C.C. 125 (B.C.C.A.); and *Antoine v. R.* (1984), 40 C.R. (3d) 375 (Qué. C.A.). A trial judge who suspects the accused may have been insane and, therefore, lacked the capacity to form intent has the discretion to reject the guily plea. See *R. v. Scrogie* (1974), 15 C.C.C. (2d) 309, [1974] W.W.R. 641 (B.C.S.C.); and *Re R. and Pooley* (1974), 27 C.R.N.S. 63, 117 C.C.C. (2d) 168 (B.C.S.C.). See also *R. v. Hansen* (1977), 37 C.C.C. (2d) 371 (Man. C.A.) for an example of how the Crown's threat to proceed on the more serious charge (in this case first degree murder) can convince an accused to plead guilty to a lesser charge (second degree murder). When the Crown's plan is abandoned, however, the accused should be given the option to withdraw the guilty plea.

[67] *R.v. Millina* (1946), 62 B.C.R. 532, [1947] 1 D.L.R. 124, 86 C.C.C. 374 (C.A.); *Brosseau v. The Queen, ibid.*; *R. v. Leonard* (1975), 29 C.C.C. (2d) 252 (Ont. C.A.).

[68] Of course, there may be situations where the courts may set aside a guilty plea even though the

In sum, the lack of a requirement under Canadian law that a judge ferret out the critical factors that may have led to the defendant's decision to plead guilty has effectively created an environment in which it is possible for Crown and defence counsel to enter into plea bargains behind the inscrutable veil of secrecy.

Withdrawal of Guilty Plea

A defence attorney may only advise a client to plead guilty if there is no possible defence to the charge.[69] Ericson and Baranek, however, observed that there are situations where the defence will encourage a client to plead guilty even when the client is not convinced of his/her guilt.[70] An accused in this position may eventually reconsider and wish to undergo a trial. The Court's response to this situation was demonstrated in a recent case where an accused's guilty plea was set aside upon appeal.[71] He claimed that the defence counsel had "pressured" him into pleading guilty and that an "agreement" had been made with the Crown with a view to obtaining a suspended sentence. Prior to the imposition of a sentence, the accused requested that he be permitted to withdraw his plea. Rothman J.A. stated that:

> It may well be that there is a fine line between "advice" and "pressure" in some cases, but in this case both versions, that of counsel as well as that of the accused, indicate that counsel was on the wrong side of the line. His conduct, on his own admission, went beyond permissible professional conduct in a criminal trial.[72]

It was held that the trial judge should have withdrawn the guilty plea and proceeded to trial.[73]

In the absence of an admission on the part of the defence or Crown, however, the Court appears somewhat reluctant to believe an accused's version of the bargaining process. In *Antoine v. R.*,[74] an appeal was launched after a sentence of 12 months' imprisonment was imposed. Antoine alleged that he had not understood the nature and consequences of the guilty plea and had not intended to admit guilt. He had, rather, succumbed to his counsel's wishes and the promise of a suspended sentence and immediate release from custody.[75] Moreover, Antoine contended that, prior to the sentencing hearing, he reconsidered the plea and on many occasions attempted to contact his lawyer from jail about the possibility of withdrawing his guilty plea. The appellate court refused to

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(cont'd) defendant was represented by counsel; for example, where a defence counsel has become embroiled in a conflict of interest (*R. v. Stork* (1975), 24 C.C.C. (2d) 210 (B.C.C.A.)), or where the defendant is not represented by counsel of his choice (*R. v. Butler* (1973), 11 C.C.C. (2d) 381 (Ont. C.A.)).

[69] It was held in *Toussaint v. R.* (1984), 40 C.R. (3d) 230 (Qué. C.A.) that an accused should not be deterred from presenting even a weak defence.

[70] *Ordering of Justice.*

[71] *Lamoureux v. R.* (1984), 40 C.R. (3d) 369 (Qué. C.A.). A trial judge has the discretion to allow an accused to withdraw a guilty plea at any time prior to sentencing while an appellate court maintains this ability at any stage. Such a change should only be allowed, however, if the plea was entered in error or under "improper inducements" or threats. E.G. Ewaschuk, *Criminal Pleadings and Practice in Canada* (Aurora, Ont.: Canada Law Book Company, 1983) at 325-26.

[72] *Ibid.* at 373-4.

[73] See also *R. v. Johnson*, unreported, January 6, 1977 (Ont. C.A.) where a guilty plea was withdrawn by the trial judge after it was determined that the defence counsel had convinced an innocent man to plead guilty because that innocence would be difficult to prove (cited in Ruby, *Sentencing* (Toronto: Butterworths, 1980) at 41).

[74] *Supra* note 66.

[75] Ericson and Baranek (*Ordering of Justice*) observed that the desire to avoid lengthy remand stays was one reason given by individuals who were refused bail for pleading guilty when they otherwise would have been inclined to plead not guilty.

permit the withdrawal of the guilty plea, feeling that there was no support for the allegation that the defence counsel had acted inappropriately and that dissatisfaction with a sentence is not grounds for appeal. The defence counsel who had brought the appeal was rebuked for relying soley on affidavits from Antoine and a coaccused as evidence that promises had been made. The existence of any agreement had been denied by the Crown. Rothman J.A. cited a previous judgement on this issue:

> I consider it most unfortunate that any counsel, carried away by his enthusiastic support of his client's cause, should permit himself, by reason of his client's instructions, to make allegations inferring unjust conduct on the part of the Court, or unprofessional conduct on the part of brother solicitors without first satisfying himself by personal investigations or inquiries that some foundation, apart from his client's instructions, existed for making such allegations. His duty to his client does not absolve a solicitor from heeding his duty to the Court and to his fellow solicitors.[76]

Such a position does not bode well for individuals seeking remedy after a broken plea bargain unless one of the official participants is willing to admit that the negotiations occurred.

Guilty Plea as a Mitigating Factor

In some instances, accused persons entering guilty pleas may expect to receive a more lenient sentence than if their guilt had been determined by a trial. This has been called a "tacit plea bargain." Judges may justify a more lenient sentence because the plea indicates remorse,[77] that the community is saved the cost of a trial[78] or that the victim is spared the trauma of testifying.[79] These factors have not been considered as mitigating if the guilty plea is entered because the accused is inescapably caught.[80] This latter principle is not, however, uniformly applied. For example, guilty pleas entered by accused who were inescapably caught have been considered to mitigate because the saving of public money by guilty pleas should be encouraged.[81] Nadin-Davis attempts to reconcile the apparently conflicting pronouncements on this issue by noting that such leniency is generally shown where the offence is one for which a tariff sentence is appropriate, while

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[76] *R. v. Elliott* (1975), 28 C.C.C. (2d) 546 at 549 *per* Kelly J.A. Also see *R. v. Lemire and Gosselin* (1948), 92 C.C.C. 201 (Qué. C.A.) where it was contended by the accused that, although innocent, they pleaded guilty to robbery after being so advised by the police and promised a lighter sentence. The appellate court did not grant a new trial because their contentions were not corroborated and were somewhat contradictory. See, however, *R. v. Butler* (1973), 37 C.C.C. (2d) 381 (Ont. C.A.) where a new trial was ordered after an alleged inducement by the police because, although the allegation might not be true, it might appear that there had not been a fair trial.

[77] This factor has frequently been mentioned. See, for example, *R. v. Ikalowjuak* (1980), 27 A.R. 492 (N.W.T.S.C.); and *R. v. Beriault* (1982), 26 C.R. (3d) 396 (B.C.C.A.). Greater rehabilitative potential is often credited to those who are remorseful.

[78] See, for example, *R. v. Johnson and Tremayne*, [1970] 4 C.C.C. 64, [1970] 2 O.R. 780 (C.A.); and *R. v. Borris*, November 3, 1982, unreported (B.C. Co. Ct.).

[79] *R. v. Shanower* (1972), 8 C.C.C. (2d) 527 (Ont. C.A.); *R. v. Traux* (1979), 22 Crim. L.Q. 157, 3 W.C.B. 387 (Ont. C.A.); and *R. v. Pineau* (1979), 24 A.R. 176 (Q.B.). Cooperation with the police is another possible mitigating circumstance. In *R. v. Bartlett; R. v. Cameron* (1961), 131 C.C.C. 119 (Man. C.A.) the accused surrendered themselves to the police, made frank and honest statements and pleaded guilty. The surrender particularly was considered to indicate some recognition of their wrongdoing and was, therefore, held to be a mitigating factor.

[80] *R. v. Squires* (1975), 25 C.C.C. (2d) 202, 8 Nfld. & P.E.I.R. 103 (Nfld. Prov. Ct.); *R. v. Basha et al.* (1979), 23 Nfld. & P.E.I.R. 286, 61 A.P.R. 286 (Nfld. C.A.); and *R. v. McClean et al.* (1980), 26 Nfld. & P.E.I.R. 158 (Nfld. Prov. Ct.).

[81] *Johnson and Tremayne, supra* note 78; *R. v. Hutton* (1977), 13 A.R. 557 (Dist. Ct.); and *R. v. Wisniewski* (1975), 29 C.R.N.S. 342 (Ont. Co. Ct.).

mitigation is not considered in cases where exemplary sentences are usually imposed, such as drug trafficking.[82]

While it may appear that accused persons are *penalized* for exercising their right to a trial, it is, instead, generally contended that those who plead guilty are treated more *leniently*.[83] The apparent disparity, especially between coaccused who plead differently, was of some concern to Salhany Co. Ct. J. in the *Layte* judgement, but he felt overall that pleas of guilty, from truly guilty people, should be encouraged:

> It is a fundamental concept of our sysytem of justice that a person accused of a crime is entitled to demand that the Crown prove his guilt by a fair and impartial trial. There is nothing that the court should ever do to whittle down or undercut that fundamental principle. At the same time, *it would be unrealistic not to recognize that if everyone demanded a full and complete trial our system of justice would come to an abrupt halt.* It is for that reason that those who are guilty, and wish to so plead, should be given special consideration when they appear before the court. [Emphasis added][84]

When encouraging guilty pleas by adopting the stance voiced in *Layte*, the Courts appear to be facilitating plea bargaining. Lawyers interviewed by Ericson and Baranek,[85] in speaking of the strategies employed to convince reluctant clients to plead guilty, noted that the promise of a more lenient sentence can be extremely persuasive. It is perhaps not coincidental that the justification offered by Salhany Co. Ct. J. for this practice is the same as that given by many who feel plea bargaining is vital to the smooth operation of the courts.

Sentence Recommendations

In contrast with the British tradition, Canadian courts generally welcome a submission by Crown[86] regarding not only the type but the *quantum* of sentence.[87] Failure to make a certain re-

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[82] *Sentencing in Canada, supra* note 57, at 174. Contrary to this explanation, however, are two cases involving trafficking in narcotics where the mitigation of a guilty plea was allowed: *R. v. Johnson and Tremayne, supra* at note 78, followed in *R. v. Layte* (1983), 38 C.R. (3d) 204 (Ont. Co. Ct.). In the later case, the plea was changed to guilty just prior to trial, possibly indicating a plea bargain. Layte received a lesser sentence than the coaccused with a similar prior record who went to trial.

[83] Pleading not guilty does not indicate a lack of remorse, but seems solely to disentitle an accused from the benefits of mitigation. However, even a guilty person who perjures himself by denying guilt in a trial might not be given a more severe sentence (S.C. Hill, "Lack of Remorse or Sentencing for Perjury?" (1982) 25 C.R. (3d) 350). Note also that lack of remorse may be an aggravating factor, but must be proved beyond a reasonable doubt (*R. v. Petrovic* (1984), 14 C.R. (3d) 275 following *R. v. Gardiner*, [1982] 2 S.C.R. 368, 30 C,R, (3d) 289, 68 C.C.C. (2d) 477, 140 D.L.R. (3d) 612, 43 N.R. 361). Cf. *R. v. MacArthur* (1979), 9 C.R. (3d) S-23, 32 N.S.R. (2d) 96, 54 A.P.R. 96 (C.A.).

[84] *R. v. Layte, supra* note 82 at 206.

[85] *Ordering of Justice.*

[86] Cf. *R. v. Wood, supra* note 48 where McDermid J.A. stated his belief that the Crown should play a restricted role in the sentence process by only making submissions when so requested.

[87] *R. v. Weber* (1972), 9 C.C.C. (2d) 49, 20 C.R.N.S. 398 (B.C.C.A.); *R. v. Simoneau* (1978), 40 C.C.C. (2d) 307, 2 C.R.(3d) S-17 (Man. C.A.); *R. v. Cusak, supra* note 60; *R. v. Dimora et al.* (1978), 45 C.C.C. (2d) 96 (Qué. S.C.); and *R. v. Sabloff* (1979), 13 C.R. (3d) 326 (Qué. S.C.). In *R. v. Jones* (1974), 17 C.C.C. (2d) 31, 27 C.R.N.S. 107 (P.E.I.C.A.) the appeals court changed the original sentence to that recommended by the Crown after trial. Further, it was stated that the court should take the Crown recommendation into account. Cf. *R. v. Greene* (1971), 20 C.R.N.S. 238 (Ont. Co. Ct.) where Graburn J., at 239, contended that Crown counsel is entitled to suggest only the form of sentence -- the quantum of sentence is a matter falling within the "absolute jurisdiction of the Court."

commendation may impede the Crown's ability to appeal the sentence.[88] As part of the defence counsel's role in the sentencing hearing, he or she can also make submissions, perhaps involving a specific recommendation as to sentence.[89]

Since Canadian courts permit, and often accept, Crown sentencing recommendations, they have given the Crown a commodity in the pre-trial market place; a favourable sentence recommendation may be exchanged for a guilty plea. The courts have, however, consistently affirmed that they have absolute discretion as to sentencing and any particular recommendation, even one made as part of a bargain, is not binding on the judge.[90] In *A.G. Can. v. Roy*, Hugessen J. suggested that the following procedure be adopted so as to avoid any misunderstanding on the part of the defendant:

> Where there has been a plea of guilty and Crown counsel recommends a sentence, a Court, before accepting the plea, should satisfy itself that the accused fully understands that his fate is, within the limits set by law, in the discretion of the judge, and that the latter is not bound by the suggestions or opinions of the Crown counsel. If the accused does not understand this, the guilty plea ought not to be accepted.[91]

Nevertheless, as Ruby[92] points out, there are many factors that may operate to persuade the trial judge to follow the sentencing recommendations of the Crown. In *Fleury*, Turgeon J.A. agreed with the comments of the trial judge:

> The trial judge is inclined, particularly when faced with a plea of guilty, to adopt the suggestion put forward by counsel for the Crown, since the latter has received the confidential report of the investigating officer and is as a result familiar with certain information and with certain extenuating circumstances of which the judge may be totally ignorant.[93]

Perhaps another reflection of the indirect judicial approval of plea bargaining is the acceptance by the courts of submissions made jointly from Crown and defence. This line of decisions apparently stems from an Ontario decision in which the late Judge Graburn of the County Court actively encouraged counsel to submit "sentence aggreements" to the Bench.[94] Insofar as such agreements will often be reached after plea bargaining, one may safely assume that the learned judge was bestowing at least a tacit approval upon the practice. In *R. v. Greene* he said:

> I welcome the assistance where counsel are able to arrive at a consensus as to the appropriate sentence in the case. I have indicated in the past that this Court will endeavour to give effect to those representations, unless they should be contrary to principle, or unless they should appear unreasonable on their face.

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[88] *R. v. James* (1971), 3 C.C.C. (2d) 1 (P.E.I.C.A.); *R. v. Switlishoff* (1950), 9 C.R. 428 (B.C.C.A.); and *R. v. Sutherland* (1974), 10 N.B.R. (2d) 221 (S.C.A.D.).

[89] *R. v. Lévesque* (1980), 19 C.R. (3d) 43 (Qué. S.C.); *R. v. Maruska* (1981), 20 C.R. (3d) 226 (Qué. S.C.).

[90] *R. v. Mouffe, supra* note 61; *R. v. Johnson*, [1970] 2 O.R. 780, [1970] 4 C.C.C. 64 (C.A.); *R. v. Fleury, supra* note 56; *R. v. Kirkpatrick, supra* note 63; *R. v. Wood, supra* note 48; *R. v. Simoneau, supra* note 87; *R. v. Cusak, supra* note 60; *R. v. Thomas*, [1968] 1 O.R. 1, [1968] 2 C.C.C. 84 (C.A.); *R. v. Pretty* (1971), 2 Nfld. & P.E.I.R. 10, 5 C.C.C. (2d) 332 (P.E.I.S.C., C.C.A.); *R. v. Morrison, supra* note 55; *R. v. Dimora et al., supra* note 87; *R. v. Sabloff, supra* note 87;

[91] *Supra* note 47.

[92] *Sentencing, supra* note 73, at 79

[93] *Supra* note 56, at 178-79. See the similar views expressed by Schultz J.A. in *R. v. Clarke* (1959), 124 C.C.C. 284 at 287-88 (Man. C.A.).

[94] *R. v. Greene, supra* note 87.

Subsequent judgements concerning the propriety of joint sentence submissions have unheld this principle, usually while stressing that the Court is free to disregard them.[95]

Empirical Research

It would seem that, although not officially legitimized, plea bargaining does occur in Canada. This recognition, being recent and, at least for some, difficult, the empirical research in the area has been sparse and has left many questions unanswered. All of the problems that plague plea bargaining research in the U.S. can be found in most of the Canadian research. The major impediment to a comprehensive understanding of plea bargaining in Canada is the paucity of research. Plea bargaining being such a multi-faceted phenomenon, generalization from the results of the few studies is not recommended. The nature and extent of bargaining, no doubt, varies among the different jurisdictions. The lack of consistent definitions is also a problem that precludes even comparison of the results of the studies. Research into plea bargaining in Canada has taken three forms. Studies have involved interviews, official documents, or observations.

Interviews

The pioneering study on plea bargaining was undertaken by Grosman.[96] Drawing upon both his own experience as a prosecutor and upon a series of interviews with 45 Crown attorneys in the County of York, Ontario, Grosman suggested that plea bargaining was an important element in a well established pattern of accommodations and concessions routinely exchanged between Crown attorneys and "favoured" defence counsel. While Grosman's trail-blazing study should not be under-estimated, it must nevertheless be noted that his observations are based on impressions and hearsay rather than systematic research of actual practices associated with plea bargaining. Furthermore, some reviewers contend strongly that his findings would not necessarily be applicable to other jurisdictions in Canada.[97]

Klein examined plea bargaining in Canada by conducting interviews with 115 inmates in a maximum security federal penitentiary in 1972.[98] The author directed his attention to the types of "deal" offenders had struck "in interaction with the agents in the criminal justice system to minimize the possible punitive consequences of [their illegal activities]."[99] Slightly more than half the inmates reported that they had been involved in such "deals."

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[95] E.g., *R. v. Lapointe* (1978), 2 W.C.B. 119 (Ont. C.A.); *R. v. Simoneau*, *supra* note 87; and *Dimora*, *supra* note 87. Nadin-Davis, *Sentencing in Canada* at 541, states that, despite the paucity of judicial comment on this subject, the practice is generally accepted by the courts.

[96] *Supra* note 1.

[97] Bowen-Coulthurst, "Book Review" (1970) 20 U. Toronto L.J. 494 at 496.

[98] *Let's Make a Deal* (Lexington Mass.: Lexington Books, 1979).

[99] *Ibid.* at 132.

Official Records

The previous two studies can be described as exploratory in nature, but as with all research that relies upon interviews as the main source of data, they suffer from probable unreliability and so are of only limited use for gaining an understanding of the phenomenon of plea bargaining in Canada. Research conducted subsequent to these studies involved the examination of court documents as an indication of the nature and extent of plea bargaining. The first quantitative research into this topic was conducted by Wynne and Hartnagel in a "prairie" city during the years 1972 and 1973.[100] The researchers examined the files of all persons charged with *Criminal Code* offences where there appeared to be "evidence" of plea bargaining between the Crown and defence counsel.[101] The factors they found to affect plea baragining as they defined it were the existence of mutiple charges and the type of charge. The validity of this operational indicator of plea bargaining can be questioned.[102]

In a similar vein, Hagan studied the role played by legal, procedural and extra-legal factors in the sentencing process by using data from court files.[103] The study took place in Edmonton and involved the examination of 1,018 offenders. The conclusion was that the sentence that was imposed was primarily a reflection of the seriousness of the initial charge and the defendant's prior record rather than of such procedural variables as charge alteration and initial plea.

Observations

The problems associated with using indirect, and therefore, inaccurate, sources of information for the study of plea bargaining can be overcome only by the direct observation of the practice itself. This approach was recommended by Cousineau and Verdun-Jones in 1979[104] and was followed by a group of researchers at the Centre of Criminology at the University of Toronto. The data, pertaining to 101 accused persons who were tracked through the system from arrest to sentence, were collected in an Ontario court and have been reported in several sources,[105] the most comprehensive of which was a book by Ericson and Baranek.[106] Verbatim transcripts were kept of interview(s) with the accused; interviews with lawyers; and conversations in the Crown attorney's office. Researchers also observed the court appearances of all defendants in the sample.

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[100] "Race and Plea Negotiation: An Analysis of Some Canadian Data" (1975) 1 Can. J. Soc. 147; and T.H. Hartnagel & D.F. Wynne, "Plea Negotiations in Canada" (1975) 17 Can. J. Crim. & Corr. 45. These data were reanalysed by K.W. Taylor, "Multiple Association Analysis of Race and Plea Negotiations: The Wynne and Hartnagel Data" (1982) 7 Can. J. Soc. 391.

[101] The "evidence" in question consisted of the presence of *all* of the following elements: the original charge had been changed, a plea of "not guilty" or a reserved plea had been altered to a plea of "guilty," and the file contained correspondence between Crown and defence counsel and/or written comments or notes indicating that the Crown had reduced a charge in exchange for a guilty plea.

[102] Cousineau & Verdun-Jones, *supra* note 8; and Verdun-Jones & Cousineau, *supra* note 24.

[103] "Parameters of Criminal Prosecution: An Application of Path Analysis to a Problem of Criminal Justice" (1975) 65 J. Crim. L. & Criminology 536. The data used in this study also are suspect in that they do not reflect a direct indication of plea bargaining.

[104] *Supra* note 8.

[105] A. Brannigan, *Crimes, Courts and Corrections: An Introduction to Crime and Social Control in Canada* (Toronto: Holt, Rinehart and Winston, 1984); A. Brannigan & J.C. Levy, *supra* note 37; H. Helder, *The Police, Case Negotiation and the Para-Legal System* (Toronto: Centre of Criminology, University of Toronto, Unpublished Thesis, 1979); J.A. Osborne, "The Prosecutor's Discretion to Withdraw Criminal Cases in the Lower Courts" (1983) 25 Can. J. Criminology 55; P.H. Soloman, *Criminal Justice Policy: From Research to Reform* (Toronto: Butterworths, 1983); and J.A. Wilkins, *The Prosecution and the Courts* (Toronto: Centre of Criminology, University of Toronto, 1979).

[106] *Ordering of Justice.*

Information collected here was also compared with data gathered during a previous study of police interactions with the same 101 individuals. This study represents the first occasion when researchers have actually been able to document the dynamics involved in the process of plea discussions.[107]

Conditions that Deter Plea Bargaining

From consideration of the legal constraints of bargaining and the limited information available from empirical research, a number of factors that generally may deter plea bargaining can be listed. These factors may serve to discourage plea bargaining or at least reduce the frequency with which it is practised. Perhaps the most crucial is the lack of certainty that bargains once struck will be upheld. The wide sentencing discretion given judges for almost all offences means that even if the Crown agrees to recommend a sentence, the judge is not bound by that suggestion. The *Criminal Code* offers little or no guidance for the disposition of most offences. Mandatory minimum and/or maximum sentences are provided for very few offences.

Similarly, the Crown being able, in some circumstances, to appeal a sentence that is consistent with a recommendation, can repudiate the position taken during the sentencing hearing. This can deter plea bargaining by making the accused more reluctant to accept a sentence bargain.

Related to this is the interchangeability of court actors which can break the continuity of a bargain. The change of Crown attorneys between the trial and appeal courts and the ability of the Attorney General to intervene and request an appeal can mean that a bargain is reneged on by persons other than those who made it. These factors restrict the defence attorney to presenting a probability statement to the client, based on previous experience in the system, rather than a guarantee that a guilty plea will result in some specific and definite payoff.

In addition to the lack of predictability, the tendency for multiple charges to be dealt with by concurrent sentences may reduce the incentive to bargain over the number of charges as the outcome will be the same regardless. Ericson and Baranek have noted this unconcern for the number of charges.[108] Sentencing guidelines will create a climate of greater certainty and predictability, which, as will be seen later, may affect a major change in the nature and extent of plea bargaining in Canada.

Conditions that Facilitate Plea Baragining

Many factors associated with the structure and operation of the Canadian criminal justice system may also serve to facilitate the occurrence of plea bargaining. Some factors which have been the subject of research and debate in the U.S., such as court complexity and high case volume, have not been addressed in the Canadian context. Many influences, however, can be inferred from an examination of the legal constraints, judicial opinions and empirical research.

A factor of major importance appears to be the trusting relationship[109] and close proximity of

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[107] Warner and Renner used court observations to study peripheral aspects of plea bargaining, specifically the recommendations made to the judge regarding sentence. Although observational, this represents another case of studying plea bargaining indirectly. The existence of a joint submission or a defence submission that was not contested by the prosecution was thought to be evidence of a sentence bargain. A.H. Warner & K.E. Renner, "The Bureaucratic and Adversary Models of the Criminal Courts: The Criminal Sentencing Process" (1981) 1 Windsor Y.B. Access Just. 81.

[108] *Ordering of Justice* at 95, 115, 134.

[109] *Ordering of Justice* at 13-14; and Warner and Renner, *supra* note 107. Ericson and Baranek also found

the court actors.[110] Individuals making "deals" have to be confident that the other party will hold up his/her end of the bargain and this trust can evolve over time after many successive and successful bargains. This trust seems to extend to the police.[111] It has been noted that the existence of such a rapport among court actors is contrary to the notion of adversarial justice.[112] It also means that defendants, who are not members of these "bargaining unit" are precluded from participating directly in pre-trial negotiations. Having a lawyer, therefore, appears to be a necessary condition for plea bargaining.[113]

As discussed above, the police can lay multiple charges for single incidents. They can also lay a more severe charge than may be warranted by the facts of the case. Ericson and Baranek found evidence of this in their sample:

> ...the police decide to charge with an eye toward outcomes in court. They 'frame' the limits as to what is negotiable, and produce conviction and sentence outcomes, by 'overcharging,' 'charging up,' and laying highly questionable charges.[114]

While the intent of the police may not be as malicious as these authors imply, it does seems apparent that the laying of multiple charges or more serious charges is a necessary condition for charge bargaining.[115]

The ability of a lawyer to convince his/her client to plead guilty once a deal has been struck is also crucial. Unscrupulous attorneys may engage in illusory bargaining by convincing the client that the dropping of a "Kienapple offence" is really a concession on the part of the Crown that should be responded to with a guilty plea. Such tactics are probably not necessary, however, since the Candian judiciary have provide other commodities for the defence to offer the defendant. These

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(cont'd) that court actors had a vested interest in maintaining mutually beneficial relationships between themselves and other actors, who were ostensibly on the "other side." Defence attorneys especially were in a precarious position, attempting to serve the best interests of their clients while maintaining a harmonious relationship with the prosecution:

> The lawyer has a particularly complex set of stakes. These involve a balance between doing a job which appears competent to his client and maintaining the professional respect and collaboration of criminal control officials (at 26).

Prosecutors also wish to avoid antagonizing a lawyer who could respond by pressing for many trials.

[110] P.L. Brantingham, *The Burnaby, British Columbia Experimental Public Defender Project: An Evaluation Report, Report II: Effectiveness Analysis* (Ottawa: Department of Justice, 1981).

[111] Warner and Renner, *supra* note 107. Grosman found that in his sample of prosecutors, little time was available to review cases prior to arraignment and therefore trust had to be placed in the police view of the case and that a truly guilty person had been arrested (*Prosecutor* at 44-59). He borrows from Skolnick who stated that the presumption of innocence has been replaced by the administrative presumption of regularity, in effect, a presumption of guilt: *Justice Without Trial* (New York: Wiley, 1966).

[112] *Supra* note 107. These authors believe that the adversarial model has been uspurped by the bureaucratic model of court functioning.

[113] This was also found by Wynne and Hartnagel, *supra* note 100. Klein (*supra* note 98), however, found that some of the inmates in his sample had been involved in negotiations with the Crown. He also notes that the majority of inmates who struck deals did so with the police. Bargaining with the police was also reported by many of the defendants interviewed by Ericson and Baranek *Ordering of Justice* at c. 2.

[114] *Ordering of Justice* at 71.

[115] Ericson and Baranek, *Ordering of Justice* at 118; Hagan, *supra* note 103 at 130; and Wynne and Hartnagel, *supra* note 100.

include the tacit plea bargaining (the promise of a more lenient sentence for a plea of guilty) and the promise of a sentence recommendation by the Crown.[116]

A final facilitating factor that will be presented here is the ability to control the information that is introduced to the court. This has been called fact bargaining and such behaviour was documented by Ericson and Baranek.[117] The frequency with which fact bargaining now occurs is not known, but this is one area where Canadian plea bargaining practices may be expected to change dramatically after the institution of sentencing guidelines. This has been predicted by Ericson and Baranek:

> Under the new fixed and presumptive sentencing laws, power is brought into the hands of the prosecutor because he can agree with the defence to withhold or introduce aggravating or mitigating factors according to whether or not the accused complies by pleading guilty. The new law gives the prosecutor a greater ability to influence the duration of the sentence, and thus a greater power in plea discussions with the defence lawyer.[118]

Again, the U.S. literature on this topic will be consulted in order to determine the potential impact of sentencing reform in Canada.

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[116] Warner and Renner (*supra* note 107) report that in their sample of 203 cases from two Halifax courts, after joint submissions or instances when defence made a sentence submission that was not contested by the Crown, the judges usually followed the recommendation.

[117] *Ordering of Justice* at 19-23, 66, 120-121.

[118] *Ordering of Justice* at 115.

PRE-TRIAL BARGAINING AND SENTENCING GUIDELINES

Several states in the U.S. have introduced, or are considering the introduction of, sentencing guidelines. The major impetus for reform, or contemplated reform, has been provided by a genuine desire for the elimination of sentencing disparity. Although the issue of plea bargaining was not considered in any depth by the early proponents of sentencing guidelines, they generally argued that increased judicial scrutiny of the practice would follow the introduction of such guidelines and that, therefore, the sentencing disparity resulting from plea bargaining would be greatly reduced.[119] Others have been quick to realize that pre-trial bargaining may well undermine the integrity of guidelines, thus permitting disparities to flourish unabated. If guidelines are introduced without a concomitant attempt to control plea bargaining, discretion may well be transferred from the sentencing judge to other actors in the criminal justice system, particularly the police, prosecutors and paroling authorities. The system, it is contended, may actually continue much as before.[120] Still others acknowledge that the precise nature of the impact of plea bargaining upon sentencing guidelines is, at this point, a matter of speculation.[121]

The latter view is no doubt the most prudent since, in the absence of empirical evidence, estimates of the potential impact of bargaining on guidelines, and *vice versa*, are merely hypothetical. The U.S. experience with sentencing guidelines has not been of sufficiently long duration to have permitted the rigorous evaluation of their impact. Moreover, inexplicably, the study of bargaining has not constituted a major focus of most sentencing commissions and their evaluators.[122] Conformity to the guidelines and the impact of guidelines on prison populations are two areas that have received much attention. Both are far more amenable to evaluation than the topic of pre-trial bargaining. However, two evaluation studies that consider plea bargaining have been located and will

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[119] See D.M. Gottfredson, L.T. Wilkins & P.B. Hoffman, *Guidelines for Parole and Sentencing: A Policy Control Method* (Lexington, Mass.: Lexington Books, 1978); Twentieth Century Fund, Task Force on Criminal Sentencing, "Presumptive Sentencing" in H. Gross & A. von Hirsch, eds., *Sentencing* (New York: Oxford University Press, 1981); J.M. Kress, "Reforming Sentencing Laws: An American Perspective" in B.A. Grosman, ed., *New Directions in Sentencing* (Toronto: Butterworths, 1980). O'Donnel, Churgin and Curtis felt that the system of sentencing guidelines they proposed might actually reduce bargaining, but their model involved a presumption against incarceration, advocating imprisonment only as a last resort. Offenders who could predict a non-incarcerative sentence, which would have been the norm, might be less inclined to bargain, if the fear of imprisonment is a major incentive to bargain. (*Toward a Just and Effective Sentencing System: Agenda for Legislative Reform* (New York: Praeger Publishers, 1977)).

[120] An early statement to this effect can be found in A.W. Alschuler's "Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for 'Fixed' and 'Presumptive' Sentencing" (1978) 126 U. Penn. L.R. 550. See also F.E. Zimring, "Making the Punishment Fit the Crime: A Consumer's Guide to Sentencing" in H. Gross & A. von Hirsch, eds., *Sentencing* (New York: Oxford University Press, 1981); S.J. Schulofer, *Prosecutorial Discretion and Federal Sentencing Reform* (Washington, D.C.: The Federal Judicial Center, 1979); S. Shane-Dubow, *History, Context, and Effects of Sentencing Reform* (Madison, Wi.: Wisconsin Center for Public Policy, 1984); D. Freed, *Flaws in the Federal Criminal Code Reform Act* Statement Presented before the Sub-Committee on Criminal Justice, House Judiciary Committee, on S. 1437, H.R. 2311 and H.R. 6869, April 19, 1978. The scenario most frequently hypothesized is that charge bargaining will replace sentence bargaining. As the charge laid will determine the sentence, the prosecution will have indirect control over the disposition.

[121] J.C. Coffee, Jr. & M. Tonry, "Hard Choices: Critical Trade-offs in the Implementation of Sentencing Reform Through Guidelines" in M. Tonry & F.E. Zimring, eds., *Reform and Punishment: Essays on Criminal Sentencing* (Chicago: University of Chicago Press, 1983).

[122] Heumann has noted this situation, calling it the product of a naïve view of the courts, and has advanced three possible reasons: academic discipline boundaries that impede the multi-disciplinary work necessary for a holistic understanding of courts and bargaining, a desire for parsimonious research, and a plethora of research which dwells on so many small details that the drawing of the larger picture is made difficult. "Thinking About Plea Bargaining" in P.F. Nardulli, ed., *The Study of Criminal Courts: Political Perspectives* (Cambridge, Mass.: Balinger Publishing Company, 1979).

be discussed below.[123]

Empirical Studies

Rich *et al.* have examined the impact of the *voluntary* adoption of sentencing guidelines in urban courts in three U.S. states.[124] Their analysis revealed no discernible change in sentencing practices. Judges frequently did not conform to the guidelines and the same types and degree of disparity that existed *before* the introduction of the guidelines persisted. The researchers, however, recognized that an assessment of the impact of sentencing guidelines could not be conducted without a consideration of bargaining, stating that "[t]he inextricable link between plea bargaining and sentencing makes it folly to address one without considering the other. In a very real sense, plea bargaining *is* sentencing."[125] Referring to both interviews and the statistical analysis of court data, they examined the pre- and post-guidelines bargaining process in courts in Denver, Philadelphia and Chicago and found that the guidelines did not have an impact on bargaining. The lack of any change, in either sentencing or bargaining, was attributed to the voluntary nature of the guidelines.[126] The authors did, however, come to one important realization:

> The experience with sentencing guidelines in Denver, Philadelphia, and Chicago argues strongly for taking a broader view of sentencing reform. It seems clear that sentencing guidelines cannot fulfill their purposes unless they are developed and implemented with due consideration of the larger system of discretionary powers that influence judicial sentencing decisions. To ignore the fact that the majority of criminal cases are settled by negotiation is foolish and ultimately fatal. The courts' need to induce guilty pleas must be taken into account in any successful attempt to reform sentencing.[127]

This analysis of courts in three different states also provided evidence for the variations in bargaining patterns that can evolve in jurisdictions with different statutory provisions governing

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[123] Of peripheral interest to this issue is the El Paso "point system" used by judges in that city. See H.C. Daudistel, "On the Elimination of Plea-Bargaining: The El Paso Experiment" in W.F. MacDonald &J.A. Cramer, eds., *Plea Bargaining* (Lexington, Mass.: Lexington Books, 1980).

[124] W.D. Rich, L.P. Sutton, T.R. Clear & M.J. Saks, *Sentencing by Mathematics: An Evaluation of the Early Attempts to Develop and Implement Sentencing Guidelines* (Williamsburg: Va.: National Center for State Courts, 1982). For discussion of the same studies, although with little reference to bargaining, see J.M. Kress, *supra* note 119; and, L.T. Wilkins, J.M. Kress, D.M. Gottfredson, J. Caplin & A. Gelman. *Sentencing Guidelines: Structuring Judicial Discretion: Report of the Feasibility Study* (Washington, D.C.: U.S. Government Printing Office, 1978). In the latter document, the authors list their reasons for selecting the courts they did for study. They felt that, as a more rigorous test of the efficacy of guidelines, they should choose courts where sentence bargaining was not practised. In rationalizing this decision, they have described exactly why plea bargaining should be considered in such an evaluation:

> [In courts in which there was sentence bargaining] it seemed to us that the judge may be more the ratifier of the decisions of others than the primary decision-maker. Our initial research focused on the concept of guidelines as related to *decision processes* and not to compromises, negotiations, or ratifications. The main problem is that as soon as more than one decision-maker enters the process, the variations increase exponentially. Thus, we simplified our research design by avoiding sentence-bargaining and were able to assume with increased confidence that the responsibility and action of sentencing were accountable to the same individual -- the sentencing judge.

[125] *Ibid.* at 161.

[126] A similar conclusion was reached after the study of voluntary guidelines in Maryland and Florida: Carow, "Judicial Sentencing Guidelines: Hazards of the Middle Ground" (1984) 68 Judicature 161; and Carow, Feins, Lee, Olinger & Weisberg, *Evaluation of Multijurisdictional Sentencing Guidelines Field Test: Draft Report* (Cambridge, Mass.: Abt Associates, 1984).

[127] *Ibid.* at 206.

sentencing. In Denver, where the discretion of sentencing judges is constrained by many statutory *minima* and *maxima*, bargaining most frequently took the form of negotiations over charges. In contrast, the judges in the Philadelphia court had relatively unlimited discretion in determining both the form and quantum of sentence. Negotiations here were characterized by sentence bargaining and overcharging. The wide discretion accorded to judges as well as the rarity of consecutive sentencing for multiple charges meant that the number of charges was not an important determinant of sentence.[128] The degree of sentencing discretion granted to judges in the Chicago court fell somewhere between that noted in Denver and Philadelphia. Overall, however, judges were given wide latitude over sentence; therefore, sentence bargaining predominated and charge bargaining was rarely necessary.[129]

The Minnesota Sentencing Guidelines Commission has undertaken an evaluation of the guidelines in operation in that state.[130] The Commission compared data concerning court functioning in 1981, 1982 and 1983 with pre-guidelines baseline data from 1978. In addition, a sub-sample of cases from 1981 and 1982 was selected for in-depth study. It was in this latter group of cases that the topic of plea bargaining was examined.[131] In addition to the routine monitoring of judicial compliance and related matters, information concerning the alleged behaviour of the accused, the initial charges laid as well as the accompanying aggravating and mitigating circumstances was collected for this smaller group.

The Commission's researchers concluded that the incidence of guilty pleas emanating from a *charge negotiation* increased, with a concomitant decrease of similar magnitude in the frequency of *sentence bargaining*. All charges being considered, the practice of reducing charges to those of lesser severity increased approximately two-fold (27%) from the baseline rate (12%). Most notably, among those cases where the original charge was one associated with presumptive incarceration, 53% were reduced to lesser offences which carried a non-carcerative disposition (compared with 41% prior to the introduction of the guidelines). The Commission came to the following conclusions:

> The power of the prosecutors unquestionably increased with the implementation of the Sentencing Guidelines. The Commission decision to base sentences on the offense of conviction rather than unadjudicated behavior resulted in prosecutorial control over presumptive sentences through charging and negotiating practices. ... [T]he power of the prosecutor to mitigate a sentence by reducing a charge to a lower severity level and a lower presumptive sentence is essentially unlimited. Similarly, the prosecutor has enormous discretion in determining the number of charges and convictions when there are multiple offenses alleged. This decision affects sentences by determining criminal history scores. When serious person offenses are involved the charging decision can affect sentence length through consecutive sentences.
>
> The other side of the prosecutor's enhanced power is enhanced accountability. Under indeterminate sentencing, the offense of conviction played a much smaller role in the sentencing decision, and prosecutors were free to reduce and dismiss charges, relatively certain that the entire record would be considered by the judge in determining the sentence.[132]

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[128] This situation closely mirrors that in Canada.

[129] Also worthy of note was that in Denver and Chicago, the same prosecutor, public defender and judge were often associated together as a "team" for several months at a time. During these periods, they became very familiar with each other's decision-making patterns, being able to predict, for example, the eventual sentence based on past experience with the same judge and similar cases. Within this context, plea agreements were common.

[130] In relation to the Minnesota guidelines, see also a series of articles in volume 5 of the Hamline Law Review (1982), in particular S.C. Rathke, "Plea Negotiations under the Sentencing Guidelines" at 271.

[131] A pre-guideline study of bargaining had also been conducted: C.L. Thomssen & P.J. Falkowski, *Plea Bargaining in Minnesota* (Saint Paul: Crime Control Planning Board, 1979).

[132] Minnesota Sentencing Guidelines Commission, *The Impact of the Minnesota Sentencing Guidelines: Three Year Evaluation* (Saint Paul: Minnesota Sentencing Guidelines Commission, 1984) at 71.

The continuation of the practice of sentence bargaining is of particular interest as this is one form of bargaining that might reasonably be expected to have been virtually eliminated by the advent of guidelines. Indeed, a decrease, albeit slight, was discovered by the researchers. It was determined that sentence bargains were made in 56% of the cases studied in 1978 and 47% of those in 1982. The reduction in sentence bargaining was hypothesized by the Commission to have been the result of:

1. an increased certainty regarding sentence;

2. a Minnesota Supreme Court decision that said the existence of a sentence bargain was not a substantial and compelling reason to deviate from the guidelines;[133] and

3. the fact that a charge bargain is effectively a sentence bargain if the new charge is one of lower severity.[134]

The frequency with which the practice still occurs is, however, interesting. Prosecutors are able to make recommendations regarding the appropriateness of the presumptive sentence and may negotiate in relation to, on the one hand, the introduction of aggravating factors (that may lead to imprisonment for an offence not within that presumptive range) or, on the other hand, mitigating circumstances (that may result in the reduction of an incarcerative sentence to probation). These types of bargaining evolved as a response to the introduction of guidelines and were reported to have occurred at the following rates:

1. the presumptive sentence is agreed upon (25%); and

2. negotiation regarding aggravating and mitigating circumstances (2%).[135]

Furthermore, the Commission notes that, despite the Supreme Court ruling, some judges cite the desire to be consistent with sentence bargains as the only factor that led them to depart from the guidelines.

In addition to the creation of new *forms* of bargaining, changes in the frequency of the existing types of sentence bargaining were noted:

1. negotiation as to duration of a prison term among those cases that resulted in imprisonment decreased from 30% to 17%; and

2. negotiation over the use and duration of a jail term as a condition of probation for cases that did not result in imprisonment increased from 5% to 26%.[136]

As noted above, most sentencing guideline systems have not been in operation long enough to have permitted their evaluation. In most states, however, such evaluative attempts are currently being undertaken. A fundamental component of such evaluation research should be the measurement of changes in bargaining patterns and frequency. However, the implementation of a truly rigorous research design appears to be a task more onerous than most state governments are willing

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[133] *State v. Garcia*, 302 N.W.2d 643 (Minn. 1981).

[134] Minnesota Sentencing Guidelines Commission at 85.

[135] This figure considers *all* charges, for many of which the subject of aggravating and mitigating circumstance did not apply. This type of bargaining is more likely to come into play if the offenders's score is straddling the in/out line on the grid.

[136] In Minnesota, a jail term, as opposed to a prison term, can be a condition of probation.

to shoulder.[137] The approach adopted by the Pennsylvania Sentencing Commission, for example, has been restricted to the monitoring of the extent to which plea bargains occur. Moreover, the validity of the operational indicator used is somewhat suspect, since prosecutors themselves are required to complete a guideline sentence form indicating the relevant information about the conviction. Among the information requested is the manner of conviction: jury trial, bench trial, negotiated pleas and non-negotiated pleas.

For 1983, the first full year of the operation of the guidelines, the Commission reported that, according to the responses of the prosecutors, 56% of all convictions were the result of negotiations for guilty pleas. Apparently, 32% of convictions resulted from spontaneous or non-negotiated guilty pleas. The remaining 12% were obtained after trials. Of greater interest, however, is that sentencing judges reported the existence of a sentence bargain as the second most common reason for departing *below* the guidelines and it was the third most frequently cited reason in those cases where the sentencing departure was *above* the guidelines. That the sentence resulted from a plea agreement was the most frequently cited mitigating factor but only the sixth most frequently cited aggravating factor.[138]

In sum, an evaluation which effectively studies the impact of bargaining on sentencing guidelines has yet to be conducted. Such a task would entail observing the modifications made in decision-making from the discovery of an offence through to the parole process, both pre- and post-guideline. It would be necessary to follow all alleged offenders, including those informally and formally diverted and who have all charges withdrawn before sentence. Decisions made by the parole board will also have to be monitored to find if sentencing disparity is being recreated at that stage in the process. A restricted focus, upon the sentencing patterns of judges or the use of indirect indicators of prosecution behaviour, would clearly fail to provide an accurate picture of the true impact of guidelines. This would ignore most of the key decision-making junctures. The short time that has elapsed since the introduction of mandatory guidelines has no doubt contributed to the paucity of empirical information on the subject.[139] The actual effects that guidelines will have on bargaining, and *vice versa*, is still a matter of speculation.

In the final analysis, much of the discussion on this topic involves pure speculation on the part of commentators. While perhaps no consensus can be reached, some common themes, nevertheless, emerge. It seems apparent that, while the precise nature of bargaining may well change, the existence of sentencing guidelines will not eradicate the practice. Sentence bargaining will continue, although in a different form, especially where the sentencing ranges for an offence category

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[137] An exhaustive study of the true impact of plea bargaining would require the tracking of cases through the system, from offence to the parole process, both pre- and post guidelines. Such an undertaking may be considered prohibitively expensive. Funding for the Toronto study conducted by Ericson and his colleagues that tracked 100 cases in this manner was in excess of one million dollars.

[138] R.L. Lubitz, *Sentencing in Pennsylvania: 1983 Report* (Philadelphia: Pennsylvania Commission on Sentencing, 1984).

[139] Martin notes that the sentencing commissions in both Minnesota and Pennsylvania realized the potential impact of pre-trial bargaining:

> But both commissions decided not to attempt to limit prosecutorial discretion or to structure plea negotiation until the guidelines has been implemented and the behavior of prosecutors could be studied. The [Minnesota Sentencing Guidelines Commission] explicitly considered and rejected "real offense" sentencing and explicit sentence discounts for guilty pleas [discussed *infra*]; The Pennsylvania Commission considered the effect of plea bargaining more generally and concluded that there little the commission could do to limit it.

("The Politics of Sentencing Reform: Sentencing Guidelines in Pennsylvania and Minnesota" in A. Blumstein, J. Cohen, S.E. Martin, & M.H. Tonry, eds., *Research on Sentencing: The Search for Reform, Volume II* (Washington, D.C.: National Academy Press, 1983) at 281.

are wide. Furthermore, where there are many different charges that may be applied to similar behaviour on the part of the accused, charge bargaining will continue (primarily in jurisdictions with a number of different degrees of the same offence category).

No doubt, new types of bargaining will emerge in the future. Information about the offence that provides evidence of aggravating and mitigating factors, as well as information about the offender's prior record (including "out of state" convictions and juvenile offences) will all become the probable topic of bargaining. The emergence of, or increase in, "fact bargaining" will perhaps be the most important consequence of the impact of bargaining. Specifically, the police and the prosecution will have the power to control both the *introduction of information* to the court and the *interpretation* of that information. This has been called "bargaining about reality."[140] Control of the information necessary for the calculation of both offence seriousness and criminal history scores may well become an even more powerful commodity with which to bargain than it is currently.

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[140] S.R. Thomas Buckle & L.G. Buckle, *Bargaining for Justice: Case Disposition and Reform in the Criminal Courts* (New York: Praeger Publishers, 1977).

RECOMMENDATIONS FOR CONTROLLING THE IMPACT OF BARGAINING ON GUIDELINES

From a review of the literature on sentencing guidelines in the U.S., it is apparent that plea bargaining *can* be used by members of the criminal justice system to undermine sentencing guidelines. The precise impact pre-trial bargaining may have on guidelines will vary in kind and degree depending upon various court-related variables and the structure of the guidelines. Although little can be done by a sentencing commission to mitigate the influence of court structure, several options are available to a Canadian commission drafting guidelines. A sentencing commission should not only focus on the definition of appropriate forms of bargaining but also should be sensitive to the various means by which the structure of the guidelines can serve to increase, reduce and/or modify pre-existing bargaining patterns. An estimate of the impact of plea bargaining on guidelines cannot be made until certain critical choices have been made regarding the form guidelines will take in Canada. It is recommended that these issues be considered even though it is realized that insight gained from the American experience is not directly transferable to the Canadian situation.

Recommendation 1: That, prior to the design and implementation of sentencing guidelines in Canada, explicit consideration should be given to the potential impact of plea bargaining upon sentencing guidelines and vice versa. This should involve an indepth analysis of the nature and extent of plea bargaining in Canada, with specific focus upon this potential impact.

Controlling Bargaining

One potential approach to mitigating the effect of bargaining would be to attempt to eliminate the practice entirely. The above discussion concerning this topic has, however, indicated that such a strategy would most likely prove to be unsuccessful. Instead, it might be possible to recognize the existence, and perhaps the inevitability, of bargaining and attempt to distinguish between those activities which are acceptable (and to be encouraged) and those which are not. Professional and ethical standards represent one method and, in many areas, such guidelines already exist. The extent to which these standards are effectively able to control the types of bargaining is linked to the degree of their enforceability which, at present, is minimal. In addition, such a system relies on the reporting of illicit bargaining that has been undertaken by professional colleagues. In practice, therefore, this approach is also an unsatisfactory method of reducing the negative effects of bargaining on sentencing guidelines.

The creation of institutionalized charging and negotiating standards would perhaps be the most effective way of controlling the types and frequency of bargaining and, most importantly, it would allow for thorough scrutiny of the practice by both the judiciary and the public. Rule 11 of the *Federal Rules of Procedure* is one example of such an attempt (see Appendix C). As Verdun-Jones and Cousineau indicate, the major anticipated advantage of introducing a legislative mechanism such as Rule 11 is that control of the pre-trial process is returned to the judiciary. In the view of these authors:

> The amended Rule 11 represents a significant shift away from the traditional adversarial model in which substantive issues relating to guilt or innocence are determined in the process of a full trial, and in which the judge assumes the role of a relatively impassive arbitrator between defence and government counsel. More specifically, the rule legitimizes the system of everyday practice in which the majority of findings of guilt are reached without the formalities of a full trial and, in a novel development, it forces the trial judge to ensure that the interests of both the state and the defendant are protected adequately during the process of reaching a plea agreement. In effect, American criminal procedure, in so far as it relates to the guilty plea in the federal courts, is assuming an increasingly inquisitorial dimension.[141]

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[141] *Supra* note 24 at 234.

Another attempt to regulate plea bargaining, specifically related to the issue of sentencing guidelines, can be found in Washington state where the bargaining guidelines have been incorporated into the same legislation that defines the sentencing guidelines. The *Sentencing Reform Act of 1981* (see Appendix D) defines what a prosecutor can agree to do, or not to do, in exchange for a guilty plea. It is apparent not only that plea, sentence and charge bargaining are all considered possible but also that fact or score bargaining is possible because the defense and prosecuting attorneys must agree upon the criminal history score prior to the sentencing hearing. Since an accurate picture of an offender's prior record is necessary to determine his/her criminal history score, the control of this information is crucial and might be expected to be the subject of much negotiation.

The control over plea bargaining in Washington state was further enhanced by the inclusion of prosecutorial standards into the legislation. For example, the situations when prosecutors may decline to lay charges for provable offences are legislatively outlined. Negotiated promises are not among the legitimate reasons for a failure to prosecute; however, it is possible to extend immunity from prosecution to defendants in exchange for information or testimony against other offenders. In addition, the use of overcharging, either by laying too many charges or by laying a charge of a higher degree than appropriate, is discouraged. The effective date of implementation of these provisions was July 1984; therefore, no systematic assessment of their impact has yet been conducted.[142]

Verdun-Jones and Cousineau applaud the American trend

> towards ensuring procedural fairness in negotiated justice by requiring all negotiatied dispositions to be presented to the trial judge for ratification or rejection. At this stage of the process, the judge has the opportunity to ensure that the interests of the public, the offender, and the victim are protected adequately.[143]

The authors later conclude that Canadians should give serious thought to following this trend.

> **Recommendation 2: That no attempt should be made to "abolish" plea bargaining on the basis that such an attempt is highly likely to be unsuccessful and may well produce undesirable and/or unintended consequences for other actors in the criminal justice system.**
>
> **Recommendation 3: That the existence of plea bargaining should be explicitly acknowledged in any sentencing guidelines implemented in Canada and that these guidelines should contain explicit mechanisms for judicial control of the practice.**

Structuring the Guidelines to Reduce Bargaining

Introduction: Initial Choices

In addition to providing enforceable guidelines and standards for bargaining, a sentencing commission can, to some extent, mitigate the effect of bargaining by anticipating the adaptive responses of court actors. Making adherence to the guidelines mandatory, with provisions for enforcement, is one method. Although not without associated problems, the institution of so-called "real offence sentencing" and guilty plea discounts have been suggested as possible solutions.[144] In

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[142] See M.P. Ruark, "The Sentencing Reform Act of 1981: A Critique of "Presumptive Sentencing" in Washington" (1981) 17 Gonzaga L. Rev. 583.

[143] *Supra* note 24.

[144] Both have been rejected by sentencing commissions in the United States as being unconstitutional,

addition, other options would be to use descriptive guidelines, to have probation officers calculate sentencing scores, to create narrow ranges within each cell of the sentencing grid, to define all appropriate mitigating and aggravating circusmtances and when sentences will run consecutively, and to promote victim involvement in the sentencing decision. Choices will also have to made regading the definition of "prior record" and the decision about the in/out line will be crucial in determining the future extent of bargaining.

Voluntary vs. Mandatory Guidelines

It seems evident that the institution of voluntary guidelines has little effect upon the behaviour of court actors. Unless adherence to the guidelines is mandatory, it is likely that both existing sentencing and bargaining practices will continue with relatively little change.

Recommendation 4: That, if sentencing guidelines are to be implemented in Canada, they should be mandatory in nature.

Real Offence vs. Convicted Offence Sentencing

"Real offence sentencing" involves using information concerning the background circumstances of the offence in determining the offence severity and calculating the offence score. To some extent, this is a reflection of present practice. Coffee and Tonry note the utility of this approach in curtailing those forms of bargaining that may undermine sentencing guidelines; however, they also offer three criticisms:

> 1. It downgrades the significance of the trial stage, where various constitutional safeguards protect the defendant, and instead postpones crucial determinations to the informal and less reliable dispositional stage;
>
> 2. It produces illusory plea bargaining, under which the prosecutor implicitly promises the defendant a concession whose value is then substracted at a later stage by the court or parole agency; and
>
> 3. It is unrealistic in that it permits no concession for a plea of guilty and hence attempts to erase plea bargaining in a single stroke.[145]

They conclude, after consideration of the constitutional and practical issues, that "real offence sentencing" is not feasible, except at the parole stage. They are not alone in this conclusion for this approach has been rejected by U.S. sentencing commissions in favour of "conviction offence sentencing." This entails the use of the charge of conviction in the calculation of the offence score.

"Real offence sentencing" clearly has the potential to curtail charge bargaining. The use of such a system, however, will lead to a dramatic increase in "fact bargaining" as the prosecuting and defence attorneys attempt to control the information available to the court.

Recommendation 5: That, if sentencing guidelines are to be implemented in Canada, they should prohibit the practice of "real offence sentencing" and should be predicated on the basis of "convicted offence sentencing."

Recommendation 6: That, whatever form sentencing guidelines take in Canada, efforts should be made to control the occurrence of "fact bargaining."

(cont'd) although, ironically, both reflect the *status quo* under indeterminate sentencing.

[145] *Supra* note 121, at 173. See also accompanying text at 173 to 185.

Guilty Plea Discount

Many commentators are concerned that guidelines may cause a dramatic reduction in the number of guilty pleas, thereby creating backlogs in the disposal of cases.[146] Although the research in this area has not produced consistent results, it would appear that, in many courts, defendants receive more severe penalties if they exercise their right to a bench or jury trial and are convicted than they would have received if they had pled guilty.[147] Although perhaps not acknowledged by judges, where this has become a common practice, it has been recognized by defence attorneys who may advise their clients to plead guilty in order to receive a lower sentence. This has been called "tacit plea bargaining" because an explicit bargain does not take place but a guilty plea is entered in anticipation of a benefit.

The consistency in sentencing mandated by guidelines would imply that such tacit bargains would be reduced as a consequence of the enhanced predictability of sentences as well as the assurance that the method of conviction does not alter the nature or quantum of sentence. The elimination of this powerful incentive to plead guilty has caused a considerable degree of concern among those who recognize that the court system may not be able to deal with a dramatic increase in the number of trials. Some have recommended that, despite the repugnance of the notion, the existence of a guilty plea discount should be officially recognized and incorporated into the guidelines.[148] The constitutionality of this approach has been questioned and, therefore, it has not been put into practice.[149]

Coffee and Tonry, however, note three different perspectives on this issue:

1. it is an incentive to plead guilty and so disfavors those defendants who go to trial;

2. it is a limitation on the amount of credit that can be given for such a plea; that is, it is as much a ceiling on the permissible reward as a disincentive to profess innocence; and

3. it is a form of consumer protection for offenders, who sometimes plead guilty in

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[146] Also see Daudistel, *supra* note 123. In that city, attempts to eliminate plea bargaining were followed by an unprecedented backlog of cases, felt to be the result of the lack of encouragement for an offender to plead guilty. The system was eventually modified by the routine warning of the defendant that a not guilty plea would result in a higher sentence.

[147] For studies that affirm the existence of a guilty plea discount, see M.S. Zatz, "Race, Ethnicity, and Determinate Sentencing: A New Dimension to an Old Controversy" (1984) 22 Criminology 147; D. Breton & J.D. Casper, "Does it Pay to Plead Guilty? Differential Sentencing and the Function of Criminal Courts" (1981) 16 L. & Soc. Rev 45; W.M. Rhodes & C. Conly, *Analysis of Federal Sentencing. Final Report* (Washington, D.C.: U.S. Department of Justice, FJRP 81/004, 1981); T.M. Uhlman & N.D. Walker, "'He Takes Some of My Time; I Take Some of His': An Analysis of Judicial Sentencing Patterns in Jury Cases" (1980) 14 L. & Soc. Rev. 323; H. Zeisel, "The Offer That Cannot be Refused" in F.E. Zimring & R. Frase, eds., *The Criminal Justice System* (Boston: Little, Brown, 1980); Alaska Judicial Council, *Felony Sentencing under Alaska's New Criminal Code: 1980 Offenses* (Anchorage: Alaska Judicial Council, 1982); and P. Nardulli, *The Courtroom Elite* (Cambridge, Mass.: Ballinger Publishing Co., 1978); The greatest difference seems to be between guilty plea and jury trial as the method of conviction. Rich *et al.* (*supra* note 124) found that in the Philadelphia court that instituted voluntary guidelines, those convicted after a jury trial could expect a sentence about 10 years longer than that which they would have received had they pled guilty or had a bench trial. Their analysis revealed that the voluntary guidelines did not reduce the disparity caused by guilty plea discounts.

[148] Gottfredson, Wilkins & Hoffman (*supra* note 119) advocate that each cell in the grid contain one sentence range for conviction by guilty plea and one for conviction by trial. See also S.J. Schulhofer, "Due Process of Sentencing" (1980) 128 U. Penn. L. Rev. 828;

[149] Several federal court rulings have confirmed a defendant's right to a trial without fear of a stiffer penalty: *United States v. Derrick*, 519 F.2d 1 (6th Cir. 1975); *United States v. Marzette*, 485 F.2d 207 (8th Cir. 1973); *Baker v. United States*, 412 F.2d 1069 (5th Cir. 1969). Cf. *Scott v. United States*, 419 F.2d 264 (D.C. Cir. 1969).

return for a valueless consideration (illusory bargaining).[150]

They generally conclude that the idea of a guilty plea discount is not practical and that "it is unlikely that the goal of sentencing equity can be realized under such a structure." To cite Coffee and Tonry:

> ...any such proposal presents significant policy and operational problems. To be palatable even to those not much troubled by the constitutional implications, any such proposal must strike a difficult balance that encourages pleas from the genuinely guilty but does not coerce them from the innocent.... Whether such a balance can be struck is open to serious question.[151]

In the absence of either a tacit or explicit guilty plea discount, it should be recognized that court actors may well find other means of rewarding guilty pleas to compensate for the prosecutor's reduced ability to induce enough guilty pleas. They may devise other means of compelling guilty pleas, including, perhaps, overcharging and charge bargaining, or promising mitigation discounts and threatening the introduction of aggravating factors at the sentencing hearing. The alternative of institutionalizing a guilty plea discount would be repugnant to traditional Canadian jurisprudence and would almost certainly be subjected to vigorous challenge under the Canadian *Charter of Rights and Freedoms.*

Recommendation 7: That, if sentencing guidelines are to be implemented in Canada, they should not include an explicit 'discount' for a guilty plea.

Descriptive vs. Prescriptive Guidelines

The original intention underpinning sentencing guidelines was that they would be constructed on the basis of past sentencing data and statistical modelling techniques, and, therefore, would reflect contemporary judicial practice. Although it was stated that the intent was to make existing sentencing policy explicit, this approach assumes both that sentencing judges collectively make appropriate decisions and that it is useful to devise an accurate description of the criteria they use.[152] Another approach to sentencing guidelines, however, rests in the view that the guidelines should be generated deliberately, as a *prescription* for judicial sentencing. Either a legislative body or a sentencing commission could accomplish this task.[153]

To the extent that the guidelines are *descriptive* of current behaviour, one would expect not only greater "conformity" but also that the incidence of plea bargaining would be much the same as before.[154] However, a potential danger of using *prescriptive* guidelines is that the actors in the

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[150] Coffee & Tonry *supra* note 121 at 187.

[151] *Ibid.* at 186-187. The reader is referred to their extended discussion on the topic.

[152] For a critique of this approach see R. Singer, "In Favor of 'Presumptive Sentences' Set by a Sentencing Commission" (1978) 24 Crime & Delinquency 401; and J.C. Coffee, Jr., "The Repressed Issue of Sentencing: Accountability, Predictability, and Equality in the Era of of the Sentencing Commission" (1978) 66 Georgetown L. J. 975. The main criticism is that the disparities of the past will be reflected in the guidelines. In practice, the creation of such guidelines may not include consideration of the truly relevant variables, especially when only the information available to the judge is used in their calculation (regardless of its reliability). See R.F. Sparks, "The Construction of Sentencing Guidelines: A Methodological Critique" in A. Blumstein, J. Cohen, S.E. Martin & M.H. Tonry, eds., *Research on Sentencing: The Search for Reform. Volume II* (Washington, D.C.: National Academy Press, 1983). The enormous influence of plea bargaining on outcome, for example, is not considered.

[153] This is the approach adopted in both Minnesota and Pennsylvania.

[154] This has been used as a "selling point" by researchers wishing to gain judicial cooperation for the experimental institution of voluntary guidelines. It was thought that judges would be more willing to accept the idea if it were presented to them as a formalization of their collective decision-making. See Coffee & Tonry, *supra* note 121; Carow, *supra* note 126; and Galegher & Carroll, "Voluntary Sentencing Guidelines:

criminal justice system may not agree with the underlying philosophy (e.g., a just deserts model leading to a greater use of incarceration) and may undermine the intent. If Crown counsel perceives a large discrepancy between his/her perception of the seriousness of the behaviour reported by the police and the guideline sentence for that offence, there are a number of means at his or her disposal to circumvent the process, including diversion and charge reduction. Similarly, if judges are required to pass sentences that are very different than the ones they would normally contemplate, they could routinely "overemphasize" mitigating factors or acquit a higher proportion of defendants.

Recommendation 8: That, if prescriptive sentencing guidelines are to be implemented in Canada, prior consideration should be given to their potential impact upon plea bargaining practices (and vice versa) and that once guidelines are implemented, there should be close monitoring of adaptive responses on the part of those actors usually engaged in bargaining. If such responses are considered to be undesirable, the guidelines should be modified accordingly by the sentencing commission.

Who Calculates Offence Scores?

Carow, in her study of voluntary guidelines in Florida and Maryland, has noted a new variant of bargaining she has called "score bargaining."[155] The extent of this behaviour varied among the courts studied, being most common where there was widespread prosecutorial resistance to the guidelines. In these courts, the guidelines were totally subverted in many cases. The preparation of score sheets, integral to the utilization of a sentencing grid, can be completed by the judge, the prosecution, the defence or a probation officer. Ideally, it would seem, the probation officer, or some other independent party, such as a representative of the sentencing commission, should be responsible for these calculations. Carow noted that probation officers completed score sheets as part of the pre-sentence report, but when such a report was not prepared, the defence and prosecution would complete the scoresheets:

> Attorneys thus had the opportunity to negotiate the more "flexible" factors in order to arrive at a point score that matched their sentence agreement. Such factors as the role of the defendant, the extent of victim injury, and victim participation were often manipulated; prior offense scores were also bargained in some cases. Our analysis showed that up to one-fifth of [studied] cases sentenced in [one court under study] may have been subject to score bargains.[156]

Carow also notes how the entire issue of plea bargaining was overlooked during the creation and implementation of the guidelines. She concluded that a considerable degree of the subversion of the guidelines by prosecutors could have been averted by obtaining their consultation and input.

Recommendation 9: That, if sentencing guidelines are to be implemented in Canada, a party independent of the defence and prosecution should be responsible for calculating the offender's score. This might be a probation officer (where appropriate) or a member of the sentencing commission staff.

(cont'd) Prescription for Justice or Patent Medicine?" (1983) L. & Human Behavior 380. This issue is a realistic concern given the "widespread and intense" judicial resistence to the concept of sentencing guidelines that was indicated by a survey of U.S. federal Judges (J. Bartolomeo; Yankelovich, Skelley, and White, Inc.; and INSLAW, Inc., *Judicial Reaction to Sentencing Guidelines: Final Report* (Washington, D.C.: U.S. Department of Justice, 1981).

[155] *Supra* note 126.

[156] *Ibid.* at 168.

Width of Sentence Ranges

Although the combination of an offender's offence and criminal history scores determines which cell on the guideline grid dictates the type of the sentence, there is, within each cell, a range for the quantum of sentence. Based on the unique characteristics of the offence and the offender, the judge determines the duration of the sentence from this range. This process, to some extent, parallels the decision-making of judges under an indeterminate sentencing system, which is characterized in the sentencing literature as a "bifurcated decision": first, the judge chooses between incarceration and all other options; second, if incarceration is chosen, the quantum of the prison term is selected. As long as a sentencing judge has a choice, the prosecution can make a recommendation, perhaps based upon a sentence bargain with the defence. Broad sentence ranges can, therefore, encourage plea bargaining.

Recommendation 10: That, if the reduction of plea bargaining is a goal of Canadian sentcing guidelines, the width of sentence ranges should be narrow.

Aggravating and Mitigating Factors

The judge may deviate from the sentence indicated by the grid if sufficiently compelling aggravating or mitigating circumstances are demonstrated by the prosecution and/or defence. From the U.S. experience, it is apparent that this is not a straight-forward determination. The consideration of mitigating factors can move an offender from an incarcerative to a non-incarcerative disposition, and the reverse is true if aggravating factors are introduced by the prosecution. This information is, therefore, of tremendous importance and can be the subject of both sentence and fact bargaining. The necessity of controlling fact bargaining is again highlighted.

In Minnesota, the Sentencing Commission provides a list of acceptable factors that can be considered as aggravating or mitigating the severity of a sentence. Moreover, the Supreme Court of that state ruled that a plea bargain is not grounds to reduce the sentence defined by the guidelines.[157] Even given these factors, a few judges still used plea bargaining as a reason for giving a lower sentence. In contrast, the judges in Pennsylvania are not limited in terms of the aggravating and mitigating factors they can consider and, as noted above, the existence of a sentence bargain was the most common "mitigating factor" reported by judges. This is an inappropriate application of the concept of mitigation and, if frequently employed, could undermine the guidelines.

Recommendation 11: That, if sentencing guidelines are to be implemented in Canada, they should contain a limited list of aggravating and mitigating factors that explicitly excludes plea bargaining as a reason to depart from the presumptive sentence.

In/Out Decision

A prominent feature of any sentencing guidelines that take the form of a two-dimensional grid is what has been called the "in/out line." This line defines the cut-off point between incarcerative and community-based dispositions. Under a prescriptive guidelines system, the position of the line is discretionary and of critical importance in terms of the potential impact of plea bargaining. Because of the possibility of charge bargaining and bargaining for the introduction of mitigating factors, those offenders who are straddling the in/out line will, if it can be assumed that most defendants wish to avoid imprisonment, engage in fierce bargaining. If a high volume of cases falls about this line, the incidence of bargaining will be high.[158]

Recommendation 12: That, if sentencing guidelines are introduced in Canada,

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[157] *State v. Hernandez*, 311 N.W.2d. 478 (Minn. 1981).

[158] See Coffee & Tonry, *supra* note 121, for a thorough discussion of this issue

explicit consideration should be given to the possibility that there will be fierce plea bargaining in relation to whether the defendant will receive an incarcerative sentence as opposed to a community-based disposition, since it is particularly around the so-called "in/out line" that attempts may be made to subvert the guidelines.

Consecutive and Concurrent Sentences

In Canada, the imposition of consecutive sentences is not common; this is one reason that charge bargaining is felt to be unnecessary by many defendants (since the severity of the disposition is not related to the number of charges). Under sentencing guidelines, however, the number of charges will have a consequence, as it will be used in the calculation of the criminal history score, either immediately or in future proceedings (depending on the definition of prior record; see below).

In addition to the impact on charge bargaining, if both consecutive and concurrent sentences were common, the prosecutor could use this as a commodity in bargaining by promising to recommend a concurrent sentence for multiple charges. In Washington State, the decision about the consecutive or concurrent nature of sentences for multiple convictions is legislatively defined, taking this subject out of the prosecutorial bargaining arsenal.

Recommendation 13: That, the situations when consecutive (as opposed to concurrent sentences) are deemed appropriate should be explicitly delineated in the guidelines.

Calculation of Prior Record

The extent of an offender's prior record is supposed to be reflected in the criminal history score, and, therefore, is a major determinant of the final disposition. If an offender is being sentenced for multiple offences, the criminal history score can be calculated in two ways; first, all convictions obtained prior to the sentencing hearing can be considered; second, the criminal history score can accumulate at the sentencing hearing, increasing the score immediately. The Minnesota guidelines originally defined the former procedure, but a Supreme Court ruling[159] initiated a change in policy and the latter was adopted. One implication of the new policy is that two qualitatively different offenders could be considered to have an equally serious criminal background. These offenders could receive the same sentence even though a subjective appraisal of their situations would reveal that different dispositions are in order, as illustrated in this example:

> ...imprisonment may be deemed the appropriate sanction for an offender with a criminal history score of four, when that score represents three or four prior interventions with community sanctions such as jail time. Imprisonment may not be deemed an appropriate sanction if the criminal history score represents a single "crime spree" with either no prior interventions, or perhaps one prior intervention with community sanctions.[160]

This policy also permits the prosecutor more control over the eventual sentence. Through overcharging, a prosecutor can increase a sentence if all the charges count against the criminal history score. Indeed, in Minnesota, "[s]ome observers indicated that prosecutors did seem less willing to dismiss charges in certain kinds of cases after implementation of the Guidelines than had been in the past and that sanctions were becoming more severe as a result."[161]

Recommendation 14: That, because the accumulation of criminal history scores on the same day of sentencing is potentially coercive, these scores

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[159] *Hernandez, supra* note 157.

[160] Minnesota Sentencing Guidelines Commission, *supra* note 132, at 81.

[161] *Ibid.* at 81.

should be calculated on the basis of convictions obtained prior to the sentencing hearing.

Recommendation 15: That the possibility of prosecutors manipulating a defendant by overcharging be forestalled by explicit provisions in the guidelines.

Role of the Victim

Input from the victim at sentencing, whether in the form of victim impact statements or actual testimony, can have an influence on bargaining.[162] On one hand, the presence in court of a victim or the introduction of a victim impact statement may come to be another commodity over which to bargain. More importantly, however, involvement of the victim at sentencing may be a method of *controlling* bargaining. Through questioning the victim or by reference to a victim impact statement, the judge could determine if the facts of the case are seriously at odds with the charge laid by the Crown. Furthermore, fact bargaining over aggravating circumstances could be lessened by routine victim input.

Recommendation 16: Participation by the victim in the sentencing process should be encourgaged (either directly through testimony or indirectly through a statement prepared by a probation or police officer).

Parole

Finally, the disparity eliminated by sentencing guidelines may be dissipated by paroling authorities in their decisions to release inmates. Another way of viewing this, however, is that the disparity created by charge bargaining may be mitigated by the *ex post facto* correction of perceived inequity. This would be the case if the parole board considers the circumstances of the crime (real offence) instead of the offence of conviction, and would constitute an illusory bargain if the offender, at the time of sentencing, perceives that he/she received a lenient sentence because of a reduced charge but, nevertheless, serves a longer portion of his/her sentence in prison as a consequence of the discretion of the parole board. In any event, although beyond the scope of this paper, the impact of parole on sentencing guidelines should be considered.[163]

Recommendation 17: That, because sentencing reform will have consequences throughout the entire criminal justice system, some attention should be paid to the role of parole in order to ensure that sentencing and parole decisions are made on a reasonably consistent basis.

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[162] Bill C-19, which died on the order paper of the last government, provided for many amendments to the *Criminal Code*, including the requirement that victims be interviewed as part of a pre-sentence investigation by a probation officer. Such a provision is already in use as part of the *Young Offenders Act*.

[163] In reference to parole and determinate sentences see F.A. Hussey & S.P. Lagory, "The Determinate Sentence and its Impact on Parole" (1983) 19 Crim. L. Bull. 101. See also P.B. Hoffman & M.A. Stover, "Reform in the Determination of Prison Terms: Equity, Determinancy, and Parole Release Function" (1979) 7 Hofstra L. Rev. 89.

APPENDIX A

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[1] * denotes an empirical study.

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APPENDIX B

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APPENDIX C

RULES FOR U.S. DISTRICT COURTS: RULE 11

(a) Alternatives. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(b) Nolo contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public and the effective administration of justice.

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole term; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceedings against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at the trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if his plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which he has pleaded, that his answers may later be used against him in a prosecution for perjury or false statement.

(d) Insuring that the plea is voluntary. The court shall not accept a plea of guilty or nolo contendre without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

(e) Plea agreement procedure.

(1) *In General.* The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request for a particular sentence, with the understanding that such recommendation or request shall not

be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of a case.

The court shall not participate in any such discussions.

(2) Notice of such agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea.

(3) Acceptance of a plea agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgement and sentence the disposition provided for in the plea agreement.

(4) Rejection of a plea agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of plea agreement procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of pleas, plea discussions, and related statements. Except as otherwsie provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceeding under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea discussions with an attorney of the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceedings wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by a defendant under oath, on the record, and in the presence of counsel.

(f) Determining accuracy of plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgement upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreements, and the inquiry into the accuracy of a guilty plea.

APPENDIX D
STATE OF WASHINGTON SENTENCING REFORM ACT OF 1981

9.94A.080 Plea agreements -- Discussions -- Contents of agreements. The prosecutor and the attorney for the defendant, or the defendant when acting pro se, may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea to a charged offense or to a lesser or related offense, the prosecutor will do any of the following:

(1) Move for dismissal of other charges or counts;

(2) Recommend a particular sentence within the sentence range applicable to the offenses to which the offender pled guilty;

(3) Recommend a particular sentence outside of the sentence range;

(4) Agree to a particular charge or count;

(5) Agree not to file other charges or counts; or

(6) Make any other promise to the defendant, except that in no circumstances may the prosecutor agree not to allege prior convictions.

The court shall not participate in any discussions under this section. (1981 c. 137 §8.)

9.94A.090 Plea Agreements -- Statement to court as to nature and reasons for agreement -- Court approval or disapproval -- Sentencing judge not bound.

(1) If a plea agreement has been reached by the prosecutor and the defendant pursuant to RCW 9.94A.080, they shall at the time of the defendant's plea state to the court, on the record, the nature of the agreement and the reasons for the agreement. The court, at the time of the plea, shall determine if the agreement is consistent with the interests of justice and with the prosecuting standards. If the court determines it is not consistent with the interests of justice and with the prosecuting standards, the court shall, on the record, inform the defendant and the prosecutor that they are not bound by the agreement and that the defendant may withdraw the defendant's plea of guilty, if one has been made, and enter a plea of not guilty.

(2) The sentencing judge is not bound by any recommendations contained in an allowed plea agreement and the defendant shall be so informed at the time of the plea. (1981 c. 137 §9.)

9.94A.100 Plea agreements -- Criminal history. The prosecuting attorney and the defendant shall each provide the court with their understanding of what the defendant's criminal history is prior to a plea of guilty pursuant to a plea agreement. All disputed issues as to criminal history shall be decided at the sentencing hearing. (1981 c. 137 §10.)

* * *

VI. RECOMMENDED PROSECUTING STANDARDS FOR CHARGING AND PLEA DISPOSITIONS

9.94A.430 Introduction. These standards are intended solely for the guidance of prosecutors in the State of Washington. They are not intended to, do not and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party in litigation with the state. (1983 c. 115 §14.)

9.94A.440 Evidentiary sufficiency. (1) Decision not to prosecute.

STANDARD: A Prosecuting Attorney may decline to prosecute, even though technically sufficient evidence to prosecute exists, in situations where prosecution would serve no public purpose, would defeat the underlying purpose of the law in question or would result in decreased respect for the law.

GUIDELINE/COMMENTARY:

Examples

The following are examples of reasons not to prosecute which could satisfy the standard.

(a) Contrary to Legislative Intent -- It may be proper to decline to charge where the application of criminal sanctions would be clearly contrary to the intent of the legislature in enacting the particular statute.

(b) Antiquated Statute -- It may be proper to decline to charge where the statute in question is antiquated in that:

(i) It has not been enforced for many years; and

(ii) Most members of society act as if it were no longer in existence; and

(iii) It serves no deterrent or protective purpose in today's society; and

(iv) The statute has not been recently considered by the legislature.

This reason is not to be construed as the basis for declining cases because the law in question is unpopular or because it is difficult to enforce.

(c) De Minimus Violation -- It may be proper to decline to charge where the violation of law is only technical or insubstantial and where no public interest or deterrent purpose would be served by prosecution.

(d) Confinement on Other Charges -- It may be proper to decline to charge because the accused has been sentenced on another charge to a lengthy period of confinement; and

(i) Conviction of the new offense would not merit any additional direct or collateral punishment;

(ii) The new offense is either a misdemeanor or a felony which is not particularly aggravated; and

(iii) Conviction of the new offense would not serve any significant purpose.

(e) Pending Conviction on Another Charge -- It may be proper to decline to charge because the accused is facing a pending prosecution in the same or another county; and

(i) Conviction of the new offense would not merit any additional direct or collateral punishment;

(ii) Conviction in the pending prosecution is imminent;

(iii) The new offense is either a misdemeanor or a felony which is not particularly aggravated; and

(iv) Conviction of the new offense would not serve any significant deterrent purpose.

(f) High Disproportionate Cost of Prosecution -- It may be proper to decline to charge where the cost of locating or transporting, or the burden on, prosecution witnesses is highly disproportionate to the importance of prosecuting the offense in question. This reason should be limited to minor cases and should not be relied upon in serious cases.

(g) Improper Motives of Complainant -- It may be proper to decline charges because the motives of the complainant are improper and prosecution would serve no public purpose, would defeat the underlying purpose of law in question or would result in decreased respect for the law.

(h) Immunity -- It may be proper to decline to charge where immunity is to be given to an accused in order to prosecute another where the accused's information or testimony will reasonably lead to the conviction of others who are responsible for more serious criminal conduct or who represent a greater danger to the public interest.

(i) Victim Request -- It may be proper to decline to charge because the victim requests that no criminal charges be filed and the case involves the following crimes or situations:

(i) Assault cases where the victim has suffered little or no injury;

(ii) Crimes against property, not involving violence, where no major loss was suffered;

(iii) Where doing so would not jeopardize the safety of society.

Care should be taken to ensure that the victim's request is freely made and is not the product of threats or pressure by the accused.

The presence of these factors may also justify the decision to dismiss a prosecution which has been commenced.

Notification

The prosecutor is encouraged to notify the victim, when practical, and the law enforcement personnel, of the decision not to prosecute.

(2) Decision to Prosecute.

STANDARD:

Crimes against persons will be filed if sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseen defense that could be raised under the evidence, would justify conviction by a reasonable and objective fact-finder.

Crimes against property/other crimes will be filed if the admissible evidence is of such convincing force as to make it probable that a reasonable and objective fact-finder would convict after hearing all the admissible evidence and the most plausible defense that could be raised.

Selection of Charges/Degree of Charge

(1) The prosecutor should file charges which adequately describe the nature of defendant's conduct [sic]. Other offenses may be charged only if they are necessary to ensure that the charges:

(a) Will significantly enhance the strength of the state's case at trial; or

(b) Will result in restitution to all victims.

(2) The prosecutor should not overcharge to obtain a guilty plea. Overcharging includes:

(a) Charging a higher degree;

(b) Charging additional counts.

This standard is mentioned to direct prosecutors to charge those crimes which demonstrate the nature and seriousness of a defendant's criminal conduct, but to decline to charge crimes which are not necessary to such an indication. Crimes which do not merge as a matter of law, but which arise from the same course of conduct, do not all have to be charged.

* * *

Pre-Filing Discussions with Defendant

Discussions with the defendant or his/her representative regarding the selection or disposition of charges may occur prior to the filing of charges, and potential agreements can be reached. (1983 c. 115 §15.)

9.94A.450 Plea dispositions. STANDARD: (1) Except as provided in subsection (2) of this section, a defendant will normally be expected to plead guilty to the charge or charges which adequately describe the nature of his or her criminal conduct or go to trial.

(2) In certain circumstances, a plea agreement with the defendant in exchange for a plea of guilty may be necessary and in the public interest. Such situations may include the following:

(a) Evidentiary problems which make conviction on the original charge doubtful;

(b) The defendant's willingness to cooperate in the investigation or prosecution of others whose criminal conduct is more serious or represents a greater public threat;

(c) A request by the victim when it is not the result of pressure from the defendant;

(d) The discovery of facts that mitigate the seriousness of the defendant's conduct;

(e) The correction of errors in the original charging decision;

(f) The defendant's history with respect to criminal activity;

(g) The nature and seriousness of the offense or offenses charged;

(h) The probable effect on witnesses. (1983 c. 115 §16.)

9.94A.460 Sentence recommendations.

STANDARD:

The prosecutor may reach an agreement regarding sentence recommendations.

The prosecutor shall not agree to withhold relevant information from the court concerning the plea agreement. (1983 c. 115 §17.)