Bargaining for Expedience?

The Overuse of Joint Recommendations on Sentence

By

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Abstract

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 thesis shows that some form of plea bargaining is involved in a substantial majority of cases. Almost half of these plea bargained matters resulted in joint recommendations on sentence. However, the vast majority of these joint recommendations did not involve a true plea bargain. In this limited study, it was observed that the presiding judge accepted all joint recommendations as presented by counsel.

One of the goals of plea bargaining is to arrive at joint recommendations on sentence. Though lawyers on both sides of the courtroom may perceive an advantage to joint recommendations, for the accused these advantages may be illusory. Judges routinely accept joint recommendations despite not being the progeny of true plea bargains involving a *quid pro quo*. This research suggests 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 for offenders.

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CHAPTER ONE: INTRODUCTION

1.1 Introduction

This thesis examines plea bargaining and joint recommendations in Manitoba with a goal of better understanding the prevalence and nature of the practice. There is a disconnect between the potential dangers of plea bargaining as identified in the academic literature, and the strong support for the process expressed in the Canadian jurisprudence. I observed guilty pleas and sentencing dispositions in the Provincial Court of Manitoba and found that some form of plea bargaining is involved in a substantial majority of cases, that joint recommendations on sentence were common, and that "true plea bargains" as defined in the case law were rare.

In this chapter I will define the terms "plea-bargain" and "joint recommendation" for the purposes of my research. As will be noted below, these terms can have varied and expansive definitions in the case law and academic commentary.[1] Some initial clarity will hopefully aid the reader with key terminology. I will also explain the use of the terms "cultural joint recommendation" and "true plea bargain joint recommendation" as the difference between these two practices is central to my hypothesis.

1.2 Bargaining in the Criminal Justice System

In 1993, The Honourable G. Arthur Martin led an advisory committee of justice system participants that generated a report for the Attorney General of Ontario. This

[1] F.D. Cousineau & S.N. Verdun-Jones, "Evaluating Research into Plea Bargaining in Canada and the United States: Pitfalls Facing the Policy Makers" (1970) 21 Canadian J. Criminology 293 at 295 (HL) [Verdun-Jones "Evaluating Research"].

report examined charge screening, disclosure and resolution discussions in Ontario.[2] Chapter IV of that report was devoted entirely to the practice of resolution discussions between counsel conducting criminal matters. The report consolidated much of the academic literature and case law on the topic of resolution discussions and has come to be viewed as an authoritative discussion of the practice.[3]

The Martin Report marked 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.[4] After the report was published, plea bargains were seen as necessary and desirable.[5] The Martin Committee specifically recommended that joint recommendations be accepted unless the proposed sentence would bring the administration of justice into disrepute.[6] The Ontario Court of Appeal adopted this recommendation,[7] and, as will be seen below, the other appellate courts of Canada followed suit. The Martin Commission gave its blessing to joint

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[2] 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) at 275-282 [Martin Report], for a thorough discussion on the use of terminology.
[3] 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 L Q 108 at 110 describes the Martin Report as "The Watershed event signaling Canada's new era of plea bargaining."; See also Albert W. Alschuler, "The Prosecutor's Role in Plea Bargaining" 36: 1 U Chi L Rev 50 at 51 (HL) [Alschuler "Prosecutor"] where he discusses the *Presidents Commission on Law Enforcement and the Administration of Justice* (1967) in the United States that gave a similar seal of approval to the practice of plea bargaining.
[4] *R v. Simoneau* 40 C.C.C. (2d) 307 at paras 23-38, [1978] M.J. No. 12 (QL); Law Reform Commission of Canada, Criminal Procedure: Control of the Process, Working paper No.15 (1975)[Working Paper 15]; See generally
[5] Joseph Di Luca, "Expedient McJustice or Principled Alternative Dispute Resolution? A Review of Plea Bargaining in Canada" 2005 50 Crim L Q 14 at 16-18
[6] Martin Report *supra* note 2 Recommendation 58 at 327.
[7] *R v. Dorsey*, 43 W.C.B. (2d) 273, (1999) 123 O.A.C. 342 (Ont. CA).

recommendations and Canadian jurists and academics have scarcely debated the topic since.

The Martin Report adopted the value neutral term 'resolution discussions' as a reflection of the general acceptance of the practice in Canadian courts and other common law jurisdictions.[8] The Report confirmed that the term "resolutions discussions" grew out of the term "plea-bargaining" as attitudes towards the practice evolved over time.[9] As Law Reform Commissions and judges began to accept the necessity of discussions between counsel in order to generate guilty pleas,[10] 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.[11] 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"[12]

The Martin Committee changed the language again in 1993 and adopted the value neutral term "resolution discussions". As explained by Joseph Di Luca, the Martin Committee adopted this term because its neutrality and remoteness from the notion of "bargained" justice.[13] The Martin Report was successful in simultaneously expanding and

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[8] Martin Report *supra* note 2 at 275-281
[9] *Ibid* at 276
[10] *Ibid* at 276-277
[11] *Ibid* at 277
[12] *Ibid* at 278 quoting Law Reform Commission of Canada, *Plea Discussions and Agreements*, Working Paper No. 60 (1989) at 8-9
[13] Di Luca *supra* note 5 at 17

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”.[14]

However, the change in language has not changed the process. As Di Luca writes in his review of plea bargaining in Canada:

> Notwithstanding the Martin Committee's laudable efforts, the exercise of euphemistically renaming the concept of "plea bargaining" in order to obscure the optics of the practice is subject to criticism. Regardless of the label applied to the practice, plea bargaining remains at its most basic a process whereby an accused person "bargains" with the prosecution in the hope of receiving the most favourable treatment possible. Concessions by accused, most notably concessions of guilt, are the currency with which the favourable treatment is purchased. The reluctance to accept plea bargaining for what it is may well be an example of public relations aimed at reconstituting the practice in a more palatable form. The labeling process is more related to addressing the public's views of the practice as opposed to substantively altering the practice itself. In fact, over the years, the substance of the practice has remained essentially the same regardless of the name by which it is referred.[15]

I agree with this position and have elected to use the term “plea bargain” for the purposes of my research. I define a plea bargain below as occurring when a guilty plea is entered to one or more charges in exchange for a real *or perceived* benefit to the accused. I see nothing pejorative in the term and find it to be a more accurate description of what occurs in practice. The legal community should strive to present this practice accurately so that the public is fully informed that bargaining is the reality of our criminal justice system.

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[14] *Ibid* at 18
[15] *Ibid* at 18

1.2.1 Plea Bargains

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.[16] 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 plead guilty in exchange for some consideration."[17] 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.[18] 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;

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[16] Martin Report *supra* note 2 at 275; See also Albert W. Alschuler, "Plea Bargaining And Its History" 1979 79: 1 Colum L Rev 1 at 3 (HL) for a concise definition in the American context: "plea bargaining consists of the exchange of official concessions for a defendants act of self-conviction."
[17] *R v. Sinclair*, 2004 MBCA 48 at para 13, 185 C.C.C. (3d) 569 Steel J.A. [*Sinclair*]
[18] Di Luca *supra* note 5 at 20 referencing Ferguson and Roberts "Plea bargaining directions for Canadian Reform" (1974) 52 Can. Bar Rev 497 at 510-514.

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.[19]

It is not hard to add to this list.[20] 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 recognize if the Crown has promised not to charge another person or not to appeal a given sentence.[21]

For the purposes of my court observations 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;[22]

c) any plea to a lesser or included offence under s.606(4) of the Criminal Code;[23] and

d) any "true plea bargain" as identified by counsel on the record.[24]

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[19] Di Luca Supra note 5 at 18-19 referencing Stanley A. Cohen & Anthony Doob, "Public Attitudes to Plea Bargaining" 1989-90 32 Crim L Q 85 at 86-87.
[20] A Crown may agree to return seized items, for example.
[21] 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.
[22] See definition of "Joint Recommendations" *infra* at 1.2.2
[23] *Criminal Code,* RSC 1985, c C-46, s 606(4)
[24] See definition of "True Plea Bargain" *infra* 1.2.4

These four types of plea bargaining can be observed through court observation without the need for other methods such as interviewing the lawyers involved. The four aspects capture the essence of plea bargaining by representing the most common bargaining chips used in the criminal process.[25] When I discuss plea bargaining in my analysis below I am therefore talking about charge bargaining, joint recommendations, pleading to a lesser offence, and true plea bargains. When discussing true plea bargains leading to joint recommendations I will use the term "true plea bargain joint recommendations." These measurable outcomes of the plea bargaining process are explicit rather than implicit. Implicit or tacit plea bargains do not result from discussions between counsel and are systemic in origin.[26]An implicit sentence bargain is when the accused "relies on the understanding that a plea of guilty will be taken into account as a mitigating fact in passing sentence."[27] I am not considering these implicit plea bargains in my research.

1.2.2 Joint Recommendations

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, for the purposes of this thesis, I identify a

[25] See Di Luca *supra* note 5 at 18-23. Di Luca discusses explicit and implicit plea bargaining. Implicit plea bargaining is defined as the entering of a guilty plea without any negotiated benefit. It is, of course, possible that some of the guilty pleas I observed are in fact implicit plea bargains, as I could not tell in all cases if the Crown and defence (or self-represented accused) had explicitly had discussions.
[26] For an early U.S. discussion of implicit bargaining see Albert W. Alschuler, "The Trial Judge's Role in Plea Bargaining, Part I" 1976 76: 7 Colum L Rev 1059 at 1076, *infra* note 129 (HL).
[27] Di Luca *supra* note 5 at 20

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. However, unlike other forms of sentence bargains, such as a promise not to seek a more severe penalty, or a promise not to appeal against a sentence imposed at trial,[28] joint recommendations are objectively measurable as an outcome of plea bargaining through court observation.

1.2.3 Cultural Joint Recommendations

"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 as 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. There is a culture of processing accused quickly and joint recommendations speed up that process.[29] Criminal justice systems contain underlying principles, values and beliefs as

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[28] *Ibid* at 22-23 quoting Verdun-Jones and Hatch, A Report Prepared for the Canadian Sentencing Commission, plea bargaining and sentencing guidelines (Simon Fraser University, 1988) at p.2

[29] 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

well as black letter legal provisions.[30] It is this cultural aspect of criminal justice that I explore below. Joint recommendations on sentence are a key part of our current criminal process and are therefore worthy of scrutiny.

1.2.4 True Plea Bargains

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.[31] 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. A true plea bargain that results in a joint recommendation is therefore a situation in which it is expected that the accused will receive a lower sentence than they would otherwise receive.[32]

1.3 Overview

Cultural joint recommendations on sentence are symptoms of a criminal justice system focused on expedience. The need for expedience derives from many sources. The professional lawyers, judges and police officers who run the criminal justice system have

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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]

[30] Regina Rauxloh, *Plea Bargaining in National and International Law* (New York: Routledge, 2012) at 106.

[31] 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>

[32] *R v. Sinclair supra* note 17 at para 13.

various reasons to expedite the criminal process.[33] Cultural joint recommendations are born of plea bargains that provide a pressure management mechanism[34] for an overburdened and under resourced system. Only a small fraction of matters that enter the criminal justice system will, in fact, ever proceed to trial.[35] Whatever justice is delivered by the system is mostly delivered by way of guilty pleas bred by plea bargains. Plea bargains are devoid of many of the procedural safeguards ensured by trials.[36]

What adds to the overburdened criminal justice system is the power differential between Crown attorneys and defence counsel. The Crown (at least the Crown with a reasonable case) holds a dominant position in plea bargaining. If these plea bargains give birth to joint recommendations then the dominant party is likely to do "better". Therefore, I hypothesize that cultural joint recommendations militate towards higher sentences for accused than may otherwise be imposed by judges. A systemic bias towards higher sentences for offenders may lead to a loss of confidence in the administration of justice. Though it is often stated that plea bargaining is an indispensable part of a fair and efficient criminal justice system,[37] judges and commentators continue to challenge this

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[33] See generally Stephanos Bibas, *The Machinery of Criminal Justice* (New York: Oxford University Press, 2012) [Bibas, *Machinery*].
[34] Sarah Armstrong, "Capacity as Philosophy: A Review of Richard Lippke's The Ethics of Plea Bargaining," online: 2014 8 Crim Law and Philos 265-281 at 266 <http://download.springer.com/static/pdf/855/art%253A10.1007%252Fs11572-013-9272-3.pdf?auth66=1405375410_5baec0aba238ea25c65ca1a24fac7062&ext=.pdf>
[35] Allan Mason 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.
[36] See generally Bibas, *Machinery supra* note 33.
[37] *R v. Sinclair supra* note 17 at para 8; *R v. Cerasuolo* 140 O.A.C. 114 at para 8, (2001) O.J. No. 359 (Ont. CA); Martin Report *supra* note 2, Recommendation 46 at 281

conventional wisdom.[38] 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.[39] Debra Parkes has cautioned against an unregulated plea bargaining system that goes on behind closed doors.[40] 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.[41] Despite these cautions, however, the largely unregulated and hidden system of plea bargaining is entrenched in our criminal justice system.

The small-scale court observation study presented below suggests that some form of plea bargaining is involved in ninety-two percent of observed dispositions before trial in the Provincial Court of Manitoba. Drawing on the evidence that only a small percentage of criminal charges end in a trial,[42] it can be reasonably stated that plea

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[38] *R v. Keeping* 342 Nfld. & P.E.I.R. 1 at paras 36-80[2013] N.J. No. 336 (QL) (Nfld Prov. Crt); Bibas *Machinery supra* note 33; Stephen J. Schulhofer, "Is Plea Bargaining Inevitable?" 1984 97: 5 Harv L Rev 1037 (HL) [Schulhofer "Inevitable"].

[39] 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 by Lafontaine *supra* note 3 at 121; 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. H.C.* 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 2, which had given the establishment's seal of approval on the plea bargaining process in Ontario.

[40] 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>

[41] *Ibid.*

[42] Kent Roach, *Due Process and Victims Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999) at 11 [Roach *Due Process*], for most matters ending in a guilty plea or Crown stay of proceedings. See also Martin Report *supra* note 2 at 313 where the Committee discusses the practical need for resolution

bargaining is a very important mechanism of resolving criminal cases in Manitoba. My research suggests that achieving a joint recommendation on sentence is a significant component of the plea bargaining process. Defence counsel will often seek a Crown position on sentence as a starting point to plea negotiations.[43] If Crown and Defence find themselves at close quarters then, with further negotiation, a joint recommendation may be struck. Joint recommendations further expedite the process of guilty plea justice.

This limited court observation has shown forty-seven percent of plea bargained matters involved joint recommendations on sentence. That is to say that in almost half of all cases, the result, either singularly or in concert with other outcomes, was for the Crown and defence to jointly recommend a sentence to the judge. All observed joint recommendations were judicially approved. Joint recommendations are thus an important part of the criminal justice system in Manitoba. In situations where the Crown is motivated to avoid a trial,[44] a joint recommendation for sentence based on a true plea bargain may result. However, my research shows that such true plea bargains are not common. Only twenty percent of the joint recommendations observed involved a true plea bargain. The vast majority of joint recommendations are, in fact, not the result of true plea bargains, and therefore are not worthy of a high level of judicial deference.[45] I believe cultural joint recommendations raise serious concerns about the fairness and principled nature of our criminal justice system.

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discussions. See also Di Luca *supra* note 5 at 15 for footnote to a figure of 80% presented in the Martin Report.

[43] Manson *supra* note 35 at 295.

[44] Such situations may arise where a conviction is not certain or there are difficult or unwilling witnesses involved.

[45] *R v. Sinclair supra* note 17 at para 13.

1.4 Hypothesis

This study aims to subject a hypothesis - joint recommendations are overused in Manitoba courts – to empirical scrutiny. Inferences about the practice of plea bargaining in Manitoba are drawn from a court observation sample.[46] These inferences identify potential implications of the overuse of cultural joint recommendations, namely that they do not seem to be employed in a principled or transparent way, and that they may lead to increased sentences.

1.5 Methodology

This thesis is based on a court observation study conducted 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. [47] The 2010/2011 annual report of the Provincial Court of Manitoba shows over 70,000 criminal charges were disposed of in that year.[48] Though empirical data is elusive, the vast majority of all criminal matters dealt with in Canadian courts involve guilty pleas.[49] The Court operates throughout the Province with circuit points from the U.S. border to the sub-arctic. It is a

[46] See John W. Creswell, *Research Design: Qualitative, Quantitative and Mixed Methods Approaches* (Los Angeles: Sage, 2014) at 143.
[47] As well as child protection matters and Judicial Inquests under the *Fatalities Inquires Act* C.C.S.M. c. F52.
[48] 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
[49] Roach, *Due Process supra* note 42 at 11; See also Martin Report *supra* note 2 at 313 where the Committee discusses the practical need for resolution discussions.

respected[50] 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.[51]

My goal was to observe as many sentencing hearings as possible in a two-week period. I met in advance with Associate Chief Judge Janice leMaistre to discuss how I might best accomplish this goal. With the assistance of Judge leMaistre I designed a tentative plan of which courtrooms I would monitor in order to catch the maximum number of sentence hearings.[52] My observation days began shortly before ten o'clock in the morning in Provincial assignment court. Matters are triaged into trial and disposition courts from the assignment court. I would either stay in assignment court to watch dispositions or I would follow matters out as they were transferred to various courtrooms.[53] Each afternoon I attended scheduled disposition courts. I wanted to capture in-custody as well as out-of-custody sentencing hearings, so I split my time between in and out-of-custody disposition courts.

I acknowledge that augmenting my court observations with qualitative interviews of justice system participants would provide further data relevant to the hypothesis.

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[50] 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>

[51] 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" 35 Man. L.J. 34 (2011) 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.

[52] I was provided with a courtroom schedule. This schedule enabled me to plan each day in advance so I could maximize the number of hearings I could observe.

[53] I had the court dockets for all matters so I could often predict which courtroom would provide the most dispositions at any one time.

Qualitative interview based studies can provide more context for a given quantitative analysis.[54] The use of an explanatory sequential mixed methods approach[55] (i.e. the use of interviews with justice system participants to build on and explain the findings of the court observation) is, unfortunately, beyond the scope of this LL.M. level study. As I am quick to note below, further research is desirable and, I would suggest, necessary, to better understand this area of criminal procedure and its implications.

As a practicing lawyer in Manitoba,[56] the decision to research and write in this subject area was not taken lightly. Though my training and experience in this area equipped me as a knowledgeable observer, I was also acutely aware of the potential for bias in my research. In part to combat this potential, I engaged only in quantitative research of publicly accessible information. That is to say my research consisted of observing sentencing hearings from the public gallery. I knew no more about each matter than any other member of the public sitting in court. I designed a recording template that listed all the factors that could potentially answer my research questions.[57] The reader will note that the template used for the first week of the research (Appendix A) differs from that used in the second week (Appendix B). Though the information collected is

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[54] See generally Elizabeth Comack & Gillian Balfour, *The Power to Criminalize* (Halifax: Fernwood, 2004) for a blend of quantitative and qualitative research, this book is a remarkable journey through the criminal justice system from the perspective of (mostly female aboriginal) accused. The methodology involved examining court records, court observation and also qualitative interviews of lawyers and other justice system participants.

[55] See Creswell *supra* note 46 at 15-16.

[56] After graduating law school and articling for a criminal defence firm in Winnipeg, I practiced criminal defence law for two years before undertaking my LL.M. On June 30, 2014, I began practicing as a Crown Attorney for Manitoba Justice, Prosecutions. This thesis represents my personal opinions and not that of Manitoba Justice.

[57] See Recording Templates in Appendix A & B.

substantially the same, I redesigned the template for the second week in order to capture the information more efficiently.[58]

In Chapter Four I discuss many recorded factors in addition to joint recommendations. Though my research instrument was not specifically designed to capture some of these factors, it became apparent that court observation is a wonderful tool for researching criminal justice. I also note impressions (as opposed to specific findings) of my experience in order to lay a foundation for further research. I hope others will take up the challenge to investigate our system further and more deeply. By applying a research lens to the criminal justice system, anecdote and intuition may begin to take a back seat to rigorous evidence that helps to inform good public policy.

1.5.1 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:

[58] For example, in the second week template (Appendix B), I actually articulated five categories of plea-bargain. I had been using these same categories in the first week of my research but I found it easier in the second week to have them written on the page so I could simply check them off. The only other substantive change to the two templates was taking out the "Disposition on Day of Trial" heading and thus not recording this information in the second week of research. I did this because it was often impossible for me to tell if the matter was set for trial or not (without asking the lawyers involved). Though many of the matters I witnessed were in either 'trial' or 'disposition' courts, it became apparent that matters often crossed between these court classifications and thus any information recorded may be inaccurate. I made other small changes to the layout of the second week template for organizational reasons.

- 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.

1.6 Thesis Outline

It is important at the outset to establish what I have not attempted to do with this thesis. In the literature review I have not attempted a complete review of everything ever written on plea bargaining or joint recommendation in Canada or elsewhere. There is a significant body of academic work on the propriety and utility of plea bargaining in the United States. Though I have necessarily discussed some of this material in the literature review, I do not claim to have raised every nuanced argument around the practice. I have instead focused on the confluence of plea bargaining and joint recommendations. My

research suggests that there are many joint recommendations being placed before the Provincial Court of Manitoba and that very few of these are true plea bargains. I suggest that there is an over-reliance on cultural joint recommendations which is undesirable because it may a) negatively affect of the administration of justice; and b) drive sentence quantum up over time because the Crown negotiates from a position of power. I have not attempted to extrapolate my limited data to make grand claims as to the inadequacies of the system. My goal is simply to demonstrate that we should take a look at the data and question a practice that may not be achieving its goals and, in fact, may be doing more harm than good.

I have used my research to answer basic quantitative questions and hopefully frame further research into the whys and wherefores of jointly recommending sentences. Though I believe there is a culture of expedience in the criminal justice system, I do not claim that 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 the 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 therefore the public) as trials do. Questioning the guilty plea process is essential in helping to maintain a just system for the overwhelming majority of accused who do not go to trial.

The thesis is divided into four further chapters. Chapter Two is a literature review examining the literature around the propriety of plea bargaining. The literature review also examines the body of scholarship on a culture of expedience in criminal justice and

what part plea bargaining may play in such a culture. Chapter Three is a review of the case law that has developed around joint recommendations in Manitoba. Chapter Four presents the findings of the court observation study and analyses these results. Here I explain the research structure and data analysis before exploring the research findings themselves. I also discuss overall impressions to augment the findings and lay the foundation for further research. The significance of demographic variables (i.e., personal characteristics such as race and gender) is discussed as well as non-demographic moderating variables (i.e., in-custody or out-of-custody status and the existence of a prior criminal record). Potential alternatives to plea bargaining and joint recommendations are also analyzed in this chapter and suggestions are made for restricting the use of joint recommendations. Chapter Five is a conclusion that outlines the significance of the findings and what conclusions can safely be drawn from the data as well as suggesting areas for further research.

CHAPTER TWO: LITERATURE REVIEW

2.1 Introduction

Though academics have long highlighted the potential problems inherent in a guilty plea bargaining system, courts have largely ignored these warnings and simply accepted the necessity and propriety of plea bargains and joint recommendations. I suggest that this acceptance is based on assumptions and a focus on expedience, rather than on the principled resolution of criminal matters. As will be seen in Chapter Three, this acceptance by the courts is a relatively recent phenomenon. Despite this disconnect between the literature and the case law, little empirical research has been conducted on the results of the plea bargaining process itself.[59] Instead, there is widespread acceptance that plea bargaining in the form of charge bargaining and joint recommendations, and myriad other practices, is an essential part of the criminal justice system. I am broadly critical of this acceptance and believe much more could and should be done to inform the debate surrounding plea bargaining in Canada. An increased focus on empirical evidence will help to determine whether the current criminal process best serves the Canadian public.

Below, I discuss the literature on the history and ethics of plea bargaining and joint recommendations as well as the academic commentary, including that which is supportive and that which is critical of the plea bargaining system. Much of this academic

[59] See David S. Abrams, "Is Pleading Really a Bargain?" 2011 8: S1 Journal of Empirical Legal Studies 200 for a U.S. example of empirical research; and John Ekstedt & Margaret Jackson, "Justice in Sentencing: Offender Perceptions" (Ottawa: Minister of Supply and Service Canada, 1988) for a Canadian example.

commentary focuses on the desirability and propriety of trial-avoidance strategies.[60] Plea bargaining is generally accepted as the preeminent means of circumventing costly and time consuming criminal trials.[61] Though many commentators and practitioners have come to take plea bargaining (and perhaps joint recommendations) for granted, there is an *"*ongoing and committed line of scholarship" that remains concerned with the damage being done by plea bargaining.[62] While much of the literature that questions the propriety of plea bargains originates in the United States, it must be noted that Canada is not far behind the United States in the number of cases that avoid the time and expense of a criminal trial.[63] In fact, it is fair to say that Canada also has a criminal justice process that is based on guilty pleas. The vast majority of criminal accused in Canada put up little resistance to their conviction.[64] However, the academic debate on the appropriateness of plea bargaining in Canada has been less robust than in the United States. The reasons for this are not immediately apparent but it seems likely that the Martin Report has had a significant impact on lessening the debate.[65] Despite this, there are a number of articles

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[60] Richard L. Lippke, *The Ethics of Plea Bargaining* (New York: Oxford University Press, 2009) at 1.
[61] Armstrong *supra* note 34 at 266.
[62] *Ibid* at 266; It is interesting to note that while the widely accepted definition of plea bargaining in the U.S. speaks of the accused "relinquishing his right to trial" the accepted Canadian version used by the Law Reform Commission of Canada speaks merely of the accused "pleading guilty", See Candace McCoy, "Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform" 2005 50 Crim L Q 67 at 70.
[63] Di Luca *supra* note 5 at 15.
[64] Roach *Due Process supra* note 42.
[65] See discussion of Martin Report, *infra*. See also Di Luca *supra* note 5 at 48-49 where the author notes the Martin Commission was careful to establish that a high rate of guilty pleas was not the singular objective of the system and that any guilty pleas must be equally fair to the accused and society. Despite this commentary in the Martin Report, in 1999 the *Report of the Criminal Justice Review Committee* amplified the expediency aims of the Martin Report by providing further recommendations aimed at improving the speed of the criminal justice system. See Di Luca 52-55 for discussion of the 1999 report:

written by and for Canadian justice system participants. I examine the major themes in these articles below. Few recent empirical studies (such as the research presented in Chapter Four) have been conducted on the plea negotiation process in Canada.

2.2 Plea Bargaining

2.2.1 A Brief History of Plea Bargaining

Throughout the history of the common law in England, Canada and the United States, the courts discouraged pleas of guilty and litigation was thought to be "the safest test of justice."[66] In many cases faster trials meant there was no need for plea bargains.[67] 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.[68] Until the mid 18th century in England, juries, with no real rules of evidence, tried cases. Guilty pleas were unknown.[69] 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

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Di Luca referring to the 1999 report as a "practice guide for the implementation of the recommendations suggested in the Martin Committee Report" (at 54).

[66] Alschuler "Prosecutor" *supra* note 3 at 50. See also Albert W. Alschuler, "Plea Bargaining And Its History" 1979 79: 1 Colum L Rev 1 at 1 (HL) [Alschuler "History"] 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).

[67] Alschuler "History" supra note 66 at 8.

[68] *Ibid* at 11.

[69] Rauxloh *supra* note 30 at 27.

the 19th century, guilty pleas were being encouraged with the reward of more lenient sentences.[70] 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.[71] Also in 1984, the Police and Criminal Evidence Act[72] 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.[73]

In the United States, plea negotiations can be traced back to the civil war. When plea bargaining started it was a controversial practice.[74] Prosecutors, though elected, were often part-time officials who were keen to clear their busy dockets and get back to more lucrative private practices.[75] Pay was either low or fixed fees were paid per case or conviction; not surprisingly, prosecutors sought to dispose of their criminal cases quickly.[76] 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

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[70] *Ibid* at 28.
[71] *Ibid* at 29.
[72] *Police and Criminal Evidence Act* 1984 c.60, online: <http://www.legislation.gov.uk/ukpga/1984/60/contents>
[73] Rauxloh *supra* note 30 at 29; See also Lafontaine *supra* note 3 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 c 11 [*Charter*] in 1982 similarly changed the plea bargaining landscape in Canada.
[74] Alschuler "History" supra note 66 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).
[75] Bibas *Machinery supra* note 33 at 18.
[76] *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.

able to drop charges against an accused in order to 'guarantee' lower sentences.[77] This familiar tactic not only persists to this day,[78] 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.[79]

Into the 20th century plea bargaining in the United States became a staple of the criminal justice system. By the 1920's, court records show that "plea bargained guilty pleas had become the most common method of case disposition in felony cases and the practice steadily increased until, by the 1970's about 90% of all felony cases were concluded through guilty pleas".[80] There are several theories for this dramatic increase in plea bargaining: rife court corruption in early 20th century America;[81] the professionalization of the system led to repeat players who shared common interests in disposing of cases quickly;[82] an increase in the number of mandatory minimum sentences in the U.S.;[83] an increase in the discretion of prosecutors to offer probation or other sentence suspension methods;[84] an increase in the length and complexity of trials;[85] urbanization and increased crime rates;[86] and the industrialization of America and the

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[77] *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 S.C.L.R. (2d) for increased number of mandatory minimum sentences in Canada.
[78] Bibas *Machinery supra* note 33 at 18.
[79] *Ibid* at xix.
[80] McCoy *supra* note 62 at 74.
[81] Alschuler "History" supra note 66 at 24-26.
[82] McCoy *supra* note 62 at 75.
[83] *Ibid* at 75.
[84] *Ibid* at 76.
[85] Alschuler "History" supra note 66 at 40.
[86] *Ibid* at 42.

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).[87] U.S. scholars of plea bargaining history seem to agree that plea bargaining began when case load pressures were low.[88] In fact, historical records of U.S. courts suggest guilty plea rates in the early 20th century went up despite caseloads going down.[89] 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.[90] 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 bargaining began as principled compromise, hardened into contract, and then degenerated into disaster.[91]

In Canada, plea-bargaining was seen historically as a somewhat vulgar addition to the criminal justice system.[92] 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

[87] McCoy *supra* note 62 at 76.
[88] *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 33 at 18-20; also note Alschuler "History" *supra* note 66 at 2 and 27 where the author comments on judicial pronouncements by pro plea bargain judges that have no foundation in the historical record.
[89] Alschuler "History" *supra* note 66 at 27.
[90] McCoy *supra* note 62 at 77; See also Bibas *Machinery supra* note 33 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 62 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.
[91] McCoy *supra* note 62 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.
[92] Martin Report *supra* note 2 at 276-277.

may take a back seat to the relative negotiating skill of counsel.[93] There is little debate that plea bargaining is a means of assessing the accused's guilt without the marshaling and testing of evidence. Rather, guilt is determined out of public view and in the absence of procedural trial safeguards.[94] The 1970's in Canada were a time of confusion regarding the propriety of plea bargaining.[95] 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.[96] Even when courts did deal with failed plea bargains they did little to illuminate the propriety debate.[97]

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[93] *Ibid* at 77.
[94] Di Luca *supra* note 5 at 37.
[95] 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 L J 227 at 238-240 (HL)[Verdun-Jones "Cleansing"].
[96] *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 1970's 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 1970's. 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 (JSTOR)[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 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 Jr Church, "Plea Bargains, Concessions and the Courts: Analysis of a Quasi-Experiment" 1976 10: 3 Law & Soc'y Rev 379 (HL) concerning a ban on charge reductions in one U.S. jurisdiction. That research showed that

Professor Kent Roach has suggested that the Supreme Court of Canada began to really legitimize plea bargaining with the seminal *Stinchcombe*[98] and *Askov*[99] decisions in the early 1990's.[100] Full disclosure in the wake of *Stinchcombe* meant that prosecutors and defenders should be able to reach a pre-trial compromise far more easily.[101] The "Charter enhanced quality" of police investigations meant that most accused should be expected to plead guilty.[102] 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 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."[103] Interestingly, it has also been suggested that the intake procedures of modern Canadian courts have themselves evolved into mechanisms to "sell" guilty pleas to

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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 1970's and the Martin Report in 1993. We are still suffering today from a lack of empirical data regarding the plea bargaining process.

[97] Verdun Jones "Cleansing" *supra* note 95 at 248.

[98] *R v. Stinchcombe* [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326 (QL) dramatically increased the Crown's burden to disclose information to the defence prior to trial.

[99] *R v. Askov* [1990] S.C.J. No. 106, [1990] 2 S.C.R. 1199 (QL) placed the Crown on notice that the accused's charter protected right to a trial within a reasonable time should be respected.

[100] Roach *Due Process supra* note 42 at 98. See also McJustice article at 14

[101] *Ibid* at 98

[102] *Ibid* at 98 quoting Martin Report *supra* note 2 at 286

[103] Roach *Due Process supra* note 42 at 99. To this should be added the observations in Alschuler "Prosecutor" *supra* note 3 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.

defendants.[104] 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 plea state of mind.[105] These factors are sometimes referred to as "process costs."

2.2.2 Ethics of Plea Bargaining

Arguments for plea bargaining can be reduced to two fundamental camps: the utilitarian and the deontological.[106] The utilitarian argument is simple: we need plea bargaining because it is cheaper than trials and the system would collapse without it.[107] The deontological view is that that the accused will plead guilty because he or she is guilty and their consequent remorse justifies any benefit received from entering the plea.[108] Of course, these positions can be refuted on many levels as the review below will demonstrate. The utilitarian and deontological justifications do, broadly speaking, form the basis of the pro plea bargaining camp and thus the philosophical underpinning of our system of plea bargaining today. What ethical considerations then must lawyers and judges consider when plea bargaining?

Pleas should not be negotiated for reasons of expedience alone.[109] Neither the rights of the accused nor the public interest should be compromised by plea bargains. While defence lawyers have a duty to attempt plea negotiations in appropriate cases,[110]

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[104] Lafontaine *supra* note 3 at 112-113.
[105] *Ibid* at 112-113. The authors also discuss the issue of being denied bail and how this further incentivizes accused to plead guilty.
[106] McCoy *supra* note 62 at 72-73.
[107] *Ibid* at 73.
[108] *Ibid* at 73.
[109] See Gavin MacKenzie, *Lawyers and Ethics* (5th ed) (Toronto: Thomson, 2009) at 6-12.
[110] *Ibid* at 7-20.3.

prosecutors have no such corresponding duty. The public prosecutor is a minister of justice instructed to act in the public interest.[111] The Manitoba Code of Professional Conduct[112] outlines the duty of prosecutors in criminal proceedings to act for the public and the administration of justice fairly and dispassionately.[113] It is notable that the prosecutor's duty is to see that "justice is done through a fair trial on the merits."[114] There is no mention of disposing of matters by way of plea bargains. This is an interesting omission given the high degree of responsibility vested in Crown attorneys. However, other sections of the Manitoba Code explicitly cover agreements on a guilty plea from the defence side, stating that "a lawyer for an accused or potential accused may discuss with the prosecutor the possible disposition of the case, unless the client instructs otherwise."[115]

When considering the ethics of plea bargaining, care should be taken to not lump all practices together. Some forms of bargaining may be more or less problematic from an ethical perspective. It has been argued that bargaining about facts and charges are more dishonest than trials because they change the essential nature of what is placed

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[111] *Ibid* at 6-14 to 6-18. See also Manitoba Code of Conduct of the Law Society of Manitoba, Rule 5.1-3, online < http://www.lawsociety.mb.ca/lawyer-regulation/code-of-professional-conduct/documents/english-version/code_of_conduct.pdf>; Crown attorneys have a challenging role in the criminal justice system where much is expected of them. For a review of the "dual role" of the prosecutor in Canada as both minister of justice and committed advocate in pursuit of a just cause, see David Layton "The prosecutorial Charging Decision" Crim L.Q. 46 (2002) 449-551.

[112] Code of Conduct *supra* note 111.

[113] *Ibid* Rule 5.1-3.

[114] *Ibid* Rule 5.1-3 Commentary.

[115] *Ibid* Rule 5.1-7; The *Canadian Bar Association Code of Professional Conduct* (Ottawa: Canadian Bar Association, 2009) at 67 contains a similar section perhaps more succinctly stating: *"The public interest and the clients interests must not, however, be compromised by agreeing to a guilty plea."*

before the court.[116] Because of this, American legal academic Stephanos Bibas argues that if nothing else is done to stem the tide of plea bargaining in the United States, at least fact bargaining and charge bargaining should be restricted.[117] One of the most problematic aspects of plea bargaining is how misleading it can be to the public.[118] Equally unattractive is the notion that prosecutors may overcharge (or acquiesce to overcharging) in order to gain more plea bargaining leverage.[119] The public may lose faith in a system in which the "primary goal is processing and the secondary goal is justice."[120] Another aspect of plea bargaining that raises concerns is its inaccessibility and secretive nature; the practice is largely beyond review or evaluation.[121] All of these factors make plea bargaining ethically complex for lawyers and judges.

2.3 The Machinery of Plea Bargaining

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."[122] However, since that time the vast majority of common law in both the United States and Canada has developed in support of plea bargaining.[123] There is little doubt that judges in both jurisdictions accept

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[116] Ronald Wright & Marc Miller, "The Screening/Bargaining Tradeoff" 55 Stanford Law Review 29 at 111-113 (HL); See also Bibas *Machinery supra* note 33 at 145.
[117] Bibas *Machinery supra* note 33.
[118] Wright & Miller *supra* note 116 at 33.
[119] *Ibid* at 33.
[120] *Ibid* at 33.
[121] *Ibid* at 34.
[122] Dickson C.J.C. in *R v. Lyons* [1987] S.C.J. No. 62 at para 103 quoting from (Law Reform Commission of Canada, Working Paper No. 15, Criminal Procedure -- Control of the Process (1975), at pp. 39-60).
[123] See Richard A. Bierschbach & Stephanos Bibas, "Notice-and-Comment Sentencing" 2012 97 Minn L Rev 1 at 8-13 (HL) [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]

and support the perceived benefits of a system of guilty plea justice. As noted above, there is a body of academic literature in the Unites States questioning the machinery of criminal justice.[124] These 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.[125] Plea bargaining is seen as a net widening of social control used by prosecutors with weak cases.[126] Far from being born of high caseloads, there is some evidence that plea bargaining itself may be responsible for unmanageable workloads in the system.[127] As Stepahanos Bibas states: "Instead of communicating that punishment is a moral denunciation based on true desert, society treats it as a marketable good, undermining its moral authority."[128] Bargaining for justice is seen as a means of releasing pressure from an otherwise overloaded system. Put simply, this literature is skeptical of the normative value of plea bargaining. Where there was a commonly held belief that the criminal justice system would collapse under its own weight should plea bargaining be banned, these academics questioned this assertion.[129]

S.C.J. No. 16 for the most recent Supreme Court of Canada endorsement of the plea bargaining process.

[124] Bibas *Machinery supra* note 33; Abrams *supra* note 59, Alschuler "Prosecutor" *supra* note 3; William J. Stuntz, "Plea Bargaining and Criminal Law's Disappearing Shadow" 2004 117: 8 Harv L Rev 2548 (HL).

[125] Bibas *Machinery supra* note 33 at 25.

[126] Joan Brockman, "An Offer You Can't Refuse: Pleading Guilty When Innocent" 2010 56 Crim L Q 116 at 128 paraphrasing McCoy supra note 62.

[127] *Ibid* at 128.

[128] Bibas *Machinery supra* note 33.

[129] See Albert W. Alschuler, "The Changing Plea Bargaining Debate" 1981 69: 3 Cal L Rev 652 (HL) [Alschuler "Changing Debate"]; Albert W. Alschuler, "The Trial Judge's Role in Plea Bargaining, Part I" 1976 76: 7 Colum L Rev 1059 (HL)[Alschuler "Trial Judge"]; Albert W. Alschuler, "The Defense Attorney's Role in Plea Bargaining" 1975 84: 6 Yale L J 1179 (HL)[Alschuler "Defense"]; Stephanos Bibas, "The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain" 2004 94: 2

In the 1960's and 70's, legal academic Albert W. Alschuler was the leading force behind questioning the propriety of plea bargaining in the United States. Alschuler wrote prolifically on the subject in the later portion of the twentieth century.[130] He was unapologetic in his opposition to plea bargaining and called for its abolition. Alschuler believed the guilty plea system had grown as a product of circumstances as America's courts expanded their scope as the volume of crime increased.[131] Many of his articles were based upon qualitative research done in America's justice system in the 1960's.[132] While an opponent of plea bargaining, he did recognize the value of the system in terms of its flexibility.[133] However, his overall sentiment can best be summed up in his words: "that in a world of second-best solutions, plea negotiations make sense."[134]

Stephen Schulhofer, another skeptic of the necessity of plea bargaining, frames the pro plea bargaining debate simply:

J Crim L & Criminology 295 (HL)[Bibas "Feeny"]; Stephen J. Schulhofer, "Plea Bargaining as Disaster" 1992 101: 8 Yale L J 1979 (HL)[Schulhofer "Disaster"].

[130] See Alschuler "History" *supra* note 66 and "Prosecutor" *supra* note 3; Albert W. Alschuler, "Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System" 1983 50: 3 U 931 (HL).

[131] Alschuler "Prosecutor" *supra* note 3 at 50. This view is opposed by other commentators who see plea bargaining not growing out of high caseloads, see for example McCoy *supra* note 62 at 78.

[132] Alschuler interviewed justice system participants in ten jurisdictions. The author famously called his non-scientific analysis of these interviews a kind of "legal journalism" rather than scientific survey (Alschuler "Prosecutor" *supra* note 3 at 52). However, the qualitative importance of this early work should not be underrated. Alschuler was able to build a picture of American criminal procedure as a closed-door world of bargaining that was shielded from public scrutiny.

[133] Alschuler "Prosecutor" *supra* note 3 at 71. Though the author notes that plea negotiations even in the face of this was still an "unsatisfactory vehicle of readjustment," he does seem to leave the door open for true plea bargains in exceptional circumstances as long as there was sufficient judicial oversight of the process. The author also goes on to note that while the system may be flexible, there is little uniformity in it (at 78).

[134] *Ibid* at 78.

> Defenders of plea bargaining usually argue that bargaining is unavoidable for either of two reasons. First, a prohibition of plea bargaining, it is said, would generate enormous costs and monumental delays; plea bargaining is essential for handling massive criminal caseloads. Second a prohibition of plea bargaining would be subverted by counsel and other participants in the system.[135]

Schulhofer examines these claims from the perspective of organization and adaption analysis.[136] He researched Philadelphia bench trials in the early 1980's to refute the two claims of pro-bargainers.[137] The research found that sentence recommendations were made in only fifteen percent of guilty pleas.[138] There were neither tacit nor explicit bargains being offered in Philadelphia and yet guilty plea rates were high.[139] Schulhofer concluded that the reason was simply that there was no issue to take to trial.[140] Bench trial rates (without a jury) were also high in Philadelphia, so there existed proof of a system in the United States where a large number of cases were resolved by judicial adjudication and guilty pleas were entered apparently without inducements. This casts

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[135] Schulhofer "Inevitable" *supra* note 38 at 1040.
[136] *Ibid* at 1096-1100 for an interesting look at these two forms of analysis grounded in management theory. If plea bargaining is analyzed from an organization perspective we see that participants will place a high value in getting along with one another. Internal goals such as maintaining group cohesion and reducing uncertainty will rank higher than external goals such as doing justice. Thus participants may subvert any ban. Adaption theory focuses instead on the learning of new participants in the criminal justice process. The author compares these approaches with that of Heumann. Heumann argues counsel chose to bargain because they have no issues to take to trial (at 1044). Though the author does not agree with this conclusion he does not dismiss it out of hand suggesting further research into the "quality" of plea bargained cases is called for.
[137] *Ibid* at 1053-1054. The research was a court observation of 340 cases conducted with 5 observers over several months and qualitative interviews. In Philadelphia there are rules around which agreements prosecutors can make (at 1057).
[138] *Ibid* at 1058 .
[139] *Ibid* at 1060-1061.
[140] *Ibid* at 1061 (See also 1082 for statistics).

some very serious doubt on the proposition that the system will collapse without plea bargaining or that case load pressures make it inevitable.[141]

Many of the actors of the criminal justice system, including the accused, judges, defence lawyers and prosecutors, derive benefits from plea bargaining.[142] Given the myriad articles on plea bargaining in the U.S. in the last forty years, it is hardly surprising that early Canadian academic writing drew heavily on the American studies and commentary.[143] One theme present in the American and British literature that has not received much attention in Canada is the over professionalization of the justice system. It has been argued that the legal profession is the driving force behind plea bargaining because it gives the professionals numerous advantages such as clearing case loads, keeping civil relationships with each other, reducing chances of judges being appealed, and (for prosecutors) avoiding the uncertainty of trials.[144] In the English context, the widespread practice of plea bargaining was developed by legal professionals outside of legislation and case law.[145] As Stephanos Bibas notes in his review of American plea bargaining:

> As defendants gained lawyers over the course of the nineteenth century, a stable criminal bar emerged. Prosecutors and defense counsel who dealt with one another regularly were repeat players. Both sides lacked personal stakes in the outcomes and had financial incentives to dispose of cases and get back to other business. The more cases they handled, the more money they made. Criminal lawyers got to know and trust one another. They soon learned the going rates or typical prices for standard crimes: a murder would go down to manslaughter, say, or a first-time burglar would get one year's imprisonment.

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[141] *Ibid* 1087.
[142] Lippke *supra* note 60 at 2.
[143] See generally Gerard A. Ferguson, "The Role of the Judge in Plea Bargaining" 1972-73 15 Crim L Q 26.
[144] Rauxloh *supra* note 30 at 43-45. To the last point the author points to a 57% acquittal rate in English Crown Courts.
[145] *Ibid* at 46.

> Over time, a predictable market developed, which made the benefits of pleading guilty clearer and so encouraged more pleas. And defense lawyers worked with and on their clients, to sell them on the advantages of plea bargains.[146]

Wright and Miller put it in this way:

> All of the actors of the criminal justice system have something to gain from plea bargaining, and only a few have openly or aggressively challenged its role. Prosecutors and judges often repeat the mantra that if plea bargaining stops, American criminal justice systems will collapse.[147]

A system that relies heavily on plea bargaining only makes sense if we assume prosecutors, judges and police fully and completely represent the public interest in doing justice.[148] It has been argued that prosecutors are imperfect agents of the public interest given their own personal needs to manage caseloads.[149] As a result, calls for greater public involvement in the sentencing of offenders have been heard in the United States.[150] Increased public involvement may illuminate public interest values in the system; bring out important facts for sentencing; and empower citizens to take part in public policy debate.[151]

There can be little doubt that pleading guilty is cheaper, less time consuming, and generally more expedient than proceeding to trial. Wherever pressures exist to avoid a trial there will be some incentive to plead guilty. Therefore, much of the literature discusses plea bargaining as a form of trial avoidance.[152] Though the United States leads

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[146] Bibas *Machinery supra* note 33 at 19.
[147] Wright & Miller *supra* note 116 at 116.
[148] Bierschbach *supra* note 123 at 3.
[149] *Ibid* at 3-4.
[150] *Ibid* at 6.
[151] *Ibid* at 6.
[152] Lippke *supra* note 60 at 1.

the world in trial avoidance, Canada is not far behind in relation to high numbers of guilty pleas.[153] The percentages vary across North America. However, approximately ninety percent or more of all criminal charges are resolved by way of guilty plea or are stayed or withdrawn by prosecutors,[154] and the vast majority of these pleas are arrived at after a plea bargain.

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 to and, potentially, which sentence they will most likely receive. Tensions in a system such as this are inevitable.[155] Both prosecutors and defence counsel have a shared interest in moving the machinery along quickly. In his book on the American justice system, *The Machinery of Criminal Justice,*[156] Stephanos Bibas sees the tension in the criminal justice system as between insiders (lawyers and judges) and outsiders (the public) rather than between prosecution and defence. He notes:

> Far from opposing each other as zealous adversaries, prosecutors and defense counsel work together to find their preferred solution. They are repeat players who establish going rates and habits of disposition. Neither the adversarial collision of truth and error nor the public spotlight checks lawyers performance any longer: There is no neutral jury, and judges rubber-stamp bargains.[157]

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[153] *Ibid* at 1 for 95% of all matters in US going to trial; Roach *Due Process supra* note 42 at 11.
[154] For Canadian figures see Juristat page 8 stating: In 2011/2012, just under two-thirds (64%) of completed cases resulted in a finding of guilt, a figure that has remained relatively stable over the past 10 years. The remainder of cases were either stayed, withdrawn, dismissed or discharged (32%), acquitted (3%), or resulted in some other type of decision (1%), online <http://www.statcan.gc.ca/pub/85-002-x/2013001/article/11804-eng.pdf>
[155] Lippke *supra* note 60 at 3-4.
[156] See generally Bibas *Machinery supra* note 33.
[157] *Ibid* at 30.

Bibas argues that prosecution and defence are no longer adversaries but rather collaborative partners with strong incentives to get along:

> They form working groups, accommodating one other and bargaining away rights. Rather than unequivocally vindicating one side or the other, they split their differences and reach muddy compromises. The adversary system presupposes that a neutral decision maker will keep each side on its toes. Now that jury trials are rare and judges automatically approve bargains, there are few adversarial checks.[158] (Original footnote omitted)

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.[159] In short, 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 towards six-minute appointments and pill pushing, the plea bargaining machinery has pushed defence lawyers toward plea pushing."[160]

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".[161] 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

[158] *Ibid* at 31.
[159] *Ibid* at 32.
[160] *Ibid* at 154.
[161] *Ibid* at 39 quoting G.K Chesterton.

mechanical compartments."[162] 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."[163] It has also been suggested that plea bargaining seriously impairs the public interest because it does little to separate the guilty from the innocent.[164] Thus, some commentators have suggested that abolition of the practice would serve the interests of justice and efficiency.[165]

2.3.1 Judicial Questioning of the Plea Bargaining Process

Canadian judges appear to have varying degrees of comfort with plea bargaining and joint recommendations. As one Canadian judge put it in 2003, "This Court 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"[166] It has long been recognized that judges, like prosecutors and defence counsel, are susceptible to systemic pressures.[167] 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.[168] Judges were asked: "do you think at present plea and sentence negotiations have much of an impact on

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[162] *Ibid* at 59.
[163] Ken Chasse, "Plea Bargaining is Sentencing" 2010 14 Can Crim L R 55 at 57.
[164] Schulhofer "Disaster" *supra* note 129 at 1979.
[165] *Ibid* at 1979.
[166] Higinbotham P.C.J. *in R v. Groleau*, 2003 BCPC 0232 as quoted in Judge K.D. Skilnick, "Joint Submissions: Laudable Initiatives or the Death of Advocacy?" 2004 62: 3 The Advocate at 413.
[167] Gerard A Ferguson, "The Role of the Judge in Plea Bargaining" 1972-73 15 Crim LQ at 48.
[168] Research Staff of the Canadian Sentencing Commission, "Views of Sentencing: A Survey of Judges in Canada" (Ottawa: Minister of Supply and Services Canada, 1988).

the sentencing process or on the sentences that are imposed?"[169] Forty-one percent of judges answered "definitely yes" and a further thirty-five percent responded "in some circumstances".[170] 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.[171] 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.[172] Finally, almost sixty percent of judges claimed not to be active in plea and sentence negotiations.[173] This study indicates that (at least in the mid 1980's) 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.[174] 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."[175] 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.[176] It has been argued that sentencing should be a

[169] *Ibid* at 12.
[170] *Ibid* at 12.
[171] *Ibid* at 12.
[172] *Ibid* at 13.
[173] *Ibid* at 13.
[174] Skilnick *supra* note 166.
[175] *Ibid* at 413.
[176] *Ibid* at 413. Judge Skilnick's colleague suggesting the trend to joint recommendations would lead to the death of criminal advocacy as they knew it.

completely judicial function and any system that interferes with that must not continue.[177] Judges certainly play a more limited role in sentencing when the parties engage in plea bargaining.[178] Commentators have called for greater judicial oversight of the bargaining process to increase fairness in the system.[179]

Occasionally judges openly question the plea bargaining system itself. Judge Porter of the Provincial Court of Newfoundland and Labrador did so in the 2013 decision of *R v. Keeping*.[180] In a case concerning the possession and distribution of child pornography, the lawyers jointly recommended a sentence of four months in prison that was rejected by the judge in favour of a one-year term. Keeping had only plead guilty on the third set trial date after two not-guilty pleas and a guilty plea withdrawal. The judge found little remorse in such a plea.[181] Having these facts before him, Judge Porter used this opportunity to question the utility of joint submissions and the anecdotal acceptance that the practice is essential to the efficient administration of justice. He noted that there are no hard numbers that support the proposition that the criminal justice system depends on guilty pleas. He noted that many of the cases in Newfoundland are resolved on the day of trial, thus not allowing the court to schedule other cases in their place.[182] The judge also noted the paradox that while improperly obtained confessions are deemed inadmissible, the system thrives on accepting guilty pleas from accused when they have

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[177] Chasse *supra* note 163 at 73-74.
[178] Wright & Miller *supra* note 116 at 39.
[179] Alschuler "Trial Judge" *supra* note 129 at 1060. Alschuler comments (at 1131) that judges and not prosecutors should control plea bargaining because prosecutors are more likely to view the "maximization of criminal convictions as a critically important objective."
[180] *R v. Keeping supra* note 38.
[181] *Ibid* at para 34. Keeping also told his probation officer he was only pleading guilty to get a reduced sentence
[182] *Ibid* at para 36.

been promised a reduced charge or sentence in exchange.[183] Judge Porter further challenged the "incorrect notion of expediency"[184] that calls for the abbreviation of the criminal justice system and the appellate direction to accept almost all joint recommendations.[185] The problem with this logic, according to the judge, is that there is absolutely no data to back up this premonition of systemic "Armageddon".[186] Judge Porter concludes that it "may well be time to reconsider the wholesale endorsement of joint recommendations" [187] in the light of the empirical evidence pointing in the opposite direction of the commonly held belief that plea bargains and joint recommendations are necessary in our justice system.[188]

2.3.2 The Role of Prosecutors in Plea Bargaining

Prosecutorial discretion is strongly protected in Canadian law, being reviewable only for abuse of process.[189] This discretion includes the ability to make sentence

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[183] *Ibid* at para 38.
[184] *Ibid* at para 45.
[185] In *R v. Oxford* [2010] N.J. No. 232 (QL); *R v. Keeping supra* note 38 at para 45 commenting on Clayton C Ruby, Sentencing, 7th ed. (Markham, ON: LexisNexis Canada Inc., 2008) as affirmed by the Court of Appeal in *Oxford*.
[186] Judge Porter then examines the Alaska plea bargaining ban as an example of empirical data that actually goes against the Ruby assertion. Judge Porter argues that Ruby's assertion must be exposed for the "legal fiction that it is" (para 62).
[187] *R v. Keeping supra* note 38 at para 77.
[188] *Ibid* at para 78. The judge goes on to say that while he is not "advocating some sort of revolution…joint submissions must be seen as persuasive, but not binding, on the judiciary" (at para 79).
[189] *Krieger v. Law Society of Alberta* 2002 SCC 65, [2002] S.C.J. 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 S.C.R. 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

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.[190] It has been argued, "criminal law and the law of sentencing define prosecutors options, not litigation outcomes." [191] 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.[192] Defence counsel harness the Crown power to "fix" sentences by seeking joint recommendations or at least a "reasonable" upper sentence limit from the Crown.[193] The system accepts this huge

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protect trial fairness within our criminal justice system" (at 296) and *R v. Gill* , 2012 ONCA 607, 112 O. R. (3d) 423 where the Ontario Court of Appeal found at paragraph 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 123 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 5 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.

[190] Chasse *supra* note 163 at 57. Also see generally Bibas "Feeny" *supra* note 129 for a discussion of legislative changes that provide greater bargaining chips to Prosecutors in the Unites States and thus further tip the scales in the favour of the state.

[191] Stuntz *supra* note 124 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).

[192] Chasse *supra* note 163 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."

[193] *Ibid* at 58 where the author gives the case of *R v. F (J.K.)* (2005), 2005 CarswellOnt 816 (Ont. C.A.) where the Court admonished the sentencing judge for "jumping" the

power of the Crown to "fix" sentence ranges because it is key to achieving expedience in the criminal justice system.[194] It should be noted that there is no statutory provision for Crown counsel to make submission on sentence quantum.[195]

The U.S. prosecutors' role is complex. In any given case, the prosecutor may be acting as a system administrator, advocate, judge, or de-facto legislator.[196] Other considerations such as the personal relationship with individual defence counsel, the attitudes of police officers, and the desires of the victim, also play a lesser role in defining how the prosecutor will proceed in a plea bargain.[197] Though administrative, legal and extra-legal factors no doubt go into the prosecutor's decision to plea bargain, it is likely that the strength of the prosecutions' case is the number one consideration.[198]

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.[199] Crown policy manuals speak to this screening requirement and properly conducted resolution discussions can be seen as an extension of proper charge screening

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Crown recommendation and submitted a sentence in line with the Crown's original recommendation; Also see *R v. Beardy infra* note 320 where the Manitoba Court of Appeal also made it clear that the Crowns upper recommendation is usually as high as the Court is permitted to go.

[194] Chasse *supra* note 163 at 59.

[195] *Ibid* at 68-69.

[196] Alschuler "Prosecutor" *supra* note 3 at 52-53. The author discusses how at any one time the American prosecutor can be an administrator intent on moving cases through the system, an advocate for maximizing convictions and sentences for the guilty, a judge who is trying to "do the right thing", and a legislator in that she may want to grant concessions in favour of the accused if the law seems too harsh in the circumstances. I would suggest that Canadian Crown attorneys have a similarly complex role.

[197] *Ibid* at 53.

[198] *Ibid* at 58-59. Alschuler also suggests (at 107) that prosecutors may be motivated to deal by the fact that bargains are easier to explain away than acquittals at trial.

[199] McCoy *supra* note 62 at 93.

as opposed to plea bargaining.[200] Of course it has also been suggested that our plea bargaining system encourages prosecutors to lay somewhat dubious charges in the hope that these charges will induce guilty pleas.[201] Reconciling these opinions is far from easy in the complex arena of prosecutorial discretion.

Bibas notes that prosecutorial discretion is one of the last bastions of leniency in the American justice system:

> Prosecutors can decline to charge, drop charges, sign co-operation agreements, and recommend mercy in various other ways. Particular sympathetic defendants may receive mercy as a result. More often, however, prosecutors use these tools as plea-bargaining chips, rewarding guilty pleas and punishing protracted litigation irrespective of the usual grounds for mercy…Far from serving substantive justice and mercy, the discretion that remain in the system drives the plea-bargaining machinery.[202]

Bibas further argues that a U.S. prosecutor's power goes far beyond deciding which charges to proceed with or drop as bargaining chips:

> And when prosecutors are not happy with the existing rules, they persuade legislators to enact more rules giving them more substantive and procedural options. For example, when prosecutors found it too hard to prove criminal attempt, legislatures made their jobs easier criminalizing solicitation.[203]

Alschuler notes that defenders of plea bargaining will argue that when a prosecutor enters a plea agreement, "his conclusion that it serves the public interest should be accepted as conclusive."[204] Alschuler goes on to note however that:

> As a factual matter, the suggestion that plea bargaining sometimes leads to undue leniency for offenders may seem somewhat implausible. The penalties

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[200] Dickie *supra* note 221 at 147.
[201] Alschuler "Changing Debate" *supra* note 129 at 688.
[202] Bibas *Machinery supra* note 33 at 26.
[203] Bibas *Machinery supra* note 33 at 42.
[204] Alschuler "Prosecutor" *supra* note 3 at 105.

> prescribed for most offences by American law are unusually severe; and, as a class, prosecutors seem unlikely to be motivated by an undue sympathy for offenders. So long as a prosecutor is satisfied with a bargain, the argument might go, an objective observer would be unlikely to find reason for complaint.[205]

Bibas has suggested that the interests of prosecutors and defence counsel are significantly more aligned in plea bargains than in trials.[206] Thus, prosecutors may be a source of plea bargaining reform because they want their plea deals to be received, understood and accepted by accused.[207]

2.3.3 Public Opinion and the Plea Bargaining Process

As we have seen, the 1975 working paper from the Law Reform Commission of Canada[208] 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*[209] 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.[210] In 1989, public opinion was gauged by way of a survey on plea

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[205] *Ibid* at 106 (original footnote omitted). The author does go on to somewhat contradict this statement by suggesting (at 111) that some prosecutors may give sentence well below what they are worth if they are particularly worried about trial losses.
[206] Bibas "Incompetent" *supra* note 103 at 165.
[207] *Ibid* at 164.
[208] Working Paper 15 *supra* note 4.15 (1975) in Cohen & Doob *supra* note 19 at 85.
[209] *Charter supra* note 72.
[210] Cohen & Doob *supra* note 19 at 88. It should be noted that the make up 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.

bargaining.[211] 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.[212] Cohen and Doob concluded that the secrecy of plea bargaining appeared to reduce public confidence in the criminal process.[213]

Public opinion gauged across jurisdictions indicates a perception that sentences are generally too lenient.[214] However, contrary to public opinion fuelled by the news media, judges are not in fact more lenient than the community at large.[215] And, at least in Australia, the community does not speak with one voice on issues of sentencing.[216] Research like this casts serious doubt on the wisdom of increasing sentence severity to satisfy what is though to be a harsher public.[217] 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".[218]

Studies suggest that deterrence is the primary sentencing concern of the public.[219] 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

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[211] *Ibid* at 93. Interestingly the survey did not use the term "plea bargain," presumably for fear of it biasing the responses.
[212] *Ibid* at 94-103.
[213] *Ibid* at 103.
[214] Austin Lovegrove, "Public Opinion, Sentencing and Lenience: An Empirical Study Involving Judges Consulting the Community" 2007: October Crim L R 769 at 769-770
[215] *Ibid* at 776.
[216] *Ibid* at 777.
[217] *Ibid* at 779.
[218] Bierschbach *supra* note 123 at 2.
[219] Nigel Walker & Mike Hough, eds, *Public Attitudes to Sentencing: Surveys from Five Countries* (Aldershot: Gower, 1988) at 86.

submissions.[220] Crown counsel must constantly wear "two hats, that of an adversary and that of a quasi-judicial officer."[221] Lawyers acting for the Crown are governed in their exercise of discretion by case law, departmental policy and Law Society rules.[222] While some studies have shown that the public believes sentences are not severe enough,[223] more in depth research has shown that the media plays a substantial role in swaying public opinion on sentencing.[224] This is very important to realize when we consider that public opinion forms the basis of sentencing policies in Canada.[225] Roberts and Doob discovered that while the majority of the public who viewed news media of a sentence thought it was too lenient,[226] far fewer people thought the same sentence was too lenient when they reviewed the actual court documents.[227] Crown attorneys must look to their role as Ministers of the public interest in determining how to proceed on charge and

[220] *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).
[221] Mary Lou Dickie, "Through the Looking Glass - Ethical Responsibilities of the Crown in Resolution Discussions in Ontario" 2005 50 Crim L Q 128 at 130.
[222] *Ibid* at 138-143.
[223] Walker *supra* note 219 at 89.
[224] 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"].
[225] *Ibid* at 454; See also Lovegrove *supra* note 214 at 771
[226] Roberts "News" *supra* note 224 at 456, 62% of sample thought the sentence was too lenient.
[227] *Ibid* at 462. Only 19% of participants thought the sentence was too lenient after reviewing the actual case file. See also Lovegrove *supra* note 214 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.

sentence bargaining decisions.[228] However, in the context of plea bargaining, the "collective public interest pulls in different directions and the interest concerned are not easily reconciled."[229] There are numerous day-to-day pressures prosecutors must respond to other than the publics desire for justice.[230]

2.4 Pleading Guilty When Innocent

The fear of innocent people pleading guilty as a result of plea bargaining has driven much of the debate in the U.S. literature.[231] There have also been several cases in Canada where innocent people have nevertheless pleaded guilty.[232] In the words of Albert Alschuler, the plea bargaining system "seems well-designed to produce the conviction of innocent defendants."[233] The pressure to plead guilty when innocent is greater with minor offences because the "process costs" far outweigh the costs of going to trial.[234] 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. The Crown should not be proceeding on cases where there is no reasonable likelihood of conviction[235] and the plea

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[228] 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.
[229] Fiona Leverick, "Sentencing Discounting for Guilty Pleas: An Argument for Certainty over Discretion" 2014: 5 Crim L R 338 at 341.
[230] Stephen J. Schulhofer, "A Wake-up Call from the Plea Bargaining Trenches" 1994 19 Law & Soc Inquiry 135 at 137 (HL) [Schulhofer "Wake-up"].
[231] Oren Bar-Gill & Oren Gazal Ayal, "Plea Bargains Only for the Guilty" 2006 XLIX (April, 2006) Journal of Law and Economics 353 at 353 (HL); Alschuler "Prosecutor" *supra* note 3 at 60.
[232] For a review of these cases see Brockman *supra* note 126 at 119-12.
[233] Alschuler "Changing Debate" *supra* note 129 at 715.
[234] Brockman *supra* note 126 at 122.
[235] *Ibid* at 122.

provisions in the *Criminal Code* are meant to provide safeguards against an innocent person pleading guilty.[236] However, the history of wrongful convictions in Canada has shown that innocent people do in fact enter guilty pleas.[237]

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.[238] 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.[239] 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."[240] Whatever the reason for an innocent person pleading guilty, there is a heavy toll on society if innocent people are convicted of crimes.[241] 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.[242] Scott and Stuntz have argued that abolishing plea bargaining

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[236] *Criminal Code supra* note 23 s 606(1.1) see also Brockman *supra* note 126 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.
[237] See, e.g., Gary Trotter, "False Confessions and Wrongful Convictions" (2004) 35(2) Ottawa Law Review 179.
[238] Brockman *supra* note 126 at 122 (including comments from a Toronto defence lawyer who thinks such pleas probably happen "hundreds of times a day").
[239] *Ibid* at 123.
[240] *Ibid* at 127 quoting Professor Covey.
[241] See Leverick *supra* note 229 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 to do not stand up to the damage done to society by the consequent diminishment in public confidence in the administration of justice.
[242] Wright & Miller *supra* note 116 at 94-95.

would be bad for innocent defendants[243] because it would take away a rational choice for those innocent accused. However, in response to this position, 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.[244] Studies involving simulations have shown that "innocent" people plead guilty at a surprisingly high rate when faced with an attractive plea deal.[245]

2.5 Alternatives to Plea Bargaining

Three quarter of Americans lack confidence and trust in the criminal justice system and two thirds of Americans see secretive plea bargaining as problematic.[246] Perhaps unsurprisingly then, the literature is replete with suggestions ranging from mild

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[243] Schulhofer "Disaster" *supra* note 129 at footnote 2 referencing Scott & Stuntz, "Plea Bargaining as Contract", 101 Yale L.J. 1909 (1992).
[244] *Ibid* at 2000-2001
[245] 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 International Review of Law and Economics 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.
[246] Bibas *Machinery supra* note 33 at 51.

reform, to adjustment of the plea bargaining process, to outright bans. I deal with the full range of such reforms below but a note of caution is necessary. I do not claim this is an exhaustive list of every plea bargaining reform suggested in the last fifty years. I have tried to highlight the salient examples from the North American literature and select suggestions or commentary from other parts of the world.

Commentators have suggested a number of relatively mild changes to the pre-trial procedures to eliminate the "worst features of plea bargaining."[247] For example:

a) all matters going to a preliminary inquiry before a guilty plea can be entered;[248]
b) the ability for an accused to withdraw his guilty plea if the judge does not accept the joint recommendation;[249]
c) removing remorse as a mitigating factor;[250]
d) increased victim participation in the plea bargaining process;[251]
e) having the accused present during the plea negotiation discussions;[252]
f) expediting trial procedures;[253]

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[247] McCoy *supra* note 62 at 97.
[248] *Ibid* at 97-99.
[249] Lafontaine *supra* note 3 at 124 (this process already happens in many U.S. States).
[250] *Ibid* at 125. See also McCoy *supra* note 62.
[251] See generally Simon N. Verdun-Jones & Adamira Tijerino, "Victim Participation in the Plea Negotiation Process: AN Idea Whose Time Has Come?" 2005 50 Crim L Q 190 [Verdun-Jones "Victim Participation"]. It should be noted that this article speaks of Manitoba as leading the other provinces in victims rights legislation because section 14 of the Victims Bill of Rights C.C.S.M. c. V55 gives victims the right to be consulted on plea negotiations. However, this section was amended and now reads "At the victim's request, the Director of Prosecutions must ensure that the victim is given an opportunity to provide his or her views on the following…" (emphasis added). The current language does not require consultation. The authors note (at 206-210) that victims may give prosecutors valuable information for the plea bargaining process and, if plea bargaining is conducted with consideration of the harm suffered by victims, prosecutors and judges may aid in the healing of victims.
[252] Alschuler "Trial Judge" *supra* note 129 at 1135.

g) simplifying trial procedures;[254] and

h) fixed legislative concessions for guilty pleas.[255]

All of these suggestions are premised on an assumption that plea bargaining is an inevitable part of the criminal process. However, not all recommendations are based on this assumption. Many academics advocate more radical reforms or even complete bans of the plea bargaining system.

The practice of plea bargaining is viewed far more skeptically in England and Wales than it is in Canada.[256] Though plea bargaining is certainly part of the English legal system, it is viewed as unsavory and perhaps distinctly "American."[257] The seminal decision in *R v. Turner* [258] clarified that an accused should not be induced to give up his right to trial. This finding is in marked contrast to the Canadian practice where judges try to facilitate pleas in pre-trial meetings and resolution conferences.[259] The focus at English pre-trial conferences is usually narrowing trial issues and not the chances of resolution.[260]

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[253] Alschuler "Implementing" *supra* note 130 at 936-937.
[254] *Ibid* at 1011. The author notes the European experience is for less bargaining along with less complex trials (at 1006) and the Philadelphia and Pittsburg simplified bench trials (1024-1048) are further examples of simpler trial and evidentiary procedures leading to less plea bargaining.
[255] Schulhofer "Wake-up" *supra* note 230 at 141.
[256] Michael Waby, "Comparative Aspects of Plea Bargaining in England and Canada: A Practitioner's Perspective" 2005 50 Crim L Q 148 at 151-152.
[257] *Ibid* at 152.
[258] *R v. Turner* [1970] 2 All E.R. 281 (C.A.).
[259] Waby *supra* note 256 at 154. It should be noted that the author far prefers the Canadian system of judicial involvement in encouraging pleas to the "hands off" English model.
[260] *Ibid* at 156. As a result, the author points out many more "low level" matters go to trial in England than in Canada. The author also suggests that judges in the English system are far more aggressive about narrowing trial issues than their Canadian counterparts. Waby was a practitioner in both jurisdictions and thus this comment would reflect his own personal experiences.

Also, in England, the Crown does not make a submission on sentence quantum at all,[261] thus eliminating a large portion of sentence bargaining.

In his book on the ethics of plea bargaining, Richard Lippke suggest an alternative to plea bargaining in the form of settlement hearings in the U.S. These hearings are pre-trial procedures before a judge that would be triggered by defendants who wish to admit their guilt.[262] The judge would scrutinize the laid charges and hear submission on the evidence. The judge would also know about any charges previously laid or dropped so any plea bargaining would be obvious.[263] The accused would make submissions, as would any victims or witnesses who chose to do so. At the end of the hearing, the judge would provide a "presumptive" sentence and the accused would decide whether or not he or she really wanted to plead guilty. If the accused elected trial after the settlement hearing then the judge would be able to move up or down from the presumptive sentence as further factors related to culpability became apparent.[264] Lippke argues that, at

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[261] *Ibid* at 160. The author notes that defence counsel also rarely do so. It should be noted that the author, having practiced in England and Canada, prefers the Canadian practice of suggesting specific sentences to the judge as he views it as beneficial to the judge. As will be argued below I disagree with this conclusion. I think there are good reasons why the judge should be left completely free of influence to impose the sentence he or she thinks is fit. The author concludes that the Canadian system is not without problems such as judge shopping (at 163-164). As well as the lack of sentencing bargains in England the author also suggests that the English trial system is somewhat less complex and therefore perhaps fewer plea bargains happen as a result; See also Alschuler "Implementing" *supra* note 130 at 975-976.

[262] Lippke *supra* note 60 at 17.

[263] *Ibid* at 17-18.

[264] *Ibid* at 20. The author notes that ranges could be imposed on the presumptive sentence in the event the accused elects trial. The author argues this would help to minimize any trial penalties. I an not entirely sure how this would prevent trial penalties and it is not, in my view, adequately explained by Lippke. The author does argue that waiver discounts could be fixed and modest and thus defendants would know with certainty what their discount would be off the presumptive sentence (at 27).

minimum, judicial oversight of the pre-trial system would be advantageous to the process.[265]

In her insightful review of Lippke's book, criminologist Sarah Armstrong highlights a number of difficulties with his proposed new model of criminal procedure.[266] A major reason for her discomfort with accepting the settlement hearing model is that she does not see plea bargaining as necessarily inevitable (as Lippke does).[267] Armstrong notes that the settlement hearing model relies heavily on the input of the presiding judge to "restrain the self-servingly strategic tendencies of prosecution and defence, which is probably the most significant pathology of the adversarial criminal process."[268] I agree with Armstrong that the overall effect of settlement hearings would be to "downgrade" the trial process as opposed to "upgrading" the plea bargaining process.[269]

More community-based alternatives to the current plea bargaining system have also been suggested in the American context. Stephanos Bibas proposes that restorative community-based juries would hear sentencing submissions from counsel and would have to justify any plea bargaining that had occurred. The jury would then go on to

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[265] *Ibid* at 24. Lippke acknowledges that the system would be slower than plea bargaining but he claims that is not a reason to dismiss the idea out of hand. (at 25). He also acknowledges that strategic overcharging could remain a problem (see discussion at 31-34). This argument has been made before by Alschuler "Trial Judge" *supra* note 129. Lippke's alternative to plea bargaining idea of settlement hearings bears uncanny resemblance to the Yale Law Journal proposed system of filing motions for pre-trial conferences. See Alschuler "Trial Judge" *supra* note 129 at 1124-1130.
[266] Armstrong *supra* note 34 at 279.
[267] *Ibid* at 279.
[268] *Ibid* at 269 citing Alschuler (1976) and Turner (2006) for other expressions of this idea. The model is, in fact, similar to the pretrial model in effect in Manitoba. In pretrial conferences (or resolution discussions as they are referred to in jury trial matters) Crown and defence sit down with the judge to discuss potential resolution of the matter or, if resolution is not an option, the focusing of trial issues.
[269] *Ibid* at 269.

decide the fit and proper sentence. These juries would vary in size depending on the seriousness of the offence and may include victims, their family members, family members of the accused, and community members at large.[270] This restorative sentencing model would go hand in hand with a shift in the working of plea bargains, by making the plea bargaining process transparent.[271] Bibas fairly acknowledges his idea is subject to legitimate criticism. Though he claims it will be a cheaper model than the trial system, it would nevertheless be extremely expensive to run.[272] Quite apart from the expense, he also notes jury sentencing may undercut equality (racial and other biases of jury members) and may fit uneasily in contemporary America.[273]

At least one American jurisdiction has banned plea bargaining outright. Concerns with leniency in the American plea bargaining system led Alaska to ban the practice in 1975.[274] In Alaska charge and sentence bargains became very rare during the first decade of the ban.[275] The trial rate in Alaska increased very modestly and, in fact, returned to its original pre-ban rates by the end of the 1980's.[276] Academics were often unwilling to see Alaska as a success story claiming that bargaining simply must be going on behind the

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[270] Bibas *Machinery supra* note 33 at 158.
[271] *Ibid* at 160. For a discussion of Alford Pleas and no contest pleas see same reference at 60-62.
[272] *Ibid* at 162.
[273] *Ibid* at 162-163.
[274] Bjerk *supra* note 245 at 1 where the author notes that in 2003 for then U.S. Attorney General John Ashcroft to severely curtail the practice in federal prosecutions; See also Wright & Miller *supra* note 116 at 46 where the authors tell us that partial plea bargaining bans (on certain offences for example) are common around the Unites States.
[275] Wright & Miller *supra* note 116 at 44. Authors note, correctly, that charge bargaining crept back in as time went on in Alaska.
[276] *Ibid* at 44 noting a peak trial rate in Alaska of 10% but dropping to 7% by the end of the 1980's.

scenes or Alaska is simply too "odd" a jurisdiction to take its model seriously.[277] It has also been suggested that the Alaskan experience was a failure because charge bargaining crept back into the system.[278]

The Alaskan experience is complex and clearly it is not a 'one size fits all' model that can solve the problems of any given jurisdiction.[279] However, a review of the findings of the Alaskan experience found in government reports indicates that many of our entrenched views of the criminal justice system can and should be challenged. The Attorney General of Alaska set his "noble experiment" to ban plea bargains in motion on August 15, 1975.[280] An interim report was released in 1977[281] and a lengthy final report was filed in 1978.[282] The findings of the report strongly suggested that "current thinking about plea bargaining and the effects of reforming or abolishing it should be reconsidered."[283] The 1978 report is both quantitative, analyzing the statistics from nearly

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[277] *Ibid* at 44-45. The authors note that academics seem to dismiss the Alaska ban precisely because it did not increase trials. Academics were so set in their dichotomy of bargains or trial that Alaska simply did not make sense and thus must be an outlier. The authors (at 46) also cite the case of El Paso, Texas, where plea bargaining was banned on burglary cases and trials went up significantly. This is a far easier narrative to reconcile with the traditional dichotomy.

[278] Leverick *supra* note 229 at 345.

[279] Though it should be noted parenthetically that Alaska and Manitoba have similar populations, locations and Indigenous populations.

[280] Alaska, Alaska Judicial Counsel, *The Effect of the Official Prohibition of Plea Bargaining on the Disposition of Felony Cases in Alaska Criminal Courts* (Anchorage: Alaska Judicial Council, 1978) Michael Rubinstein *et al* at (ii) [1978 Alaska Report] online: <http://www.ajc.state.ak.us/reports/pleab.pdf >

[281] Alaska, Alaska Judicial Council, *Interim Report on the Elimination of Plea Bargaining* (Anchorage: Alaska Judicial Council, 1977) online: <http://www.ajc.state.ak.us/reports/pleab77.pdf >

[282] 1978 Alaska Report *supra* note 280.

[283] *Ibid* at (ii).

3600 felony cases, and qualitative, incorporating hundreds of lengthy interviews with justice system participants.[284] Specifically, the report found the following:

i) Court processes did not bog down; they accelerated;
ii) Defendants continued to plead guilty at about the same rates;
iii) Although the trial rate increased substantially, the number of trials remained small;
iv) Sentences became more severe – but only for relatively less serious offenses and relatively "clean" offenders; [285]
v) The conviction and sentencing of persons charged with serious crimes of violence such as murder, rape, robbery, and felonious assault appeared completely unaffected by the change in policy;
vi) Conviction rates did not change significantly overall, although prosecutors were winning a larger proportion of those cases that actually went to trial; and
vii) Local styles of prosecuting and judging were of overriding importance: Anchorage, Fairbanks and Juneau differed so greatly that we concluded the situs of prosecution had stronger associations with differences in the outcomes of court dispositions than whether or not those dispositions were subject to the policy against plea bargaining.[286]

These findings are significant and run contrary to the anecdotal acceptance of plea bargaining in Canadian academic literature and jurisprudence. Plea bargaining, at least in Alaska, was not necessary for an efficient justice system. In fact, in some respects the system became more efficient after the bargaining ban. Perhaps most interestingly, accused continued to plead guilty at roughly the same rates. Importantly, conviction rates were not significantly affected. The same number of people were found guilty as under a plea bargaining system. On the face of the Alaskan experience, there is little to be said for maintaining a plea bargaining system at all.

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[284] *Ibid* at (i).
[285] See Alschuler "Changing Debate" *supra* note 129 at 726-730 for an excellent discussion of why this minor increase should not be taken as an indication that plea bargaining bans will create an increase in sentences. The upshot of the authors' analysis is that sentence may have increased irrespective of the plea bargaining ban.
[286] 1978 Alaska Report *supra* note 280 at (ii) and (iii).

Before the ban, plea bargaining was ingrained in the Alaskan criminal justice system.[287] Not only was the practice culturally entrenched among attorneys, it was written in state law.[288] Plea bargaining in Alaska was an every day occurrence in the system, believed to be integral to its operation.[289] The Attorney General of Alaska saw plea bargaining as "the least just aspect of the criminal justice system"[290] and in 1975 issued a memorandum to his prosecutors banning the practice. The memorandum forbade district attorneys' and their delegates from engaging in plea negotiations "designed to arrive at an agreement for entry of a plea of guilty in return for a particular sentence."[291] The Memorandum did not specifically ban prosecutors from reducing the charge, but did not permit such reductions to be "simply to obtain a guilty plea."[292]

An important sentiment around the ban was that plea bargaining was "the glue that holds together all the loose joints of the system."[293] Bad actors in the system, shoddy police investigators or lazy attorneys and judges, could cover their tracks by plea bargaining around cases.[294] The success of the ban could, at least in part, be put down to the fact that without this "glue", the system would naturally begin to heal and work better.[295] Not everyone in the system shared this view and critics of the ban asserted,

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[287] *Ibid* at 2.
[288] *Ibid* at 1-2, Rule 11(e). The State Supreme Court had amended its own Rules of Criminal Procedure by providing an accused the right to withdraw his plea of guilty if the sentence imposed was longer than that bargained for.
[289] *Ibid* at 8.
[290] *Ibid* at 14. Discussion of the motives for the ban (at 12-16).
[291] *Ibid* at 1.
[292] *Ibid* at 1.
[293] *Ibid* at 16.
[294] *Ibid*.
[295] *Ibid*.

quite correctly no doubt, that eliminating plea bargaining would not automatically make justice system participants ethical, hardworking, and diligent.[296]

The Alaska ban did not preclude charge bargaining, dismissing or reducing charges in order to elicit guilty pleas, *per se*. It was repeatedly stressed that the central aim of the policy was the curtailment of sentence bargaining.[297] The ban on sentence bargains was accomplished by telling prosecutors they could not commit to quantum or type of sentence.[298] Though this ban seemed to work well, eliminating charge bargaining proved far more challenging.[299] Though there was confusion over the initial language used, the ultimate direction of the Attorney General was for prosecutors to "only reduce charges when the level of proof warrants."[300] Unfortunately, the line between legitimate discretion and bargaining for guilty pleas was blurry at best.[301] The 1978 report found there was little change in patterns of charge adjustment pre and post-ban.[302]

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[296] *Ibid* at 17.
[297] *Ibid*; See also Alschuler "Trial Judge" *supra* note 129 at 1136 where the author explains that other jurisdiction in the U.S. have at various points in time banned sentence bargaining.
[298] 1978 Alaska Report *supra* note 280 at 18.
[299] *Ibid* at 19.
[300] *Ibid* at 21. Emphasis in original. A further memo was issued to District Attorneys to restate this position a year after this memo (at 22). It was apparent that prosecutors were not listening to the instructions on charge bargaining and were overcharging to retain the same advantages as sentence negotiations. The DA was of the opinion that overcharging should stop and that the practice was itself a byproduct of the plea bargaining system (at 23).
[301] *Ibid* at 17-28 for s discussion of how tricky the charge bargaining directive was to enforce.
[302] *Ibid* at 27. The report does note that: "There is some statistical evidence that fewer pleas to reduced charges were entered during the first year following the new policy, and that fewer charges were dismissed in multi-count cases". However, overall there was little significant change in patterns.

The Alaskan Judicial Council reevaluated the Alaskan experience in 1991.[303] The ban, though still in effect in 1991, was significantly different because of two major factors. First, presumptive sentencing provision had entered Alaskan criminal procedure in 1980. Second, fiscal and staffing concerns in the mid 1980's saw a renewed inclination towards charge bargaining to cut costs.[304] Despite these changes, sentence bargaining was still substantially banned in Alaska with prosecutors not making specific recommendations on sentence and "open pleas" being the norm.[305] Specific sentencing policies modified in 1986 in fact allowed for more sentence bargaining than typically went on in1991.[306] In 2014, Alaska may be returning to an outright ban on plea bargaining so judges once again have unfettered discretion over the length of an offenders' sentence.[307] This reinvigoration of the plea bargaining ban has come in the wake of savage killings that took place the day an offender was released from jail as part of a plea bargain.[308] While the wisdom of knee jerk reactions to specific atrocities is questionable, it is easy to see why Alaskans have more faith in a ban of plea bargaining than other jurisdictions.

2.6 Conclusion

The existing literature explains the historical formation of plea bargaining and its modern acceptance in our courts. We are cautioned that lawyers and judges who have

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[303] Alaska, *Alaska's Plea Bargaining Ban Re-evaluated*, (Alaska, online, 1991) Executive Summary, White Carns *et al* [1991 Alaska Report] online: <http://www.ajc.state.ak.us/reports/plea91Exec.pdf>1991 report
[304] *Ibid* at 7.
[305] *Ibid* at 14.
[306] *Ibid* at 14.
[307]Michelle Theriault Boots, "State puts an End to Sentencing Deals in Serious Crimes," *Alaska Dispatch News* (July 23, 2013), online: <http://www.adn.com/2013/07/23/2987774/law-department-puts-an-end-to.html>
[308] *Ibid.*

their own goals and objectives may not adequately protect a system in which the vast majority of individuals plead guilty. Put simply, trials offer significant protection for the few while plea bargaining guilty pleas offers significantly less protection for the many. Though plea bargaining has become widely accepted in Canada there are pockets of resistance in the United States and England. There is a line of scholarship[309] that sees the blind acceptance of plea bargaining as fertile ground for wrongful convictions and other affronts to the successful administration of justice in a fair and just society.

In contrast, the plea bargaining debate in Canada has been essentially non-existent since the Martin Committee report was released in 1993. Though the Canadian history of plea bargaining has not completely mirrored the U.S. experience, both countries now seem to have resigned themselves to the inevitability of plea bargaining and most current calls for reform on both sides of the border are mild adaptations as opposed to radical rethinking or abolition of the guilty plea justice system. Since the 1960's 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 grow out of increased caseload pressures,[310] there is still stubborn adherence to its ultimate utility in managing an overburdened system.

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[309] What one of the major anti-plea bargaining proponents, Stephen Schulhofer, calls "a lonely band of academics" in Schulhofer "Wake-up" *supra* note 230 at 135.
[310] See generally McCoy *supra* note 62.

Where empirical studies of plea bargaining have been undertaken,[311] 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 Report and the judicial decisions that have followed it to defend the practice of plea bargaining and the prevalence and acceptance of joint recommendations.

[311] See Alaska statistics *supra* note 276.

CHAPTER THREE: CASE LAW REVIEW

3.1 Introduction

The focus of my research is on the formation of joint recommendations as the progeny of plea bargains. These sentence recommendations, along with charge bargains, are the "primary currency" of the plea bargaining system.[312] There is a significant body of Canadian common law jurisprudence that has developed around the acceptance of joint recommendations for sentence. In *Sentencing and Penal Policy in Canada*,[313] Allan Manson *et al* dedicate a chapter of their seminal work to plea discussions and joint submissions. 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.[314] There are a number of leading cases on the law of joint recommendations. I begin by examining the growth of the law in Manitoba over the last forty years. Though the common law on joint recommendations in Manitoba is fairly well settled today, it was not always so. Judges of the Manitoba Court of Appeal have not always agreed upon which direction the law should take on this issue. Balancing judicial discretion and the perceived needs of the criminal justice system have been the hallmark of this line of jurisprudence. Finally, I briefly summarize the leading authorities elsewhere in Canada to better understand the shared national perceptions that plea bargaining and joint

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[312] Lippke *supra* note 60 at 8.
[313] Manson *supra* note 35 at Chapter 7.
[314] *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), 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 129 at 1107 for discussion of prosecutors uncontrolled ability to reduce charges.

recommendations are essential to the proper running of the criminal justice system, despite the lack of empirical evidence to support such a perception.

During my court observations in January 2014, the sentencing judge accepted every joint recommendation I recorded.[315] Common sense, experience, and a review of the case law below, shows that an acceptance rate of one hundred percent cannot be extrapolated. It is quite probable though that acceptance is the norm. Put simply, joint recommendations work. Joint recommendations seem to work often in spite of the fact that sentencing judges may not agree with the jointly recommended quantum. One does not have to look far to find cases where judges make it very clear that they would not accept the sentencing recommendation but for the fact that it was presented as a joint recommendation. For example, in *R v. Bowden*,[316] McDougall J. comments:

> Mr. Bowden, I am prepared to accept the joint recommendation of counsel, if not for the fact that both Crown counsel, Mr. Borden, and Defence counsel, Mr. Newton, are very experienced and very capable criminal lawyers, I would likely not accept the recommendation. I would likely have given you a much longer sentence of incarceration given your track record, but I'm satisfied that Mr. Borden and Mr. Newton both have a better handle, a better understanding and appreciation for all of the circumstances of this case and based on their collective good judgment and experience in recommending the three years as the appropriate disposition, I am prepared to accept it.

It is difficult to immediately see the logic in this position. In *Bowden* the judge not only explicitly states the proposed sentence is not what he would have imposed, he also states that the lawyers involved know more about the case (and presumably the relevant sentencing considerations) than he does. This goes against the generally accepted model of the judiciary as the impartial arbiters of sentence in Canada.

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[315] This may be something that has been true historically, see Alschuler "Trial Judge" *supra* note 129 at 1065 where he states research in the U.S. shows judges almost automatically ratify prosecutorial charge reductions and sentence recommendations.
[316] *R v. Bowden* 2014 NSSC 141at para 42, [2014] N.S.J. No. 188 (N.S. Supreme Court)

The Manitoba Court of Appeal has often dealt with the issue of joint recommendations.[317] While I have not attempted an in-depth Canadian comparison, Manitoba certainly has its fair share of case law in this area. It would be easy, though perhaps unwise, to conclude that joint recommendations are more prevalent in Manitoba than elsewhere. The reasons for such a high number of appellate cases in Manitoba, or indeed for a relative lack of appellate cases elsewhere, may be hard to discern. However, the plethora of cases in Manitoba combined with the high percentage of joint recommendation identified in my court observation study, point to the need for more research. The vast majority of appellate cases (both in Manitoba and beyond) involve the original joint recommendation being rejected by the sentencing judge. The appellate court's task is to side with either the sentencing judge or counsel on any given sentence. Discrete issues, such as parity in sentences involving joint recommendations, are also discussed in the case law.[318] Manitoba's top court has emphasized the importance of true plea bargains in the judicial acceptance of joint recommendations from counsel. While the Court of Appeal has made it clear that sentencing judges must consider joint

[317] Though of little empirical value, it is interesting to note that of 28 Manitoba Court of Appeal Cases (1978-2011), 14 can be said to resolve in favour of the lawyers' recommendation. Of 17 decided before *R v. Sinclair supra* note 17, only 41% resolved in favour of the lawyers original joint recommendation. In 10 cases following *R v. Sinclair*, 70% were decided in favour of counsel.

[318] See *R v. Reader,* 2008 MBCA 42, [2008] M.J. No. 120 (MBCA) for a discussion of joint recommendations as they may impact parity of sentence between co-accused. This case holds that the impact of parity will depend on how much information is given to the judge concerning a true plea bargain. See also *R v. Christie,* 2004 ABCA 287, 189 CCC (3d) 274 (as noted in Manson *supra* note 35 at 307) at paragraph 46 where the Court cautions sentencing judges not to disregard a joint submission sentencing on a co-accused without first examining known similarities in the circumstances between offenders; Also *R v. Woo,* 2007 MBCA 151 at para 9, 225 Man.R. (2d) 25 holding that a joint recommendation will have a significant bearing on whether co-accused are sentenced similarly.

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.[319]

In Manitoba, counsel's submissions on sentence (joint or not) should be given significant weight. The 2014 Manitoba Court of Appeal decision in *R v. Beardy*[320] gives us some insight as to the weight accorded to counsel's submissions. The case dealt with the appeal of a sentence imposed that was in excess of both the Crown and defence position. The accused plead guilty to attempt robbery and aggravated assault in a case involving horrendous facts.[321] The Court made it clear that the upper limit of the Crown's positions should be the highest possible sentence in most cases. As put by the Court:

> For a guilty plea to be valid, an accused must understand the nature and consequences of the plea prior to entering it (see s. 606(1.1)(*b*)(ii) of the *Criminal Code*). This includes an understanding of the Crown's position on sentence. Typically, the Crown's position will represent the upper limit of any sentence an accused can expect to receive from the sentencing judge. While the Crown's position cannot bind the discretion of the sentencing judge, judges should be slow to go over the recommended upper limit of the sentence or "jump" the sentence without first giving counsel an opportunity to address any concerns.[322]

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[319] *R v. Sinclair supra* note 17at para 13.

[320] *R v. Beardy*, 2014 MBCA 23, 303 Man.R. (2d) 1.

[321] *Ibid* at para 2: "The accused approached a stranger at a gas station demanding money and, without giving him a chance to respond, stabbed him in the abdomen causing a three-centimetre laceration. When that person began running away, the accused chased him and stabbed him again, this time causing a laceration of the liver. The victim had surgery and was hospitalized for two weeks."

[322] *Ibid* at para 6. It should be noted that the Court found the sentence excessive in any event. Even had the sentencing judge not jumped the Crown recommendation, a failure to consider the relevant mitigating factors would have led to a reduction in the overall sentence. In the end a sentence of four years was substituted. The end result though is perhaps not the most interesting part of this case. In my view, the Chief Justice of Manitoba has made it clear that the recommendation of Crown counsel is, in effect, an upper limit that sentencing judges should be slow to depart from. As with the case law below concerning joint recommendations, the Court stresses the importance of certainty to an accused giving up his right to trial. Though maintaining the rhetoric of final judicial discretion in all circumstances, this discretion seems to become steadily more limited as the submissions of counsel are given more and more weight in our system.

3.2 The Beginning of Acceptance in Manitoba

In the 1978 case of *R v. Simoneau*,[323] the Manitoba Court of Appeal dealt with a joint recommendation that was not part of a wider plea bargain.[324] 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, clearly underwhelmed by the joint submission, 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.[325] In his concurring judgment, Monnin J.A. 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"[326] He then went on to outline his opinion that neither lawyer should recommend a sentence to the judge:

> It is the judge's responsibility to decide on the fitness of the sentence to be imposed. There is always the danger that a recommendation, especially one coming jointly from counsel, may fetter or, what is even worse, appear to fetter the discretion of the court. This will not necessarily happen, but there is danger that it may. A judge faced with a joint recommendation may too rapidly conclude that the matter having been studied by both counsel, he should accept the recommendation without questioning it, on the basis that both parties have agreed upon a solution and he should not disturb it. A sentence is a matter of public interest and is not to be disposed of at the will of two counsel. That would be a serious error on the part of the sentencing

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[323] *R v. Simoneau supra* note 4.
[324] *Ibid* at para 8 noting that defence counsel told the court there was no quid pro quo involved in entering the plea.
[325] *Ibid* at paras 14-15.
[326] *Ibid* at para 25.

> judge, since he only has the duty to impose a fit sentence subject to review by an appellate tribunal.[327] (Emphasis added)

Justice Monnin was perhaps one of the first voices of caution in the Manitoba debate surrounding plea bargaining and joint recommendations. I suggest that his argument, notwithstanding his inability to convince his colleagues on the bench, had merit beyond the bounds of the case itself. He articulated systemic concerns about the process of sentencing that did not seem to concern the other members of the court. I believe that he saw the potential for the erosion of judicial discretion and perhaps some wider negative implications for the administration of justice.[328] However, his voice appears to have been lost in an area of law that has subsequently seen counsels' recommendations grow in weight and importance.

3.3 The Period of Uncertainty

In the years between *R v. Simoneau* (1978) and the seminal case of *R v. Sinclair* (2004), the Manitoba Court of Appeal dealt with the issue of joint recommendations several times. The cases from this period are marked by their brevity and, to some degree,

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[327] *Ibid* at para 35.

[328] It is interesting to note that Canadian courts generally avoided confronting the propriety plea bargaining at this time. See Ferguson *supra* note 167 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 supra* note 258. 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 thought 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, "The Role of the Judge in Plea bargaining", *supra* note 167 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.

their "potluck" nature as to whether a joint recommendation was upheld or not. In 1989 in *R v. Goulet*,[329] a unanimous court upheld a nine-month sentence. A joint recommendation for fines had been placed before the sentencing judge for two separate thefts of work tools. 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."[330] 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*.[331] The possession was brief and the accused did not stand to profit from the sale of the drugs. A joint recommendation for sixty days in jail was made to the sentencing judge who jumped 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.[332] 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.

Justice Huband was again called on to lead the court in deciding whether a joint recommendation was fit in *R v. Kiesman.*[333] Once again the Court came down on the side of counsel making the recommendation, noting: "The joint submission to the learned trial judge is understandable and justifiable only on the basis of the submission made by

[329] *R v. Goulet* [1989] M.J. No. 283 (Man.CA) (QL).
[330] *Ibid* at final paragraph (unnumbered).
[331] *R v. Divito* [1990] M.J. No.12 (Man. CA) (QL).
[332] *Ibid* at second paragraph (unnumbered).
[333] *R v. Kiesman* 75 Man.R. (2d) 314, [1991] M.J. No. 457 (Man. CA) (QL).

counsel for the accused, which was unchallenged by the Crown."[334] These comments were that the accused was not the instigator of the offences. The sentencing judge of course knew this and had decided he did not believe the accused was less involved than her husband (the co-accused). However, the Court of Appeal came down squarely on the side of counsel.

In *R v. Lagowski* [335] the Court had to wrestle with the case of a child's abduction by a father. The child was taken from his mother and lived with the father overseas for nine years before being voluntarily returned. The Crown and defence jointly recommended fines. The judge instead imposed a term of imprisonment of three years. Helper J.A. found this to be excessive but nevertheless substituted a jail term of eighteen months, significantly more than had been recommended by the lawyers. There is no comment in the decision as to what factors could protect or dismantle a joint submission. In the wake of this 1992 decision, the Manitoba bar would have little indication of whether a joint recommendation would sink or swim in the Court of Appeal.

This pattern of uncertainty continued in the 1990's[336] until the case of *R v. Pashe*[337] 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."[338]

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[334] *Ibid* at para 2.
[335] *R v. Lagowski* 78 Man.R. (2d) 316, [1992] M.J. No. 373 (Man. CA) (QL).
[336] See for example *R v. Hrehirchuk,* 81 Man.R. (2d) 257, [1992] M.J. No. 430 (Man. CA).
[337] *R v. Pashe* 100 Man.R. (2d) 61, [1995] M.J. No. 76 (Man. CA).
[338] *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 conciseness. When the child did not wake up the accused took him to hospital. Counsel had

Interestingly, Huband J.A. 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."[339] However, it should be noted that this quote from *Divito* is not cited to any particular authority. 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.[340]

The Court also held that it was "reasonable for counsel to bring the joint recommendation before the Court since the proposed sentence was in the appropriate range, albeit towards the lower end" [341] By 1995 then, joint recommendations should not be rejected without good reason and, if they were within the appropriate range, it may be hard for sentencing judges to reject them at all.[342]

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recommended a sentence of one year and Justice Huband found this acceptable in the circumstances.

[339] *Ibid* at para 12.

[340] *Ibid* at para 13.

[341] *Ibid* at para 15.

[342] *R v. Pashe* is also notable for its strong dissent by Justice Twaddle. In a judgment reminiscent of the voice of caution raised by Justice Monnin in the 1978 case of *R v. Simoneau*, Twaddle J.A. uses his judicial voice to comment on the propriety of plea bargaining. His comments in dissent (at para 18) are noteworthy: "Although I personally disapprove of plea-bargaining, where it involves a recommended sentence, I recognize it as a practice so ingrained in the Manitoba justice system that any attempt on my part to discourage it would fare no better than King Canute's attempt to stem the tide. That being so, I accept the proposition that a plea-bargained recommendation should not be, in the words of my brother Huband, "too readily rejected by the sentencing judge". Justice

Despite the instructive dicta of *Pashe* it was still difficult for counsel to know which way the Court of Appeal may go on a failed joint recommendation. The sentence of the judge was upheld in some cases[343] and not in others. In *R v. Chartrand*[344] the court even went so far as to state the court was not "the place for philosophic debate about the desirability of plea bargaining. It has become a fact of life."[345] With respect, it is difficult to accept that the Manitoba Court of Appeal is not the appropriate venue for discussing the propriety of an aspect of criminal procedure. Nevertheless, this dictum, coming five years after the Martin Report, made it clear that any debate on the propriety of plea bargaining was unwelcome. The implication of this perspective was far reaching.

Twaddle would have dismissed the appeal holding that the sentence may have been appropriate had the accused only shaken the baby. However, in combination with the strikes that rendered the baby unconscious, a more sever sentence was required. The dissent in *R v. Pashe* marks the starting point of the test we have today in *R v. Sinclair*. It is perhaps ironic that the genesis of the *Sinclair* test which has, I suggest, led to a lower level of judicial scrutiny of joint submissions, came out of a dissent with strong views of caution around the use of plea bargained recommendations.

[343] For example in *R v. Podolaniuk* 118 Man.R. (2d) 188, [1997] M.J. No. 425 (Man. CA); See also *R v. Beaulieu* 118 Man.R. (2d) 148, [1997] M.J. No. 369 (Man. CA)(QL), notable for the judge's decision being upheld despite being double what had been recommended in a home invasion and sexual assault case. It is also notable because the Court uses the fact that the matter is not a true plea bargain to uphold the lengthy sentence on very aggravating facts (at para 8).

[344] *R v. Chartrand* 131 C.C.C. (3d) 122, 131 Man.R. (2d) 114 (Man. CA); See also *R v. Sherlock* 131 Man.R. (2d) 142, [1998] M.J. No. 591 (Man. CA)(QL) (Leave to appeal S.C.C. denied without reasons April 29, 1999) though this is a case that jointly recommends a range of sentence. The judge imposed a sentence of 5 years after a joint recommendation for two and a half to five was placed before the court. It is difficult to reconcile how this was a joint recommendation at all. The sentence (and associated driving prohibition) was lowered on appeal but it cannot really be seen as a precedent for upholding joint recommendations because the judge did, in fact, impose a sentence that was (albeit at the highest point) within the recommendation. The comments of Huband J.A. (para 14) and Kroft J.A. (in partial dissent at para 32) once again extoll the importance of plea bargaining in the court system.

[345] *R v.Chartrand supra* note 344 at para 7.

Manitoba was entering a period of increased tension between sentencing judges and the lawyers who appeared before them.

Between 2000-2004 there was a flurry of joint recommendation cases that made it to the Manitoba Court of Appeal, culminating with *R v. Sinclair*. In 2000, the Court heard *R v. Thomas*.[346] In *Thomas*, 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. Then Chief Justice Scott 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."[347] Chief Justice Scott uses strong language in deciding the sentencing judge erred in not accepting the joint recommendation:

> The trial judge erred in failing to give sufficient weight to the fact that the accused's cooperation had enabled the Crown to resolve and dispose of a number of serious criminal charges - some of which may never have been otherwise proven - expeditiously with no inconvenience to the public or the victims. In the end, the fact that he simply did not think that a seven-year sentence in totality was enough, was not a sufficient ground to reject the plea bargain put before him so firmly by both counsel. Plea bargaining is an important, if not an essential, component of the criminal justice process. The integrity of the system requires that judges, before rejecting a negotiated plea in circumstances such as this, have good reasons for doing so. There were no such reasons in this case.[348] (Emphasis added)

[346] *R v. Thomas,* 2000 MBCA 148, 153 Man.R. (2d) 98.
[347] *Ibid* at para 6.
[348] *Ibid* at paras 6-7.

There is no clarification from the Court as to what "circumstances such as this" really are. Though the term is not used, it would seem the Court is getting at whether or not the joint recommendation came about as part of a true plea bargain. The accused in *R v. Thomas* was co-operative with police but there is no explicit indication as to how the Crown would have struggled to prove the charges against the accused.

In *R v. Mason*[349] the Court had the opportunity to put the *R v. Thomas* test of "clear and cogent reasons" to work. The Crown and defence jointly recommended a light custodial sentence to be followed by probation for a habitual offender with significant substance abuse issues. The sentencing judge instead placed the accused on a two-year conditional sentence order and gave detailed reasons for this decision. The Court upheld the judge's original sentence. In *R v. Mason* we do not see the rhetoric of past cases concerning the range of sentence or importance of joint recommendations to the system. Rather 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.

In *R v. Broekaert*[350] the Manitoba Court of Appeal once again held in favour of judicial discretion and in doing so introduced a key dichotomy to the joint recommendation rubric. Not all joint recommendations are created equal. Two distinct forms of joint recommendation (or joint submission) are commented on:

> The amount of weight to be accorded a joint submission will depend on all of the circumstances. One of the circumstances can be whether the joint submission arises out of a plea bargain situation, or as a result of a joint

[349] *R v. Mason*, 2002 MBCA 113, 166 Man.R. (2d) 170.
[350] *R v. Broekaert,* 2003 MBCA 10, 171 C.C.C. (3d) 97.

> submission on a guilty plea to the offence charged. By plea bargain I mean a situation where an accused person pleads guilty to the offence charged, or a lesser offence and, by doing so, gives up a viable defence, or provides another "quid pro quo" in exchange for a joint submission on sentence.[351]

This distinction, though not fully explained in *R v.Broekaert*, becomes of foundational importance to the development of the law in Manitoba. Only a few short months later the Court released its decision in *R v. Weenusk,*[352] which involved a vigilante style break in and assault on a First Nations reserve in northern Manitoba. The sentencing judge was not inclined to follow the joint recommendation of nine months imprisonment and instead handed the accused two years less a day. Huband J.A. noted:

> I would also note that there are differences in plea-bargained joint recommendations. A joint recommendation often arises when there is doubt as to the success of the prosecution. There may be identity issues or other concerns over the ability of the Crown to establish the guilt of the accused with respect to the offences with which he is charged.
>
> I recognize that even the most solid prosecution case can go awry for the most unexpected reasons. In this case, however, it seems fairly clear that the accused freely admitted his responsibility from the outset. There was less reason for the Crown to compromise concerning the appropriate punishment, and this, in turn, is a valid consideration for the sentencing judge to take into account.[353]

Without explicitly saying so, the Court makes it clear that this joint recommendation may have been accepted if there was evidence of a true plea bargain. Without such evidence, the Judge was free to move away from the recommendation and impose a harsher sentence.[354] Again, the momentum seemed to be with sentencing judges. If they gave

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[351] *Ibid* at para 29.
[352] *R v. Weenusk,* 2003 MBCA 79, 173 Man.R. (2d) 318.
[353] *Ibid* at paras 13-14.
[354] Soon after *R v. Weenusk ibid* was decided, the case of *R v. K.L.H,* 2003 MBCA 73, 173 Man.R. (2d) 295 came out. This was an appeal by the accused where a joint recommendation for time served was jumped and a conditional sentence order was

clear and cogent reasons and the *quid pro quo* was absent, joint recommendations could be rejected.

Once more in 2003, the Manitoba Court of Appeal was confronted with a true plea bargain joint recommendation that was rejected by the sentencing judge in *R v. J.W.I.B*.[355] 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."[356] The Crown added that having the victim in this matter testify was also fraught with difficulties given her young age and prior inconsistent statements. Quite simply the Crown was by no means assured a conviction at trial. Freedman J.A. reminds us that significant deference is due to a sentencing judge's decision regardless of whether a joint recommendation was presented.[357] The Court goes on to state:

> Before us the Crown left no doubt that this was truly a case of "quid pro quo," and that the plea bargain was of considerable benefit to the Crown itself. The certainty it achieved for the appellant was also achieved for the Crown, and the guilty plea resolved the difficulties facing the Crown. The victim, and her

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imposed by the judge. Hamilton J.A. decided the appeal by determining a conditional sentence was not available to the sentencing judge because she had already made a finding that the accused was a high risk to re-offend and the public must thus be protected. It is worthy of mention that Hamilton J.A. did not think the sentencing judge could have imposed a 'real' jail sentence either stating: "In my view, a sentence of imprisonment is not an option either, in light of the joint recommendation and credit due to the appellant for his eight months in predisposition detention on a two-for-one basis" (at para 14)

[355] *R v. J.W.I.B.,* 2003 MBCA 92, 176 C.C.C. (3d) 13.

[356] *Ibid* at para 8.

[357] *Ibid* at para 17.

> sister, were spared having to testify. All this was known by the sentencing judge.[358]

Though the appeal was 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* sort of result as opposed to having the accused acquitted at trial. As will be discussed below, 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.[359] Nevertheless, as Madame Justice Steel readied herself to deliver judgment in the leading case of *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.

3.4 The Contemporary Approach to Joint Recommendations in Manitoba

R v. Sinclair came on the heels of the many other cases asking the court to resolve the tension surrounding joint recommendations. Justice Steel took on the task of summarizing the law to date and providing better guidance to counsel and judges of the courts below. Eric Justin Sinclair pled guilty to assault causing bodily harm. He was the perpetrator of an unprovoked attack. He spent between ten and twelve months in presentence custody (counted 2:1) and the joint recommendation was for his time in custody only with no further jail time ordered. The sentencing judge rejected this

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[358] *Ibid* at para 23.
[359] 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>

recommendation and imposed a sentence of three further months in custody. The Court of Appeal upheld the additional three months in custody. Justice Steel paid particular attention to the continuum of plea bargaining. Though not using the terms "cultural joint recommendations" and "true plea bargain joint recommendations", the court certainly acknowledges 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 (D.D.) (2003), 170 Man.R. (2d) 229, 2003 MBCA 10, at para. 29, and Booh, at para. 11.[360]

Helpfully, a summary of the law on joint submissions was also provided in *Sinclair*:

> (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.

[360] *R v. Sinclair supra* note 17 at para 13.

> (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.[361]

R v. Sinclair has become a leading case on the law of joint recommendations in Canada.[362] However, if we move through the steps outlined by Justice Steel, it becomes apparent that there is room for argument as to when a joint recommendation can and should be accepted. The cases that followed *Sinclair* illustrate this point. The Court in *Sinclair* tells us that although the judge is ultimately in charge of the sentence, proposed sentences should be given very serious consideration. With respect, I am not entirely sure what value this direction adds for sentencing judges. It is axiomatic that sentencing judges should give *all* submissions serious consideration. As for the direction to give cogent reasons for sentence, again, one would assume because reasons are required under the *Criminal Code*[363] those reasons should indeed be cogent.

The Court then instructs judges to take into account "all the circumstances underlying the joint submission,"[364] and that where the joint submission falls on the continuum of plea bargaining "will affect, perhaps significantly, the weight given the

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[361] *Ibid* at para 17.
[362] See Manson *supra* note 35 at 301.
[363] *Criminal Code supra* note 23 s 726.2.
[364] *R v. Sinclair supra* note 17 at para 17.

joint submission by the sentencing judge."[365] However, the tipping point (as evidenced by the case law) is difficult to determine. The Court in *Sinclair* acknowledges 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.

3.5 The Post-*Sinclair* Approach

R v. McKay[366] 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."[367] The accused appealed the imposed sentence and relied on the ruling in *R v. Pashe* and the Quebec decision of *R v. Douglas.*[368] 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."[369] The court stated that "in the present case, there was no apparent *quid pro quo*. There is no reason to

[365] *Ibid*.
[366] *R v. McKay*, 2004 MBCA 78, 186 C.C.C. (3d) 328.
[367] *Ibid* at para 1.
[368] *R v. Douglas* (2002), 162 C.C.C. (3d) 37, 2002 CanLII 32492 (Quebec C.A.).
[369] *R v. McKay supra* note 366 at para 16.

believe that the Crown could not have established each of the charges beyond reasonable doubt."[370]

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.

R v. Lamirande[371] 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.[372] In reversing the sentencing judge's decision, the Court noted

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[370] *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."
[371] *R v. Lamirande*, 2006 MBCA 71, 211 C.C.C. (3d) 350.
[372] *Ibid* at para 16.

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."[373] Exigencies in the Crown's case were key to the Court of Appeal finding in favour of counsels' recommendations.

R v. Lamirande is a majority decision of the Manitoba Court of Appeal. Justice Twaddle added his dissent to the conversation of plea bargains and joint recommendations. He would have dismissed the appeal. Justice Twaddle offers little dicta on the propriety of the joint recommendation process, stating simply that he agreed with the judge's view of deterrence and denunciation in this case. He does, however, make it clear that there is no need for a judge to go along with a joint recommendation if he or she does not think it is a fit and appropriate sentence. Nevertheless, the *R v. Lamirande* decision stands for the proposition that if the Crown tells the Court it has a poor case, judges should be very wary of disturbing the plea bargained joint recommendation that has resulted.

Also in 2006 the case of *R v. R.W.T.* was decided.[374] 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.[375] This was not a true plea bargain situation. Nor was the sentence of two years less a day within the normal range

[373] *Ibid* at para 19.
[374] *R v. R.W.T.,* 2006 MBCA 91, 208 Man.R. (2d) 60.
[375] 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.

for such offences.[376] 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. Justice Freedman dissented in this case noting that it was not apparent to the sentencing judge that the original submission was, in fact, jointly formed. The Crown even stated to the judge that it was not a joint recommendation case.[377] It is, with respect, difficult to imagine a case in which a joint recommendation should be less binding on a sentencing judge. This was a terrible crime perpetrated on a young victim by a man in a position of complete trust. While there appears to have been real and substantive efforts at rehabilitation made by the accused,[378] this level of criminality rightly attracts the concern of sentencing judges. Not only was the judge not really aware that the submission for "high provincial time" was a joint recommendation, but the facts of the case cried out for denunciation that would, in my view, be hard to achieve without a penitentiary sentence.[379] Even in this situation, however, where it is almost exclusively the antecedents and rehabilitative efforts of the accused that fashion the joint

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[376] *R v. R.W.T. supra* note 374 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.

[377] *Ibid* at para 69. That Crown position was clearly revised on appeal. Justice Freedman also noted that the result may not have been much different even if the sentencing judge had known of the joint recommendation (at para 36). Oddly the majority decision, upholding the original joint recommendation, does not deal with the very foundational concept of whether or not the sentencing judge even knew there was a joint recommendation before the court, other than to say the Judge's error in law was "through no fault of her own" (at para 1).

[378] *Ibid* at paras 6-10.

[379] Ironically perhaps, the accused opted on appeal to ask for two years rather than two years less a day so he could serve his sentence in a penitentiary with the hope of accessing better services. I feel sure that the irony of this was not lost on the sentencing judge.

recommendation, the sentencing judge is not permitted to make the final decision on sentence.

In the 2007 decision in *R v. Perron*, [380] the Court 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 harm. The sentencing judge imposed the conditional sentence but increased the community service hours and imposed a one-year driving prohibition. Monnin J.A. 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."[381] 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.[382]

The run of cases decided in favour of joint recommendations continued in 2008 with *R v. Cournoyer.*[383] According to the Court of Appeal, this was a case "at the end of the continuum of joint recommendations that ought to be given substantial deference."[384]

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[380] *R v. Perron*, 2007 MBCA 73, 214 Man.R. (2d) 243.
[381] *Ibid* at para 5.
[382] Also in 2007 the Court of Appeal released *R v. S. (S.P.)*, 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 W.C.B. (2d) 510, for a similar result.
[383] *R v. Cournoyer,* 2008 MBCA 71, [2008] M.J. No. 203 (QL).
[384] *Ibid* at para 3.

A number of issues "could substantially affect the ability of the Crown to obtain convictions in respect of the charges."[385] Again, the sentencing judge did not give counsel an opportunity to address any concerns surrounding the need for denunciation. In the same year, *R v. Bird*[386] 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*.[387] Sharpe had been the driver in a home invasion robbery where the victim was shot and badly injured. The victim owed a drug debt to Sharp, who in turn owed a drug debt to his co-accused (one of the two men who actually carried out the home invasion). The proceeds of the robbery were to be applied to Sharpe's debt to the co-accused. A joint recommendation of three years was placed before the court. The sentencing judge made it clear to counsel that he was concerned with the leniency of the sentence and invited further submissions. Defence counsel made submissions but did not address the concerns of the judge. Upon specifically asking what the *quid pro quo* was in this case, defence counsel told the judge that Sharpe was giving up his right to trial.

After noting the differences in criminal records of the co-accused and the roles they played, the sentencing judge concluded "that the accused was as morally culpable as the co-accused and that the accused had not made a material concession in changing his

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[385] *Ibid*.
[386] *R v. Bird*, 2008 MBCA 138, 236 Man.R. (2d) 15.
[387] *R v. Sharpe*, 2009 MBCA 50, 246 C.C.C. (3d) 455.

plea in exchange for a joint recommendation."[388] The sentencing judge had already heard six days of trial evidence in this case before the accused opted to plead guilty and he saw little remorse in the decision as a conviction was the likely outcome. Citing *Sinclair* and *Weenusk* Justice MacInnes confirmed: "An unfit sentence is, of course, a cogent reason for rejection of a joint submission."[389] 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."[390] The Court of 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.[391]

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

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[388] *Ibid* at para 33.
[389] *Ibid* at para 46.
[390] *Ibid* at para 48.
[391] *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 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 as she might have given a plea bargain or a joint recommendation where there was a clearer *quid pro quo*.

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.

3.6 Other Canadian Jurisprudence

In order to balance the perceived value of plea bargaining with the independence and authority of judges, other Canadian appellate courts have tended to hold that while sentencing judges are not bound by joint recommendations, they should only depart from them in specific circumstances.[392] In the seminal case of *R v. Douglas* [393] Fish J.A. (as he then was) resolved a number of differences in terminology used by appeal courts in articulating the tests concerning joint recommendations.[394] The ruling in *Douglas* remains the operable law in Quebec. Joint recommendation will be accepted unless they are unreasonable, bring the administration of justice into disrepute, or are contrary to the administration of justice.[395] The law is Ontario is very similar. In the 2001case of *R v. Cerasuolo*[396] the Ontario Court of Appeal affirmed their decision in *R v. Dorsey*[397] holding that trial judges should not reject joint recommendations unless they are contrary to the public interest. The law in British Columbia has followed this general line of

[392] Manson *supra* note 35 at 297.
[393] *R v. Douglas supra* note 368.
[394] *Ibid* at para 43.
[395] See *Boivin c. R*, 2010 QCCA 2187, [2010] Q.J. No. 12575 (QL).
[396] *R v. Cerasuolo supra* note 37.
[397] *R v. Dorsey supra* note 7.

authority.[398] The leading case on the law of joint recommendations in Alberta is *R v. G.W.C.*[399]

There is little doubt that while subtle differences remain in the various provincial Courts of Appeal[400] there is an overwhelming similarity in the message that is sent to counsel and sentencing judges in Canada. Joint recommendations are thought to be of real value to the system and must therefore be given significant weight. Even in cases

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[398] See *R v. Bezdan,* 2001 BCCA 215 at paras 13-14, 154 B.C.A.C. 122; *R v. Olson,* 2011 BCCA 8 at para 19, 300 B.C.A.C. 288.

[399] *R v. G.W.C.,* 2000 ABCA 333, 150 C.C.C. (3d) 513. Justice Berger also makes it clear in this case that the sentencing judge should know everything the lawyers know about the matter to be sentenced (See Manson *supra* note 35 at 304 where this point is made). The law in Alberta is well summarized in the recent judgment of Rooke A.C.J. in *R. v. Baumgartner* (2013), 94 Alta. L.R. (5th) 1 [2013] A.J. No. 1497 (Alta. QB) (QL); For the leading case in Saskatchewan see *R v. Webster*, 2001 SKCA 72 at paras 7-8 , [2001] S.J. No. 371; Nova Scotia see *R v. McIvor,* 2003 NSCA 60, 176 C.C.C. (3d) 420 and *R v. Cromwell,* 2005 NSCA 137, 202 C.C.C. (3d) 310 and see also *R. v. Marriott,* 2014 NSCA 28 at paras 99-100, [2014] N.S.J. NO. 139 for a recent interpretation of this law. Interestingly, *R v. Marriot* was a decision in which the accused appealed a jointly recommended sentence that was not rejected. He claimed it was unfit nevertheless. The case makes it clear that there is still no settled law on whether a joint recommendation should alter the standard of review: "Neither the Supreme Court of Canada, nor any Canadian appellate court, has closely examined whether the standard of review changes depending on whether there is a joint recommendation. In *R. v. Levesque*, 2012 ONCA 231 at para 1, the Ontario Court of Appeal declined to address the issue." (at para 54); For the law in Newfoundland see *R v. Druken* 2006 NLCA 67 (QL) at para 17, 215 C.C.C. (3d) 394, and *R v. Green* [2014] N.J. No. 135, 2014 NLTD(G) 49 (QL), for a recent application of the *R v. Druken* criteria.

[400] I have very briefly surveyed the situation in most of the provinces above. In New Brunswick the operative law in this area is laid out in *R v. Steeves,* 2010 NBCA 57 at para 30, 360 N.B.R. (2d) 88. The test in that Province seems to be at least as deferential to submissions as elsewhere even stating that "considerable weight" should be given to joint recommendations. In P.E.I. the law is well summarized in *R. v. Chappell,* 2012 PECA 10 at para 145, 324 Nfld. & P.E.I.R. 223, where, again, the test appears similar to other jurisdictions. The PEI Court of Appeal stating that: "A sentencing judge must give a joint recommendations respect and consideration." In the Northwest Territories the issue of joint recommendations was recently dealt with in *R v. Abbott,* 2014 NWTSC 30 at para 20, [2014] N.W.T.J. No. 31. That jurisdiction draws on the law as articulated by the various Provincial Courts of appeal (As outlined in the earlier case of *R v. P.J.N.*,2004 NWTSC 28, [2004] 10 W.W.R. 562 (QL))

where the sentence appears to be outside of the normal range, sentencing judges must not dismiss the recommendation out of hand. Rather, they must elicit further submissions from counsel and, if they still find the sentence to offend against the administration of justice, they must provide clear reasons for their departure from the submissions of counsel.[401]

How much the accused is giving up in exchange for the joint recommendation is, at least on paper, of key importance in Manitoba. While other provinces have not focused so heavily on the need for a true plea bargain (preferring the language of procedural expediency found in the Martin Report) the practical result across the country is that joint recommendations routinely pass judicial scrutiny. All jurisdictions agree that lawyers *must* articulate the basis for their joint recommendation on the record.[402] However, failure to do so may not be fatal to upholding a joint recommendation. This is completely logical as it is difficult to envisage proper sentencing, or effective appellate review, without the reasons for a joint recommendation being placed squarely on the record. As will be noted below in the discussion of the court observation, this is not necessarily happening on the ground in Manitoba.

The literature strongly suggests that the biggest incentive for accused persons to give up their right to trial is a favourable sentence.[403] Canadian Appellate courts have

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[401] Canada has seemingly come a long way since the 1970's when sentence bargaining in general was "the least significant of all types of prosecutorial bargain in Canada and the United States." See Ferguson *supra* note 167 at 36.

[402] It has been noted that a careful judicial inquiry of the facts leading to a plea bargain can be particularly important for victims of crime if the judge extends such an inquiry to ensure victims interests have been adequately considered. See Marie Manikis, "Recognizing Victims' Role and Rights During Plea Bargaining: A Fair Deal for Victims of Crime" 2012 58 Crim L Q 411 at 427.

[403] Lippke *supra* note 60 at 6, 8.

protected this incentive by placing more and more power in the hands of Crown attorneys and defence counsel to effectively predetermine sentences. Sentencing judges are "free" to deviate from joint recommendations of sentence but must articulate why the sentence is contrary to the interests of justice, not just contrary to their better judgment. The result is that sentencing judges may often impose joint recommendations that may have been quite far from what they would otherwise have imposed as a fair sentence in the circumstances. Nevertheless, they are compelled to do so unless the sentence is outrageous. The case law concerning joint recommendations in Canada is indicative of a system that supports guilty plea justice and regards plea bargaining as the most effective and efficient way of processing alleged criminal behavior. The data presented below is too small a sample to conclude that wholesale change of this system is needed. However, there is enough data to suggest we should pause and think about the potential pitfalls of our system. If, as I find, almost half of all sentences imposed are joint recommendations, then more empirical observation of the plea bargaining process is required to increase our knowledge of this phenomenon and ascertain its propriety and utility in a fair and robust system of criminal justice in Manitoba.

CHAPTER FOUR: FINDINGS AND ANALYSIS

4.1 Introduction

In 2014, I conducted two non-contiguous weeks of court observation in the Provincial Court of Manitoba, recording data from 56 sentencing hearings.[404] The results below outline the recorded data as it is broken down by variable. Some of these refer to personal characteristics (i.e. race and gender) while others refer to such factors as whether an accused was in-custody or out-of-custody at the time of the hearing. I then cross-reference each variable category with the jointly recommended matters. The results are presented by both amount and percentage. 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 for sentence. As will be discussed below, in this small sample, the majority of joint recommendations were not the result of true plea bargains. On the basis of this data alone, a qualitative study may be worth pursuing to examine the how and why of plea bargaining practices. As noted above, the academic

[404] 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.

literature is limited by a general lack of qualitative analysis of the plea bargaining process upon which to base public policy recommendations.

4.2 Key Findings

The prevalence of plea bargains and joint recommendations were key findings of this research. Fifty-two of the 56 matters (92%[405]) involved some form of plea bargain. Of these 52 plea bargained matters, 45 (86%) involved charge bargains and 5 (9%) involved pleas to a lesser charge. Perhaps most interestingly of all, only 6 of the 52 plea bargained matters (11%) involved true plea bargains. The research also confirmed that 25 out of 52 plea bargained matters (48%) involved joint recommendations.[406] 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.

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. Twenty-five out of 52 plea bargained matters (48%) involved in-custody accused and 27 out of 52 plea bargained matters (51%) 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 (29%) involved joint recommendations.

[405] All percentage figures are rounded down to the nearest whole number.
[406] 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.

Another key finding of the study concerned the prevalence of administration of justice charges.[407] 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 (30%) resulted in joint recommendations. It should also be noted that 19 out of 52 plea bargained matters (36%) involved the accused pleading guilty *only* to administration of justice charges.

4.3 Other findings

4.3.1 Demographic

The research instrument measured several other demographic and non-demographic moderating variables. These findings, though incidental to the major research agenda, are nevertheless noteworthy. Eight out of 56 accused (14%) were female.[408] All female accused had charges dropped 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 (37%) were involved in joint recommendations and 22 out of the 48 male accused (45%) were involved in joint recommendations. Fifteen out of 29 accused who were identified on the record as Aboriginal[409] (51%) were involved in joint recommendations and 10 out of 27 accused not identified as Aboriginal (37%) were involved in joint recommendations.

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[407] These matters are commonly referred to as "breaches" and include breaches of court-generated documents such as recognizances and probation orders.

[408] 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.

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

4.3.2 Non-Demographic

Whether the accused received a custodial sentence was a measured outcome of the research. Thirty-two out of 52 accused in plea bargained matters (61%) 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. The nature of the charges themselves was also tracked. 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 (53%) involved joint recommendations.

The Manitoba criminal court adult intake system is divided into two streams:[410] the Adult Custody (AC) stream and the Domestic Violence (DV) stream. A decision is made by Manitoba Prosecutions as to which stream a matter will be placed into. For our purposes, it is sufficient to state a DV matter involves an aspect of family violence and an AC matter does not.[411] Thirteen of 22 DV plea bargained matters (59%) involved joint recommendations and 10 of 27 AC plea bargained matters (37%) involved joint recommendations.

I was also able to record whether or not an accused had a criminal record. Thirty-eight out of 56 accused (67%) had a prior criminal record at the time of the observed

[410] 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.

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

hearing. 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.

4.4 Discussion of Research Findings

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 nine percent 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. 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. That all the recommendations were

accepted indicates, at least, that acceptance is the norm. 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 "The clearer the *quid pro quo*, the more weight should be given an appropriate joint submission by the sentencing judge."[412] 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 was significantly impacted by certain variables. As discussed immediately below, most measured variables did little to impact the rate, with the possible exceptions of whether the 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.

Before discussing demographic variables I must once more insert a caveat. This was a small study that was not deigned primarily to capture data on gender and race. With that in mind, 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.[413] There is little

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[412] *R v. Sinclair supra* note 17 at para 13.
[413] 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>

significance that I can see in the fact that all women had charges dropped while only eighty-five percent of men had charges against them dropped.

We know from the 1975 Wynne and Hartnagel study that Aboriginal Canadians were discriminated against in receiving the perceived benefit of negotiated pleas.[414] 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.[415] However, it is very likely 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.[416] There were numerous occasions where the accused (mostly though counsel) waived the formal preparation of a Gladue pre-sentence report. I tread lightly with my comments at this point, as I was not specifically recording data regarding race or the use of Gladue reports. However, my overall impression from listening to defence counsel submissions was that Gladue reports were often waived as a matter of course.[417] The data presented on Aboriginal accused is therefore not conclusive. Firstly, there is little difference between the rate of joint recommendations between identified Aboriginal accused and non-Aboriginal accused in any event. Secondly, the identification statistics themselves are probably misleading because many more Aboriginal accused were probably before the courts than the identified numbers would suggest.

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[414] See Wynne *supra* note 96.
[415] I use the term Aboriginal to include people who were identified as Aboriginal, First Nations, Metis, or Inuit.
[416] 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.
[417] In some circumstances it may take longer to prepare a *Gladue* report than the accused 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 in *R v. Ipeelee,* 2012 SCC 13, [2012] 1 S.C.R. 433.

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 twenty percent lower than that rate for all matters. These "swings" may be considered slightly more significant than others because of their size and the greater number of accused making up each category. 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, than whether the accused is in or out-of-custody at the time of the sentencing. Accused receiving custodial sentences were only about ten percent more likely to have joint recommendations. Our data tells us that twelve out of nineteen joint recommendations that ended in custody involved only the time already in custody being noted. That is to say that sixty-three percent 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.

The system itself generates potential charges by placing accused or convicted offenders on court orders.[418] Sixty-five percent of all observed plea bargained matters involved breaches of court orders or so-called administration of justice charges. Though

[418] I am not suggesting the system in any way generates offending behavior, simply that the mechanism by which to commit the offence is generated by the justice system itself.

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 fifty-two observed plea bargained matters (36%) involved accused who plead guilty *only* to breaches.[419] It is fair to say then that a 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.

An in-depth discussion of this phenomenon is beyond the scope of this thesis. However, when such a large percentage of matters involve offences against the administration of justice it is incumbent upon me to highlight a relevant criminological concern. It has been shown that criminal justice agencies manufacture their own clientele.[420] Breaches of court-imposed orders, as well as other mechanisms running the length of the criminal process,[421] are undoubtedly examples of how courts create crimes that stand to be committed. That is not to say that courts generate the offending behavior. There is also certainly a need to ensure compliance with court orders. However, it has

[419] With 14 of 52 (29%) being charged only with breaches.
[420] *Armstrong supra* note 34 at 276 citing McAra and McVie (2007).
[421] *Ibid*.

been argued that judges should exercise great care in not imposing unnecessary conditions on offenders, thereby adding to the problem.[422]

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 forty-eight percent. Rates between the AC and DV stream were interesting. More DV Crowns used plea bargains (59%) than did AC Crowns (37%). There is perhaps little statistical significance here given the small sample. 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.

The findings of this study suggest that around half of all plea bargained matters result in joint recommendations and acceptance of these recommendations is the norm. We also know that in most joint recommendations a true plea bargain is not spoken of on the record. The above data inclines to few measured variables having a significant impact on whether counsel engage in joint recommendations on sentence. Of all variables, custody seems to have the most potential significance. Many of the quantitative research questions outlined in the introduction have therefore been answered. The data did not answer the following questions that require further research: Do joint recommendations have an effect on sentence quantum? Is there a culture of expedience in the criminal justice system? Do lawyers, judges and other constituents of the process have similar goals in expediting matters through the system?

[422] Quigley *supra* note 51 at 334.

CHAPTER FIVE: CONCLUSIONS

5.1 Introduction

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 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 than convincing an independent decision maker of your position. While the limited court observation study outlined in Chapter Four 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 ensconced in Law Society rules and 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. By returning to an era of advocacy in Canada where judges made unfettered sentencing decisions, there is, I suggest, little down side. 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 perfectly legitimate. In fact, those submissions are actually obligatory in Manitoba under the common law but my research sample indicates that such submissions are not made as often as the law requires. 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 a true plea bargain situation.

5.2 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. The reason for this is because, unlike in true plea bargain joint recommendations, the Crown

negotiates cultural joint recommendations from a position of dominance.[423] There is little incentive for Crown attorneys to agree to low cultural joint recommendations for sentence.[424]

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 joint recommendations will provide us with concrete 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. Such certainty, however, may be at the expense of a higher sentence. Joint recommendations are useful in oiling the

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[423] Alschuler "Prosecutor" *supra* note 3 at 106.
[424] 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.

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.[425] 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.[426]

In a recent case from Prince Edward Island,[427] the Crown and defence told the court that they were "jointly recommending" a global sentence of eight years in a drug trafficking case. The judge was quick to point out that while counsel presented the sentence as a joint recommendation, the parties were not in agreement on whether the time should be served consecutive or concurrent to another existing sentence. The difference, in fact, was between the accused spending no further time or eight further years in prison. The judge rightly found that this was not a joint recommendation because the substantive difference in the positions was eight years in jail. This case illustrates just how culturally entrenched the practice of jointly recommending sentences has become. Counsel may have become used to striking deals that they want to galvanize against judicial "tampering." A plea bargain that gives birth to a joint recommendation is therefore a prized asset in the lawyers' toolbox.

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

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[425] See generally Bibas *Machinery supra* note 33.
[426] *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."
[427] *R v. Yeo*, 2014 PESC 16, [2014] P.E.I.J. No. 26.

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.[428] 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 *perceived* rather than actual benefits to the accused.

For joint recommendations to be a valid means of sentencing offenders they must add something to our justice system. I am not entirely sure that they do. I believe 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 recommendation they know (on the current law) are likely to be upheld on appeal. The waters muddy even more when we consider that the lawyers own need for expedience plays a role, however subtle, in the formation of joint recommendations. One way of solving the joint recommendation dilemma (without banning plea bargaining) is simply to only allow true plea bargain joint recommendations. Other jurisdictions appear to get on very well

[428] See generally Di Luca *supra* note 5; McCoy *supra* note 62.

without sentence recommendations of counsel at all.[429] In Canada, too, there was very little recommending of sentences until the late 1970's.[430] There is no evidence to suggest that judges were finding sentencing too difficult a task and thus were requiring counsel to aid them by providing joint recommendations. I would suggest a return to this time. I see no logical reason for the pervasive practice of counsel presenting joint recommendations. 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.

What is the worst that could happen if we did not have cultural joint recommendations? Judges are unlikely to be so confounded that they can no longer form a fit and proper sentence for the accused. If a culture of plea bargaining joint recommendations adds to the overall quality of our justice system then the practice should be encouraged. However, we do not know if that is the case. We need to do more research on the deals that are made in the hallways and the courtroom steps. Who holds the balance of power in the 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

[429] See generally Waby *supra* note 256.
[430] *R v. Simoneau supra* note 4 at para 14.

that there was too little research-taking place on the Canadian justice system.[431] 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.

5.3 Effective Judicial Oversight of Cultural 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*[432], Scott C.J.M (as he then was) quotes from *Ruby on Sentencing*[433]

> 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

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

[432] *R v. Thomas supra* note 346

[433] 5th ed., Butterworth's 1999 at s.3.191-192 (as referenced in the decision).

> observations of appellate judges and the strictures surrounding plea bargaining must be reconsidered in that light.[434] (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[435] 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 needs to 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 justice system where impartial arbiters 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 perhaps some credible empirical evidence to refute it. However, regardless of whether you believe the system would fall apart without plea bargains or not, there is still no principled reason to encourage cultural joint recommendations by counsel.

The Manitoba cases highlighted in Chapter Three identify themes and tensions that are not entirely resolved today. While it is clear that joint recommendations 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

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[434] *Ibid* at para 5.
[435] Clayton Ruby, *Ruby on Sentencing* (5th ed., Butterworth's 1999) as cited in *R v. Thomas ibid.*

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 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.

I suggest that it is in this cauldron of uncertainty that cultural joint recommendations have grown. 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,[436] the accused must be giving up more than his or her (albeit significant) right to trial.

I would cautiously make one further point regarding the submissions of counsel. As we have seen in the jurisprudence outlined above in the case law review, many cases on joint recommendations speak to the necessity for courts to take joint recommendations

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

seriously *particularly* when made by experienced counsel.[437] During my court observation study I was aware of the approximate years of call to the Bar of most of the lawyers I was watching because they are my colleagues. As a matter of overall impression, many of the counsel appearing were, like myself, relatively junior. At least one of the lawyers in most hearings was very often under ten years call. In fact, one or both of the lawyers in some cases were under five years call to the Bar. I claim no scientific certainty here. I simply wish to point out that it is often junior counsel (both Crown and defence) who are dealing with Provincial Court dispositions on relatively straightforward matters. I would be the first to agree that senior members of the Bar can make questionable submissions in hearings and articling students can positively shine. However, given the emphasis placed on counsels' experience by the case law,[438] this fact is worthy of note.

5.4 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 fascinatingly dynamic method of data collection. Myriad information can be gathered to answer important research queries. The criminal justice system is a 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

[437] *R v. Divito supra* note 331; *R v. Pashe supra* note 337at para 12.
[438] See for example *R v. Divito supra* note 331 at para 12.

nature and extent of plea bargaining.[439] Research looking at guilty plea rates alone is not sufficient to learn more about plea bargaining.[440] Plea bargaining must instead be examined within the broader context of the criminal justice system.[441] 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*[442] 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.[443]

5.4.1 Resolution on the Day of Trial

I was unable 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

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[439] See Ferguson *supra* note 167 at 31; Cohen & Doob *supra* note 19 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 116 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 94 at 229; Church *supra* note 96 at 377; Verdun-Jones "Evaluating Research" *supra* note 1 at 295-296.
[440] Verdun-Jones "Evaluating research" *supra* note 1 at 296.
[441] *Ibid* at 301.
[442] Victims Bill of Rights *supra* note 251.
[443] Bibas *Machinery supra* note 33 at 149.

other matters, then the contribution of guilty pleas to an efficient system seems very tenuous indeed. I would therefore suggest further research into exactly when matters resolve in the process.

5.4.2 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.[444] That Commission, along with the Law Reform Commission of Canada made many recommendations specific to the plea bargaining process.[445] In 1987 there was no evidence that sentences in Manitoba were any harsher than those handed down by judges in other provinces.[446] I suggest further and updated research into the sentence quantum in Manitoba by means of a longitudinal court observation, measuring the average sentence lengths by offence. This data could be subjected to analysis concerning moderating variables such as Aboriginality and presence of a prior criminal record.

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[444] Anthony Doob, "The Unfinished Work of the Canadian Sentencing Commission" Canadian Journal of Criminology and Criminal Justice, Volume 53,Number 3, July/juillet 2011, 279-297, Online: <http://muse.jhu.edu.proxy2.lib.umanitoba.ca/journals/canadian_journal_of_criminology_and_criminal_justice/v053/53.3.doob.pdf> discusses a lack of systemic information of sentencing, minimum sentences and other policy areas.

[445] For a list of applicable recommendations form 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].

[446] 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].

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 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. I would therefore suggest file review research regarding Crown offers before trial that were refused. This information could be compared to the sentence imposed upon conviction.

5.4.3 Charge Bargaining

Charge bargaining was by far the most important form of plea bargaining seen in the court observation study. The potential for strategic overcharging by the police and persecutors 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.

5.4.4 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 simply by providing more information and a greater sample size.

5.5 Conclusion

It has been suggested that once we accept plea bargaining as a part of the criminal justice system, it no longer commands our attention.[447] 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, I suggest that 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. I suggest simply that we take pause and consider the future of a system that values expedience of process over other values. The protections offered by the plea inquiry[448] 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-

[447] Schulhofer "Inevitable" *supra* note 38 at 1105.
[448] *Criminal Code supra* note 23 s 606(1.1).

> criminalization in all its forms and improving the social and economic lot of the disadvantaged.[449]

Plea negotiations often result in joint sentencing submissions accepted by courts.[450] That is not to say that joint recommendations are the exclusive or even natural fruit of the bargaining process. Joint recommendations are distinct and 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 showed that charge bargaining is by far the most common form of plea bargaining. 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 may really want to know is how much time will the prosecutor 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. What is less debatable is that the accused may receive a lower sentence if his counsel were to advocate for one. 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.

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[449] Lippke *supra* note 60 at 143. In her review of Lippke's book, Armstrong *supra* note 34 at 275, simply notes "*Amen*", in response to this observation; See also Quigley *supra* note 51 at 318.
[450] Manikis *supra* note 402 at 413.

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.[451] I suggest the propagation and general acceptance of cultural joint recommendations is a systemic issue.[452] The purpose of this thesis is to highlight some potential problems with an over reliance on cultural joint recommendations. Like all stakeholders, I wish to contribute to a fairer and more robust system of criminal justice in Manitoba. Hopefully, the use of empirical research will challenge justice system participants and policy makers to review current practices and encourage further research into this absorbing area of criminal procedure.

[451] Bibas *Machinery supra* note 33 at 116.
[452] Roach, *Due Process supra* note 42 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.

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APPENDIX A – RECORDING TEMPLATE (WEEK ONE)

Ireland Court Observation

Date
Day
Courtroom
Name
Age
Sex
First Nations Status
Appearing (in person or on video)
Counsel
Independent Prosecutor
DV/Non-DV
Disposition on the day of trial
Number of charges on docket

Number of charges plead guilty to
Nature of Charges
Breaches
Plea-Bargain (Definition: As a result of discussions between the accused and the state, a guilty plea is entered to one or more charges in exchange for a real *or perceived* benefit to the accused)
Plea-Bargain referred to on the record
Nature of plea-bargain (charge bargain; sentence; Crown agreement not to call evidence on disputed facts; agreement to drop other charges)

Joint Recommendation as to sentence
Custody received
Prior Criminal Record
TIC plus time going forward
TIC only
Joint recommendation accepted

APPENDIX B – RECORDING TEMPLATE (WEEK TWO)

Ireland Court Observation

Date	
Day	
Courtroom	
Name	
Age	
Sex	
Prior Criminal Record	
First Nations Status	
Appearing (in person or on video)	Custody (in or out)
Counsel	
Independent Prosecutor	
DV/Non-DV	
Number of charges on docket	

Number of charges plead guilty to
Nature of Charges
Breaches
Plea-Bargain (Definition: As a result of discussions between the accused and the state, a guilty plea is entered to one or more charges in exchange for a real *or perceived* benefit to the accused) CHARGE BARGAIN JOINT RECOMMENDATION PLEA TO LESSER CHARGE TRUE PLEA BARGAIN OTHER
Plea-Bargain referred to on the record
Joint Recommendation as to sentence
Custody received
TIC plus time going forward

TIC only
Joint recommendation accepted
Comments