

Bargaining for Expedience? The Overuse of Joint Recommendations on Sentence

DAVID IRELAND *

It is often stated that plea bargaining is an indispensable part of a fair and efficient criminal justice system. By observing sentencing hearings in the Provincial Court of Manitoba, this article shows that some form of plea bargaining is involved in a substantial majority of cases, that most joint recommendations on sentence are accepted by presiding judges, and that most of these joint recommendations are not “true plea bargains” in the sense of a *quid pro quo* being offered. It is argued that the vast majority of joint recommendations are born of cultural expedience rather than as a result of true plea bargains. These cultural joint recommendations encroach significantly on the judicial function and may erode public confidence in the administration of justice. The continued proliferation of cultural joint recommendations may further entrench a culture of expedience in our criminal justice system and could potentially lead to higher sentences.

I. INTRODUCTION

Only a small fraction of matters that enter the criminal justice system will, in fact, ever proceed to trial.¹ Whatever justice is delivered by the

* David Ireland (B.A. (Hons.) (Ebor), LL.B., LL.M.) is currently working as a Crown Attorney with Manitoba Justice, Prosecutions. This paper was written as a thesis for his Master's degree under the supervision of Professor Debra Parkes. The full thesis is available online at: <<http://mspace.lib.umanitoba.ca/handle/1993/23924>>.

¹ Allan Manson et al, *Sentencing and Penal Policy in Canada* (Toronto: Emond Montgomery, 2008) at 295, citing the *Report of the Canadian Sentencing Commission, Sentencing Reform: A Canadian Approach* (Ottawa: The Commission, 1987) at 406.

system is mostly dispensed by way of guilty pleas bred by plea bargains. Our criminal justice system is therefore mostly a system of guilty pleas where accused persons offer their plea of guilty as a commodity to be exchanged for (perceived) benefits granted by the state. The majority of these exchanges occur within the crucible of plea bargaining. However, plea bargains are devoid of many of the procedural safeguards ensured by trials.²

Though it is often stated that plea bargaining is an indispensable part of a fair and efficient criminal justice system,³ academic commentators continue to challenge this conventional wisdom.⁴ For some, the potential dangers of plea bargaining outstrip its utility in expediting our criminal justice system. It is certainly true that plea bargaining can lead to controversial results that may excite public reaction in specific cases. In Manitoba, one does not have to look far for public disapprobation of the plea bargaining process.⁵ Debra Parkes has cautioned against an unregulated plea bargaining system that goes on behind closed doors.⁶

² See generally Stephanos Bibas, *The Machinery of Criminal Justice* (New York: Oxford University Press, 2012) [Bibas *Machinery*].

³ *R v Sinclair*, 2004 MBCA 48 at para 8, 185 CCC (3d) 569, Steel JA [Sinclair]; *R v Cerasuolo*, (2001), 140 OAC 114 at para 8, (2001) OJ No 359 (Ont CA) [Cerasuolo]; Ontario, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussion* (Chair G.A. Martin) (Toronto: Queen's Printer, 1993) Recommendation 46 at 281 [Martin Report].

⁴ Bibas *Machinery*, *supra* note 2; Stephen J Schulhofer, "Is Plea Bargaining Inevitable?" (1984) 97: 5 Harv L Rev 1037 (HL) [Schulhofer "Inevitable"].

⁵ See James Turner, "Confessed Killer Gets 20 Years," *Winnipeg Free Press* (15 November 2013), online: <<http://www.winnipegfreepress.com/local/confessed-killer-gets-20-years-232023341.html>>; Also see public perception as outlined in Gregory Lafontaine & Vincenzo Rondinelli, "Plea Bargaining and the Modern Criminal Defence Lawyer Negotiating Guilt and the Economics of the 21st Century Criminal Justice" (2005) 50 Crim LQ 108 at 110 describes the *Martin Report* as "The Watershed event signaling Canada's new era of plea bargaining."; see also the discussion of the Paul Bernardo case in Department of Justice Canada: Victim Participation in the Plea Negotiation Process in Canada, found in Appendix A of *R v HC*, 2009 MBPC 58. This report notes that Karla Homolka was given her controversial plea bargain in the months after the release of the *Martin Report*, *supra* note 3, which had given the establishment's seal of approval on the plea bargaining process in Ontario.

⁶ Debra Parkes, "Plea Deals Shrouded in Mystery," *Winnipeg Free Press* (22 November 2013) online: <<http://www.winnipegfreepress.com/opinion/analysis/plea-deals-shrouded-in-mystery-232964851.html>>

Parkes suggests that improved charge screening and better use of resources may help to limit wrongful convictions and promote public confidence in the administration of justice.⁷ Despite these cautions, however, the largely unregulated and hidden system of plea bargaining is entrenched in our criminal justice system. It should be noted however that the ubiquity of plea bargaining is a relatively recent phenomenon.

In 1993, then Justice G. Arthur Martin led an advisory committee of justice system participants that generated a report for the Attorney General of Ontario⁸ marking a watershed in the development of plea bargaining in Canada. Before the report, judges, academics, and the Law Reform Commission of Canada questioned the propriety of plea bargaining.⁹ After the Martin Commission report was published, plea bargains were seen as necessary and desirable.¹⁰ The Martin Commission specifically recommended that joint recommendations be accepted unless the proposed sentence would bring the administration of justice into disrepute.¹¹ The Ontario Court of Appeal adopted this recommendation,¹² and the other appellate courts of Canada followed suit. The Martin Commission gave its blessing to joint recommendations and Canadian jurists have scarcely debated the topic since.

II. PLEA BARGAINING, JOINT SUBMISSIONS AND MORE: DEFINING TERMS

When it comes to understanding the law and practice of plea bargaining in Canada, some attention to terminology is important. The Martin Commission adopted the neutral term *resolution discussions* as a reflection of the general acceptance of the practice in Canadian courts and

⁷ *Ibid.*

⁸ *Martin Report*, *supra* note 3 at 275-282, for a thorough discussion on the use of terminology.

⁹ *R v Simoneau*, 40 CCC (2d) 307 at paras 23-38, [1978] MJ No 12 (QL); Law Reform Commission of Canada, Criminal Procedure: Control of the Process, Working paper No.15 (1975) [Working Paper 15].

¹⁰ 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 16-18.

¹¹ *Martin Report*, *supra* note 3, Recommendation 58 at 327.

¹² *R v Dorsey*, 43 WCB (2d) 273, (1999) 123 O.A.C. 342 (Ont. CA).

other common law jurisdictions.¹³ The Martin Commission also confirmed that the term “resolution discussions” grew out of the term “plea bargaining” as attitudes towards the practice evolved over time.¹⁴ As Law Reform Commissions and judges began to accept the necessity of discussions between counsel in order to generate guilty pleas,¹⁵ the pejorative language of “bargaining” for justice was replaced by “resolving” for justice. This evolution of language can be seen in the recommendations of the Law Reform Commission of Canada. In 1975 the Law Reform Commission noted that “plea bargaining”, though well-established and likely necessary to oil the wheels of the justice system, should not be accepted simply for the sake of expedience.¹⁶ However, by 1989 the Law Reform Commission characterized plea negotiations as “...not an inherently shameful practice; it ought not, on a theoretical level, be characterized as a failure in principle”.¹⁷

The Martin Commission was successful in simultaneously expanding and legitimizing the term “resolution discussions”. While plea bargains should be hidden from public view, resolution discussions were open, fair, and integral to the operation of the justice system. By making resolution discussions a formalized and sanctioned step in the criminal process, the secretive backroom talks “had been reborn as a mandatory and desirable component of our modern justice system”.¹⁸

The term *plea bargaining* has commonly been used to describe any agreement for the accused to plead guilty in return for the promise of some benefit.¹⁹ The Manitoba Court of Appeal has described plea bargaining as follows: “In some cases, the Crown's case has some flaw or weakness and the accused agrees to give up his or her right to a trial and to

¹³ *Martin Report*, *supra* note 3 at 275-281

¹⁴ *Ibid* at 276.

¹⁵ *Ibid* at 276-277.

¹⁶ *Ibid* at 277.

¹⁷ *Ibid* at 278 quoting Law Reform Commission of Canada, *Plea Discussions and Agreements*, Working Paper No. 60 (1989) at 8-9.

¹⁸ Di Luca, *supra* note 10 at 18.

¹⁹ *Martin Report*, *supra* note 3 at 275; See also Albert W Alschuler, “Plea Bargaining And Its History” (1979) 13:2 *Law & Soc’y Rev* 211 at 213 (HL) for a concise definition in the American context: “plea bargaining consists of the exchange of official concessions for the [defendant’s] act of self-conviction.”

plead guilty in exchange for some consideration.”²⁰ Ferguson and Roberts named three constant elements of plea bargaining: (i) there will always be a plea of guilty to one or more charges; (ii) a bargain or benefit will only be provided if the accused pleads guilty; and (iii) the bargain must result from express or overt negotiation.²¹ In practice, plea bargains can be nebulous, encompassing any number of bargaining chips and dynamics. There are many benefits that the Crown may promise in exchange for a guilty plea, as explained by Cohen and Doob:

- a) a reduction in the charge;
- b) a withdrawal of charges;
- c) a promise not to proceed on other charges;
- d) a recommendation or promise as to the type of sentence to be expected (fine, probation, imprisonment etc.);
- e) a recommendation as to the severity of sentence;
- f) a Crown election to proceed by summary rather than indictable procedure where the offence involves a Crown option;
- g) a promise not to seek a sentence of preventive detention;
- h) a promise not to seek an enhanced penalty where the code allows for one in the event of a prior conviction for the same offence;
- i) a promise not to charge another person;
- j) a promise concerning the nature of any submissions to be made to the sentencing judge (e.g. not to mention aggravating facts or circumstances when they are in dispute);
- k) a promise not to compel a jury trial through resort to a preferred indictment or by means of the power given under s.568 of the Code;
- l) a recommendation or promise as to the place of incarceration or arrangements concerning release (e.g. day parole);
- m) an arrangement for the sentencing to take place before a particular judge; and
- n) a promise not to appeal the sentence imposed.²²

There are myriad factors the Crown and an accused may want to bargain with depending on the factual circumstances of each case. However, many of these considerations are not easily measured by court observation. It is highly unlikely, for example, that an observer could

²⁰ Sinclair, *supra* note 3 at para 13.

²¹ Ferguson & Roberts, “Plea bargaining directions for Canadian Reform” (1974) 52 Can Bar Rev 497 at 510-514, cited in Di Luca, *supra* note 10 at 20.

²² Stanley A Cohen & Anthony Doob, “Public Attitudes to Plea Bargaining” (1989-90) 32 Crim L Q 85 at 86-87, cited in Di Luca, *supra* note 10 at 18-19.

recognize if the Crown has promised not to charge another person or not to appeal a given sentence.²³

For the purposes of my research I define a plea bargain as:

- a) Any charge bargain (i.e. the Crown dropping one or more other charges on the docket when a guilty plea is entered to at least one charge);
- b) Any joint recommendation as to sentence;
- c) Any plea to a lesser or included offence under s.606(4) of the *Criminal Code*;²⁴ and
- d) Any “true plea bargain” as identified by counsel on the record.

A *joint recommendation* occurs when the accused (usually through counsel) joins with the Crown in recommending the same sentence to the court. As will be explained below in the case law review, there has been much judicial commentary on what exactly is meant by a joint recommendation. However, I identify a joint recommendation as occurring anytime either or both parties, or the presiding judge, identifies the sentence recommendation as being joint. Joint recommendations are only one form of sentence bargains that may be struck during the plea bargaining process.

Cultural joint recommendation is a term I use to denote all joint recommendations that are not the result of true plea bargains. That is to say, there is no *quid pro quo* beyond the offering of a guilty plea in exchange for the joint recommendation (or joint recommendation in concert with a charge bargain or plea to a lesser offence). Cultural joint recommendations often occur when the Crown has no particular incentive to elicit a guilty plea. In other words, there is no need for the Crown to jointly recommend a sentence to avoid a shaky case going to trial or perhaps to save vulnerable witnesses from testifying. I chose the term “cultural” because I suggest these recommendations have grown out of, and in fact perpetuate, a culture of expedience in today’s criminal justice system. Put simply, I argue there is a culture of expedience in our

²³ Unless of course this information is put on the record, but in many cases this would seem unlikely. During the course of the court observation, this type of information was not typically provided to the presiding judge.

²⁴ *Criminal Code*, RSC 1985, c C-46, s 606(4).

criminal justice system and joint recommendations contribute to expediting accused through that system.²⁵

A *true plea bargain* is what happens when the Crown and defence agree the accused will enter a plea of guilty despite exigencies in the Crown's case.²⁶ Not all true plea bargains will result in a joint recommendation, though the research set out below shows five of the six true plea bargains observed did, in fact, result in joint recommendations. A true plea bargain is understood as involving any situation in which the accused is not simply giving up his or her right to a trial but is giving up a good chance of being acquitted at trial. When a true plea bargain results in a joint recommendation, the accused will generally receive a lower sentence than they would otherwise expect to be imposed.²⁷

Empirical studies of plea-bargaining and joint recommendations are scarce in Canada. I set out to contribute to that literature by adding some empirical data to the academic record. I also wanted to challenge the anecdotal acceptance of the utility of plea bargaining and, in particular, joint recommendations on sentence.

I have attempted to answer basic quantitative questions and hopefully frame further research into the "whys" and "wherefores" of jointly recommending sentences. Though I argue there is a culture of expedience in the criminal justice system, I do not claim that complete proof of such exists in these pages. The same can be said for whether cultural joint recommendations will drive sentences up over time. Much more needs to be done in order to credibly make these claims. In short, we are left with many more questions than answers. I hope the value of this work is in focusing these questions to some degree. Our system of justice is a guilty plea system that should have as much protection for an accused (and

²⁵ While I did not record the length of all dispositions in my study, my general impression was that the hearings proceeded quite quickly. For a court observation study that includes information about the very quick pace of proceedings in bail court, see Nicole Myers, *Creating Criminality: The Intensification of Institutional Risk Aversion Strategies and the Decline of the Bail Process* (PhD thesis, University of Toronto, 2013) [unpublished].

²⁶ This definition invites the larger question of why the Crown is proceeding with charges in which they do not have a reasonable likelihood of conviction, an essential element in continuing with a prosecution. See generally Manitoba Justice Policy online: <<http://www.gov.mb.ca/justice/prosecutions/mbprosecutionservice.html>>

²⁷ *R v Sinclair*, *supra* note 3 at para 13.

therefore the public) as trials do. Questioning the efficacy of our guilty plea process is essential in helping to maintain a just system for all.

III. PLEA BARGAINING IN CANADA: BRIEF HISTORY AND CONTEXT

Throughout the history of the common law in England, Canada, and the United States, the courts discouraged pleas of guilty; litigation was thought to be “the safest test of justice.”²⁸ In many cases, faster trials meant there was no need for plea bargains.²⁹ Throughout Anglo-American legal history, death was often the accepted punishment (even for less serious offences), so it is perhaps not surprising that few guilty pleas were freely offered.³⁰ Until the mid-18th century in England, juries, with no real rules of evidence, tried cases. Guilty pleas were unknown.³¹ At some point in the 18th century, judges in England became increasingly worried about miscarriages of justice, and rules of evidence and procedure came into play. As a result, the system began to slow down. By the 19th century, guilty pleas were being encouraged with the reward of more lenient sentences.³² In England, policing and prosecutions were inexorably linked (with police prosecuting in the lower courts until 1985) until the creation of the Crown Prosecution Service in 1984.³³ Also in 1984, the *Police and Criminal*

²⁸ Albert W Alschuler, “The Prosecutor’s Role in Plea Bargaining” (1968) 36:1 U Chi L Rev 50 [Alschuler “Prosecutor”] at 50. See also Alschuler “History”, *supra* note 19 at 211 where the author contends that Anglo-American law departed from a trial system “largely as a result of laziness, bureaucratization, overcriminalization, and economic pressure.” It should also be noted that in the same article Alschuler does acknowledge (at 5) the fact that his conclusion (that plea bargaining did not happen in any great sense until the 19th century) falls victim to his inability to “prove a negative”. In other words, just because the practice does not exist in the historical record, does not mean it was not going on in some form or other. Alschuler notes that it is “probable” that plea bargaining would have left a trace and thus is happy to conclude as he does. Alschuler also states that historic legal treatises and case reports indicate that Anglo-American courts did not encourage guilty pleas (at 7-12).

²⁹ Alschuler “History”, *ibid* at 8.

³⁰ *Ibid* at 11.

³¹ Regina Rauxloh, *Plea Bargaining in National and International Law* (New York: Routledge, 2012) at 27.

³² *Ibid* at 28.

³³ *Ibid* at 29.

*Evidence Act*³⁴ was brought into force, restricting permissible evidence and generally making cases harder to win for the Crown; as a result, informal negotiations between Crown and defence became more prevalent.³⁵

In the United States, plea negotiations can be traced back to the Civil War. When plea bargaining started, it was a controversial practice.³⁶ Prosecutors, though elected, were often part-time officials who were keen to clear their busy dockets and get back to more lucrative private practices.³⁷ Pay was either low, or fixed fees were paid per case or conviction; not surprisingly, prosecutors sought to dispose of their criminal cases quickly.³⁸ It is against this background of systemic expedience that charge bargaining first made its appearance in the criminal process. Prosecutors in the United States were able to drop charges against an accused in order to “guarantee” lower sentences.³⁹ Not only does this familiar tactic persist to this day,⁴⁰ it is by far the most common form of plea bargaining. Lawyers in the United States have a strong self-interest in disposing of cases quickly to lighten their workloads and avoid risky trials.⁴¹

Into the 20th century, plea bargaining in the United States became a staple of the criminal justice system. By the 1920s, court records show that “plea bargained guilty pleas had become the most common method of case

³⁴ *Police and Criminal Evidence Act 1984* (UK), c 60, online: <<http://www.legislation.gov.uk/ukpga/1984/60/contents>>

³⁵ Rauxloh, *supra* note 31 at 29; see also Lafontaine, *supra* note 5 at 109 for a discussion of how the coming into force of the *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11 [Charter] in 1982 similarly changed the plea bargaining landscape in Canada.

³⁶ Alschuler “History”, *supra* note 19 at 21 where the author discusses the courts concern with the voluntariness of confessions in a plea bargaining environment. Courts in America were also reluctant to allow accused to waive their procedural rights (at 23).

³⁷ Bibas *Machinery*, *supra* note 2 at 18.

³⁸ *Ibid* at 18, the author noting some prosecutors carried hundreds of files and earned less than a dollar per case, despite having to travel around judicial circuits.

³⁹ *Ibid* at 18: For example murder to manslaughter or dropping “fixed penalty” charges in exchange for pleas to non-fixed penalty offences. This practice is still prevalent today and of particular interest in Canada given the proliferation of mandatory minimum sentence offences, see Debra Parkes, “From Smith to Smickle: The Charter’s Minimal Impact on Mandatory Minimum Sentences” (2012) 57 SCLR (2d) for increased number of mandatory minimum sentences in Canada.

⁴⁰ Bibas *Machinery*, *supra* note 2 at 18.

⁴¹ *Ibid* at xix.

disposition in felony cases and the practice steadily increased until, by the 1970s about 90% of all felony cases were concluded through guilty pleas”.⁴² There are several theories for this dramatic increase in plea bargaining: rife court corruption in early 20th century America;⁴³ the professionalization of the system leading to repeat players who shared common interests in disposing of cases quickly;⁴⁴ an increase in the number of mandatory minimum sentences in the U.S.;⁴⁵ an increase in the discretion of prosecutors to offer probation or other sentence suspension methods;⁴⁶ an increase in the length and complexity of trials;⁴⁷ urbanization and increased crime rates;⁴⁸ and the industrialization of America and the increased tort litigation that arose from an industrial society (thus incentivizing judges to get rid of their criminal dockets faster to accommodate big civil cases).⁴⁹ U.S. scholars of plea bargaining history seem to agree that plea bargaining began when case load pressures were low.⁵⁰ In fact, historical records of U.S. courts suggest guilty plea rates in the early 20th century went up, despite caseloads going down.⁵¹ The history of plea bargaining in the United States therefore casts serious doubt on the pro-plea bargaining argument that the system will collapse without bargaining.⁵² Plea bargaining in the U.S. did not evolve because there were too many cases to handle. It has been suggested, in fact, that plea

⁴² Candace McCoy, “Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform” (2005) 50:1-2 *Crim LQ* 67 at 74.

⁴³ Alschuler “History”, *supra* note 19 at 24-26.

⁴⁴ McCoy, *supra* note 42 at 75.

⁴⁵ *Ibid* at 75.

⁴⁶ *Ibid* at 76.

⁴⁷ Alschuler “History”, *supra* note 19 at 40.

⁴⁸ *Ibid* at 42.

⁴⁹ McCoy, *supra* note 42 at 76.

⁵⁰ *Ibid* at 77 relying on George Fisher’s work in “Plea Bargaining’s Triumph: A History of Plea Bargaining in America (Palo Alto, CA: Stanford University Press, 2003). See also Bibas *Machinery*, *supra* note 2 at 18-20; also note Alschuler “History”, *supra* note 19 at 2 and 27 where the author comments on judicial pronouncements by pro plea bargain judges that have no foundation in the historical record.

⁵¹ Alschuler “History”, *supra* note 19 at 27.

⁵² McCoy, *supra* note 42 at 77; see also Bibas *Machinery*, *supra* note 2 where the author argues it is far more likely that plea bargaining grew internally as the “repeat players” of the system found it useful. McCoy, *supra* note 42 at 78, points out that thought plea bargaining did not grow out of increased case loads it has become a very useful tool in dealing with them.

bargaining began as principled compromise, hardened into contract, and then degenerated into disaster.⁵³

In Canada, plea-bargaining was seen historically as a somewhat vulgar addition to the criminal justice system.⁵⁴ Reasons for this included: its perceived secrecy; lack of accountability to the trial process; propensity to foster overly partisan positional bargaining on sentence; and, perhaps most importantly, the fact that the merits of the case may take a back seat to the relative negotiating skill of counsel.⁵⁵ Guilt is determined out of public view and in the absence of procedural trial safeguards.⁵⁶ The 1970s in Canada were a time of confusion regarding the propriety of plea bargaining.⁵⁷ While the Law Reform Commission of Canada disapproved of bargaining, law societies approved of the practice, and case law was somewhat mute on the subject.⁵⁸ Even when courts did deal with failed plea bargains, they did little to illuminate the propriety debate.⁵⁹

⁵³ McCoy, *supra* note 42 at 96. The author tells us that John Langbein has even likened plea bargaining to torture in the historical context. For a full discussion, see McCoy at 96.

⁵⁴ *Martin Report*, *supra* note 3 at 276-277.

⁵⁵ *Ibid* at 77.

⁵⁶ Di Luca, *supra* note 10 at 37.

⁵⁷ F Douglas Cousineau & Simon N Verdun-Jones, "Cleansing the Augean Stables: A Critical Analysis of Recent Trends in the Plea Bargaining Debate in Canada" (1979) 17:2 *Osgoode Hall LJ* 227 at 238-240 (HL) [Verdun-Jones, "Cleansing"].

⁵⁸ *Ibid* at 238-240. Cousineau and Verdun-Jones note (at 249) that the Law Reform Commission had not based its 1979 opinion on empirical evidence. Canadian studies in the 1970s suggested far less than 90% of defendants were pleading guilty. The highest estimates (some 80%) came from research in Winnipeg, but other jurisdictions were significantly lower. Thus the Law Reform Commission was perhaps jumping the gun when it said plea bargaining was out of control in Canada in the 1970s. The authors go on (at 251-254) to discuss the research of prosecutor Brian Grosman in 1969. This research included interviews with Crown attorneys and was said by the authors to be based on "impression and hearsay rather than systematic research of the actual practices involved in plea bargaining" (at 252). The research in Derek F Wynne & Timothy F Hartnagel, "Race and Plea Negotiations: an Analysis of Some Canadian Data" (1975) 1:2 *Canadian Journal of Sociology* 147 [Wynne], is also discussed. The Wynne study concluded that Aboriginal people did not experience the same benefits as white accused and is discussed further below. The Wynne study, according to Cousineau and Verdun-Jones, was a file review as opposed to observational and thus shared the shortcomings of other empirical studies of the time in that they relied to one extent or another on secondary sources (at 253). It should be noted that the Wynne study was not about sentence bargaining but rather concerned

As recently as 1987, the Supreme Court of Canada held a principled, critical view of the plea bargaining system: "Justice should not be, and should not be seen to be, something that can be purchased at the bargaining table."⁶⁰ However, since that time the vast majority of common law in both the United States and Canada has developed in support of plea bargaining.⁶¹ There is little doubt that judges in both jurisdictions accept and support the perceived benefits of a system of guilty plea justice. However, some academics question a system based on plea bargaining, where sentence discounts are based on the mere fact of pleading guilty as opposed to genuine remorse.⁶²

Plea bargaining has also been viewed as a net widening of social control used by prosecutors with weak cases.⁶³ Far from being born of high caseloads, there is some evidence that plea bargaining itself may be responsible for unmanageable workloads in the system.⁶⁴ As Stephanos Bibas states: "Instead of communicating that punishment is a moral

itself with charge reductions (Wynne at 149). That is not to say the research is not useful, but at a minimum it needs to be updated. The data suggests that Aboriginal accused were discriminated against and that in and of itself is a very significant finding (Wynne at 151). It is also worth commenting on the research of Thomas Church: Thomas Church, Jr, "Plea Bargains, Concessions and the Courts: Analysis of a Quasi-Experiment" (1976) 10:3 Law & Soc'y Rev 377, concerning a ban on charge reductions in one U.S. jurisdiction. That research showed that while trial rates went up, guilty pleas were still sustained because of sentence bargaining (at 383-386). Finally, it is worthy of note that no more reliable empirical data was produced in Canada (that I have been able to find) between the 1970s and the *Martin Report* in 1993. We are still suffering today from a lack of empirical data regarding the plea bargaining process.

⁵⁹ Verdun Jones, "Cleansing", *supra* note 57 at 248.

⁶⁰ Dickson CJC in: *R v Lyons*, [1987] SCJ No 62 at para 103 quoting from (Law Reform Commission of Canada, Working Paper No. 15, Criminal Procedure ~ Control of the Process (1975), at 39-60).

⁶¹ See Richard A Bierschbach & Stephanos Bibas, "Notice-and-Comment Sentencing" (2012) 97 Minn L Rev 1 at 8-13 [Bierschbach] for the repeated endorsement of plea bargaining by the U.S. Supreme Court; see *R v Babos*, 2014 SCC 16 at para 59, [2014] SCJ No 16 for the most recent Supreme Court of Canada endorsement of the plea bargaining process.

⁶² Bibas *Machinery*, *supra* note 2 at 25.

⁶³ Joan Brockman, "An Offer You Can't Refuse: Pleading Guilty When Innocent" (2010) 56:1&2 Crim LQ 116 at 128.

⁶⁴ *Ibid* at 128.

denunciation based on true desert, society treats it as a marketable good, undermining its moral authority.”⁶⁵

Professor Kent Roach has suggested that the Supreme Court of Canada began to really legitimize plea bargaining with the seminal *R v. Stinchcombe*⁶⁶ and *R v. Askov*⁶⁷ decisions in the early 1990s.⁶⁸ Full disclosure in the wake of *Stinchcombe* meant that prosecutors and defenders should be able to reach a pre-trial compromise far more easily.⁶⁹ The “Charter enhanced quality” of police investigations meant that most accused should be expected to plead guilty.⁷⁰ Roach argues that these two key due process decisions had the effect of facilitating a greater emphasis on plea bargaining. When joined (shortly after) by the Martin Commission report, the overall design was to “speed up and legitimate the crime-control assembly line in which the vast majority of cases were resolved without a trial.”⁷¹ Interestingly, it has also been suggested that the intake procedures of modern Canadian courts have themselves evolved into mechanisms to “sell” guilty pleas to defendants.⁷² The cost of retaining counsel, the frustration of multiple remands, and the educative effect of multiple appearances to allow the “consumer” to know exactly how the system works (by way of guilty plea of course) all contribute to fostering a guilty

⁶⁵ Bibas *Machinery*, *supra* note 2.

⁶⁶ *R v Stinchcombe*, [1991] SCJ No 83, [1991] 3 SCR 326 (QL) dramatically increased the Crown’s burden to disclose information to the defence prior to trial.

⁶⁷ *R v Askov*, [1990] SCJ No 106, [1990] 2 SCR 1199 (QL) placed the Crown on notice that the accused’s Charter protected right to a trial within a reasonable time should be respected.

⁶⁸ Kent Roach, *Due Process and Victims Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999) at 98 [Roach *Due Process*]. See also Di Luca, *supra* note 10 at 14.

⁶⁹ Roach *Due Process*, *ibid* note 68 at 98.

⁷⁰ *Ibid* at 98 quoting *Martin Report*, *supra* note 3 at 286.

⁷¹ *Ibid* at 99. To this should be added the observations in Alschuler “Prosecutor”, *supra* note 28 at 82, where the author argues that under a guilty plea system constitutional rights are bargained away by defendants and thus unconstitutional behavior on the part of the state often goes unpunished; see also Stephanos Bibas, “Incompetent Plea Bargaining and Extrajudicial Reforms” (2012) 126 Harv L Rev 150 at 172 (HL) [Bibas “Incompetent”]. Here, the author summarizes the work of William Stuntz by stating the constitutionalizing of rights under the Warren Court in the United States unintentionally provided prosecutors with bargaining chips, diverting attention from innocence, and forcing legislators to broaden the criminal law.

⁷² Lafontaine, *supra* note 5 at 112-113.

plea state of mind.⁷³ These factors are sometimes referred to as “process costs.”

IV. THE PREVALENCE AND PERILS OF PLEA BARGAINING: INSIGHTS FROM THE LITERATURE

The disconnect between the dangers of plea bargaining as identified in the academic literature, and the wholesale judicial acceptance of the process, is stark and concerning. As discussed below, red flags have been waived by academics for some time, though empirical research to substantiate their claims has been rare. I argue that plea bargaining is, at the very least, a component of the criminal justice system that warrants research in order to further understand if and how it benefits the Canadian criminal justice system. If we have a system that claims fairness and justice for all participants, the mechanism that delivers the majority of results must be fully understood and critically assessed.

A. Plea Bargaining and the Machinery of Criminal Justice

In Canada we have a system that allows public officials (Crown prosecutors) to negotiate with persons accused of crimes (or their counsel) to determine which charges the accused will plead guilty to and, potentially, which sentence they will most likely receive. Tensions in a system such as this are inevitable.⁷⁴ Both prosecutors and defence counsel have a shared interest in moving the machinery along quickly.

Counsel who are new to the system may start out suspicious of the plea bargaining process but will eventually find it almost impossible to see any other way of doing business.⁷⁵ In the American context, Bibas sees there is far more in it for both sides if everyone just gets along and moves forward in an efficient and predictable fashion. As he notes: “Unfortunately, just as managed care pushes primary-care physicians

⁷³ *Ibid* at 112-113. The authors also discuss the issue of being denied bail and how this further incentivizes accused to plead guilty.

⁷⁴ Richard L Lippke, *The Ethics of Plea Bargaining* (New York: Oxford University Press, 2009) at 3-4.

⁷⁵ Bibas *Machinery*, *supra* note 2 at 32.

towards six-minute appointments and pill pushing, the plea bargaining machinery has pushed defence lawyers toward plea pushing.”⁷⁶

Judges and lawyers may become jaded with the never-ending line of clients that fill the criminal justice system. Rather than seeing the accused as an individual and the courtroom as theatre of justice, they may simply see “the usual man in the usual place” in the lawyers’ “own workshop”.⁷⁷ Bibas notes plea bargaining and the subsequent sentencing decision is “swift and impersonal,” being “tied to the individual defendant’s badness and need for retribution, deterrence, and incapacitation. They tend to be static backward looking assessments of blame and dangerousness that fit neatly into mechanical compartments.”⁷⁸ It has been argued that plea bargaining is not a safe practice because the consequent lack of trials is detrimental to the substantive criminal law. Trials are “a powerful inducement to proper police investigations and Crown prosecutions.”⁷⁹ It has also been suggested that plea bargaining seriously impairs the public interest because it does little to separate the guilty from the innocent.⁸⁰ Thus, some commentators have suggested that abolition of the practice would serve the interests of justice *and* efficiency.⁸¹

It has long been recognized that judges, like prosecutors and defence counsel, are susceptible to systemic pressures.⁸² In 1988, the research staff of the Canadian Sentencing Commission released a government report tabulating the result of a questionnaire returned by 400 Canadian judges.⁸³ Judges were asked: “Do you think at present plea and sentence negotiations have much of an impact on the sentencing process or on the sentences that are imposed?”⁸⁴ Forty-one percent of judges answered, “Definitely yes” and a further thirty-five percent responded, “In some

⁷⁶ *Ibid* at 154.

⁷⁷ *Ibid* at 39 quoting GK Chesterton.

⁷⁸ *Ibid* at 59.

⁷⁹ Ken Chasse, “Plea Bargaining is Sentencing” (2010) 14 Can Crim L Rev 55 at 57.

⁸⁰ Stephen J Schulhofer, “Plea Bargaining as Disaster” (1992) 101:8 Yale LJ 1979 (HL) [Schulhofer “Disaster”] at 1979.

⁸¹ *Ibid* at 1979.

⁸² Gerard A Ferguson, “The Role of the Judge in Plea Bargaining” (1972-73) 15 Crim LQ at 48.

⁸³ Canada, Research Staff of the Canadian Sentencing Commission, *Views of Sentencing: A Survey of Judges in Canada* (Ottawa: Minister of Supply and Services Canada, 1988).

⁸⁴ *Ibid* at 12.

circumstances”.⁸⁵ However, when asked, “Do you think that there should be legislative recognition and control of plea and sentence negotiations?”, fifty-two percent of judges said no.⁸⁶ Sixty-three percent of judges did not favour legislative prohibition of plea negotiations and only twenty-three percent of judges thought definitely that changes should be made to the way in which prosecutorial discretion is exercised.⁸⁷ Finally, almost sixty percent of judges claimed not to be active in plea and sentence negotiations.⁸⁸ This study indicates that — at least in the mid-1980s — many judges were quite satisfied with the state of plea bargaining and sentence recommendations in Canada.

It is not clear that the same can be said today. Judge K.D. Skilnick in British Columbia was less than enamored with the proliferation of joint recommendations is his 2004 article on the subject.⁸⁹ Upon his appointment to the Provincial Court Bench, he was surprised at the number of joint submissions placed before him “for a judicial rubber stamp on the love child of their plea negotiation.”⁹⁰ Both he and a colleague on the bench guessed that perhaps eighty-five percent of all sentencing submissions they heard were by way of joint recommendation.⁹¹ It has been argued that sentencing should be a completely judicial function and any system that interferes with that must not continue.⁹² Judges certainly play a more limited role in sentencing when the parties engage in plea bargaining.⁹³ Commentators have called for greater judicial oversight of the bargaining process to increase fairness in the system.⁹⁴ As another Canadian judge put it in 2003, “This Court

⁸⁵ *Ibid* at 12.

⁸⁶ *Ibid* at 12.

⁸⁷ *Ibid* at 13.

⁸⁸ *Ibid* at 13.

⁸⁹ Judge KD Skilnick, “Joint Submissions: Laudable Initiatives or the Death of Advocacy?” (2004) 62: 3 *The Advocate* at 413.

⁹⁰ *Ibid* at 413.

⁹¹ *Ibid* at 413. Judge Skilnick’s colleague suggested the trend to joint recommendations would lead to the death of criminal advocacy as they knew it.

⁹² Chasse, *supra* note 79 at 73-74.

⁹³ Ronald Wright & Marc Miller, “The Screening/Bargaining Tradeoff” (2002-03) 55 *Stan L Rev* 29 at 111-113 (HL); at 39.

⁹⁴ Albert W Alschuler, “The Trial Judge’s Role in Plea Bargaining, Part I” (1976) 76: 7 *Colum L Rev* 1059 (HL) [Alschuler “Trial Judge”] at 1060. Alschuler comments (at 1131) that judges and not prosecutors should control plea bargaining because

respectfully suggests that until such time as advocacy in these matters is returned to the courtroom from the corridors where it now seems to reside, it is unrealistic to expect great weight to be given to a joint submission".⁹⁵

Prosecutorial discretion is strongly protected in Canadian law, being reviewable only for abuse of process.⁹⁶ This discretion includes the ability to make sentence recommendations that induce guilty pleas by creating an effective penalty for those who chose to go to trial. It has been suggested that this ability to create a "trial penalty" is the basis of Crown power in the plea bargaining system.⁹⁷ It has been argued that "criminal law and the

prosecutors are more likely to view the "maximization of criminal convictions as a critically important objective."

⁹⁵ Higinbotham PCJ in *R v Groleau*, 2003 BCPC 0232 as quoted in Skilnick, *supra* note 89 at 413.

⁹⁶ *Krieger v Law Society of Alberta*, 2002 SCC 65, [2002] SCJ No 45; see also *R v Ladurantaye*, 2014 ONSC 1505, for a recent and informative review of the case law in this area including Justice Charon's decision in the Supreme Court of Canada case of *R v Nixon*, 2011 SCC 34, [2011] 2 SCR 566, where prosecutorial discretion was upheld even in the face of a repudiated plea agreement made with the accused (also see Ari Linds, "A Deal Breaker: Prosecutorial Discretion to Repudiate Plea Agreements after *R v Nixon*" (2012) 38:1 Queen's LJ 295, where the author argues that *Nixon* risks undermining public confidence in the administration of justice because the decision fails to "seize the opportunity before it to improve transparency, strengthen accountability and protect trial fairness within our criminal justice system" (at 296); and *R v Gill*, 2012 ONCA 607, 112 OR (3d) 423, where the Ontario Court of Appeal found at paras 74-75 that there is no free standing principle of justice that the Crown justify the exercise of its discretion to the trial court. See also *R v Babos*, *supra* note 61, where a six-member majority of the Supreme Court held that the Crown had not stepped into the realm of abuse of process, despite a finding that he had acted in a threatening manner that was far outside of legitimate plea bargaining (at paras 60-61). But see the dissenting opinion of Abella J who held "A Crown who makes threats intended to bully an accused into foregoing his or her right to a trial, takes fatal aim at the heart of the public's confidence in that integrity" (at para 75). See also Di Luca, *supra* note 10 at 41 where it has been suggested that the dearth of plea bargaining case law may be because Crown counsel are viewed as always acting in the best interest of justice.

⁹⁷ Chasse, *supra* note 79 at 57. Also see generally Stephanos Bibas, "The Feeny Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain" (2004) 94: 2 J Crim L & Criminology 295 (HL) [Bibas "Feeny"] for a discussion of legislative changes that provide greater bargaining chips to Prosecutors in the United States and thus, further tip the scales in the favour of the state.

law of sentencing define prosecutors' options, not litigation outcomes."⁹⁸ Two factors augment the Crown power to induce guilty pleas: the general acceptance that the system will fall apart without a high rate of guilty pleas; and common law restrictions on sentencing judges in deviating from Crown recommendations.⁹⁹ Defence counsel harness the Crown power to "fix" sentences by seeking joint recommendations or at least a "reasonable" upper sentence limit from the Crown.¹⁰⁰ The system accepts this huge power of the Crown to "fix" sentence ranges because it is key to achieving expedience in the criminal justice system.¹⁰¹ It should be noted that there is no statutory provision for Crown counsel to make submission on sentence quantum.¹⁰²

It has been persuasively argued that effective pre-trial screening of matters could mitigate system pressures at least as well as inducing guilty pleas by use of trial penalties.¹⁰³ Crown policy manuals speak to this screening requirement and properly conducted resolution discussions can be seen as an extension of proper charge screening as opposed to plea bargaining.¹⁰⁴ Of course, it has also been suggested that our plea bargaining system encourages prosecutors to lay somewhat dubious

⁹⁸ William J Stuntz, "Plea Bargaining and Criminal Law's Disappearing Shadow" (2004) 117: 8 Harv L Rev 2548 (HL) at 2549. The author outlines distinctions between civil and criminal law and explores whether and to what extent the substantive criminal law actually governs settlements in criminal matters. The author concludes that the substantive criminal law, rather than imposing outcomes on matters, provides "a menu – a set of options law enforcers may exercise, or a list of threats prosecutors may use to induce the plea bargains they want" (at 2569).

⁹⁹ Chasse, *supra* note 79 at 58. The author goes on to say (at 61) that "any principle of sentencing that narrows the judge's freedom of decision expands the Crown's plea bargaining power". For example, a "joint submission" as to sentence is to be accepted, except only in extraordinary circumstances."

¹⁰⁰ *Ibid* at 58 where the author gives the case of *R v F (JK)*, [2005] OJ No 812, 195 OAC 141 (Ont CA) where the Court admonished the sentencing judge for "jumping" the Crown recommendation and submitted a sentence in line with the Crown's original recommendation; also see *R v Beady*, 2014 MBCA 23, 303 Man R (2d) 1, where the Manitoba Court of Appeal also made it clear that the Crown's upper recommendation is usually as high as the Court is permitted to go.

¹⁰¹ Chasse, *supra* note 79 at 59.

¹⁰² *Ibid* at 68-69.

¹⁰³ McCoy, *supra* note 42 at 93.

¹⁰⁴ Dickie, *infra* note 119 at 147.

charges in the hope that these charges will induce guilty pleas.¹⁰⁵ Reconciling these opinions is far from easy in the complex arena of prosecutorial discretion.

B. Plea Bargaining and Public Opinion

As we have seen, the 1975 working paper from the Law Reform Commission of Canada¹⁰⁶ was strongly critical of plea bargaining. However, by 1989 influential academics like Stanley Cohen and Anthony Doob (as well as the Law Reform Commission itself) were reconsidering this position in light of the *Charter of Rights and Freedoms*¹⁰⁷ and the increased availability of legal aid. The Law Reform Commission's 1989 paper gave tentative approval to plea bargaining, provided it was an open and accountable process.¹⁰⁸ In 1989, public opinion was gauged by way of a survey on plea bargaining.¹⁰⁹ A total of 1,049 Canadians were interviewed by the study; the majority disapproved of plea bargaining. Those who disapproved of plea bargaining generally thought sentences were too lenient. The public was more inclined to think defence counsel did a better job when a plea bargain occurred and Crown counsel did a less adequate job.¹¹⁰ Cohen and Doob concluded that the secrecy of plea bargaining appeared to reduce public confidence in the criminal process.¹¹¹

Public opinion gauged across jurisdictions indicates a perception that sentences are generally too lenient.¹¹² However, contrary to public opinion fuelled by the news media, judges are not, in fact, more lenient than the

¹⁰⁵ Albert W. Alschuler, "The Changing Plea Bargaining Debate" (1981) 69: 3 Cal L Rev 652 (HL) [Alschuler "Changing Debate"] at 688.

¹⁰⁶ Working Paper 15 (1975), *supra* note 9 in Cohen & Doob, *supra* note 22 at 85.

¹⁰⁷ *Charter*, *supra* note 35.

¹⁰⁸ Cohen & Doob, *supra* note 22 at 88. It should be noted that the makeup of the five review boards of the Commission (as outlined at 90) include only justice system "insiders". There is no lay oversight of the conclusions reached by the Law Reform Commission.

¹⁰⁹ *Ibid* at 93. Interestingly the survey did not use the term "plea bargain," presumably for fear of it biasing the responses.

¹¹⁰ *Ibid* at 94-103.

¹¹¹ *Ibid* at 103.

¹¹² Austin Lovegrove, "Public Opinion, Sentencing and Lenience: An Empirical Study Involving Judges Consulting the Community" (2007) Crim L Rev 769 at 769-770.

community at large.¹¹³ And, at least in Australia, the community does not speak with one voice on issues of sentencing.¹¹⁴ Research like this casts serious doubt on the wisdom of increasing sentence severity to satisfy what is thought to be a harsher public.¹¹⁵ Though increased public involvement in the criminal justice system increases its legitimacy, the public must have a “view and a voice” in the process, not a “veto”.¹¹⁶

Studies suggest that deterrence is the primary sentencing concern of the public.¹¹⁷ Crown attorneys are the guardians of public interest, so it is hardly surprising that the consideration of deterrence will often be a large factor in Crown sentencing submissions.¹¹⁸ Crown counsel must constantly wear “two hats, that of an adversary and that of a quasi-judicial officer.”¹¹⁹ Lawyers acting for the Crown are governed in their exercise of discretion by case law, departmental policy, and Law Society rules.¹²⁰ While some studies have shown that the public believes sentences are not severe enough,¹²¹ more in-depth research has shown that the media plays a substantial role in swaying public opinion on sentencing.¹²² This is very important to realize when we consider that public opinion forms the basis of sentencing policies in Canada.¹²³ Roberts and Doob discovered that while the majority of the public who viewed news media of a sentence thought it was too lenient,¹²⁴ far fewer people thought the same sentence

¹¹³ *Ibid* at 776.

¹¹⁴ *Ibid* at 777.

¹¹⁵ *Ibid* at 779.

¹¹⁶ Bierschbach, *supra* note 61 at 2.

¹¹⁷ Nigel Walker & Mike Hough, eds, *Public Attitudes to Sentencing: Surveys from Five Countries* (Aldershot: Gower, 1988) at 86.

¹¹⁸ *Ibid* at 113. It is noted however that the majority of Canadian (70%) in a study conducted by Roberts and Doob for the Canadian Sentencing Commission in 1987, favoured spending money on sanctions other than imprisonment. While Canadians want deterrence, they do not necessarily want imprisonment as that means of deterrence. Canadians also do not look exclusively to sentencing to solve the problems of crime, taking a more sociological perspective (at 124).

¹¹⁹ Mary Lou Dickie, “Through the Looking Glass - Ethical Responsibilities of the Crown in Resolution Discussions in Ontario” (2005) 50 *Crim LQ* 128 at 130.

¹²⁰ *Ibid* at 138-143.

¹²¹ Walker, *supra* note 117 at 89.

¹²² Anthony Doob & Julian V Roberts, “News Media Influences on Public Views of Sentencing” 1990 *14: 5 Law and Human Behaviour* 451 at 452 [Roberts “News”].

¹²³ *Ibid* at 454; see also Lovegrove, *supra* note 112 at 771.

¹²⁴ Roberts “News”, *supra* note 122 at 456: 62% of sample thought the sentence was too

was too lenient when they reviewed the actual court documents.¹²⁵ Crown attorneys must look to their role as ministers of the public interest in determining how to proceed on charge and sentence bargaining decisions.¹²⁶ However, in the context of plea bargaining, the “collective public interest pulls in different directions and the interest concerned are not easily reconciled.”¹²⁷ There are numerous day-to-day pressures prosecutors must respond to other than the public’s desire for justice.¹²⁸

C. Plea Bargaining and Wrongful Convictions

The spectre of innocent people pleading guilty as a result of plea bargaining has driven much of the debate in the U.S. literature.¹²⁹ There have also been several cases in Canada where innocent people have nevertheless pleaded guilty.¹³⁰ In the words of Albert Alschuler, the plea bargaining system “seems well-designed to produce the conviction of innocent defendants.”¹³¹ The pressure to plead guilty when innocent is greater with minor offences because the “process costs” far outweigh the benefit of going to trial.¹³² Some “process costs” in the criminal law context include time taken off work for multiple appearances, adjournments, delays, and the financial costs of hiring a lawyer. An accused may conclude that it is easier to plead guilty in some circumstances rather than attend multiple court appearances and endure significant legal costs.

lenient.

¹²⁵ *Ibid* at 462. Only 19% of participants thought the sentence was too lenient after reviewing the actual case file. See also Lovegrove, *supra* note 112 at 772 where studies have shown perceived lenience has a detrimental effect on public confidence in the justice system. The author notes that sentences in the UK and Australia have risen as a result of judges being susceptible to this public perception driven by the news media.

¹²⁶ For discussion of the Crown role in advocating in the public interest, see Robert J Frater, *Prosecutorial Misconduct* (Aurora: Canada Law Books, 2009) at 9-13.

¹²⁷ Fiona Leverick, “Sentencing Discounting for Guilty Pleas: An Argument for Certainty over Discretion” (2014) 5 *Crim L Rev* 338 at 341.

¹²⁸ Stephen J Schulhofer, “A Wake-up Call from the Plea Bargaining Trenches” (1994) 19 *Law & Soc Inquiry* 135 at 137 (HL) [Schulhofer “Wake-up”].

¹²⁹ Oren Bar-Gill & Oren Gazal Ayal, “Plea Bargains Only for the Guilty” 2006 *XLIX* (April, 2006) *JL & Econ* 353 at 353 (HL); Alschuler “Prosecutor”, *supra* note 28 at 60.

¹³⁰ For a review of these cases, see Brockman, *supra* note 63 at 119-12.

¹³¹ Alschuler “Changing Debate”, *supra* note 105 at 715.

¹³² Brockman, *supra* note 63 at 122.

The Crown, of course, should not be proceeding on cases where there is no reasonable likelihood of conviction.¹³³ The plea provisions in the *Criminal Code* are meant to provide safeguards against an innocent person pleading guilty.¹³⁴ However, the history of wrongful convictions in Canada has shown that innocent people do, in fact, enter guilty pleas.¹³⁵ It is therefore reasonable to suggest that adherence to the Crown mandate to only prosecute when doing so is in the public interest and there is a reasonable likelihood of conviction, may be questionable. It is also quite possible that the plea inquiry requirements in the *Criminal Code* may simply not offer adequate protection against wrongful convictions.

It has been suggested that innocent defendants are more risk averse and thus more likely to take a “safe” guilty plea over trial and, of course, on lower level matters this may never come to light.¹³⁶ The lesson that may be taken here is that plea bargaining is not only for the guilty. Rather, it may be just a simple trade-off for the accused.¹³⁷ Process costs can be high in the criminal justice system and “where the process is the punishment, minimizing the process is the best way to minimize punishment.”¹³⁸ Whatever the reason for an innocent person pleading guilty, there is a heavy toll on society if innocent people are convicted of crimes.¹³⁹ Wright and Miller have suggested that in a system of aggressive pre-trial screening by prosecutors, fewer wrongful convictions would occur because prosecutors would be forced to take a longer, harder look at charges in the initial stages of a prosecution.¹⁴⁰ Scott and Stuntz have argued that

¹³³ *Ibid* at 122.

¹³⁴ *Criminal Code*, *supra* note 24, s 606(1.1). See also Brockman, *supra* note 63 at 117. Brockman does note (at 134) that greater judicial involvement at the plea stage may help to establish if prosecutors have the necessary evidence to proceed with a charge.

¹³⁵ See e.g., Gary Trotter, “False Confessions and Wrongful Convictions” (2004) 35:2 *Ottawa L Rev* 179.

¹³⁶ Brockman, *supra* note 63 at 122 (including comments from a Toronto defence lawyer who thinks such pleas probably happen “hundreds of times a day”).

¹³⁷ *Ibid* at 123.

¹³⁸ *Ibid* at 127, quoting Professor Covey.

¹³⁹ See Leverick, *supra* note 127 at 340-341 where the author noted that although there may be defensible “economic” arguments to stating that an innocent should be able to plead guilty because they may be wrongfully convicted at trial and thus get a heavier sentence, these arguments do not stand up to the damage done to society by the consequent diminishment in public confidence in the administration of justice.

¹⁴⁰ Wright & Miller, *supra* note 93 at 94-95.

abolishing plea bargaining would actually be bad for innocent defendants¹⁴¹ because it would take away a rational choice for those innocent accused. However, Schulhofer argues (more persuasively, in my view) that abolition would not have this effect because there are serious costs to the community at large when innocent people plead guilty.¹⁴² Perhaps most importantly, studies involving simulations have actually shown that “innocent” people plead guilty at a surprisingly high rate when faced with an attractive plea deal.¹⁴³

Since the 1960s, there has been a call in North America for more empirical evidence upon which to base policy decisions around the propriety and utility of plea bargaining. However, there has been little academic appetite, particularly in the last twenty years, to study the plea bargaining process through quantitative or qualitative research. This has left us in a policy vacuum, filled by anecdotal acceptance, intuition, and best guesses as to why plea bargaining is the best thing for our criminal justice systems. Despite clear historic evidence that plea bargaining did not

¹⁴¹ Schulhofer “Disaster”, *supra* note 80 at footnote 2 referencing Scott & Stuntz, “Plea Bargaining as Contract” (1992) 101:8 Yale LJ 1909.

¹⁴² *Ibid* at 2000-2001

¹⁴³ Miko M Wilford, “Let’s make a deal: Exploring plea acceptance rates in the guilty and the innocent” (Master of Science, Iowa State University, 2012) [ProQuest] 165. In this study, undergraduate students were involved in an experiment to determine the rates at which an “innocent” person would accept a plea deal. The methodology of the experiment is involved and complex (see 24-27). Essentially students were randomly assigned as either “innocent” or “guilty” and were paired up with a “confederate” that was aware of the experiment. The “confederate” would ask only the guilty people to cheat on a psychological test. The test setter, noting a problem after the tests were completed would then confront all participants and accuse them of cheating. The “innocent” and “guilty” were then given a “plea deal” of working in the search lab for 20 hours or risk a charge of academic dishonesty. Seventy-nine percent of guilty subjects took the deal and 52% of innocent subjects also took the deal. Though conducted under controlled conditions and not obviously involving real criminality, the results are nevertheless fascinating. If more than half of those people who did nothing wrong were still tempted into taking a plea deal, then the “innocence problem” of plea bargaining may be a very real problem indeed. See also David Bjerk, “On the Role of Plea Bargaining and the Distribution of Sentences in the Absence of Judicial System Frictions” (2008) 1 Intl Rev L & Econ 1, for a theoretical economic analysis that suggests even in a perfect world where innocent defendants could not be convicted and the prosecutor has all the necessary information to proceed to trial, a risk averse society may still opt for a plea bargaining system.

grow out of increased caseload pressures,¹⁴⁴ there is still stubborn adherence to its ultimate utility in managing an overburdened system.

Where empirical studies of plea bargaining have been undertaken,¹⁴⁵ they tend to show that the system will not collapse under the weight of too many trials. In fact, though trial rates in experimental regions have usually risen, these rises appear to have been manageable and guilty plea rates have not changed significantly. There is no empirical evidence that proponents of the plea bargaining system can point to as proof that a guilty plea system is the fairest and most appropriate system for the public. There is little doubt that a plea bargaining system benefits lawyers, but the literature raises questions about whether it is in the public interest. The risks that go along with clear inducements for an accused to plead guilty are myriad, and the benefits to justice questionable. Alternatives such as the simplification of the trial process to allow for adjudicative rather than submissive dispositions, have received little traction in Canada. Instead, the legal community looks to the Martin Commission report, and the judicial decisions that have followed it, to defend the practice of plea bargaining and the prevalence and acceptance of joint recommendations.

V. PLEA BARGAINING IN THE JURISPRUDENCE: INSIGHTS FROM THE MANITOBA CASE LAW

There is a significant body of Canadian common law jurisprudence that has developed around the acceptance of joint recommendations.¹⁴⁶ In *Sentencing and Penal Policy in Canada*,¹⁴⁷ Allan Manson et al dedicate a chapter of their seminal work to plea discussions and joint submissions.

¹⁴⁴ See generally McCoy, *supra* note 42.

¹⁴⁵ See Alaska statistics in Wright & Miller, *supra* note 93 at 44 noting that where plea bargaining was banned in Alaska a peak trial rate of 10% was seen that then dropped to 7% by the end of the 1980s. For an overview of the Alaska plea bargaining ban, see David A Ireland, "Bargaining for Expedience? The Overuse of Joint Recommendations on Sentence" (Master of Laws, University of Manitoba, 2014) at 55-60 MSpace, online: <<http://mspace.lib.umanitoba.ca/jspui/bitstream/1993/23924/1/david%20ireland%20thesis.pdf>> [Ireland "Bargaining"]

¹⁴⁶ For a more comprehensive look at the Canadian case law on joint recommendations, see Ireland "Bargaining", *ibid* at 63-90.

¹⁴⁷ Manson, *supra* note 1 at Chapter 7.

The authors observe that joint recommendations are set apart from other forms of plea bargaining because joint recommendations only take effect on the assent of the judge.¹⁴⁸

The Manitoba Court of Appeal has often dealt with the issue of joint recommendations, addressing the topic in at least 28 decisions between 1978 and 2011.¹⁴⁹ The leading Canadian case on the treatment of joint recommendations by sentencing judges is the Manitoba Court of Appeal decision in *R v Sinclair*.¹⁵⁰ Manitoba's top court has emphasized the importance of true plea bargains in the judicial acceptance of joint recommendations from counsel. While the Court has made it clear that sentencing judges must consider joint recommendations and accord them weight, the amount of weight should be determined by the degree to which the joint recommendation resembles a true plea bargain.¹⁵¹ This section traces the evolution of the law in Manitoba concerning joint recommendations and plea bargaining, examining the changing approach taken by the Court of Appeal and the resulting guidance given to sentencing judges (and counsel) about the practice.

A. The *Pre-Sinclair* Period: Early Acceptance and Uncertainty

Prior to the *Sinclair* decision, the Manitoba Court of Appeal was less than united on the propriety of joint recommendations as to sentence. One of the first major discussions of the joint recommendation process came in the 1978 case of *R v. Simoneau*.¹⁵² Here, the Manitoba Court of

¹⁴⁸ *Ibid* at 297. This is as opposed to covert forms of bargaining discussed above in the introduction. The authors do rightly acknowledge that s.606(4) of the *Criminal Code* requires judicial compliance but are quick to point out that a) *R v Narainden*, [1990] OJ No 1645, 80 CR (3d) 66 (Ont CA), suggests deference should be afforded the Crown in the use of s.606(4); and b) Prosecutors can in fact easily circumvent the judge by simply not using 606(4) and simply laying a new charge as required. See also Alschuler "Trial Judge", *supra* note 94 at 1107, for discussion of prosecutors' uncontrolled ability to reduce charges.

¹⁴⁹ These decisions will be further discussed below, but it is interesting to note that of these 28 cases, 14 were resolved in a manner that favoured the lawyers' recommendation.

¹⁵⁰ Manson, *supra* note 1 at Chapter 7

¹⁵¹ *R v Sinclair*, *supra* note 3 at para 13.

¹⁵² *R v Simoneau*, *supra* note 9.

Appeal dealt with a joint recommendation that was not part of a wider plea bargain.¹⁵³ The accused had (apparently without incentive) decided to plead guilty. Only after this decision was made did counsel jointly recommend a reformatory jail sentence of two years less a day. The sentencing judge imposed a sentence of three and a half years. The Court of Appeal upheld this sentence. Joint submissions themselves were somewhat new at this time and there was no real consensus on how they should be dealt with. In fact, the issue of whether or not counsel should even make specific submissions on sentence was not settled.¹⁵⁴

In his concurring judgment, Monnin JA (as he then was) was very concerned with the propriety of joint recommendations. He was “perturbed with what seemed to be developing into a practice of joint specific recommendations as to sentence.”¹⁵⁵ Justice Monnin was one of the first voices of caution in the Manitoba debate surrounding plea bargaining and joint recommendations. He articulated systemic concerns about the process of sentencing. It seems that he saw the potential for the erosion of judicial discretion and perhaps some wider negative implications for the administration of justice.¹⁵⁶

The cases from the pre-*Sinclair* period are marked by their brevity and, to some degree, their “potluck” nature as to whether a joint

¹⁵³ *Ibid* at para 8, noting that defence counsel told the court there was no *quid pro quo* involved in entering the plea.

¹⁵⁴ *Ibid* at paras 14-15.

¹⁵⁵ *Ibid* at para 25.

¹⁵⁶ It is interesting to note that Canadian courts generally avoided confronting the propriety plea bargaining at this time. See Ferguson, *supra* note 82 at 27. In that article the author calls for an end to judicial plea bargaining as contemplated by the seminal English decision of *R v. Turner*. In *Turner* the accused plead guilty after his counsel met with the judge and then informed the accused that he would not get jail if he entered a guilty plea. Even though he indeed avoided jail he made an application to withdraw his plea and the court found his guilty plea a nullity because his choice to plead guilty was not free once he thought the judge had given his OK to the deal. For an interesting discussion of the *Turner* decision, see Ferguson, *supra* note 82 at 32-40. The author points out the lapses in logic in the decision such as (at 35) the fact that the guilty plea was held a nullity because the accused was deprived of complete freedom of choice, yet only judicial and not prosecutorial plea bargaining was considered improper on this basis. The author (at 39) challenges Canadian courts to address whether the offering of a benefit in exchange for a guilty plea makes the plea involuntary. In my view, this question has not been satisfactorily answered by Canadian courts.

recommendation was upheld or not. In 1989 in *R v. Goulet*,¹⁵⁷ a unanimous court upheld a nine-month sentence. In dismissing the joint recommendation, Huband J.A. was decidedly brief, holding that “we are of the opinion that the learned sentencing judge exercised her discretion properly in rejecting the joint recommendation.”¹⁵⁸ A year later, Justice Huband (again in a very concise decision) dealt with an accused who had pled guilty to possession of cannabis resin worth \$25,000-\$30,000 in *R v. Divito*.¹⁵⁹ A joint recommendation for sixty days in jail was made to the sentencing judge who rejected it, for a sentence of six months. Citing no particular authority, the Court asserted that there must be good reason for a sentencing judge to reject a joint recommendation, particularly when made by experienced counsel.¹⁶⁰ In both *Goulet* and *Divito*, one is left with the feeling that the fitness of the sentence was the deciding factor in whether to uphold the joint recommendation and not any principled interpretation of the process.

This pattern of uncertainty continued through the early 1990s¹⁶¹ until the case of *R v. Pashe*¹⁶² in 1995. In a majority (2-1) decision, the Court came down on the side of counsel’s joint recommendation noting: “The bargaining process is undermined if the resulting compromise recommendation is too readily rejected by the sentencing judge.”¹⁶³ Interestingly, Huband JA chose to quote his own judgment in *R v. Divito*: “there must be good reason (to reject a joint recommendation), particularly, as in this case, where the joint recommendation is made by experienced counsel.”¹⁶⁴ This dicta is not cited to any particular authority.

¹⁵⁷ *R v Goulet*, [1989] MJ No 283 (Man CA) (QL).

¹⁵⁸ *Ibid* at final paragraph (unnumbered).

¹⁵⁹ *R v Divito*, [1990] MJ No 12 (Man CA) (QL).

¹⁶⁰ *Ibid* at second paragraph (unnumbered).

¹⁶¹ See for example *R v Hrehirchuk*, 81 Man R (2d) 257, [1992] MJ No 430 (Man CA).

¹⁶² *R v Pashe*, 100 Man R (2d) 61, [1995] MJ No 76 (Man CA).

¹⁶³ *Ibid* at 11. In this very difficult case, a foster mother had struck a twenty-one month old child in her care, knocking the child unconscious. The child died of the injuries sustained as the accused shook the infant in an attempt to revive her to consciousness. When the child did not wake up, the accused took him to hospital. Counsel had recommended a sentence of one year and Justice Huband found this acceptable in the circumstances.

¹⁶⁴ *Ibid* at para 12.

Nevertheless, it is on this foundation that the Court formulates the test for acceptance of joint recommendations:

The question then becomes whether the learned sentencing judge had good cause to reject the joint recommendation. The sentencing judge thought that the jail term of one year was simply unfit, even as a result of a plea bargain, and that would indeed be appropriate grounds for rejecting a joint recommendation. In my view, however, the recommended jail term was within the appropriate range of sentences for criminal negligence causing death, given the surrounding circumstances. While shorter than it might have been, it was not unfit.¹⁶⁵

Between 2000-2004, there was a flurry of joint recommendation cases that made it to the Manitoba Court of Appeal. In 2000, the Court heard *R v. Thomas*.¹⁶⁶ Here, the sentencing court rejected a joint recommendation of seven years for six counts of robbery with a firearm and other offences, and instead imposed a ten-year sentence. Chief Justice Scott (as he then was) used this case to review the Court's approach to joint recommendations and lay down some unequivocal direction to sentencing judges. Using the decision in *R v. Pashe* as a starting point, Scott C.J.M. affirms the notion that while the judge is the final arbiter of sentence, there needs to be "clear and cogent reasons for departing from a recommendation in circumstances such as we have here."¹⁶⁷

In *R v. Mason*,¹⁶⁸ the Court had the opportunity to put the *Thomas* test of "clear and cogent reasons" to work. In *Mason*, the test is simply whether or not the sentencing judge gave clear reasons as to why they would not go along with the joint recommendation. The message to sentencing judges seemed clear. If judges articulated their reasons for rejection, then judicial discretion was back in the driver's seat.

However, in 2003, the Manitoba Court of Appeal seemingly changed tack in *R v. J.W.I.B.*¹⁶⁹ In substituting the original jointly recommended sentence, the Court of Appeal noted that the sentencing judge was told by counsel: "that the present case was 'a true plea bargain in every sense of the word.'" She was told that the accused, in pleading guilty, was giving up an arguable and possibly successful defence."¹⁷⁰ Though the appeal was

¹⁶⁵ *Ibid* at para 13.

¹⁶⁶ *R v Thomas*, 2000 MBCA 148, 153 Man R (2d) 98.

¹⁶⁷ *Ibid* at para 6.

¹⁶⁸ *R v Mason*, 2002 MBCA 113, 166 Man R (2d) 170.

¹⁶⁹ *R v J W I B*, 2003 MBCA 92, 176 CCC (3d) 13.

¹⁷⁰ *Ibid* at para 8.

decided in fact on the basis that the sentencing judge erred in her application of the parity principle, the case is of significance to the law of joint recommendations. The Court now took the position that joint recommendations have a bigger role to play when the Crown has a weak case. In other words, there is utility in having a guilty plea entered and getting *some* form of conviction as opposed to having the accused acquitted at trial. This logic is difficult to follow in light of the Crown's obligation to only prosecute an accused if there is a reasonable likelihood of conviction.¹⁷¹ Nevertheless, as Madam Justice Steel readied herself to deliver judgment in *R v. Sinclair*, it was now very clear that joint recommendations had a place in convicting those who, should the matter proceed to trial, would likely not be convicted.

B. *R v. Sinclair*: Attempting to Clarify the Standard

In *R v. Sinclair*, Justice Steel took on the task of summarizing the law to date and providing better guidance to counsel and sentencing judges. The Court of Appeal upheld the sentencing judge's decision to reject a joint recommendation. Though not using the terms "cultural joint recommendations" and "true plea bargain joint recommendations", the Court certainly acknowledged the dichotomy:

There is a continuum in the spectrum of plea bargaining and joint submissions as to sentence. In some cases, the Crown's case has some flaw or weakness and the accused agrees to give up his or her right to a trial and to plead guilty in exchange for some consideration. This consideration may take the form of a reduction in the original charge, withdrawal of other charges or an agreement to jointly recommend a more lenient sentence than would be likely after a guilty verdict at trial. Evidence always varies in strength and there is always uncertainty in the trial process. In other cases, plea negotiations have become accepted as a means to expedite the administration of criminal justice. That is the case here, where the accused's decision to forego his right to a trial must be considered within the context of a backlog in trial dates and the months already spent in pre-trial detention. The clearer the quid pro quo, the more weight should be given an appropriate joint submission by the sentencing judge. See *R v Broekaert (DD)* (2003), 170 Man R (2d) 229, 2003 MBCA 10, at para 29, and *Booh*, at para 11.¹⁷²

The law on joint recommendations was now clearly enumerated:

¹⁷¹ This information is laid out well for the public in: Manitoba, Prosecutions the Criminal Case: Step by Step, online: <<http://www.gov.mb.ca/justice/prosecutions/stepbystep.html#2>>

¹⁷² *R v Sinclair*, *supra* note 3 at para 13.

(1) While the discretion ultimately lies with the court, the proposed sentence should be given very serious consideration.

(2) The sentencing judge should depart from the joint submission only when there are cogent reasons for doing so. Cogent reasons may include, among others, where the sentence is unfit, unreasonable, would bring the administration of justice into disrepute or be contrary to the public interest.

(3) In determining whether cogent reasons exist (i.e., in weighing the adequacy of the proposed joint submission), the sentencing judge must take into account all the circumstances underlying the joint submission. Where the case falls on the continuum among plea bargain, evidentiary considerations, systemic pressures and joint submissions will affect, perhaps significantly, the weight given the joint submission by the sentencing judge.

(4) The sentencing judge should inform counsel during the sentencing hearing if the court is considering departing from the proposed sentence in order to allow counsel to make submissions justifying the proposal.

(5) The sentencing judge must then provide clear and cogent reasons for departing from the joint submission. Reasons for departing from the proposed sentence must be more than an opinion on the part of the sentencing judge that the sentence would not be enough. The fact that the crime committed could reasonably attract a greater sentence is not alone reason for departing from the proposed sentence. The proposed sentence must meet the standard described in para. 2, considering all of the principles of sentencing, such as deterrence, denunciation, aggravating and mitigating factors, and the like.¹⁷³

R v. Sinclair has become a leading case on the law of joint recommendations in Canada.¹⁷⁴ The Court in *Sinclair* acknowledged that systemic pressures can and do create joint recommendations. These less than *quid pro quo* joint recommendations are still worthy of consideration by the court, though not as much as true plea bargain joint recommendations. Despite this seemingly definitive direction, the question of when a joint recommendation can and cannot be disregarded was still open for debate in Manitoba. In the many cases that followed *Sinclair*, it is apparent that the Court moves slowly towards the value of protecting all joint recommendations and away from judicial discretion in sentencing. With respect, this shift is based on assumptions about the value of plea bargaining that are not grounded in evidence.

¹⁷³ *Ibid* at para 17.

¹⁷⁴ See Manson, *supra* note 1 at 301.

C. The Post-*Sinclair* Approach: Deference to True Plea Bargains

In the cases that followed *Sinclair*, the Manitoba Court of Appeal has developed a “pro-counsel” approach to joint recommendations. If a jointly recommended sentence comes out of a *quid pro quo*, it is very likely to be upheld by the Court. *R v. McKay*¹⁷⁵ was the first opportunity the Court of Appeal took to apply *Sinclair*. Huband J.A. made short work of distinguishing the true plea bargaining form of joint recommendation from the others, stating at the outset of the decision: “An important distinction is to be made between a joint recommendation resulting from a plea bargain, and a joint recommendation with no similar foundation.”¹⁷⁶ The accused appealed the imposed sentence and relied on the ruling in *R v. Pashe* and the Quebec decision of *R v. Douglas*.¹⁷⁷ The Court found it easy to distinguish these decisions finding that Mr. McKay’s case had not been the subject of a “genuine plea bargain.”¹⁷⁸ The court stated that “in the present case, there was no apparent *quid pro quo*. There is no reason to believe that the Crown could not have established each of the charges beyond reasonable doubt.”¹⁷⁹

The decision in *McKay* is undoubtedly an important clarification of *Sinclair*. Counsel and sentencing judges were told that non *quid pro quo* joint recommendations were not entitled to receive significant deference. Judges would not even have to allow counsel the opportunity to address such a questionable joint recommendation before judicial rejection. How clear the *quid pro quo* — or looked at another way, how bad the Crown’s case was — would now be of central importance in settling the issue of acceptance or rejection of joint recommendations.

¹⁷⁵ *R v McKay*, 2004 MBCA 78, 186 CCC (3d) 328.

¹⁷⁶ *Ibid* at para 1.

¹⁷⁷ *R v Douglas*, [2002] JQ No 418, 162 CCC (3d) 37 (Quebec C.A.).

¹⁷⁸ *R v McKay*, *supra* note 175 at para 16.

¹⁷⁹ *Ibid* at para 21. The Court deals with the judge’s failure to give counsel an opportunity to address the failed joint recommendation (as required in *Sinclair*):

“Although reasons for departure from the recommendation should ordinarily be given, the failure to provide reasons in a case not involving a true plea bargain is not by itself a ground of appeal. The question on appeal remains that common to all sentence appeals - was the sentence imposed a fit one? I hasten to add that in this particular case, the sentencing judge did provide clear and cogent reasons for the departure.”

*R v. Lamirande*¹⁸⁰ was a case in which the Crown may not have obtained a conviction after trial. It was an HIV assault case where issues of intoxication and witness frailty were live. Rather than risk a trial, the Crown and defence negotiated a joint recommendation of two years less a day to be served in the community. The sentencing judge saw things very differently and imposed a real jail sentence of two and a half years. In so doing, the sentencing judge noted that while serious consideration must be given to a true plea bargain joint submission, the existence of a true plea bargain could not be the determinative factor. Rather, the principles of sentencing enumerated in the *Criminal Code* must be **paramount**.¹⁸¹ In reversing the sentencing judge's decision, the Court of Appeal noted that: "In a true plea bargain such as presented here, a sentencing judge who intends to reject the joint recommendation is obliged to give clear and, as importantly, cogent reasons for such rejection...The more substantial the *quid pro quo* inherent in the bargain, the more weight should be given to an appropriate joint recommendation."¹⁸²

Also in 2006, the case of *R v. R.W.T.* was decided.¹⁸³ The accused had sexually abused his young stepdaughter over a period of two years. The sentencing judge rejected a jointly recommended sentence of two years less a day.¹⁸⁴ This was not a true plea bargain situation. Nor was the sentence of two years less a day within the normal range for such offences.¹⁸⁵ Nevertheless, the Manitoba Court of Appeal sided with the submissions of counsel and served sentencing judges with further notice not to interfere in joint recommendations. The Manitoba Court of Appeal had put the joint recommendations of counsel firmly in control of sentencing.

In *R v. Perron*,¹⁸⁶ the Court of Appeal dealt with whether to uphold a joint recommendation for a conditional sentence—community service and no driving prohibition—for two counts of dangerous driving causing bodily

¹⁸⁰ *R v Lamirande*, 2006 MBCA 71, 211 CCC (3d) 350.

¹⁸¹ *Ibid* at para 16.

¹⁸² *Ibid* at para 19.

¹⁸³ *R v RWT*, 2006 MBCA 91, 208 Man R (2d) 60.

¹⁸⁴ The joint recommendation was for "high provincial time" but counsel for the accused argued that it should be served in the community with the Crown arguing for real jail.

¹⁸⁵ *R v RWT*, *supra* note 183 at paras 11-13: Justice Hamilton for the majority did find that in exceptional circumstances the typical sentence of four to five years may be reduced to two years.

¹⁸⁶ *R v Perron*, 2007 MBCA 73, 214 Man R (2d) 243.

harm. The sentencing judge imposed the conditional sentence but increased the community service hours and imposed a one-year driving prohibition. Monnin JA stated: "Joint recommendations are an important, if not essential, component of the criminal justice process. The issue of how they are to be dealt with by a sentencing judge has been repeatedly stated by this court as well as other appellate courts."¹⁸⁷ The language used in this case is a departure from *quid pro quo* and the proper administration of justice. Rather, we are now being reminded of the "criminal justice process." The distinction here is subtle yet important. The Court in *Perron* was not concerned with the details of whether the sentence was fit and appropriate. The simple deviation from the process of properly hearing a joint recommendation was enough for the sentence to be overturned.¹⁸⁸

The run of cases decided in favour of joint recommendations continued in 2008 with *R v. Cournoyer*.¹⁸⁹ In the same year, *R v. Bird*¹⁹⁰ held that a lack of clear and cogent reasons on the part of the sentencing judge left the Court with little choice but to find in favour of the lawyers' joint recommendation. What, in the wake of *Sinclair*, was beginning to look like an uninterrupted trajectory of jurisprudence favouring the joint submissions of counsel, came to a halt in 2009 when the Court decided *R v. Sharpe*.¹⁹¹ The jointly recommended sentence in that case was decidedly low. MacInnes JA confirmed: "An unfit sentence is, of course, a cogent reason for rejection of a joint submission."¹⁹² He then went on to comment on the lack of *quid pro quo* stating: "In the present case, the jointly recommended sentence was less than half of the low end of the sentencing range. In my view, there was little to offer by way of *quid pro quo* to justify its acceptance as fit and proper in the circumstances and, accordingly, little, if any, prospect for its acceptance."¹⁹³ The Court of

¹⁸⁷ *Ibid* at para 5.

¹⁸⁸ Also in 2007 the Court of Appeal released *R v S (SP)*, 2007 MBCA 161, 225 Man R (2d) 28, in which a joint recommendation for deferred custody for a youth convicted of drug trafficking was upheld because the judge did not express concern with the joint recommendation. See also *R v Tkach*, 2008 MBCA 6, 76 WCB (2d) 510, for a similar result.

¹⁸⁹ *R v Cournoyer*, 2008 MBCA 71, [2008] MJ No 203 (QL).

¹⁹⁰ *R v Bird*, 2008 MBCA 138, 236 Man R (2d) 15.

¹⁹¹ *R v Sharpe*, 2009 MBCA 50, 246 CCC (3d) 455.

¹⁹² *Ibid* at para 46.

¹⁹³ *Ibid* at para 48.

Appeal in *Sharpe* made it very clear that the sentencing judge's "ultimate responsibility" was to make sure the accused received a fit and appropriate sentence.¹⁹⁴

The Manitoba Court of Appeal has directed that courts must seriously consider joint recommendations and significant weight should be placed in them. The amount of weight should be determined by the degree to which the joint recommendation resembles a true plea bargain. As such, counsel should make clear submissions on the basis for the joint recommendation. The Court has also directed that no joint recommendation should be rejected unless counsel has been first invited to defend their position.

VI. PLEA BARGAINING IN MANITOBA: THE STUDY

In this study, half of all plea bargained matters resulted in joint recommendations. The sentencing courts accepted all joint recommendations. Furthermore, in most proceedings involving joint recommendations, a true plea bargain was not referred to on the record. Few of the measured variables discussed below correlated with joint recommendations on sentence. However, of all variables recorded, whether the accused was in custody before the sentencing seems to have the most potential significance.

¹⁹⁴ *Ibid* at para 47. See also *R v Sharpe* at para 61 where the Court instructs counsel to "understand the fundamental importance of the relationship between the underlying quid pro quo and the proposed disposition as that is the prime determinant for the level of deference to be accorded by the sentencing judge to the proposed plea agreement." For a more recent Manitoba Court of Appeal decision on joint recommendations see *R v Wolonciej*, 2011 MBCA 91, 270 Man R (2d) 241. This case raises an interesting issue in relation to joint recommendations. Before the sentencing, defence counsel agreed with the sentence the Crown was going to suggest to the court, namely one-year incarceration. The Crown at the sentencing informed the judge the recommendation was joint but on appeal the Crown said it was in fact not a joint recommendation. On appeal the Crown argued that the recommendations were essentially coincidental. The Court of Appeal agreed with the appellate submission of the Crown and held the recommendation, while still a joint recommendation governed by the *Sinclair* principles, "ranked low on the continuum" (at para 10), and consequently, the judge did not have to give it the same weight as he or she might have given a plea bargain or a joint recommendation where there was a clearer *quid pro quo*.

A. Methodology

To shed some light on the practice of plea bargaining in Manitoba, I conducted a court observation study over two non-contiguous weeks in January 2014 in the Provincial Court of Manitoba. The Provincial Court deals with the vast majority of *Criminal Code* charges laid in Manitoba. In fact, the Court deals with tens of thousands of criminal charges each year.¹⁹⁵ The 2010/2011 annual report of the Provincial Court of Manitoba shows over 70,000 criminal charges were disposed of in that year.¹⁹⁶ Though empirical data is elusive, the vast majority of all criminal matters dealt with in Canadian courts involve guilty pleas.¹⁹⁷ The Court operates throughout the Province with circuit points from the U.S. border to the sub-arctic. It is a respected¹⁹⁸ and innovative organization that delivers justice in a complex socio-economic era of post colonization, where the Indigenous peoples of the province are grossly over-represented in the criminal justice system.¹⁹⁹

My goal was to observe as many sentencing hearings as possible in a two-week period. Through my court observation, I recorded data from 56 sentencing hearings.²⁰⁰ The results below outline the recorded data as it breaks down by variable. Some of these refer to personal characteristics such as race and gender while others refer to such factors as whether an

¹⁹⁵ As well as child protection matters and Judicial Inquests under the *Fatalities Inquires Act*, CCSM, c F52.

¹⁹⁶ Provincial Court of Manitoba Annual Report 2010-2011 at 8, online: <http://www.manitobacourts.mb.ca/site/assets/files/1541/annual_report_2010-2011-1.pdf> at 8.

¹⁹⁷ Roach, *Due Process*, *supra* note 68 at 11; See also *Martin Report*, *supra* note 3 at 313 where the Committee discusses the practical need for resolution discussions.

¹⁹⁸ In 2006 the Provincial Court was awarded a United Nations Public Service Award in the category of "improving the delivery of services", online: <<http://news.gov.mb.ca/news/index.html?item=28615&posted=2006-06-19>>.

¹⁹⁹ See generally *Report of the Aboriginal Justice Inquiry of Manitoba 1999*, online: <<http://www.ajic.mb.ca/volume.html>>; Debra Parkes & David Milward, "Gladue: Beyond Myth and Towards Implementation in Manitoba" (2011) 35:1 Man LJ 34 at 84 (HL). See also Tim Quigley, "Has the Role of Judges in Sentencing Changed...or Should it?" (2000) 5 Can Crim L R 317 at 321 for statistics on racial disparity and 327 for the excessive use of imprisonment in Canada.

²⁰⁰ In actual fact, I recorded data from more hearings. I was most often unable to use this data because pleas were entered on a previous court appearance. I could not use these observations because it was impossible for me to tell whether the Crown at the previous court appearance had stayed other charges.

accused was in-custody or out-of-custody at the time of the sentencing. I then cross-reference each variable category with the matters involving joint recommendations. The purpose of presenting the information is simply to provide a preliminary empirical foundation upon which a wider debate and further research may occur. A larger scale study over a greater period of time and subjected to quantitative analysis would be required to persuasively argue for policy change in the plea bargaining system.

With those caveats in mind, this observation study provides interesting information about the reality of our guilty plea justice system. It is clear that plea bargaining is important in Manitoba courts. It is equally clear that lawyers in Manitoba rely heavily on joint recommendations. In this small sample, the majority of joint recommendations were not the result of true plea bargains. As noted above, the academic literature is limited by a general lack of qualitative analysis of the plea bargaining process upon which to base public policy recommendations.

B. Research Questions

Empirical studies of plea-bargaining and joint recommendations are scarce in Canada. I set out to address a number of questions that the literature did not fully answer by adding some empirical data to the academic record. I also wanted to challenge the anecdotal acceptance of the utility of plea bargaining and, in particular, joint recommendations on sentence. There were many questions that I hoped to answer:

- How does the practice of plea bargaining and joint recommendations compare to the assumptions and principles as articulated in the case law?
- How prevalent is plea bargaining?
- How prevalent are joint recommendations?
- How often do judges accept joint recommendations?
- Are most joint recommendations true plea bargains?
- Do joint recommendations have an effect on sentence quantum?
- What factors may influence whether or not a plea bargain or joint recommendation is struck between Crown and defence?
- Is there evidence of a culture of expedience in the criminal justice system?

These questions formed the core of my research and analysis. Many of these questions are answered (at least in part) by the research presented. Those more qualitative questions surrounding a culture of expedience and sentence quantum will require further research to augment this limited court observation study.

C. Key Findings

The sheer prevalence of plea bargains and joint recommendations was a key finding of this research. The prevalence of the four categories of plea bargaining – charge bargains, pleas to a lesser charge, true plea bargains, and joint recommendations – are located in Table 1²⁰¹. Fifty-two of the 56 matters (93%)²⁰² involved some form of plea bargain. Of these 52 plea bargained matters, 45 (87%) involved charge bargains and 5 (10%) involved pleas to a lesser charge. Perhaps most interestingly of all, only 6 of the 52 plea bargained matters (12%) involved true plea bargains. The research also confirmed that 25 out of 52 plea bargained matters (48%) involved joint recommendations.²⁰³ Five out of the 25 joint recommendation matters (20%) involved true plea bargains. I also found that 7 out of 52 plea bargained matters (13%) involved joint recommendations without an associated charge bargain. Another key finding was the fact that the sentencing judge accepted all joint recommendations.

²⁰¹ Located below.

²⁰² All percentage figures are rounded to the nearest whole number.

²⁰³ If we adjust for the six self-represented accused involved in plea bargained matters, then we are left with 25 out of 46 or a rate of 54% for represented accused.

TABLE 1: CATEGORIES OF PLEA BARGAINING AND PREVALENCE OF JOINT RECOMMENDATIONS

| | Number of Cases | Total cases observed (n=56) |
|---------------------|--------------------|--------------------------------|
| Total Plea Bargains | 52 | 93% |

| Types of Plea Bargains | Number of Cases | Total Plea Bargain Cases (n=52) |
|--|--------------------|------------------------------------|
| Charge Bargains | 45 | 87% |
| Plea to a Lesser Charge | 5 | 10% |
| True Plea Bargain | 6 | 12% |
| Joint Recommendation | 25 | 48% |
| Joint Recommendations without Associated Charge Bargain | 7 | 13% |

| Joint Recommendation with: | Number of Cases | Total Joint Recommendation Cases (n=25) |
|----------------------------|--------------------|---|
| True Plea Bargain | 5 | 20% |
| Acceptance from Judge | 25 | 100% |

One particularly interesting result concerned the prevalence of joint recommendations vis-à-vis whether the accused was in or out-of-custody at the time of sentencing (Table 2). Twenty-five out of 52 plea bargained matters (48%) involved in-custody accused and 27 out of 52 plea bargained matters (52%) involved out-of-custody accused. Of the 25 in-custody plea bargained matters, 17 (68%) involved joint recommendations. However, only 8 of 27 out of custody plea bargained matters (30%) involved joint recommendations.

TABLE 2: CUSTODY AT TIME OF SENTENCING

| | Number of Cases | Total Plea Bargain Cases (n=52) |
|---|--------------------|------------------------------------|
| In Custody | 25 | 48% |
| With Joint Recommendation (Out of 25 In-Custody Cases) | 17 | 68% |
| Out of Custody | 27 | 52% |
| With Joint Recommendation (Out of 27 Out of Custody Cases) | 8 | 30% |

Another key finding of the study concerned the prevalence of administration of justice charges (Table 3).²⁰⁴ Thirty-four out of 52 plea bargained matters (65%) involved administration of justice charges. Sixteen out of 34 plea bargained matters involving administration of justice charges (47%) resulted in joint recommendations. It should also be noted that 19 out of 52 plea bargained matters (37%) involved the accused pleading guilty only to administration of justice charges.

TABLE 3: ADMINISTRATION OF JUSTICE CHARGES

| | Number of Cases | Total Plea Bargain Cases (n=52) |
|--|--------------------|------------------------------------|
| Administration of Justice Charges | 34 | 65% |
| With Joint Recommendation (Out of 34 Cases) | 16 | 47% |
| | Number of Cases | Total Plea Bargain Cases (n=52) |
| Pleading Guilty to ONLY Administration of Justice Charges | 19 | 37% |

D. Other Findings

This research measured several other demographic and non-demographic variables such as gender, Aboriginal status (if on the record)

²⁰⁴ These matters are commonly referred to as “breaches” and include breaches of court-generated documents such as recognizances and probation orders.

(Table 4), nature of the charge(s) (Tables 5 & 6), and criminal record (Table 7). Some findings with respect to these variables are noteworthy but further study would be welcome on the relationship of these variables to plea bargaining.

Eight out of 56 accused (14%) were female.²⁰⁵ All female accused had charges dropped (100%) in exchange for their guilty pleas whereas 41 out of 48 male accused (85%) had charges dropped in exchange for their guilty pleas. Three out of the 8 female accused (38%) were involved in joint recommendations and 22 out of the 48 male accused (46%) were involved in joint recommendations. Fifteen out of 29 accused who were identified on the record as Aboriginal²⁰⁶ (52%) were involved in joint recommendations and 10 out of 27 accused not identified as Aboriginal (37%) were involved in joint recommendations.

²⁰⁵ All gender determinations were made on the basis of observation and pronoun usage during submissions. I acknowledge the possibility that some accused may have identified as another gender, or gender neutral, and the results should be read accordingly.

²⁰⁶ An accused was identified as Aboriginal when they themselves, their lawyer, the Crown, or the judge commented on their Aboriginal heritage in court.

TABLE 4: DEMOGRAPHICS

| Gender | Number of Cases | Total Plea Bargain Cases (n=52) |
|--|----------------------------|--|
| Female | 8 | 14% |
| Guilty Plea, Resulting in All Charges Dropped | 8 | 100% |
| With Joint Recommendation (Out of 8 Cases) | 3 | 38% |
| Male | 48 | 86% |
| Guilty Plea, Resulting in All Charges Dropped | 41 | 85% |
| With Joint Recommendation (Out of 48 Cases) | 22 | 46% |
| Race | Number of Cases | Total Cases (n=56) |
| Aboriginal | 29 | 52% |
| With Joint Recommendation (Out of 29 Cases) | 15 | 52% |
| Not Aboriginal | 27 | 48% |
| With Joint Recommendation (Out of 27 Cases) | 10 | 37% |

Whether the accused received a custodial sentence was a measured outcome of the research (Table 5). Thirty-two out of 52 accused in plea bargained matters (62%) received custodial sentences. Nineteen out of 32 accused in plea bargained matters that involved custody (59%) were involved in joint recommendations and 12 of 19 accused in plea bargained that involved custody and joint recommendations (63%) only received time in custody as opposed to time going forward.

TABLE 5: CUSTODIAL SENTENCES

| Custodial Sentence with: | Number of Cases | Total Plea Bargain Cases (n=52) |
|--|-----------------|---------------------------------|
| Plea Bargain | 32 | 62% |
| With Joint Recommendation (Out of 32 Cases) | 19 | 59% |
| Time in Custody (Out of 19 Joint Recommendations) | 12 | 63% |
| Time Going Forward (Out of 19 Joint Recommendations) | 7 | 37% |

The nature of the charges themselves was also tracked (Table 6). 20 out of 52 plea bargained matters (38%) involved charges of violence; 11 out of 20 violence charges (55%) involved joint recommendations; 13 out of 52 plea bargained matters (25%) involved property charges; and 7 out of 13 property charges (54%) involved joint recommendations.

The Manitoba criminal court adult intake system is divided into two streams:²⁰⁷ the Adult Custody (AC) stream and the Domestic Violence (DV) stream. A decision is made by Manitoba Prosecutions as to the stream into which a matter will be placed. For our purposes, it is sufficient to understand that a DV matter involves an aspect of family violence and an AC matter does not.²⁰⁸ This information is located in Table 6. Thirteen of 22 DV plea bargained matters (59%) involved joint recommendations and 10 of 27 AC plea bargained matters (37%) involved joint recommendations.

²⁰⁷ Youth and Federal prosecution matters are not included in these streams. For the most part these matters are disposed of in separate courts though I did observe one youth matter and two federal prosecutions matters and have included these in the 56 observed cases.

²⁰⁸ There are procedures and protocol that accompany the streaming decision but they are not germane to our discussion.

TABLE 6: NATURE OF THE CHARGE

| | Number of Cases | Total Plea Bargain Cases (n=52) |
|--|--------------------|------------------------------------|
| Violence Charge | 20 | 38% |
| With Joint Recommendation (Out of 20 Cases) | 11 | 55% |
| Property Charge | 13 | 25% |
| With Joint Recommendation (Out of 13 Cases) | 7 | 54% |
| Domestic Violence Stream (DV) | 22 | 42% |
| With Joint Recommendation (Out of 22 Cases) | 13 | 59% |
| Adult Custody Stream (AC) | 27 | 52% |
| With Joint Recommendation (Out of 10 Cases) | 10 | 37% |

I was also able to record whether or not an accused had a criminal record (Table 7). Thirty-eight out of 56 accused (68%) had a prior criminal record at the time of sentencing. This percentage is unchanged for the plea-bargained matters with 35 out of 52 accused in plea bargained matters (67%) having a prior criminal record. Eighteen out of 35 accused with prior criminal records in plea bargained matters (51%) were involved in joint recommendations.

TABLE 7: CRIMINAL RECORD

| | Number of Cases | Total Cases (n=56) |
|--|--------------------|--------------------|
| Prior Criminal Record | 38 | 68% |
| With Plea Bargain (Out of 52 cases) | 35 | 67% |
| With Joint Recommendation (Out of 35 Cases) | 18 | 51% |

VII. DISCUSSION AND IMPLICATIONS: A SYSTEM OF CULTURAL JOINT RECOMMENDATIONS

For the purposes of this research, plea bargaining is split into four categories: charge bargaining, joint recommendations, pleading to a lesser offence, and true plea bargains. In many of the observed plea bargained cases (24 of 52 or 46%) these separate plea bargaining practices appeared in combination. By far the most important single plea bargaining practice was charge bargaining. Twenty-five of the fifty-two plea bargained matters (48%) involved *only* charge bargains. Only 9% of matters involved an accused pleading guilty to a lesser charge.

The relatively high rate of charge bargaining raises the question: are police or prosecution services (or both) over-charging accused? This study is simply too limited in scope to tell us anything about the strength of the charges laid. However, what we do know is that in the fifty-six matters that I observed, a total of 275 charges were laid and guilty pleas were entered in relation to only 108 of them. The balance — a majority of charges — were stayed or withdrawn. Further research on charging practices is warranted when 61% of charges laid are not proceeded on.

Joint recommendations on sentence are an important mechanism for resolving charges in Manitoba. Almost half of all plea bargained matters observed presented an agreed-upon sentence quantum to the judge. The appellate case law in Manitoba clearly tells counsel and sentencing judges that such deals, though not binding on the sentencing judge, should be given very serious consideration. The fact that only twenty percent of joint recommendations were true plea bargains is particularly significant given the clear direction of the Manitoba Court of Appeal that “[t]he clearer the *quid pro quo*, the more weight should be given an appropriate joint submission by the sentencing judge.”²⁰⁹ Eighty percent of accepted joint recommendations in this small study should, according to the professed standard, be accorded relatively little weight.

This data set allowed me to ask whether the rate of half of all plea bargains being joint recommendations correlated with certain variables. As discussed immediately below, most measured variables did not seem to have an impact the rate, with the possible exceptions of whether the

²⁰⁹ *R v Sinclair*, *supra* note 3 at para 13.

accused was in or out-of-custody at the time of sentence and whether jail was part of the joint recommendation. For the most part though, joint recommendations were not significantly more likely in any one "type" of case or with any one category of accused. In my view, the fact that few variables seemed to drive the rate up or down is suggestive of joint recommendations being cultural and endemic in the Manitoba criminal justice system. The high acceptance rate of non-true plea bargain joint recommendations supports this view.

A. Gender and Aboriginality

In this study there appears to be little difference between male and female accused when it comes to the distribution of joint recommendations. The fact that fourteen percent of accused were women is substantially similar to national averages.²¹⁰ There is little significance that I can see in the fact that all women had charges dropped while only 85% of men had charges against them dropped.

A 1975 study by Wynne and Hartnagel found that Aboriginal Canadians experienced discrimination in not receiving the perceived benefit of negotiated pleas.²¹¹ This research needs to be updated. Twenty-nine of the fifty-six accused observed (51%) were identified on the record in court as being Aboriginal.²¹² However, it is very likely that more of the accused were, in fact, Aboriginal. I only recorded "Yes" to Aboriginal heritage if the judge, lawyers, or the accused him or herself identified their race on the record.²¹³ There were numerous occasions where the accused (mostly through counsel) waived the formal preparation of a Gladue pre-sentence report. I tread lightly with my comments at this point, as the study was not structured to systematically record detailed data regarding race or the use of Gladue reports. However, my overall impression from observing defence counsel was that Gladue reports were often waived as a matter of course.²¹⁴ The data presented on Aboriginal accused is therefore

²¹⁰ Eight out of every ten accused in Canada is male based on 2011-2012 Juristat figures, online <<http://www.statcan.gc.ca/pub/85-002-x/2013001/article/11804-eng.pdf>>.

²¹¹ See Wynne, *supra* note 58.

²¹² I use the term Aboriginal to include people who were identified as Aboriginal, First Nations, Metis, or Inuit.

²¹³ It should also be noted that in a number of cases, it was the judge and not the lawyers who inquired as to the Aboriginal heritage of the accused.

²¹⁴ In some circumstances it may take longer to prepare a Gladue report than the accused

not conclusive, particularly because there were likely more Aboriginal people in the study who were not identified as such on the record.

B. Whether the Accused was In-Custody

One potentially significant factor in determining the use of joint recommendations may be whether the accused is in or out-of-custody at the time of sentencing. In-custody joint recommendation dispositions were 20% higher than the rate for all matters. Out-of-custody rates were approximately 20% lower than the rate for all matters. This of course raises several questions. Are in-custody accused more risk-averse than out-of-custody accused? Is there simply more on the line (getting out of jail) so in-custody accused want a greater degree of certainty?

Whether or not an accused is facing a custodial sentence is of less significance in determining how and why joint recommendations are used. Accused receiving custodial sentences were only about 10% more likely to have joint recommendations. Our data tells us that 12 out of 19 joint recommendations that ended in custody involved only the time already in custody being noted. That is to say that 63% of jointly recommended custodial sentences included no time going forward for the accused. Taken together, these two rates may suggest that joint recommendations are more frequently applied for in-custody accused receiving time served dispositions. However, this area also requires further research.

C. Nature of the Charge(s)

Sixty-five percent of all observed plea bargained matters involved breaches of court orders or so-called administration of justice charges. Though the public may find this number somewhat shocking, many practitioners, myself included, may have expected it to be even higher. Breaches of probation orders, undertakings, recognizances, and other court orders are extremely commonplace in our criminal justice system. Nineteen out of the 52 observed plea bargained matters (36%) involved accused who plead guilty *only* to breaches.²¹⁵ It is fair to say then that a

would otherwise spend in custody. However, my notes indicate several cases where the accused was out of custody and the report was waived. In these cases, I observed very limited submissions being made on the *Gladue* factors as required by the Supreme Court of Canada in *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433.

²¹⁵ With 14 of 52 (27%) being charged only with breaches.

significant number of accused were dealing with breaches of one sort or another. However, all breaches are not created equal. Some breaches of court orders can be considered relatively minor (perhaps reporting late for a standard probation appointment), while others are undoubtedly more serious (such as the breach of a no-contact provision of a recognizance). In all cases, however, the court is dealing with the criminalization of not following its own (or another court's) orders.

While an in-depth discussion of this phenomenon is beyond the scope of this article, a theme that arises in the literature is the extent to which criminal justice system processes "manufacture" their own clientele.²¹⁶ Breaches of court-imposed orders, as well as other mechanisms running the length of the criminal process,²¹⁷ are undoubtedly examples of how court processes create crimes that stand to be committed. That is not to say that courts generate the offending behavior. There is certainly a need to ensure compliance with court orders. However, it has been argued that judges should exercise great care in not imposing unnecessary conditions on offenders, thereby adding to the problem.²¹⁸

The nature of other charges seems to have little impact on joint recommendation rates. Rates for violent and property offences were very similar and just slightly above the overall rate of 48%. Rates between the AC and DV stream were interesting. More DV Crowns used plea bargains (59%) than did AC Crowns (37%). Keeping in mind the relatively small sample size, if anything, these numbers suggest DV Crowns are more willing to jointly recommend sentences to the judge than AC Crowns. Finally, a prior criminal record does not seem to be significant in determining whether or not an accused will be involved in a joint recommendation.

VIII. SUGGESTIONS FOR FUTURE RESEARCH

If the vast majority of joint recommendations are not born of true plea bargains, then what motivates their creation? I suggest joint recommendations may have grown out of, and also perpetuate, a culture of expedience in our criminal justice system. This culture may be

²¹⁶ Armstrong, *infra* note 243 at 276, citing McAra & McVie (2007).

²¹⁷ *Ibid.*

²¹⁸ Quigley, *supra* note 199 at 334.

potentially damaging to judicial discretion and the administration of justice. Further, the proliferation of these cultural joint recommendations may contribute to climbing sentence quantum in Manitoba. An over-reliance on joint recommendations may also limit effective advocacy in our courts as lawyering becomes more about negotiating with fellow counsel, rather than convincing an independent decision maker of your position. While the limited court observation study outlined above provides no proof that joint recommendations are “out of control,” it does incline towards further investigation when considered in the light of the literature surrounding plea bargaining.

Justice system professionals reap rewards from a system based on bargaining guilty pleas as opposed to contesting trials. That is not to say that lawyers are not acting properly in plea bargaining. As has been seen, the bargaining practice is well-established in the common law. There are benefits in time-saving, easing workload pressures, and potentially even financial benefits in encouraging a high rate of guilty pleas by bargaining inducements and concessions. In this environment, the importance of actual benefits being conferred on the accused upon entering a guilty plea are dramatically outweighed by the importance of any perceived benefits. When lawyers and judges have their own interests in seeing high rates of guilty pleas in the system, the illusion of these benefits is maintained simply by adopting the status quo.

If we consider sentence bargaining, and particularly joint recommendations, as a key component in incentivizing guilty pleas, then it is not a far step to imagine the need for lawyers to play up these benefits to the accused. The difficulty from the accused’s perspective is that the professionals proposing the benefits are also the ones with vested interests in the accused’s acceptance. With these risks in mind, I propose minimizing the risks by precluding cultural joint recommendations. Defence lawyers may argue that joint recommendations help to reduce sentences where the accused is giving up a reasonable shot at trial (i.e. a true plea bargain). However submissions on the parameters of true bargains would still be legitimate. In fact, those submissions are actually obligatory in Manitoba under the common law. In other words, sentencing submissions would not change except for the fact that lawyers would no longer jointly direct the judge to a particular sentence unless it was as part of a true plea bargain.

A. Impact of an Overreliance on Joint Recommendations

The hypothesis that joint recommendations may raise sentences is somewhat counter intuitive. Intuitively, plea bargaining should benefit the accused. The accused is giving up his or her right to trial in exchange for a benefit. A joint recommendation for sentence should be one such benefit. Plea bargains that result in joint recommendations should help to lower overall sentences then, not raise them. However, I suspect that plea bargains leading to cultural joint recommendations may, in fact, increase sentences over time. The reason for this is because, unlike in true plea bargain joint recommendations, the Crown negotiates cultural joint recommendations from a position of dominance.²¹⁹ There is little incentive for Crown attorneys to agree to low cultural joint recommendations for sentence.²²⁰

Whenever the Crown occupies this position of dominance, joint recommendations will likely reflect the “best interest” of the Crown (i.e. higher sentences). Because cultural joint recommendations considerably outnumber true plea bargains, I believe it would be worth investigating whether, over time, sentences are higher in joint recommendation dispositions than in non-joint recommendation dispositions. There are complexities in the interpersonal dynamics of plea bargaining that would be difficult to capture in any study. Some Crown attorneys will be naturally more conciliatory and amenable to “lighter” sentences while others will be “hard-liners”. The same, of course, can be said of defence counsel. As a general rule though, I suggest that this dynamic of Crown dominance may contribute to climbing sentence quantum in the long term. However, only further research into the length and severity of cultural jointly recommended sentences will provide us with answers.

In our adversarial system of criminal justice, defence counsel should be able to prevent the phenomenon of rising sentences caused by Crown dominance, by making submissions on the lower end of the range. However, the use of joint recommendations has become pervasive to the point of entrenchment in our system. Defence counsel and their clients, understandably, want certainty of results. I argue, however, that this certainty may actually lead to higher sentence. Joint recommendations are

²¹⁹ Alschuler “Prosecutor”, *supra* note 28 at 106.

²²⁰ The possible exception to this may be high volume courts that have been set up specifically to vent pressure from the system: See *ibid* at 111.

useful in oiling the wheels of justice and are therefore appealing to busy counsel. Lawyers on both sides of the courtroom tend not to question the utility of joint recommendations because they help to achieve joint goals of expedience and efficiency.²²¹ No one constituent of the criminal justice system is to blame for this phenomenon. It is what Stephanos Bibas describes as “legal drift”: the imperceptible shifting of legal practices and results that happens over time.²²²

When we look at the high rates of joint recommendations and the particularly high rates of cultural joint recommendation without foundation in a true plea bargain, we are compelled to examine whether there is a reason for this phenomenon. By examining the literature, we have seen many commentators in the United States are skeptical of the value of plea bargains in a system focused heavily on expediting criminal prosecutions with the minimal outlay of time and money. In Canada, the literature has mostly looked at plea bargaining as a “necessary evil” of the system.²²³ Letting some offenders off lightly is a price that must be paid to keep the wheels of justice moving. I suggest the exchange of leniency for expedience may actually be illusory. In a system where cultural joint recommendations dominate, the accused may not be receiving a more lenient sentence in exchange for giving up the right to trial. By adding empirical data to the debate, we can look at plea bargaining and joint recommendations through another lens focused on the actual rather than perceived benefits to the accused.

For joint recommendations to be a valid means of sentencing offenders, they must add something to our justice system. They may make the system more efficient, but that does not mean it is more effective. Lawyers making submissions on the case and judges deciding sentences is a clear and fair way to determine sentences. Each party has its own distinct job to do. The waters begin to muddy when judges are forced to evaluate their instincts in the face of joint recommendations they know are likely to be upheld on appeal. The waters muddy still further when we consider that the lawyers’ own need for expedience plays a role, however subtle, in

²²¹ See generally Bibas *Machinery*, *supra* note 2

²²² *Ibid* at 1 where the author describes legal drift: “Like continental drift, legal drift happens over centuries and millennia, often without a single cataclysm or public recognition of the shift.”

²²³ See generally Di Luca, *supra* note 10; McCoy, *supra* note 42.

the formation of joint recommendations. One way of solving the joint recommendation dilemma (without banning plea bargaining) is simply to only give weight to true plea bargain joint recommendations.

Other jurisdictions appear to get on very well without sentence recommendations of counsel at all.²²⁴ In Canada, too, recommending sentences did not really occur until the late 1970s.²²⁵ There is no evidence to suggest that judges were finding sentencing too difficult a task before this time. There is no logical reason for the pervasive cultural practice of counsel presenting joint recommendations. Effectively precluding cultural joint recommendations would eliminate any suggestion of “downgrading” judicial sentencing authority and the consequent diminishment in public confidence in the administration of justice. Precluding cultural joint recommendations will not handicap judges in any way.

If a culture of plea bargaining joint recommendations added to the overall quality of our justice system, then the practice should be encouraged. However, there is no evidence that this is the case. Far more research is required about the deals that are made in the hallways and on the courtroom steps. Who holds the balance of power in these negotiations? Are accused really going to get lower sentences by pleading guilty rather than by going to trial? Are joint recommendations so readily accepted because judges think they are fair or because they think they will be upheld on appeal in any event so why not just go along with them?

We do not know the answers to these questions. Much more quantitative and qualitative research into the workings of the criminal justice system needs to take place. A recent report of the Canadian Bar Association working group on access to justice found that there was too little research-taking place on the Canadian justice system.²²⁶ Lawyers, criminologists, and legal academics need to better understand the complex dynamics of plea bargaining for justice in order to really know if our current system is genuinely beneficial for the public or simply a means to expedite voluminous accused through the system as quickly as possible.

²²⁴ See generally Michael Waby, “Comparative Aspects of Plea Bargaining in England and Canada: A Practitioner's Perspective” (2005) 50 Crim LQ 148.

²²⁵ *R v Simoneau*, *supra* note 9 at para 14.

²²⁶ Canada, Canadian Bar Association, *Reaching Equal Justice: An Invitation to Envisage and Act*, Canadian Bar Association, August 2013 at 11, online: <http://www.cba.org/CBA/equaljustice/secure_pdf/EqualJustice-Summary-Report-eng.pdf>.

B. Judicial Oversight of Joint Recommendations

The notion of effective judicial oversight of the joint recommendation system is not supported by the research presented above. While there is not enough data in this study to conclude judges are never rejecting joint recommendations, the Manitoba Court of Appeal has affirmed an interesting commentary on who is really in charge of the sentencing process when joint recommendations are made. In the 2000 decision of *R v. Thomas*²²⁷, Scott CJM (as he then was) quotes from *Ruby on Sentencing*:²²⁸

An accused is persuaded to surrender his right to trial, with its accompanying procedural safeguards, in exchange for concessions aimed at sentence reduction and certainty. He wants to know in advance what will happen to him when he leaves the courtroom. An offender has little interest in the exact title affixed to this crime.

The bargaining power of the prosecutor is his ability to circumscribe the judge's sentencing discretion by fixing or manipulating the penalty into a lower sentencing range. The court is not bound to give effect to the bargain arranged between counsel, but the truth is that most accused persons rely on the process. This avoids trials. All disclaimers that the court is not bound are often viewed by the accused, and by all counsel, as ceremonial incantations. If this be taken as the reality of plea bargaining in Canadian courts, then the observations of appellate judges and the strictures surrounding plea bargaining must be reconsidered in that light.²²⁹ [Emphasis added]

It is surprising that the bargaining power of the Crown, i.e. their ability to lock the court into a sentence range, is so openly accepted by the Court of Appeal. This quote from *Ruby on Sentencing*²³⁰ hits to the heart of the issue. Judicial discretion to reject joint recommendations approaches fictitious dimensions in all but the most extreme circumstances.

If we accept that plea bargains are necessary in order to expedite guilty pleas so the system does not collapse, then the power to decide sentences must lie with the parties making those deals. In other words, the judge in a system dominated by a culture of expedience, is not an actual decision-maker in most cases. It is this shift in judicial roles that must add value to our justice system. If it does not, then the balance must be redressed in order to better protect the rights of the accused and public confidence in a

²²⁷ *R v Thomas*, *supra* note 166. See also *R v Beards*, *supra* note 105.

²²⁸ Clayton Ruby, *Ruby on Sentencing* (5th ed., Butterworths 1999) at ss. 3.191-192 as cited in *R v Thomas* *ibid* (as referenced in the decision).

²²⁹ *R v Thomas*, *supra* note 166 at para 5.

²³⁰ *Supra* note 228.

justice system where impartial judges make objective and reasoned decisions about the nature and length of punishment required in any given case. As noted above, there is little evidence to support the “system collapse” theory and, in fact, there is actually some credible empirical evidence to refute it.

While it is clear that joint recommendations in Manitoba are to be taken seriously by sentencing judges, there is still uncertainty over which recommendations must be accepted. What the Manitoba Court of Appeal has done is essentially provide sentencing courts with a fluid standard of review in regard to joint submissions. When each joint recommendation is presented, the sentencing judge must first decide whether the sentence is fit and appropriate. In the event the judge decides the sentence is not what he or she would have imposed, the judge must then determine if there is enough evidentiary, procedural, or systemic background factors to accept the joint recommendation, notwithstanding the fact that they have determined it is not fit and appropriate in the circumstances. This is a challenging task for judges, particularly when we factor in the murky realities of backroom plea bargaining.

It is in this cauldron of uncertainty that cultural joint recommendations have flourished. If all but the most outlandish joint recommendations will tend to be upheld on appeal, then sentencing judges will naturally lean towards accepting them. The higher the level of acceptance, the more counsel will come to rely on joint recommendations to expedite caseloads. The more joint recommendations are used and become part of the normal process of the courts, the less anyone will be inclined to question their overall effect on the criminal justice system. To combat this phenomenon, a recommendation should only be considered joint in circumstances of a true plea bargain. In most cases,²³¹ the accused must be giving up more than his or her (albeit significant) right to trial.

C. Other Areas for Further Research

It is difficult and probably unwise to draw firm conclusions from the small sample of data above. Court observation, while time-consuming, is a dynamic method of data collection. Myriad information can be gathered to answer important research questions. The criminal justice system is a

²³¹ Other than in cases potentially where the accused is genuinely remorseful and is taking measures to spare witnesses the added suffering of testifying.

data-rich environment that needs to be studied. The benefits of further study begin with a greater understanding of the realities of the criminal process. Research can help to instigate and even direct changes in criminal procedure that will benefit all participants in the system and, most importantly, the public. The academic literature has highlighted the lack of empirical research into the nature and extent of plea bargaining.²³² Research looking at guilty plea rates alone is not sufficient to learn more about plea bargaining.²³³ Plea bargaining must instead be examined within the broader context of the criminal justice system.²³⁴ The roles played by justice system participants should be subjected to qualitative analysis to expand our understanding of the complex dynamics involved in the plea bargaining process. Interview and questionnaire based studies of judges, lawyers, and accused would help to better inform the data presented above. Given the rights afforded victims in the Manitoba *Victims' Bill of Rights*²³⁵ and the new *Canadian Victims Bill of Rights*,²³⁶ it would also be very useful to interview victims of crimes disposed of by way of plea bargains in order to better understand their unique perspective on the bargaining process.²³⁷

²³² See Ferguson, *supra* note 82 at 31; Cohen & Doob, *supra* note 22 at 92, although the authors state that even without empirical data, the case for reform of plea bargaining is still strong considering the problems with overcharging and inducement of pleas among other issues; Wright & Miller, *supra* note 93 at 117, where the authors decry "American legal scholars obsession with doctrine and the decisions in individual cases rather than the study of legal institutions and the processing of many cases. Perhaps the lack of insight stems in part from the legal academy's reluctance to collect and use empirical information"; Verdun-Jones "Cleansing", *supra* note 57 at 229; Church, *supra* note 58 at 377; FD Cousineau & SN Verdun-Jones, "Evaluating Research into Plea Bargaining in Canada and the United States: Pitfalls Facing the Policy Makers" (1970) 21 Can J Crim 293 at 295 (HL) at 295-296. [Verdun-Jones "Evaluating Research"]

²³³ *Ibid* at 296.

²³⁴ *Ibid* at 301.

²³⁵ *Victims Bill of Rights*, CCSM, c V55.

²³⁶ *Canadian Victims Bill of Rights*, SC 2015, c 13, s 2, in force since July 23, 2015. Section 14 of this Act mandates the consideration of victim's views on the decisions made by "the appropriate authorities in the criminal justice system".

²³⁷ Bibas *Machinery*, *supra* note 2 at 149.

1. Resolution on the Day of Trial

It was not possible to accurately record which matters settled to a guilty plea on the day of trial. It would certainly have been useful to collect this information. If many cases do in fact resolve on the day of trial in Manitoba, there would be little support for the proposition that guilty pleas are needed to run an efficient criminal justice system. After all, if most guilty pleas come on the day of trial when it is effectively too late to book other matters, then the contribution of guilty pleas to an efficient system seems very tenuous indeed. Further research into exactly when matters resolve would cast significant light on the efficiency debate.

2. Sentence Quantum in Manitoba

Criminologist Anthony Doob has argued that many of the problems in Canadian sentencing exist because sentencing has been neglected as a serious policy area. He cites the lack of progress that has been made since the Recommendations of the Canadian Sentencing Commission in 1987.²³⁸ That Commission, along with the Law Reform Commission of Canada, made many recommendations specific to the plea bargaining process.²³⁹ In 1987, there was no evidence that sentences in Manitoba were any harsher than those handed down by judges in other provinces.²⁴⁰ Further and updated research into the sentence quantum in Manitoba by means of a longitudinal court observation, measuring the average sentence lengths by offence, would be extremely beneficial. This data could be subjected to analysis concerning moderating variables such as Aboriginality and presence of a prior criminal record.

The trial penalty is the single biggest incentive for an accused to plead guilty. However, it is unclear if sentences do, in fact, go up after trial. The

²³⁸ Anthony Doob, "The Unfinished Work of the Canadian Sentencing Commission" (2011) 53:3 Can J Corr 279, online: <<http://heinonline.org/uml/idm.oclc.org/HOL/Page?page=279&handle=hein.journals%2Fecj53&collection=journals>> discusses a lack of systemic information of sentencing, minimum sentences and other policy areas.

²³⁹ For a list of applicable recommendations from each source, see Nova Scotia (AG), *Sentencing Now and in the Future, Materials prepared for a seminar held in Halifax, Nova Scotia on March 3 & 4, 1989*, Douglas Hunt, Chapter 3 Plea Bargaining [unpublished, archived at E.K. Williams Law Library].

²⁴⁰ Doob Anthony, *Preliminary Analysis of the Sentencing Data from the Sentencing Information System Project, 1987* at 3. [unpublished, archived at E.K. Williams Law Library].

literature has conflicting data and it is quite possible that the trial penalty could vary significantly between jurisdictions. Quantifying a trial penalty is far from straightforward. Discussions between counsel on this issue are often not committed to the court record. File review research, regarding Crown offers made before trial that were refused, is one possible way of effectively researching this question. This information could be compared to the sentence imposed upon conviction in an attempt to provide empirical data to the trial penalty debate.

3. Charge Bargaining

Charge bargaining was by far the most important form of plea bargaining seen in this court observation study. The potential for strategic overcharging by the police and prosecutors is an ever-present consideration in the plea bargaining debate. This limited court observation study may be a springboard for a more in-depth exploration of the charge screening process in Manitoba. By examining the available court data on charges laid and charges pled to, it may be possible to build a statistical picture of the number and nature of charges not proceeded on. This data could be cross-referenced with demographic and non-demographic moderating variables to extract themes in the charging process.

4. Additional Court Observations

Court observation studies over a greater period of time would be useful in determining the trajectory of failed joint recommendations. If enough data was gathered, it would be possible to examine whether rejected joint recommendations are more often jumped or undercut by judges. This would also allow the observer to time sentence hearings to establish whether joint recommendation hearings are more expeditious than non-joint recommendation hearings. Recording whether the matters were summary or indictable proceedings by the Crown would also provide a useful moderating variable for analysis. A transcript review of observed proceedings would also allow for analysis of the strength of the Crown case. Further court observations could help to strengthen or diminish the findings presented above.

IX. CONCLUDING THOUGHTS ON THE FUTURE OF PLEA BARGAINING

It has been suggested that once we accept plea bargaining as a part of the criminal justice system, it no longer commands our attention.²⁴¹ Plea bargaining becomes self-legitimizing because it is universally accepted as an integral part of the criminal justice system. In the face of this acceptance, a culture of expedience has gradually enveloped our criminal justice system and cultural joint recommendations have resulted. Where principles of fairness and justice guard our trial system, the reality of guilty plea justice is significantly less appealing. It is time to take pause and consider the future of a system that values expedience of process over other values. The protections offered by the plea inquiry²⁴² in the Criminal Code may be inadequate to safeguard accused in the overburdened criminal justice machine. In presenting my research I remain acutely aware that even a perfect justice system does not operate in a vacuum. As Richard Lippke observes:

Modifications in plea bargaining, all by themselves, will do little to help matters. We would likely achieve better outcomes by reducing over-criminalization in all its forms and improving the social and economic lot of the disadvantaged.²⁴³

Plea negotiations often result in joint sentencing submissions accepted by courts.²⁴⁴ That is not to say that joint recommendations are the exclusive or even natural fruit of the bargaining process. Joint recommendations are distinct and often unnecessary adaptations of the plea bargaining system that are specifically engineered to induce guilty pleas. The plea bargaining process could, and in fact does, thrive without producing joint recommendations. The court observation study showed that charge bargaining is by far the most common form of plea bargaining.

²⁴¹ Schulhofer "Inevitable", *supra* note 4 at 1105.

²⁴² *Criminal Code*, *supra* note 24 s 606(1.1).

²⁴³ Lippke, *supra* note 74 at 143. In her review of Lippke's book, Sarah Armstrong, "Capacity as Philosophy: A Review of Richard Lippke's The Ethics of Plea Bargaining" (2014) 8 *Crim Law and Philosophy* 265 at 266, online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2274362>, the author simply notes "Amen" in response to this observation; see also Quigley, *supra* note 199 at 318.

²⁴⁴ Marie Manikis, "Recognizing Victims' Role and Rights During Plea Bargaining: A Fair Deal for Victims of Crime" (2012) 58:3-4 *Crim LQ* 411 at 413.

Charge bargaining may have a great impact on inducing guilty pleas (and the risks of wrongful convictions that go along with them) but it is highly doubtful charge bargaining is as effective in inducing guilty pleas as sentence bargains. What the accused really wants to know is how much time the prosecutor will recommend to the judge and whether the judge can be fixed to that position by way of joint recommendation. If the number arrived is perceived to be low enough, the accused will trade his guilty plea for a fixed sentence. Whether or not the sentence is in fact lower than the accused would receive after trial is debatable. It is quite possible that the sentence the Crown is happy to jointly recommend is likely to be closer to a “bad deal” for the accused than a “good deal,” except in true plea bargain scenarios.

Cultural joint recommendations are efficient. Efficiency is an appealing goal of the system because it is quantifiable and value neutral. Efficiency is also economically and politically attractive. However, efficiency in criminal justice does not equal effectiveness.²⁴⁵ The propagation and general acceptance of cultural joint recommendations is a systemic issue.²⁴⁶ Rather than accepting a system that may in fact be detrimental to the public interest, we should strive to understand it fully and make any required policy shifts that will better serve our future.

Plea bargaining sits somewhat uncomfortably at the heart of our adversarial system. Those that safeguard the rule of law in Canada rightly protect our adversarial system. However, our system of criminal justice must constantly evolve if it is to fulfill its potential and assure fairness for all that come to it. Hopefully, the use of empirical research will challenge justice system participants and policy makers to review current practices in an effort to enhance a fairer system of criminal justice in Manitoba.

²⁴⁵ Bibas *Machinery*, *supra* note 2 at 116.

²⁴⁶ Roach, *Due Process*, *supra* note 68 at 20, describing the “common organizational interests” of justice system actors (Crown, defence, Judiciary, Police) that defy the accepted adversarial notion of their various roles.