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CRIMINAL LAW

plea discussions and agreements

Working Paper 60

Canada

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AGREEMENTS

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Law Reform Commission
of Canada

Working Paper 60

PLEA DISCUSSIONS
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1989

Notice

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

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

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Acknowledgements

We are indebted to all those individuals consulted during the preparation of this Working Paper. Members of standing advisory panels containing representatives of the judiciary, the practising bar (both Crown and defence), law teachers and the police regularly advise us on our work in development.

Special thanks are also due to other distinguished members of the bench and bar who attended a series of very useful meetings held in various Canadian cities during 1987 and 1988. Although we emphasize that the views and recommendations advanced herein do not necessarily reflect the opinions of these individuals, we would be remiss if we did not take this opportunity to thank each of them by name. Grouped alphabetically by city of attendance, they are:

Winnipeg — December 8th, 1987: Mr. G. Gregory Brodsky, Q.C., Mr. David G. Frayer, Q.C., Mr. Jeffrey Gindin, The Hon. Mr. Justice Theodore M. Glowacki, Mr. John P. Guy, Q.C., His Honour Judge R.L. Kopstein, Mr. Peter M. Kremer, The Hon. Madam Justice Ruth Krindle, His Honour Judge C. Newcombe, Associate Chief Justice The Hon. Mr. Richard J. Scott, Mr. Stuart J. Whitley, Mr. Hersch E. Wolch, Q.C.

Vancouver — December 10th, 1987: Mr. Leonard T. Doust, Mr. John E. Hall, Q.C., Mr. P.W. Halprin, Mr. R.T. Israels, His Honour Judge Gordon H. Johnson, His Honour Judge K.J. Libby, Mr. H.A.D. Oliver, Q.C., The Hon. Mr. Justice Wallace T. Oppal, Mr. G.B. Purdy, Mr. Ernie Quantz, The Hon. Mr. Justice Samuel M. Toy, Mr. Scott Van Alstine, Mr. Herbert F. Weitzel, His Honour Judge Douglas T. Wetmore, His Honour Judge Randall S.K. Wong.

Toronto — March 10th, 1988: Mr. Austin M. Cooper, Q.C., Ms. Marlys A. Edwardh, The Hon. Mr. Justice Gregory T. Evans, The Hon. Mr. Justice Eugene G. Ewaschuk, Mr. Alan D. Gold, Mr. Edward L. Greenspan, Q.C., His Honour Judge S.M. Harris, His Honour Judge David Humphrey, Mr. Douglas C. Hunt, Q.C., His Honour Judge Hugh R. Locke, Mr. Morris Manning, Q.C., Mr. G.H. McCracken, Q.C., The Hon. Mr. Justice John G.J. O'Driscoll, His Honour Judge R.D. Reilly, Ms. Bonnie Wein.

Montreal — March 22nd, and May 3rd, 1988: Mr. Claude Bélanger, Q.C., The Hon. Mr. Justice Claude Bisson, Associate Chief Judge Jean-Pierre Bonin, Mr. François Daviault, The Hon. Mr. Justice Jacques Ducros, His Honour Judge Bernard Grenier, Mr. Jacques Letellier, Q.C., Mr. Serge Ménard, Mr. Claude Parent, His Honour Judge Jean Sirois, Mr. André Vincent.

Introduction

In the course of its systematic review of the law of criminal procedure, this Commission has examined — and has made detailed recommendations with respect to — matters of procedure falling into two broad categories: those already dealt with (albeit inadequately) in existing legislation;[1] and those for which no comprehensive legislative framework has been attempted in this country.[2] One important aspect of criminal procedure falling into the latter category, and which we consider appropriate for legislative control, is that dealing with the phenomenon commonly known as "plea bargaining."

The subject of plea bargaining is one we considered more than a decade ago in a Working Paper entitled *Criminal Procedure: Control of the Process*.[3] In that document, we defined a plea bargain as "any agreement by the accused to plead guilty in return for the promise of some benefit."[4] For reasons that will become evident in the course of this Working Paper, however, we prefer to abandon the expression "plea bargaining" (which, to some, has an inherently negative connotation[5]) in favour of more neutral terminology. In our view, the process with which we are concerned (though unquestionably flawed) may better be described as that of "plea *negotiation*,"[6] or the holding of "plea *discussions*."[7] The object of that process is to reach a satisfactory *agreement*, not to give the accused a "bargain." Accordingly, our recommendations eschew the expression "plea bargain" and replace it with "plea agreement."[8] We define that expression (again, in neutral terms) as "any agreement by the accused to plead guilty in return for the prosecutor's agreeing to take or refrain from taking a

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1. See, *e.g.*, Law Reform Commission of Canada [hereinafter LRCC], *Arrest* (Report 29) (Ottawa: LRCC, 1986).

2. See, *e.g.*, LRCC, *Questioning Suspects* (Report 23) (Ottawa: Supply and Services, 1984); LRCC, *Obtaining Forensic Evidence: Investigative Procedures in Respect of the Person* (Report 25) (Ottawa: LRCC, 1985).

3. LRCC, *Criminal Procedure: Control of the Process* (Working Paper 15) (Ottawa: Information Canada, 1975).

4. *Ibid.*, at 45.

5. This point is made by L. Graburn in "Problems in Ethics and Advocacy: Panel Discussion" in Law Society of Upper Canada, *Special Lectures of the Law Society of Upper Canada 1969: Defending a Criminal Case* (Toronto: De Boo, 1969) 279 at 299.

6. But see Graburn, *ibid.*, at 297.

7. This is the expression used *inter alia* in the American Law Institute's (ALI) *A Model Code of Pre-Arraignment Procedure* (Philadelphia: American Law Institute, 1975), in the American Bar Association (ABA) *Standards for Criminal Justice*, 2nd ed. (Boston: Little, Brown, 1980), and in the 1988 United States *Federal Rules of Criminal Procedure*, 18 U.S.C.A.

8. This is the expression used *inter alia* in the ALI *Model Code of Pre-Arraignment Procedure*, *ibid.*, in the ABA *Standards for Criminal Justice*, *ibid.*, and in the 1988 United States *Federal Rules of Criminal Procedure*, *ibid.*

particular course of action."[9] We defer, to a later time, our examination of agreements in which the consideration flowing from the accused is something other than a guilty plea (such as evidence or information). While such agreements bear certain similarities to true *plea* agreements, we believe that their conceptual differences are sufficiently significant to require that they be dealt with separately.

In our Working Paper on *Control of the Process*, we adverted to various dangers inherent in the practice of plea negotiation, and expressed serious reservations both as to its utility and as to its desirability as a vehicle for furthering the ends of justice. At the time, we were concerned that the process of plea negotiation had become, or was in the process of becoming, a shadowy justice system unto itself — one that threatened to pervert the criminal process, as we knew it, and to diminish its stature in the eyes of the public.

We believe now, as we did in 1975, that "[j]ustice should not be, and should not be seen to be, something that can be purchased at the bargaining table."[10] At the same time, however, we are obliged to recognize that our legal system has undergone significant change in the intervening years, and that it is in the process of undergoing further change. Although we remain attuned to the practical and theoretical difficulties inherent in the practice of plea negotiation, we believe a cautious re-examination of the subject to be only prudent and appropriate in the light of a number of recent and ongoing developments having potentially far-reaching effect on the workings and character of our justice system. The development and formalization of pre-trial conference procedures, to take one example, may be seen as a first step toward a fundamental alteration in the working relationship between prosecution and defence counsel. Both the advent of the *Canadian Charter of Rights and Freedoms*[11] and the expansion of provincial legal aid schemes[12] have made not guilty pleas (and protracted trials) more viable alternatives for many persons charged with criminal offences.[13] The increased availability of legal representation has, by the same token,

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9. See Recommendation 1, *infra*.

10. *Supra*, note 3, at 46.

11. Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

12. See E.J. Ratushny, "Plea-Bargaining and The Public" (1972), 20 *Chitty's L.J.* 238; S. Shetreet, "The Limits of Expeditious Justice" in Canadian Institute for the Administration of Justice, *Expeditious Justice: Papers of The Canadian Institute for the Administration of Justice* (Toronto: Carswell, 1979) 1 at 11. See D. Dawson, "Plea Bargaining" Summer, 1981 *Victorian Bar News* at 19 (cited in New South Wales Law Reform Commission, *Criminal Procedure: Procedure From Charge to Trial: Specific Problems and Proposals* [Discussion Paper 14, vol. 2] (Sydney: New South Wales Law Reform Commission, 1987) 500, n. 24), where it is suggested that a decrease in offers to enter guilty pleas may be attributable to increased access to legal aid.

13. We do not, of course, see anything wrong with this situation *per se*.

alleviated some of the potential dangers[14] posed by the process of plea negotiation.[15] In short, the nature of our criminal justice system has evolved, and is constantly in the process of evolving. Our recognition of this fact, in turn, has caused us to explore in some detail the problems associated with plea negotiation, as it is currently practised, and to consider what measures (short of total abolition) might be employed to deal with these problems in an effective and principled way.

Plea negotiation, like many of the subjects with which we have dealt in our ongoing review of criminal law and procedure, is a controversial subject amongst members of the judiciary, the practising bar, law enforcement agencies and the academic community.[16] Those with strong opinions on plea negotiation tend to line up in one of two opposing camps: retentionist and abolitionist.[17] Retentionists usually justify the practice of plea negotiation, at least primarily, on the basis of expediency and economics. Were plea discussions and agreements not permitted, they argue, our already overburdened criminal justice system would become hopelessly bogged down; the number of full-scale trials resulting from the consequent increase in the number of

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14. Adoption of our recommendation for improved disclosure by the prosecution should further reduce the potential dangers of plea negotiation. See LRCC, *Disclosure by the Prosecution* (Report 22) (Ottawa: Supply and Services, 1984) at 13-15. See also A. Hooper, "Discovery in Criminal Cases" (1972), 50 *Can. B. Rev.* 445 at 465-67, where the potentially beneficial effects of compulsory disclosure on plea negotiation are discussed in detail.

15. It appears, however, that plea negotiation is largely dependent on legal representation. See T.H. Hartnagel, "Plea Negotiation in Canada" (1975), 17 *Can. J. Criminology and Corrections* 45 at 49. In a recent discussion paper, the New South Wales Law Reform Commission has suggested that legal aid has likely increased the incidence of plea negotiation in Australia. See New South Wales Law Reform Commission, *supra*, note 12, at 466.

16. As has been pointed out, however, judicial *dicta* concerning the practice of plea negotiation are quite rare in Canadian cases (see S.N. Verdun-Jones 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 at 235, and the discussion of reported cases at 240-42; P.C. Stenning, *Appearing for the Crown* (Cowansville, Que.: Brown Legal Publications, 1986) at 250, and the discussion of reported cases at 250-51; S.N. Verdun-Jones and A.J. Hatch, "An Overview of Plea Bargaining in Canada: Cautionary Notes for Sentencing Reform" in Canadian Institute for the Administration of Justice (H. Dumont, ed.), *Sentencing* (Cowansville, Que.: Yvon Blais, 1987) 71 at 82, and the discussion of reported cases at 82-83). For a recent article expressing the views of one Ontario Provincial Court Judge on the subject of plea negotiation, see D. Vanek, "Prosecutorial Discretion" (1988), 30 *Crim. L.Q.* 219 at 235. In the recent case of *R.* v. *Commisso* (1988), 3 W.C.B. (2d) 358 (Ont. Dist. Ct.), Borins D.C.J. remarked (at 15 of the original judgment) that "there was nothing wrong ..." with the prosecution and defence entering into a plea agreement, that "[p]lea negotiations and plea agreements have become an accepted, and essential, element of the criminal justice system in this country," and that "[a]dministratively, the criminal justice system has come to depend upon pleas of guilty and, hence upon plea negotiations and plea agreements."

17. By virtue of the recommendations we make herein for the regulation of plea negotiation, we would fall into the category of "qualified retentionists." For an excellent discussion of the arguments for and against plea negotiation, see G.A. Ferguson and D.W. Roberts, "Plea Bargaining: Directions for Canadian Reform" (1974), 52 *Can. B. Rev.* 497. That work, prepared as a Study Paper for this Commission, is referred to throughout this Working Paper. See also P. Thomas, "An Exploration of Plea Bargaining," [1969] *Crim. L.R.* 69; D.W. Perras, "Practice Note: Plea Negotiations" (1979-80), 44 *Sask. L. Rev.* 143; L.R. Genova, "Plea Bargaining: In the End, Who Really Benefits?" (1981), 4 *Can. Criminology Forum* 30; P. Clark, "The Public Prosecutor and Plea Bargaining" (1986), 60 *Aust. L.J.* 199.

not guilty pleas would result in chaos.[18] Unfortunately, however, the necessity hypothesis remains a largely unproven one in this country. While it seems very likely to us that the practice of plea negotiation does in fact reduce the burden on our justice system,[19] it is doubtful that the allegedly indispensible nature of plea negotiation is currently capable of being demonstrated by empirical data.[20] Even if it were irrefutably proved, for instance, that in the absence of plea negotiation the number of not guilty pleas would place an intolerable strain on the system (a questionable hypothesis in itself[21]), it would not necessarily follow that plea negotiation is the only means by which that strain could be alleviated.[22] Other measures which have been suggested, such as an increase in the practice of diversion, in the general efficiency of prosecutorial and court procedures, or in the funding of our criminal justice system, might be sufficient to deal with the "numbers problem."[23]

Abolitionists, on the other hand, tend to characterize the plea negotiation process as unnecessary, improper and degrading to our criminal justice system; in particular, they have criticized plea negotiation as either being, or appearing to be, an irrational, unfair and secretive practice facilitating the manipulation of the system and the compromise of principles.[24]

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18. For examination of this argument, see Ferguson and Roberts, *supra*, note 17, at 520-25; LRCC, *supra*, note 3, at 47; L.S. Goulet, "Prosecutorial Discretion" in S.E. Oxner, ed., *Criminal Justice: Papers prepared for presentation at the Canadian Institute for the Administration of Justice Conference on Criminal Justice held at Halifax, October 28, 29 and 30, 1981* (Toronto: Carswell, 1982) 45 at 50–51. See also A.W. MacKay, "The Influence of the Prosecutor: Plea Bargaining, Stays of Proceedings, Controlling the Process" in Oxner, *supra*, 69 at 74; "Problems in Ethics and Advocacy: Panel Discussion," *supra*, note 5, at 301-02.

19. P.H. Solomon, Jr. has suggested, however, in *Criminal Justice Policy, From Research to Reform* (Toronto: Butterworths, 1983) at 46 that plea negotiation may increase delays in the disposition of cases. This eventuality is important when one considers the justification for plea negotiation articulated by the United States Supreme Court in *Santobello* v. *New York*, 404 U.S. 257 (1971) at 260-61. If "[p]roperly administered ...," the Court said, plea negotiation "leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned."

20. See Ferguson and Roberts, *supra*, note 17, at 521. See M. Halberstam, "Towards Neutral Principles in the Administration of Criminal Justice: A Critique of Supreme Court Decisions Sanctioning the Plea Bargaining Process" (1982), 73 *J. Crim. L. and Criminology* 1 at 35-45.

21. See Ferguson and Roberts, *supra*, note 17, at 521-24. See also the studies cited in F.D. Cousineau 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 at 299. And see Halberstam, *supra*, note 20, at 35-45.

22. See Ratushny, *supra*, note 12, at 238-39. See also Halberstam, *supra*, note 20, at 40-45.

23. See Ferguson and Roberts, *supra*, note 17, at 523-24; LRCC, *supra*, note 3, at 47. See also "Problems in Ethics and Advocacy: Panel Discussion," *supra*, note 5, at 302, cited by Ratushny, *supra*, note 12, at 239.

24. For a summation of various arguments that may be marshalled along these lines, see Ferguson and Roberts, *supra*, note 17. For a relatively recent indictment of the practice (summarizing previous criticisms), and a detailed examination of alternatives in the American context, see A.W. Alschuler, "Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System" (1983), 50 *U. Chi. L. Rev.* 931.

The attitude of the Canadian public towards plea negotiation is also instructive. In a national survey recently conducted for us by Gallup Canada Inc., more than 68 per cent of those polled (and more than 79 per cent of those respondents having an opinion) expressed either strong or general disapproval of the practice of "plea bargaining," as we had defined it. Our analysis of the responses, in that survey, to questions posed concerning various hypothetical situations suggests that plea negotiation tends generally to undermine public confidence (already low[25]) in the appropriateness of sentences.[26]

We believe it is safe to say, therefore, that the plea negotiation process has not generally enjoyed a very flattering public image.[27] Being a largely unregulated[28] practice, moreover, plea negotiation has been susceptible to abuse. Having considered the question at length, however, and having taken into account recent studies dealing with possible effects that attempts to abolish plea negotiation might have, we are not convinced that abolition (as opposed to regulation) is the soundest remedial alternative. We note that in its recent report on *Sentencing Reform*, the Canadian Sentencing Commission has alluded to studies indicating that efforts to abolish plea negotiation may in fact present their own difficulties.[29] A ban on prosecutorial plea negotiation with regard to charges, for example, might have the effect of encouraging judges to engage in a tacit form of plea negotiation related to the matter of sentence.[30] As we suggested in *Control of the Process*, we believe judicial plea negotiation (*i.e.*, actual

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25. In our survey, 69 per cent of those people asked expressed the opinion that the sentences imposed by Canadian courts were generally not severe enough. Only 20.9 per cent thought sentences were generally appropriate, and only 1.4 per cent thought sentences were generally too severe. The question on sentence severity was asked of five different groups, each of which had been presented with a different scenario describing a hypothetical prosecution in which the accused pleaded guilty to one charge (the same charge in each scenario) and had a second charge (again, the same charge in each scenario) withdrawn. In four of the scenarios there had been some form of plea negotiation; in one there had not. Interestingly, the opinion that sentences were too light was significantly more common amongst the people who had earlier been presented with one of the plea negotiation scenarios. See Appendix B.

26. We have been informed of other empirical research suggesting that plea negotiation may undermine respect for our justice system by victims of crime as well as offenders. See the preliminary report by M. Baril, S. Gravel, M.-M. Cousineau and N. Primeau "*La pratique de la négociation de plaidoyer au palais de justice de Montréal*," (Université de Montréal, Centre international de criminologie comparée, unpublished, 1989) at 193-94.

27. See National District Attorneys Association, *National Prosecution Standards* (Chicago: National District Attorneys Association, 1977) at 214.

28. On the federal statutory level, as some commentators have pointed out, there do exist certain limits on the type of agreement that can be made. See, *e.g.*, *Criminal Code*, R.S.C. 1985, c. C-46, ss. 119, 120 and 139 (formerly ss. 108, 109 and 127), referred to by A.D. Klein, "Plea Bargaining" (1971-72), 14 *Crim. L.Q.* 289 at 291-92, and by S.A. Cohen, *Due Process of Law: The Canadian System of Criminal Justice* (Toronto: Carswell, 1977) at 179.

29. Canadian Sentencing Commission, J.R.O. Archambault, Chairman, *Sentencing Reform: A Canadian Approach [Report of The Canadian Sentencing Commission]* (Ottawa: Supply and Services, 1987) at 414-15, referring to studies by Church (presumably, T. Church, "Plea Bargains, Concessions and the Courts: Analysis of a Quasi-Experiment" (1975-76), 10 *L. & Soc. Rev.* 377) and McCoy (presumably, C. McCoy, "Determinate Sentencing, Plea Bargaining Bans, and Hydraulic Discretion in California" (1984), 9 *Justice System J.* 256) cited in S.N. Verdun-Jones and A.J. Hatch, *Plea Bargaining and Sentencing Guidelines* (Ottawa: Canadian Sentencing Commission, 1985) at 9-11. See also Verdun-Jones and Hatch, *supra*, note 16, at 99-106. And see D. Cousineau, *Legal Sanctions and Deterrence* [a study undertaken for the Canadian Sentencing Commission] (Ottawa: Supply and Services, 1988) at 106-10.

30. See Church, *ibid.* Note Solomon, *supra*, note 19, at 47-48.

negotiation by the judge) to be a practice that ought to be avoided at all costs.[31] Having referred to research conclusions that discretion is an inevitable ingredient of the criminal justice system, and that plea negotiation is a means for accommodating various (and sometimes competing) aims within that system, the Sentencing Commission has taken the position that improvement of the process (by making it more visible, and making the participants more accountable) is a more realistic goal than abolition.[32] It is also, we believe, a goal that is in keeping with the principled yet pragmatic expectations of the Criminal Law Review. In its policy document on *The Criminal Law in Canadian Society*,[33] the Government of Canada quite clearly did not view the process of plea negotiation as being incompatible *per se* with the basic precepts it espoused. Rather than condemn the process outright, it expressed the hope that suitable prosecutorial guidelines would be developed in the area, as part of an effort to control discretion and thereby enhance accountability and equality in the criminal process.[34]

In our estimation, it would be a mistake to dismiss plea negotiation as a distasteful practice made necessary only by the unhappy reality of an overburdened criminal justice system. Plea negotiation is not an inherently shameful practice; it ought not, on

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31. *Supra*, note 3, at 48. For cases in which the proper limits on pre-plea discussions as to sentence between the judge and defence counsel are considered, see *R.* v. *Turner*, [1970] 2 All E.R. 281 (C.A.); *R.* v. *Brook*, [1970] *Crim. L.R.* 600 (C.A.); *R.* v. *Inns*, [1975] *Crim. L.R.* 182 (C.A.); *R.* v. *Plimmer*, [1975] *Crim. L.R.* 730 (C.A.); *R.* v. *Cain*, [1976] *Crim. L.R.* 464 (C.A.) and "Practice Direction: *R.* v. *Cain*," [1976] *Crim. L.R.* 561 (C.A.), cited in New South Wales Law Reform Commission, *supra*, note 12, at 467 and 501, n. 33 and/or Verdun-Jones and Cousineau, *supra*, note 16, at 249, n. 97 and/or P.K. McWilliams, *Canadian Criminal Evidence*, 2nd ed. (Aurora, Ont.: Canada Law Book, 1984) at 418. See also *R.* v. *Grice* (1977), 66 Cr. App. R. 167 (C.A.); *R.* v. *Ryan* (1977), 67 Cr. App. R. 177 (C.A.); *R.* v. *Bird* (1977), 67 Cr. App. R. 203 (C.A.); *R.* v. *Llewellyn* (1978), 67 Cr. App. R. 149 (C.A.); *R.* v. *Atkinson* (1977), 67 Cr. App. R. 200 (C.A.); *R.* v. *Howell*, [1978] *Crim. L.R.* 239 (C.A.); *R.* v. *Winterflood* (1979), 68 Cr. App. R. 291 (C.A.); *R.* v. *Coward* (1979), 70 Cr. App. R. 70 (C.A.), most of which are cited by the New South Wales Law Reform Commission at 472 and 502, n. 50. And see *R.* v. *Deary*, [1977] *Crim. L.R.* 47 (C.A.), cited by Verdun-Jones and Cousineau, *supra*, note 16, at 249, n. 97; *R.* v. *Quartey*, [1975] *Crim. L.R.* 592 (C.A.); *R.* v. *Cullen* (1984), 81 Cr. App. R. 17 (C.A.); *R.* v. *Marshall*, [1981] V.R. 725 (S.C.). For a discussion of many of these (and other) cases, see J. Baldwin and M. McConville, "Plea Bargaining and the Court of Appeal" (1979), 6 *Brit. J. Law and Society* 200. In *R.* v. *Wood* (1975), 26 C.C.C. (2d) 100 (Alta. S.C.A.D.) at 108, McDermid J.A. of the Alberta Supreme Court's Appellate Division stated: "[A] Judge should take no part in any discussion as to sentencing before a plea has been taken, and all the circumstances in regard to the particular case have been placed before him, then having listened to the submission of counsel he should give his decision. To take part in a discussion of sentencing prior to a plea being taken would constitute a grave dereliction of duty." More recently, in the case of *R.* v. *Dubien* (1982), 27 C.R. (3d) 378 (Ont. C.A.) at 383, MacKinnon A.C.J.O. stated in the course of delivering judgment on behalf of the Ontario Court of Appeal:

> "With great deference to a very experienced and able trial judge, I am of the view that it is not advisable for a judge to take any active part in discussions as to sentence before a plea has been taken, nor to encourage indirectly a plea of guilty by indicating what his sentence will be. It was apparent in the instant case that the sentence was going to be the same whether the respondent changed his plea or not, and there was no suggestion or implication, so far as the trial judge was concerned, that the sentence would be lighter if the respondent changed his plea to guilty. A trial judge can determine what a just sentence should be only after he has heard all relevant evidence in open court on that subject and listened to the submissions of counsel."

32. *Supra*, note 29, at 415. On the question of whether plea negotiation is an unavoidable phenomenon, see S.J. Schulhofer, "Is Plea Bargaining Inevitable?" (1984), 97 *Harv. L. Rev.* 1037 at 1037-46.

33. Government of Canada, *The Criminal Law in Canadian Society* (Ottawa: Government of Canada, 1982).

34. *Ibid.*, at 64-65. See Canadian Sentencing Commission, *supra*, note 29, at 405.

a theoretical level, be characterized as a failure of principle. If practised properly it should, to the contrary, be recognized as the expression and merging of two complementary principles: those of efficiency and restraint. Efficiency, we must emphasize, means more than simple expediency or thrift. As we suggested in our recent Report on *Our Criminal Procedure*,[35] the principle of efficiency favours (among other things) accuracy. The goal of accuracy in plea negotiation requires, as a general rule, that any offence to which the accused agrees to plead guilty be a realistic reflection of the accused's criminal conduct (to the extent it can be proved),[36] and that any sentence that the prosecutor agrees to recommend (or not to oppose) be justifiable in accordance with established sentencing principles.[37] At the same time, the principle of efficiency demands an acknowledgement that the concept of cost has moral and human (not merely monetary) dimensions.[38] Restraint, moreover, should not be equated with prosecutorial weakness. In our Working Paper on *Diversion*, we said unambiguously that "[t]he principle of restraint should ... apply at the prosecutorial level."[39] We added, however, that while "pre-trial settlement ... is consistent with the principle of restraint ...,"[40] it ought "in the name of justice and equality ... to be put on some rational and organized basis."[41] What was true where the process of diversion was concerned is equally true in the case of plea negotiation.

Nor should prosecutorial compromise necessarily be regarded as a means of short-changing justice.[42] If the prosecution of a particular accused person without plea negotiation results in conviction for more offences, or conviction for a more serious offence, than that to which the accused was prepared to plead guilty (and results in the imposition of a more severe sentence, or more severe sentences, than might otherwise have been imposed), does this mean inevitably that justice has been properly served? Often, we believe, the ordeal of a full-scale trial may create its own injustice.[43] Consider, for example, the effect that a vigorously contested criminal trial may have on the victim of the offence in question. Notwithstanding the enactment of procedures tending to reduce the hardship suffered by victims who become witnesses in the trials

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35. LRCC, *Our Criminal Procedure* (Report 32) (Ottawa: LRCC, 1988) at 24.

36. As to the relevance of charge accuracy in plea negotiation, see A. Brannigan and J.C. Levy, "The Legal Framework of Plea Bargaining" (1983), 25 *Can. J. Criminology* 399 at 407.

37. See Note, "Restructuring the Plea Bargain" (1972), 82 *Yale L.J.* 286 at 289, cited by Ferguson and Roberts, *supra*, note 17, at 526.

38. See LRCC, *supra*, note 35, at 24. See also, on this question, the analysis provided by M. Bayles, "Principles for Legal Procedure" (1986), 5 *Law and Philosophy* 33 at 45-50.

39. LRCC, *Diversion* (Working Paper 7) (Ottawa: Information Canada, 1975) at 9.

40. *Ibid.*

41. *Ibid.*

42. As to the procedural benefits of plea negotiation from the perspective of the accused and defence counsel, see Solomon, *supra*, note 19, at 48.

43. See LRCC, *Guidelines: Dispositions and Sentences in the Criminal Process* (Report 2) (Ottawa: Information Canada, 1976) at 15-16, where we recommended that in arriving at pre-trial settlements, consideration should be given *inter alia* to the fact that "trial and conviction may cause undue harm to the victim or offender or otherwise result in unreasonable social costs."

of some offences,[44] the anticipation and actuality of a criminal trial, of giving evidence, and of undergoing probing and perhaps lengthy cross-examination may be experiences from which certain victims of crime deserve to be spared.[45] In our opinion, relieving such victims from the burden of becoming witnesses in criminal trials ought not to depend entirely upon the spontaneous generosity of the accused.[46]

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44. See, *e.g.*, *Criminal Code*, ss. 276, 277, 486. (formerly ss. 246.6, 246.7, 442). See Ferguson and Roberts, *supra*, note 17, at 540-41.

45. See New South Wales Law Reform Commission, *supra*, note 12, at 458, 461 and 473, where similar justifications are alluded to.

46. Nor ought it to be accomplished through judicial plea negotiation. See *R.* v. *Grice*, *supra*, note 31.

CHAPTER ONE

The Need for Reform

In our consultations with members of the bench and bar (both prosecuting and defence counsel) we have been repeatedly told that the present system works well and is remarkably free of error. We have no reason to question the perceptions of the actual users of the system but we are aware, from our travels across the country, that the system, although it may work well, works differently in different parts of the country.

When judges and lawyers tell us that the system works well, they are in fact describing several different realities. Indeed, there is a marked variation in practice amongst judges of different courts and even amongst judges of the same court.

What should we make of the claim that the system is remarkably error-free? What is an acceptable level of error within an operating system? These questions, in the context of plea negotiation, are not free of controversy. It is true that there are relatively few reported cases describing abuse or negligence. This may be, however, merely a reflection of the fact that plea negotiation is an activity which is carried on *sub rosa* and involves the participation of the very individuals whose hands are on the levers of power. The decision not to litigate a complaint concerning the process may reflect a variety of factors, not all of which are relevant to the actual merits of the complaint.

In expressing satisfaction with the operation of the present system, our consultants seem to believe that there is a certain shared perception of how the system actually operates and an acceptance of the legality of its known attributes. We believe that certain attributes of plea negotiation, as presently practised in certain areas of the country, are of doubtful or questionable legality. What, for example, is the legal status of a plea agreement arrived at with the active participation of a judicial officer who, in the course of closeted discussion with counsel, not only indicates the nature of the range of sentence but indeed, stipulates the actual sentence that he or she believes to be acceptable? What form can judicial intervention lawfully take and what are the limits of judicial intervention? These questions are incapable of precise answers inasmuch as there is neither a statutory framework upon which to base a conclusion nor are there relevant established precedents of high authority addressing the issues.

We have been told that certain judges refuse to participate in the plea negotiation process because of their view of the ethics, if not the legality, of the process. This preoccupation with the ethics or appropriateness of the practice, in our view, arises primarily because the law on the subject cannot be confidently stated, given its uncodified status. The present mélange of common law, local practice and canons of professional ethics is replete with contradictions and gaps in coverage. The resulting

uncertainty is in turn productive of controversy concerning what are essentially matters of policy.

This is an unhealthy state of affairs. The policy questions ought to be squarely confronted. If the practice is one that should continue then it should find clear expression in legislation. The legal and the ethical standards of application in this area of the practice of law should coincide. Judges, of all people, should not have to speculate whether a well-known and much resorted to part of the legal process is legally deficient or ethically dubious.

Notwithstanding our own opinion that the process of plea negotiation may serve a legitimate purpose within the context of a moral and realistic criminal justice system, and our consequent reluctance to advocate its complete abolition, we believe that a number of fundamental problems will have to be addressed if pragmatism and principle are to co-exist. In particular, we believe that the process needs to be more open; that it should be subject to judicial supervision; that the absence of improper inducements should be ensured with respect to pleas resulting therefrom; that the accuracy and appropriateness of pleas resulting therefrom should be monitored; that equal treatment of accused persons should be made a general goal; and that enforceability of plea agreements should be the rule.

I. Openness

Perhaps the most serious criticisms of the process of plea negotiation, as it has operated in the past, have arisen from the secretive aura that has enveloped it.[47] Private "deals," no matter how inherently respectable they might be, tend to be regarded by the public with suspicion and cynicism.[48] Judges who ratify such deals in turn run the risk of being viewed either as dupes[49] or as participants in some sort of charade. The consequences of secrecy, therefore, are potentially quite grave indeed. Disrespect for the judicial system, whether justified or not, strikes at the very foundations of the rule of law.

The problem of secrecy was adverted to (and the importance of openness underscored) in a recent Ontario Provincial Court decision dealing hypothetically with

47. See MacKay, *supra*, note 18, at 74. For an interesting study describing the opinions of journalists on the question of secrecy in plea negotiation, see G. Tremblay, *Research on Media Strategies and Practices in the Field of Legal News* [a study undertaken for the Canadian Sentencing Commission] (Ottawa: Supply and Services, 1988) at 23-24.

48. See Law Reform Commission of Australia, *Sentencing of Federal Offenders* [Interim Report No. 15] (Canberra: Australian Government Publishing Service, 1980), para. 125 at 83.

49. In our national survey (see Appendix B), participants were presented with, and questioned about, one of five scenarios describing a hypothetical criminal prosecution. A scenario in which a joint sentence submission resulted from plea negotiation gave rise to the assumption that the prosecutor did not place all relevant information before the judge significantly more often than did a scenario in which no plea negotiation occurred. However, scenarios in which it was clearly indicated that the judge had been made aware of the reasoning behind the plea agreement (see our Recommendation 12) did not give rise to this assumption significantly more often than did the scenario in which no plea negotiation occurred.

the issue of plea agreements that appear to require the prosecution to "refrain from introducing evidence..."[50] on matters that the court might consider relevant to sentence.[51] In *R.* v. *J.E.J.*,[52] Nadeau Prov. Ct. J. expressed the emphatic opinion that "[w]here the Crown intentionally sup[p]resses circumstances which cannot but agg[r]avate the seriousness of the offence, in order to persuade the court of the appropriateness of the sentence which he has, as a result of negotiations with the accused's counsel agreed to advance as appropriate, he is in breach of his obligation both to the Court and to the community."[53] In such circumstances, His Honour continued, "[h]e transforms the sentencing process into what can only be perc[ei]ved by the victims, their families and the community as a systematized sham in which the Court's function is reduced to one of symbolic approval of that sentence which counsel have, by means of a process of covert negotiation, determined is acceptable to each of them."[54] In His Honour's opinion, "[t]he Crown in such a case cannot be said to have acted in a manner consonant with either the spirit of the criminal process or the community's sense of justice."[55]

In its recent report on *Sentencing Reform*, the Canadian Sentencing Commission has recommended the introduction of a procedure requiring generally that the elements of any plea agreement, and the reasons therefor, be disclosed in open court.[56] In so doing, the Sentencing Commission has made the point that increased openness would tend to strengthen public faith in the judicial system.[57] We agree. Our own empirical research[58] tends to confirm, for example, that people are more likely to expect that a sentence imposed following a negotiated guilty plea and joint submission will be appropriate if they are assured that the presiding judge has been apprised, in open court, of the process by which the agreement was reached. They also appear more likely, in such circumstances, to express confidence in the fairness and propriety of the judge's handling of the case.

Fair and rational decisions, it seems to us, are more likely to be *perceived* as being fair and rational if their origins and underpinnings have been fully disclosed.[59]

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50. *R.* v. *J.E.J.* (1987), 2 W.C.B. (2d) 65 (Ont. Prov. Ct.), *per* Nadeau Prov. Ct. J. at 16 of the original judgment.

51. See also "Problems in Ethics and Advocacy: Panel Discussion," *supra*, note 5, at 305. And see the analysis contained in *The Dewar Review: A report prepared by The Honourable A.S. Dewar at the request of the Attorney-General of Manitoba*, October, 1988, Appendix C at 10, 11, 13, 15.

52. *Supra*, note 50.

53. *Ibid.*, at 18 of the original judgment.

54. *Ibid.*

55. *Ibid.*

56. *Supra*, note 29, recommendation 13.9 and the commentary thereto at 422-23. See, on the subject of disclosure, the assessment contained in *The Dewar Review*, *supra*, note 51, at 52, 80.

57. See also National District Attorneys Association, *supra*, note 27, at 217 regarding the necessity for public visibility in the area of plea negotiation.

58. See Appendix B.

59. See C.C. Ruby, *Sentencing*, 3rd ed. (Toronto: Butterworths, 1987) at 87.

As we have suggested in our recent Working Paper on *Public and Media Access to the Criminal Process*,[60] moreover, permitting the public to examine the actions of participants in the criminal trial process makes it more probable that the decisions of these participants will *in fact* be fair and rational.[61] Openness, as we have noted in *Our Criminal Procedure*, helps to ensure accountability.[62]

At the same time, however, we recognize that particular circumstances may arise in which full public disclosure might not be considered advisable.[63] In *R. v. Turner*,[64] for example, England's Court of Appeal (Criminal Division), while acknowledging that "so far as possible, justice must be administered in open court," suggested that an exception might be made in a case where "counsel for the accused may by way of mitigation wish to tell the judge that the accused has not long to live, is suffering maybe from cancer, of which the accused is and should remain ignorant."[65] Although we refrain from commenting on the merits of this particular exception (the problem it envisions must, in any event, be extremely rare), we appreciate that openness may not be an absolute. In its report, the Canadian Sentencing Commission has likewise taken the position that full disclosure might not be indicated in certain circumstances; it has alluded, by way of example, to situations in which public knowledge of the accused's relationship with the police might place the accused or other persons in jeopardy.[66] The Sentencing Commission has therefore recommended that an exception to full public disclosure of the reasons for plea agreements be made in cases where the interest of the

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60. LRCC, *Public and Media Access to the Criminal Process* (Working Paper 56) (Ottawa: LRCC, 1987) at 15.

61. See MacKay, *supra*, note 18, at 75, where it is suggested that judicial examination of plea agreements ought to make the fair treatment of accused persons more likely.

62. *Supra*, note 35, at 27. As to the importance of openness, see the remarks of Branca J.A. (in a context not involving plea negotiation) in *R. v. Johnson* (1977), 35 C.C.C. (2d) 439 (B.C.C.A.) at 453.

63. See Ruby, *supra*, note 59, at 87.

64. *Supra*, note 31, *per* Parker L.C.J. at 285.

65. But *cf. The Queen v. Tait and Bartley* (1979), 24 A.L.R. 473 (F.C.), discussed by the Law Reform Commission of Australia, *supra*, note 48, para. 124 at 81-83. And see J.E. Adams, "The Second Ethical Problem in *R. v. Turner*; the Limits of an Advocate's Discretion," [1971] *Crim. L.R.* 252. There are Canadian cases suggesting that medical information relevant to sentence ought ordinarily to be presented in open court in the accused's presence: see *R. v. Carey* (1951), 102 C.C.C. 25 (Ont. C.A.); *R. v. Bezeau* (1958), 122 C.C.C. 35 (Ont. C.A.), both referred to in "Problems in Ethics and Advocacy: Panel Discussion," *supra*, note 5, at 308, n. 13. It has also been suggested, however, that the withholding from the accused of certain medical information that would not normally result in the imposition of a more severe sentence might be justified in some circumstances: see *R. v. Benson and Stevenson* (1951), 100 C.C.C. 247 (B.C.C.A.). See, on the subject of disclosure and withholding of information relevant to sentence, LRCC, *supra*, note 43, at 41-44, 67. As regards the duty of counsel concerning the disclosure to clients of medical information relating to them, see H. Krever, *Report of the Commission of Inquiry into the Confidentiality of Health Information* (Toronto: Queen's Printer, 1980), vol. II at 515.

66. *Supra*, note 29, at 423. See also "Manitoba makes plea bargaining public" *Vancouver Sun*, June 2, 1977, in D.F. Cousineau, S.N. Verdun-Jones *et al.*, "Setting Standards for Canadian Criminal Courts: The Case of Plea Bargaining" (unpublished, 1977). Compare *R. v. Douglas* (1977), 1 C.R. (3d) 238 (Ont. C.A.).

public demands that the disclosure be made in chambers.[67] We agree with the general thrust of this proposal. However, for the reasons we have given in our Working Paper on *Public and Media Access to the Criminal Process*, we believe that any such departure from the general rule of public access should be expressed in rather more limited terms. Accordingly, we suggest that the exception should be drafted to apply only in compelling circumstances (*e.g.*, where there exists a likelihood that full disclosure in open court would result in serious harm to the accused or to another person).

II. Judicial Supervision

We envision a statutory requirement for the justification of plea agreements as being part of a package of measures requiring greater judicial supervision of the actions of the prosecutor and defence counsel in concluding such agreements.[68] Enhanced judicial supervision should, among other things, help to allay concerns as to the potential that plea negotiation may have for distorting the roles of Crown and defence counsel within the adversary system. One concern, for example, is that plea negotiation, as currently practised, effectively enables the prosecutor to assume the court's adjudicative and dispositional functions.[69] This argument, it seems to us, may be something of an exaggeration. It is clear, for instance, that the court cannot be bound by any agreement that the prosecution and defence may make concerning sentence.[70] Under the current provisions of the *Criminal Code*, moreover, the trial judge may be justified in refusing to accept a plea of guilty to any offence other than the one charged.[71] In the recent case of *R.* v. *J.E.J.*, the Court remarked that "[t]he propriety of the terms of any agreement in respect of a plea, and indeed of the process of 'plea bargaining' itself are matters for the legal conscience of the Attorney General and his agents and not matters into which the Court should generally speaking intrude;"[72] however, it went on to express the opinion (novel in this context) that "the discretionary powers of the Crown are not so 'unfettered' as to preclude the Court from exercising

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67. *Supra*, note 29, recommendation 13.9 at 422-23. On the subject of sentence submissions and openness (and possible exceptions thereto), see G. Garson, "Criminal Pre-Trial Procedure in the Provincial Courts of Manitoba" (1980), 17 C.R. (3d) 371 at 382.

68. As to the importance and benefit of judicial supervision in this area, see C.T. Griffiths, J.F. Klein and S.N. Verdun-Jones, *Criminal Justice in Canada: An Introductory Text* (Vancouver: Butterworths (Western Canada), 1980) at 165. See also B.A. Grosman, *The Prosecutor: An inquiry into the exercise of discretion* (Toronto: University of Toronto Press, 1969) at 102-04.

69. See Ferguson and Roberts, *supra*, note 17, at 526, 547, 551. See also E. van den Haag, "Limiting Plea Bargaining and Prosecutorial Discretion" (1984-85), 15 *Cum. L. Rev.* 1 at 18.

70. See *A.G. Canada* v. *Roy* (1972), 18 C.R.N.S. 89 (Que. Q.B.) at 92-93; *R.* v. *Brown* (1972), 8 C.C.C. (2d) 227 (Ont. C.A.), *per* Gale C.J.O. at 228; *R.* v. *Simoneau* (1978), 40 C.C.C. (2d) 307 (Man. C.A.), *per* Matas J.A. (with whom Hall and O'Sullivan JJ.A. concurred) at 315-16; *R.* v. *Morrison* (1981), 63 C.C.C. (2d) 527 (N.S.S.C.A.D.) at 530; *R.* v. *Rubenstein* (1987), 41 C.C.C. (3d) 91 (Ont. C.A.) at 94; *R.* v. *Commisso*, *supra*, note 16, at 11-12 of the original judgment.

71. See *Criminal Code*, s. 606(4). See also the discussion *infra* under Recommendation 18.

72. *Supra*, note 50, *per* Nadeau Prov. Ct. J. at 16 of the original judgment.

its inherent powers to control those powers should that be seen as necessary to prevent an abuse of the court's process.''[73] Another concern is that plea negotiation puts defence counsel in a position of potential conflict. In order to preserve a viable working relationship with Crown prosecutors, it has been suggested, defence counsel, over time, may have to ensure that a certain percentage of his or her clients pleads guilty.[74] The extent to which this hypothesis is based upon reality, however, remains unclear.[75] To what extent does the plea negotiation process actually cause defence counsel to neglect their professional duties?[76] Do defence counsel feel any more dependent upon their relationships with Crown counsel than they do upon their relationships with the judiciary?

Judicial supervision of plea negotiation is one thing. Judicial participation, however, is quite another.[77] In our opinion, involvement of the judge in the actual ''give-and-take''[78] of plea negotiation would be wrong for a number of reasons. Although several have been canvassed in an oft-cited Study Paper prepared for us several years ago,[79] there are two in particular that bear repeating. First and foremost, such participation is inconsistent with the judge's role as impartial adjudicator.[80] Besides impairing the court's image as a dispassionate overseer, judicial plea negotiation may, in actual practice, serve to weaken the presumption of innocence in any trial that proceeds after plea negotiations in which the accused has expressed a willingness to plead guilty have broken down.[81] Second, judicial negotiation is likely to amount to an ''improper inducement'' for accused persons to plead guilty.[82] Given the unequal relationship between the accused and the trial judge, the pressure on an accused to

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73. *Ibid.*, at 17 of the original judgment.

74. See Ferguson and Roberts, *supra*, note 17, at 539, 550-51. See also Grosman, *supra*, note 68, at 77, 80 (cited by Ferguson and Roberts at 539); Hartnagel, *supra*, note 15, at 52.

75. See Canadian Sentencing Commission, *supra*, note 29, at 411, where the findings of authors R. Ericson and P. Baranek (*The Ordering of Justice: A Study of Accused Persons as Dependents in the Criminal Process* (Toronto: University of Toronto Press, 1982) at 123) are discussed. As the Commission has noted (at 411), it was not able to determine their general applicability throughout Canada.

76. See Solomon, *supra*, note 19, at 44, where the author, citing *inter alia* a Canadian study, has argued that plea negotiation does not in fact result in a failure of defence counsel to serve their clients' interests properly.

77. See ''Problems in Ethics and Advocacy: Panel Discussion,'' *supra*, note 5, at 306-11. For discussion of the judge's role with respect to plea negotiation, see R.D. Seifman, ''Plea Bargaining in Victoria — Getting the Judges' Views'' (1982), 6 *Crim. L.J.* 69.

78. See *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978) at 363.

79. See Ferguson and Roberts, *supra*, note 17, at 556-58.

80. *Ibid.*, at 556-57. See Seifman, *supra*, note 77, at 71. See also J. Ducros, ''The Role of the Trial Judge in the Criminal Process'' in Canadian Bar Association, *Studies in Criminal Law and Procedure* (Agincourt, Ont.: Canada Law Book, 1973) 1 at 5.

81. See Ferguson and Roberts, *supra*, note 17, at 557.

82. See Note, ''Plea Bargaining and the Transformation of the Criminal Process'' (1977), 90 *Harv. L. Rev.* 564 at 583-85, discussed by the Canadian Sentencing Commission, *supra*, note 29, at 425.

plead guilty (rather than be tried by a judge whose suggested agreement he or she has rebuffed) would be immense.[83]

The results of our empirical investigation into public attitudes on various aspects of plea negotiation[84] suggest to us that judicial involvement in the actual negotiation of a plea agreement could affect perceptions concerning the fairness and propriety of judicial conduct in a negative way. In our national survey, those persons asked to comment on a hypothetical situation in which the judge had rejected one plea agreement proposal before accepting a subsequent one were somewhat less likely to assume that the judge's handling of the case had been fair and proper than were those persons asked to comment on a hypothetical situation in which the judge had knowledge of the agreement but had had no influence on its content. To the extent that "justice ... should manifestly and undoubtedly be seen to be done,"[85] those who would advocate the legitimization of judicial plea negotiation should regard this finding as a warning.

III. Protection from Improper Inducements

There is, as we have suggested, a need to ensure that negotiated pleas have not been improperly induced.[86] Though some might characterize this requirement as one of "voluntariness," we would prefer to move away from the use of that term. It may, after all, be argued that all guilty pleas arising out of plea agreements are necessarily "involuntary,"[87] and that they ought, therefore, to be invalidated automatically.[88]The obvious analogy that one would invoke to support this argument would be the rule applicable to confessions, under which "no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority."[89] The relevance of this analogy is even, to some extent, borne out by the reasoning used in various Canadian cases dealing with the reception of guilty pleas.[90] In *Guerin* v. *The*

83. See Ferguson and Roberts, *supra*, note 17, at 558.

84. See Appendix B.

85. *R.* v. *Sussex Justices, Ex p. McCarthy*, [1924] 1 K.B. 256, *per* Hewart L.C.J. at 259.

86. See New South Wales Law Reform Commission, *supra*, note 12, at 465; A. Davis, "Sentences for Sale: A New Look at Plea Bargaining in England and America," [1971] *Crim. L.R.* 150 at 154-61.

87. See Ferguson and Roberts, *supra*, note 17, at 548-49, where this argument is stated and explored. For further discussion of the "voluntariness" issue in the context of American judicial decisions concerning plea negotiation, see Halberstam, *supra*, note 20, at 26-28.

88. See K. Kipnis, "Criminal Justice and the Negotiated Plea" (1976), 86 *Ethics* 93.

89. *Ibrahim* v. *The King*, [1914] A.C. 599 (P.C.), *per* Lord Sumner at 609.

90. In an article on "The Role of the Judge in Plea Bargaining" (1972-73), 15 *Crim. L.Q.* 26 at 39, G.A. Ferguson predicted that Canadian courts would probably adopt the American approach whereby guilty pleas resulting from *improper* inducements would be characterized as involuntary. See, *e.g.*, *R.* v. *Tennen* (1959), 122 C.C.C. 375 (Ont. C.A.), aff'd [1960] S.C.R. 302, *per* Roach J.A. at 382 (C.C.C.), cited by Ferguson at 39, n. 43.

King,[91] for example, Walsh J. of the Quebec King's Bench stated that "[a] plea, or confession, can ... be set aside, if it is shown to have been offered involuntarily, and to have been induced by a person in authority, who might have been in a position to hold out a promise of favour or advantage."[92] Similarly, in *Colligan* v. *The Queen*,[93] a majority of the Quebec Court of Queen's Bench (Appeal Side) suggested *inter alia* that the accused might have been successful in his appeal against conviction for an offence to which he had pleaded guilty if, in pleading guilty, he had been "misled or *persuaded by any person in authority*."[94]

It must be remembered, however, that when it is applied to confessions in the classic *Ibrahim*[95] sense, "the word 'voluntary' is given a special legal meaning."[96] That meaning, which has come to govern the conduct of "persons in authority" in one particular situation, has by no means been adopted in all legal contexts. In *Goldman* v. *The Queen*,[97] for example, the Supreme Court of Canada expressly rejected the applicability of the *Ibrahim* test to a determination of the "voluntariness" of a person's consent to the interception of a private communication under what was then section 178.11(2)(*a*) (now section 184(2)(*a*)) of the *Criminal Code*.[98] It held, in part, that such consent "is a valid and effective consent if it is the conscious act of the consentor doing what he intends to do for reasons which he considers sufficient,"[99] and that "[i]f the consent he gives is the one he intended to give and if he gives it as a result of his own decision and not under external coercion the fact that his motives for so doing are

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91. (1933), 60 C.C.C. 350 (Que. K.B.).

92. *Ibid.*, at 352 (emphasis omitted).

93. (1955), 21 C.R. 120 (Que. Q.B. (Appeal Side)).

94. *Ibid.*, at 124 (emphasis added).

95. *Ibrahim* v. *The King*, *supra*, note 89.

96. *R.* v. *Towler*, [1969] 2 C.C.C. 335 (B.C.C.A.), *per* McFarlane J.A. at 337, quoted by F. Kaufman, *The Admissibility of Confessions*, 3rd ed. (Toronto: Carswell, 1979) at 106. For a detailed philosophical analysis of the "voluntariness" issue in plea negotiation situations, see M. Philips, "The Question of Voluntariness in the Plea Bargaining Controversy: A Philosophical Clarification" (1981-82), 16 *L. & Soc. Rev.* 207. Compare C.G. Brunk, "The Problem of Voluntariness and Coercion in the Negotiated Plea" (1978-79), 13 *L. & Soc. Rev.* 527, discussed therein.

97. [1980] 1 S.C.R. 976.

98. In this case, the Court considered "voluntariness" of a consent under s. 178.11(2)(*a*) (now s. 184(2)(*a*)) of the *Criminal Code*, induced, according to the Trial Judge (at 1003), "by promises of leniency ...." McIntyre J. (with whom Martland, Ritchie, Pigeon, Dickson, Beetz, Estey and Pratte JJ. concurred) said, in part, at 1005:

> "The consent given under s. 178.11(2)(*a*) [now s. 184(2)(*a*)] must be voluntary in the sense that it is free from coercion. It must be made knowingly in that the consentor must be aware of what he is doing and aware of the significance of his act and the use which the police may be able to make of the consent. The test to be applied in considering the admissibility of a statement or confession made by an accused person in custody to police officers or others in a position of authority is not applicable here. The word 'voluntary' in the sense in which it applies to a consent to intercept or to admit evidence under Part IV.1 of the *Criminal Code* should not be considered in the restricted sense of the rule in the *Ibrahim* case."

99. *Supra*, note 97, *per* McIntyre J. (with whom Martland, Ritchie, Pigeon, Dickson, Beetz, Estey and Pratte JJ. concurred) at 1005.

selfish and even reprehensible by certain standards will not vitiate it."[100] In its ruling, the Court implicitly suggested that inducements made by "persons in authority" need not in all instances be regarded as unacceptable; their propriety, the decision suggests, will depend upon their nature and/or the nature of what they are designed to induce. In the context of statements and confessions, the Supreme Court would consider improper any inducement that would place reliability in doubt.[101] Where consents to intercept private communications under section 184(2)(*a*) of the *Code* are concerned, however, the relevant consideration is whether the inducement amounts to "intimidating conduct ... force or threats of force ...."[102]

In the guilty plea context, it is our opinion that an improper inducement is one that necessarily renders suspect the genuineness or factual accuracy of the plea. Although one might be tempted to call an improperly-induced guilty plea "involuntary" in order to parallel the nomenclature applicable to improperly-induced confessions, we believe that this label can only mislead. It is a mistake to assume that the criteria for determining what is or is not an improper inducement in the context of confessions are logically transferable to the context of guilty pleas.[103] While threats or promises made by a police officer may clearly amount to improper inducements when made to an isolated suspect following lengthy interrogation, the inducements offered by a prosecutor to an accused in the presence of counsel who is doing his or her job, or

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100. *Ibid.* His Lordship went on to state (at 1006):

> "The word coercion requires some definition in this context. The consent must not be procured by intimidating conduct or by force or threats of force by the police, but coercion in the sense in which the word applies here does not arise merely because the consent is given because of promised or expected leniency or immunity from prosecution."

His reason (at 1006) was as follows:

> "Inducements of this nature or compulsion resulting from threats of prosecution would render inadmissible a confession or statement made by an accused person to those in authority because the confession or statement could be affected or influenced by the inducement or compulsion. Different considerations arise, however, where a consent of the kind under consideration here is involved."

See also *Rosen* v. *The Queen*, [1980] 1 S.C.R. 961, *per* McIntyre J. (with whom Martland, Ritchie, Pigeon, Dickson, Beetz, Estey and Pratte JJ. concurred) at 974-75.

101. See *Goldman*, *supra*, note 97, at 1006.

102. *Goldman*, *supra*, note 97, at 1006. *Cf. Smerchanski* v. *M.N.R.*, [1977] 2 S.C.R. 23, an income tax case in which it was argued that agreements by an individual and a corporate taxpayer to waive their rights to appeal from tax reassessments were voidable *inter alia* because they had been entered into in order to avoid prosecution. In rejecting this argument, Laskin C.J. (who also spoke for Martland, Judson, Ritchie, Spence, Dickson and de Grandpré JJ.) noted (at 25-26) that, before agreeing to the waiver, "he ["[t]he individual taxpayer ..."] had had competent legal advice from more than one lawyer — indeed, he had had the opinion of accountants as well — and he had accepted the advice and acted upon it." His Lordship was "content to act on the view ... that the tax authorities held the threat of prosecution over Smerchanski but with good grounds and that the latter was aware of this and knowingly made a settlement, however draconian it may look to him in retrospect, which he was only too glad to make to escape the prospect of a conviction and of a gaol term" (at 32). He added that this was not a case "where the tax authorities, having no substantial case against a taxpayer, nonetheless importune and harass him with the threat of prosecution in order to exact an unjustified settlement" or "where a Crown prosecutor, to vindicate a private claim against another, threatens him with prosecution to force a favourable settlement of the claim" (at 33).

103. For a detailed discussion of the justification for not applying to guilty pleas the "voluntariness" test used in confessions, see J.E. Bond, *Plea Bargaining and Guilty Pleas*, 2nd ed. (New York: Clark Boardman, 1982) s. 3.13 at 3-36 to 3-39.

acted upon on the proper advice of counsel,[104] need not necessarily be placed on the same footing.[105] In the case of *R.* v. *Hughes*,[106] the Alberta Court of Appeal responded to the accused's argument that "his plea of guilty was prompted by police assurances that ... his girl friend ... would not be charged if he pled guilty, and promptly"[107] by saying *inter alia* that "[s]eparating any dealings Hughes had with the police and his pleas of guilty in the Provincial Court was his full access to duty counsel,"[108] and that "[e]vidence that concessions or advantages were offered by the Crown or the police and were acted upon by the accused will not, simpliciter, erode an informed guilty plea."[109]

In our opinion, the fact that an accused person who pleads guilty to an offence in accordance with the terms of a plea agreement has legal representation should not invariably end the matter. Although we believe, as Laskin J. (as he then was) acknowledged in his dissenting judgment (concurred in by Spence J.) in *Adgey* v. *The Queen*,[110] that the question of legal representation "is material to the duty that lies upon a trial judge in relation to pleas of guilty," we also think that judges should be able to go behind the guilty plea of even a represented accused where the circumstances warrant such investigation. It is not, it seems, unheard-of for defence counsel to "pressure" an accused into pleading guilty, notwithstanding the accused's preference for maintaining his or her innocence. In *Lamoureux* v. *The Queen*,[111] for example, the Quebec Court of Appeal stated that the accounts given by both the accused and the lawyer who had represented him at trial "indicate that the plea of guilty was induced by pressure from counsel and that the accused did not wish to plead guilty." In allowing the accused's appeal against the trial judge's refusal to allow him to withdraw his guilty plea, the Court reasoned that "[a] plea of guilty must always be a free and voluntary act by the accused himself, untainted by any threats or promises to induce

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104. See Recommendations 3(1)(g) and 9.

105. See Bond, *supra*, note 103, s. 3.13(a) at 3-37. See also A. Enker, "Perspectives on Plea Bargaining" in The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* (Washington: U.S. Government Printing Office, 1967), Appendix A, 108 at 116-17, quoted by Ferguson and Roberts, *supra*, note 17, at 549.

106. (1987), 76 A.R. 294 (Alta. C.A.).

107. *Ibid.*, *per* McClung J.A. at 295-96.

108. *Ibid.*, *per* McClung J.A. at 296. His Lordship further stated: "The duty counsel spoke to him at the Remand Centre before he was taken to court."

109. *Supra*, note 106, *per* McClung J.A. at 296. Although the Court (*per* McClung J.A. at 296) stated that "this is not such a case," it acknowledged that "there may be cases where a motion to strike a guilty plea by an adult accused could still be successfully taken despite timely access to counsel before the plea was entered."

110. [1975] 2 S.C.R. 426 at 436. See also *Lamoureux* v. *The Queen* (1984), 40 C.R. (3d) 369 (Que. C.A.). In *Antoine* v. *The Queen* (1984), 40 C.R. (3d) 375 (Que. C.A.) at 381, Rothman J.A. (with whom Vallerand J.A. concurred) said: "When a guilty plea is offered and there is any reason to doubt that the accused understands what he is doing, the judge or magistrate should make inquiry to assure that he does. But a trial judge is not bound, as a matter of law, in all cases to conduct an inquiry after a guilty plea, and the cases are rare where such an inquiry is necessary where the accused is represented by counsel ...."

111. *Supra*, note 110, *per* Rothman J.A. at 373.

the accused to admit that he committed the offence when he does not wish or intend to do so."[112]

The major difficulty with plea discussions, insofar as the question of improper inducement is concerned, relates to the use of "over-charging" and similar scare tactics.[113] In an essentially unregulated system, these devices may be used by the police and the prosecution as methods of situating themselves in the best negotiating position possible.[114] This problem can and should be corrected. In its *Model Code of Pre-Arraignment Procedure*,[115] the American Law Institute (ALI) has drafted specific statutory safeguards designed to limit the type of inducements that may emanate from the prosecution. Section 350.3 of the ALI Code prohibits a prosecutor from resorting to certain negotiating techniques in order to bring about a guilty plea.[116] Specifically (but, apparently, not exhaustively) the section prohibits the use of three prosecutorial negotiating tactics. One is that of laying, or threatening to lay, a charge that the prosecutor does not believe to be supported by provable facts.[117] Another is that of laying, or threatening to lay, a charge that is not usually laid with respect to an act or omission of the type attributed to the accused.[118] A third is that of threatening that a not guilty plea entered by the accused may result, upon the accused's conviction, in a sentence more severe than the sentence that is usually imposed upon a similar accused person who has been convicted, following a not guilty plea, of the offence with which the accused is charged.[119] In prohibiting these practices,[120] the ALI has sought to ensure, generally, that plea discussions are conducted in a manner that is consistent with the type of prosecutorial practices that would normally be engaged in if the conclusion of a plea agreement were not a goal,[121] and that the accused, as a result, is "fully aware of ... the actual value of any commitments made to him by the ...

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112. *Ibid.* See H. Litton, "Plea bargaining, an injustice or necessary evil?" in *Papers of the 7th Commonwealth Law Conference Hong Kong 18-23 September 1983* (Hong Kong: 7th Commonwealth Law Conference, 1983) 37 at 41.

113. See generally Cohen, *supra*, note 28, at 182-83, and the case of *Kienapple* v. *The Queen*, [1975] 1 S.C.R. 729, discussed therein; Ericson and Baranek, *supra*, note 75, at 71, cited by the Canadian Sentencing Commission, *supra*, note 29, at 413. In his book, *A Theory of Criminal Justice* (New York: Oxford University Press, 1979) at 453, Professor H. Gross has provocatively argued that the very nature of plea negotiation allows appropriate sentences to be negotiated only in cases in which the State resorts to such methods.

114. See Ferguson and Roberts, *supra*, note 17, at 551; Solomon, *supra*, note 19, at 45.

115. *Supra*, note 7.

116. *Ibid.*, at 244-45.

117. Section 350.3(3)(a), at 244.

118. Section 350.3(3)(b), at 245.

119. Section 350.3(3)(c), at 245.

120. See the annotation to s. 350.3, at 246-47.

121. Commentary to s. 350.3, *supra*, note 7, at 614.

prosecutor ....''[122] We agree with these aims and, for this reason, have incorporated similar prohibitions in our recommendations.

IV. Accuracy and Appropriateness

One danger that must, in our view, be actively guarded against is the danger that accused persons will be induced, as the result of prosecutorial plea negotiation tactics or improper legal advice,[123] to plead guilty to offences of which they are innocent. It may be contended that the very process of plea negotiation is inherently wrong because it is calculated to induce innocent persons to enter pleas of guilty.[124] The weaker the prosecution's case against a particular accused is (the argument goes), the greater is the likelihood that the prosecutor will endeavour to make a guilty plea attractive.[125] In our opinion, however, this is more an argument for the implementation of effective safeguards in the plea negotiation process than it is an indictment of that process *per se*. The risk that an accused will be induced to plead guilty to an offence that he or she did not commit is, in our view, no greater than the risk that an accused or suspect will be induced to confess to an offence of which he or she is innocent. Rather than prohibiting the questioning of accused persons or suspects by the police, or rendering all confessions thereby obtained inadmissible as evidence, our law has devised measures to ensure, as well as possible, both the reliability of confessions and the integrity of the criminal justice process. Where we have perceived the law surrounding the questioning of suspects to be deficient in this regard, we have made specific and detailed recommendations for its improvement.[126] While it would, perhaps, be easier simply to abolish the practice of plea negotiation rather than face the challenges it presents, we do not consider the practical difficulties involved in the protection of innocent accused persons from unfair prosecutorial practices to be insurmountable.

A related criticism of plea negotiation, as it has sometimes been practised, is that it can result in charge reductions that do not reflect the reality of offences that have been committed.[127] This concern is fundamental and, in our view, lies at the root of

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122. *Brady* v. *United States*, 397 U.S. 742 (1970) at 755, quoting from *Shelton* v. *United States*, 246 F. 2d 571 (C.A. 5th Cir. 1957) (*en banc*) (rev'd on unrelated grounds 356 U.S. 26 (1958)) at 572, n. 2, and quoted in the Commentary to s. 350.3, *supra*, note 7, at 615. See also Ratushny, *supra*, note 12, at 239.

123. See G.A. Martin, "The Role and Responsibility of the Defence Advocate" (1969-70), 12 *Crim. L.Q.* 376 at 387.

124. See Ferguson and Roberts, *supra*, note 17, at 543-44. See van den Haag, *supra*, note 69, at 18, where it is argued that there is little reason to assume that the danger of innocent people pleading guilty is any greater than that of their being convicted after a full-scale trial.

125. See A.W. Alschuler, "The Prosecutor's Role in Plea Bargaining" (1968), 36 *U. Chi. L. Rev.* 50 at 60, and Ferguson and Roberts, *supra*, note 17, at 545-46 (citing Alschuler), where this argument is articulated.

126. See LRCC, *Questioning Suspects*, *supra*, note 2.

127. See Ferguson and Roberts, *supra*, note 17, at 553. For further discussion of this phenomenon, see generally D.J. Newman, *Conviction: The Determination of Guilt or Innocence Without Trial* (Boston: Little, Brown, 1966) at 99-104.

the "bad reputation" plaguing the plea negotiation process. Unduly lenient charge reduction, we believe, can only serve to diminish public respect for our criminal laws and for the administration of criminal justice.

The Canadian Sentencing Commission has suggested, in its report on *Sentencing Reform*, that part of the solution to the problem of excessive charge reduction lies in the establishment of uniform guidelines governing the manner in which prosecutorial discretion is exercised.[128] We are of a similar opinion. In our 1976 Report entitled *Guidelines: Dispositions and Sentences in the Criminal Process*[129] (referred to by the Sentencing Commission), we alluded to the fact that "[t]here is a wide area of discretion in the charging process and pre-trial practices which has led to real if ill-defined concerns such as 'plea bargaining.'" We took the position that "Crown discretion should be fully recognized and made visible,"[130] and recommended "that the Attorneys General of the provinces and territories develop and publish policy guidelines for charging, pre-trial settlements and the conduct of prosecutions ...."[131] In formulating its recommendations, the Sentencing Commission has stated specifically that prosecutorial guidelines ought to limit the charge-reducing ability of Crown prosecutors in situations in which more serious offences can be proved.[132] We concur.

In our view, however, what is also needed (both to deal with the problem of excessive charge reduction and to guard against the entering of guilty pleas by innocent accused persons) is a statutory mechanism for ensuring that findings of guilt resulting from negotiated guilty pleas are appropriate when measured against the actual conduct of the accused and the surrounding circumstances. In this regard, it is our opinion that the current law does not go far enough. At present, there is no statutory obligation on the prosecutor (as the Canadian Sentencing Commission has suggested there should be) to justify a plea agreement involving consent (under section 606(4) of the *Code*) to the acceptance of an accused's plea of guilty to an offence other than the one charged; nor is there (as we believe there should be) a specific obligation on the court to consider any such justification in deciding whether to accept such a plea. Furthermore, there is no statutory encouragement for trial judges, following the entering of a guilty plea by the accused, to make factual enquiries of the sort we believe may be indicated in plea agreement situations. As Smith J.A. of the British Columbia Court of Appeal stated in the general context of guilty pleas when he delivered the majority judgment in *R. v. Milina*:[133] "[W]hen an accused person pleads guilty it is not the law that the Magistrate

128. *Supra*, note 29, at 421-22.

129. *Supra*, note 43, at 55-56.

130. *Ibid.*, at 56.

131. *Ibid.*

132. *Supra*, note 29, recommendation 13.7 at 422. See van den Haag, *supra*, note 69, at 19, where it is argued, in effect, that prosecutors should be under a legal obligation to charge everything reasonably capable of being proved. For discussion of a similar approach taken elsewhere, see Cousineau, Verdun-Jones *et al.*, *supra*, note 66. For a sentencing case in which the Court discussed the practice of reducing charges believed to be provable, see *Perkins and Pigeau* v. *The Queen* (1976), 35 C.R.N.S. 222 (Que. C.A.).

133. (1946), 86 C.C.C. 374 (B.C.C.A.).

must go into the facts in order to satisfy himself that the accused is in fact guilty."[134] In contrast, Rule 11(f) of the United States *Federal Rules of Criminal Procedure* provides that "[n]otwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea."[135] Although we suspect that imposing an obligation in all cases to undertake a rigorous factual inquiry into the question of the accused's guilt would bring about (to borrow Smith J.A.'s words) "an end ... to any efficacy in a plea of guilty,"[136] we believe that something less than a full-scale trial could be provided for where indicated. Implementation of our recommendations would encourage judges to enquire into the factual bases of guilty pleas arising out of plea agreements by providing specific statutory authority to do so where they consider it necessary.[137]

V. Equality

Another concern that needs to be addressed relates to the issue of equality.[138] Critics of plea negotiation have pointed out that opportunities for discussion, as well as the nature of agreements that are ultimately struck, may depend on a variety of factors. Disparate prosecutorial treatment of similar accused persons may result, for example, from variations in the quality of representation received during plea negotiations,[139] in relationships between different prosecution and defence counsel,[140] in attitudes of different prosecutors concerning plea negotiation itself,[141] or in prosecutors' assessments as to the strength of their cases.[142] The potential effects of such disparate treatment by prosecutors, it has been suggested, are unfairness, uncertainty and inconsistency in the area of sentencing.[143]

Notwithstanding the potential that plea negotiation may have for producing these adverse effects, however, the actual extent to which the plea negotiation process results in sentence disparities is not very clear. Although studies cited recently by the Canadian Sentencing Commission indicate a widespread *perception* amongst participants in the

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134. *Ibid.*, at 381 (Sloan C.J.B.C. and Robertson J.A. concurring).

135. *Supra*, note 7.

136. *Supra*, note 133, at 381 (Sloan C.J.B.C. and Robertson J.A. concurring).

137. For discussion of American procedures for determining the accuracy of guilty pleas, see Newman, *supra*, note 127, at 10-21.

138. See Newman, *supra*, note 127, at 42-44.

139. See Ferguson and Roberts, *supra*, note 17, at 551. Plea negotiation appears to be uncommon in cases where the accused is not represented by counsel. See Hartnagel, *supra*, note 15, at 52.

140. See Ferguson and Roberts, *supra*, note 17, at 552; Grosman, *supra*, note 68, at 80.

141. See Ferguson and Roberts, *supra*, note 17, at 552.

142. *Ibid.*, at 551-52.

143. See Canadian Sentencing Commission, *supra*, note 29, at 406, 427.

criminal process that plea negotiation affects sentencing to one degree or another[144] (the results of our national survey suggest that this perception is shared by the Canadian public at large), some Canadian commentary suggests that more direct empirical support for the claim that plea negotiation results in unequal sentences may be lacking.[145]

We realize that inequality in the area of sentencing is, to some extent, inevitable under our present system of criminal justice. It is a problem that cannot, in any event, be entirely attributable to the plea negotiation process. If plea negotiation were eliminated tomorrow, we suspect that differences in judicial and prosecutorial attitudes, and in the experience and ability of defence counsel, would continue to produce variations in the sentences received by similar offenders.[146] Some persons who plead guilty, moreover, might continue to receive sentences less severe than those they would have received if they had been convicted following a full-scale trial[147] — not as a result of plea negotiation, but because their guilty pleas save public expense,[148] spare victims from the ordeal of giving evidence,[149] or are viewed as indications of remorse.[150] Nevertheless, in view of our commitment to fairness as a fundamental principle,[151] we believe that the *potential* that plea negotiation has for producing inequality in particular cases must be recognized.

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144. *Ibid.*, at 406.

145. See Brannigan and Levy, *supra*, note 36, at 401-02. And see Solomon, *supra*, note 19, at 38-39.

146. As regards the relationship between judicial attitudes and sentencing generally, see J. Hogarth, *Sentencing as a Human Process* (Toronto: University of Toronto Press, 1971).

147. But *cf.* M.L. Friedland, *Detention before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates' Courts* (Toronto: University of Toronto Press, 1965) at 121, n. 12 and Hogarth, *supra*, note 146, at 345-49, both cited by Ferguson and Roberts, *supra*, note 17, at 561, n. 225. On the question of so-called "sentence discounts" (*i.e.*, reductions in sentence severity as a result of guilty pleas *per se*), see D.A. Thomas, *Principles of Sentencing*, 2nd ed. (London: Heinemann, 1979) at 50-52, and the cases cited therein; *R.* v. *Davis* (1980), 2 Cr. App. R. (S) 168 (C.A.); *R.* v. *Boyd* (1980), 2 Cr. App. R. (S) 234 (C.A.); *R.* v. *Williams* [1983] *Crim. L.R.* 693 (C.A.); *R.* v. *Ross* (1983), 5 Cr. App. R. (S) 318 (C.A.). See *R.* v. *Shannon* (1979), 3 *Crim. L.J.* 307 (C.C.A.) and the Commentary thereto by F. Rinaldi at 308-09; *R.* v. *McGaw* (1980), 4 *Crim. L.J.* 51 (C.C.A.) and the Commentary thereto by F. Rinaldi at 51-52.

148. See *R.* v. *Johnston and Tremayne*, [1970] 4 C.C.C. 64 (Ont. C.A.); *R.* v. *Tanguay-Dupere* (1971), 13 *Crim. L.Q.* 436 (Que. C.A.); *R.* v. *Hutton* (1977), 13 A.R. 557 (Dist. Ct.); *R.* v. *Layte* (1983), 38 C.R. (3d) 204 (Ont. Co. Ct.), all cited by R.P. Nadin-Davis, "Principles of Sentencing" in R.P. Nadin-Davis and C.B. Sproule, *Canadian Sentencing Digest Quantum Service* (Toronto: Carswell, 1982) vol. 1, 1 at 160 (as updated) and footnotes. See also *R.* v. *Atkinson*, *supra*, note 31, at 201-02.

149. See *R.* v. *Shanower* (1972), 8 C.C.C. (2d) 527 (Ont. C.A.); *R.* v. *Truax* (1979), 22 *Crim. L.Q.* 157 (Ont. C.A.), cited by Nadin-Davis and Sproule, *supra*, note 148, at 160 and footnotes.

150. See *R.* v. *Turner*, *supra*, note 31, at 285; *R.* v. *Layte*, *supra*, note 148. As regards the extent to which guilty pleas may affect sentence, however, see *R.* v. *Spiller*, [1969] 4 C.C.C. 211 (B.C.C.A.) at 214-15 (cited by Ferguson and Roberts, *supra*, note 17, at 506, n. 41 and 561); *R.* v. *Wisniewski* (1975), 29 C.R.N.S. 342 (Ont. Co. Ct.); *R.* v. *Basha* (1979), 23 Nfld. & P.E.I.R. 286 (Nfld. C.A.); *R.* v. *Bruce* (1982), 28 C.R. (3d) 247 (P.E.I.C.A.) (cited by Nadin-Davis and Sproule, *supra*, note 148, at 160-61 and footnotes).

151. See Bayles, *supra*, note 38, at 54-55; LRCC, *supra*, note 35, at 24.

The issue of equal treatment is one that we have considered in other contexts. In our Working Paper on *Diversion*,[152] we expressed the opinion that "equal justice is not an absolute to be pursued to the exclusion of all other values or considerations," and that "[i]f the resulting inequality is not gross it may be worthwhile to put up with it in order to secure other desirable objectives." At the same time, however, we acknowledged the need to minimize the inequalities that were the inevitable by-products of discretion. Toward this end, we recommended that guidelines be articulated to govern the exercise of that discretion, and that the visibility of discretionary decisions be increased.[153] Measures of this sort, it seems to us, would be particularly appropriate in the area of plea negotiation.

In recommending non-statutory guidelines, we are acknowledging that the legislative regulation of plea negotiation may not in itself be sufficient to guarantee equality of treatment, and that control of prosecutorial discretion, to some extent, will have to be accomplished through other means. This fact has been recognized by others who have grappled with the problem of equal treatment in plea negotiation. In its *Model Code of Pre-Arraignment Procedure*, for example, the American Law Institute has included a provision requiring all state prosecution offices to establish procedures and guidelines aimed at providing equal plea negotiation opportunities to accused persons in similar situations, and to promulgate these procedures and guidelines through the issuance of regulations.[154]

VI. Enforceability

An important aspect of plea negotiation relates to the enforceability of any agreements that may be struck.[155] Our review of the relevant case law has revealed at least an element of uncertainty in this regard. There have, for example, been cases (not necessarily involving plea agreements[156]) in which courts have refused to hold the

152. *Supra*, note 39, at 10.

153. *Ibid.*, at 10, 21.

154. *Supra*, note 7, s. 350.3(2), at 244.

155. For a discussion of this topic, and of many of the cases dealt with below, see Cohen, *supra*, note 28, at 186-87, Ferguson and Roberts, *supra*, note 17, at 501-03, and the excellent article by Verdun-Jones and Cousineau, *supra*, note 16, at 244-48.

156. See *R.* v. *Cusak* (1978), 41 C.C.C. (2d) 289 (N.S.S.C.A.D.) at 295 where Hart J.A. said, in delivering the Court's judgment:

> "A review of the various decisions indicates to me that the only reluctance to change a sentence imposed with the approval of the Crown by appellate Courts is in those situations where there has been an attempt made at plea bargaining. It has been considered unfair to the accused who has entered a plea of guilty on the understanding that the Crown will not oppose a certain sentence to permit the Crown by appeal to repudiate its original position."

Having expressed the opinion (at 298) that "an appellate Court must be free to consider the representations made by the Crown as one factor only in determining the fitness of sentence except in plea bargaining situations, and even there in exceptional circumstances such as those referred to by Montgomery, J.A., in the *Mouffe* case, the appeal Court may find it necessary to intervene," His Lordship went on to say (at 299): "In the case at bar the respondent freely entered a plea of guilty to the offence charged before the matter of sentence came before the Court for consideration," and that "[t]here was no suggestion of plea bargaining."

prosecution to a position taken as to sentence by Crown counsel appearing at trial.[157] In *R.* v. *Kirkpatrick*,[158] for instance, the Quebec Court of Appeal allowed the Crown's appeal against the one-day jail sentence, three-year probation term and $1000 fine received by the accused (increasing the sentence to three years' imprisonment), notwithstanding the fact that the prosecution at trial had indicated its lack of opposition to a $1000 fine.[159] In *R.* v. *Mouffe*,[160] the same Court allowed the Crown's appeal against (and increased) a sentence that Crown counsel at trial had suggested.[161] In *R.* v. *Simoneau*,[162] a case in which the accused appealed to the Manitoba Court of Appeal from a sentence higher than that which had been suggested to the court in a joint submission, the accused argued *inter alia* (as Matas J.A. put it) "that it was wrong for the Crown[163] to oppose the appeal because of the agreement made at the trial level ...."[164] Rejecting this argument,[165] Matas J.A. expressed the view that "[i]n exercising its appellate function, a Court of Appeal will not, in all cases, necessarily hold the Crown to a position taken at the trial."[166] Although "[i]t will certainly consider the earlier stance of the Crown to be an important factor to be taken into account,"[167] His Lordship said, "whether the Crown ought to be bound will depend on the circumstances of the case."[168]

On the other hand, there are cases (again, not necessarily involving plea agreements) suggesting that the unilateral abandonment of concluded plea agreements

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157. But see *R.* v. *Christie et al.* (1956), 115 C.C.C. 55 (Sask. C.A.). There Gordon J.A. (with whom Martin C.J.S. and Procter and Culliton JJ.A. concurred) stated at 56: "So far as the accused Wolfe is concerned, the agent of the Attorney-General consented to suspended sentence as against him and we do not think that under these circumstances an appeal by the Crown should be entertained, although we are of the opinion that he was treated very lightly."

158. [1971] C.A. 337 (Que.).

159. Montgomery J.A. (with whom Owen J.A. concurred) dissented. See note 211, *infra*, and accompanying text.

160. (1972), 16 C.R.N.S. 257 (Que. C.A.).

161. As in *Kirkpatrick*, Montgomery J.A. (with whom Turgeon J.A. now concurred) dissented. His Lordship said in part (at 263): "I do not doubt that we have discretion to maintain an appeal taken by the Crown under such circumstances but, in my opinion, we should do so only in exceptional cases, e.g., where there is evidence of bad faith or where counsel for the Crown has been led into error. I do not find this to be such a case."

162. *Supra*, note 70.

163. Different counsel appeared for the Crown at the appeal.

164. *Supra*, note 70, at 316. The "agreement ..." here concerned the appropriate sentence only, and was not a plea agreement.

165. Matas J.A. (with whom O'Sullivan and Hall JJ.A. concurred) was of the opinion (*supra*, note 70, at 316) that "[d]ifferent considerations may apply to those cases in which the accused has changed his position as a result of an undertaking by the Crown."

166. *Supra*, note 70, at 316.

167. *Ibid.*

168. *Ibid.*

by the prosecution ought not generally to be permitted.[169] In *R.* v. *Ah Tom*,[170] for example (a Nova Scotia case), an accused whose plea of guilty had been induced by a statement by the prosecutor causing him to believe that he would receive a small fine on conviction was granted a new trial and permitted to withdraw his plea.[171] In *R.* v. *Stone*[172] (also a Nova Scotia case), the accused had entered a guilty plea to a customs offence in circumstances indicating "some evidence of bargaining with her and the prosecution as to the punishment she should receive, and of her asserting her innocence and pleading guilty to protect her family."[173] According to Chisholm C.J.: "It ... appeared from the evidence that there was some negotiation between the defendant and the customs officers for a small fine to follow the plea of *guilty*."[174] Graham J. elaborated, saying:

> "It is admitted that this defendant was promised by the prosecution, that if she gave information, presumably as to who the person really was who had liquor in her garage, and pleaded guilty, the minimum fine of $50 would be imposed upon her. She gave information, which the officers however say was valueless. They therefore considered themselves absolved from their bargain; but they never told her so. They allowed her, relying on their promise, to plead guilty, and to be fined the maximum amount of $200."[175]

In these circumstances, a decision allowing the accused to appeal from her conviction (and allowing that appeal) was upheld by a majority of the Court.[176]

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169. See *R.* v. *Jones* (1978), 40 C.C.C. (2d) 173 (B.C.S.C.), wherein some of these cases were considered in a slightly different context.

170. (1928), 49 C.C.C. 204 (N.S.S.C.).

171. The accused had been sentenced to a six-month prison term and a $500 fine (or an additional three-month prison term in default of payment thereof) by a stipendiary Magistrate who "found as a matter of fact that the defendant pleaded guilty on the representation of the prosecutor that if he so pleaded he would be let off with a fine ..." (*per* Harris C.J. at 205), and who said that "had he been aware of these representations ... he would have directed a plea of not guilty ..." (*per* Harris C.J. at 205). Harris C.J. (with whom Chisholm and Carroll JJ. concurred) termed the prosecutor's statements to the accused "misleading ..." (at 206).

172. (1932), 58 C.C.C. 262 (N.S.S.C.).

173. *Ibid.*, *per* Mellish J. at 266.

174. *Supra*, note 172, at 264 (emphasis included).

175. *Supra*, note 172, at 267.

176. Compare *R.* v. *Morrison*, *supra*, note 70. Here, the Appeal Division of the Nova Scotia Supreme Court, in the course of hearing an application for leave to appeal from sentence, was told that counsel for the defence and for the prosecution at trial had "entered into a plea bargaining arrangement whereby if the appellant re-elected and changed his plea to guilty, the prosecutor would recommend to the Court a sentence of three months' imprisonment consecutive to the sentence the appellant was then serving" (*per* Pace J.A. at 529-30). Counsel for the prosecution on appeal (who was not the prosecutor appearing for the Crown at the accused's sentencing) "admitted that such a bargain had been made and that the Crown prosecutor at the trial did not carry out the bargain" (*per* Pace J.A. at 530). After noting that counsel for the accused had not raised the issue before the Trial Judge, the Court (*per* Pace J.A. at 530) emphasized that "Courts are not bound by plea bargaining agreements made by counsel," and that while "[i]t may be that under certain circumstances a Court will not permit a party to repudiate an agreement once submitted before the trial Judge ...," this "does not mean that the Court is bound to carry out the agreement." Here, the Court noted (*per* Pace J.A. at 530), "the appellant had his remedies of either appealing his conviction or applying to the trial Judge to withdraw his plea; he chose to do neither." This being so, it was "now too late for him to raise this issue ..." (*per* Pace J.A. at 530).

In *R.* v. *Agozzino*,[177] the Ontario Court of Appeal dismissed the Crown's appeal from what it considered to be the "utterly inadequate ..."[178] sentence imposed on the accused, after noting that "prior to the trial Crown counsel intimated that he would not ask for a jail term and on the basis of such intimation counsel for the accused received instructions to plead guilty."[179] Although the Court indicated that it would likely have allowed the appeal if it had considered itself free to consider the adequacy of the sentence, it reasoned that "it would now be quite unfair, not only to the Magistrate but to the accused, for the Crown, by means of this appeal, to change its position by asking for a substantial term of imprisonment."[180] It added: "In effect the appeal repudiates the position taken by Crown counsel at the trial and we do not care to give effect to that repudiation."[181]

In *R.* v. *Fleury*,[182] the Crown appealed against sentences only slightly shorter than those which Crown counsel at trial had recommended, asking this time that substantially longer sentences be imposed. A majority of the Quebec Court of Appeal dismissed the appeal. In the course of his judgment, Montgomery J.A. (who was part of that majority) referred to his dissents in the *Mouffe* and *Kirkpatrick* cases, and said:

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177. [1970] 1 C.C.C. 380 (Ont. C.A.).

178. *Ibid.*, *per* Gale C.J.O. at 381.

179. *Ibid.*

180. *Ibid.*, at 381-82.

181. *Ibid.*, at 382. See *R.* v. *Boutilier* (1981), 48 N.S.R. (2d) 179 (S.C.A.D.), a case in which the Crown sought leave to appeal against the sentence (a fine and probation) received by an accused who had pleaded guilty to breach of trust. After noting (at 179) that "[t]his court has been advised that a plea-bargaining arrangement was entered into between the Crown and the accused whereby the Crown agreed not to demand that a jail sentence be imposed ...," the Court concluded (at 180) that "[i]n view of this arrangement and the fact that we do not necessarily have all the facts associated with such a bargain, this court is not prepared to grant the Crown leave to appeal from the sentence imposed by the trial magistrate." In *R.* v. *Dubien*, *supra*, note 31, Crown counsel had indicated, in discussions with the accused's counsel before the accused pleaded guilty, "that, in the event that the respondent was sufficiently remorseful to plead guilty to rape (and not to attempted rape), and if he was prepared to acknowledge to the court that he was in need of psychiatric help, the Crown would acknowledge those mitigating factors and would undertake not to seek a declaration that the accused was a dangerous offender," and that "[t]he Crown would seek, in those circumstances, a term in the range of seven to ten years" (*per* MacKinnon A.C.J.O. at 380). Upon the trial Judge's indicating "that he would give a sentence of five years in any event," however, "[t]he Crown indicated to defence counsel that, in the event that the respondent now pleaded guilty to rape, and in the event that the respondent was sentenced to a term of five years, Crown counsel would not recommend to the Crown Law Office that the sentence be appealed," and "further expressed the opinion that, in the absence of such a recommendation from the assistant Crown attorney who prosecuted the case, no appeal as to sentence would be launched" (*per* MacKinnon A.C.J.O. at 381). In allowing the Crown's subsequent appeal against the five-year sentence imposed after the accused pleaded guilty to, and was convicted of, rape, the Ontario Court of Appeal noted *inter alia* that the prosecutor had made it clear to counsel for the accused during their discussions before the accused's guilty plea "*that the assistant Crown attorney in charge of the prosecution of the trial had no power to bind the Attorney General on matters of appeal, and that the ultimate decision would be his*" (*per* MacKinnon A.C.J.O. at 381; emphasis included). Because the prosecutor at trial had not recommended an appeal against the accused's sentence, and had not initiated a dangerous offender application, the Court said, there had been no repudiation of his position.

182. (1971), 23 C.R.N.S. 164 (Que. C.A.).

> "Where after a plea of guilty the Crown recommends a light sentence, I do not suggest that this recommendation is binding on the trial judge. He may quite properly state that he intends to impose a heavy sentence and ask the accused whether he wishes to withdraw his plea of guilty. If, however, he accepts the Crown's recommendations, I am of the opinion that it is only in the most exceptional circumstances that a court of appeal should intervene. Apart from the possibility that the accused might wish to withdraw his plea, he might wish to make further evidence in mitigation of sentence."[183]

In *R.* v. *Brown*,[184] the prosecutor had agreed, in exchange for the accused's guilty plea on one charge, to withdraw certain other charges and to inform the Trial Judge that he was not requesting a sentence consecutive to the one the accused was serving at the time. Following the accused's plea of guilty, however, "Crown counsel then vacillated, but, on the whole, seems to have urged the trial Judge ... to impose a consecutive term."[185] In these circumstances, the Ontario Court of Appeal allowed the accused's appeal from his sentence, and substituted a concurrent term for the consecutive one that had ultimately been imposed.

The cases dealing with the question of whether repudiation ought to be permitted do not, however, exhibit judicial unanimity in the articulation of criteria upon which the decision should be made. On one hand, there is the test propounded in *A.G. Canada* v. *Roy*.[186] There, the Quebec Court of Queen's Bench dismissed the Attorney General of Canada's appeal against a sentence it considered to be inadequate. Having noted that the sentence imposed on the accused was one that had been suggested by (different) Crown counsel at trial, and having considered the accused's argument "that the sentence imposed was in fact one which was negotiated and arrived at by consent prior to the plea,"[187] Hugessen J. reasoned *inter alia* that "[t]he Crown, like any other litigant, ought not to be heard to repudiate before an appellate court the position taken by its counsel in the trial court, except for the gravest possible reasons."[188] Elaborating, His Lordship continued: "Such reasons might be where the sentence was an illegal one, or where the Crown can demonstrate that its counsel had in some way been misled, or finally, where it can be shown that the public interest in the orderly administration of justice is outweighed by the gravity of the crime and the gross insufficiency of the sentence."[189] His Lordship then concluded: "Applying these principles to the case at bar, I cannot see that the Crown has satisfied the test which I have laid down."[190]

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183. *Ibid.*, at 175.

184. *Supra*, note 70.

185. *Ibid.*, *per* Gale C.J.O. at 228. As the Court also noted (at 228), the Trial Judge "of course, was not in any way bound, and perhaps knew nothing of the prior arrangement ...."

186. (1972), 18 C.R.N.S. 89 (Que. Q.B.).

187. *Ibid.*, *per* Hugessen J. at 90.

188. *Ibid.*, at 93.

189. *Ibid.*

190. *Ibid.*

The test propounded in the *Roy* case was applied by the Appeal Division of the Prince Edward Island Supreme Court in *R.* v. *MacArthur*.[191] There Crown counsel at trial, in accordance with an agreement under which the accused had pleaded guilty to a charge of criminal negligence causing bodily harm, had made no submission regarding sentence. In dismissing the Crown's subsequent appeal from the sentence that had ultimately been imposed, MacDonald J. (who delivered the Court's judgment) quoted from Hugessen J.'s judgment in *Roy*, and said: "Here the sentence was not an illegal one, neither has the Crown contended that it has been misled. If the sentence is to be varied, it must be on the ground that the sentence was grossly insufficient and that it is in the public interest that it should be varied."[192] Although His Lordship later remarked "Had I been the trial Judge, I probably would have sentenced the accused to a jail term,"[193] he was quick to add: "... I must weigh the fact that the respondent has entered a guilty plea and that it is now too late for him to ask for leave to change his plea. His guilty plea was entered on the understanding that the Crown would not speak on sentencing and I do not feel it would be fair to the respondent to sentence him when he may well have entered a not guilty plea had he known a jail sentence was being sought by the Crown."[194] His Lordship then concluded by saying that "[w]hile this case is very close to being one where the gravity of the crime outweighs the public interest in the administration of justice, the benefit must be given to the accused."[195]

In *R.* v. *Goodwin*,[196] Crown counsel had agreed to recommend consecutive ten-month prison sentences if the accused pleaded guilty to robbery and attempted robbery. Although the accused did so and Crown counsel made the recommendation agreed to, the Court sentenced the accused to concurrent prison terms of only six months plus probation for two years. In dealing with the Crown's subsequent application for leave to appeal against these sentences, and with the appeal itself, the Appeal Division of the Nova Scotia Supreme Court considered *inter alia* "whether the Crown, by this appeal, can repudiate its agreement and the representations made by its counsel to the trial judge and now ask for a much greater term of imprisonment."[197] Although it determined that the sentences were inappropriate and ought to be varied, the Court declined to increase them beyond the consecutive ten-month terms that had been agreed to. After quoting from the *Roy* case, Pace J.A. (who delivered the Court's judgment) said:

> "In the present appeal we must consider whether the sentence imposed is so grossly insufficient in view of the gravity of the offences that the public interest in the orderly administration of justice would be adversely affected. The Crown was under no duty to make any bargain. The fact that it now considers that it should not keep its part of the bargain must be viewed in the light not only of the insufficiency of sentence but also of

191. (1978), 39 C.C.C. (2d) 158 (P.E.I.S.C.A.D.).

192. *Ibid.*, at 160.

193. *Ibid.*, at 161.

194. *Ibid.*

195. *Ibid.*

196. (1981), 21 C.R. (3d) 263 (N.S.S.C.A.D.).

197. *Ibid.*, *per* Pace J.A. at 266.

fairness to the respondent. The respondent had a right to have his case tried in the usual manner and to present to the court any defence that was available to him. With knowledge of the terms of the bargain, he entered pleas of guilty. It may be that the bargain should not have been made, in view of what this court has stated as being proper sentences in crimes of this nature. However, it was made and, in my opinion, it must be honoured. Plain honesty and fairness demand that the agreement not be now repudiated.

Although the sentence agreed to was insufficient, I do not consider it so grossly insufficient as to be against the public interest, weighed in the light of the alternative. A bargain is a bargain and, if the Crown does not wish to be bound by it, the simple solution is to make no bargain at all. I do not wish to imply that this court will always uphold a bargain made by counsel, however wrong or ill-advised, but rather that, in weighing the proper principles to be applied in resolving such matters, the burden is heavy on the party who seeks to repudiate. I do not find in this appeal that the Crown has satisfied that burden."[198]

In *R.* v. *Wood*,[199] on the other hand, the Appellate Division of the Alberta Supreme Court took a slightly different view as to the importance that the prosecution's position at trial ought to be accorded. There, a sentence of 30 months' probation had been imposed on an accused who had pleaded guilty to a charge of gross indecency.[200] On the Crown's subsequent application for leave to appeal from that sentence, defence counsel questioned, in McDermid J.A.'s words, "whether the Crown should be allowed to appeal in view of the fact that it had been intimated to the Provincial Judge that the Crown was not seeking a jail sentence."[201] In His Lordship's view, this consideration was not determinative. "A position taken by Crown counsel before a trial Judge is a circumstance to be taken into consideration,"[202] he reasoned, "but we cannot be bound by any such position taken and are not willing to restrict the appeal of the Crown by such a consideration."[203] In the particular circumstances of this case, and "to be sure that there can be no suggestion of unfairness to the accused,"[204] His Lordship stated that he "would grant leave to appeal, quash the conviction, direct a new trial and that the accused be given the appropriate election and be allowed to plead again at the new trial."[205] He added that the prosecution should not then be permitted to introduce the accused's guilty plea in evidence.

Moir J.A. (with whom Haddad J.A. concurred) adopted a somewhat different approach. This was a case, he stated, in which "the agent for the Attorney-General

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198. *Ibid.*, at 267.

199. *Supra*, note 31.

200. After the accused had pleaded guilty, the prosecution withdrew a second count charging the accused with buggery.

201. *Supra*, note 31, at 105.

202. *Ibid.*, at 110.

203. *Ibid.* See *R.* v. *Dubien*, *supra*, note 31, where the Ontario Court of Appeal (*per* MacKinnon A.C.J.O. at 383) expressed the opinion that "counsel for the Crown could not take away the discretion vested in the Attorney General to determine whether an appeal should or should not be taken or the obligation imposed on this court to consider the fitness of the sentence when the matter is before us."

204. *Supra*, note 31, at 110.

205. *Ibid.*

told defence counsel that he would not seek a jail sentence if the accused entered a plea of guilty,''[206] and ''[c]learly, the effect of that intimation would be to encourage the accused to plead guilty.''[207] In these circumstances, it was His Lordship's view that leave to appeal ought to be refused. Although he agreed with McDermid J.A. that ''counsel for the Attorney-General cannot bind him by his submission as to sentence so as to preclude the Attorney-General from appealing,''[208] he considered the actions of Crown counsel at trial to be ''an important circumstance to be taken into account in determining whether the Crown should be granted leave to appeal where no jail sentence was imposed.''[209] Rejecting the solution proposed by McDermid J.A., His Lordship continued:

> ''The Court, in determining whether or not leave to appeal should be granted, seeks to ensure fair play. To this end, my brother McDermid has directed that the Crown make no reference to the accused's plea of guilty on the new trial which is directed, in an attempt to see to it that the accused is not prejudiced by what has occurred. The accused can be prejudiced in ways other than the admission against him of a guilty plea. Here, after pleading guilty, the accused, through his counsel, disclosed he had been seen by two psychiatrists. In dealing with these people the accused told them certain things. The Crown is now aware of these facts. The Crown may now call both of these psychiatrists as witnesses. Their evidence is both competent and compellable. The Court cannot prevent such evidence from being called. This will surely prejudice the accused.
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> In addition, the accused has been on very strict probation for about one year. He has lived up to the strict terms of his probation. It seems to me that after such a long period to sentence the accused to a term of imprisonment may be unfair. Usually sentence appeals are brought before this Court with much greater expedition.
>
> I do not want to be taken to have suggested that the sentence here was adequate. I am in entire agreement with my brother McDermid that a substantial term of imprisonment is called for. However, because we cannot put the accused back into the position he was in before his plea, and because of the delay, I would refuse leave to appeal.''[210]

It is our opinion that the concept of fairness requires generally that plea agreements concluded by the prosecution be adhered to, and that their repudiation not be sanctioned by appellate courts. As Montgomery J.A. (with whom Owen J.A. concurred) remarked in his dissenting judgment in the *Kirkpatrick* case (after referring to *Agozzino*): ''[S]uch a repudiation by the Crown of a position taken by its representative in charge of a case is derogatory to the orderly administration of justice, and we should countenance it only if an urgent public interest so demanded.''[211] In our view, the criteria for determining whether or not the prosecution should be allowed, on appeal against sentence, to repudiate the position it has taken at trial are most adequately expressed in

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206. *Ibid.*, at 111.

207. *Ibid.*

208. *Ibid.*, at 110-11.

209. *Ibid.*, at 111.

210. *Ibid.* As to admissibility of communications by accused persons to psychiatrists, compare *R. v. C.K.L.* (1987), 62 C.R. (3d) 131 (Ont. Dist. Ct.).

211. *Supra*, note 158, at 339. It appears that this remark was made with reference not merely to plea agreement situations.

the *Roy* case.[212] The alternative suggested in *Wood* (in which the prosecution's previous position would be merely "a circumstance to be taken into consideration ...,"[213] or "an important circumstance to be taken into account ..."[214]) does not provide sufficient guidance for courts of appeal faced with the very difficult problem of plea agreement repudiation.[215] Although it is not our aim to tie the hands of appellate judges in such matters, we believe that the principles of clarity and fairness demand the articulation of more specific criteria governing the exercise of judicial discretion in this area. Clarity, as we have suggested in our recent Report on *Our Criminal Procedure*,[216] need not — and ought not — eliminate all features of discretion and flexibility from the decision-making process. These features, after all, are themselves essential to the goal of fairness; they imbue our criminal justice system with a sense of humanity.[217] At the same time, however, we believe that discretion and flexibility may be incompatible with the goals of clarity and fairness if not placed within their proper boundaries. An accused person contemplating the entering of a guilty plea as the result of an undertaking given by the prosecution is entitled, in our view, to have a reasonably clear idea of the circumstances in which the prosecution may repudiate that undertaking. This view, in our opinion, is consistent with the reasoning and intentions expressed by the Government of Canada in *The Criminal Law in Canadian Society*,[218] when it called for clear and accessible articulation of the rights of those whose freedom the criminal process directly threatens. Decisions as to whether or not the prosecution should be permitted to repudiate an undertaking relied upon by an accused in entering a guilty plea should, moreover (for the sake of fairness both to the accused and to the public), be based on specific, pre-determined criteria. This view, we believe, is consistent with the basic precept enunciated by the Government of Canada in *The Criminal Law in Canadian Society* when it recognized that appropriate methods for controlling discretion in the criminal process were important to the maintenance of accountability and equality.[219]

It is our further opinion that, once an accused has pleaded guilty to an offence in accordance with a plea agreement, it would not generally be right for the prosecution to commence or continue any proceedings (whether by way of appeal or otherwise) in

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212. *Supra*, note 186. As indicated by Recommendation 21 below and the commentary thereto, however, our endorsement of *Roy* is not without qualification.

213. *Supra*, note 31, *per* McDermid J.A. at 110.

214. *Ibid.*, *per* Moir J.A. (Haddad J.A. concurring) at 111.

215. But see the views expressed by E.G. Ewaschuk, "Criminal Pleadings" (1976), 35 C.R.N.S. 273 at 294 and by Verdun-Jones and Cousineau, *supra*, note 16, at 247-48.

216. *Supra*, note 35, at 25.

217. For a recent view on the relationship between discretion and humanity in the area of sentencing, see the Minority Report of Commissioner B.J. Pateras in Canadian Sentencing Commission, *supra*, note 29, 334 at 339.

218. *Supra*, note 33, at 53, 60.

219. *Ibid.*, at 54, 64.

contravention of that agreement.[220] This position, we believe, is supported by a number of Canadian cases dealing with the applicability of the "abuse of process" doctrine in analogous situations.[221]

In *Re Smith and the Queen*,[222] for example, the agreement (not a plea agreement) between the accused and the prosecutor involved the turning over of evidence in exchange for a promise not to lay certain charges.[223] Although he acknowledged the possibility that the public's interest in law enforcement might arguably require the continuation of a prosecution in some instances,[224] Berger J. of the British Columbia Supreme Court considered that the agreement in this case precluded the accused's prosecution on the particular charges involved. Referring to the agreement, His Lordship stated that "[t]here should ... be no attempt to avoid its consequences,"[225] and that "[t]hat is an abuse of the process of the Court."[226]

A similar view was expressed in the case of *R.* v. *Betesh*.[227] There, an agreement not to prosecute strikers for acts committed during a postal strike had constituted part of the settlement that was ultimately reached. In granting the accused's application to stay proceedings subsequently brought against him for an act that was alleged to have been committed during the strike, Graburn Co. Ct. J. stated his opinion that such proceedings amounted to an abuse of the Court's process. "[A]lthough the concept of 'abuse of process' was not expressly articulated by the Courts in *Agozzino*, *Brown* and *Roy*,"[228] His Honour said, "in effect, those Courts refused the relief sought by the

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220. See *R.* v. *LeBlanc*, *R.* v. *Long* (1938), 71 C.C.C. 232 (N.B.S.C.A.D.) at 239, where it was suggested in an *obiter dictum* that, had the accused's guilty plea been induced by a promise by the prosecutor not to appeal against sentence as it was doing (the Court found that there had been no such promise), the breaking of such a promise "might afford some reason for this Court to say that it would not act under such circumstances."

221. See *R.* v. *Jewitt*, [1985] 2 S.C.R. 128, in which the Supreme Court of Canada agreed with the Ontario Court of Appeal's assessment in *R.* v. *Young* (1984), 13 C.C.C. (3d) 1 (Ont. C.A.), *per* Dubin J.A. at 31, that "there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings," and that "[i]t is a power ... of special application which can only be exercised in the clearest of cases." It may also be that commencement or continuation of a prosecution in contravention of a plea agreement would be contrary to "the principles of fundamental justice" under s. 7 of the *Charter*. As to the relationship of s. 7 to the doctrine of abuse of process, see D.C. Morgan, "Controlling Prosecutorial Powers — Judicial Review, Abuse of Process and Section 7 of the Charter" (1986-87), 29 *Crim. L.Q.* 15 at 52-55.

222. (1974), 22 C.C.C. (2d) 268 (B.C.S.C.). See also *Re Delaney* (1977), 17 N.B.R. (2d) 224 (Q.B.); *R.* v. *Blackstock* (1983), 10 W.C.B. 73 (Sask. Prov. Ct.). But see *R.* v. *Stafford* (1985), 14 W.C.B. 54 (Ont. Dist. Ct.); *R.* v. *Burlingham* (1986), 1 W.C.B. (2d) 154 (B.C.S.C.).

223. At issue was whether the charges that were laid against the accused were contemplated by the agreement.

224. *Supra*, note 222, at 272.

225. *Ibid.*

226. *Ibid.*

227. (1975), 30 C.C.C. (2d) 233 (Ont. Co. Ct.).

228. *Ibid.*, at 250-51.

Crown, since to grant it, would, in fact, constitute an abuse of the process of the Court."[229] Continuing, he emphasized: "The abuse lies in the *Crown reneging on an agreement made and presented to a Court. To renege on such an agreement constitutes an abuse of the process of the Court. The Crown is expected to honour the agreements it has made in relation to prosecutions.*"[230] He then stated: "To this I would add that the Crown is expected to honour such agreements whether presented to the Court or otherwise, as I have already reached the conclusion that the federal Attorney-General's function is to consider, as well as conduct, prosecutions."[231]

In *Re Abitibi Paper Co. Ltd. and The Queen*,[232] Jessup J.A. of the Ontario Court of Appeal noted that "[t]he cases use such adjectives as vexatious, unfair, oppressive and now, 'most exceptional circumstances' in describing conduct deemed to be in abuse of process."[233] Having referred *inter alia* to the *Betesh*, *Smith* and *Agozzino* cases,[234] His Lordship went on to express the opinion that "the conduct of the Crown in this case, in breach of an undertaking by one of its senior officers, attracts each of the adjectives I have mentioned."[235]

In *R.* v. *Crneck, Bradley and Shelley*,[236] Krever J. of the Ontario High Court of Justice saw "considerable merit ..."[237] in the argument of an applicant for a stay of proceedings that "[f]or the Crown to have reneged on an agreement to extend immunity from prosecution to an accused person in return for co-operation from that person, which is in fact given, undermines the administration of justice and brings the entire system of the administration of justice into disrepute."[238] Although His Lordship also saw "merit ..."[239] in the Crown's argument "that the decision of an Assistant Crown Attorney, as an agent of the Attorney-General, a member of the executive branch of Government, must be accorded respect by the Court as a decision made in the interests of the administration of justice and made on information which a Judge or Court can know nothing about ...,"[240] he added: "I doubt that it outweighs the principle that agreements made by a representative of the Attorney-General after consideration and consultation with experienced police officers, should — because the representative

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229. *Ibid.*, at 251. But *cf. R.* v. *Clifford* (1981), 13 M.V.R. 264 (B.C. Co. Ct.).

230. *Supra*, note 227, at 251 (emphasis included).

231. *Supra*, note 227, at 251.

232. (1979), 47 C.C.C. (2d) 487 (Ont. C.A.).

233. *Ibid.*, at 496.

234. His Lordship referred as well to the case of *Re Delaney*, *supra*, note 222.

235. *Supra*, note 232, at 496.

236. (1980), 55 C.C.C. (2d) 1 (Ont. H.C.).

237. *Ibid.*, *per* Krever J. at 10.

238. *Ibid.*

239. *Ibid.*, *per* Krever J. at 12.

240. *Ibid.* His Lordship added: "[O]f course, the decision I refer to now is the decision to renege, not the original decision."

symbolically and in reality is the embodiment of our society's idea of fairness in the administration of justice — should, I say, be carried out."[241] Having expressed his view that, in the particular circumstances of this case, "[i]f the Crown is permitted to withdraw from the agreement to discontinue the proceedings against Miss Bradley after she has fulfilled her part of the bargain, the Crown ... will have caused serious prejudice to her in her defence on this charge,"[242] Krever J. went on to stay the proceedings against the applicant as an abuse of process. "The cumulative effect of this consideration and the principle enunciated by the authorities that the Crown must be expected to carry out its agreement," His Lordship stated, "is enough, in my view, to bring this case within the category of 'cases of the most exceptional circumstances', to use the words of Mr. Justice Jessup in the *Abitibi Paper Co.* case."[243]

More recently, in the Ontario case of *R.* v. *Engel*,[244] Draper Prov. Ct. J. specifically referred *inter alia* to "the Crown resiling from the plea bargain after the accused had acted on it by consenting to the extension of the time limit for laying the third charge..."[245] in enumerating his reasons for staying a previous charge that a Crown Attorney had agreed to withdraw.[246]

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241. *Supra*, note 236, at 12. Before noting that there was "a more compelling consideration ..." involved in this case, however, His Lordship added: "In the view I take of this matter, it is unnecessary to decide, if there were nothing more to be considered, which of these two competing principles is to be preferred."

242. *Supra*, note 236, at 12.

243. *Ibid.*, at 13.

244. (1982), 7 W.C.B. 347 (Ont. Prov. Ct.). Compare *R.* v. *Kennedy* (1972), 6 C.C.C. (2d) 564 (Ont. C.A.).

245. *Supra*, note 244, at 8 of the original judgment.

246. The withdrawal, according to Draper Prov. Ct. J., was conditional upon the accused's pleading guilty to the charge for which the limitation period had expired.

CHAPTER TWO

Recommendations and Commentary

Our analysis of the practical and theoretical problems associated with the process of plea negotiation, and our commitment to the fundamental principles alluded to in the course of that analysis, have led us to a number of conclusions concerning the manner in which plea negotiation ought to be regulated. In our view, the principles of fairness, clarity and accountability demand, by and large, that the plea negotiation process be given a statutory framework. As we have suggested in previous Reports, we consider the primary vehicle for promoting the goals of certainty, uniformity and equality (all of which flow from the above-stated principles) to be that of legislation.[247] Given the considerable extent to which the informality of plea negotiation has contributed to its unsavory reputation, we believe the imposition of some legislative controls to be particularly appropriate.

This is not to say, however, that legislation constitutes the entire solution. Inevitably, the success of any legislative scheme will depend on the manner in which it is put into practice.[248] As we have acknowledged, moreover, not all of our recommendations are suitable for embodiment in federal statutory provisions. Some must find expression in the development and promulgation, by the appropriate authorities, of uniform guidelines. Although we have not attempted to devise an exhaustive and comprehensive set of ethical and professional rules to govern the conduct of prosecutors, defence counsel and judges in the area of plea negotiation, we have formulated an opinion on what we consider to be the essentials.

As regards the specific content of the rules we have in mind, for both guidelines and legislation, we recommend as follows:

I. Definitions

The following recommendations are intended for implementation in both legislation and guidelines.

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247. See, *e.g.*, LRCC, *Questioning Suspects*, *supra*, note 2, at 9; LRCC, *Obtaining Forensic Evidence: Investigative Procedures in Respect of the Person*, *supra*, note 2, at 6, 8.

248. As to the success, in practice, of American legislation designed to improve procedures for taking guilty pleas (negotiated and otherwise), see generally W.F. McDonald, "Judicial supervision of the guilty plea process: a study of six jurisdictions" (1987), 70 *Judicature* 203.

RECOMMENDATION

1. The term "plea agreement"[249] should be defined as meaning any agreement by the accused to plead guilty in return for the prosecutor's agreeing to take or refrain from taking a particular course of action.

Commentary

This is the recommended definition set out in the Introduction to this paper. It explicitly contemplates agreements of a two-sided nature, involving the mutual exchange of consideration.

The definition has been drafted broadly (the consideration flowing from the prosecution has deliberately not been specified) in order to encompass the very wide range of plea agreements that may be concluded. In practice, as various writers have suggested, plea agreements may involve promises relating to the number and/or gravity of charges to be faced by the accused;[250] the nature and/or severity of sentence that a prosecutor may recommend (or agree not to oppose);[251] or the way in which the prosecutor's influence is exercised in a number of other areas that affect the accused.[252]

As mentioned in the Introduction, the definition excludes agreements in which the consideration flowing from the accused is something other than a guilty plea (evidence or information, for example).

RECOMMENDATION

2. The term "plea discussion"[253] should be defined as meaning a discussion directed toward the conclusion of a plea agreement.

This recommended definition is self-explanatory.

RECOMMENDATION

3. (1) The term "improper inducement" should be defined as meaning any inducement that necessarily renders suspect the genuineness or factual accuracy of

249. As indicated *supra* in note 8, this is the expression used *inter alia* in the ALI *Model Code of Pre-Arraignment Procedure*, *supra*, note 7, in the ABA *Standards for Criminal Justice*, *supra*, note 7, and in the United States *Federal Rules of Criminal Procedure*.

250. See, *e.g.*, Ferguson and Roberts, *supra*, note 17, at 513; Cohen, *supra*, note 28, at 179.

251. *Ibid.*

252. See, *e.g.*, Ferguson and Roberts, *supra*, note 17, at 513-14; Cohen, *supra*, note 28, at 179-80.

253. As stated *supra* in note 7, this is the expression used *inter alia* in the ALI *Model Code of Pre-Arraignment Procedure*, *supra*, note 7, in the ABA *Standards for Criminal Justice*, *supra*, note 7, and in the United States *Federal Rules of Criminal Procedure*.

the accused's plea, and as including the following conduct when it is engaged in for the purpose of encouraging the accused to plead guilty:

(a) the laying of any charge not believed to be supported by provable facts;[254]

(b) the laying of any charge that is not usually laid with respect to an act or omission of the type attributed to the accused;[255]

(c) a threat to lay any charge of the type described in paragraphs (a) or (b) above;[256]

(d) a threat that any not guilty plea entered by the accused will result, upon the accused's conviction, in the prosecutor's asking for a sentence more severe than the sentence that is usually imposed upon a similar accused person who has been convicted, following a not guilty plea, of the offence with which the accused is charged;[257]

(e) any offer, threat or promise the fulfillment of which is not a function of the maker's office;[258]

(f) any material misrepresentation; and

(g) any attempt to persuade the accused to plead guilty notwithstanding his or her continued denial of guilt.

(2) The term "improper inducement" should be defined so as to make it clear that encouraging the accused to enter into a plea agreement, as defined in Recommendation 1, is not in itself an improper inducement.[259]

Commentary

Coupled with Recommendations 5, 19(a) and 20(a) below, this recommendation is designed to place limits on the type of inducement that may be offered to an accused person in the context of plea discussions (and elsewhere). It accords with the view,

254. This provision is adapted from the ALI *Model Code of Pre-Arraignment Procedure*, *supra*, note 7, s. 350.3(3)(a), at 244.

255. This provision is adapted from the ALI *Model Code of Pre-Arraignment Procedure*, *supra*, note 7, s. 350.3(3)(b), at 245.

256. This provision is adapted from the ALI *Model Code of Pre-Arraignment Procedure*, *supra*, note 7, s. 350.3(3)(a) and (b), at 244-45.

257. This provision is adapted from the ALI *Model Code of Pre-Arraignment Procedure*, *supra*, note 7, s. 350.3(3)(c), at 245. It would cover, among other things, attempts to induce a guilty plea by selective and unfair use of the *Criminal Code*'s provisions relating to the giving of notice to the accused of the prosecutor's intention to seek "greater punishment ... by reason of previous convictions ...." See *Criminal Code*, s. 665(1).

258. See the definition of plea negotiation provided by Cohen, *supra*, note 28, at 179.

259. As to the possible relationship of improper inducements to professional misconduct, see, *e.g.*, Law Society of Upper Canada, *Professional Conduct Handbook* (Toronto: Law Society of Upper Canada, 1978 (as amended)), Rule 8 and commentary.

expressed by the Criminal Law and Penal Methods Reform Committee of South Australia,[260] that while plea discussions are not inherently objectionable, certain negotiating practices are. Paragraphs (a) to (d) of part (1) describe techniques of intimidation. Paragraph (e) is designed to deal with practices characterized in American jurisprudence as "having no proper relationship to the prosecutor's business ...,"[261] and with practices that are likewise inimical to the proper functions of police officers. It would cover intimidating tactics such as violence or the threat of violence, and would extend to other improper practices such as bribery. Paragraph (f) is designed to deal with practices that obfuscate the "actual value ..."[262] of apparent prosecutorial concessions. One such practice would be telling an accused who is likely to receive a light sentence, if convicted, that he or she is likely to receive a very severe one. Another would be making "unfulfillable promises ..."[263] (such as a promise that the accused will receive parole after serving a much smaller portion of his or her prison sentence than the law allows). Paragraph (g), which complements Recommendation 9, refers to inducements that are specifically calculated to vitiate the genuineness of guilty pleas.

This recommendation is not intended to be exhaustive on the question of what may constitute an improper inducement. Its purpose is to help ensure the genuineness and factual accuracy of guilty pleas, particularly those entered as a result of plea discussions.

II. Conduct of Plea Discussions, etc.

A. Recommendations to be Implemented in Legislation

RECOMMENDATION

4. (1) The prosecutor and the accused, or counsel for the accused on his or her behalf, should be permitted to have plea discussions.[264]

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260. See Criminal Law and Penal Methods Reform Committee of South Australia, *Third Report: Court Procedure and Evidence* (Adelaide: Criminal Law and Penal Methods Reform Committee of South Australia, 1975) at 119.

261. *Brady* v. *United States*, *supra*, note 122, at 755, quoting from *Shelton* v. *United States*, *supra*, note 122, at 572, n. 2.

262. *Ibid.*

263. *Ibid.*

264. Part (1) is modelled loosely after Rule 11(e)(1) of the United States *Federal Rules of Criminal Procedure*, s. 350.3(1) of the ALI *Model Code of Pre-Arraignment Procedure* (*supra*, note 7, at 244) and standard 14-3.1(a) of the ABA *Standards for Criminal Justice*, *supra*, note 7.

(2) No judicial officer before whom proceedings in respect of the accused are or will be held should take part in plea discussions.[265]

(3) Notwithstanding part (2), it should be permissible for the Chief Justice, or a judge whom he or she has designated, to initiate and preside over plea discussions between the prosecutor and the defence, provided it is emphasized that the accused will not be appearing before that judge and is not obliged to conclude any plea agreement.

[(4) A judge may, in general terms, inform the prosecution and defence as to the potential benefit of plea discussions, and may provide them with an opportunity to have such discussions.[266]]

Commentary

This recommendation acknowledges the general acceptability of plea discussion between accused persons (or their counsel) and prosecutors.[267] Part (1) affirms the basic proposition that there is nothing inherently wrong with the practice of plea discussion by such persons when it is conducted properly. Part (2) makes it clear, however, that participation in the process of negotiation (*e.g.*, by offering to impose a particular sentence in exchange for a guilty plea, or by mediating plea discussions between the defence and the prosecutor) should not be permitted in the case of a "judicial officer before whom proceedings in respect of the accused are or will be held ...." We have used the term "judicial officer" in this part to refer to a judge or justice.[268]

Part (3) recognizes that the dangers of judicial participation are considerably lessened when the judge involved is not one "before whom proceedings in respect of the accused are or will be held ...." Provided that the accused's freedom of choice is preserved and that he or she is not made to feel "pressured" in any way, we believe the experience and objectivity of a senior trial judge can be useful in keeping plea discussions on a realistic plane, and in bringing about plea agreements that are potentially acceptable. As the recommendation indicates, we consider the most appropriate judge for this purpose to be the Chief Justice or a judge whom he or she has specifically designated. We remain flexible as regards the forum in which judicial initiation or mediation of plea discussions ought to take place; our recommendation

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265. Part (2) is modelled loosely after Rule 11(e)(1) of the United States *Federal Rules of Criminal Procedure*, s. 350.3(1) of the ALI *Model Code of Pre-Arraignment Procedure* (*supra*, note 7, at 244) and Recommendation 13.10 of the Canadian Sentencing Commission's report (*supra*, note 29, at 425). The wording is also adapted, in part, from s. 625.1(1) of the *Criminal Code*. See New South Wales Law Reform Commission, *supra*, note 12, tentative proposal 4 at 494.

266. Compare standard 14-3.3(e) of the ABA *Standards for Criminal Justice*, *supra*, note 7.

267. For a summary of the American position in this regard, see Verdun-Jones and Cousineau, *supra*, note 16, at 231-32.

268. See our similar definition of the term in *Disclosure by the Prosecution*, *supra*, note 14, at 18.

does not, for example, confine such activity to pre-trial conferences (although it appears to us that such conferences might be conducive to this sort of activity in many cases).

Part (4), which appears in square brackets, represents a minority view. It would permit a judge, at any stage of the proceedings, to facilitate the fair and efficient resolution of criminal cases by encouraging plea discussions, but without becoming involved in them. The majority has refrained from endorsing this part of the recommendation (which could be invoked by the trial judge even after plea discussions initiated and mediated under part (3) have failed) owing to its concern about the interpretation (even if erroneous) that the accused and the public might otherwise place upon some judicial efforts to encourage plea discussions, and its desire to ensure that our scheme is fully consistent with the presumption of innocence. As Kent D.C.J. remarked (in another context) in the case of *R.* v. *Gagnon*,[269] "a chief concern raised in the cases is that a judge should not place himself in a position where he has even indirectly encouraged a plea of guilty."[270] Moreover, "the court must remain mindful of the need to preserve both the fact and the appearance that both the prosecution and the defence start on an equal footing."[271] These points were brought home with particular force in the non-jury case of *R.* v. *Roy*.[272] There it appeared that the Trial Judge, during the prosecution's case, had (as the Ontario Court of Appeal put it) "initiated discussions respecting a possible plea of guilty to a lesser offence by the accused."[273] In allowing the accused's appeal from his conviction (the accused had maintained his innocence), the Ontario Court of Appeal expressed the opinion that a trial judge who sits alone "cannot initiate such a discussion after entering upon the trial and hearing evidence and still preserve the appearance of impartiality and being of an open mind, which qualities are so essential to a fair trial and the meaning of the presumption of innocence."[274] Elaborating, it explained: "The fact that he initiates such a discussion and sends counsel to the accused with talk of pleas of guilty and terms of sentence could reasonably result in apprehension by the accused that the Judge presiding at his trial had reached some conclusions about the case."[275] Noting that "[i]t does not hurt to repeat again that justice must appear to be done,"[276] the Court

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269. (1985), 48 C.R. (3d) 93 (Ont. Dist. Ct.).

270. *Ibid.*, at 95. Here Kent D.C.J. was referring to cases "which all deal with judicial expressions of opinion as to sentence made before plea." He noted (also at 95) that "none of those cases deals specifically with the situation before me ...."

271. *Supra*, note 269, *per* Kent D.C.J. at 96.

272. (1976), 32 C.C.C. (2d) 97 (Ont. C.A.).

273. *Ibid.*, *per* Brooke J.A. at 97-98.

274. *Ibid.*, at 99.

275. *Ibid.*

276. *Ibid.*

concluded that "[t]his is not limited simply to what is seen from the floor of the court-room or by the public ...,"[277] and that "[i]t is also vital that justice must appear to be done, to the accused man in particular."[278]

The minority does not disagree with the essential principles on which the *Roy* decision (made in the absence of legislative guidance) was based. It takes issue, however, with the majority's view as to how those principles must be expressed. Part (4) is premised on the minority's conviction that judicial encouragement of plea discussions need not amount to the application of pressure on accused persons to plead guilty, and need not diminish either the actuality or the appearance of fairness. In the minority's opinion, a great deal turns on the manner in which the encouragement is offered. Informing the parties generally as to the potential benefit of plea discussions, and giving them an opportunity to have such discussions, is neither coercive nor destructive of the presumption of innocence.

Part (4) recognizes that plea agreements (as we have defined them) are two-sided in nature. Because plea discussions may result in the reduction or withdrawal of charges against the accused, the minority would point out that encouraging the prosecutor to engage in plea discussions may be beneficial to accused persons whose willingness to plead guilty to certain charges has never been in doubt.[279]

RECOMMENDATION

5. A prosecutor, police officer or defence counsel should not offer any improper inducement to an accused.[280]

Commentary

This recommendation is self-explanatory. Its purpose (when combined with Recommendations 3, 19(a) and 20(a)) is to help ensure the genuineness and factual accuracy of guilty pleas — particularly those produced by plea discussions.

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277. *Ibid.*

278. *Ibid.*

279. A case in point is the English decision in *R. v. Winterflood*, *supra*, note 31. There the accused, who was charged *inter alia* with robbery, "was always ready to admit that he had dishonestly handled certain parts of the jewellery obtained in the robbery ..." (*per* Roskill L.J. at 292). During the trial, the Trial Judge ascertained from the accused through counsel that he would plead guilty to "dishonest handling." (The Court said, *per* Roskill L.J. at 292: "When the trial had been proceeding for some four days apparently the learned judge sent for counsel and inquired in his room whether if a count of dishonest handling were added to the indictment the appellant would plead guilty. Counsel appearing for the appellant took instructions and came back with an affirmative answer.") He then asked the prosecutor if he would apply to have that count added to the indictment. Upon the prosecutor's agreeing, "[t]he judge gave leave for that count to be added whereupon the new count was put to the appellant and he pleaded guilty to that count, the trial on the robbery count and the other counts not being proceeded with" (*per* Roskill L.J. at 292). Although the Court of Appeal (*per* Roskill L.J. at 293) later expressed the view that "there was no reason why this should not all have been done in open court ..." (albeit in the jury's absence), it did so "[w]ithout in any way presuming to criticise what happened here ..." and did not otherwise comment on the judge's actions.

280. That part of this recommendation relating to improper inducements by the prosecutor is derived from s. 350.3(3) of the ALI *Model Code of Pre-Arraignment Procedure*, *supra*, note 7, at 244.

RECOMMENDATION

6. No judicial officer before whom proceedings in respect of the accused are or will be held should offer any inducement for the purpose of encouraging an accused to plead guilty to any offence.[281]

Commentary

The purpose of this recommendation, like that of Recommendation 5 above, is to help ensure the genuineness and factual accuracy of guilty pleas. In this recommendation, we do not refer to "improper" inducements since, in our view, all inducements made by the court (once again, the term "judicial officer" is used to refer to a judge or justice[282]) for the purpose of encouraging the accused to plead guilty would be improper. It is not suggested, however, that the conduct contemplated by part (4) of Recommendation 4 above would constitute the offering of an "inducement for the purpose of encouraging an accused to plead guilty to any offence."

B. Recommendations to be Implemented in Guidelines

RECOMMENDATION

7. (1) A prosecutor should not, when the accused has retained counsel, have plea discussions directly with the accused in the absence of the accused's counsel.[283]

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

(a) representation by counsel may be advantageous to the accused; and

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

and should not thereafter have plea discussions directly with the accused unless the accused has informed the prosecutor unequivocally that he or she will not be retaining counsel.

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281. Compare standard 14-3.3(f) of the ABA *Standards for Criminal Justice*, *supra*, note 7.

282. See note 268, *supra*, and accompanying text.

283. This recommendation is loosely based upon standard 14-3.1(a) of the ABA *Standards for Criminal Justice*, *supra*, note 7, which requires that plea discussions be between counsel unless there has been a waiver of counsel by the defendant. See also Rule 11(e)(1) of the United States *Federal Rules of Criminal Procedure*. See s. 350.3(1) of the ALI *Model Code of Pre-Arraignment Procedure* (*supra*, note 7, at 244), which does not mention waiver.

Commentary

This recommendation recognizes the importance of proper representation in the plea discussion process, and the clear vulnerability of accused persons who attempt to negotiate with prosecutors on their own.[284] Counsel's superior ability to evaluate the strength of evidence, the appropriateness of charges, the likely sentence that might result upon conviction, and so on,[285] can provide valuable protection for the accused, and help to make plea discussions meaningful.

RECOMMENDATION

8. (1) Prosecutors should afford accused persons in similar circumstances the same opportunities for engaging[286] in plea discussions.

(2) A prosecutor should endeavour to ensure, in the course of plea discussions, that accused persons in similar circumstances receive equal treatment.[287]

Commentary

This recommendation is based on the most basic of principles: that of fairness.[288] It is aimed at enhancing equality in the area of plea discussions. We have no illusions as to the practical difficulties inherent in its implementation and enforcement; for this reason, we consider it more suited for embodiment in guidelines than in legislation.

The recommendation would require not only that prosecutors endeavour to treat accused persons with whom they deal in a manner consistent with the way they have treated other accused persons in similar circumstances, but that prosecutors achieve consistency amongst themselves. While those prosecutors who do not currently engage in plea discussions might object to guidelines that require them to begin doing so in appropriate cases, we do not see how equality of treatment could ever be achieved in this or any area of the law if absolute deference were to be given to individual policies and personal preferences.

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284. See Grosman, *supra*, note 68, at 43.

285. For discussion of the functions and value of defence counsel in plea discussions, see the Commentary to s. 350.3 of the ALI *Model Code of Pre-Arraignment Procedure*, *supra*, note 7, at 612-13. But see A.W. Alschuler, "The Defense Attorney's Role in Plea Bargaining" (1974-75), 84 *Yale L.J.* 1179.

286. Normally, as indicated by Recommendation 7 above, the accused would be engaging in plea discussions through counsel.

287. This recommendation is modelled after s. 350.3(2) of the ALI *Model Code of Pre-Arraignment Procedure* (*supra*, note 7, at 244) and standard 14-3.1(c) of the ABA *Standards for Criminal Justice*, *supra*, note 7.

288. For discussion of this principle, see Bayles, *supra*, note 38, at 54-55; LRCC, *supra*, note 35, at 24.

While this recommendation is designed to govern the conduct of prosecutors, we realize that its implementation could conceivably have more far-reaching effect. Relying on section 15(1) of the *Canadian Charter of Rights and Freedoms*,[289] for example, an accused might argue that Recommendations 4(3) and 8(1), when combined, entitle him or her to equal opportunity for engaging in *judicially mediated* plea discussions. Although (as the permissive wording of Recommendation 4(3) suggests) we do not regard judicial mediation as an essential protection for accused persons, we are prepared (as we must be in all matters involving the extent of those rights guaranteed by the *Charter*) to leave the last word on the subject of equality to the courts.

RECOMMENDATION

9. Counsel for an accused person should not conclude on the accused's behalf any plea agreement that requires the accused to plead guilty to an offence of which the accused maintains he or she is innocent.[290]

Commentary

This recommendation, which complements Recommendation 3(1)(g), is designed to help guard against any potential that the plea negotiation process may have for interfering with professional duties owed by counsel to their clients, and to help ensure the factual accuracy of guilty pleas arising out of plea agreements. Notwithstanding the perceived benefits of a guilty plea in a particular situation, counsel should "emphasise that the accused must not plead guilty unless he has committed the acts constituting the offence charged,"[291] and should make clear the necessity for the accused's having had the requisite mental state.[292] While there may be accused persons who are willing to agree to plead guilty despite continued assurances that they are innocent (just as there may be accused persons who are willing to give evidence that contradicts what they have described to counsel as the truth), we do not believe that assisting such persons in concluding a plea agreement in these circumstances is part of counsel's function or is in any way helpful to the interests served by the judicial process.

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289. *Supra*, note 11. Section 15(1) provides that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

290. This recommendation is derived from a similar provision in the Canadian Bar Association (CBA) *Code of Professional Conduct*. See Canadian Bar Association, *Code of Professional Conduct* (Ottawa: Canadian Bar Association, 1988), Chapter IX, commentary 12, at 38.

291. *R.* v. *Turner*, *supra*, note 31, *per* Parker L.C.J. at 285.

292. See Martin, *supra*, note 123, at 387, n. 16 where *Turner* is quoted and elaborated upon.

RECOMMENDATION

10. A prosecutor should not suggest, conclude or participate in any plea agreement that

(a) requires the accused to plead guilty to an offence that is not disclosed by the evidence;[293]

(b) requires the accused to plead guilty to charges that inadequately reflect the gravity of the accused's provable conduct,[294] unless, in exceptional circumstances, they are justifiable in terms of the benefits that will accrue to the administration of justice, the protection of society, or the protection of the accused;[295]

(c) requires the prosecutor to withhold or distort evidence;[296] or

(d) contemplates a disposition that departs significantly from that which, in the absence of a plea agreement, would have resulted upon the accused's pleading guilty to the same offence,[297] unless, in exceptional circumstances, it is justifiable in terms of the benefits that will accrue to the administration of justice, the protection of society, or the protection of the accused.[298]

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293. This part of the recommendation is adapted from prosecutorial guidelines issued to Ontario Crown Attorneys (see the memorandum from former Ontario Attorney General Dalton Bales, quoted by Verdun-Jones and Cousineau, *supra*, note 16, at 239-40), and from recommendation 20(d) contained in the Ontario Law Reform Commission's *Report on Administration of Ontario Courts*, Part II (Toronto: Ministry of the Attorney General, 1973) at 127.

294. This part of the recommendation is based upon a similar requirement, governing judicial (rather than prosecutorial) acceptance of plea agreements, contained in the sentencing guidelines recently submitted to the U.S. Congress by the United States Sentencing Commission: see United States Sentencing Commission, *Sentencing Guidelines and Policy Statements* (Washington: U.S. Government Printing Office, 1987) s. 6B1.2.(a). Compare ALI *Model Code of Pre-Arraignment Procedure*, *supra*, note 7, s. 350.5(2)(c).

295. Compare the memorandum from former Ontario Attorney General Dalton Bales, quoted by Verdun-Jones and Cousineau, *supra*, note 16, at 239-40.

296. This part of the recommendation is loosely based upon the plea negotiation guidelines (recommendation 20(h)) contained in the Ontario Law Reform Commission's *Report on Administration of Courts* (*supra*, note 293, Part II at 128), and upon a similar requirement contained in the United States Sentencing Commission's recent sentencing guidelines, *supra*, note 294, s. 6B1.4.(a)(2).

297. See the United States Sentencing Commission's guidelines, *supra*, note 294, s. 6B1.2.(b) and (c) and 18 U.S.C.S. 3553(b). For views as to the circumstances in which effect may be given to plea agreements that permit departures from the normal sentencing guidelines, see A.W. Alschuler, "Background Note on Plea Bargaining for Seminar on Reform of the Law of Sentencing, Conference on Reform of the Criminal Law, July 28, 1987" (unpublished), at 5-6; *Dissenting View of Commissioner Paul H. Robinson on the Promulgation of Sentencing Guidelines by the United States Sentencing Commission* (Washington: U.S. Government Printing Office, 1987), at 20.

298. Compare the memorandum from former Ontario Attorney General Dalton Bales, quoted by Verdun-Jones and Cousineau, *supra*, note 16, at 239-40.

Commentary

One of the purposes of this recommendation is to help ensure, in general, that negotiated guilty pleas are reasonably accurate from a factual standpoint and, in particular, to discourage the practice[299] of reducing charges in an illogical and/or improper fashion.

Paragraph (a) is aimed at discouraging artificial arrangements in which the accused agrees to plead guilty to a less serious offence that the prosecutor knows the accused did not actually commit. Paragraph (b), while acknowledging that the reduction of charges may have a number of legitimate justifications (*e.g.*: sparing a victim from the trauma of testifying; alleviating a burden that threatens to undermine the accused's rehabilitation; minimizing the danger that imprisonment might pose to certain offenders[300]), is designed to curb *unduly lenient* charge reductions. Although we appreciate that the standard we are suggesting lacks absolute precision,[301] we believe that a certain amount of flexibility is called for here; the prosecutorial process (as the practice of plea discussion recognizes) is not, after all, an exact science. At the same time, however (as we have previously stated), we believe in prosecutorial accountability. It is for this reason that paragraph (c) proscribes the withholding or "tailoring" of evidence in order to support (and render immune from scrutiny) reduced charges.

Paragraph (d) is premised on the principles of fairness and efficiency. In discouraging significant departures from general sentencing rules in cases of plea discussion, it promotes fairness by enhancing equality. At the same time, it upholds the principle of efficiency by restricting the potential that plea agreements may have for interfering with sentence accuracy. The wording of our recommendation nevertheless allows, once again, for the fact that the sentencing process is not, by nature, an exercise in absolute mechanical precision, and that agreements contemplating even significant departures from normal sentencing rules may be justifiable in exceptional circumstances (see the commentary to paragraph (b), above). In generally proscribing agreements that involve significant departures from dispositions that would otherwise have followed *guilty pleas*, moreover, it takes into account the effect that guilty pleas might ordinarily have on sentence severity if they indicate remorse, save public expense, or spare victims from the ordeal of becoming witnesses.[302]

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299. See Newman, *supra*, note 127, at 100-02.

300. Although many would view "the protection of society ..." as including "the protection of the accused ...," we have listed these justifications separately for the sake of clarity.

301. See Alschuler, *supra*, note 297, at 6-7.

302. See *supra*, notes 148-50 and accompanying text.

RECOMMENDATION

11. (1) A prosecutor should, unless the circumstances make it impracticable to do so, solicit and weigh carefully the views of any victims before concluding a plea agreement.

(2) A prosecutor who concludes a plea agreement should endeavour to ensure that victims are told the substance of, and reasons for, that agreement, unless compelling reasons, such as a likelihood of serious harm to the accused or to another person, require otherwise.

Commentary

Part (1) of this recommendation, designed as a general rule,[303] indicates our concurrence with the basic philosophy that informed similar (but not identical) proposals made by the Canadian Sentencing Commission.[304] Although we are not, in this document, attempting to catalogue the precise criteria upon which prosecutorial decisions relating to plea discussions should be made, we believe that the views of the victim constitute an important factor for consideration and should be mentioned in any guidelines that are designed to govern such decisions. In our opinion, obtaining the position of victims is important not only to ensure that their particular interests are protected,[305] but to maintain the confidence of the general public in our system of criminal justice. As the Canadian Sentencing Commission has pointed out, there is evidence that victims tend to feel shut out from that system. We have been informed of recent research, moreover, indicating that this is a particular concern in the area of plea discussions.[306] In order, therefore, to advance what we regard as a fundamental principle — that of significant participation[307] in the criminal process — we have made the modest recommendation contained in part (1) above.

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303. The prosecutor would not have to fulfill the duty stated in this recommendation where "the circumstances make it impracticable to do so ...." Compliance would obviously not be necessary, for example, where the victim cannot be found or has died.

304. See Canadian Sentencing Commission, *supra*, note 29, recommendations 13.1 and 13.2 at 417. See also 416, where it is noted that several American states have made provision for obtaining the position of victims in plea discussions.

305. See New South Wales Law Reform Commission, *supra*, note 12, at 489-90 and the authorities cited therein. This goal may be regarded as particularly important in light of the *Criminal Code*'s recently enacted provisions relating to restitution orders (new ss. 725 to 727.8 (projected)). See K.W. MacKay, "Plea Bargaining and New 'Victim's Legislation' in Canada," an unpublished paper presented at the conference on "Reform of Sentencing, Parole and Early Release" held by The Society for the Reform of the Criminal Law, Ottawa, August 1-4, 1988.

306. See the study referred to in note 26, *supra*, at 159, 193.

307. For statement and a brief discussion of this principle, see Bayles, *supra*, note 38, at 54. See also LRCC, *supra*, note 35, at 27.

Part (2) of Recommendation 11 reflects our agreement with the general philosophy underpinning similar (but, again, not identical) recommendations by the Canadian Federal-Provincial Task Force on Justice for Victims of Crime[308] and the Canadian Sentencing Commission.[309] Its purpose, once more (beyond that of according simple consideration to victims of crime), is to maintain public confidence in our justice system. As with that in part (1), however, the rule embodied in part (2) is not unqualified. In recognition of the fact (discussed above[310]) that public disclosure of a plea agreement's substance or basis (or of its very existence) may run contrary to certain overriding interests in some circumstances, we have created a limited exception to our general rule that is similar to that recommended by the Canadian Federal-Provincial Task Force on Justice for Victims of Crime.[311]

III. Judicial Supervision

The following recommendations are intended for implementation in legislation.

RECOMMENDATION

12. (1) A prosecutor and an accused who have concluded a plea agreement should, before the accused's plea is entered, disclose to the court

(a) the substance of, and reasons for, that agreement; and

(b) whether any previous plea agreement has been disclosed to another judge in connection with the same matter and, if so, the substance of that agreement.

(2) The disclosure and justification contemplated by part (1) of this recommendation should be made in open court unless compelling reasons, such as a likelihood of serious harm to the accused or to another person, require otherwise.[312]

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308. Canadian Federal-Provincial Task Force on Justice for Victims of Crime, *Report* (Ottawa: Supply and Services, 1983) at 128, cited by the Canadian Sentencing Commission, *supra*, note 29, at 416.

309. *Supra*, note 29, recommendation 13.1 at 417. See also 416, where it is noted that several American states require victims to be informed as to plea agreements. And see New South Wales Law Reform Commission, *supra*, note 12, at 490, 495.

310. See notes 63 to 67 and accompanying text.

311. *Supra*, note 308, at 128, referred to in Canadian Sentencing Commission, *supra*, note 29, at 416.

312. This recommendation, with the exception of para. (1)(b), is based on a combination of the general type of disclosure provision embodied in the ALI *Model Code of Pre-Arraignment Procedure* (*supra*, note 7, s. 350.5(1)), ABA *Standards for Criminal Justice*, *supra*, note 7 (standard 14-3.3(a)), United States *Federal Rules of Criminal Procedure* (Rule 11(e)(2)) and the former CBA *Code of Professional Conduct* (see Canadian Bar Association, *Code of Professional Conduct* (Ottawa: Canadian Bar Association, 1974), Chapter VIII, commentary 10, at 30-31), and the justification recommendation made by the Canadian Sentencing Commission (*supra*, note 29, recommendation 13.9, at 422-23). That part of the recommendation allowing for matters to be dealt with, in exceptional circumstances, in the absence of the public (or in the absence of the accused and the public) has its origins in Rule 11(e)(2) of the United States *Federal Rules of Criminal Procedure*, and recommendation 13.9 of the Canadian

Commentary

This recommendation is designed, in part, to provide the judge with a basis for deciding whether the accused should receive the disposition a plea agreement contemplates, and to help ensure the general visibility of the plea discussion process. Visibility, as we have suggested in Chapter One, is necessary in order to maintain public confidence in the criminal justice system, and to ensure accountability for prosecutorial decisions. Requiring, as a rule, that plea agreements be disclosed and justified in open court should promote equality of treatment by prosecutors, and should discourage unfair negotiating practices, excessive charge reductions, and so on. At the same time, the exception to our general requirement for openness acknowledges that special circumstances, such as the need to protect the accused or another person from serious harm, may, on occasion, constitute an overriding consideration. We do not, however, see this exception as dispensing with the need for the disclosure and justification to be put on the record[313] (although it may be that sealing of the record would be appropriate in some circumstances).

Paragraph (1)(b) has a special purpose beyond that of providing a basis for judicial decision-making and ensuring visibility. It is designed to discourage what is commonly referred to as "judge shopping."[314] Given what is doubtless the widely-held judicial belief (expressed recently in the case of *R.* v. *Commisso*[315]) that "the parties should not be permitted to advance the same plea agreement before another trial judge ...,"[316] we think it is reasonable to expect that judges will require compelling reasons before accepting plea agreements similar to ones that have previously been rejected (see Recommendation 15).

Sentencing Commission's report; see also the memorandum from former Ontario Attorney General Dalton Bales, quoted by Verdun-Jones and Cousineau, *supra*, note 16, at 239-40.

313. See the memorandum from former Ontario Attorney General Dalton Bales, quoted by Verdun-Jones and Cousineau, *supra*, note 16, at 239-40.

314. This expression was used recently by Draper Prov. Ct. J. in *R.* v. *Rubenstein*, *supra*, note 70, as quoted by Zuber J.A. at 94.

315. *Supra*, note 16.

316. *Ibid.*, at 20 of the original judgment. In this case, the accused had sought leave to withdraw guilty pleas entered in the mistaken belief (honestly shared and fostered by the prosecutor) that they could automatically be withdrawn, as a matter of practice, if the court was not prepared to accept the joint submission to which the prosecution and defence had agreed. In the course of granting the accused leave to withdraw the guilty pleas, and directing that not guilty pleas be substituted therefor, His Honour said (at 20 of the original judgment): "Although I have directed that pleas of not guilty be substituted, there is nothing to prevent the defendant from later pleading guilty if so advised. Should this occur, the parties should not be permitted to advance the same plea agreement before another trial judge as this would offend the principle announced in *R.* v. *Rubenstein*."

RECOMMENDATION

13. Upon being informed that the prosecutor and the accused have concluded a plea agreement, the judge should be able, where he or she considers it necessary to do so, to ascertain by questioning whether the accused understands the substance and consequences of that plea agreement.

Commentary

This recommendation is similar, but not identical, to recommendation 13.3 in the Canadian Sentencing Commission's report.[317] Its purpose is to help ensure that any guilty plea entered by an accused person pursuant to a plea agreement represents an informed decision on his or her part. (Understanding "the substance and consequences ..." of the plea agreement would simply involve an appreciation of what is being agreed to.) Unlike the Sentencing Commission's recommendation, which urges sentencing judges to investigate accused persons' understanding of plea agreements and their ramifications, and which would empower sentencing judges to strike the sentences as well as the pleas of accused persons found to lack such understanding, this recommendation encourages judges to inquire before any guilty plea has been accepted or even entered (*i.e.*, at the time the plea agreement is disclosed). In so doing, it attempts to reduce the possibility (alluded to by the Sentencing Commission[318]) that accused persons who are unhappy with the sentences they receive following the entry of guilty pleas will claim falsely that they did not comprehend the plea agreements out of which such pleas arose.

RECOMMENDATION

14. No plea agreement or submission should be binding on a judge.[319]

Commentary

This recommendation is self-explanatory. For the time being, we have omitted any requirement that the trial judge inform unrepresented accused persons of the substance of this recommendation; however, we shall be returning to the subject of the unrepresented accused in our forthcoming Working Paper on *The Judge and Conduct of Trial*.

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317. *Supra*, note 29, at 417.

318. *Ibid.*

319. Recommendation 13.11 of the Canadian Sentencing Commission's Report, *supra*, note 29, at 425 states that a provision similar to this should be explicitly set out in the *Criminal Code*.

RECOMMENDATION

15. In any case in which the judge, having been informed of the existence and substance of a plea agreement and of the reasons for that agreement, determines that an accused should not be judicially disposed of in the manner contemplated by the plea agreement, the judge should inform the accused of this fact.[320]

Commentary

This recommendation proceeds from the premise (explicit in Recommendation 14) that the judge cannot be bound by a plea agreement, and from the understanding (implicit in Recommendation 10(d)) that no effect should be given to "any plea agreement that ... contemplates a disposition that departs significantly from that which, in the absence of a plea agreement, would have resulted upon the accused's pleading guilty to the same offence, unless, in exceptional circumstances, it is justifiable in terms of the benefits that will accrue to the administration of justice, the protection of society, or the protection of the accused ...." The purpose of this recommendation, therefore (as with Recommendation 13), is to ensure that any guilty plea entered pursuant to a plea agreement represents an informed decision by the accused.[321]

In devising this recommendation, we rejected the alternative (embodied in section 350.5(4) of the ALI *Model Code of Pre-Arraignment Procedure*) of requiring the court to explain why a plea agreement has not been accepted and to give the prosecution and defence the opportunity to present the court with a modified agreement. Such an alternative, it seems to us, would have the effect of making the judge a negotiating party.[322] Because Recommendation 15 would make the judge's decision to reject a plea

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320. The recommendation was modelled, loosely, on Rule 11(e)(4) of the United States *Federal Rules of Criminal Procedure* and standard 14-3.3(g) of the ABA *Standards for Criminal Justice*, *supra*, note 7. See the cases referred to in note 31, *supra*.

321. Compare *R.* v. *Rubenstein*, *supra*, note 70. There, an Ontario Provincial Court Judge had refused to allow the accused to withdraw guilty pleas to several charges when it became clear that His Honour was going to reject a joint submission on sentence. On the accused's appeal from his conviction, it was contended that withdrawal ought to have been permitted "since an accused in the position of an appellant offers the plea in the expectation that the joint submission will be followed," and because "the joint submission was the *quid pro quo* for the pleas of guilty ...." (*per* Zuber J.A. at 94). One of the Court's reasons for rejecting this argument, it appears, related to a fear of encouraging what the Trial Judge (Draper Prov. Ct. J., as quoted by Zuber J.A. at 94) had referred to as "[j]udge shopping ...." It was the Court's view (*per* Zuber J.A. at 94) that "[a]s Judge Draper observed, an accused who could thus withdraw his plea could simply keep doing so until he found a trial judge who would accept a joint submission." See Recommendation 12(1)(b), *supra*.

322. See *Rubenstein*, *supra*, note 70 (and discussed in note 321, *supra*). In that case, one of the Court's reasons for rejecting the accused's argument that he should have been allowed to withdraw his guilty pleas once the judge's intention to reject a joint sentence submission became clear appears to have related to a fear of allowing the judicial function to be compromised. "To permit an accused to withdraw his plea when the sentence does not suit him," reasoned the Court (*per* Zuber J.A. at 94-95), "puts the court in the unseemly position of bargaining with the accused."

agreement final, and would not permit the parties to present a modified agreement to the judge, a judge who informed the parties of his or her decision in accordance with this recommendation would not thereby "take part in plea discussions" in contravention of Recommendation 4(2). Since the plea agreement would already have been reached and would not be subject to modification, in other words, informing the accused of a decision to reject that agreement would not constitute "a discussion *directed toward the conclusion of a plea agreement*"[323] (Recommendation 2's definition of "plea discussion"). Nor would it constitute an "inducement for the purpose of encouraging an accused to plead guilty to any offence" in contravention of Recommendation 6 above; if anything, it would be more likely to have the opposite effect.

RECOMMENDATION

16. Before any guilty plea is accepted from an accused, the judge should be able, where he or she considers it necessary to do so, to ascertain by questioning whether any inducement to plead guilty, other than an inducement disclosed as part of a plea agreement, has been offered to the accused.[324]

Commentary

The purpose of this recommendation is to help ensure the genuineness and factual accuracy of guilty pleas. In allowing judges to require disclosure of *all* inducements (not just those articulated in the context of a plea agreement), implementation of this recommendation would assist them in ascertaining whether improper inducements have been offered (see Recommendations 3, 5 and 19(a)) and whether any judicial officer has offered an inducement to the accused to plead guilty (see Recommendations 6 and 19(b)).

RECOMMENDATION

17. In any case in which the prosecutor and the accused have concluded a plea agreement, the judge should be able, before any guilty plea is accepted from the accused, to make such inquiry as he or she considers necessary in order to be satisfied that a factual basis for the accused's guilty plea exists.[325]

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323. Emphasis added.

324. This recommendation is based loosely on s. 350.4(2) of the ALI *Model Code of Pre-Arraignment Procedure*, *supra*, note 7, at 248.

325. Compare United States *Federal Rules of Criminal Procedure*, Rule 11(f), and ALI *Model Code of Pre-Arraignment Procedure*, *supra*, note 7, s. 350.4(3) at 248-49.

Commentary

This recommendation is designed to ensure, to a reasonable degree, the "accuracy" of any guilty plea entered in accordance with the terms of a plea agreement. The recommendation envisions two lines of inquiry. First, the judge should be able to ascertain whether the behaviour admitted by the accused constitutes the offence to which he or she is pleading guilty.[326] As Stevenson J.A. said in delivering the Alberta Court of Appeal's judgment in *R.* v. *Corkum*:[327] "As a bare minimum the facts must justify the plea which has been given."[328] Second, the judge should be able to satisfy him- or herself that the facts admitted by the accused are at least potentially true.[329] The recommendation is not designed to make the trial judge determine the accused's guilt beyond a reasonable doubt,[330] since a requirement of this nature (as the Court in *R.* v. *Milina*[331] noted) would defeat the purpose of a guilty plea. It may be, of course, that a more stringent standard could be devised in order to decrease the theoretical risk that persons who are convicted after pleading guilty are not guilty in fact.[332] After a point, however, the imposition of a stricter test may become tantamount to abolition of the guilty plea option — a step we consider unnecessary, provided the genuine and informed nature of guilty pleas is ensured.[333]

In allowing the judge to make "such inquiry as he or she considers necessary ...," the recommendation recognizes that the need for an inquiry into the factual basis of an accused's guilty plea may vary from one case to another. An inquiry is more likely to be necessary, for example, where the accused is not represented by counsel. (The

326. See *McCarthy* v. *United States*, 394 U.S. 459 (1969).

327. (1984), 64 A.R. 354 (C.A.).

328. *Ibid.* at 355. See also *R.* v. *Forde*, [1923] 2 K.B. 400 (C.C.A.); *R.* v. *Gordon* (1947), 3 C.R. 26 (B.C.C.A.); *R.* v. *Voorwinde* (1975), 29 C.C.C. (2d) 413 (B.C.C.A.); *R.* v. *Grainger* (1978), 42 C.C.C. (2d) 119 (Ont. C.A.). In *Adgey* v. *The Queen*, *supra*, note 110, at 444-45, Laskin J. (as he then was), dissenting (Spence J. concurring), said:

> "The duty of the Court respecting an inquiry as to the 'legality' (if I may make such a compendious reference) of the plea of guilty must, it seems to me, be complemented by a duty of the Crown to adduce facts which, taken to be true, support the charge and conviction in that aspect of the matter. It would, in my view, be unsatisfactory to leave to the discretion of the Crown whether or not to adduce facts supportive of the charge and conviction. The trial judge could undoubtedly call for them, but the issue at that stage ought not to involve him in anything more than being satisfied that what is alleged, taking it to be true, completes the elements of a conviction on a plea of guilty; and this would be so even where the facts could have no bearing on sentence because, in the particular case, it is mandatory."

329. See *R.* v. *Laurie* (1978), 42 C.C.C. (2d) 311 (N.B.S.C.A.D.), a case (not a plea negotiation case) in which it was discovered after the accused pleaded guilty to an offence under s. 4(3) of the *Narcotic Control Act*, R.S.C. 1970, c. N-1 (now R.S.C. 1985, c. N-1), and after he was sentenced therefor, that the substance involved was actually saccharin.

330. See the annotation to s. 350.4(3) of the ALI *Model Code of Pre-Arraignment Procedure*, *supra*, note 7, at 250.

331. *Supra*, note 133, at 381.

332. See McDonald, *supra*, note 248, at 210 where the standard issue is discussed.

333. See, in this regard, the measures proposed in our forthcoming Working Paper on *Pleas and Verdicts*.

duties of judges dealing with unrepresented accused persons will be dealt with more fully in our forthcoming Working Paper on *The Judge and Conduct of Trial*.) It would not be necessary, however, (and would be redundant) in cases where a preliminary inquiry has been held under Part XVIII (formerly Part XV) of the *Criminal Code* and the accused has been ordered to stand trial on the charge in question.[334] In such cases, the existence of a factual basis for the accused's guilty plea will have been determined.

RECOMMENDATION

18. In determining whether to accept an accused's plea of guilty to any offence other than the offence charged, the judge should consider the substance of, and reasons for, any plea agreement concluded between the accused and the prosecutor.

Commentary

This recommendation is designed to ensure judicial supervision of plea agreements that involve the accused's pleading "not guilty of the offence charged but guilty of any other offence arising out of the same transaction ...."[335] It is premised, therefore, on the continued existence of what is now section 606(4) (formerly section 534(4)) of the *Criminal Code*. (In due course, we shall be reviewing the question as to whether a provision of this sort should be included in our forthcoming procedural code. We have been informed that some judges prefer not to use section 606(4); instead, they require that the prosecutor stay the proceedings on the original charge and proceed on a new charge.)

The recommendation proceeds from the premise that while judges should not normally have the power to interfere with the prosecutorial function by rejecting guilty pleas to charges they consider to be inadequate, an exception should exist in those cases (see *Criminal Code* section 606(4)) where acceptance of a guilty plea to an offence other than the one charged imposes on the judge the potentially distasteful duty to "find the accused or defendant not guilty of the offence charged ...."[336] Although it is not necessary (or even desirable), therefore, to ensure that the judge "consider the substance of, and reasons for, any plea agreement concluded between the accused and

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334. See ALI *Model Code of Pre-Arraignment Procedure*, *supra*, note 7, s. 350.4(3) at 248-49. Section 548(1) of the *Criminal Code*, dealing with procedure at a preliminary inquiry, provides in part:

> "**548**. (1) When all the evidence has been taken by the justice, he shall
>
> *(a)* if in his opinion there is sufficient evidence to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction, order the accused to stand trial, ..."

See *The United States of America* v. *Shephard*, [1977] 2 S.C.R. 1067.

335. *Criminal Code*, s. 606(4).

336. *Ibid.* See *R.* v. *C.H.O.* (1987), 83 A.R. 33 (Alta. Youth Ct.) at 35-36, quoted *infra* (see notes 348-50 and accompanying text).

the prosecutor'' when deciding whether to accept an accused's plea of guilty to the offence charged, we believe it is important to do so in circumstances where the guilty plea relates to another offence.

Although the recommendation contemplates clarification of the trial judge's role under section 606(4) of the *Criminal Code* in plea agreement situations, it stops short of articulating an inflexible rule of the sort found in the English case of *R.* v. *Soanes*.[337] In *Soanes*, a case in which the accused had been charged with the murder of her newborn infant, England's Court of Criminal Appeal approved of the Trial Judge's refusal to accept a plea of guilty to infanticide notwithstanding the prosecutor's acquiescence to such a plea. In delivering the Court's judgment, Goddard L.C.J. expressed the opinion that ''where nothing appears on the depositions which can be said to reduce the crime from the more serious offence charged to some lesser offence for which, under statute, a verdict may be returned, the duty of counsel for the Crown would be to present the offence charged in the indictment, leaving it as a matter for the jury, if they see fit in the exercise of their undoubted prerogative, to find the lesser verdict.''[338] Referring to the case at hand, His Lordship continued: ''In this case we think that the learned judge was not only right, but, indeed, bound, to insist on the applicant being tried for murder. There was nothing disclosed on the depositions which would have justified a reduction of the charge from murder to infanticide ....''[339]

The use of section 606(4) and its forerunners as a means of supervising the exercise of prosecutorial discretion appears, in the past, to have been infrequent.[340] It has been suggested that the provision was never intended to confer such a broad power,[341] and that the judicial discretion regarding the acceptance of guilty pleas to other offences should be viewed in a narrower context.[342] On the other hand, section 606(4)'s potential for allowing the type of judicial control exercised in the *Soanes* case

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337. [1948] 1 All E.R. 289 (C.C.A.). *Cf. R.* v. *Bedwellty Justices, ex p. Munday*, [1970] *Crim. L.R.* 601.

338. *Supra*, note 337, at 290.

339. *Ibid.* But see *R.* v. *Coward*, *supra*, note 31; *R.* v. *Jenkins* (1986), 83 Cr. App. R. 152 (C.A.) at 154. See the discussion by R. Pattenden, *The Judge, Discretion and the Criminal Trial* (Oxford: Clarendon, 1982) at 58-59 and the cases cited at 210, n. 128.

340. See, with reference to an earlier version of this provision, Ferguson and Roberts, *supra*, note 17, at 569. See also Verdun-Jones and Cousineau, *supra*, note 16, at 241, n. 64. Reported decisions in which s. 606(4) (formerly s. 534(4)) has been used for this purpose are scarce.

341. See H. Leonoff and D. Deutscher, ''The Plea and Related Matters'' in V.M. Del Buono, ed., *Criminal Procedure in Canada: Studies* (Toronto: Butterworths, 1982) 229 at 239, with reference to an earlier version of this provision (in which *inter alia* the words ''in its discretion ...'' appeared after the words ''the court may ...''). See Ferguson and Roberts, *supra*, note 17, at 569. As to the apparent origins of this provision, see *R.* v. *Dietrich*, [1968] 4 C.C.C. 361 (Ont. C.A.); *R.* v. *Hogarth* (1976), 31 C.C.C. (2d) 232 (Ont. C.A.); R. Salhany, *Canadian Criminal Procedure*, 2nd ed. (Toronto: Canada Law Book, 1972) at 131, n. 12; Ferguson and Roberts, *supra*, note 17, at 569, n. 249 (citing Salhany); Leonoff and Deutscher, *supra*, at 237; Ontario Law Reform Commission, *supra*, note 293, Part II, at 122.

342. See Leonoff and Deutscher, *supra*, note 341, at 239-40. See Klein, *supra*, note 28, at 294-97 regarding judicial control over prosecutorial discretion.

(or something like it) has some support.[343] In *Gagné* v. *The Queen*,[344] for example, a case in which an earlier version of section 606(4) (in which *inter alia* the words "in its discretion ..."[345] appeared after the words "the court may ...") was under consideration, the Quebec Court of Appeal expressed the opinion that [TRANSLATION] "[i]n the absence of statutory standards, the applicable rule is that any discretion vested in the Court should be exercised judicially, having regard to all relevant factors, including the facts of the case,"[346] and that "[w]ere the Court to accept a plea of guilty to a different offence where all the essential elements of the crime originally charged have been proven, it would not be exercising its discretion judicially ...."[347] More recently, in *R.* v. *C.H.O.*, Fitch Prov. Ct. J. of the Alberta Provincial Court (Youth Division) expressed the view that the court's function under what is now section 606(4), as it is currently worded, is to "be satisfied not only that the facts support the lesser charge to which the plea of guilty has been tendered, but the facts do not support a finding of guilt for the greater offence charged ...."[348] His Honour reasoned that "[i]f Parliament had intended that on a s. 534(4) [now s. 606(4)] application the Court simply be satisfied that the facts support the lesser charge to which the plea of guilty is tendered, then the section could have been worded to provide that if the Court finds the facts support the lesser charge, the accused is then deemed to be not guilty of the greater charge."[349] Continuing, he added: "That wording would not place the Court in the invidious position of saying, 'I find you not guilty of a charge on which the facts before the Court speak otherwise', a position that cannot be avoided if the Court is only concerned with the lesser charge but the facts in a particular case support the greater charge."[350]

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343. As regards an earlier version of this provision (in which *inter alia* the words "in its discretion ..." appeared after the words "the court may ..."), see Verdun-Jones and Cousineau, *supra*, note 16, at 241, n. 64; Perras, *supra*, note 17, at 151-52; J.O. Wilson, *A Book for Judges* (Ottawa: Canadian Judicial Council/Supply and Services, 1980) at 68.

344. [1977] C.A. 146 (Que.), discussed by Leonoff and Deutscher, *supra*, note 341, at 238-40.

345. In the more recent case of *R.* v. *C.H.O.*, *supra*, note 336, the Court described the deletion of these words from the current provision (at 35) as "simply the correction of the tautology 'may in its discretion'."

346. *Supra*, note 344, at 148.

347. *Ibid.*

348. *Supra*, note 336, at 35.

349. *Ibid.*

350. *Ibid.* His Honour elaborated (at 35-36) as follows:

> "Accordingly, I am satisfied that the duty of the court is not the same in a s. 534(4) [now s. 606(4)] application as it is if the plea of guilty is to the offence charged.
>
> To put it another way, if in this case the only charge before the court had been Level 2 Assault, and a plea of guilty had been tendered to that charge, then the facts certainly would have supported the charge, and if it appeared that the prosecution was what is sometimes called 'under-charging', that would be irrelevant. The court cannot find someone guilty of a greater offence than the one before the court. It is the administrative discretion of the Attorney General as the chief law officer of the Crown to decide what charge should be preferred, but when the court is exercising its discretion under s. 534(4) [now s. 606(4)], in my view it has a different duty than it has under YOA 19(1)."

In its 1987 report on *Sentencing Reform*, the Canadian Sentencing Commission quite clearly considered what is now section 606(4) to be a means for ensuring accountability in the area of plea discussions.[351]

RECOMMENDATION

19. The judge should reject an accused's guilty plea if *inter alia* he or she has reasonable grounds to believe

(a) that the plea was entered as a result of an improper inducement;

(b) that the plea was entered as a result of a judicial officer's having offered an inducement for the accused to plead guilty;

(c) where the accused, pursuant to what is currently section 606(4) of the *Criminal Code*, is pleading "not guilty of the offence charged but guilty of [another] offence arising out of the same transaction ...," that the offence to which the accused is pleading guilty inadequately reflects the gravity of the accused's provable conduct; or

(d) that no factual basis for the accused's guilty plea exists.[352]

Commentary

This recommendation (which is not intended to be exhaustive on the question of when the judge should reject an accused's guilty plea) is designed *inter alia* to give effect to Recommendations 5, 6 and 17. It would also give effect to Recommendation 10(a) (by virtue of paragraph (d)) and, in part, to Recommendation 10(b). It is envisioned that those portions of Recommendation 10 that would not be enforceable through the implementation of this recommendation would be enforceable through professional and/or administrative disciplinary measures.

Paragraphs (a), (b) and (d) are self-explanatory. Paragraph (c) is a rejection of the rule in the *Soanes* case (discussed above). Rather than focusing on the narrow question of whether there is anything "which can be said to reduce the crime from the more

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351. *Supra*, note 29, at 410. See also J.J. Atrens, "Included Offences and Alternative Verdicts" in J.J. Atrens, P.T. Burns and J.P. Taylor, eds., *Criminal Procedure: Canadian Law and Practice* (Vancouver and Toronto: Butterworths, 1981), vol. 2, Chapter XI at XI—116-120, where the author, referring to an earlier version of s. 606(4) (in which *inter alia* the words "in its discretion ..." appeared after the words "the court may ..."), has suggested that provision permitted some supervision of plea negotiation by judges. The 1985 supplement to this chapter, which has set out (as s. 534(4)) s. 606(4) as it now appears in the current *Code*, has not altered the author's discussion of the provision's function in this regard. In its *Report on Administration of Ontario Courts* (*supra*, note 293, Part II at 122), the Ontario Law Reform Commission viewed a previous version of s. 606(4) (in which *inter alia* the words "in its discretion ..." appeared after the words "the court may ...") as conferring a power the exercise of which should involve consideration of submissions made by counsel.

352. See United States *Federal Rules of Criminal Procedure*, Rule 11(f).

serious offence charged to some lesser offence ...,''[353] it requires an assessment of whether ''the offence to which the accused is pleading guilty *inadequately* reflects the gravity of the accused's provable conduct ....''[354] Recommendation 18 makes it clear that this determination of adequacy would involve consideration of the prosecutor's reasons for concluding a plea agreement with the accused. Under Recommendation 19(c), therefore, the judge could decide that a less serious offence to which a particular accused is pleading guilty adequately reflects the gravity of the accused's provable conduct if the ''trade-off'' is not unduly lenient and is justified in the circumstances (*e.g.*, by a need to spare an emotionally distraught victim from having to testify, etc.).

IV. Withdrawals and Appeals

The following recommendations are intended for implementation in legislation.

RECOMMENDATION

20. An accused who has entered a guilty plea should be entitled to withdraw that plea before sentence, or to appeal against a conviction based thereon,

(a) if it was entered as a result of an improper inducement;

(b) if it was entered as a result of the judge's having offered an inducement for the accused to plead guilty;

(c) if it was entered as a result of a significant misapprehension as to the substance or consequences of a plea agreement concluded between the accused and the prosecutor; or

(d) if the prosecutor has breached a plea agreement concluded with the accused.

Commentary

This recommendation is designed *inter alia* to give effect to Recommendations 5, 6 and 13. However, it is not intended as an exhaustive enumeration of the circumstances in which it ought to be permissible for an accused person to withdraw a guilty plea or to appeal against a conviction based thereon.

In formulating this recommendation, we considered whether the prosecution's alleged breach of an agreement as to sentence[355] should be grounds on which an accused whose guilty plea was based thereon may appeal against sentence (as opposed

353. *Soanes*, *supra*, note 337, *per* Goddard L.C.J. at 290.

354. Recommendation 19(c) (emphasis added).

355. *E.g.*, an agreement to recommend, or not to oppose, a particular sentence or form of sentence.

to conviction). This alternative is suggested by the case of *R.* v. *Brown*[356] (discussed above). There, it will be recalled, the Ontario Court of Appeal allowed the accused's appeal against sentence and substituted a concurrent term of imprisonment for one consecutive to the term the accused was already serving, after stating that the prosecutor *inter alia* had "agreed that [he] ... would make representations to the trial Judge that he was not asking that any sentence imposed in this case be consecutive ...,"[357] but "on the whole, seems to have urged the trial Judge ... to impose a consecutive term."[358] Although the decision in the *Brown* case was not specifically referred to by the Nova Scotia Supreme Court's Appeal Division in the later decision of *R.* v. *Morrison*,[359] similar reasoning appears to have motivated the accused in that case to argue on his appeal against sentence (as Pace J.A. put it) "that the bargain must be carried out and that this Court should impose a sentence consistent with the agreement."[360] The difficulty with a rule entitling the accused, in effect, to sue for "specific performance"[361] (by way of an appeal against sentence), however, is that it would place appellate courts in a position that (for good reason) is not imposed on trial judges.[362] For this reason, we prefer the position taken by the Court in *Morrison* that "Courts are not bound by plea bargaining agreements made by counsel,"[363] and that "[i]t may be that under certain circumstances a Court will not permit a party to repudiate an agreement once submitted before the trial Judge ..., but that does not mean that the Court is bound to carry out the agreement."[364]

RECOMMENDATION

21. Where an accused has pleaded guilty to an offence and, upon his or her conviction, has received a sentence that is permitted under the *Criminal Code* in the circumstances and that accords with, or is within the range anticipated by, a plea agreement, the prosecutor should not be permitted to appeal against the sentence received by the accused unless it is shown

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

(b) that the court, in passing sentence, was wilfully misled in some material respect.

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356. *Supra*, note 70.

357. *Ibid.*, *per* Gale C.J.O. at 228.

358. *Ibid.*

359. *Supra*, note 70.

360. *Ibid.*, at 530.

361. This term is used in this context by Verdun-Jones and Cousineau, *supra*, note 16, at 244.

362. See the discussion in Chapter One, part II, *supra*, notes 69-73 and accompanying text.

363. *Supra*, note 70, *per* Pace J.A. at 530.

364. *Ibid.*

Commentary

This recommendation is derived from the judgment of Hugessen J. in *A.G. Canada* v. *Roy*.[365] As with Recommendation 20(d) above, the operative principle here is fairness. This recommendation is designed to hold the prosecution to agreements that it has entered into (in order to be fair to the accused), except in certain specified circumstances.

The introductory portion of the recommendation assumes that the sentence is permissible under current *Code* provisions. The exception in paragraph (a) (derived from *Roy*) would cover situations in which the prosecutor has been induced to conclude a particular plea agreement through some deceit on the part of the accused (concealment of a serious criminal record, for example). The exception in paragraph (b) would cover situations in which the court has been induced to accept a plea agreement through some deceit by the parties to the agreement. (It is conceivable, for example, that a prosecutor might join with the accused in deceiving the court as the result of bribery or threats.)

We realize that it may also be necessary to deal with situations in which deceit has influenced not merely the sentence imposed but the very acceptance, by the prosecutor or the court, of the accused's guilty plea to a particular offence. In such situations, appeal by the prosecutor against sentence might not be an adequate solution. Although we do not consider our present context to be the most appropriate one for exploring this particular problem in detail, we intend to return to it in the course of our forthcoming Working Papers on *Criminal Appeal Procedure* and *Extraordinary Remedies*.

We have not included the exception, suggested in *Roy*, that would apply "where it can be shown that the public interest in the orderly administration of justice is outweighed by the gravity of the crime and the gross insufficiency of the sentence."[366] The general rule, in our view, is that the Crown speaks with one voice and should be bound by the mistakes of its prosecutors. Although (as the exceptions in paragraphs (a) and (b) indicate) deception and the need to discourage obstructions of justice, respectively, may on occasion negate or transcend the need for fairness to the accused, we do not regard mere prosecutorial errors in the same light. The error of a prosecutor in asserting and taking a position should not be treated differently from any other mistake that he or she can make in the criminal process. Under the present law, no prosecutorial error is appealable by the prosecutor who made it even if, for instance through an erroneous decision not to introduce some evidence, it leads to the acquittal of an accused. We see no reason why an error in plea discussions should be an exception to that general rule.

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365. *Supra*, note 186.

366. *Ibid*, at 93.

V. Prohibition against Subsequent Proceedings

The following recommendation is intended for implementation in legislation.

RECOMMENDATION

22. In any case in which the accused has pleaded guilty to an offence in accordance with a plea agreement concluded between the accused and the prosecutor, any proceedings taken subsequently against the accused in contravention of that agreement should be prohibited unless the prosecutor

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

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

Commentary

This recommendation is designed to promote fairness to accused persons, and to preserve respect for the manner in which criminal justice is administered. It proceeds on the basis that prosecutorial breaches of plea agreements, of the type described, ought not generally to be countenanced.

Paragraphs (a) and (b) provide two exceptions to the general rule. Paragraph (a) has been explained in the commentary to Recommendation 21, above. Paragraph (b) would cover situations in which the prosecutor has been bribed or threatened, etc.

VI. Exclusion of Evidence

The following recommendation is intended for implementation in legislation.

RECOMMENDATION

23. Evidence of a guilty plea, later withdrawn, or of an offer to plead guilty to an offence, or of statements made in connection with any such plea or offer, should be inadmissible on the issue of guilt or credibility in any proceeding.

Commentary

This recommendation begins by restating, almost verbatim, the position we have taken in section 25 of our draft *Evidence Code*.[367] That portion of the recommendation providing for the exclusion of withdrawn guilty pleas and related statements (which is premised not merely on our notion of fairness but on basic logic) recognizes that the accused's right to withdraw a guilty plea in accordance with Recommendation 20 "would be illusory if it could be used against the accused at a subsequent trial."[368] The portion relating to the exclusion of guilty plea offers and related statements (which would cover plea discussions) is derived from analogous jurisprudence dealing with "without prejudice" offers of settlement.[369] It is designed to "promote[ ] the disposition of criminal cases without trial by permitting compromise negotiations before trial."[370]

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367. See LRCC, *Evidence* (Report 1) (Ottawa: Information Canada, 1975) at 25. See also LRCC, *supra*, note 43, at 62. And see United States *Federal Rules of Criminal Procedure*, Rule 11(e)(6); ABA *Standards for Criminal Justice*, *supra*, note 7, standard 14-3.4; ALI *Model Code of Pre-Arraignment Procedure*, *supra*, note 7, s. 350.7.

368. LRCC, *supra*, note 367, at 68. See *Thibodeau* v. *The Queen*, [1955] S.C.R. 646.

369. See generally J. Sopinka and S.N. Lederman, *The Law of Evidence in Civil Cases* (Toronto: Butterworths, 1974) at 196-99. As regards the admissibility of unaccepted (or unacceptable) guilty pleas to lesser offences, see *R.* v. *Hazeltine* (1967), 51 Cr. App. R. 351 (C.A.); *R.* v. *Dietrich* (1970), 1 C.C.C. (2d) 49 (Ont. C.A.), leave to appeal to S.C.C. refused (1970), 1 C.C.C. (2d) 68n; *R.* v. *Pentiluk and MacDonald* (1974), 28 C.R.N.S. 324 (Ont. C.A.), aff'd *sub nom. MacDonald* v. *The Queen*, [1977] 2 S.C.R. 832; *R.* v. *Dobson* (1985), 19 C.C.C. (3d) 93 (Ont. C.A.).

370. LRCC, *supra*, note 367, at 68. See *R.* v. *Draskovic* (1971), 5 C.C.C. (2d) 186 (Ont. C.A.), where the Ontario Court of Appeal ruled admissible an accused's statement to a police officer that he would enter a plea of guilty to certain charges if another was dropped. Although it declined (*per* Arnup J.A. at 188) to offer an opinion "as to whether there exists in Ontario or Canada any privilege with respect to discussions between counsel for the accused and counsel for the Crown with respect to what charges will be proceeded with and what pleas will be made, commonly referred to as 'plea bargaining' ...," the Court stated that "[w]hat occurred was in no sense 'plea bargaining' but was simply a volunteered statement made by the accused to the detective, who had no authority to do anything other than report the making of the statement to someone else." For criticism of this characterization, see Ferguson and Roberts, *supra*, note 17, at 553, n. 199. Compare *R.* v. *Jones*, *supra*, note 169, at 186. On the subject of statements made by an accused or his or her counsel to the prosecutor, to the police or to the prosecutor in the presence of the police, see G. Ferguson, "Discovery in Criminal Cases" in Atrens, Burns and Taylor, *supra*, note 351, vol. 2, Chapter XIII at XIII—50, n. 205.

CHAPTER THREE

Summary of Recommendations

1. The term "plea agreement" should be defined as meaning any agreement by the accused to plead guilty in return for the prosecutor's agreeing to take or refrain from taking a particular course of action.

2. The term "plea discussion" should be defined as meaning a discussion directed toward the conclusion of a plea agreement.

3. (1) The term "improper inducement" should be defined as meaning any inducement that necessarily renders suspect the genuineness or factual accuracy of the accused's plea, and as including the following conduct when it is engaged in for the purpose of encouraging the accused to plead guilty:

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

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

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

(d) a threat that any not guilty plea entered by the accused will result, upon the accused's conviction, in the prosecutor's asking for a sentence more severe than the sentence that is usually imposed upon a similar accused person who has been convicted, following a not guilty plea, of the offence with which the accused is charged;

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

(f) any material misrepresentation; and

(g) any attempt to persuade the accused to plead guilty notwithstanding his or her continued denial of guilt.

(2) The term "improper inducement" should be defined so as to make it clear that encouraging the accused to enter into a plea agreement, as defined in Recommendation 1, is not in itself an improper inducement.

4. (1) The prosecutor and the accused, or counsel for the accused on his or her behalf, should be permitted to have plea discussions.

(2) No judicial officer before whom proceedings in respect of the accused are or will be held should take part in plea discussions.

(3) Notwithstanding part (2), it should be permissible for the Chief Justice, or a judge whom he or she has designated, to initiate and preside over plea discussions between the prosecutor and the defence, provided it is emphasized that the accused will not be appearing before that judge and is not obliged to conclude any plea agreement.

[(4) A judge may, in general terms, inform the prosecution and defence as to the potential benefit of plea discussions, and may provide them with an opportunity to have such discussions.]

5. A prosecutor, police officer or defence counsel should not offer any improper inducement to an accused.

6. No judicial officer before whom proceedings in respect of the accused are or will be held should offer any inducement for the purpose of encouraging an accused to plead guilty to any offence.

7. (1) A prosecutor should not, when the accused has retained counsel, have plea discussions directly with the accused in the absence of the accused's counsel.

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

(a) representation by counsel may be advantageous to the accused; and

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

and should not thereafter have plea discussions directly with the accused unless the accused has informed the prosecutor unequivocally that he or she will not be retaining counsel.

8. (1) Prosecutors should afford accused persons in similar circumstances the same opportunities for engaging in plea discussions.

(2) A prosecutor should endeavour to ensure, in the course of plea discussions, that accused persons in similar circumstances receive equal treatment.

9. Counsel for an accused person should not conclude on the accused's behalf any plea agreement that requires the accused to plead guilty to an offence of which the accused maintains he or she is innocent.

10. A prosecutor should not suggest, conclude or participate in any plea agreement that

(a) requires the accused to plead guilty to an offence that is not disclosed by the evidence;

(b) requires the accused to plead guilty to charges that inadequately reflect the gravity of the accused's provable conduct, unless, in exceptional

circumstances, they are justifiable in terms of the benefits that will accrue to the administration of justice, the protection of society, or the protection of the accused;

(c) requires the prosecutor to withhold or distort evidence; or

(d) contemplates a disposition that departs significantly from that which, in the absence of a plea agreement, would have resulted upon the accused's pleading guilty to the same offence, unless, in exceptional circumstances, it is justifiable in terms of the benefits that will accrue to the administration of justice, the protection of society, or the protection of the accused.

11. (1) A prosecutor should, unless the circumstances make it impracticable to do so, solicit and weigh carefully the views of any victims before concluding a plea agreement.

(2) A prosecutor who concludes a plea agreement should endeavour to ensure that victims are told the substance of, and reasons for, that agreement, unless compelling reasons, such as a likelihood of serious harm to the accused or to another person, require otherwise.

12. (1) A prosecutor and an accused who have concluded a plea agreement should, before the accused's plea is entered, disclose to the court

(a) the substance of, and reasons for, that agreement; and

(b) whether any previous plea agreement has been disclosed to another judge in connection with the same matter and, if so, the substance of that agreement.

(2) The disclosure and justification contemplated by part (1) of this recommendation should be made in open court unless compelling reasons, such as a likelihood of serious harm to the accused or to another person, require otherwise.

13. Upon being informed that the prosecutor and the accused have concluded a plea agreement, the judge should be able, where he or she considers it necessary to do so, to ascertain by questioning whether the accused understands the substance and consequences of that plea agreement.

14. No plea agreement or submission should be binding on a judge.

15. In any case in which the judge, having been informed of the existence and substance of a plea agreement and of the reasons for that agreement, determines that an accused should not be judicially disposed of in the manner contemplated by the plea agreement, the judge should inform the accused of this fact.

16. Before any guilty plea is accepted from an accused, the judge should be able, where he or she considers it necessary to do so, to ascertain by questioning

whether any inducement to plead guilty, other than an inducement disclosed as part of a plea agreement, has been offered to the accused.

17. In any case in which the prosecutor and the accused have concluded a plea agreement, the judge should be able, before any guilty plea is accepted from the accused, to make such inquiry as he or she considers necessary in order to be satisfied that a factual basis for the accused's guilty plea exists.

18. In determining whether to accept an accused's plea of guilty to any offence other than the offence charged, the judge should consider the substance of, and reasons for, any plea agreement concluded between the accused and the prosecutor.

19. The judge should reject an accused's guilty plea if *inter alia* he or she has reasonable grounds to believe

(a) that the plea was entered as a result of an improper inducement;

(b) that the plea was entered as a result of a judicial officer's having offered an inducement for the accused to plead guilty;

(c) where the accused, pursuant to what is currently section 606(4) of the *Criminal Code*, is pleading "not guilty of the offence charged but guilty of [another] offence arising out of the same transaction ...," that the offence to which the accused is pleading guilty inadequately reflects the gravity of the accused's provable conduct; or

(d) that no factual basis for the accused's guilty plea exists.

20. An accused who has entered a guilty plea should be entitled to withdraw that plea before sentence, or to appeal against a conviction based thereon,

(a) if it was entered as a result of an improper inducement;

(b) if it was entered as a result of the judge's having offered an inducement for the accused to plead guilty;

(c) if it was entered as a result of a significant misapprehension as to the substance or consequences of a plea agreement concluded between the accused and the prosecutor; or

(d) if the prosecutor has breached a plea agreement concluded with the accused.

21. Where an accused has pleaded guilty to an offence and, upon his or her conviction, has received a sentence that is permitted under the *Criminal Code* in the circumstances and that accords with, or is within the range anticipated by, a plea agreement, the prosecutor should not be permitted to appeal against the sentence received by the accused unless it is shown

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

(b) that the court, in passing sentence, was wilfully misled in some material respect.

22. In any case in which the accused has pleaded guilty to an offence in accordance with a plea agreement concluded between the accused and the prosecutor, any proceedings taken subsequently against the accused in contravention of that agreement should be prohibited unless the prosecutor

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

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

23. Evidence of a guilty plea, later withdrawn, or of an offer to plead guilty to an offence, or of statements made in connection with any such plea or offer, should be inadmissible on the issue of guilt or credibility in any proceeding.

APPENDIX A

Rules and Guidelines Frequently Cited in This Paper

Ontario Law Reform Commission, *Report on Administration of Ontario Courts*, Part II (1973), Chapter 2, Summary of Recommendations, #2.

Plea Negotiation

20. The following guidelines should be laid down for prosecutors in plea negotiations:

(a) Expediency should not be a consideration or a motive. The problems arising out of the burden of heavy caseloads must be solved by means other than negotiated pleas of guilty whether related to sentence or otherwise.

(b) The prosecutor should do nothing to induce or compel a plea of guilty to a reduced number of charges or a lesser or included offence.

(c) The prosecutor should permit to be maintained only those charges on which he intends to proceed to trial.

(d) The prosecutor should not agree to the acceptance of a plea of guilty to an offence that the evidence in his possession does not support.

(e) The prosecutor should not agree to the acceptance of a plea of guilty to a charge that cannot be prosecuted because it is barred by statutory limitation or otherwise.

(f) In all discussions with defence counsel the prosecutor must maintain his freedom to do his duty as he sees fit. Nothing should be said or done to fetter the freedom of the prosecutor and the defence counsel.

(g) The prosecutor may state to defence counsel the views he may give, if asked by the presiding judge to comment on the matter of sentence. No undertaking should be given relating to the term of sentence by the prosecutor. He may draw the attention of the presiding judge to any mitigating or aggravating circumstances that may appear to him and what the appropriate form of sentence might be, but it should be made clear that the matter of sentence is strictly for the judge and that any statement that is made cannot bind the Attorney General in the exercise of his discretion whether to appeal against the sentence or not.

(h) There should be no attempt to reduce the gravity of the evidence to suit the reduced charge.

(i) The prosecutor should always consider himself as agent of the Attorney General. The ultimate responsibility for disposition of the case must always rest with the court except in those cases where the Attorney General wishes to withdraw the charge.

(j) Apart from very exceptional circumstances neither counsel for the Crown nor counsel for the accused, either alone or together, should discuss a proposed plea of guilty with the judge in his chambers or any place other than in open court. Where attendance in the judge's chambers is dictated by the circumstances, a court reporter always should be present to take down the full discussion which should form part of the record of the case.

Canadian Bar Association, *Code of Professional Conduct* (1974), Chapter VIII, commentary 10.

Where, following investigation,

(a) a defence lawyer bona fide concludes and advises his accused client that an acquittal of the offence charged is uncertain or unlikely,

(b) the client is prepared to admit the necessary factual and mental elements,

(c) the lawyer fully advises the client of the implications and possible consequences, and particularly of the detachment of the court, and

(d) the client so instructs him,

it is proper for the lawyer to discuss with the prosecutor and for them tentatively to agree on the entry of a plea of "guilty" to the offence charged or to a lesser or included offence appropriate to the admissions, and also on a disposition or sentence to be proposed to the court. The public interest must not be or appear to be sacrified in the pursuit of an apparently expedient means of disposing of doubtful cases, and all pertinent circumstances surrounding any tentative agreements, if proceeded with, must be fully and fairly disclosed in open court. The judge must not be involved in any such discussions or tentative agreements, save to be informed thereof.

Canadian Bar Association, *Code of Professional Conduct* (1988), Chapter IX, commentary 12.

Where, following investigation,

(a) the defence lawyer *bona fide* concludes and advises the 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 of a guilty plea and that the matter of sentence is solely in the discretion of the trial judge, and

(d) the client so instructs the lawyer, preferably in writing,

it is proper for the lawyer to discuss and agree tentatively with the prosecutor to enter a plea of guilty on behalf of the client to the offence charged or to a lesser or included offence or to another offence appropriate to the admissions, and also on a disposition

or sentence to be proposed to the court. The public interest and the client's interests must not, however, be compromised by agreeing to a guilty plea.

American Law Institute, *A Model Code of Pre-Arraignment Procedure* (1975), section 350.3.

Section 350.3. Procedure for Plea Discussions

(1) *Plea Conference.* At the request of either party, the parties shall meet to discuss the possibility that upon the defendant's entry of a plea of guilty or nolo contendere to one or more offenses, the prosecutor will not charge, will dismiss or will move for the dismissal of other charges, or will recommend or not oppose a particular sentence. The defendant must be represented by counsel in such discussions and the defendant need not be present. The court shall not participate in such discussions.

(2) *Prosecutor's Regulations.* Each prosecution office in the state shall issue regulations pursuant to Section 10.3 setting forth guidelines and procedures with respect to plea discussions and plea agreements designed to afford similarly situated defendants equal opportunities for plea discussions and plea agreements.

(3) *Improper Pressure.* The prosecutor shall not seek to induce a plea of guilty or nolo contendere by exerting such undue pressures as:

(a) charging or threatening to charge the defendant with a crime not supported by facts believed by the prosecutor to be provable;

(b) charging or threatening to charge the defendant with a crime not ordinarily charged in the jurisdiction for the conduct allegedly engaged in by him; or

(c) threatening the defendant that if he pleads not guilty, his sentence may be more severe than that which is ordinarily imposed in the jurisdiction in similar cases on defendants who plead not guilty.

(4) *Obtaining Information for Plea Conference.* If the parties agree that the defendant will enter a plea of guilty, they shall be subject to the disclosure obligations set forth in Section 320.3 of this Code. The parties may request the court's assistance to develop additional facts relevant to such an agreement as provided in Section 320.4.

(5) *Preliminary Consideration of Plea Agreement.* If the parties have reached a proposed plea agreement they may, with the permission of the court, advise the court of the terms of the agreement and the reasons therefor in advance of the time for tender of the plea. The court may indicate to the parties whether it will concur in the proposed disposition. Any such concurrence is subject to the information in the presentence report being consistent with representations made to the court.

American Law Institute, *A Model Code of Pre-Arraignment Procedure* (1975), section 350.4(2).

(2) *Plea to Reflect Informed Choice by Defendant.* By inquiring of the prosecutor and defense counsel and the defendant personally, the court shall ascertain whether there were any prior plea discussions, whether the parties have entered into any agreement with respect to the plea and the terms thereof and whether any inducements

were offered in violation of Subsection 350.3(3). The court shall not accept a plea of guilty or nolo contendere from a defendant without first determining that such plea is a product of informed choice and that the defendant understands the effect, if any, of the plea on other charges that have been or may be brought against him.

American Law Institute, *A Model Code of Pre-Arraignment Procedure* (1975), section 350.5.

Section 350.5. Additional Action to be Taken by the Court Where There is Plea Agreement

(1) *Disclosure of Agreement at Time of Plea.* If the parties have entered a plea agreement pursuant to Section 350.3, they shall disclose it to the court at the time the defendant is called upon to plead.

(2) *Court's Consideration of Appropriateness of Disposition.* In considering whether to approve a plea pursuant to a plea agreement, the court shall consider whether:

(a) the parties have considered adequately the facts relevant to an appropriate disposition with respect to the defendant;

(b) the terms of the agreement and any psychiatric or other special rehabilitation program agreed upon appear generally suited to the defendant's needs, and

(c) the agreement is in the public interest in that it takes into account not only the benefit to the public in securing a prompt disposition of the case, but also the importance of a disposition that furnishes the public adequate protection and does not depreciate the seriousness of the offense or promote disrespect for the law.

(3) *Presentence Investigation.* The court may direct its probation service to conduct an investigation to assist it in ruling on the plea agreement. If the court believes it appropriate it may direct that such investigation be commenced at the time a plea agreement is presented for preliminary consideration pursuant to Subsection 350.3(5).

(4) *Ruling on the Plea.* Before accepting a plea pursuant to a plea agreement, the court shall advise the parties whether it approves the agreement and will dispose of the case in accordance therewith. If the court determines to disapprove the agreement and not to dispose of the case in accordance therewith, it shall so inform the parties, not accept the defendant's plea of guilty or nolo contendere, and advise the defendant personally that he is not bound by the agreement. The court shall advise the parties of the reasons it rejected the agreement and afford them an opportunity to modify the agreement accordingly. A decision by the court disapproving an agreement shall not be subject to appeal.

United States *Federal Rules of Criminal Procedure* (1988), Rule 11(e), (f).

(e) *Plea Agreement Procedure.*

(1) *In General.* The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view

toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

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

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

The court shall not participate in any such discussions.

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

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

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

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

(6) *Inadmissibility of Pleas, Plea Discussions, and Related Statements.* Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

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

(B) a plea of nolo contendere;

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

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

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

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

American Bar Association, *Standards for Criminal Justice* (1980), standards 14-3.1, 14-3.2, 14-3.3, 14-3.4.

PART III. PLEA DISCUSSIONS AND PLEA AGREEMENTS

Standard 14-3.1. Propriety of plea discussions and plea agreements

(a) The prosecuting attorney may engage in plea discussions with counsel for the defendant for the purpose of reaching a plea agreement. Where the defendant has waived counsel pursuant to these standards, the prosecuting attorney may engage in plea discussions with the defendant. Ordinarily a verbatim record should be made and preserved for all such discussions.

(b) The prosecuting attorney, in reaching a plea agreement, may agree to one or more of the following, as dictated by the circumstances of the individual case:

(i) to make or not to oppose favorable recommendations as to the sentence which should be imposed if the defendant enters a plea of guilty or nolo contendere;

(ii) to dismiss, to seek to dismiss, or not to oppose dismissal of the offense charged if the defendant enters a plea of guilty or nolo contendere to another offense reasonably related to defendant's conduct; or

(iii) to dismiss, to seek to dismiss, or not to oppose dismissal of other charges or potential charges against the defendant if the defendant enters a plea of guilty or nolo contendere.

(c) Similarly situated defendants should be afforded equal plea agreement opportunities.

(d) The prosecuting attorney should make every effort to remain advised of the attitudes and sentiments of victims and law enforcement officials before reaching a plea agreement.

Standard 14-3.2. Relationship between defense counsel and client

(a) Defense counsel should conclude a plea agreement only with the consent of the defendant, and should ensure that the decision whether to enter a plea of guilty or nolo contendere is ultimately made by the defendant.

(b) To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and of considerations deemed important by defense counsel or the defendant in reaching a decision.

Standard 14-3.3. Responsibilities of the judge

(a) The judge should not accept a plea of guilty or nolo contendere without first inquiring whether the parties have arrived at a plea agreement and, if there is one, requiring that its terms, conditions, and reasons be disclosed.

(b) If a plea agreement has been reached by the parties which contemplates the granting of charge or sentence concessions by the judge, the judge should:

(i) order the preparation of a preplea or presentence report, when needed for determining the appropriate disposition;

(ii) give the agreement due consideration, but notwithstanding its existence reach an independent decision on whether to grant charge or sentence concessions; and

(iii) in every case advise the defendant whether the judge accepts or rejects the contemplated charge or sentence concessions or whether a decision on acceptance will be deferred until after the plea is entered and/or a preplea or presentence report is received.

(c) When the parties are unable to reach a plea agreement, if the defendant's counsel and prosecutor agree, they may request to meet with the judge in order to discuss a plea agreement. If the judge agrees to meet with the parties, the judge shall serve as a moderator in listening to their respective presentations concerning appropriate charge or sentence concessions. Following the presentation of the parties, the judge may indicate what charge or sentence concessions would be acceptable or whether the judge wishes to have a preplea report before rendering a decision. The parties may thereupon decide among themselves, outside of the presence of the court, whether to accept or reject the plea agreement tendered by the court.

(d) Whenever the judge is presented with a plea agreement or consents to a conference in order to listen to the parties concerning charge or sentence concessions, the court may require or allow any person, including the defendant, the alleged victim, and others, to appear or to testify.

(e) Where the parties have neither advised the judge of a plea agreement nor requested to meet for plea discussion purposes, the judge may inquire of the parties whether disposition without trial has been explored and may allow an adjournment to enable plea discussions to occur.

(f) All discussions at which the judge is present relating to plea agreements should be recorded verbatim and preserved, except that for good cause the judge may order the transcript of proceedings to be sealed. Such discussions should be held in open court unless good cause is present for the proceedings to be held in chambers. Except as otherwise provided in this standard, the judge should never through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered.

(g) In cases where a defendant offers to plead guilty and the judge decides that the final disposition should not include the charge or sentence concessions contemplated by the plea agreement, the judge shall so advise the defendant and permit withdrawal of the tender of the plea. In cases where a defendant pleads guilty pursuant to a plea agreement and the court, following entry of the plea, decides that the final disposition should not include the contemplated charge or sentence concessions, withdrawal of the plea shall be allowed if:

(i) prior to the entry of the plea the judge concurs, whether tentatively or fully, in the proposed charge or sentence concessions; or

(ii) the guilty plea is entered upon the express condition, approved by the judge, that the plea can be withdrawn if the charge or sentence concessions are subsequently rejected by the court.

In all other cases where a defendant pleads guilty pursuant to a plea agreement and the judge decides that the final disposition should not include the contemplated charge or sentence concessions, withdrawal of the plea may be permitted at the discretion of the judge.

Standard 14-3.4. Discussion and agreement not admissible

Unless the defendant subsequently enters a plea of guilty or nolo contendere which is not withdrawn, the fact that the defendant or defense counsel and the prosecuting attorney engaged in plea discussions or made a plea agreement, or statements made by the defendant in connection with and relevant to such plea discussions, should not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings.

***Sentencing Reform: A Canadian Approach — Report of the Canadian Sentencing Commission* (1987), recommendations 13.1 to 13.13.**

13.1 The Commission recommends that the interests of the victim in plea negotiations continue to be represented by Crown counsel. To encourage uniformity of practice across Canada, the responsible federal and provincial prosecutorial authorities should develop guidelines which direct Crown counsel to keep victims fully informed of plea negotiations and sentencing proceedings and to represent their views.

13.2 The Commission recommends that, where possible, prior to the acceptance of a plea negotiation, Crown counsel be required to receive and consider a statement of the facts of the offence and its impact upon the victim.

13.3 The Commission recommends that the sentencing judge inquire of the defendant whether he or she understands the plea agreement and its implications and, if he or she does not, the judge should have the discretion to strike the plea or sentence.

13.4 The Commission recommends that federal and provincial prosecutorial authorities collaborate in the formulation of standards or guidelines for police respecting over-charging and/or inappropriate multiple charging.

13.5 The Commission recommends that the relevant federal and provincial authorities give serious consideration to the institution of formalized screening mechanisms to permit, to the greatest extent practicable, the review of charges by Crown counsel prior to their being laid by police.

13.6 The Commission recommends that police forces develop and/or augment internal review mechanisms to enhance the quality of charging decisions and, specifically, to discourage the practice of laying inappropriate charges for the purpose of maximizing a plea bargaining position.

13.7 The Commission recommends that the relevant federal and provincial prosecutorial authorities establish a policy (guidelines) restricting and governing the power of the Crown to reduce charges in cases where it has the means to prove a more serious offence.

13.8 The Commission recommends that the appropriate federal and provincial authorities formulate and attempt to enforce guidelines respecting the ethics of plea bargaining.

13.9 The Commission recommends a mechanism whereby the Crown prosecutor would be required to justify in open court a plea bargain agreement reached by the parties either in private or in chambers unless, in the public interest, such justification should be done in chambers.

13.10 The Commission recommends that the trial or sentencing judge never be a participant in the plea negotiation process. This recommendation is not intended to preclude the judge from having the discretion to indicate in chambers the general nature of the disposition or sentence which is likely to be imposed upon the offender in the event of a plea of guilty.

13.11 The Commission recommends that the *Criminal Code* be amended to *expressly* provide that the court is not bound to accept a joint submission or other position presented by the parties respecting a particular charge or sentence.

13.12 The Commission recommends the development of a mechanism to require full disclosure in open court of the facts and considerations which formed the basis of an agreement, disposition or order arising out of a pre-hearing conference.

13.13 The Commission recommends that an in-depth analysis of the nature and extent of plea bargaining in Canada be conducted by the federal and provincial governments or by a permanent sentencing commission.

APPENDIX B

Description and Analysis of Our Public Opinion Survey*

Part I: Report – Public Attitudes Toward Plea Bargaining

Part II: The Scenarios Used in Our Survey

Part III: The Survey Questions

* This survey was designed for us by Professor A.N. Doob, Director of the Centre of Criminology, University of Toronto. It was conducted for us by Gallup Canada, Inc.

PART I: Report

Public Attitudes Toward Plea Bargaining

Anthony N. Doob

Introduction

The purpose of this study was to determine both the overall public view of plea bargaining and to attempt to understand what aspects of plea bargaining upset the public.

Two general techniques were used: a direct question asking the public what they thought of plea bargaining and an experiment embedded in the survey. The survey was carried out by Gallup, Canada, in late February 1988. The Gallup organization defines its sampling procedure as being "designed to produce an approximation of the adult civilian population, 18 years or older, living in Canada except for those persons in institutions such as prisons or hospitals, or those residing in far Northern regions."

In the experiment, approximately 200 people were given each of five different scenarios describing the manner in which a criminal case was resolved without trial. All respondents were then asked to answer nine questions. A total of 1049 people responded to the survey as a whole.

The five scenarios differed in the description of how the case was resolved. Comparisons across scenarios allow us to see how different forms of resolution affect public perceptions of the process.

For purposes of this report, I will be using the following terminology to describe the conditions:

A: No bargain. A case was described in which a person was charged with robbery and using a firearm during the offence. The accused is described as having pleaded guilty to the robbery. The second charge was dropped by the Crown. The reader is told that counsel had not discussed the case prior to the court appearance and that similar sentence submissions were made. The sentence handed down was described as falling between the two submissions.

B: Standard bargain. This scenario differs from "A" in the following ways. The reader is told that Crown and defence had met in the Crown's office prior to the court hearing and an agreement had been made on a joint submission on a sentence for the robbery and a dropping of the other charge. The sentence handed down was what counsel had recommended.

C: Bargain — explanation given. The difference between this and "B" (above) is that counsel are described as having given, in open court, an explanation on how they had arrived at the decision to drop the weapons charge and the joint submission.

D: Bargain — judge present. This is essentially the same as "B" except that the plea bargaining took place in the judge's office with the judge present.

E: Bargain — judge involved. This is the same as "D" except that the judge is described as having rejected (in his chambers) a preliminary suggestion from counsel on the outcome of the case and subsequently accepting a second suggestion.

Results

Plea bargaining, generally

The most simple way of determining the public's view of plea bargaining is to look at the responses to a direct question about it (asked *after* the other questions had been asked). The findings are simple and straightforward: Most Canadians disapprove of plea bargaining (defined, in this question as "the practice whereby an accused person agrees to plead guilty in return for the promise of some benefit such as agreement that certain charges be dropped and/or certain recommendations be made to the judge on what the sentence should be").

View of plea bargaining:	Overall	Excluding no opinion & DK/NS*
Strongly approve of the practice	1.8%	2.1%
In general, approve of the practice	16.3%	18.8%
No opinion about the practice	9.1%	—
In general, disapprove of the practice	39.3%	45.3%
Strongly disapprove of the practice	29.3%	33.8%
Dont't know or not stated	4.3%	—
Total:	100%	100%

* Don't know/Not stated

On this question, 68.6% of all Canadians, or 79.1% of those who had at least some opinion about the practice, disapprove of plea bargaining. The scenario that the respondents had just read had no effect on their responses.

There seemed to be little important demographic variation in this view. Disapproval of plea bargaining was expressed by at least 60% of the following demographic breakdowns: each of the five regions of Canada, three age groupings, both sexes, three levels of educational achievement, four income groupings, mother tongue, and size of community. Students were the only occupational grouping whose overall level of disapproval dropped below 60% (to 58%).

Overall view of sentencing

The conclusion of the five scenarios used in the study was the sentence handed down by the court. Of the seven questions asked in relation to the scenarios, three dealt directly with sentencing. The others deal with the behaviour of judge, Crown and defence. It is important, then, to remember, in the context of sentencing, that typically most Canadians indicate that they do not think that the *severity* of sentences is appropriate. This has been the finding of Canadian public opinion polls for the past twenty years; this poll was no exception. In this survey, at least 60% of all respondents in each of the experimental conditions thought that sentences were too lenient. The proportion thinking that sentences were about right in severity varied from 18% to 27% across conditions. Almost nobody thinks that sentences are too severe (from 0% to 2% across conditions).

Given that comprehensive sentencing data do not exist in Canada, it is interesting to note that most Canadians do have a view on this topic: only 6% to 11% didn't know how to answer this question.

It should be noted that the question dealing with the respondents' opinion on the severity of sentences (generally) came immediately after the seven questions that related to the scenario. Although it was prefaced with the statement "Now we would like to ask you two general questions," it seems that the scenario it followed influenced the responses. Specifically, those who had just read a scenario involving *any* kind of plea bargaining (Standard bargain, Bargain—explanation given, Bargain—judge present, Bargain—judge involved) were significantly more likely to think that sentences were not severe enough than those who had read the "no bargain" scenario.

Opinion of sentences handed down by the courts
(of those who expressed an opinion)*

	Too lenient	Too severe/about right	Total
Scenario:			
No Bargain (A)	68%	32%	100%
Some form of bargaining (B,C,D,E)	77%	23%	100%

* In this and all subsequent tables, only the data from those who expressed an opinion are reported. Figures in some tables may not add to 100% due to rounding.

Chi square = 7.17, df = 1, $p < .01$

Expressed somewhat differently, within a sample of people who read a scenario *not* involving plea bargaining, 27% thought that sentences of the court were "about right." Reading about a case involving plea bargaining, however, reduced this portion by almost a third to 19%.

Impact of plea bargaining on the perception of the sentence in the case

It is clear that the public's expectation of the appropriateness of a sentence in a particular case is determined, in part, by the way in which it was arrived at.

Did respondent assume that sentence likely to be appropriate?

	Yes	Probably not	Definitely not	Total
Condition:				
No bargain (A)	34.7%	34.7%	30.5%	100%
Standard bargain (B)	20.7%	37.1%	42.2%	100%
Bargain—explanation given (C)	26.6%	39.6%	33.8%	100%
Bargain—judge present (D)	28%	38.7%	33.3%	100%
Bargain—judge involved (E)	23.2%	33.9%	42.9%	100%

Chi square, overall = 16.29, df = 8, $p < .05$
Chi square, A vs. B = 11.21, df = 2, $p < .01$
Chi square, A vs. E = 7.79, $p < .05$
Chi square, A vs. C = 3.24 not significant
Chi square, C vs. E = 3.36 not significant

There are two findings that stand out in this table. The first is the contrast of "No bargain" with "Standard bargain." Belief that the sentence will be appropriate drops dramatically when the public hears that the Crown and defence have bargained.

The second is the effect of giving an explanation for the bargain in open court (Condition C). It is quite clear that a good portion of the detrimental effects of the normal plea bargain is erased by having a full explanation given in court.

Having the judge present, but not as an active participant (Condition D) appears to lead the public to anticipate a more acceptable outcome than the standard bargain; however, having the judge actively involved in the plea bargaining process leads the public to expect a less acceptable outcome.

Expectation that all of the relevant information was brought to the attention of the judge before sentencing

Part of the difference in the expected appropriateness of the sentence may be due to large differences in the expectation as to whether all of the relevant evidence was brought to the attention of the judge before he made his sentencing decision.

Was all appropriate information brought to the attention of the judge before sentencing?

	Yes	Probably not	Definitely not	Total
Condition:				
No bargain (A)	31%	42%	27%	100%
Standard bargain (B)	27%	37%	37%	100%
Bargain—explanation given (C)	36%	43%	21%	100%
Bargain—judge present (D)	46%	39%	16%	100%
Bargain—judge involved (E)	40%	38%	22%	100%

Chi square, overall = 35.43, df = 8, $p < .01$

Clearly, one effect of having a case resolved by a standard plea bargain (Condition B) is that the public will be more likely to believe that the judge did not have access to all relevant information about the case.

Where an explanation is given in court of how the "bargain" had been arrived at (Condition C), the public was more likely to believe that the relevant information was available to the judge than in the standard bargain condition (B). In the two conditions where the plea negotiation took place in the judge's chambers (Conditions D and E), there was even stronger belief that the judge had access to the appropriate information.

Belief that judge took all relevant factors into account in sentencing offender

The previous question suggests that people believe that in a standard plea bargaining situation, the judge does not have access to all appropriate information and is less likely to have access than in the other situations described in other scenarios. Not surprisingly, then, people in the standard plea bargaining situation (Condition B) are less likely to believe that the judge took into account all relevant information than in the other conditions.

Did judge take into account all relevant information?

	Yes	Probably not	Definitely not	Total
Condition:				
No bargain (A)	45%	26%	28%	100%
Standard bargain (B)	24%	34%	42%	100%
Bargain—explanation given (C)	39%	42%	18%	100%
Bargain—judge present (D)	42%	35%	22%	100%
Bargain—judge involved (E)	40%	38%	22%	100%

Chi square, overall = 50.04, df = 8, $p < .01$

On this question, the condition that stands out is Condition B — the standard plea bargaining situation. Respondents in this condition were considerably less likely to think that the judge took into account all relevant factors in coming to his sentencing decision.

Perception of whether defence counsel did a good job of representing the offender's interests

Did defence do a good job?

	Definitely yes	Probably yes	No	Total
Condition:				
No bargain (A)	24%	51%	25%	100%
Standard bargain (B)	40%	36%	24%	100%
Bargain — explanation given (C)	43%	39%	18%	100%
Bargain — judge present (D)	42%	43%	15%	100%
Bargain — judge involved (E)	35%	42%	23%	100%

Chi square, overall = 24.29, df = 8, $p < .01$

Overall, it is clear that defence counsel are seen by most people (in all conditions, at least three quarters of those having an opinion) as doing a good job of representing the offender's interests.

The one condition that stands out as being different from the rest is A (No bargaining). Respondents are somewhat less sure in this condition than in the other four conditions (where some form of bargaining takes place) that the defence has done a good job.

One might infer from this that for the public, "doing a good job in representing the accused's interests" involves bargaining with the Crown over sentence.

Did the Crown do a proper job of presenting all appropriate information to the court?

On the evaluative question asked about them, Crowns were not seen in as favourable terms as was defence counsel. Fewer than 40% of the respondents with an opinion in each condition thought that the Crown did a proper job of presenting all appropriate information.

Did the Crown prosecutor do a proper job of presenting all appropriate information?

	Yes	Probably not	Definitely not	Total
Condition:				
No bargain (A)	34%	37%	29%	100%
Standard bargain (B)	28%	31%	40%	100%
Bargain—explanation given (C)	36%	39%	25%	100%
Bargain—judge present (D)	37%	33%	29%	100%
Bargain—judge involved (E)	38%	36%	26%	100%

Chi square, overall = 15.89, df = 8, $p < .05$

The one condition that stands out among the rest is the "Standard bargain" (Condition B). Clearly in this condition, respondents assume that the Crown would not do a good job of bringing the appropriate information to the court.

Did the judge act in a proper and fair manner in handling the case?

There was a lot of variation in how the judge was perceived. Of those who expressed an opinion, more saw the judge behaving properly in the "No bargain" condition than in any other. Indeed, only in this condition did a majority of those who expressed a view see the judge as behaving in a proper and fair manner in handling the case.

Did judge act in proper and fair manner?

	Yes	Probably not	Definitely not	Total
Condition:				
No bargain (A)	52%	25%	23%	100%
Standard bargain (B)	31%	34%	35%	100%
Bargain—explanation given (C)	44%	29%	27%	100%
Bargain—judge present (D)	42%	29%	29%	100%
Bargain—judge involved (E)	33%	32%	35%	100%

Chi square, overall = 24.227, df = 8, $p < .01$
Chi square (B vs. C) = 8.51, df = 2, $p < .05$

For reasons that one can only speculate on, the judge is seen in less favourable terms when there is a "Standard bargain" reported. It is possible that the judge is being criticized, implicitly, for presiding over a hearing where he is perceived not to be taking into account all relevant information (see above) even though it appears to be perceived as the Crown's fault that this information did not come to the attention of the judge.

It is worth noting, however, that where an explanation is given for the plea agreement (Condition C), the judge is rated significantly more favourably than he is in the "Standard bargain" condition.

Finally, there is an indication that the public does not approve of the judge getting heavily involved in the plea bargaining process. The ratings of the actions of the judge are slightly (but not significantly) lower in the condition where he is actively involved (Condition E) than when he is present, but inactive (Condition D).

Opinion on judge's level of involvement in the case

Overall, it is clear that most people in *all* experimental conditions want the judge more involved in the case. It is possible that one common factor — the dropping of the second charge against the accused — is responsible for this. Even in Condition E — where the judge is actively involved in the plea discussions — 56% of those expressing an opinion believe that the judge should have been more involved in the case.

Opinion of judge's level of involvement in the case

	Too involved	Appro-priate	Should be more involved	Total
Condition:				
No bargain (A)	2%	30%	69%	100%
Standard bargain (B)	4%	23%	73%	100%
Bargain—explanation given (C)	5%	23%	72%	100%
Bargain—judge present (D)	7%	26%	67%	100%
Bargain—judge involved (E)	21%	23%	56%	100%

Chi square, overall = 63.480, df = 8, $p < .01$

The condition that clearly stands out on this question is Condition E (Bargain — judge involved). Only in this one instance did a sizeable portion of the respondents believe that the judge was too involved.

Interestingly enough the portion viewing the judge's level of involvement as appropriate was more or less the same across conditions.

Unwillingness to express an opinion

All of the tables presented thus far involve the responses only of those who were willing to express an opinion on each question to the Gallup interviewer. A small portion of those interviewed, however, simply said that they could not express a view on a given question even though the interviewer read the following statement to the respondents "Even though it may be difficult in some cases, I would still like you to try to answer the following questions based on the information alone contained on the card."

What is interesting about the "Don't know" responses is not that they occurred, but rather that they occurred primarily in the case of Condition A (No bargain).

Proportion answering "don't know" for each question by experimental condition

	A	B	C	D	E	Overall chi square	$p <$ df = 4
Question:							
Relevant evidence to judge	4.5%	2.2%	2.3%	5.5%	5.3%	6.394	n.s
Judge took relevant factors into acc't	8.9%	2.5%	3.4%	6.2%	5.5%	11.801	.05
Sentence appropriate	10.4%	2.7%	5.7%	6.1%	8.9%	11.562	.05
Crown did proper job	12.1%	3.1%	5.0%	8.7%	9.8%	16.083	.01
Defence did good job	12.8%	3.4%	2.7%	4.8%	9.8%	28.443	.01
Judge acted proper & fair	13.7%	5.8%	5.1%	7.0%	9.4%	13.690	.01
judge's level involvement	15.6%	3.2%	3.3%	8.5%	9.9%	31.256	.01
Sentences generally	9.1%	6.8%	9.4%	11.4%	5.7%	4.898	n.s
View of plea bargaining	7.3%	1.5%	1.7%	5.1%	5.2%	13.892	.01

Generally speaking, it appears that people are least likely to express an opinion in a situation where there has simply been a guilty plea described and most likely to express an opinion when they have just read about the "Standard bargain."

PART II: The Scenarios Used in Our Survey

(Each of the following five scenarios was presented to approximately 200 of our survey respondents to read before answering a series of questions. No person was given more than one scenario to read.)

A: This is a case involving an accused person charged with two related offences: the robbery of a convenience store and the additional offence of using a firearm during this robbery.

The accused pleaded guilty in court to the offence of robbery and the second offence (the firearms offence) was dropped by the Crown prosecutor.

The Crown prosecutor and defence counsel had not discussed the case with each other before the court appearance where the accused pleaded guilty to the robbery. At the court appearance where the accused pleaded guilty, the Crown prosecutor and the defence counsel made very similar suggestions to the judge on what the sentence should be.

The judge, having listened to the recommendations, sentenced the offender in between the two recommendations.

B: This is a case involving an accused person charged with two related offences: the robbery of a convenience store and the additional offence of using a firearm during this robbery.

The accused pleaded guilty in court to the offence of robbery and the second offence (the firearms offence) was dropped by the Crown prosecutor.

The Crown prosecutor and defence counsel had met in the Crown prosecutor's office earlier in the day to discuss the case.

On the basis of this discussion, when the case came up in court later in the day, the Crown prosecutor agreed to drop the firearms offence in exchange for the accused person's agreement to plead guilty to the robbery charge. As an additional part of the agreement, the Crown prosecutor and defence counsel agreed to make a joint statement to the judge on what the sentence should be. In court, they told the judge what they had agreed the sentence should be.

The judge, having listened to the recommendation, gave the offender the sentence the Crown prosecutor and defence counsel had recommended.

C: This is a case involving an accused person charged with two related offences: the robbery of a convenience store and the additional offence of using a firearm during this robbery.

The accused pleaded guilty in court to the offence of robbery and the second offence (the firearms offence) was dropped by the Crown prosecutor.

The Crown prosecutor and defence counsel had met in the Crown prosecutor's office earlier in the day to discuss the case.

On the basis of this discussion, when the case came up in court later in the day, the Crown prosecutor agreed to drop the firearms offence in exchange for the accused person's agreement to plead guilty to the robbery charge. As an additional part of the agreement, the Crown prosecutor and defence counsel agreed to make a joint statement

to the judge on what the sentence should be. In court, they told the judge what they had agreed the sentence should be.

They then explained to the judge in open court how they had arrived at the decision to drop the firearms charge and how they had arrived at the recommendation on the sentence. They explained how they had worked out their earlier disagreement as to the appropriate sentence.

The judge, having listened to the recommendation, gave the offender the sentence the Crown prosecutor and defence counsel had recommended.

D: This is a case involving an accused person charged with two related offences: the robbery of a convenience store and the additional offence of using a firearm during this robbery.

The accused pleaded guilty in court to the offence of robbery and the second offence (the firearms offence) was dropped by the Crown prosecutor.

The Crown prosecutor and defence counsel had met earlier in the day with the judge in the judge's office to discuss the case.

On the basis of the discussion in the judge's office, when the case came up in court later in the day, the Crown prosecutor agreed to drop the firearms offence in exchange for the accused person's agreement to plead guilty to the robbery charge. As an additional part of the agreement, the Crown prosecutor and defence counsel agreed to make a joint statement to the judge on what the sentence should be. In court, they told the judge what they had agreed the sentence should be.

The judge, having listened to the recommendation, gave the offender the sentence the Crown prosecutor and defence counsel had recommended.

E: This is a case involving an accused person charged with two related offences: the robbery of a convenience store and the additional offence of using a firearm during this robbery.

The accused pleaded guilty in court to the offence of robbery and the second offence (the firearms offence) was dropped by the Crown prosecutor.

The Crown prosecutor and defence counsel had met earlier in the day with the judge in the judge's office to discuss the case.

Initially, the judge rejected as inappropriate a suggestion on how the case should turn out. The judge did, however, offer a second suggestion which they all then accepted.

On the basis of the discussion in the judge's office, when the case came up in court later in the day, the Crown prosecutor agreed to drop the firearms offence in exchange for the accused person's agreement to plead guilty to the robbery charge. As an

additional part of the agreement, the Crown prosecutor and defence counsel agreed to make a joint statement to the judge on what the sentence should be. In court, they told the judge what they had agreed the sentence should be.

The judge, having listened to the recommendation, stated in court that he had had discussions in his office with the Crown prosecutor and defence counsel. The judge then sentenced the offender and indicated that the sentence was the same as had been agreed to by the Crown prosecutor, defence counsel, and the judge himself in the discussions that had taken place in the judge's office.

PART III: The Survey Questions

(Each of our survey respondents, having read *one* of the five scenarios set out in Part II above, was asked the following questions.)

1) On the basis of this information alone, would you assume that all of the relevant evidence about the offence and the offender was brought to the attention of the judge before he made his decision on the appropriate sentence?

— Definitely yes
— Probably yes
— Probably not
— Definitely not

2) On the basis of this information alone, would you assume that the judge took all relevant factors into account in coming to his decision about the sentence?

— Definitely yes
— Probably yes
— Probably not
— Definitely not

3) On the basis of this information alone, would you assume that the sentence given to the offender was likely to be appropriate?

— Definitely yes
— Probably yes
— Probably not
— Definitely not

4) On the basis of this information alone, would you assume that the Crown prosecutor did a proper job of presenting all appropriate information to the court?

— Definitely yes
— Probably yes
— Probably not
— Definitely not

5) On the basis of this information alone, would you assume that the defence counsel did a good job of representing the offender's interests?

— Definitely yes
— Probably yes
— Probably not
— Definitely not

6) On the basis of this information alone, would you assume that the judge had acted in a proper and fair manner in the way in which he handled all aspects of this case?

— Definitely yes
— Probably yes
— Probably not
— Definitely not

7) On the basis of this information alone, would you assume that the judge's level of involvement in the case was appropriate? Or do you think he was too involved or not involved enough in the way in which the outcome of the charges and sentence were determined?

— The judge was too involved in the case
— The level of involvement of the judge was appropriate
— The judge should have been more involved in the case

8) In general, would you say that the sentences handed down by the courts in Canada are too severe, about right, or not severe enough?

— Too severe
— About right
— Not severe enough
— Don't know

9) What is your view of plea bargaining — the practice whereby an accused person agrees to plead guilty in return for the promise of some benefit such as an agreement that certain charges be dropped and/or certain recommendations be made to the judge on what the sentence should be?

— I strongly approve of the practice
— In general, I approve of the practice
— I have no opinion about the practice
— In general, I disapprove of the practice
— I strongly disapprove of the practice