

Bargaining for Justice: The Road Towards Prosecutorial Accountability in the Plea Bargaining Process

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I. INTRODUCTION

If the Supreme Court of Canada's recent decisions on prosecutorial discretion¹ are any indication, judicial constraint of prosecutorial discretion will continue to be exercised in an exceptionally limited manner. Consider, for example, the Supreme Court's decision in *Babos*.² One of the central issues of this case was the egregious conduct of a prosecutor who, during the plea bargaining process,³ threatened to lay

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¹ See *R v Babos*, 2014 SCC 16, [2014] 1 SCR 309 [*Babos*]; *R v Anderson*, 2014 SCC 41, [2014] 2 SCR 167 [*Anderson*]; *R v Nur*, 2015 SCC 15, [2015] 1 SCR 773 [*Nur*]; *R v Nixon*, 2011 SCC 34, [2011] 2 SCR 566 [*Nixon*]; *R v Anthony-Cook*, 2016 SCC 43, [2016] 2 SCR 204 [*Anthony-Cook*].

² *Babos*, *supra* note 1.

³ In this article, “plea bargaining” refers to a broad range of behaviours—from simple discussions to concrete agreements—that take place between different actors in the criminal court system—notably Crown and defence counsel—and that is perceived to be binding on the involved parties (Simon N Verdun-Jones, “Plea Bargaining” in Michelle G Grossman & Julian V Roberts, eds, *Criminal Justice in Canada: A Reader* (Toronto: Nelson Education, 2015) 168 at 169 [Verdun-Jones]. For the purpose of this article, it is assumed that the plea bargaining process is, as per the *Martin Report*, an essential part of the criminal justice system that, when “properly conducted, benefit not only the

additional charges against two accused if they refused to enter guilty pleas.⁴ Despite the lower courts' acknowledgment that the prosecutor's conduct was unacceptable and despite the call from the trial judge to grant a stay of proceedings, the majority of the Supreme Court refused to justify that stay or provide any other remedies for this misconduct.⁵ Even though the prosecutor's "bullying tactic" was "reprehensible and unworthy of the dignity of her office,"⁶ Justice Moldaver, writing for the Majority, ultimately denied the accused's appeal. Considering the manner in which the lower courts characterized the prosecutor's conduct (as an abuse of process) and mindful of the strongly worded dissent from Justice Abella, the Majority's opinion arguably stands for the acceptance, albeit reluctantly, of behaviour that should not have been condoned as well as a resultant dilution of standards that should have been applied in order to guard against injustice.⁷

Situations of prosecutorial misconduct, like the one presented in *Babos*, raise serious questions about the role of prosecutorial discretion in the criminal justice system generally and the plea bargaining process more specifically. For all of the alleged benefits that come with prosecutorial discretion—such as flexibility, scarce resource maximization, and individualized justice⁸—there remains the "very real potential for pernicious use and abuse of this discretion."⁹ This article focuses on the place of prosecutorial discretion in the specific context of plea bargaining in Canada and asks whether and to what extent prosecutorial discretion ought to be guided and constrained to promote the principles of procedural fairness, accountability, flexibility, and transparency. Considering that between 2008 and 2009, fifty-nine percent of accused persons appearing before Canadian

accused, but also victims, witnesses, counsel, and the administration of justice generally" (Ontario, Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Ministry of the Attorney General, 1993) at 281 [Martin Report].

⁴ *Babos*, *supra* note 1. See review of the facts at paras 7–18.

⁵ For a review of the judicial history, see *ibid* at paras 19–28.

⁶ *Ibid* at para 61.

⁷ H Archibald Kaiser, "Babos: Further Narrowing Access to a Stay of Proceedings Where the Integrity of the Judicial Process Is Implicated" in Don Stuart, ed, *Criminal Reports* (Toronto: Carswell, 2014) 59 at 83 [Kaiser].

⁸ Brandon K Crase, "When Doing Justice Isn't Enough: Reinventing the Guidelines for Prosecutorial Discretion" (2007) 20:3 *Geo J Leg Ethics* 475 at 481 [Crase].

⁹ *Ibid* at 482.

adult courts pleaded guilty and it is widely believed that many of these guilty pleas resulted from a plea bargain reached between prosecutors and defence counsel,¹⁰ a critical reflection surrounding prosecutorial discretion in the plea bargaining process is both important and timely.

This article draws on doctrinal as well as comparative legal methods to argue that the current devices designed to constrain and guide prosecutorial discretion in Canada—case law, provincial Rules of Professional Conduct (“Rules”), and Crown Policy Manuals (“Manuals”)—risk prioritizing expedience over procedural fairness and ought to be reformed. We look to the German model as an alternative avenue for reform of prosecutorial discretion while also raising limitations associated with this model. This article proceeds in three parts. Part I contextualizes prosecutorial discretion by outlining the nature of this discretion and its place in the criminal justice system broadly and the plea bargaining process more specifically. Part II sets out the inadequacies of the current devices and notes their inability to constrain and guide prosecutorial discretion during the plea bargaining process. Part III explores alternative avenues for reform of prosecutorial discretion in the plea bargaining process by engaging in a comparative analysis inspired by the German model of prosecutorial oversight and assessing the strengths and limitations of this model. This model embraces a number of policies and procedures aimed at regulating the plea bargaining process, including note-taking during plea discussions and motivating plea recommendations. The German model is most notably lauded for its transparency, which can, in turn, enable greater prosecutorial and procedural accountability. While it might be argued that additional regulations imposed on the Canadian process risk grinding the gears of criminal justice to a halt, we argue that our proposed avenues for reform do not impose time-consuming burdens on prosecutors, particularly when these changes are combined with policies and practices that favour decriminalization. As will be seen, prosecutors in Canada have more discretionary powers to charge individuals with offences, and in this respect, implementing the proposed new measures and combining them with additional diversion and decriminalization strategies can realistically lead to a more efficient and equitable process.

¹⁰ Verdun-Jones, *supra* note 3 at 169.

II. PROSECUTORIAL DISCRETION AND ITS SPECIFIC CHALLENGES IN THE CONTEXT OF PLEA NEGOTIATIONS

Prosecutorial discretion refers to the freedom of choice and of action exercised by the Attorney General—and his/her delegated agent (“prosecutor”)—in matters relating to the prosecution of criminal offences that fall within his/her authority.¹¹ This discretion encompasses a wide range of activities including but not limited to the choice of charge, the decision to proceed summarily or by indictment when the offence is hybrid, and the staying of proceedings or the withdrawal of charges.¹² Prosecutorial discretion is inherent to the office of the Attorney General and flows from the sovereign’s constitutional right to prosecute crime.¹³ When exercising this discretion in prosecutorial matters, the prosecutor occupies a distinct position because he/she must not only consider the situation of the individual in question but also the demands of the public interest.¹⁴ As Justice Rand notes in *Boucher v The Queen*, the Canadian prosecutor’s function as a “minister of justice” is a “matter of public duty than which in civil life there can be none charged with greater personal responsibility.”¹⁵ As will be discussed in greater detail below, the discretion to prosecute is much wider in the Canadian context than in the German one. Whereas the Canadian prosecutor’s wide discretion demands an evaluation of the public interest, prosecutors in Germany generally have to observe mandatory prosecutions when the evidence is sufficient, regardless of any evaluation for the public interest dimension.¹⁶

¹¹ David Vanek, “Prosecutorial Discretion” (1987-1988) 30 *Crim LQ* 219 at 219.

¹² Donna C Morgan, “Controlling Prosecutorial Powers—Judicial Review, Abuse of Process, and Section 7 of the *Charter*” (1986-1987) 29 *Crim LQ* 15 at 20 [Morgan].

¹³ *Ibid* at 19. See also Marc Rosenberg, “The Attorney General and the Administration of Criminal Justice” (2009) 34 *Queens LJ* at 818-32 [Rosenberg].

¹⁴ *Ibid*. See also Mark Phillips, “The Public Interest Criterion in Prosecutorial Discretion: A Lingering Source of Flexibility in the Canadian Criminal Process?” (2015) 36 *Windsor Rev Legal Soc Issues* 43.

¹⁵ *Boucher v The Queen*, [1955] SCR 16 at 24, 110 CCC 263.

¹⁶ See Joachim Herrmann, “The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany” (1974) 41 *U Chicago L Rev* 469. This principle dates back to the Code of Criminal Procedure of 1877 and is used to enforce the equal application of the law and to protect against prosecutorial bias.

Balancing these potentially competing interests in Canada requires an important level of independence.¹⁷ Neither the government, nor Parliament, nor the police may attempt to influence the Attorney General, and by extension the Crown, as prosecutors exercise their discretion over “the nature and extent of the prosecution.”¹⁸ Moreover, the Attorney General may not attempt to influence individual prosecutors as they make routine decisions.¹⁹

Prosecutorial independence from the government advances the rule of law.²⁰ Independence from government and Parliament insulates prosecutors from political influence, thereby assuring that prosecutions do not proceed because the accused is an opponent of the government or is engaged in politically (not legally) objectionable activities. As Donna Morgan notes, the prosecutor is to “stand alone, acting independently of political or other external influences. He is to be neither instructed [n]or restrained, save by his final accountability to Parliament.”²¹

The Supreme Court has characterized discretion as an essential feature of the criminal justice system and has recognized that prosecutorial discretion does not offend the principles of fundamental justice.²² According to Justice La Forest, the complete elimination of discretion would result in an “unworkably complex and rigid” criminal justice system.²³ When exercised fairly and firmly, prosecutorial discretion helps further the goals of flexibility, scarce resource maximization, and individualized justice. We briefly outline each of these goals in turn. First, given that criminal statutes cannot be drafted specifically or quickly enough to respond to changes in public attitudes and conduct, discretion allows prosecutors to adapt the criminal law to novel circumstances. Second, in a system characterized by scarce resources—notably time and money—discretion empowers prosecutors to assess and determine those cases worthy of being pursued. Third, discretion allows for a system of individualized

¹⁷ Brian A Grosman, “The Role of the Prosecutor in Canada” (1970) 18 Am J Comp L 498 at 499–500 [Grosman].

¹⁸ *Krieger v Law Society of Alberta*, 2002 SCC 65 at para 47, [2002] 3 SCR 372 [Krieger].

¹⁹ Rosenberg, *supra* note 13 at 832–36.

²⁰ *Ibid* at 835.

²¹ Morgan, *supra* note 12 at 19.

²² *R v Beare*, [1988] 2 SCR 387 at para 51, 55 DLR (4th) 481 [Beare].

²³ *Ibid*.

justice in which prosecutors only bring provable cases that are in the interest of society.²⁴

The same goals that justify the use of discretion in the criminal justice system are also used to justify the place of prosecutorial discretion in the plea bargaining process. For some commentators, including Mary Lou Dickie, Crown Counsel, and member of the Crown Case Management Team (Ontario), the plea bargaining process is “merely an extension of the screening process in an effort to find the correct result for a matter before the court.”²⁵ If properly conducted, she asserts, the plea bargaining process allows the prosecutor to develop “innovative approaches to trial proceedings, dispositions, and sentences that can satisfy the needs of the accused, victims, and society.”²⁶ This assertion echoes the spirit of Recommendation 46 of the *Martin Report*, which not only affirms the necessity of these negotiations but also acknowledges the benefits that flow from them.²⁷

Nevertheless, the optics of the plea bargaining process—insulated from the public and unconstrained by the procedural safeguards of the trial—challenge the assumption that prosecutorial discretion should be exercised in plea bargain negotiations as it does in a trial, namely in a relatively unfettered manner. This assumption ought to be rejected for two principal reasons. First, contrary to Dickie’s assertion, the prosecutor’s power in the plea bargaining process extends far beyond merely screening cases. In an effort to persuade the defendant to plead guilty, the prosecutor wields the incredible power of offering promises that relate to the nature of the charge(s) to be laid (charge bargaining), the ultimate sentence that may be decided by the court (sentence bargaining), and even the facts that may be raised with the trial judge (fact bargaining).²⁸ These promises are indeed powerful incentives for guilty pleas, particularly in specific contexts, such as

²⁴ Crase, *supra* note 8 at 481.

²⁵ Mary Lou Dickie, “Through the Looking Glass – Ethical Responsibilities of the Crown in Resolution Discussion in Ontario” (2005) 50 *Crim LQ* 128 at 147 [Dickie].

²⁶ *Ibid.*

²⁷ *Martin Report*, *supra* note 3 at 281.

²⁸ Verdun-Jones, *supra* note 3 at 170. See generally Simon N Verdun-Jones & Alison Hatch, *Plea Bargaining and Sentencing Guidelines* (Ottawa: Department of Justice Canada, 1988) at 2 where the authors list examples of the possible promises and agreements available for each “type” of bargaining.

cases where an accused can become a state collaborator/informant,²⁹ offences that carry mandatory minimum sentences,³⁰ and plea negotiations conducted with a member of a vulnerable population.³¹

Second, the private form of interaction that characterizes the plea bargaining process renders ineffective the traditional procedural safeguards that are designed to keep prosecutorial discretion in check and justify judicial deference to prosecutorial discretion in the first place. In *R v Power*,³² the Supreme Court approvingly cites JA Ramsay who writes that prosecutorial discretion is constrained, in large part, because proceedings

²⁹ See the case of Karla Homolka discussed notably in Simon N Verdun-Jones & Adamira A Tijerino, "Victim Participation in the Plea Negotiation Process in Canada: A Review of the Literature and Four Models for Law Reform" (2002) Department of Justice Canada.

³⁰ See Palma Paciocco, "Proportionality, Discretion, and the Roles of Judges and Prosecutors at Sentencing" (2014) 18 Can Crim L Rev 241 and Marie Manikis, "The Recognition of Prosecutorial Obligations in an Era of Mandatory Minimum Sentences of Imprisonment and Over-representation of Aboriginal People in Prisons" (2015) 71 SCLR 277 that discuss the rise of the prosecutor's negotiating power in the mandatory minimum sentence context [Manikis].

³¹ Research has evidenced that certain populations are more susceptible to plead guilty following state incentives and persuasive discourse. For example, the developmentally disabled or cognitively impaired, juveniles, and the mentally ill are often eager to please and are easily influenced and led to comply in situations of conflict. They lack coping mechanisms and are easily overwhelmed by stress and anxiety. See e.g. James W Ellis & Ruth A Luckasson, "Mentally Retarded Criminal Defendants" (1984-1985) 53 Geo Wash L Rev 414; Ronald W Conley, Ruth A Luckasson & George N Bouthilet, *The Criminal Justice System and Mental Retardation: Defendants and Victims* (Baltimore: Brookes Publishing Company, 1992). Further, Indigenous people who are denied bail have a strong tendency to plead guilty. This happens disproportionately in the Canadian criminal justice system. See e.g. Brent Knazan, "The Toronto Gladue (Aboriginal Persons) Court: An Update" (Paper delivered at the National Judicial Institute Aboriginal Law Seminar, St. John's Newfoundland and Labrador, April 2005) [unpublished] at 18. See also Rupert Ross, *Dancing with a Ghost: Exploring Indian Reality* (Toronto: Penguin Canada, 2006) at ch 3. Rupert Ross, a prosecutor who has spent most of his career working with First Nations in remote northwestern Ontario, describes how Indigenous accused show clear discomfort when they enter pleas of "not guilty" upon advice of their lawyers, especially where the court is taking place in their home community. He highlights: "I suspect that for many Native accused, putting such an onus on the community by requiring witnesses to come forward and testify would be seen as an immoral thing to do. The rule is not to burden others that way."

³² *R v Power*, [1994] 1 SCR 601 at para 45, 23 WCB (2d) 194. [*Power*].

take place in a public forum where members of the public are entitled to raise prosecutorial misconduct with the Attorney General.³³ The result is that the prosecutor “must be prepared to account for their actions on every single case they prosecute.”³⁴ The closed-door nature of the plea bargaining process, however, does away with this procedural safeguard in its entirety. While the abuse of process doctrine certainly remains a possibility for the complainant (a point discussed in greater detail below), the fact that plea bargaining negotiations are unrecorded, that the prosecutor’s actions are unsupervised, and that the prosecutor’s decisions need not be justified, make it difficult for the courts—let alone the defence, the public, or the victim³⁵—to require the prosecutor to account for his/her actions. This situation is rendered all the more difficult, as in *Babos*, when the Prosecutor denies having engaged in the alleged misconduct at all.³⁶ This is particularly problematic for unrepresented accused that might suffer from significant power imbalance in this process. As highlighted by Brenton Klause, in the context of an unrepresented accused, some prosecutors do adopt a practice whereby conversations that occur during plea discussions with an unrepresented accused are placed on the record in front of the judge.³⁷ These prosecutors then ask the accused, in court, to either agree or disagree with the contents of the recording before he/she is called upon to enter a plea. The German model offers a useful way forward in the context of an unrepresented accused by requiring discussions be recorded and then analyzed by the judge that hears the plea.

In accepting the necessity of plea bargaining, the Martin Committee was aware and appreciative of the challenges raised above. In fact, the

³³ JA Ramsay, “Prosecutorial Discretion: A Reply to David Vanek” (1987-1988) 30 *Crim LQ* 378 at 378-79.

³⁴ *Ibid.*

³⁵ Marie Manikis, “Recognizing Victims’ Role and Rights During Plea Bargaining: A Fair Deal for Victims of Crime” (2012) 58 *Crim LQ* 411. Manitoba’s *Victims’ Bill of Rights*, CCSM c V55, s 12(i) makes it mandatory for prosecutors to inform victims where they seek information about the possibility of discussions between the Crown attorney and the defence. It is worth noting that most provincial Bills of Rights do not include such obligations, and even when they do, as in the case in Manitoba, victims are not entitled to know the details of discussions or specifics about how the process unfolded, but rather just general information about the possibility of discussions between the parties.

³⁶ *Babos*, *supra* note 1 at footnote 8.

³⁷ Brenton Klause, “The Self-Represented” (Seminar delivered at the Saskatchewan Legal Education Seminar, 2006).

Committee's acceptance of plea bargaining was largely premised on the belief that plea bargaining would be properly conducted lest improper conduct undermines the public's confidence in the administration of criminal justice. As per Recommendation 50 of the *Martin Report*, the Crown's position on the sentence must not be formulated for reasons of expediency nor can the position bring the administration of justice into disrepute.³⁸ The problem here is that faith without action does little to guide or constrain prosecutorial power as well as ensure procedural fairness. Over two decades have passed since the Martin Committee published its seminal report with some but not all of its recommendations put into practice. Despite calls for further reform from the Criminal Justice Review Committee (1999),³⁹ the current devices designed to guide and constrain prosecutorial discretion in the plea bargaining process remain, as will be discussed in the next part, procedurally ineffective and inadequate.

III. THE LIMITS OF CURRENT DEVICES TO CONSTRAIN AND GUIDE PROSECUTORIAL DISCRETION

A body of rules—drawn from three sources—govern the conduct of prosecutors in Canada as they exercise their discretion during the plea bargaining process. These sources referred to as devices for the purpose of this piece include case law, the Rules, and Manuals.⁴⁰ In this part, the limitations of each device are discussed by addressing their inability to adequately guide and constrain prosecutorial discretion during the plea bargaining process. Although some variations exist between the devices available in the different provinces, they regulate plea bargaining in a similar limited way.

³⁸ *Martin Report*, *supra* note 3 at 300. In addition, this report recommended that the Attorney General set clearer guidelines for the exercise of prosecutorial discretion, including plea discussion.

³⁹ John D Evans, Hugh Locke & Murray Segal, *Report of the Criminal Justice Review Committee* (Toronto: The Committee, 1999) at ch 6. While the Report generally advocates for increased efficiency in the plea bargaining process, notable recommendations include requiring the sentencing judge to conduct a plea comprehension inquiry in all cases, regardless of whether the accused is represented by counsel (6.3) and having the Ministry of the Attorney General and the Department of Justice (Canada) circulate to Crown counsel a list of early resolution “best practices” (6.8).

⁴⁰ Dickie, *supra* note 25 at 138.

A. Caselaw analysis: The inaccessibility of the abuse of process doctrine and the inapplicability of a lower standard of review for tactics/conduct in the plea bargaining process

While judges continue to strongly justify the prosecutor's independence and scope of authority, the tone from the bench has evolved over the past three decades such that prosecutorial discretion is no longer immune from the gaze of the courts. As highlighted by Justice Rosenberg, this shift in tone, which recognized the possibility of judicial review, can be attributed to a series of events that left many Canadians critical and wary of the Attorney General's role in the criminal justice system. These events include the Supreme Court's 1985 decision in *Operation Dismantle Inc v R* (which held that cabinet decisions are indeed reviewable in the courts), the 1989 release of the Report of the Royal Commission on the Donald Marshall, Jr., Prosecution (which recognized the Crown's role in Marshall's wrongful conviction), and a general desire for greater transparency in the operation of public affairs, notably in the criminal justice system.⁴¹

This shift is reflected in the fact that the traditional position held by the courts—that prosecutorial discretion is not subject to judicial review even if the decision could be considered an abuse of power—is no longer valid law.⁴² In his comparison of the language used in the cases of *R v Power* and *R v Krieger*, Justice Rosenberg notes that the highly deferential approach to the review of prosecutorial decisions in *Power* has “given way to a more interventionist tone in *Krieger*.”⁴³ He supports his argument by contrasting statements made by Justice L'Heureux-Dubé in *Power*—“the Crown cannot function as a prosecutor before the court while also serving under its general supervision”⁴⁴—with statements made by Justices Iacobucci and Major in *Krieger*—“Decisions that do not go to the nature and extent of the prosecution, i.e., the decisions that govern a Crown's prosecutor's tactics or conduct before the court, do not fall within the scope of prosecutorial

⁴¹ Rosenberg, *supra* note 13 at 817.

⁴² *Ibid* at 839. Even critics who have argued that facilitating judicial review of prosecutorial discretion will generate an avalanche of litigation until the proverbial wheels of justice grind to a halt view this development positively. See e.g. Michael Code, “Judicial Review of Prosecutorial Decisions: A Short History of Costs and Benefits, in Response to Justice Rosenberg” (2009) 34 *Queen's LJ* 863 at 854–56.

⁴³ *Ibid* at 842.

⁴⁴ *Power*, *supra* note 32 at para 45.

discretion.”⁴⁵ This approach was recently clarified in *Anderson* in which the Supreme Court reaffirms that “[a]ll Crown decision making is reviewable for abuse of process.”⁴⁶ A distinction is therefore made between exercises of prosecutorial discretion that can only be reviewed for abuse of process and tactics/conduct before the court that are subject to a wider range of review by the court (even when they fall short of an abuse of process).

While the tone from the courts suggests a shift in how courts have traditionally characterized and discussed prosecutorial discretion and its scope, this shift in tone has not translated into a shift in action. As exemplified by the analysis below, the Supreme Court has adopted a notoriously high evidentiary threshold and has remained reluctant to interfere with prosecutorial discretion, particularly when asked to remedy an abuse of process with a stay of proceedings.

First, the standard of “considerable deference”⁴⁷ retained to identify abuse of process is very difficult to meet and indeed very rarely achieved. In *Anderson*, the Supreme Court ruled that conduct should only be considered an abuse of process if it seriously compromises trial fairness and/or the integrity of the justice system.⁴⁸ The claimant must demonstrate that prosecutorial conduct matches these criteria on a balance of probabilities.⁴⁹ In *Nur*, the Supreme Court recognized that the abuse of process doctrine is of limited utility because it sets “a notoriously high bar,”⁵⁰ which seems to suggest that, in practice, this standard creates a situation where “the prosecutor’s discretion is effectively immune from meaningful review.”⁵¹ In addition to this notoriously high bar, the Supreme Court has defined prosecutorial discretion in an increasingly broad manner, such that little prosecutorial conduct is reviewable on a more relaxed standard.⁵² The

⁴⁵ *Krieger*, *supra* note 18 at para 47.

⁴⁶ *Anderson*, *supra* note 1 at para 36.

⁴⁷ *Nur*, *supra* note 1 at para 48.

⁴⁸ *Anderson*, *supra* note 1 at para 50. For further discussion on this standard see Manikis, *supra* note 30.

⁴⁹ *Ibid* at para 52.

⁵⁰ *Nur*, *supra* note 1 at para 94.

⁵¹ *Ibid*.

⁵² *Anderson*, *supra* note 1 at para 44. Compare with *Krieger*, *supra* note 18 at para 43 (“Prosecutorial discretion refers to the use of those powers that constitute the core of the Attorney General’s office and which are protected from the influence of improper political and other vitiating factors by the principle of independence”).

Supreme Court was careful in *Anderson* to differentiate between acts falling under prosecutorial discretion and decision and acts amounting to conduct or tactics. Matters falling under the latter category are subject to a wider-ranging judicial review with a less stringent standard but are limited to the trial process. This distinction necessarily subjects prosecutorial conduct/tactics in the context of plea bargaining to the higher standard of abuse of process, which is problematic since it presumes that conduct/tactics that are prohibited at trial will be accepted during the plea bargaining process.

Second, as exemplified by the Majority's reasoning in *Babos*, courts remain reluctant to interfere with prosecutorial discretion, notably when they are tasked with determining the appropriateness of a stay of proceedings under the abuse of process doctrine. As the Majority in *Babos* makes clear, the accused will only be permitted to articulate his/her claim for a stay of proceedings if the threshold of "clearest of cases" has been met. The Majority also acknowledges that meeting this burden is onerous since the stay will only be granted in "exceptional" and "very rare" circumstances.⁵³ Moreover, the Majority's formulation of the test with its rigorous balancing exercise at each level of the analysis creates further obstacles for the complainant to make out a successful claim.⁵⁴ Even if a trial judge were to conclude that the prosecutorial conduct in question could not be condoned, the balancing exercise forces him/her to undermine his/her conclusion and possibly determine that the egregious behaviour is, nonetheless, pardonable (as was the case in *Babos*).⁵⁵

Considering the significant asymmetry of information and resources between the complainant and the prosecutor, the evidentiary threshold required to be met under the abuse of process doctrine, and the closed-door nature of the plea bargaining process, the complainant, makes his/her case in a clearly disadvantageous position. While the Majority in *Babos* is correct in asserting that society is entitled to have proceedings that determine the merits of a case, its reasoning does not pay adequate attention to the equally important assertion that society is also entitled to have, as Justice Abella notes, "confidence in the integrity of the justice system."⁵⁶ Accordingly,

⁵³ *Babos*, *supra* note 1 at para 44.

⁵⁴ Kaiser, *supra* note 7 at 62.

⁵⁵ *Babos*, *supra* note 1 at para 84.

⁵⁶ *Ibid* at para 75.

writing for the Minority, she highlights that although the public has an interest in trials on the merits, it has “an even greater interest in knowing that when the state is involved in proceedings, particularly those that can result in an individual’s loss of liberty, it will put fairness above expedience. Justice is not only about results, it is about how those results are obtained.”⁵⁷ The ultimate result of *Babos*, *Anderson*, and *Nur* is the formulation of an abuse of process doctrine that is notoriously difficult to prove and when applied, does more to obstruct relief from integrity prejudice than render it more accessible, all the while doing very little to keep prosecutorial discretion in check.⁵⁸

B. The inadequacies of the current ethical duties for prosecutors

The LSUC Rules fail to provide meaningful constraints and guidance to prosecutors as they engage in the plea bargaining process. As Section 5.1-3 (Duty as Prosecutor) of the Rules outlines, prosecutors are to “act for the public and the administration of justice resolutely and honourably within the limits of the law.”⁵⁹ According to the accompanying commentary, translating this duty into practice involves the prosecutor seeing justice “done through a fair trial on the merits” rather than merely seeking a conviction.⁶⁰ LSUC’s framing of prosecutorial duty is problematic in that it is void of any reference to plea bargaining; instead, prosecutorial discretion is conceptualized vis-à-vis the trial. One could argue that this section and its accompanying commentary are less about LSUC’s treatment of plea bargaining in the Rules and more about the challenge(s) with articulating rules that cover all of the diverse functions exercised by prosecutors.

However, just a few sections down from the discussion on prosecutorial duty, Section 5.1-8 (Agreement on Guilty Pleas) sets out, in far greater detail, the manner in which a lawyer for an accused or potential accused ought to act in the context of plea bargaining. This section sets out two positive duties for counsel and two positive duties for the client. It also explicitly recognizes

⁵⁷ *Ibid.*

⁵⁸ Kaiser, *supra* note 7 at 81.

⁵⁹ The Law Society of Upper Canada, *Rules of Professional Conduct*, Toronto: Law Society of Upper Canada, 2000, LSUC at 5.1-3.

⁶⁰ *Ibid* at 5.1-3 Commentary.

that a specific relationship (lawyer-client) is operating in a specific context (discussions preceding the agreement on the guilty plea). The accompanying commentary suggests that in the process of agreeing to the guilty plea, placing duties on counsel for the accused may help guard against expediency.⁶¹ The burden of “guard[ing] against expediency,” however, should not be borne solely by counsel and the client. In light of the particular position that the prosecutor occupies, and the power he/she exercises when bargaining with the charge, sentence, or facts, more robust instructions are needed in the Rules to address the ethical duties for prosecutors in the plea bargaining process.

C. Crown Policy Manuals and the need for greater direction

Crown Policy Manuals are the primary mechanisms by which the Attorney General offers advice and guidance to prosecutors regarding the exercise of prosecutorial discretion. This advice is intended to inform the prosecutor’s judgment, support flexibility, and establish key considerations for prosecutorial decision-making.⁶² We draw on the Manual in Ontario to illustrate its limited use in the plea bargaining process. The Manual sets out four binding directives pertaining to plea bargaining. First, prosecutors cannot accept a guilty plea to a charge knowing that the accused is innocent. Second, a guilty plea to the charge cannot be accepted when a material element of the charge can never be proven unless that fact is fully disclosed to the defence. Third, prosecutors cannot claim to bind the Attorney General’s right to appeal the sentence. Fourth, prosecutors must honour all agreements reached during the plea bargaining (provided there are no exceptional circumstances).⁶³

The Manual is public despite the fact that the Supreme Court in *Power* explicitly discourages the Crown from publishing the “precise details about the process by which [prosecutors] decide to charge, to prosecute, and to take other actions.”⁶⁴ According to Justice L’Heureux-Dubé, publishing these manuals “promotes inflexible and static policies which are not

⁶¹ *Ibid* at 5.1-8 Commentary.

⁶² Ministry of the Attorney General, *Role of the Crown: Preamble to the Crown Policy Manual*, 2005 at 4 [Crown Policy Manual Preamble].

⁶³ Ministry of the Attorney General, *Resolution Discussions*, 2005 [Crown Policy Manual Resolution Discussions].

⁶⁴ *Power*, *supra* note 32 at para 44.

necessarily desirable.”⁶⁵ The then-Attorney General Michael Bryant celebrated the public dimension of the Manual,⁶⁶ noting that the directives assist in making the boundaries of prosecutorial discretion more transparent. In contrast to the Rules, the Manual does outline specific directives that are to be followed by prosecutors as they engage in plea bargaining. The trade-off with this transparency is a set of directives that are far too basic and far too tightly circumscribed to hold prosecutors accountable for their actions and render the process of plea bargaining more transparent. By focusing primarily on specific conditions that would vitiate the bargain, the directives prioritize the (eventual) outcome of the bargaining over the *process* by which the outcome is reached. While the Attorney General is tasked with balancing the competing demands of accountability, flexibility, and transparency, the appropriate balance has not been reached with regards to the directives for plea bargaining set out in the Manual.

IV. TOWARDS GREATER TRANSPARENCY AND ACCOUNTABILITY: THE GERMAN MODEL AS INSPIRATION FOR REFORM

Having argued that the optics of the plea bargaining process should be cause for concern and having noted some of the inadequacies of the current devices in their inability to constrain and guide prosecutorial discretion during the plea bargaining process, we now make a case for reform. Our approach assumes that plea bargaining remains an accepted option,⁶⁷ that maintaining the *status quo* is no longer tenable, and that any reform must focus on the process—and not just the outcome—of plea bargaining.

⁶⁵ *Ibid.*

⁶⁶ Crown Policy Manual Preamble, *supra* note 63 at 1.

⁶⁷ This proposition is, of course, debatable with scholars articulating persuasive arguments for the abolition of plea bargaining. See especially the scholarship of Jeff Palmer, “Abolishing Plea Bargaining: An End to the Same Old Song and Dance” (1999) 26 *Am J Crim L* 505; and Stephen Schulhofer, “Plea Bargaining as Disaster” (1991-1992) 101 *Yale LJ* 1979 as well as comments by the late Marc Rosenberg of the Ontario Court of Appeal that expressed skepticism of the most common rationale for plea bargaining—namely preventing the collapse of the criminal justice system (Kirk Makin, “Top Jurist Urges Review of ‘Coercive’ Plea Bargaining System”, *The Globe and Mail* (7 March 2011)) [Makin].

Considering the reluctance of courts to make the abuse of process doctrine more accessible to complainants and mindful that the Rules may be better suited for general pronouncements of proper conduct that apply generally to prosecutorial discretion, our proposals focus on potential changes to Crown Manuals in the hope that they translate into structural changes on the ground.⁶⁸ These changes seek to promote transparency during the plea bargaining process, which, in turn, would facilitate process-based accountability that would enable the accused to effectively use a lower standard of review currently only available for challenges to prosecutorial conduct/tactics at trial.

Inspired by recent efforts by the German Federal Parliament to formalize plea bargaining, we outline three avenues for reform and then assess each avenue according to a matrix structured by the principles of accountability, transparency, and flexibility through discretion. Accountability guarantees equality in the operation and enforcement of the law; transparency ensures that arrangements agreed upon are voluntary,⁶⁹ and flexibility respects the prosecutor's constitutionally protected discretionary function in the criminal justice system.⁷⁰

A. Contextualizing the German Model

As in any comparative analysis, there is the risk that by “borrowing” an approach from a foreign jurisdiction to address a particular domestic challenge, one might overlook key differences in social structures between the jurisdictions while paying insufficient attention to how the “borrowed” approach functions in relation to the foreign jurisdiction’s coherent set of principles and rules.⁷¹ To address both of these concerns and assess the

⁶⁸ For instance, legal realists have expressed distrust towards legal rules and noted the gap between the law in the books and the law in action. See e.g. Karl Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Chicago: University of Chicago Press, 1962). The limits of laws in the policing context are discussed in Rob Baldwin & Richard Kinsey, “Rules, Realism and the Police Act” (1985) 4:3 *Critical Social Policy* 89.

⁶⁹ Stanley A Cohen & Anthony Doob, “Public Attitudes to Plea Bargaining” (1989) 32 *Crim LQ* 85 at 88. As highlighted by Cohen and Doob, accountability and transparency were identified as the “necessary conditions of effective reform” under the Law Reform Commission’s 1989 Working Paper (that eventually led to the 1993 *Martin Report*).

⁷⁰ Rosenberg, *supra* note 13.

⁷¹ Hugh Collins, “Methods and Aims of Comparative Contract Law” (1991) 11:3 *Oxford J Leg Stud* 396. See also Trevor Jones & Tim Newburn, *Policy Transfer and Criminal*

appropriateness of the German model, it is helpful to consider some relevant differences and similarities between the two jurisdictions. The principal difference between Canada and Germany is that Germany, as a Civil law country, treats the trial as an event designed to find the material truth rather than, as in Common law countries, determine guilt by way of an adversarial process where the state must prove its case beyond a reasonable doubt.⁷² In practice, this means that in Germany, admissions of guilt are viewed merely as confessions, are not sufficient to convict the defendant, and cannot be used to end or avoid a trial.⁷³ While Germany has historically mandated compulsory prosecution, modifications to the *German Code of Criminal Procedure* have allowed for a greater exercise of prosecutorial discretion while the increasing use of informal plea bargains has also played a significant part in eroding the principle of mandatory prosecution.⁷⁴

The use of plea bargaining in Germany is much more restricted than in Canada. While sentence bargaining has become common in Germany, charge and fact bargaining are still formally prohibited.⁷⁵ This prohibition applies to all serious cases. For less serious cases, prosecutors have tools to summarily dispose of various cases prior to trial. Charge bargaining is therefore very limited and only occurs in instances where the defendant's guilt is "minor" or would not have an impact on the sentence.⁷⁶ As for fact bargaining, it appears to be rarer. Interviews conducted with German

Justice: Exploring US Influence over British Crime Control Policy (New York: Open University Press, 2007); Michele Graziadei, "Transplants and Receptions" in Mathias Reimann & Reinhard Zimmermann, eds, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2008) 470; Pierre Legrand, "The Impossibility of Legal Transplants" (1997) 4:2 MJECL 111.

⁷² Regina E Rauxloh, "Formalization of Plea Bargaining in Germany: Will the New Legislation Be Able to Square the Circle?" (2011) 34:2 Fordham Intl LJ 2011 296 at 296 [Rauxloh].

⁷³ *Ibid* at 297.

⁷⁴ Yue Ma, "Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective" (2002) 12 Intl Crim Just Rev 22 at 35 [Ma].

⁷⁵ See *Beschlussempfehlung und Bericht des Rechtausschusses* [Decision and Recommendation Report of the Legal Committee], 20 May 2009 and *Bundesgerichtshof* [Federal Court of Justice], 3 March 2005, BGH GSSt 1/04.

⁷⁶ See Jenia Iontcheva Turner, "Prosecutors and Bargaining in Weak Cases: A Comparative View" in Erik Luna & Marianne Wade, eds, *The Prosecutor in Transnational Perspective* (Oxford: Oxford University Press, 2012) 102 [Turner].

prosecutors and defence attorneys reveal general disapproval of the practice and acknowledgment that fact bargaining does not occur.⁷⁷

Even though Canada and Germany rely on different approaches to adjudicate criminal claims—reflecting the Civil/Common law divide—and despite the fact that plea negotiations play slightly different roles in each system—in Germany, the sentence concession may be gained from a *confession* of guilt whereas that concession in Canada may be gained from an *admission* of guilt—plea negotiations are used, accepted, and deemed legal (and constitutional) in both jurisdictions.⁷⁸ Moreover, both jurisdictions share a common history with plea bargaining—as a practice that was first hidden but widely acknowledged to a practice that has become legalized and upheld by the courts—and invoke similar justifications to defend its use—notably the efficient allocation and management of scarce resources.⁷⁹

The German model was legislatively enshrined in the 2009 *Bill for the Regulation of Agreements in the Criminal Procedure*. Flagging situations of abuse, some prosecutors and defence counsel have noted that the model is not perfect.⁸⁰ Moreover, considering that the Federal Constitutional Court only ruled on the legality and scope of this significant legislative change in 2013,⁸¹ it remains to be seen whether the reforms will actually change the culture surrounding plea negotiations. Nevertheless, the appeal of the German model as inspiration for reform in Canada is its general scepticism of prosecutorial discretion. This scepticism in the German model is largely a function of the principle of substantive truth since each judge must scrutinize the truthfulness of the confession not as an admission but as a piece of evidence.⁸²

⁷⁷ Jenia Iontcheva Turner, “Judicial Participation in Plea Negotiations: A Comparative View” (2006) 54:1 Am J Comp L 199 at 231.

⁷⁸ Rauxloh, *supra* note 72 at 297.

⁷⁹ Julia Fionda, *Public Prosecutors and Discretion: A Comparative Study* (Oxford: Clarendon Press, 1995) at 168.

⁸⁰ Rauxloh, *supra* note 72 at 310 highlights that there are many examples of abuses on both sides with reported cases of defendants being put under great pressure to confess to crimes that they denied having committed. Anecdotal evidence is also provided that suggests that defence counsel forced prosecution into a settlement declaring that he knew that there was a serious basis for appeal.

⁸¹ BVerfG [Federal Constitutional Court], 19 March 2013, Case No 2 BvR 2628/10.

⁸² Rauxloh, *supra* note 72 at 311.

Since plea negotiations in Canada go beyond discussions that relate to sentencing, it can be argued that greater risks of wrongful convictions exist and thus greater attention needs to be paid to this process by adopting measures that enable greater transparency and accountability as well as the discovery of abuses and pressures that can lead to wrongful convictions.

B. Proposed reform 1: Keep notes/records of the plea bargaining process

The first proposed reform would be to mandate that details of the plea bargaining process be noted/recorded and then presented to the judge as he/she accepts, rejects, or reformulates the guilty plea or the sentence. Under the German model, the plea agreement must be extensively recorded.⁸³ In its 2013 interpretation of the 2009 legislation, the Bundesverfassungsgericht (BVerfG) [Federal Constitutional Court], held that for the plea agreement to be considered by the court, the following pieces of information must be noted/recorded: Which party suggested that the negotiation(s) take place, the contributions by each party to the negotiation(s), which fact(s) and circumstance(s) formed the basis of the eventual decision, and which suggested outcome(s) were settled upon.⁸⁴ While this holding has been criticized as overburdensome and impractical,⁸⁵ these means, according to the BVerfG, justify the ends. Considering the impact that plea bargaining has on the accused, the BVerfG concluded that “comprehensive transparency” is necessary.⁸⁶ According to the BVerfG, “the legislature considers plea bargaining to be admissible only if the transparency and documentation obligations are observed.”⁸⁷

Mindful of the Canadian prosecutor’s workload, this first reform could be pursued using different strategies. A transcript detailing every word spoken might not be practical since it would entail additional resources to transcribe proceedings, however, alternative strategies are feasible. One strategy includes mandating a checklist featuring some/all of the criteria

⁸³ Andreas Mosbacher, “The Decision of the Federal Constitutional Court of 19 March 2013 on Plea Agreements” (2014) 15 German LJ 5 at 11.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ Alexander Schemmel, Christian Corell & Natalie Richter, “Plea Bargaining in Criminal Proceedings: Changes to Criminal Defence Practice as a Result of the German Constitutional Court Verdict of 19 March 2013?” (2014) 15 German LJ 43 at 50.

⁸⁷ *Ibid.* at 51.

mentioned by the BVerfG that would be signed by the prosecutor and accused/counsel. A second strategy involves recording the negotiation(s) using audio or video devices and having those recordings made available to the sentencing judge (automatically or upon request).

These two alternative strategies are not without limitations. First, some crucial interactions may be left out of the documented interactions and not all of the relevant dynamics behind the discussions will be captured. Beyond potential privacy and technical glitch issues, there is also the risk that this process could become a mere inconvenience that needs to be carried out quickly without much reflection. With regards to the first limitation, audio recordings have the advantage of capturing the tone of the exchange while video recordings can capture non-verbal language.⁸⁸ These recordings would, therefore, provide a more effective way to capture situations of pressure and abuse of process while also helping prosecutors in developing the strongest evidence possible to help convict the guilty. Moreover, not only are most courthouses already equipped with audio and video technology for use in other proceedings, starting/stopping a video or audio recording would not take additional time in a busy prosecutorial schedule.⁸⁹ With regards to the second limitation, the checklist option might prompt

⁸⁸ A parallel can be made between this proposal and the electronic recording of custodial interrogations. Electronic recording in the custodial interrogation context has emerged as a powerful innovation that has helped guard against false confessions. Much of the literature on this topic has emerged from the United States. See e.g. Thomas P Sullivan, "Electronic Recording of Custodial Interrogations: Everybody Wins" (2005) 95:3 J Crim L & Criminology 1127; The Justice Project, "Electronic Recording of Custodial Interrogations: A Policy Review", online: <[http://web.williams.edu/Psychology/Faculty/Kassin/files/Justice%20Project\(07\).pdf](http://web.williams.edu/Psychology/Faculty/Kassin/files/Justice%20Project(07).pdf)>; Matthew D Thurlow, "Lights, Camera, Action: Video Cameras as Tools of Justice" (2005) 23:4 Marshall J Computer & Info L 771; Lars Nelson, "Preserving the Public Trust: Prosecutors' Professional Responsibility to Advocate for the Electronic Recording of Custodial Interrogations" (2007-2008) 44:1 Willamette L Rev 1; Lisa C Oliver, "Mandatory Recording of Custodial Interrogations Nationwide: Recommending a New Model Code" (2005-2006) 39:1 Suffolk UL Rev 263.

⁸⁹ See e.g. Jane Bailey & Jacquelyn Burkell, "Implementing Technology in the Justice Sector: A Canadian Perspective" (2013) 11:2 CJLT 253 in which the authors of the study interviewed individuals involved in implementing technological change in the Canadian court setting. Successes and challenges related to the implementation changes are discussed. See also Senate, Standing Senate Committee on Legal and Constitutional Affairs, *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada* (August 2016) (Chair: Bob Runciman, Deputy Chair: George Baker).

prosecutors and defence lawyers to reflect on whether their motives and conduct risk giving rise to wrongful convictions.⁹⁰

Such a reform has the potential to benefit all parties involved. For the prosecutor, this reform disincentivizes overly aggressive, baseless, and malicious prosecution while also protecting the prosecutor from a false accusation of abusive conduct. For the accused/counsel for the accused, the reform would render the abuse of process doctrine more accessible by allowing him/her to overcome the high evidentiary burden of proving abuse (if necessary). Indeed, if the audio or video options were adopted, the accused would be able to rely on non-verbal as well as tonal interactions, which would go a long way to help detect and prove situations of abuse. In the context of groups or unrepresented accused who are more inclined to plead guilty (as discussed above), this reform can expose potentially problematic conversations and tactics. Further, this reform would reduce the risk of an accused being pressured by his/her counsel to plead guilty to a crime, even though he/she may be factually or legally not guilty.⁹¹

For the judge, this reform would allow him/her to evaluate the (procedural) fairness of the plea bargaining process and, if unfair, assess the questionable conduct in a context that is not abstract (as was done by the Majority in *Babos*) but that is instead based on recordings from the actual event. This reform would also assist the judge in conducting, as per Section 606 of the *Criminal Code*,⁹² plea comprehension inquiries and assessing the voluntariness of the guilty plea.⁹³ Finally, in light of the Supreme Court's

⁹⁰ See discussion about reflexivity and ethical checklists in Jarrett Blaustein, "Ethical Criminologists Fly Economy: Process-oriented Criminological Engagement 'Abroad'" in Sarah Armstrong, Jarrett Blaustein & Alistair Henry, eds, *Reflexivity and Criminal Justice* (London: Springer, 2017) 357.

⁹¹ Milica Potrebic Piccinato indicates that despite defence counsel's duty to protect their clients, they sometimes compel a client to act in a manner that is inconsistent with the intentions of the client. This can be explained in various ways, including the economic demands on defence counsel to be financially efficient in order to survive professionally (Milica Potrebic Piccinato, "Plea Bargaining" (2004) Department of Justice Canada). Similarly, Grosman exposes the professional pressures of defence counsels to get into plea agreements with prosecutors in order to maintain good relationships with them (Grosman, *supra* note 17).

⁹² *Criminal Code*, RSC 1985, c C-46, s 606 [*Criminal Code*].

⁹³ Joseph Di Luca, "Expedient McJustice or Principled Alternative Dispute Resolution? A Review of Plea Bargaining in Canada" (2005) 50:1-2 *Crim LQ* 14 at 42.

recent decision in *Anthony-Cook*,⁹⁴ this reform would provide judges with a clearer and more reliable portrait of any circumstances that led to a joint submission at sentencing when judges are inclined to depart from this joint submission.

One could argue that this reform would result in a chilling effect on prosecutorial discretion because the boundaries between firm and aggressive prosecutorial conduct may, at times, seem blurred. The challenge with this argument is that it presupposes that prosecutorial conduct in the negotiation room is evaluated using a different standard than the standard used to assess prosecutorial conduct in a public courtroom. As raised in the second part of this article, if the prosecutor's tactics are inappropriate in the trial context, they should also be deemed inappropriate in the plea bargaining context. At the moment, the lack of transparency, unfortunately, leads to situations where problematic conduct remains undetected and difficult to prove. This first reform would not limit prosecutorial discretion, but rather facilitate the monitoring of exchanges that can be problematic and beyond the accepted range of conduct.

C. Proposed reform 2: Mandate (oral or written) reasons

The second proposed reform would be to mandate that reasons for the agreed-upon plea bargain be recorded—orally or in writing—and then presented to the judge as he/she accepts, rejects, or reformulates the guilty plea or the sentence. Under the German model, prosecutors are required to provide written reasons for their disposition of cases.⁹⁵ Like the first proposed reform of keeping notes or recording the plea bargaining process, this second proposed reform helps realize many of the same goals of transparency and accountability without adding a significant burden on the system. That said, this second proposed reform shifts the focus away from the process of plea bargaining and directs it towards the outcome of the bargain. For prosecutors, having to justify their reasoning would encourage them to deliberate carefully and ensure that their decision rests on defensible grounds.⁹⁶ For judges, this reform would allow him/her to inquire into the original offense and assess whether or not the plea bargain

⁹⁴ *Anthony-Cook*, *supra* note 1.

⁹⁵ *Ma*, *supra* note 74 at 48.

⁹⁶ *Ibid* at 39.

is appropriate and reflective of the offense⁹⁷ or other accepted considerations.⁹⁸

One could critique this reform by suggesting that mandating prosecutors to justify their decisions would be impractical and burdensome. It is important to note that these reasons would not necessarily have to be justified at great length nor would they need to be written down; presenting the reasons orally, for example, could suffice to realize the goals set out above. One could also critique this reform by suggesting that mandating prosecutors to justify their decisions is an unwelcome intrusion into the prosecutorial function and that judges will be empowered to meddle in the prosecutor's reasoning. It is worth noting some of the limits of this argument on a number of fronts, including the role of prosecutors as representatives of the public interest. Indeed, it would make sense for an actor who represents the public interest to make his/her motives more transparent.⁹⁹ This awareness would not be considered an intrusive meddling by judges since the judiciary would generally not intervene in decisions reached by prosecutors and defence, unless there is an issue with the motives brought forward. It is worth noting that the *Criminal Code* (notably section 606(1.1)(b)(iii))¹⁰⁰ and case law (notably the Supreme Court's decision in *Anthony-Cook*)¹⁰¹ empower judges, in some situations, to

⁹⁷ H Michael Caldwell, "Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System" (2011) 61:1 Cath U L Rev 63 at 88.

⁹⁸ In the context of plea bargaining of sentences that give rise to joint submissions, the Supreme Court in *Anthony-Cook* made clear that it is legitimate for prosecutors to take into account elements unrelated to the offense (*Anthony-Cook*, *supra* note 1).

⁹⁹ Victims' rights in most common law jurisdictions have opened the door for greater transparency in this regard. For example, in England and Wales, the former Director of Public Prosecutions made clear that prosecutorial discretion needs to be transparent (Kim Evans, "Keir Starmer on 'Prosecutorial Discretion'" (6 December 2013) *The Justice Gap* (Magazine), online: <<http://thejusticegap.com/2013/12/keir-starmer-prosecutorial-discretion/>>. In this respect, Starmer put in place the *Victims' Right to Review Scheme* in which victims have more opportunities to be made aware of the motives behind prosecutorial decisions. For details regarding the scheme, see The Crown Prosecution Service, "Victims' Right to Review Scheme" (July 2016), online: <https://www.cps.gov.uk/victims_witnesses/victims_right_to_review/index.html>.

¹⁰⁰ *Criminal Code*, *supra* note 92, s 606(1.1)(b)(iii). In *Anthony-Cook*, the Supreme Court developed a high standard of review of joint submissions at the sentence (*Anthony-Cook*, *supra* note 1).

¹⁰¹ *Anthony-Cook*, *supra* note 1.

reject agreements made by the accused and the prosecutor. This reform would actually guarantee greater protection than that offered by the Supreme Court in *Anthony-Cook*,¹⁰² since judges would routinely be aware of the reasons behind plea agreements (and not just when a judge seeks to depart from a joint submission related to sentencing).

D. Proposed reform 3: Improving efficacy with decriminalization

While we maintain that the aforementioned reforms would not burden the criminal justice system, we acknowledge that to enable greater efficiency in the process and reduce the risks of wrongful convictions, the reforms mentioned above must be combined with revised prosecutorial guidelines that encourage diversion and alternatives to criminalization.

In Germany, under the Strafprozessordnung (StPO) [Code of Criminal Procedure], prosecutors can use their discretionary powers to charge bargain as a way to divert cases outside the criminal process in contexts where the defendant's guilt is "minor." In these cases, prosecutors can refrain from pressing charges if the defendant agrees to fulfill a condition, such as compensating the victim or paying money to the treasury or a charity.¹⁰³ This practice has proven to be efficient with regards to resource management as well as enabling a quick resolution of cases.¹⁰⁴

Further, German prosecutors are discouraged from striking bargains in weak cases. If the prosecutor believes that the suspect is guilty of a serious crime but has doubts about the strength of the evidence, a trial would be considered the more appropriate avenue than attempting to bargain the case. This conduct is also reinforced internally among peers, which is an important dimension of its success. Indeed, a prosecutor who would attempt to bargain a weak case would be negatively perceived as cutting corners to obtain convictions among her peers.¹⁰⁵

A similar reform in Canada would translate into prosecutorial guidelines that encourage diversion and alternatives to criminalization for

¹⁰² *Ibid.*

¹⁰³ Strafprozessordnung (StPO), §§ 153(1), 153a(1) [Code of Criminal Procedure].

¹⁰⁴ See Sean Boyne, "Is the Journey from the In-Box to the Out-Box a Straight Line? The Drive for Efficiency and Prosecution of Low-Level Criminality in Germany" in Erik Luna & Marianne Wade, eds, *The Prosecutor in Transnational Perspective* (Oxford: Oxford University Press, 2012) 37.

¹⁰⁵ Turner, *supra* note 76.

defendants who represent a low level of moral blameworthiness (i.e. non-serious offences). This guideline reform would also posit that prosecutors should drop criminal charges and proceed with diversion whenever they are unlikely to meet the burden of proof at trial or take the case to trial in the event of a serious case for which they have doubts about the strength of the evidence. This practice would enable prosecutors to dispose of cases quicker through a more selective process, which would, in turn, save time and resources by not charging non-serious cases.¹⁰⁶ At the same time, this approach would signal to prosecutors that they should spend more criminal justice resources on the most serious cases by way of a trial. Combined with the requirement to provide reasons for agreements, this additional guideline would also posit that weak prosecutorial evidence cannot be used as a reason justifying a guilty plea agreement with the accused.

In addition to enabling greater efficiency by diverting less serious cases to alternative programmes and processes outside criminal proceedings,¹⁰⁷ this reform would advance procedural justice and reduce the chances of wrongful conviction by discouraging plea bargaining in cases with weak evidence. This proposal would also be advantageous for victims and members of the public that have an interest in ensuring that the state does not use processes that can indeed lead to wrongful convictions.¹⁰⁸

¹⁰⁶ *Ibid.* See the experience implemented by the New Orleans District Attorney Harry Connick, which increased efficiency .

¹⁰⁷ An example of such diversion programs can be found at the municipal level in Montreal. The Municipal Court has implemented the Programme d'accompagnement justice-santé mentale (PAJ-SM) and the Programme accompagnement justice itinérance à la cour (PAJIC), which respectively offer diversion for people with mental health problems and those experiencing homelessness. The PAJ-SM provides an alternative to incarceration by diverting accused persons with mental health issues away from the criminal justice system. Similarly, PAJIC is left to prosecutorial discretion and strives to end the cycle of poverty and decrease the impact of judicialization on the indigent by enabling the modification of sentences and the dropping of charges of people who have experienced homelessness and have been convicted or been found to owe a debt to the Municipal Court.

¹⁰⁸ United States, US Department of Justice, *Study of Victim Experiences of Wrongful Conviction*, by Seri Irazola et al (2013). In this study, many victims described the impact of the wrongful conviction as being comparable to, or worse than, their original victimization. Victims also made clear that one of the primary ways they could be assisted in a case of wrongful conviction was to reduce the potential for a wrongful conviction to occur in the first place.

V. CONCLUSION

In a speech describing the dramatic entrenchment of plea bargaining in Ontario, Justice Marc Rosenberg lamented a system that has become “coercive and abusive” to the point that the pressure to plead guilty is now “too extreme.”¹⁰⁹ As argued in this paper, the current devices designed to constrain and guide prosecutorial discretion in Canada—case law, Law Society Rules, and Crown Manuals—have failed to ensure that procedural fairness is prioritized over expedience. The burden for a defendant to make out an abuse of process claim is too high, the rules governing prosecutorial conduct are too vague, and the directives set out by the Attorney General do not go far enough.

In an article Justice Rosenberg published three years before he gave that speech, he cautions that no one system can be “fully insulated from the impact of outright corruption” since “nothing can guarantee that the powers of the Attorney General will always be exercised in the public interest.”¹¹⁰ By juxtaposing his spoken and written words, we argue throughout this article that accepting the practice of plea bargaining does not imply accepting a system that is void of procedural safeguards, as well as checks and balances. The German model, while not perfect, offers a strong and realistic way forward in thinking concretely and creatively about rendering the plea bargaining process more accountable and more transparent without inhibiting prosecutors from carrying out their roles. Lest justice be cheapened, the plea bargaining process in Canada demands reform. After all, justice is “not only about results, it is about how those results are obtained.”¹¹¹

¹⁰⁹ Makin, *supra* note 67.

¹¹⁰ Rosenberg, *supra* note 13 at 817.

¹¹¹ Babos, *supra* note 1 at para 85.