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BACKGROUND DISCUSSION PAPER

AN OVERVIEW OF PLEA BARGAINING IN CANADA; CAUTIONARY NOTES
FOR SENTENCING REFORMES

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Introduction

My, he was disappointed.
He had forgotten that a bargain dog never bites.
(Ogden Nash)

The winds of reform are starting to blow through the dusty mansion of Canadian sentencing praxis. With the advent of the Canadian Sentencing Commission, there has been a revival of interest in fundamental reform of sentencing laws, procedures and practices in Canada. However, if the experience of the justice system south of the border is to serve as a guide, it is clear that sentencing reform is likely to become a sorry exercise if it is spawned in a vacuum. In particular, the introduction of such far-reaching reforms as the adoption of sentencing guidelines should only be implemented after a full consideration of their potential impact upon discretionary practices throughout the criminal justice system. This paper is concerned with the discretionary practice of plea bargaining and provides an overview of the nature and extent of the practice in Canada. It concludes with the admonition that major sentencing reform is unlikely to be successful unless commensurate attention is paid to the issue of plea bargaining.

In a study of the impact of the impact of the voluntary adoption of sentencing guidelines in the urban courts of three U.S. states, the researchers contended 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."¹ Indeed, one of the significant conclusions of this study was that:

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 account² in any successful attempt to reform sentencing.

It is against the background of anticipated sentencing reform that we shall consider the issue of plea bargaining in Canada.

Definitional Problems

On the basis of a consideration of the research, which has been published to date, it is apparent that the words "plea bargaining" can only be considered a compendious term, that may be used to describe a wide diversity of behaviours which occur among participants in the court process. Indeed,

1 Rich, W.D., Sutton, L.P., Clear, T.R., and M.J. Saks. **Sentencing By Mathematics: An Evaluation of the Early Attempts to Develop and Implement Sentencing Guidelines.** (Williamsburg, Va.: National Centre for State Courts) at p. 161.

2 *ibid*, at p. 206.

such behaviours may range from true bargains to tentative agreements, plea negotiations, or simple discussions.

For present purposes, it may be useful to conceptualize the phenomenon in terms of, what Grosman has called, the "pre-trial market place" in which the actors negotiate using the various commodities at their disposal.³ Actual bargains need never be struck. Indeed, Ericson and Baranek⁴, who have conducted the most comprehensive study of plea bargaining in Canada, express the view that even the term "negotiated" is something of a misnomer within the context of the accused person's relationship with the agents of the criminal justice system since there is such a stark imbalance of power between the parties concerned. In particular, these researchers have suggested that it is more realistic to view the accused's decisions, within the justice system, as being "coerced" and/or "manipulated" and so may be perceived as anything but a bargain by the defendant. In similar vein, Solomon⁵, based on his own examination of the data generated by Ericson and Baranek, has contended that plea bargaining generally did not result in agreements that led to lenient sentences. Instead, they

....resulted usually in the dropping of charges (often not warranted to begin with) and

3 Grosman, B. **The Prosecutor** (Toronto: University of Toronto Press, 1969) at p. 30.

4 Ericson, R.V. and P.M. Baranek. **The Ordering of Justice: A Study of Accused Persons as Defendants in the Criminal Process**. (Toronto: University of Toronto Press, 1982) hereinafter referred to as **Ordering of Justice**.

5 P.H. Solomon Jr., **Criminal Justice Policy, From Research to Reform** (Toronto: Butterworths, 1983), at p.43.

sometimes in an implicit understanding about a sentencing recommendation (which did not determine the punishment).....[Defence counsel] could not hold out for a promise of a concession in sentencing, when judges...kept sentencing decisions in their hands; nor could counsel expect to achieve more than the usual disposition for a case unless they could identify a special feature - a weakness in the evidence, a quality of the offences, or mitigating factors about the offenders.....

....The primary responsibility of defence counsel in plea bargaining, it might be argued, consists not in seeking special advantages, but in assuring that the outcome of the case is no worse than local norms dictate. [emphasis added]

Certainly, this assessment of the nature of plea negotiations in a Canadian jurisdiction paints a radically different picture from the popular stereotype of the practice and underscores the need to treat the compendious term, "plea bargaining", with a considerable degree of caution.

Returning to the perspective of the "pre-trial market place", it may be observed that the defendant generally has the fewest commodities with which to bargain, and his/her bargaining strength decreases the further he/she proceeds through the various stages in the process. At the police investigation stage, where bargaining may commence, the accused can "trade" (or choose simply to "surrender") cooperation, a confession, directions as to the location of evidence (such as stolen property or weapons), information

concerning other crimes, or evidence against an accomplice.⁶ The police, for their part, may promise many commodities including charge reduction, failing to charge certain counts, not opposing bail, earlier release from police custody, a favourable report to the Crown or in open court, or declining to pursue further investigations against the accused and/or his/her relatives and friends.⁷ The outcomes of the decisions made by the accused at this stage may well furnish the police and Crown counsel with "ammunition" that may be used as leverage against him/her later in the criminal justice process.

The more options available to the accused, the more commodities he/she possesses for the purpose of bargaining. Where available, the election of the mode of trial is an important commodity since the Crown may wish to avoid investing the time and resources required for jury selection and trial. An alleged offender may also exchange testimony against a co-accused under the terms of s. 5(2) of the **Canada Evidence Act**.⁸ The guilty plea, however, represents the defendant's most powerful bargaining leverage since it is available to all defendants and may be offered in exchange for a number of considerations. The list of such

6 Ericson and Baranek, **Ordering of Justice**, 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.

7 *ibid*, at p. 53.

8 R.S.C. 1970, c. 307.

considerations is so diverse that the generic category of "plea bargain" may usefully be divided into the following forms of bargaining:

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.

Sentencing Bargaining

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

(b) promise of a certain sentence recommendation by the 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 sentencing 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 judges as an aggravating factor.

With some of the intractable problems of definition behind us, we may now turn to a consideration of the skimpy information, that we currently possess in relation to plea bargaining in Canada.

Plea Bargaining in Canada

It is certainly true that an examination of the United States literature can furnish the Canadian reader with a considerable degree of insight into the remarkable complexity of the multi-faceted phenomenon, commonly described as "plea bargaining". However, particular care should be taken in attempting to generalize American findings to the Canadian situation. There are firm grounds for believing that the nature and extent of plea bargaining, that occurs in Canada, vary in many critical ways from the bargaining activities engaged in by participants in the criminal justice system south of the 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 such activities varies between the two countries. This view is supported by both the limited empirical evidence available and an examination of the legal structure and judicial opinions that mould both the behaviour and the decision-making patterns of court actors.

We shall now direct our attention to some of the structural constraints placed upon those Canadian actors engaging in plea bargaining and then examine the findings that can be gleaned from the limited number of empirical studies that have been undertaken in Canada. On the basis of this discussion, it should be possible to identify a number of critical factors that can serve either to enhance or to restrict plea bargaining.

Official Standards and Guidelines

There are currently in existence both ethical and administrative constraints upon the nature and extent of plea 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, there is nothing provided in Canadian jurisprudence that either defines or prohibits the practice outright; however, if such action were desired by either the judiciary or by parliamentarians, then the ability to take it clearly exists.

Legislative Guidelines

In Canada, plea bargaining is neither legislatively sanctioned nor prohibited. It has been contended, however, that the practice of at least certain forms of bargaining conduct could be eliminated by legislative fiat. For example, an amendment to the **Criminal Code** could be enacted

so as to invalidate those pleas of guilty that flow from plea bargains.⁹ Similarly, it is possible that existing legislation could be adapted for this purpose. Klein, for example, has suggested that the sections of the **Criminal Code** dealing with the corruption and disobedience of public officials could be harnessed in an attempt to restrain plea bargaining.¹⁰

Verdun-Jones and Cousineau¹¹ contend that, should the judiciary wish to do so, it could at least limit the scope of plea bargaining by exercising a degree of active control over prosecutorial discretion. For example, such control was asserted in **Perkins and Pigeau v. The Queen**¹²; in this case, Rinfret J.A. contended 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 prescribed by statute.¹³ It is not clear whether the Court wished to establish a general

9 Ferguson, G.A. and D.W. Roberts, **Plea Bargaining: Directions for Canadian Reform** (1974), 52 Can. B. Rev. 497 at p. 573.

10 Klein, A.D., **Plea Bargaining** (1972), 14 Crim. L.Q. 289. The author was apparently referring to ss. 108, 109, and 127(2). There is no indication that these provisions have ever been employed for this purpose.

11 Verdun-Jones, S.N. and F.D. Cousineau, **Cleansing the Augean Stables: A Critical Analysis of Recent Trends in the Plea Bargaining Debate in Canada** (1979), 17 Osgoode Hall L.J. 227.

12 [1976] Que.C.A. 527, 35 C.R.N.S. 222.

13 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, in fact, suffered bodily harm.

principle restricting the power of the Crown to reduce charges in those cases where it has the means to prove a greater offence at trial.¹⁴ However, the uniform application of such a principle to the broad range of plea bargaining activities could well constitute a singularly effective device for decreasing the incidence of plea bargaining. One possible means for implementing such an approach may be found in section 534 (4) of the **Criminal Code**¹⁵ , which 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 accused not guilty of the offence charged. (emphasis added).¹⁶

To date, however, there is no evidence to suggest that this section is being used regularly as a means of controlling prosecutorial discretion.

¹⁴ 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 such a case. See Verdun-Jones and Cousineau, *supra* n.11.

¹⁵ **Criminal Code**, R.S.C. 1970, c. C-34.

¹⁶ For discussion of s. 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 pp. 18-19; and Law Reform Commission of Ontario, **Report of Administration of Ontario Courts. Part II** (Toronto: Ministry of the Attorney General, 1973) at pp. 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 by the court, see **R. v. Pentiluk** (1974), 21 C.C.C. (2d) 87 (Ont. C.A.).

Common Law Guidelines

Although a long-established part of civil procedure, pre-trial discovery has gradually earned an increasing degree of acceptance in the arena of the criminal courts; this is particularly the case within the context of the preliminary inquiry.¹⁷ The Law reform Commission of Canada has recently advocated the enactment of statutory rules concerning pre-trial disclosure.¹⁸ In addition, what has now become a common law tradition was recently re-affirmed in a B.C. Court of Appeal judgement that upheld the disciplinary action taken by the B.C. Law Society in sanctioning a prosecutor who failed to inform defence counsel of a witness, who might potentially have undermined the Crown's case.¹⁹

Pre-trial disclosure provides a tailor-made opportunity to plea bargain since both defence and Crown counsel meet together in an informal setting and discuss evidence and other procedural matters. Each side can assess the strength

¹⁷ See Salhany, R., **The Preliminary Inquiry: Extension of Pre-Trial Discovery** (1967), 9 Crim. L.Q. 394; Hooper, A., **Discovery in Criminal Cases** (1972), 50 Can. B. Rev. 445; Wilkins, J., **Discovery** (1976), 18 Crim. L.Q. 355; MacEachern, A., **The Pre-Trial Conference** (1980), 38 Advocate 299; and Napley, D., **The Preliminary Inquiry as an Aspect of Trial Strategy**, in **Advocacy -- A Symposium Presented by the C.B.A., Ontario** (Toronto: DeBoo Publishers, 1982).

¹⁸ **Report #22: Disclosure by the Prosecution** (Ottawa: Ministry of Supply and Services). The Commission had, in 1974, advocated the abolition of the preliminary inquiry in favour of a formal system of disclosure and pre-trial conferences; **Discovery in Criminal Cases** (Ottawa: Information Canada, 1974).

¹⁹ **Cunliffe v. Law Society of B.C.; Bledsoe v. Law Society of B.C.** (1984), 40 C.R. (3d) 67.

of the other's case. Napley has noted that such a process can well pave the way for negotiations in relation to the entry of a plea of guilty (particularly if the defence is perceived as not being "airtight").²⁰ Conversely, the Crown may consider that its own case is weak and offer to reduce the charge(s).

The Law Reform Commission reports the results of a number of pilot, or experimental, projects in which the process of pre-trial discovery was formalized to some degree. According to the Commission, one advantage of the formalized system was that plea bargaining was facilitated. Analysis of the pilot project, undertaken in Montreal, revealed that the rate of guilty pleas doubled and the number of charges withdrawn by the prosecution actually tripled.²¹ This process was, therefore, touted by the Commission as being both cost-efficient and a benefit to the administration of criminal justice.

Another, critical factor that influences the nature of plea bargaining in Canada is the common law principle of res judicata, that was expansively articulated in the **Kienapple**²² decision. In this case, the Supreme Court of Canada appeared to suggest that the doctrine of res judicata could be extended to prohibit multiple convictions for different offences arising out of the same incident.

20 *supra*, n. 17.

21 Rizkella, M. **Pre-Trial Discovery: Evaluation of the Montreal Pilot Project** (unpublished, 1980).

22 **Kienapple v. The Queen** (1974), 15 C.C.C. (2d) 524.

However, according to Salhany,²³ subsequent interpretations of the case have established that the application of 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 can only be **convicted** of one offence in the circumstances to which the principle of **res judicata** applies, it is still legitimate for the Crown to lay more than one charge. It may, therefore, be contended that the **Kienapple** case and its subsequent interpretation by the courts have 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 ultimate findings of guilt, 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.²⁴

Brannigan and Levy, refraining from terming this phenomenon "overcharging", prefer to refer to these extra

²³ Salhany, R. **Canadian Criminal Procedure, Fourth Edition** (Aurora, Ontario: Canada Law Book, 1984) at pp. 258-259.

²⁴ Brannigan, A. and J.C. Levy, **The Legal Framework of Plea Bargaining** (1983), 25 Can. J. Criminology 399.

charges as "negotiable cases" or "insurance charges".²⁵ Ericson and Baranek, on the other hand, refer to the practice of police "overlying" of higher and multiple charges or to the addition of "kicker" charges in order to induce a guilty plea to the "main charge".²⁶ Indeed, these authors boldly assert²⁷ that

.....Our observation of the police in constructing cases against our accused respondents... led us to include that an established practice was to charge every accused in a case with everything possible as a means of creating a maximal starting position for plea discussions. This was undertaken even on some occasions when the police explicitly stated that some of the charges against some of the accused would clearly not be upheld in court.

In light of such police practices, it is possible that an accused person could become the unwitting victim of an "illusory" bargain if he/she is convinced to plead guilty in exchange for the dropping of charges that it was never intended to pursue seriously in the first place.

It should be remarked that police charging practices are by no means uniform across Canada and the patterns of negotiation, uncovered by Ericson and Baranek, may not be reflected in other jurisdictions. For example, in British Columbia, the laying of charges has now generally become a function performed exclusively by Crown counsel and it has been asserted that this change in practice has stifled the practice of "overcharging"; evidently, there is

25 *ibid*, at p. 403.

at pp. 116, 150.

27 at p. 115.

a pressing need for empirical research to examine the validity of such assertions.

Professional and Ethical 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 employed in the enterprise of controlling the practice.²⁸ They also note, however, that this method is likely to prove to be of only limited efficacy since lawyers may be somewhat reluctant or unwilling to report their colleagues "misconduct" to the relevant authorities.

It may be argued that it is not the practice of bargaining per se that is unethical but, rather, some of the tactics employed by the bargainers. Ericson and Baranek, for example, document some of the strategies adopted by defence counsel in order 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.²⁹ Illusory bargaining is another potentially unethical means of compelling a guilty plea. So-called tacit plea bargaining may also be unethical in the situation where the defendant believes that he/she is not guilty or if there is a plausible defence to the charge(s). A tacit plea bargain occurs where an accused

28 *supra*, n. 9 at p.573.

29 *Ordering of Justice*, at pp. 157-163.

person pleads guilty in anticipation of a less severe sentence than would have been the case after conviction by trial.

The conduct of defence counsel in criminal cases is generally governed by the various provincial law societies and associations, 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.³⁰ This statute provides only a remarkably 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.

The **Professional Conduct Handbook** of the B.C. Law Society fails to furnish a more specific definition. 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 be interpreted as covering illicit plea bargaining; however, a total of 24 complaints have been laid against B.C. criminal lawyers, between January, 1982 and March, 1984, and none of these cases resulted in a finding adverse to the lawyer. As we shall discover later, a client

30 R.S.B.C. 1979, c.26.

involved in an allegedly unethical plea bargain will find it difficult to establish that he/she has been wronged.

The **Code of Professional Conduct** of the Canadian Bar Association furnishes a more explicit articulation of those types of plea agreement that are deemed to be 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 the commentary upon 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

(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 and 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.³¹

³¹ Canadian Bar Association, **Code of Professional Conduct** (Ottawa: C.B.A., 1974).

The conduct of the Crown is, of course, often governed by policy guidelines and considerations. The individual Crown Attorneys are agents of the Provincial Attorneys or Solicitors General; however, as a matter of practice, these elected officials cannot be expected to monitor the decisions of all prosecutors (although this is technically part of their legislative mandate). Within each province, the Crown Attorneys may be guided by directives concerning the stance they may take in plea bargains. For example, in British Columbia, the **Provincial Crown Handbook** furnishes the following statement of policy:

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 exists,
 - (d) agree to a specific sentence,
 - (e) speak to the judge in chambers without the defence.
2. Crown is to remind the 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.³²

It is clear that, in Canada, there are many institutionalized regulations governing the conduct of

32 Cited in Goulet, L.S., **Prosecutorial Discretion**, in Oxner, S.E. (Ed.) **Criminal Justice** (Toronto: Carswell, 1982) at pp. 65-66.

criminal justice professionals who engage in plea bargaining. The degree to which such guidelines are followed is not known; however, it is certainly arguable that they lack the teeth of enforceability and, therefore, fail to serve as an effective deterrent to illicit forms of bargaining.

The very existence of such guidelines, however, appears to indicate that the agents of the criminal justice system have been increasingly willing to acknowledge that plea bargaining does occur in Canada. While it has probably been practiced in Canada for many decades, plea bargaining has traditionally been frowned upon and most individuals were not prepared to admit publicly that it took place. Until relatively recently, 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".³³ As an indication of just how far "informed thought" has evolved in relation to this matter, it is interesting that, in a recent publication, the Law Reform Commission apparently discusses plea bargaining as though it were a routine part of the criminal court process.³⁴ A similar evolution of thought is perhaps discernible in the comments of members of the judiciary, who were initially critical of the practice but some of whom have now come to accept its existence as a necessary evil.

33 Fourth Annual Report (Ottawa: Information Canada, 1974-75) at p. 14.

34 *supra*, n. 18.

The Judicial Response

Pronouncements by Canadian judges concerning the propriety of bargaining are an important indication of the willingness of the courts to condone or discourage the practice. Explicit statements have been infrequent but, nevertheless, consistent. In **Perkins and Pigeau v. The Queen**, the Quebec Court of Appeal held that it could not accept the legitimacy of the practice, whether the initiative for plea bargaining came from the Crown or the defence.³⁵ Similarly, in **A.G. Canada v. Roy**, Hugesson J. held that "plea bargaining is not to be regarded with favour".³⁶ In **R. v. Wood**,³⁷ the Appellate Division of the Supreme Court of Alberta apparently adopted a similar position in relation to the propriety of plea bargaining. In this case, McDermid J.A. quoted, with evident approval, the view of the Law Reform Commission of Canada that plea bargaining is incompatible with a "decent system of criminal justice".³⁸

To date, these cases apparently represent the only **explicit** judicial pronouncement as to the propriety of prosecutorial plea bargaining in Canada. In none of these

35 [1976] Que. C.A. 527 at p. 528; 35 C.R.N.S. 22 at p. 226 per Rinfret J.A.

36 (1972), 18 C.R.N.S. 89 at p. 92 (Que. Q.B.).

37 [1976] 2 W.W.R. 135; 26 C.C.C. (2d) 100 (Alta. C.A.).

38 *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 p. 147 (W.W.R.); p. 110 (C.C.C.) per Moir J.A.

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 Canadian courts appear to have become less censorious of plea bargaining is reflected in the **Zelensky** case, in which a Supreme Court Justice mentioned, without apparent disapproval (and, indeed, almost as an afterthought), that the guilty plea was the result of a plea bargain.³⁹ More significantly, in **R. v. Dubien**,⁴⁰ the defence counsel contended that the whole system of plea bargaining would collapse if the Crown were allowed to appeal a sentence agreed upon as part of a plea bargain. That such a defence was presented at all is surprising in light of the traditional judicial response to plea bargaining; however, even more unexpected is the fact that not so much as a judicial eyebrow appears to have been raised in the face of such a contention.

While most Canadian courts have avoided committing themselves to a firm stand as to 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 thorny issue whenever the Crown has either reneged

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

40 67 C.C.C. (2d) 341 (Ont. C.A.).

on an agreement during the course of the trial or has appealed against the previously agreed upon sentence.⁴¹

Broken Bargains: Pre-adjudication Phase

As will be discussed later, most Canadian courts are relatively 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's recommendation as to a "lenient" sentence may, therefore, be conceptualized as a "commodity" in the pre-trial market place. Furthermore, as Ericson and Baranek document, the Crown may also agree to **withhold** information from the judge (e.g., evidence of a prior record or aggravating circumstances).⁴² In the few cases where the Crown has clearly failed to fulfill its part of the "bargain" at trial, the view of the courts appears to have been that the defendant should be entitled (depending on the circumstances) either to specific performance of the

41 For an American review, see Perskin, S.H. and Lewis, D.L., **Enforcing Plea Agreements**, in Edwards, M.F. (Ed.) **Settlements and Plea Bargaining** (Washington, D.C.: Association of Trial Lawyers of America, 1981) at p.342.

42 **Ordering of Justice**, at p. 66, pp. 120-121.

agreement⁴³ or to withdraw his/her plea of guilty and to undergo a new trial.⁴⁴

Broken Bargains: Repudiations by the Crown at the Appellate Stage

In certain circumstances, Crown counsel will have agreed to maintain a certain position with respect to sentencing; in exchange for a plea of guilty, he/she may well have undertaken either to make an active submission in favour of an "agreed upon sentence" or, alternatively, to indicate his/her acquiescence in the contentions advanced by defence counsel. Canadian courts have generally proved themselves to be somewhat reluctant to permit the Crown to repudiate its position by appealing against a sentence that accorded with the recommendation made to the trial judge. This is especially the case if that sentence recommendation could be perceived as being part of a plea bargain. Indeed, appellate courts have occasionally refused to vary a sentence in such a situation, stating that "exceptional

43 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. C.A.).

44 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 sentence was entered instead.

circumstances" would have to be present before the Crown will be allowed to resile from its bargain.⁴⁵

This approach clearly may be considered to treat the defendant with the utmost fairness; however, it may nevertheless overlook the broader interests of society, the administration of justice in general and the victim in particular. On these grounds, the Crown has at times been permitted to repudiate its position at trial. Nadin-Davis⁴⁶ has summarized the four generally accepted circumstances in which the court is likely to adopt such a course of action. In his view, a repudiation will be permitted where:

Crown counsel mistakenly agreed to an illegal sentence;⁴⁷

Crown counsel was misled by the accused at trial;⁴⁸

Crown counsel was led into his position by the trial judge, rather than acting on his own initiative; and⁴⁹

the sentence is so grossly insufficient that the public interest overrides considerations particular to the accused.⁵⁰

45 **R. v. Fleury** (1973), 23 C.R.N.S. 164 (Que. 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] 1 C.C.C. 380, [1970] 1 O.R. 480, 11 Crim. L.Q. 332 (C.A.).

46 Nadin-Davis, P. **Sentencing in Canada** (Toronto: Carswell, 1982) at p. 571.

47 **R. v. Agozzino**, *supra* n.45.

48 **A.G. Can. v. Roy**, *supra* n. 36.

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

50 **A.G. Can. v. Roy**, *supra* n. 36; **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 (Que. 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.).

In a recent case, The Ontario Court of Appeal was faced with a situation in which the Crown had informed the defendant that the "bargained for sentence" was subject to appeal by the Attorney General. The Court, therefore, ruled that, in these particular circumstances, the launching of an appeal by the Attorney General could not be viewed as a "repudiation".⁵¹ In light of the fact that the defendants in these "repudiation cases" appeared to have pleaded guilty primarily as a consequence of their expectations as to the nature of the sentence to be imposed, it is troublesome that the courts concerned did not see fit to afford the defendants the opportunity to withdraw their pleas and undergo new trials.⁵²

The lack of any clear criteria defining when a repudiation is permitted would obviously be of some concern to a defendant, who contemplates entering into a plea bargain with the Crown. To those commentators, who believe that plea bargaining has become an "integral part of the administration of justice", the failure to establish a specific set of principles, as to when the Crown may successfully repudiate a sentence agreement made at the trial stage, is regarded as an unjustifiable deterrent to those accused persons who seek to participate in the process.⁵³ Of course, such a contention has relatively

51 *R. v. Dubien*, *supra*, n. 40.

52 *R. v. Mouffe*, *supra*, n. 50; *R. v. Kirkpatrick* [1971] Que. C.A. 337. However, c.f. *R. v. Wood*, *supra*, n. 37.

53 See *Decision on Sentencing* (1972), 14 Crim. L.Q. 396.

little persuasive force for those who reject the propriety of all forms of plea bargaining.

The Tacit Judicial Response

While it is clear that an unequivocal judicial denunciation of plea bargaining could serve to reduce its incidence, it is significant that very few such declarations have ever been made. Conversely, while it is certainly open to the members of the judiciary to lend their open support to the practice, to date, no such commitment has ever been forthcoming. Instead, it may be suggested that Canadian courts have generally provided more subtle condonation of the practice. Of particular importance to defence counsel is the ability to convince the client that pleading guilty is in his/her "best interests". The responses of the courts in this area of criminal procedure have arguably provided not only persuasive arguments to this effect but also have created an atmosphere that permits the practice to flourish unchecked by judicial scrutiny.

Guilty Pleas and the Trial Courts

Canadian jurisprudence has traditionally 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, for example, the Canadian trial judge is not bound by law to investigate in depth the circumstances surrounding all guilty pleas before

accepting them.⁵⁴ The failure to inquire into such circumstances may result in the reversal of a conviction or the eventual 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.⁵⁵ Where the defendant has been represented by a defence counsel, however, such a reversal of the initial conviction will occur most infrequently.⁵⁶ In other words, the very presence of defence counsel will generally excuse the trial judge from conducting a

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

55 **Brousseau v. The Queen**, [1969] S.C.R. 181, at 190, 2 D.L.R. (3d) 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 (Que.C.A.). A trial judge, who suspects the accused may have been insane and, therefore, lacked the capacity to form the necessary intent, has the discretion to refuse to accept the guilty plea: **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.

56 **R. v. Millina** (1946), 62 B.C.R. 532, [1947] 1 D.L.R. 124, 86 C.C.C. 374 (C.A.); **Brousseau v. The Queen**, *supra*, n. 55; **R. v. Leonard** (1975), 29 C.C.C. (2d) 252 (Ont.C.A.).

meticulous inquiry into the circumstances surrounding a guilty plea.⁵⁷

In sum, the lack of a tradition in Canadian criminal jurisprudence, that the trial judge must ferret out the critical factors that may have induced a defendant 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 the Guilty Plea

Defence counsel may only advise a client to plead guilty if there is no viable defence to the charge(s).⁵⁸ However, Ericson and Baranek observed a (very limited) number of situations in which the client alleged that his/her counsel encouraged him/her to enter a plea of guilty despite the fact that the client was not really convinced of his/her guilt.⁵⁹ An accused person, in such a situation, may eventually reconsider his/her decision and express the desire to undergo a trial. One appellate court's response to this situation was demonstrated in a recent case, in which

57 Of course, there may be situations where the courts may set aside a guilty plea even though the 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.))

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

59 **Ordering of Justice**

an accused person's guilty plea was set aside upon appeal.⁶⁰ He claimed that 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 sentence, the accused requested that he be permitted to withdraw his plea. Rothman J.A., of the Quebec Court of Appeal, 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.⁶¹

It was held that the trial judge should have withdrawn the guilty plea and proceeded to a trial.⁶²

In the absence of an such an admission on the part of defence counsel, however, it appears that the courts will manifest a certain reluctance to accept an accused person's version of what transpired in the pre-trial process. In

60 **Lamoureux v. R.** (1984), 40 C.R. (3d) 230 (Que. C.A.). A trial judge has the discretion to allow an accused person 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. See Ewaschuk **Criminal Pleadings and Practice in Canada** (Aurora, Ont.: Canada Law Book Company, 1983) at pp. 325-326.

61 *ibid*, at pp. 373-374.

62 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 his innocence would be difficult to prove (cited in Ruby, **Sentencing** (Toronto: Butterworths, 1980) at 41).

Antoine v. R.,⁶³ an appeal was launched after a sentence of 12 months' imprisonment had been imposed. The appellant 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.⁶⁴ Moreover, Antoine contended that, prior to the sentencing hearing, he reconsidered his plea and, on many occasions, attempted to contact his lawyer from jail in relation to the possibility of withdrawing his guilty plea. The Quebec Court of Appeal refused to permit the withdrawal of the guilty plea, indicating its view that there was no support for the allegation that defence counsel had acted inappropriately and that dissatisfaction with a sentence does not constitute sufficient grounds for an appeal. Defence counsel, who had brought the appeal, was rebuked for relying solely on affidavits, from the appellant and a co-accused, as evidence that promises had been made. Rothman J.A. cited a previous judgement dealing with 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

63 **supra**, n. 55.

64 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.

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.⁶⁵

Such a judicial approach probably does not bode well for defendants seeking a remedy after a broken plea bargain unless one of the professional participants is prepared to admit that the alleged negotiations did, in fact, occur.

The Guilty Plea as a Mitigating Factor: The "Tacit Plea Bargain"

In some instances, accused persons entering guilty pleas may **routinely** expect to receive a more lenient sentence than would have been the case had their guilt been determined by a full trial. This expectation of routine lenience, based on the mere entry of a guilty plea, has frequently been referred to, in the U.S. literature, as constituting a "tacit plea bargain". In Canada, there has been no official recognition of the "tacit plea bargain"; however, Canadian courts have clearly recognized that the entry of a guilty plea may well qualify as a "mitigating

⁶⁵ 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 (Que.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 as though there had not been a fair trial.

factor", in certain circumstances. Judges may, for example, justify a more lenient sentence on the basis that a guilty plea indicates "remorse",⁶⁶ that the community has been spared the cost of an unnecessary trial,⁶⁷ or that the victim (particularly in cases of sexual assault or abuse) has been spared the trauma of testifying in open court.⁶⁸ However, some courts have indicated that the first of these factors cannot be considered as "mitigating" if the guilty plea has been entered only because the accused was inescapably caught.⁶⁹ On the other hand, this latter principle does not appear to have been applied uniformly. For example, in some cases, a guilty plea entered by an "inescapably caught" defendant was nevertheless considered a "mitigating factor" because the court believed that the

66 This factor has frequently been mentioned by commentators. 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.

67 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.).

68 *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, in particular, was considered to indicate some recognition of their wrongdoing and was, therefore, held to be a mitigating factor.

69 *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.).

saving of public money should be encouraged.⁷⁰ Nadin-Davis⁷¹ valiantly attempts to reconcile the (apparently contradictory) judicial pronouncements concerning this issue by hypothesizing that such lenience is legitimately extended where the offence concerned can be dealt with according to the "normal principles of tariff sentencing"; on the other hand, it cannot be extended in cases where exemplary sentences must be imposed (e.g., in cases involving major conspiracies to traffic in narcotics where mitigating factors are not taken into account).

While it may appear to the cynical observer that accused persons are being penalized for exercising their right to a trial, the courts have firmly stressed the converse viewpoint that those who plead guilty are treated more leniently.⁷² The apparent disparity in the treatment of

⁷⁰ **Johnson and Tremayne, supra, n. 67.**

⁷¹ **Sentencing in Canada, supra, n.46.** 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 n. 67,** followed in **R. v. Layte (1983), 38 C.R. (3d) 204 (Ont. Co. Ct.).** In the latter case, the plea was changed to guilty just prior to the trial, possibly indicating a plea bargain. Layte received a lighter sentence than the co-accused, who had a similar record but went to trial.

⁷² It is claimed that pleading not guilty does not indicate a lack of remorse, but acts solely to disentitle an accused person from the benefits of mitigation. However, even a guilty person, who perjures himself by denying guilt in a trial, may not be given a more severe sentence; see **Hill, S.C., Lack of Remorse or Sentencing for Perjury? (1982), 25 C.R. (3d) 350.** Note that lack of remorse may be an aggravating factor; however, it 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.** However, c.f. **R v. MacArthur (1979), 9 C.R. (3d) S-23, 32 N.S.R. (2d) 96, 54 A.P.R. 96 (C.A.).**

accused persons (especially in the situation where there are co-accused persons, who plead differently) was evidently of considerable concern to Salhany Co.Ct.J. in *R. v. Layte*; however, he believed that it was nevertheless important to encourage pleas of guilty from truly guilty people:

It is a fundamental concept of our system 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]

It could well be argued that the courts are facilitating the practice of plea bargaining when they encourage guilty pleas in the manner advocated in the *Layte* case. Indeed, lawyers interviewed by Ericson and Baranek⁷³ indicated that the promise of a more lenient sentence can be an extremely persuasive strategy in convincing reluctant clients to plead guilty. It is perhaps not entirely coincidental that Judge Salhany's rationale for supporting the practice of rewarding guilty pleas with a degree of lenience is identical to that advanced by many commentators, who feel that plea bargaining is vital to the smooth operation of the criminal courts.

73 **Ordering of Justice.**

Sentence Recommendations

In contrast with the British tradition, Canadian courts generally appear to welcome a submission by the Crown⁷⁴ regarding not only the **type** but also, in certain circumstances, the **quantum** of sentence.⁷⁵ Furthermore, failure to make a certain recommendation may ultimately impede the Crown's ability to appeal the sentence⁷⁶. 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.⁷⁷

Since Canadian courts permit and, in certain circumstances, are prepared to accept sentencing recommendations, it could be argued that they have furnished the Crown with a "commodity in the pre-trial market place";

⁷⁴ c.f. *R v. Wood*, *supra*, n.37, where McDermid J.A. stated his belief that the Crown should play a restricted role in the sentencing process, making submissions only when requested to do so.

⁷⁵ *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*, n. 49; *R. v. Dimora et al.* (1978), 45 C.C.C. (2d) 96 (Que. S.C.); and *R. v. Sabloff* (1979) 13 C.R. (3d) 326 (Que. 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 Court of Appeal changed the original sentence to that recommended by the Crown after trial. Furthermore, it was stated that the court should have taken the Crown's recommendation into account. C.f. *R. v. Greene* (1971), 20 C.R.N.S. 238 (Ont.Co.Ct.), where Graburn J., at p. 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."

⁷⁶ *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. 221 (S.C. App. Div.).

⁷⁷ *R. v. Levesque* (1980), 19 C.R. (3d) 43 (Que.S.C.); *R. v. Maruska* (1981), 20 C.R. (3d) 226 (Que.S.C.).

in short, a favourable sentence recommendation may be exchanged for a guilty plea. However, the courts have consistently emphasized that they retain **absolute** discretion in relation to sentencing and no particular recommendation (even one made as part of a plea bargain) can be considered as binding on the trial judge.⁷⁸ In *A.G. Can. v. Roy*, Hugessen J. suggested that the following procedure be adopted so as to avoid the creation of any misunderstanding on the part of 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 his fate is, within the limits set by the 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.⁷⁹

Nevertheless, as Ruby⁸⁰ has pointed out, there is a host of factors that may operate to persuade the trial judge to follow the sentencing recommendations of the Crown. In *Fleury*, Turgeon J.A. concurred 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

⁷⁸ *R v. Mouffe*, *supra*, n. 50; *R. v. Johnson*, [1970] 2 O.R. 780, [1970] 4 C.C.C. 64 (C.A.); *R v. Fleury*, *supra*, n. 45; *R v. Kirkpatrick*, *supra*, n. 52; *R v. Wood*, *supra*, n. 37; *R. v. Simoneau*, *supra*, n. 75; *R. v. Cusack*, *supra*, n. 49; *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. Dimora et al.*, *supra*, n. 75; *R. v. Sabloff*, *supra*, n. 75.

⁷⁹ *supra*, n. 36.

⁸⁰ *Sentencing*, *supra*, n. 62., at 79.

report of the investigating officer and is as a result familiar with certain information and with extenuating circumstances of which the judge may be totally ignorant.⁸¹

Perhaps yet another reflection of the indirect judicial condonation of plea bargaining is the acceptance by the courts of submissions made jointly by Crown and defence counsel. This approach apparently stems from an Ontario decision in which the late Judge Graburn, of the County Court, actively encouraged counsel to submit "sentence agreements" to the Bench.⁸² Insofar as such agreements will often be reached after a degree of plea bargaining, one may safely assume that the learned judge was bestowing at least a measure of tacit approval upon the practice. In *R. v. Greene*, he stated that:

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.

Subsequent judgements concerning the propriety of joint sentence submissions have upheld this approach although the courts have taken great pains to emphasize that they are free to disregard them.⁸³

81 *Supra*, n. 45, at pp. 178-179. See the similar views expressed by Schultz J.A. in *R. v. Clarke* (1959), 124 C.C.C. 284, at pp. 287-288 (Man.C.A.)

82 *R. v. Greene*, *supra*, n. 75.

83 E.g., *R. v. Lapointe* (1978), 2 W.C.B. 119 (Ont.C.A.); *R. v. Simoneau*, *supra*, n. 75; and *Dimora*, *supra*, n. 75. Nadin-Davis, *Sentencing in Canada* at p. 541, states that, despite the paucity of judicial comment on this subject, the practice is generally accepted by the courts.

Empirical Research into Plea Bargaining in Canada

Perhaps the major impediment to a comprehensive understanding of plea bargaining in Canada is the paucity of empirical research. Since plea bargaining is such a multi-faceted phenomenon, it is highly inadvisable to make generalizations on the basis of the few studies, that have already been conducted in Canada. There is little doubt that the nature and extent of plea bargaining vary considerably among the different Canadian jurisdictions. Furthermore, the lack of any consistent definition of the phenomenon constitutes a obstacle that precludes a meaningful comparison of the results of the existing Canadian studies. To date, research into plea bargaining in Canada has assumed three forms. Empirical studies have been based upon interviews, official documents, or observations of the plea bargaining process itself.

Studies Based Upon Interviews

The pioneering study of plea bargaining was undertaken by Grosman.⁸⁴ Drawing upon both his experience as a prosecutor and upon a series of interviews with 45 Crown attorneys in the County of York, Ontario, Grossman suggested that plea bargaining was an important element in a well established pattern of accommodations and concessions routinely exchanged between Crown attorneys and certain, "favoured" defence counsel. While Grosman's trail-blazing

⁸⁴ **The Prosecutor** (Toronto: University of Toronto Press, 1969).

study should certainly not be underestimated, it must nevertheless be noted that his observations were based entirely on impressions and hearsay rather on systematic research into the actual practices associated with plea bargaining. Furthermore, some reviewers have contended strongly that his findings would not necessarily be applicable to other jurisdictions in Canada.⁸⁵

Klein examined plea bargaining in Canada by conducting interviews with 115 inmates in a maximum security federal penitentiary, during 1972.⁸⁶ The author directed his attention to the types of "deal" that offenders had allegedly struck "in interaction with the agents in the criminal justice system to minimize the possible punitive consequences of [their illegal activities]."⁸⁷ Slightly more than half of the inmates claimed that they had been involved in such "deals". Naturally, it is an open question whether inmates' recollections furnish a valid basis for drawing inferences about the nature and extent of plea bargaining practices.

Studies Relying Upon Official Records

The previous two studies can best be described as exploratory in nature; however, as is the case with all

85 Bowen-Coulthurst, *Book Review* (1970), 20 U. Toronto L.J. 494 at p. 496.

86 Klein, J.F. *Let's Make a Deal* (Lexington, Mass.: Lexington Books, 1979).

87 *ibid*, at p. 132.

research that relies upon interview data, they suffer from a significant degree of unreliability and so are only of limited utility in the task of developing an understanding of the phenomenon of plea bargaining in Canada. The research, conducted in the wake of these early 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 1973.⁸⁸ 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.⁸⁹ The factors, found to have an impact upon plea bargaining (at least as the researchers defined it), were the existence of multiple charges and the type of charge. However, the validity of the researchers'

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

89 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.

operational indicator of plea bargaining is certainly open to question.⁹⁰

In a similar vein, Hagan studied the role played by legal, procedural and extra-legal factors in the sentencing process; this author also relied upon data from official court files.⁹¹ The study was conducted in Edmonton and involved the examination of 1,018 offenders' files. The conclusion, reached by Hagan, was that the sentence 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.

Observational Studies

The very real problems associated with the use of indirect indicators of plea bargaining can only be overcome by the direct observation of the practice itself. This approach was recommended by Cousineau and Verdun-Jones⁹² in 1979 and was followed by a group of researchers at the Centre of Criminology at the University of Toronto. The data, concerning 101 accused who were "tracked" through the justice system from arrest to sentence, were collected in an

90 Cousineau, F.D. and S.N. Verdun-Jones, **Evaluating Research into Plea Bargaining in Canada and the United States: Pitfalls Facing the Policy Makers**, (1979), 21 Can. J. Criminology 293-309; and Verdun-Jones and Cousineau, *supra*, n. 11.

91 Hagan, J., **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 are also somewhat suspect since they do not reflect a direct indicator of plea bargaining.

92 *supra*, n. 11.

urban Ontario court and have been reported in several sources,⁹³ the most comprehensive of which was a book by Ericson and Baranek.⁹⁴ Verbatim transcripts were created of interviews with the accused; interviews with lawyers; and conversations held in the Crown attorneys' offices. Researchers also observed the court appearances of all defendants in the sample. Information collected here was also compared with data gathered during a previous study of police interactions with the same 101 individuals. This richly documented study represents the very first occasion on which researchers have been able to paint a picture of the dynamics involved in the process of plea discussions.⁹⁵

93 Brannigan, A., **Crimes, Courts and Corrections: An Introduction to Crime and Social Control in Canada** (Toronto: Holt, Rinehart and Winston, 1984); Brannigan, A. and J.C. Levy, *supra* n.24; Helder, H. **The Police, Case Negotiation and the Para-Legal System** (Toronto: Centre of Criminology, University of Toronto, Unpublished Thesis, 1979); Osborne, J.A., **The Prosecutor's Discretion to Withdraw Criminal Cases in the Lower Courts** (1983), 25 *Can. J. Criminology* 55; Solomon, P.H. Jr., *supra*, n. 5; and Wilkins, J.A. **The Prosecution and the Courts** (Toronto: Centre of Criminology, University of Toronto, 1979).

94 **Ordering of Justice.**

95 Warner and Renner relied upon court observations to study peripheral aspects of plea bargaining, specifically the recommendations made to the judge regarding sentence. Although observational in nature, this research represents another example of the indirect study of plea bargaining. The existence of a joint submission or a defence submission, that was not contested by the prosecution, was considered to be evidence of a sentence bargain; Warner, A.H. and K.E. Renner, **The Bureaucratic and Adversary Models of the Criminal Courts: The Criminal Sentencing Process** (1981), 1 *Windsor Yearbook of Access to Justice* 81.

Conditions that Deter Plea Bargaining in Canada

From a consideration of both the legal constraints, operating in relation to plea bargaining, and the limited information generated by the empirical research, a number of factors, that may serve to **deter** plea bargaining, may be identified. These factors may well serve to discourage plea bargaining or at least reduce the frequency with which it is practiced. Perhaps the most crucial factor is the **lack of certainty** that bargains, once struck, will ultimately be upheld by the courts. The broad sentencing discretion, granted to judges in relation to most offences, necessarily implies that, even if the Crown agrees to recommend a particular disposition, the trial judge is not bound by that recommendation and may adopt a completely different course of action. The **Criminal Code** offers little or no guidance for the disposition of the great majority of offences since there are very few mandatory maximum or minimum sentences.

A further factor, that may inhibit the incidence of plea bargaining, is the ability of the Crown to appeal against a sentence even if such a sentence was consistent with a recommendation made by Crown counsel at the original sentencing hearing. The possibility of such a repudiation taking place is likely to render an accused person, and his/her counsel, somewhat reluctant to enter into a sentence bargain. Related to this factor is the phenomenon of the "interchangeability of court actors" in certain

jurisdictions in Canada. Such a phenomenon can easily disrupt the continuity of a plea bargain. The change of Crown counsel between the various court levels as well as the ability of the Attorney General to intervene and launch an appeal may produce a situation in which a bargain is repudiated by persons who were not involved in making it in the first place. Such factors restrict defence counsel to presenting his/her client with a "statement of probabilities" (based on prior 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 convictions to be dealt with by concurrent, rather than consecutive, sentences may reduce the incentive to bargain over the number of charges laid since the outcome, in terms of the sentence ultimately imposed, may well turn out to be the same regardless of the number of convictions actually entered against the defendant. Significantly, Ericson and Baranek indicated that there were a number of cases, in their sample, in which a relative lack of concern was manifested in relation to the issue of the total number of charges laid and, instead, the major emphasis of the plea negotiations was the ultimate sentence likely to be imposed.⁹⁶

96 *Ordering of Justice*, at pp. 95, 115, 134.

If sentencing guidelines were to be introduced in Canada, it is most likely this reform would create a climate of greater certainty and predictability in relation to the outcome of the sentencing process. Such a climate might, therefore, tend to **enhance** the prospects for plea bargaining and might potentially lead to the very sentencing disparities that guidelines are supposed to control (unless, of course, an attempt is made to regulate the plea bargaining process, as is the case in many U.S. jurisdictions).

Conditions That May Facilitate Plea Bargaining

Many factors, associated with the structure and operation of the Canadian criminal justice system may also operate to facilitate the occurrence of plea bargaining. Unfortunately, Canadian research has not addressed such issues as jurisdictional complexity and high case volume, which have been the focus of a considerable body of U.S. research literature. However, there are a number of such facilitating factors that can be readily inferred, in the Canadian context, from an examination of the legal framework, judicial opinions and the existing empirical research.

A factor of considerable importance appears to be the close proximity of courtroom actors and the resulting relationship of trust, that frequently develops between

them.⁹⁷ Individuals making "deals" have to be confident that the other parties will uphold their end of the bargain and this trust may well evolve after many successive, and successful, bargains. It is interesting that it appears that this relationship of trust extends to the police.⁹⁸ In any event, it is clear that defendants, who are not members of the "trusting group", are precluded from participating directly in pre-trial negotiations. Representation by a lawyer, therefore, appears to be a necessary condition for the occurrence of plea bargaining.⁹⁹

A facilitating factor of particular importance is the power of the police to lay multiple charges in relation to single incidents of criminal behaviour. The police also possess the power to lay a more severe charge, than may be

97 **Ordering of Justice** at pp. 13-14; and Warner and Renner, *supra*, n. 95. Ericson and Baranek also found 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 counsel were in a particularly precarious position, attempting to serve the best interests of their clients while simultaneously maintaining a harmonious relationship with the prosecution. As to the importance of the proximity of the court actors, see Brantingham, P.L. **The Burnaby, British Columbia Experimental Public Defender Project: An Evaluation Report II: Effectiveness Analysis** (Ottawa: Department of Justice, 1981).

98 Warner and Renner, *supra*, n. 95. Grosman discovered 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 (**The Prosecutor**, at pp. 44-59).

99 See Wynne and Hartnagel, *supra*, n. 88. However, Klein (*supra*, n. 86) found that some of the inmates in his sample had allegedly 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 Ericson and Baranek, **Ordering of Justice**, chapter 2.

strictly warranted by the facts of the case. Ericson and Baranek uncovered some evidence of such police conduct in their sample of defendants:

...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.¹⁰⁰

While the intent of the police may not be as malicious as these authors imply, it does seem apparent that the laying of multiple, or more serious, charges is a necessary condition for charge bargaining.¹⁰¹

The ability of counsel to convince his/her client to plead guilty, once a deal has been struck, is also a critical factor. It is possible that an unscrupulous counsel may engage in "illusory" bargaining by convincing the client that the dropping of a charge, affected by the "kienapple principle", represents a significant concession on the part of the Crown. However, it is not clear that such tactics would ever be necessary since the Canadian courts have apparently endorsed the offering of other "commodities", that might be presented to the defendant as an incentive to plead guilty. These include the so-called "tacit plea bargain" (the routine granting of a more lenient sentence

100 **Ordering of Justice**, at p. 71.

101 Ericson and Baranek, **Ordering of Justice**, at p.118; Hagan, *supra*, n. 91, at 130; and Wynne and Hartnagel, *supra*, n. 88.

where a plea of guilty is entered) and the promise of a sentence recommendation by the Crown.¹⁰²

A final facilitating factor, that might be considered, is the power of courtroom actors to control the information presented to the trial judge. The exercise of this power can lead to a phenomenon, that has been dubbed "fact bargaining".¹⁰³ For example, it may be agreed that certain aggravating circumstances will not be presented to the court or, conversely, that both the Crown and defence will emphasize certain mitigating factors. It is not unknown, in the Canadian context, for the Crown to agree not to allege a prior record (particularly, for example, when a mandatory prison sentence must be imposed for second or subsequent convictions). Ericson and Baranek uncovered evidence of such "fact bargaining" within the Ontario jurisdiction that they studied. The introduction of sentencing reforms, such as fixed or presumptive sentencing legislation or sentencing guidelines, could potentially be vitiated by the phenomenon of "fact bargaining". For example, Ericson and Baranek have suggested that :

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

¹⁰² Warner and Renner, *supra*, n. 95, report that, in their sample of 203 cases from two Halifax courts, after joint sentencing submissions or instances when defence counsel made a sentence submission, that was not contested by the Crown, the judges usually followed the recommendations.

¹⁰³ Ericson and Baranek, *Ordering of Justice*, at pp. 19-23, 66, 120-121.

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.¹⁰⁴

Attempts to Abolish the Practice of Plea Bargaining

Discussion of the various factors, that might operate either to encourage or to deter the practice of plea bargaining, leads naturally to a consideration of the question whether it is feasible to attempt to abolish it. In the complete absence of any Canadian research concerning this issue, it is perhaps fruitful to focus our attention upon the relevant studies, conducted in the U.S.

Unfortunately, even in the U.S., there have been relatively few research endeavours, that have studied the consequences of attempts to abolish or restructure plea bargaining. Furthermore, even among the few studies that have been conducted in this area, it is fair to state that most of them have been so poorly designed and implemented that they provide little reliable information concerning the consequences of attempts to ban plea bargaining. However, there are, to date, at least two studies that do permit the drawing of some reasonable conclusions concerning such attempts.

In the first of these studies, Church was able to study the consequences, for an entire court system, of an attempt

104 Ordering of Justice, at p. 115.

to abolish plea bargaining in relation to drug sales cases.¹⁰⁵ In this criminal justice system, the primary pattern of disposition of cases consisted of the negotiation of guilty pleas between defence attorneys and assistant prosecutors. Prior to the new policy concerning plea bargaining, charges for drug sales offences were, in exchange for the entry of a guilty plea, usually reduced to charges of attempted sale or mere possession. Such bargaining habitually took place during the evidentiary hearing or at the arraignment.¹⁰⁶

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 issued during 1973, the year following the introduction of the new policy. The researcher also interviewed many of the court actors, including defence

105 Church, T., **Plea Bargains, Concessions and the Courts: An Analysis of a Quasi-Experiment** (1976), 10 *Law & Society Rev.* 377. Church's study was concerned with a suburban county criminal justice system, that was 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 displayed high levels of morale and professionalism.

106 The judges in this system were almost never involved in negotiation practices; however, they typically ratified the agreements flowing from such negotiations. There was considerable evidence that any judicial participation in these plea bargaining practices was regarded as being very improper.

and prosecuting attorneys, court administrators, and the judiciary. Analysis of the data, that compared the periods both before and after the policy reform, revealed an almost complete 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 prison sentence of 25 years.

The willingness of defendants to plead guilty to such a serious charge certainly requires explanation and Church soon discovered that new patterns of bargaining had emerged in response to the new situation. The most interesting accommodation to the "no plea bargain" policy was the cooptation of judges into a practice of sentence bargaining. Despite the widespread agreement, by members of the court concerned, that judicial participation in plea bargaining was improper, the change in policy resulted in a shift to increasing judicial involvement in, and even control over, the practice of sentencing bargaining. The bargaining was not explicit; instead, it assumed the form of suggesting "hypothetical" cases to which the judge would respond with "hypothetical" sentences.

The behaviour of the the judges also changed in that they began to permit the withdrawal of guilty pleas in the

situation where an unfavourable pre-sentence report had been presented. This approach evolved because the pre-trial sessions were conducted before the pre-sentence report became available and, therefore, judges began to permit defendants to withdraw their pleas once it had emerged that the information, provided by the probation officer, would not allow them to honour their "hypothetical" sentences.

The judges also embarked upon a course of encouraging sentence recommendations from prosecutors and of dismissing a slightly larger percentage of cases. A few judges altered the nature of some of the dispositions, that they habitually employed. Finally, it was found that those judges, who resisted the general trend, experienced considerable "docket problems". The evidence also indicated that, after the "no plea bargain" policy was implemented, the trial rate soared; however, it increased primarily for those judges who would not become involved in the practice of sentence negotiation. Quite clearly, then, the elimination of prosecutorial plea bargaining, far from achieving the goals mirrored in the new policy, merely displaced the arena in which the practice occurred. As a consequence, the judges became reluctant partners in the process of negotiating sentences.

The introduction of the new policy also stimulated significant change in the practices of prosecutors. The incidence of *nolle prosequere* and dismissal of charges increased by about one-third and this remarkable trend was reflected

in a sharp decline in the over-all conviction rate. Confronted by such a decline in the conviction rate, the police responded both by improving their charging practices and by reducing the total number of warrants issued. Nevertheless, during this initial changeover period, prosecutors actually **increased** the dismissal rate in spite of the improved preparation of cases by the police. It may, perhaps, be contended that the reduction in the number of discretionary options available to the prosecutors merely produced a situation in which increased reliance was placed upon the one drastic option which was still within their power to exercise. Since an improvement in police charging practices might normally be expected to decrease the dismissal rate, the discovery of a directly contrary trend raises serious questions about the wisdom of the new policy outlawing plea bargaining.

While Church by no means investigated all of the possible consequences for the criminal justice system of abolishing plea bargaining, his research, nevertheless, does convey a salutary warning to those commentators who blithely assume that the abolition of the practice will necessarily produce solely beneficial results. It well be suggested that, if abolition of plea bargaining at the prosecutorial level of the justice system leads both to sentencing negotiations at the judicial level and to greatly increased rates of dismissal at the prosecutorial level, then the

"cure" may be no better than, or perhaps worse than, the perceived "disease".

The second study of the consequences of an attempt to abolish plea bargaining is McCoy's examination of the impact of legislation designed to implement a series of criminal justice reforms in the state of California.¹⁰⁷ Proposition 8 was approved by California voters in 1982 and was apparently designed to effect a number of changes to existing prosecutorial practices. One component was the imposition of a limitation upon 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 of the most serious felony categories in the California penal code. However, This ban on plea bargaining applied only to the Superior Court and did not mention plea bargaining in the various Municipal Courts (which deal with the initial intake of all cases, including felonies).

McCoy points out that this attempt to ban several forms of plea bargaining took shape within the broader context of several changes to the nature of criminal justice system practices in California; foremost among these were the

¹⁰⁷ McCoy, C., **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, Cincinnati, Ohio, November 1984; and **Determinate Sentencing, Plea Bargaining Bans, and Hydraulic Discretion in California**, (1984), 9 Justice System Journal 256-275.

introduction of determinate sentencing and the abolition of the parole board. McCoy delineates some of the apparent effects of these legislative changes, in general, and the plea bargaining reforms, in particular, upon both guilty pleas and trial rates. While overall changes were not dramatic, the researcher notes that complaints and protests sprang with increasing frequency from the California Department of Corrections concerning the added burden of housing an escalating number of inmates in the state prison system.

While there were few changes in the methods of disposal of cases per se, there were apparently considerable shifts in the locations of, and procedures for, guilty pleas. While a similar proportion of cases resulted in guilty pleas, there was a dramatic shift in **how** and **where** these cases were processed. For example, the ban on plea bargaining in Superior Court 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, the Municipal Courts dealt with two kinds of guilty pleas; non-negotiated "held to answer" pleas and negotiated "certified guilty" pleas. The latter were the result of negotiations between 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 Court where they were reviewed by a Superior Court

"certification judge". 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 Courts. The net result of the reform appears to have been that there was a considerable increase in the power of prosecutors. Since more felony cases were now settled in the Municipal Courts and Superior Court judges routinely accepted negotiated sentences, power shifted from Superior Court judges to prosecutors. Of course, the determinate sentencing law, in California, had already concentrated greater powers in the hands of the prosecutor since sentencing discretion had been largely removed from the judiciary.

The studies of Church and McCoy clearly demonstrate the extreme adaptability and tenacity of the phenomenon of plea bargaining. Indeed, these two studies unequivocally suggest that attempts to ban plea bargaining are unlikely to lead to its elimination, but only to the relocation of the practice to different locales and changes in the specific methods by means of which the courts process cases.

Restructuring Plea Bargaining

Given that it may be very difficult, if not impossible, to eradicate entirely the practice of plea bargaining, is there any evidence that formalization of the practice has any beneficial results for the system of criminal justice? In the United States, there have been several attempts (such

as, for example, Rule 11 of the Federal Rules of Criminal Procedure) to formalize, and regulate, the practice. One of the best studies of plea bargaining reforms, to date, is Heinz and Kersteller's examination of the institutionalization of plea bargaining in the forum of the pre-trial settlement conference.¹⁰⁸

During this field experiment, which took place in Dade County, Florida, all plea negotiations occurred in front of a judge with all interested parties present. The courts selected for the experiment already had a pre-trial conference mechanism in place. Following the arraignment of cases, judges held "routine conferences" about one week prior to the scheduled trial; one purpose of this conference was to attempt to discuss plea settlements. If these settlement conferences resulted in guilty pleas, then these were approved by the judges and the defendant would enter a plea of guilty in court. There was also provision for a second settlement conference on the day of the trial, if no prior agreements had been achieved.

The Heinz and Kersteller experiment added police and victim participation to pre-trial settlement conferences and arranged for some judges to use these conferences while others did not. They were then able to examine the consequences of the presence or absence of pre-trial

¹⁰⁸ Heinz, A.M. and W.A. Kersteller, **Pretrial Settlement Conference: Evaluation of a Reform in Plea Bargaining**, (1979), 3 Law & Society Rev. 349.

settlement conferences in the various cases. 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 taken to dispose of cases by some three weeks.

An exploratory study by Farr in Portland, Oregon, also contended that formalization of the negotiation process may have manifold advantages¹⁰⁹. The researcher noted that a "highly formalized disposition process encouraged efficient case settlement as well as functional cooperation between prosecutor and defence groups"¹¹⁰. Among other advantages, Farr indicates that the formalization of the negotiation process prompted the prosecuting and defence attorneys to place a greater degree of emphasis upon the strength of the case against the accused:

Although causing some dilemmas for the public defenders, the importance of the strength of case factor generated a concern with factual or legal guilt. This, in turn, strengthened attorneys' focus on their professional roles as adversarial representatives of their respective clients. Additionally, it allowed for a concern with due process rights, balancing a loss of some rights following arraignment with a gain in the protection of procedural rights prior to arraignment.

109 Farr, K.A., **Administration and Justice: Maintaining Balance Through an Institutionalized Negotiation Process**, (1984), 22 *Criminology* 291-320.

110 at p. 317.

Both the studies, undertaken by Farr and by Heinz and Kersteller, lend credence to the possibility that plea bargaining can be formalized within the mechanism of a pre-trial conference with some positive benefits to the justice system as a whole.

The "Hydraulic Theory" of Discretion: Implications for Sentencing Reform

McCoy has drawn attention to the view of the "discretion-ridden" criminal justice system that compares it to a "set of hydraulic brakes":¹¹¹

If you push down on one point, the displaced volume of fluid will exert pressure and "bulge out", reappearing elsewhere in the mechanism. Similarly, discretion in the criminal justice system can never be extinguished; it is simply dislodged and shifted to other system parts....

The point of the metaphor is that it is unwise to focus reformist zeal upon one particular component of the justice system. Attempting to eliminate problems with the exercise of discretion in one part of the system is merely likely to create other problems elsewhere. Therefore, in the particular context of sentencing reform in Canada, it is imperative that any attempt to introduce, for example, sentencing guidelines be done so only after a full consideration of the impact of plea bargaining upon such reform. Similarly, it seems reasonably clear that a belief that plea bargaining can be eradicated by the wave of a magic wand can only be termed naive and that it may be more

¹¹¹ McCoy, *Determinate Sentencing*, etc., *supra*, n. 107, at p. 256.

fruitful to consider the formalization and regulation of the practice as part of any major sentencing reform package; indeed, there are a number of existing American jurisdictions that can provide viable models for such an approach (e.g., Rule 11 of the Federal Rules of Criminal Procedure and the **Sentencing Reform Act, 1981** of the State of Washington).

It seems reasonable to conclude from the few, comprehensive U.S. studies that, while bans may reduce the incidence of plea bargaining, it is never entirely eliminated and such reforms are often accompanied by unanticipated and undesirable consequences. What appears to be certain is that plea bargaining is pervasive, tenacious and infinitely adaptable. It seems 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, it seems reasonable to assume that these systems will always generate and perpetuate discretionary decision-making processes as adaptations to these multiple ends. Plea bargaining appears to allow, and indeed facilitate, the accommodation of these multiple purposes of criminal justice systems. Hopefully, any major sentencing

reform, that is contemplated in Canada, will be based upon a realistic assessment of the impact of plea bargaining upon the sentencing process and will attempt to regulate this frequently misunderstood phenomenon.