

## THE DEFENCE COUNSEL'S ETHICS IN PLEA BARGAINING: LOSING SIGHT OF THE INNOCENT?

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**ABSTRACT:**The vast majority of accused who appear before a criminal court in Canada will not proceed to trial and most of those will plead guilty to some offence. This means that a substantial portion of a defence lawyer's cases will be resolved. Sometimes this will occur after months or years of negotiation, sometimes on the court-house steps, but all will involve some form of discussion between Crown and defence. These negotiations have commonly been referred to, by the public and participants in the criminal justice system alike, as "plea bargaining".

Plea bargaining is now an accepted and integral part of our criminal justice system.<sup>1</sup> The process involves an exchange of information between Crown counsel and defence counsel about the strengths and weaknesses of their respective cases and the circumstances of the offence and of the offender.<sup>2</sup> Experienced Crown and defence counsel use this opportunity to ensure that individual justice is done. Through this process, an accused will surrender his right to trial, with its accompanying procedural safeguards, in exchange for concessions aimed at sentence reduction and certainty.<sup>3</sup>

For some, the term plea bargaining implies that justice is a commodity that can be bought, sold and bartered and thus negative connotations have resulted. It also inaccurately assumes that plea bargaining relates solely to agreements concerning guilty pleas. Discussions between counsels frequently include a vast array of considerations, much more than negotiated guilty pleas, and sometimes do not, in fact, result in guilty pleas at all<sup>4</sup>.

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<sup>1</sup> *R v. S.K.*, [1995] O.J. No. 1627, 99 C.C.C. (3d) 376 (Ont CA)

<sup>2</sup> C. C. Ruby, G. J. Chan, N. R. Hasan, *Sentencing*, (8<sup>th</sup> ed.), (Markham, Ont: LexisNexis Canada Inc., 2012), at page 69

<sup>3</sup> *R v. Oxford*, [2010] N.J. No. 232, 77 C.R. (6<sup>th</sup>) 364, at para. 56 (N.L.C.A.), and referred to C. C. Ruby, G. J. Chan, N. R. Hasan, *Sentencing*, (8<sup>th</sup> ed.), (Markham, Ont: LexisNexis Canada Inc., 2012), at page 69

<sup>4</sup> S.A. Cohen and A.N. Doob, "Public Attitudes to Plea Bargaining" (1989-1990) 32 C.L.Q. 85 lists factors which could be included in "resolution discussions": reduction or withdrawal of charges; agreement not to proceed on other charges; agreement to refer offences to various diversion programs; agreement as to the type of severity of sentence; agreement as to Crown election; agreement not to pursue dangerous offender or long term offender designations; agreement not to rely on previous convictions where to do so would result in a mandatory minimum sentence; agreement not to charge another person or to withdraw charges against another person; agreement not to compel a jury trial; agreement not to seek increased periods of parole-ineligibility; agreement to have the sentencing hearing before a specific advance not to appeal a sentence; some of these practices, such as for example, agreeing in advance not to appeal a sentence, are specifically prohibited by Crown Policy Manuals such as the Federal Prosecution Service Deskbook.

Whether this practice is a blight or a blessing on the criminal justice system has been much debated<sup>5</sup>. Due to its strong focus on efficiency and its resemblance to an "assembly-line conveyor belt"<sup>6</sup>, plea bargaining can be linked to what the American scholar Herbert Packer defined as a crime control model of justice<sup>7</sup> whereby "the criminal justice process is controlled by prosecutors, with the primary aim being a stream-lined guilty plea".<sup>8</sup> The defence counsel's role is nonetheless very important in ensuring that the innocent accused does not get "caught" in what could be seen as a criminal factory, especially if the accused decides to "cut their losses" and plead guilty. In this way, defence counsel has a duty to protect the innocent accused's rights and circumvent this incremental descent into poor judgment, not forgetting the image of the criminal justice system itself. What is the defence counsel's ethics in this process? The main focus of this essay will be on the ethical considerations for defence counsel when engaging in plea bargaining, in the subset of resolution discussions, the negotiated guilty plea, while keeping in mind the risk of wrongful conviction. This essay will show that, to the exception of the Canadian Bar Association Model Code of Professional Conduct, there is little guidance on ethics in the plea bargaining process.

**KEYWORDS:** *the defence, counsel, ethics, plea bargaining*

**JEL CODE:** *K 1*

## 1. WHAT IS PLEA BARGAINING?

Plea bargaining usually refers to the "discussion that occur between the prosecutor and defence counsel regarding an accused's person's likely plea, and the possible negotiation of the charge(s), case facts, and/or the Crown's sentencing submissions".<sup>9</sup> The term favoured by the Martin Committee Report in 1993 for "any discussions between counsel aimed at resolving issues that a criminal prosecution raises" is "resolution discussions"<sup>10</sup>

The Law Reform Commission of Canada defines a plea bargain as "an agreement by the accused to plead guilty in return for the prosecutor's agreeing to take or refrain from taking a particular course of action"<sup>11</sup> It can also entail informal agreements not to proceed with charges against another person, or a requirement that the accused become a prosecution witness.<sup>12</sup> Plea bargaining can occur at any time prior to trial's conclusion. It can be done in a face-to-face meeting, during phone calls or through facsimile. Similarly,

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<sup>5</sup> For example of pros and cons, see J. Di Luca, "Expedient McJustice or Principled Alternative to Dispute Resolution" 50 C.L.Q. 14; C. McCoy, "Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform", (2005) 50 C.L.Q. p. 67; G. Lafontaine & V. Rondinelli, (2005) 50 C.L.Q. p. 108; K. Makin, "Top jurist urges review of "coercive" plea bargaining system" *The Globe and Mail* ( 7 March 2011)

<sup>6</sup> H. L. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968) at 159

<sup>7</sup> *Ibid*, at p. 159

<sup>8</sup> A. Flynn, "We've changed our minds: What do you do with a Failed Plea Bargain? A Reflection on R v. Nixon", (June, 2012) 32 W.R.L.S.I. 123, at p. 130

<sup>9</sup> A. Flynn "We've changed our minds: What do you do with a Failed Plea Bargain? A Reflection on R v. Nixon", (June, 2012) 32 W.R.L.S.I. 123, at p. 129

<sup>10</sup> Ontario, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Queen's Printer, 1993), Chair: G.A. Martin (referred to as "The Martin Committee Report) at p. 282

<sup>11</sup> Law Reform Commission of Canada, *Working Paper no 60: Plea Discussions and Agreements* (Ottawa: Canadian Law Reform Commission, 1989), at p. 3-4

<sup>12</sup> A. Flynn, "We've changed our minds: What do you do with a Failed Plea Bargain? A Reflection on R v. Nixon", (June, 2012) 32 W.R.L.S.I. 123, at p. 129

according to the Canadian Department of Justice, plea bargaining falls within three broad categories:

- 1) Promises relating to the nature of the charges to be laid (charge bargaining);
- 2) Promises relating to the ultimate sentence that may be metered out by the court (sentence bargaining); and
- 3) Promises relating to the facts that the Crown may bring to the attention of the trial judge (fact bargaining).<sup>13</sup>

The primary aim of plea bargaining is to arrive at a mutually acceptable agreement between the Crown prosecutor and defence counsel, in exchange of a guilty plea from the accused. At the very least, discussions between counsels aim to identify issues not in dispute, thus reducing the length of subsequent hearings and limiting delays as for example, through trial adjournments.<sup>14</sup> As defined by a former Director of Public Prosecutions of the Province of Saskatchewan, Mr. DW Perras QC, plea bargaining involves "a proceeding whereby competent and informed counsel openly discuss the evidence in a criminal trial with a view to achieving a disposition which will result in the reasonable advancement of the administration of justice."<sup>15</sup> Ken Chasse suggests that "plea bargaining should have to satisfy the basic requirements of administrative law in relation to the exercise of power and decision making by government officials which are: (1) transparency; (2) accountability; (3) fairness; and, (4) a system of review. Otherwise, the rule of law will not prevail".<sup>16</sup> Other scholars advance that "Plea bargaining is sentencing"<sup>17</sup>.

*Canadian criminal justice system and the plea agreements: cost factor efficiency*

It has been said that the Canadian criminal justice system is so reliant on plea arrangements that without them "the administration of justice could not operate efficiently and would in fact grind to a halt"<sup>18</sup>. In 2008 and 2009, 91 per cent of all adult cases in Canadian criminal courts were disposed of without a trial.<sup>19</sup> A large body of literature suggests that our criminal justice system is too reliant on plea bargaining. For example, Ken Chasse suggests that "efficiency is favoured over justice"<sup>20</sup>. Given that the practice of

<sup>13</sup> Department of Justice Canada, *Victim Participation in the Plea Negotiation Process in Canada*, online: Department of Justice Canada <[www.justice.gc.ca/eng/pi/rs/rep-rap/2002/rr02\\_5/p3.html](http://www.justice.gc.ca/eng/pi/rs/rep-rap/2002/rr02_5/p3.html)>

<sup>14</sup> A. Flynn, "We've changed our minds: What do you do with a Failed Plea Bargain? A Reflection on R v. Nixon", (June, 2012) 32 W.R.L.S.I. 123, at p. 130

<sup>15</sup> D.W. Perras "Plea Negotiations" (1980) 22 C.L.Q. 58 at 58-59

<sup>16</sup> K. Chasse, "Plea Bargaining is Sentencing" (2009) Can. Crim.L.Rev. 55 at p. 75

<sup>17</sup> C. McCoy, "Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform,"(2005), 50 C.L.Q. 67 at p. 107. ( This phrase is the last sentence of her article: "An awareness that plea bargaining is sentencing, and that punishments emerging from the guilty plea process must comport with fundamental principles of fair and just sentencing, is essential"

<sup>18</sup> M. P. Piccinato, *Plea Bargaining*, online: Department of Justice Canada, [www.justice.gc.ca](http://www.justice.gc.ca) at page 6, referring to Ontario Ministry of the Attorney General, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions*, 1993, pages 1-523, at page 277

<sup>19</sup> J. Thomas, *Adult Criminal Court Statistics, 2008/2009* (28 July 2010), online: Statistics Canada, [www.statcan.gc.ca](http://www.statcan.gc.ca)

<sup>20</sup> "The Triumph of Plea Bargaining", Case Comment on *R v. Nixon* (2011), 85 CR (6<sup>th</sup>) 29 at p.39

plea bargaining has become so ingrained in the criminal justice system<sup>21</sup>, it should come as little surprise that attempts had been made to restrain its exercise.

This is not a new trend.<sup>22</sup> This so-called dependence upon plea bargaining has been heavily criticized<sup>23</sup> over the last few years. Previously, plea bargaining was rarely criticized, or even as admitted, in Canada. As Philip C. Stenning noted, it was only in the late 1970s that the practice emerged "from the dark realms of the unmentionable into the light of informed public debate."<sup>24 25</sup> In 1975, the Law Reform Commission in Canada called plea bargaining "something for which a decent criminal justice system has no place and contrary to the entire notion of justice"<sup>26</sup> By 1989, faced with a system "bogging down under its own weight"<sup>27</sup>, the Commission's position had completely reversed and suggested that "it would be a mistake to dismiss plea negotiation as a distasteful made necessary only by the unhappy reality of an overburdened criminal justice system"<sup>28</sup>.

It is important to note that our reliance on plea bargaining and our tolerance for plea arrangements varies greatly with the circumstances of the offence and the accused. In the context of the United Kingdom, the American scholar Mike McConville argues that "plea bargaining is a widespread institutional practice and not isolated aberrational behaviour on the part of some maverick lawyers."<sup>29</sup> Similarly in the United States, Krauss observes that "today, plea bargaining and prosecutorial discretion determine the outcome of the vast majority of criminal cases."<sup>30</sup>

Furthermore in the United States, it has been said that the process is often justified on a utilitarian basis as a measure to reduce court backlog and increase clearance rates. Its benefits have also been justified as to "extend to reducing financial and resource expenditure for the State and the accused, and sparing victims and accused persons from drawn-out proceedings".<sup>31</sup> As Mike McConville suggests, plea bargaining is "defended as an essential weapon in (...) the quest for cost-effective criminal justice system."<sup>32</sup>

<sup>21</sup> *R v. Pashe* (1995), 100 Man R. (2d) 61 ("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" at para. 18, Justice Twaddle, dissenting)

<sup>22</sup> A. Linds, "A Deal Breaker: Prosecutorial Discretion to Repudiate Plea Agreements after *R v. Nixon*" (2012), 38 Queen's L.J. 295, at p.305

<sup>23</sup> *Ibid.*, at p. 305

<sup>24</sup> P. Stenning, *Appearing for the Crown* (Cowansville, QC: Brown Legal Publications, 1986) at p. 250

<sup>25</sup> A. Linds, "A Deal Breaker: Prosecutorial Discretion to Repudiate Plea Agreements after *R v. Nixon*" (2012), 38 Queen's L.J. 295, at p.305

<sup>26</sup> Canada Law Reform Commission, *Criminal Procedure: Control of the Process* (Working Paper 15, 1975) at p. 46

<sup>27</sup> Law Reform Commission of Canada, *Working Paper no 60: Plea Discussions and Agreements* (Ottawa: Canadian Law Reform Commission, 1989), at p. 8

<sup>28</sup> *Ibid.*, at p. 8

<sup>29</sup> M. McConville, "Development of Empirical Research Techniques and Theory" in M. McConville & W. Hong Chui, eds. *Research Methods for Law* (Edinburgh, UK: Edinburgh University Press, 2007) 207 at 211

<sup>30</sup> R. Krauss, "The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments" (2009) 6 Seton Hall Circuit Review 1 at 26

<sup>31</sup> A. Flynn, "We've changed our minds: What do you do with a Failed Plea Bargain? A Reflection on *R v. Nixon*", (June, 2012) 32 W.R.L.S.I. 123, at p. 130, referring to J. Bishop, *Prosecution Without Trial* (Sydney: Butterworths, 1989); P. Byrne, "Criminal Law and Justice: Plea Bargaining" (1988) 62:10 Austl L J. 799; A. Freiberg & R. Seifman, "Plea Bargaining in Victoria: The Role of Counsel" (2001) 25:2 Crim LJ 64; P. Utz, *Settling the Facts: Discretion and Negotiation in Criminal Courts* (Toronto: Lexington Books, 1978)

<sup>32</sup> M. McConville, "Development of Empirical Research Techniques and Theory" in M. McConville & W. Hong Chui, eds. *Research Methods for Law* (Edinburgh, UK: Edinburgh University Press, 2007) 207 at 213

Other scholars have looked at the benefits of plea bargaining, such as offering an efficient method of justice, by saying that "plea bargaining is considered to offer benefits to those directly involved in the case, particularly the accused, who are likely to receive some form of concession in exchange of a guilty plea, whether the concession related to the nature or number of charges, or the sentence imposed".<sup>33</sup> It also been said to reduce legal costs for the accused, and as said by Markus Dubber, works to "strengthen the defendant's position by permitting her to shape the proceedings that will settle her fate."<sup>34</sup> Victims may also benefit from the process as the matter is resolved quickly and without the need to give evidence or having to attend court.<sup>35</sup> Mather also argues that an acknowledgement of guilt by the accused can even "advance the emotional restoration of the victim(s)."<sup>36</sup>

*Plea bargaining: a shady practice*

Generally, "plea bargaining is a practice held in a low esteem by the general public"<sup>37</sup>. It is perceived this way because discussions are conducted behind closed doors and away from public or judicial scrutiny<sup>38</sup>. As Douglass maintains, "plea negotiations have too long been regarded as a shady, backroom processes (...) these misconceptions stem from a lack of knowledge and poor representation of the fact to the public."<sup>39</sup> Thus, as identified by the Law Reform Commission of Canada, plea bargaining can be seen to "pervert the criminal justice process... and to diminish its stature in the eyes of the public".<sup>40 41</sup>

The author Burns also advances that "popular critiques of plea agreements zero in on their lack of openness and transparency, and bemoan the death of the trial".<sup>42</sup> This absence of transparency is consistently recognized as one of the major weaknesses of the process; "few practices in the system of criminal justice create a greater sense of unease and suspicion than the negotiated plea of guilty"<sup>43</sup>. As a consequence of this so-called lack of transparency, plea bargaining has developed a certain reputation, "smacking of wheeling and dealing"<sup>44</sup>, which is fuelled by a "limited public understanding of

<sup>33</sup> A. Flynn, "We've changed our minds: What do you do with a Failed Plea Bargain? A Reflection on *R v. Nixon*", (June, 2012) 32 W.R.L.S.I. 123, at p. 5

<sup>34</sup> M. D. Dubber, "American Plea Bargains, German Law Judges, and the Crisis of Criminal Procedure" (1997) 49 Stan L. Rev. 547 at 604

<sup>35</sup> A. Flynn, "We've changed our minds: What do you do with a Failed Plea Bargain? A Reflection on *R v. Nixon*", (June, 2012) 32 W.R.L.S.I. 123, at p. 5

<sup>36</sup> L. M. Mather, *Plea Bargaining or Trial? The Process of Criminal Case Disposition* (Toronto: Lexington Books, 1979)

<sup>37</sup> S. Cohen & A. Doob, "Public Attitudes to Plea Bargaining" (1989-1990) 32 Crim. L.Q. 85 at 91

<sup>38</sup> O. E. Fitzgerald, *The Guilty Plea and Summary Justice: A Guide for Practitioners* (Toronto: Carswell, 1990); W. T. Pizzi, *Trials Without Truth: Why Our System of Criminal Trials Has Become an Expensive Failure and What We Need to Do to Rebuild It* (New York: New York University Press, 1999)

<sup>39</sup> J. J. Douglass, *Ethical Issues in Prosecution* (Houston: National College of District Attorneys, 1988) at 267

<sup>40</sup> Law Reform Commission of Canada, *Working Paper no 60: Plea Discussions and Agreements* (Ottawa: Canadian Law Reform Commission, 1989) at 4

<sup>41</sup> A. Flynn, "We've changed our minds: What do you do with a Failed Plea Bargain? A Reflection on *R v. Nixon*", (June, 2012) 32 W.R.L.S.I. 123, at p.6

<sup>42</sup> A. Linds, "A Deal Breaker: Prosecutorial Discretion to Repudiate Plea Agreements after *R v. Nixon*" (2012), 38 Queen's L.J. 295, at p.305 referring to R. P. Burns, *The Death of the American Trial* (Chicago: University of Chicago Press, 2009) at p. 98

<sup>43</sup> United States' President's Commission on Law Enforcement and Administration of Justice, *Taskforce Report on Courts* (Washington, DC: Washington Printing Office, 1967) at 9

<sup>44</sup> P. H. Solomon, *Criminal Justice Policy: From Research to Reform* (Toronto: Butterworths, 1983) at 44

discussions beyond the representations of dramatized television shows such as *Law and Order*<sup>45</sup>.

*Privileged and Confidential*

It would be important to mention that any resolution discussions between Crown and defence counsel are privileged and will not be admissible at trial<sup>46</sup>. This privilege may be set aside where it is waived by the client, frequently in the context of a subsequent attempt to overturn a guilty plea based on ineffective assistance of counsel<sup>47</sup>. Counsel has to be particularly aware of the duty to the client to maintain confidentiality. During most if not all plea discussions, counsel is required to give the Crown information obtained from the client in confidence. Most rules governing confidentiality prohibit disclosure unless expressly or impliedly authorized by the client.<sup>48</sup> Where counsel has instructions to participate in plea discussions, some disclosure may be impliedly permitted, but a safer option is to obtain the client's express permission to provide information to the Crown, particularly sensitive information.

Counsel must also take care not to mislead the Crown during plea discussions. In addition to being a breach of ethical rules, knowingly misleading the Crown about the circumstances, could irreparably harm counsel's reputation with the Crown office and result in the repudiation of the plea agreement.

Generally, a resolution agreement will be considered binding on the counsel. The Martin Committee Report recommended that repudiation only be permitted where, amongst other factors, the agreement would bring the administration of justice into disrepute.<sup>49</sup> A Crown's repudiation may be reviewed under s. 7 of the *Charter*<sup>50</sup> and a remedy ordered where there has been repudiation of a resolution agreement and some "articulable or tangible" unfairness to the individual accused and/or the integrity of the justice system as a result<sup>51</sup>. This situation has changed since the *R v. Nixon*<sup>52</sup> decision. That topic is not going to be addressed in this essay.

Defence counsel is also ethically obligated to honour a resolution agreement.<sup>53</sup> However, it is recognized that if a client changes his mind about plea or sentence, his defence counsel has in those circumstances no choice but to follow the client's instructions.<sup>54</sup> Although the number of scope of the exceptions<sup>55</sup> may seem to diminish the

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<sup>45</sup> A. Flynn, "We've changed our minds: What do you do with a Failed Plea Bargain? A Reflection on *R v. Nixon*", (June, 2012) Review of Legal and Social Issues, 32 W.R.L.S.I. 123, at p. 6

<sup>46</sup> *R v. Bernardo* (1994), O.J. No. 1718; *R v. Delorme* (2005) NWTSC 34; *R v. Griffin* (2009), ABQB 696

<sup>47</sup> *Ibid*

<sup>48</sup> As example, this can be found in the Nova Scotia Barristers Society, Legal Ethics Handbook, at Chapter 5

<sup>49</sup> Crown policy manuals generally permit repudiation of a plea agreement in unusual or exceptional circumstances, as for example in the Ontario Ministry of the Attorney General, Crown Policy Manual, "Resolution Discussions"; the Nova Scotia Public Prosecution Service, Crown Policy Manual; and, the Public Prosecution Service of Canada, Federal Prosecution Deskbook.

<sup>50</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11

<sup>51</sup> *R v. R.N.M.*, [2006], 83 O.R. (3<sup>rd</sup>) 349 (OSCI)

<sup>52</sup> *R v. Nixon*, [2011] 2 SCR 566

<sup>53</sup> The comments in the *Martin Committee Report* were directed at "counsel" in general and not limited to the Crown; further counsel's general ethical duties of candour in dealing with opposing counsel would apply.

<sup>54</sup> M. Proulx and D. Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin, 2001), at p. 468-469

<sup>55</sup> Such exceptions and obligations on confidentiality include express or implied client authorization, required disclosure to the law society and court ordered or other lawful demand to disclosure (Model Code 2.03(1); and

importance of confidentiality and privilege, defence counsel has a duty to be vigilant in protecting client's information. Any discussion held at a casual coffee shop or elevator talk is a breach. Care must be taken into referrals to medical doctors and others who have independent obligations or abilities to breach confidence.

## 2. ETHICS IN PLEA BARGAINING

The ethical dilemma of defence counsel during plea bargaining is not new but has been recognized as one of the biggest challenges to arise in defence practice.<sup>56</sup> As an officer of the court, defence counsel "bear a duty to further the proper administration of justice"<sup>57</sup>, which includes a duty not to "knowingly mislead the court and hence unacceptably subvert the truth-finding function of the criminal justice process" by abetting a guilty client's wish to evade justice.<sup>58</sup> The authors Proulx and Layton refer to the case of *Rondel v. Worsley*, in which it was said that:

Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the Court concerned in the administration of justice, he has an overriding duty to the Court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the Court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession.<sup>59</sup>

Little guidance is offered by provincial bar associations concerning ethics in plea bargaining, with exception of the Canadian Bar Association. Defence counsel is left most of the time with his discretion in resolution of the proper ethics.

### *Canadian Bar Association Code of Professional Conduct (CBA Code)*

Canadian lawyers are regulated provincially and territorially. As a result, fourteen governing bodies, including two in Quebec, are empowered to enact rules and codes of professional conduct for ethical guidance for lawyers.

The Canadian Bar Association Code of Professional Conduct (CBA Code) is a model code of conduct adopted by some jurisdictions in Canada but more often used as a reference for interpretation and amendment of provincial codes. More specifically for the

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also public safety/future harm exception (Model Code, 2.03(3); *Smith v. Jones* [1999] 1 S.C.R. 455; obtain ethical advice (Model Code, 2.03(6)); lawyer's own defence (Model Code, 2.03(4)); and fee collection (Model Code, 2.03(5))

<sup>56</sup> C. C. Savage, "The Duties and Conduct of Crown and Defence Counsel in a Criminal Trial" (1958) 1:2 C.L.Q. 164; G. A. Martin, "The Role and Responsibility of the Defence Advocate" (1969) 12:4 C.L.Q. 376 [Martin, "Role and Responsibility"]; M. Proulx and D. Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin, 2001); M. Code, "Ethics and Criminal Law Practice" in A. Woolley et al, eds., *Lawyers' Ethics and Professional Regulation* (Toronto: LexisNexis, 2008) at 395.; J. L.J. Edwards, *Walking the Tightrope of Justice*, prepared for the *Royal Commission on the Donald Marshall, Jr. Prosecution* (Halifax: Province of Nova Scotia, 1989), at p. 77

<sup>57</sup> A. Linds, "A Deal Breaker: Prosecutorial Discretion to Repudiate Plea Agreements after *R v. Nixon*" (2012), 38 *Queen's L.J.* 295, at p.318

<sup>58</sup> M. Proulx and D. Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin, 2001), at p. 36-37 which also refers to *Rondel v. Worsley*, [1967] 3 All E.R.993 at 998:

<sup>59</sup> *Rondel v. Worsley*, [1969] 1 A.C. 191 at p. 227

purpose of this essay, Commentary 13 to Chapter IX of the CBA Code deals specifically with "Agreement on Guilty Plea":

13. Where, following the investigation,

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

(b) the client is prepared to admit the necessary factual and mental elements,<sup>60</sup>

(c) the lawyer fully advises the client of the implications and possible consequences of a guilty plea and that the matter of sentence is solely in the discretion of the trial judge, and

(d) the client instructs the lawyer, preferably in writing, it is proper for the lawyer to discuss and agree tentatively with the prosecutor to enter a plea of guilty on behalf of the client to the offence charged or to a lesser or included offence or to another offence appropriate to the admissions, and also on a disposition or sentence to be proposed to the court. The public interest and the client's interests must not, however, be compromised by agreeing to a guilty plea.<sup>61</sup>

*Tentative resolution*

Strict application of this rule would prohibit counsel from engaging in a tentative plea discussion; a clear difficulty in applying it in practice. The said CBA Rule referred to earlier permits discussions with the prosecutor about possible resolution only where the client has been fully advised, and admits the offence. The first requirement puts the defence lawyer in an impossible "Catch 22". A lawyer cannot "fully advise" the client of the implications and possible consequences of a guilty plea without input from the prosecutors as to penalty, but cannot get input without first fully advising his or her client.

The second requirement puts the client in the position of having to choose whether to make admissions without a clear understanding of his or her jeopardy. A good portion of informed clients may be reluctant to make those admissions to their lawyer, thereby limiting the lawyer's ability to defend, without knowing the prosecutor's position on charges and penalty.

Certain jurisdictions such as in Ontario and Nova Scotia either implicitly or explicitly permit conditional plea discussions<sup>62</sup>. Others contain the same language as the model CBA Code.<sup>63</sup> In the jurisdiction where conditional plea discussions are permitted, there are restrictions, either explicitly stated in the plea agreement rule or which apply by

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<sup>60</sup> Model of Professional Responsibility of the American Bar Association (Chicago), Ethical Considerations 7.7 (ABA-MC EC 7.7); B.C. 8(20); N.B. 8-C.15; N.S. C-10.8; Ont. 4.01(5)

<sup>61</sup> Law Society of Upper Canada, Rules of Professional Conduct, Rule 4.01(9)

<sup>62</sup> Law Society Barristers' Society, Legal Ethics Handbook, Chapter 10, Rule 10.8, states as follows: "It is not improper for a defence lawyer to discuss a guilty plea with the prosecutor and where..."; Rule 4.01(8) of the Law Society of Upper Canada, Rules of Professional Conduct, states as follows: "Before a charge is laid or at any time after a charge is laid, a lawyer for an accused or potential accused may discuss with the prosecutor the possible disposition of the case, unless the client instructs otherwise"; The Law Society of Manitoba, Code of Professional Conduct, Rule 4.01(7) & (8), contains the same language as the Ontario rule; The Codes of Professional Conduct of the Law Society of Alberta and British Columbia do not preclude conditional or tentative plea discussions.

<sup>63</sup> Law Society of New Brunswick, Code of Professional Conduct, Chapter 8, Commentary 15; The Law Society of Newfoundland and Labrador, Code of Professional Conduct, Chapter 9, Commentary 12; The Law Society of Saskatchewan, Chapter 9, Commentary 12; The Law Societies of Nunavut and the North West Territories adopt the CBA Code of Professional Conduct in its entirety.

operation of other rules of ethics. In the Ontario rule, for example, the lawyer is permitted to have tentative plea discussions "unless the client instructs otherwise".<sup>64</sup>

The various codes of conduct require that the lawyer obtain instructions prior to entering into a plea agreement and recommend that those instructions be in writing. Canadian Courts have also confirmed that written instructions are preferable. As was stated by Justice Trotter in *R v. Valencia*, when assessing a complaint of ineffective assistance of counsel:

As acknowledged in the affidavit of trial counsel, it was regrettable that written instructions were not obtained from Mr. Valencia concerning the guilty plea: (referring to Michel Proulx and David Layton<sup>65</sup>), While written instructions are not mandatory under the Rules of Professional Conduct of the Law Society of Upper Canada, had written instructions been obtained from Mr. Valencia, the issues on this appeal would have been much easier to resolve. Indeed, there may have been no appeal at all.<sup>66</sup>

*Has the client been fully advised?*

The "plea agreement" rule in the CBA code obligates counsel to fully advise the client prior to entering into a plea agreement. Many of the provincial codes of conduct that contain a specific plea agreement rule, also contain this requirement. Even where it is not included as a specific duty, the obligation to advise the client prior to the client deciding whether to enter into a plea agreement would be seen as a fundamental duty of a lawyer. This specific advice requirement of the CBA code includes the duty to advise the client about his success at trial is unlikely and the full implications of a guilty plea.

The advice might not be fully understood because of the client's limitations. For example, the client may be uneducated or unsophisticated, or may have intellectual, psychiatric or emotional challenges, or may speak a different language. An interpreter could be necessary or of assistance or even an expert opinion as to whether the client is capable of understanding the advice. In other cases, such as when dealing with an experienced participant in the criminal justice system, the client may think that the advice is unnecessary.

Of course, there is always an ongoing obligation of counsel to keep the client informed which means that the client must be advised of all plea offers, even those that counsel feel are unreasonable and will be rejected.<sup>67</sup> As noted by Layton and Proulx, there are a number of factors which must be considered by defence counsel and discussed with their client in order to meet the duty imposed by the rule.<sup>68</sup> They propose the following comprehensive list:

1. The merits of the case, including the strengths and weaknesses of any available defences;
2. The likelihood of a conviction following trial;

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<sup>64</sup> The Law Society of Upper Canada, Rules of Professional Conduct, 2000, Rule 4.01(8). This specific restriction may be unnecessary as it would be a breach of other ethical rules for a lawyer to act contrary to a client's express instructions.

<sup>65</sup> M. Proulx and D. Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin, 2001), at p. 466-467

<sup>66</sup> *R v. Valencia*, [2008] O.J. No. 3692 at para. 23

<sup>67</sup> The general duty of competency and quality of service include a duty to keep the client informed, as for example chapter II, commentary 7 of the CBA model code. As well, many codes of conduct impose specific obligations on counsel to advise client of all settlement offers. Another example is found in Rule 4.01(1) of the Law Society of Alberta, Code of Professional Conduct.

<sup>68</sup> M. Proulx and D. Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin, 2001), at pp. 432-434

3. The consequences to the client if he or she loses after trial, including the maximum sentence, the probable range of sentences and any relevant impact on personal life (for example, work, family, driving international travel, firearms use);

4. Any adverse impact associated with the trial process where guilt is disputed, including publicity and the stress and unpleasantness that may flow from a decision to testify;

5. The impact that a guilty plea has upon the trial process, including the waiver of many fundamental constitutional rights;

6. The factual basis for a guilty plea, and the sentencing process in instances where disputed aggravating or mitigating facts are litigated by the parties;

7. The benefits that might accompany a guilty plea, including concessions made by the Crown under a proposed plea agreement but also pertaining to speedier resolution, stress reduction, and minimized cost to the client;

8. The plea of guilty as a beneficial factor on sentencing, including the heightened mitigation that often accompanies an early plea;

9. The possible methods of indicating remorse, and commencing the process of rehabilitation, as well as any associated disadvantages, responsibilities or benefits;

10. The impact of the accused's prior criminal record and any other personal circumstances (family, work, character, drug dependency) on the sentencing outcome;

11. The nature and range of penalties attendant upon a guilty plea, including any mandatory minimum penalty and the maximum possible penalty;

12. If the circumstances warrant, parole and probation possibilities, long-term and dangerous offender designations, conditional sentences and property forfeiture;

13. Any reasonably anticipated collateral consequences of a guilty plea, such as the impact of the plea on personal life, civil litigation, criminal charges in foreign jurisdiction, and deportation proceedings;

14. The judge's power to ignore a joint submission in some circumstances;

15. If the identity of the judge hearing the case is known, the judge's sentencing predilections;

16. The precise process involved in entering a plea, including the possibility that the judge will embark upon a plea inquiry; and

17. The client's complete freedom of choice regarding the plea decision.

#### *Duty to investigate*

Most ethical rules governing plea negotiation include a requirement that counsel "investigate".<sup>69</sup>

This duty relates to the more general duty of competence. Simply put, the duty to investigate requires a lawyer to discover and understand the factual and legal aspects of a case before advising a client. This duty is of fundamental importance to the other ethical duties at play in plea negotiation. A lawyer cannot advise his client whether an acquittal is likely or whether a potential plea agreement is beneficial, without fully understanding the facts and potential defences. A lawyer cannot effectively negotiate with the prosecutor without a full understanding of the factual and legal strengths and weaknesses of the case.

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<sup>69</sup> This requirement is important to both plea negotiation and conditional plea discussions; however, the level of investigation prior to tentative or preliminary plea discussions may be less rigorous.

How much investigation is enough? In the view of defence counsel and jurist G. Arthur Martin, the level of investigation required before urging a client to plead guilty would be the same as when preparing for a trial.<sup>70</sup> Others suggest that it "should reflect the degree of preparation normally expected of competent counsel"<sup>71</sup> There is no easy answer as it depends on the case. Certainly, more will be required than simply the client's acknowledgement of guilt. The client may not understand the legal and factual elements of the offence, may not understand the potential defences, may not be aware of evidentiary issues that impact on the ability of the Crown to prove its case and may have motives for accepting guilty that do not relate to actual guilt or innocence.

*Admission of guilt – or admission of necessary factual and mental elements*

As mentioned earlier in the CBA Model Code, before entering into any tentative plea discussions with the Crown, and also in determining whether the parties can negotiate and agree to an actual plea agreement, the admission of guilt must be established. Specifically, the Model Code contains a provision similar to s. 606(1.1) of the Criminal Code placing an ethical obligation on counsel before entering into a plea agreement, to make investigations and advise the client of the verdict prospects, in addition to ensuring an understanding of the s. 606(1.1) CCC elements.<sup>72</sup> This is also important in determining whether defence counsel can assist the client in entering the guilty plea in court.

Assuming that tentative or conditional plea discussions are permissible under the CBA Model Code and that the client has not specifically instructed the lawyer otherwise, counsel would be permitted to have discussions with the prosecutor about possible resolution even where the client denies guilt. In some circumstances such as where there is a strong likelihood of conviction, counsel will not be providing effective assistance if alternatives to trial are not explored. Where the client denies guilt, it would be prudent to obtain the client's instructions to participate in plea discussions with the Crown.

On that specific point, our criminal justice system does have a series of "safety valves meant to guard against the danger of unreliable guilty pleas"<sup>73</sup>. As an example, Rule 4.01(1) of the Ontario Rule of Professional Conduct intends to "cleanse plea bargaining of false guilty pleas"<sup>74</sup>, by requiring the client to admit voluntarily to all necessary factual and mental elements of the offence<sup>75</sup>. Section 606(1) of the Criminal Code empowers judges to perform plea comprehension hearings<sup>76</sup>. Section 606(1.1) requires a court to be satisfied of the voluntariness of the plea and the accused's understanding of the plea's nature and consequences and the sentencing court's discretion. Most courts rely on counsel to have canvassed that provision prior to proceeding.

These measures intend to make it "appropriate for defence counsel to form the opinion that their clients have committed the alleged offences and accepted responsibility when

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<sup>70</sup> G. Arthur Martin, "The Role and Responsibility of the Defence Advocate", (1970) 12 C.L.Q. 376, at p. 386

<sup>71</sup> M. Proulx and D. Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin, 2001), at p. 430

<sup>72</sup> CBA Model Code, 4.01(8)

<sup>73</sup> A. Linds, "A Deal Breaker: Prosecutorial Discretion to Repudiate Plea Agreements after R v. Nixon" (2012), 38 Queen's L.J. 295, at p. 319

<sup>74</sup> *Ibid.*, at p. 319

<sup>75</sup> Law Society of Upper Canada, Rules of Professional Conduct, R. 4.01(9)

<sup>76</sup> *Criminal Code*, RSC 1985, c C-46 s 606(1.1)

they accept a plea bargain".<sup>77</sup> In other words, once an accused indicated their wish to accept a plea bargain, the accused has provided their lawyer with "irresistible knowledge" of actual guilt<sup>78</sup>.

However, it may not be wise to regard all admissions in plea bargaining as admissions of guilt, and all clients who accept plea agreements in these contexts as being "guilty clients". For one, a client's "admission may be made as a means of expressing moral guilt, despite the absence of legal liability"<sup>79</sup>. Similarly, a client's conduct, however unsavoury, may hide by legal defences, such as self-defence, duress, mistake of fact, necessity, or mental health problem or disorder. G. Arthur Martin said while addressing the Advocates' Society in 1969 that:

An admission of facts which constitutes guilt to counsel does not preclude counsel from testing the evidence submitted by the prosecution and from submitting that such evidence does not establish the guilt of the defendant beyond a reasonable doubt. Such an admission by the client, however, imposes ethical restrictions on defence counsel with respect to the manner in which he is entitled to conduct the defence of his client.<sup>80</sup>

Moreover, and most importantly, a client's admission of guilt during plea bargaining may be unreliable. What defence counsel need of any client, according to Michael Proulx and David Layton, is a "reliable, unequivocal and unrecanted admission"<sup>81</sup>. However, since a plea bargain depends on a client's admission of guilt, "some clients falsely confess in the belief that the admission will put an early end to the unpleasant stress and strain of the criminal process"<sup>82</sup>.

However, the accused need not expressly confess to the defence counsel, and due to embarrassment or for other reasons, may decline to do so. As long as the client does not maintain his innocence, and understands the impact of the public guilty plea, there is nothing preventing counsel from going ahead with the sentencing.

In some cases, a client who previously has denied guilt sometimes changes his mind if presented with an attractive plea offer. Care must be taken in this situation to ensure that the client has been coerced into changing his mind. Canadian courts have recognized that inducements are an inherent part of plea agreements and, standing alone, do not render a subsequent plea involuntary.<sup>83</sup> However, there is also recognition that the system can be

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<sup>77</sup> A. Linds, "A Deal Breaker: Prosecutorial Discretion to Repudiate Plea Agreements after R v. Nixon" (2012), 38 Queen's L.J. 295, at p. 320

<sup>78</sup> M. Proulx and D. Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin, 2001), at p. 40

<sup>79</sup> M. Proulx and D. Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin, 2001), at p. 45

<sup>80</sup> G. Arthur Martin, "The Role and Responsibility of the Defence Advocate" (1969) 12:4 Crim LQ 376 at p. 386. This was further elaborated in the Rules of Professional Conduct. Ontario, Law Society of Upper Canada, Rules of Professional Conduct, R. 4.01:

Admissions made by the accused to a lawyer may impose strict limitations on the conduct of the defence, and the accused should be made aware of this (...) The lawyer is entitled to test the evidence given by each individual witness for the prosecution and argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged, but the lawyer should go no further than that.

<sup>81</sup> M. Proulx and D. Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin, 2001), at p. 40, 44

<sup>82</sup> *Ibid.*, at p.47

<sup>83</sup> *R v. Valencia* [2008] O.J. No. 3692 and *R v. King*, [2004] O.J. No. 717 at para. 4.

"coercive and abusive"<sup>84</sup>. Inducements to plead guilty, such as lower penalty, withdrawal of charges against co-accused and reduction in charges, can equally be viewed as threats against going to trial. Clients who are denied bail frequently are offered penalties that would be less onerous than the time spent in custody awaiting trial.

Because of this, defence counsel has no choice but to be vigilant where a client changes his mind after learning of a plea offer. Depending on the particular case, there may be warning signs that the client is being improperly influenced by the inducement of the plea agreement or the threat of trial, particularly where the Crown case is not strong or where there are available defences. Counsel may wish to attempt to persuade the client to go to trial in some circumstances.

In Canada, the Rules of Professional Conduct for lawyers do not provide a clear answer to this dilemma<sup>85</sup>. For example in Québec, the Code of Ethics of Advocates does not even mention guilty plea proceedings. On the other hand, in Ontario, Rule 4.01(8) of the Rules of Professional Conduct entitled "Agreement on Guilty Plea" solely addresses the specific time when counsel can ethically initiate and complete a plea agreement with the prosecutor. One of the conditions mentioned is that "(c) the client voluntarily is prepared to admit the necessary factual and mental elements of the offence charged".<sup>86</sup> However, since the client is, in fact, quite prepared to make such a public admission, this ethical obligation does "not necessarily prohibit counsel from representing their client even assuming this obligation extends to the in-court guilty plea procedure as it does, for example, in British Columbia and Alberta".<sup>87</sup>

On the other hand, all codes of professional conduct that address plea agreements specifically require some form of admission from the client of the elements of the offence.<sup>88</sup> The CBA Model Code requires that the client "be prepared" to admit the factual and legal element of the offence. Other codes of conduct, such as the Nova Scotia Ethics Handbook require specifically that the client "*admits* the necessary factual and mental elements"<sup>89</sup>. The language contained in the CBA Model Code and those provincial codes that adopt it may permit counsel to continue to negotiate and finalize a plea agreement where the client continues to deny guilt as long as the client is prepared to admit guilt in court.

<sup>84</sup> As per comments of Justice Rosenberg as reported in K. Makin, "Top jurist urges review of "coercive" plea bargaining system", *Globe and Mail* (7 March 2011)

<sup>85</sup> D. Tanovich, "Taillefer: Disclosure, Guilty Pleas and Ethics" (2004)17 C.R. (6<sup>th</sup>) 149, at p. 153

<sup>86</sup> Ontario Rules of Professional Conduct under Rule 4: Relationship to the Administration of Justice, Rule 4.01(8), copy of which can be found at [www.lsuc.on.ca/WorkArea/Download/Asset.aspx?id=2147489379](http://www.lsuc.on.ca/WorkArea/Download/Asset.aspx?id=2147489379)

<sup>87</sup> D. Tanovich, "Taillefer: Disclosure, Guilty Pleas and Ethics" (2004)17 C.R. (6<sup>th</sup>) 149, at p. 153, referring to M. Proulx and D. Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2001) at 442-445; and also G. Mackenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (Toronto: Carswell, 2001) at 7-22

<sup>88</sup> The Law Society of Upper Canada, Rules of Professional Conduct, Rule 4, 4.01(8), 4.01(9); Law Society of New Brunswick, Code of Professional Conduct, 2004, Ch. 8, Commentary 15; The Law Society of Newfoundland and Labrador, Code of Professional Conduct, 1999, Ch. 9, Commentary 12; The Law Society of Saskatchewan, Code of Professional Conduct, 2012, Ch.4.01(7) & 4.01(8); The Nova Scotia Barrister's Society, Legal Ethics Handbook, 2011, Rule 10.8; The Law Society of Alberta, Code of Conduct, Chapter 4.01(8); The Law Society of British Columbia, Code of Professional Conduct for British Columbia, Chapter 5, 5.1-7, 5.1-8; The Law Society of Manitoba, Code of Professional Conduct, Chapter 4, 4.01(7); The Law Society of Nunavut, North West Territories, Yukon and Prince Edward Island all adopt the CBA Code of Professional Conduct in its entirety.

<sup>89</sup> Nova Scotia Barrister's Society: Legal Ethics Handbook, Rule 10.8(c )

### 3. ETHICS OF REPRESENTING AN ACCUSED WHO MAINTAINS HIS OR HER INNOCENCE

There is a more subtle but nonetheless important issue that is raised during the plea bargaining process. Can a defence counsel ethically represent a client who wishes to plead guilty but maintains, at least privately, their innocence?<sup>90</sup> Unlike some of the other difficult ethical issues in criminal law, this issue arises frequently and in all manner of offences. With the enactment of s. 606(1.1) of the Criminal Code in 2002, it is clear that counsel cannot participate in the entry of a guilty plea and speak to sentence where the client maintains his innocence.

A guilty plea is not a statement in which the accused "recognizes the probability of conviction: it is a judicial confession to having *in fact* committed the acts forming the basis of the charges."<sup>91</sup> How far would counsel go in letting a client say that he admits facts? Mike McConville says that "where the defendant is privately denying having committed the offences then, as counsel knows, the client is being permitted to tell the court something which the client says is false, and which counsel believes is or might be false."<sup>92</sup> Such statement brings to question how far ethically is it acceptable for counsel to accept that an innocent man pleads guilty.

Another central problem raised in plea bargaining is when the accused claims his innocence but eventually enters a guilty plea. The problem of inconsistent pleaders is not unique to plea bargaining<sup>93</sup>. Innocent accused may choose to plead guilty for a multiple reasons, such as "to protect a third party, to get the matter over with, or out of inner feelings of guilt unconnected with the alleged crime."<sup>94</sup> But as said by Mike McConville, it is "plea bargaining in general and the sentence discount in particular which is the greatest cause of inconsistent pleading"<sup>95</sup>. In the increasing amount of mandatory minimums in Canada, the threat of a higher sentence after trial can easily become one of the most significant matter in which any defendant now has to take into account.<sup>96</sup> As research has shown, the sentence discount as laid-out by Crown sometimes has sometimes "put defence counsel in the position of persuading a client who maintains innocence in the face of an apparently strong prosecution case to plead guilty in order to avoid the likelihood of a more severe sentence."<sup>97</sup>

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<sup>90</sup> Attorney General's Advisory Committee (Ontario) on Charge Screening, Disclosure and Resolution Discussion (Toronto: Queen's Printer, 1993) at p. 278, which notes that "one example of the marked differences in the American practice is the United States Supreme Court's holding that criminal defendants can enter a negotiated plea or guilty even while continuing to protest their innocence..."

<sup>91</sup> M. McConville, "Plea Bargaining: Ethics and Politics" (1998) 25:4 Journal of Law and Society 562 at p. 568

<sup>92</sup> Ibid, at p. 568

<sup>93</sup> Ibid, at p. 566

<sup>94</sup> Ibid, at p. 566

<sup>95</sup> Ibid, at p. 568

<sup>96</sup> M. McConville, "Plea Bargaining: Ethics and Politics" (1998) 25:4 Journal of Law and Society 562 at p. 566-567

<sup>97</sup> Ibid, at p. 567

There are many reasons why a client has been prepared to plead guilty while maintaining innocence: the cost of going to trial, including financial consequences, risks of greater penalty and publicity, potential consequences to co-accused and witnesses, may be too great when compared with the benefits of plea, including better sentence, charge reduction, agreement to withdraw against others, etc. The client may not be actually innocent but simply unwilling to admit to difficult facts or unwilling to accept that his actions make him guilty in law; there may be mental health issues or, there may be external pressure on him to accept guilt.

As suggested by Bowers, the pressure to plead guilty when innocent is probably even greater with minor offences because the "process costs far outweigh the costs of going to trial".<sup>98</sup> Brockman adds by saying that it is less likely that the "truth behind these low-stakes pleas would come to anyone's attention and therefore we are less likely to know the extent to which they take place."<sup>99</sup> Other authors have suggested that the "innocent accused might be more averse to risk and therefore more prone to plead guilty when presented with an enticing offer".<sup>100</sup>

The ethics may not preclude counsel's participation in the dangerous road where the Crown's case is so compelling that counsel believes that his or her client is, in fact, guilty. As Proulx and Layton observe, "if anything, it is counsel who is likely being misled by the client"<sup>101</sup> and may possibly preclude representation. However, as the authors point out, "false contrition is in itself misleading and unacceptable..."<sup>102</sup> and may possibly preclude representation. They conclude that it is ethically acceptable to represent an accused who confidentially maintains its innocence<sup>103</sup> provided that counsel is satisfied that "there is strong factual record for the plea and that counsel do not suggest, in court, that the plea is evidence of remorse".<sup>104</sup>

This specific ethical issue has been addressed in England<sup>105</sup> and in the United States. In both countries, it has been concluded that counsel are not prohibited from representing a client who maintains its innocence on a guilty plea<sup>106</sup>. Since very little guidance is offered to counsel in terms of ethics, as advanced by Professor David Tanovich, "it is time for the profession and our courts to squarely effect of stimulating reform of the systemic problems that have been largely responsible for the creation of this ethical dilemma"<sup>107</sup>.

#### 4. PLEADING A CLIENT GUILTY FOR CONVENIENCE

<sup>98</sup> J. Brockman, "An Offer You Can't Refuse: Pleading Guilty When Innocent", (2010) 56 C.L.Q. 116, at p. 122 referring to J. Bowers, "Punishing the Innocent" (2008) 156 U. Penn.L.Rev. 1117 at p. 1122

<sup>99</sup> Ibid, at p. 122

<sup>100</sup> J. Brockman, "An Offer You Can't Refuse: Pleading Guilty When Innocent", (2010) 56 C.L.Q. 116, at p. 122 referring to R. E. Scott, W. J. Stuntz, "A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants" (1992) 101 Yale L.J. 2011

<sup>101</sup> M. Proulx, D.Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2001) at 443

<sup>102</sup> Ibid, at 445; also R v. K.(S.) (1995), 99 C.C.C. (3d) 376 (Ont. C.A.) at 382

<sup>103</sup> M. Proulx, D.Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2001) at 452-453

<sup>104</sup> D. Tanovich, "Taillefer: Disclosure, Guilty Pleas and Ethics" 17 C.R. (6<sup>th</sup>) 149, at p. 154, referring to M. Proulx, D.Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2001) at p. 452-453

<sup>105</sup> R v. Hebert (1992), 94 Cr.Appl. R. 230 (C.A.); M. Proulx, D.Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2001) at p. 445-447

<sup>106</sup> D. Tanovich, "Taillefer: Disclosure, Guilty Pleas and Ethics" 17 C.R. (6<sup>th</sup>) 149, at p. 155

<sup>107</sup> Ibid, at p. 155

As McCoy notes, plea bargaining widens the "net of social control and is sometimes used by prosecutors to deal with weak cases. Thus, the old assumption that heavy caseloads causes plea bargaining "probably misunderstands the direction of causation in the modern era. Perhaps plea bargaining causes high caseload, not the other way around."<sup>108</sup> McCoy adds, "like a drug, plea bargaining spread into trial courts in the United States, and court professionals became addicted to it. The progression of plea bargaining has now produced a typical state of affairs so brutal that a very steep trial penalty is regarded as ethical."<sup>109</sup> Such an approach will dangerously guarantee that the innocent will be enticed to plead guilty.<sup>110</sup> As such, Joan Brockman says that "weak cases should be screened out of the system, not bartered to a guilty plea."<sup>111</sup> Any system that allows prosecutors to force bargains because they have weak cases or no time to develop them will result in the innocent accused pleading guilty and perhaps even cases where unfairness to the guilty who plead guilty"<sup>112</sup>.

But, if lenient offers from the Crown have no common measure with the seriousness of the offence, is it possible that they induce an accused to plead guilty to avoid, at all costs, the risk of receiving a much more severe sentence in the event of conviction after trial? The temptation to make this type of offer may arise in cases where the evidence is rather weak or when the Crown prosecutor is faced with an overloaded docket.

The accused will often not appreciate why defence counsel can't assist them where the guilty plea is for convenience, but the proper administration of justice should never be sacrificed in the interests of expediency. As advanced by G.A. Martin:

"(...) under no circumstances should Crown Counsel agree to a proposed resolution simply as a matter of expediency. Such a course of action can compromise the interests of justice in many ways. Resolution discussions outcomes based primarily upon a desire by the prosecution to be done with a case tend to be too lenient, thereby undermining the important criminal law objectives of denunciation and deterrence"<sup>113</sup>.

## 5. TO PLEAD OR NOT TO PLEAD? THAT IS THE ULTIMATE QUESTION?

Even after following all of the recommended elements under the CBA Model Code, or disposition under various provinces, one remaining area of ethical concern for counsel exists. This dilemma is whether a lawyer should give the client his or her opinion or recommendation on the ultimate question, whether or not to plead guilty.<sup>114</sup>

<sup>108</sup> C. McCoy, "Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform" (2005), 50 C.L.Q. 67 at p. 78

<sup>109</sup> *Ibid* at p. 80

<sup>110</sup> J. Brockman, "An Offer You Can't Refuse: Pleading Guilty When Innocent", (2010) 56 C.L.Q. 116, at p. 128

<sup>111</sup> The notion that the criminal justice system is not a widget factory designed to produce the maximum number of convictions has a number of supporters – for example, the Law Reform Commission of Canada, *Our Criminal Law* (Ottawa, 1976); Law Commission of Canada, *What is a Crime? Challenges and Alternatives* (Ottawa: Law Commission of Canada, Discussion Paper, 2003); Alan M. Young, *Justice Defiled: Perverts, Potheads, Serial Killers and Lawyers* (Toronto: Key Porter Books, 2003)

<sup>112</sup> J. Brockman, "An Offer You Can't Refuse: Pleading Guilty When Innocent", (2010) 56 C.L.Q. 116

<sup>113</sup> G. A. Martin, at page 302 Report of the Attorney General's advisory committee on charge screening, disclosure and resolution discussions, Ontario Ministry of the Attorney General, Ontario, Queen's Printer, 1993, p. 302

<sup>114</sup> S. Zeidman, "To Plead or Not to Plead: Effective Assistance and Client- Centred Counselling", (1998) 39(4) B.C.L.Rev., 841

All counsel would agree that a lawyer has an obligation to provide her opinion as to the likelihood of success at trial and the relative benefits and drawbacks of a guilty plea versus proceeding to trial. When a client asks for the lawyers opinion or recommendation on plea, there are differing views and practice on how to respond. At one extreme is the view that to give one's opinion or recommendation on this issue is inappropriate, paternalistic risks subordinating the views of the client and can lead to wrongful conviction. At the other extreme is the view that counsel are obligated to provide an opinion on this crucial decision and to refuse is a dereliction of duty and ineffective assistance.<sup>115</sup>

Arthur Martin stated in 1970 that "counsel is free to advise an accused in strong terms as to the plea he should enter, the ultimate choice is that of the accused and it must be a free choice"<sup>116</sup>. Layton and Proulx also state that "defence counsel who studiously avoids giving an opinion on the matter is not doing the client any service. Lawyers should offer such advice where possible, and they are given licence to provide the opinion in "strong terms".<sup>117</sup> This view is motivated by the understanding that a competent well informed lawyer will be in the best position to know the best result the client is likely to achieve and, so long as the client makes the ultimate decision, persuasion is permissible.

Others, particularly modern defence counsel, are more likely to stop short of recommending a particular plea, preferring to provide the client with the information necessary to make the decision. This view may be motivated by a respect for the client's autonomy, a fear of participating in a wrongful conviction (particularly if a client is maintaining his innocence), a concern about liability or a fear of taking on the responsibility of the decision. Neither approach can be considered unethical. Where a given lawyer falls in the spectrum from neutrality to arm twisting may depend on their personality, the particular client or the facts of the case. For instance a lawyer faced with the virtual certainty of a conviction may feel justified in trying to persuade a client to accept a beneficial plea agreement whereas, a lawyer faced with a client who claims innocence with a less certain outcome, may prefer to remain neutral. As Professor Zeidman stated :

The clearer the choice, the more counsel should attempt to influence a client's decision. Counsel should assert her opinion commensurate with the clarity of her decision, and so as to ensure that the client understands completely her advice and its foundation.<sup>118</sup>

Regardless of the approach, the ultimate decision is the client's. The defence counsel's efforts to persuade cannot overrule the client's free will and he or she must be careful to avoid a situation where the solicitor/client relationship is irretrievably broken if client does not take the counsel's advice.

## 6. WRONGFUL CONVICTION

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<sup>115</sup> E. Buckle, "Ethical Considerations for Defence Counsel in Negotiating a Guilty Plea and the Conduct of Plea Proceedings", National Criminal Law Program, 2011, at p. 9 [unpublished]

<sup>116</sup> M. Proulx and D. Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin, 2001), at p. 387

<sup>117</sup> M. Proulx and D. Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin, 2001), at p. 434

<sup>118</sup> S. Zeidman, "To Plead or Not to Plead: Effective Assistance and Client- Centered Counselling, (1998) 39(4) B.C.L.Rev. 841, at p. 897

One cannot look at ethics of counsel in plea bargaining without looking at wrongful conviction. Wrongful conviction is very much a live topic now, including the subject of government reports "on the prevention of miscarriages of justice."<sup>119</sup> Lofquist suggest that we should look at wrongful convictions as "organizational produced by police and prosecutorial agencies in a manner analogous to corporations' manufacture of unsafe products."<sup>120</sup> Wrongful convictions are:

Organizational outcomes linked to premature commitment to a particular suspect, inattention to alternative scenarios due to the operation of "normal science" among investigators, the organizational and legal structures of the criminal justice system, and the lack of resources available to the defense.<sup>121</sup>

Unfortunately, according to Lofquist, wrongful conviction can be the product of "normal, day-to-day routine operations of decision makers acting free of any conspiratorial intent or wrongdoing"<sup>122</sup>. "Assumptions of normality and regularity lead actors to follow prescribed practices" that can lead to bias and wrongful convictions.<sup>123 124</sup> Other academics such as Siegel refer to it as "deep structural features that operate outside the ken of legal, let alone public observers – to warp the administration of criminal justice and produce wrongful convictions."<sup>125</sup>

*Is plea bargain part of a guilty plea culture?*

A pervasive issue remains, which is the way in which the plea bargaining, including sentence discount has contributed to what could be referred to as a "guilty plea culture" among lawyers and the consequences this has for the accused in general. As demonstrated by statistics in Canada and in United States, there are many factors which may have lead to a trial-averse mentality among lawyers. More particularly, "the availability of the sentence discount has sometimes seemed to have pressurized defence counsels into going down the guilty-plea route" as has been described by McConville.<sup>126</sup>

The quest for a resolution or solution of ethical problems will be endless and unsuccessful. In every situation, counsels are very often left with considerable discretion. They commonly have to "operate where the rules are indeterminate"<sup>127</sup>, such as in the case with the Model CBA rule, or in provincial professional code of conduct, or "where there is simply no rule"<sup>128</sup>. Counsels are often left "trying to rationalize their conduct they may be forced to choose between conflicting obligations".<sup>129</sup>

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<sup>119</sup> See Report on the Prevention of Miscarriages of Justice – FPT Heads of Prosecutions Committee Working Group, September 2004, online: federal Department of Justice, <<http://www.justice.gc.ca/eng/dept-min/pub/pmj-pej/p0.html>>

<sup>120</sup> W. S. Lofquist, "Whodunit? An Examination of the Production of Wrongful Convictions" In Sandra D. Westervelt and John A. Humphrey, eds. *Wrongly Convicted: Perspectives on Failed Justice* (New Brunswick, New Jersey: Rutgers University Press 2001), p. 174 at p. 175

<sup>121</sup> *Ibid.*, at p. 176

<sup>122</sup> *Ibid.*, at p. 192

<sup>123</sup> *Ibid.*, at p. 192

<sup>124</sup> J. Brockman, "An Offer You Can't Refuse: Pleading Guilty When Innocent", (2010) 56 C.L.Q. 116, at p. 126

<sup>125</sup> A. M. Siegel, "Moving Down the Wedge of Injustice: A Proposal for a Third Generation of Wrongful Conviction and Scholarship Advocacy" (2005), 42 Am. Crim. L. Rev. 1219 at p. 1223; J. Brockman, "An Offer You Can't Refuse: Pleading Guilty When Innocent", (2010) 56 C.L.Q. 116, at p. 116

<sup>126</sup> M. McConville, "Plea Bargaining: Ethics and Politics" (1998) 25:4 Journal of Law and Society 562 at p. 572

<sup>127</sup> *Ibid.*, at p. 577

<sup>128</sup> *Ibid.*, at p. 577

<sup>129</sup> *Ibid.*, at p. 577

McConville adds that we can see "in the new arrangements a fundamental realignment of criminal justice in which an abstract system, etched in principles of adversariness and presumption of innocence, has been converted into a process, the production lines of which are inscribed with the demands of efficiency and a presumption of guilt"<sup>130</sup> as has been suggested in the Herbert Packer's crime control model. There has, perhaps, always been a "significant element of process and production within criminal justice"<sup>131</sup>. What is new is its open incorporation into the "tenets of the adversary system: the bargained-for plea is no longer claimed to be aberrational, an object of shame and apology"<sup>132</sup>. Instead, it has come in from the "cold to be celebrated ornament of the adversary system, as a jewel in its crown. Guilty-plea process have found justifications linked to the adversary ideal. The technologies employed to secure this objective have been the commodification of cases and the juridification of defendants. These technologies are intertwined, nurturing and feeding each other as they shape the understandings which encourage courtroom actors, working on ethical codes, to give expression to a process in which the guilty plea has come to epitomize the new adversariness."<sup>133</sup>

Summarily, in a "guilty-plea culture", it has been said that the defence counsel "commonly trails the prosecution in adopting a strategy of case disposal through the guilty plea. In addition to those cases in which defendants voluntarily admit guilt and choose to forgo trial, guilty pleas become an achieved outcome of the intervention of defence lawyers on the way they handle clients."<sup>134</sup>

## 7. CONCLUSION

It is now generally accepted that resolution discussions or plea bargaining are an integral element of our criminal justice system. The reality of our current criminal justice system is that heavy reliance is, in fact, placed upon the productive efficiency of resolution discussions<sup>135</sup> to ensure that court dockets do not become impossibly congested.<sup>136</sup> Indeed, it has been said that without effective and timely plea discussions, it is likely that our "already overburdened criminal justice system would become hopelessly bogged down"<sup>137</sup>. Accordingly, the practical utility of resolution discussions has by default guaranteed their continued employment.

As discussed in this paper, plea bargaining is largely an "unregulated practice"<sup>138</sup>. As a result, it has been considered as a practice that "infringes and denies" constitutional rights. It thereby also carries a significant risk of causing innocent people to plead guilty."<sup>139</sup> The process of resolving pending criminal cases through the means of private, out-of-court

<sup>130</sup> M. McConville, "Plea Bargaining: Ethics and Politics" (1998) 25:4 *Journal of Law and Society* 562 at p. 580

<sup>131</sup> *Ibid.*, at p. 580

<sup>132</sup> *Ibid.*, at p. 580

<sup>133</sup> *Ibid.*, at p. 581

<sup>134</sup> *Ibid.*, at p. 572

<sup>135</sup> D.W. Perras, "Plea Negotiations" (1979-1980), 22 *Crim.L.Q.* 58, at pp. 58-59

<sup>136</sup> G. A. Martin, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Ontario Ministry of the Attorney General (1993), at chapter 6

<sup>137</sup> Canada Law Reform Commission, *Plea Discussions and Agreements*, (Working Paper 60, 1989) at pp.5-6;

H. Locke, J.D. Evans and M. Segal, *Report of the Criminal Justice Review Committee* (1999), at pp. 52-62

<sup>138</sup> Canada Law Reform Commission, *Plea Discussions and Agreements*, (Working Paper 60, 1989) at p. 7

<sup>139</sup> K. Chasse, "Plea Bargaining is Sentencing", (2009) 14 *Can. Crim. L.Rev.* 55 at 57

discussions between the Crown and the accused has "not generally enjoyed a very flattering public image<sup>140</sup>". Critics of such discussions have complained that justice should not be something that can be purchased at the bargaining table through some shadowy, secretive, unregulated, parallel justice system that is susceptible to manipulation and abuse<sup>141</sup>.

Martin's Report in 1993, along with the Law Reform Commission of Canada in its 1975 Working Paper and later in 1989, have commented and discussed largely on the importance of resolution discussions. Some commentators continue to argue strongly in favor of the outright abolition of the practice, while others treat it as an unregulated encouragement of the practice. Others continue to occupy the middle ground position between these extremes. Ultimately, resolution discussions are still considered an essential part of the criminal justice system in Canada and when properly conducted, benefit not only the accused, but also victims, witnesses, counsel and the administration of justice generally.<sup>142</sup> But, even if the Martin Report committee was of the view that appropriate resolution discussions are a proper and necessary part of the administration of justice in Ontario and in Canada, they warned that, "if resolution discussions are conducted improperly, they may have the effect of undermining community confidence in the administration of criminal justice."<sup>143</sup>

One must not forget that the criminal defence lawyer plays an integral role in the administration of justice, uniquely serving the needs of the client for whom access to the rule of law requires loyal and zealous advocacy, respectful of confidentiality. But the lawyer exercises that role only in accordance with their other obligations to those within the legal system, and defends her client in accordance with the rule of law, the rules of ethics, and with integrity. Therefore civility, respect and integrity must define their aggressive fulfillment of their duties to their client. The counsel's conduct is highly visible as a criminal defence advocate, and often misunderstood, especially with unclear and unspecific ethical obligation in regards to plea bargaining. There has been suggested changes to regulate plea bargaining, but nothing has been enforced, other than the suggested CBA Model Code for Agreement on Guilty Plea as reference and with various provincial code of professional conduct.

With the statistics demonstrating a high rate of resolution in court, it is not surprising that a large sum of the literature refers to trial as largely becoming what the poet Leonard Cohen calls "a sacred artifact of the past". Others say that the trial is now a *de facto penalty* in Canada for going to trial rather than a discount for plea.<sup>144</sup>

All reminders that, no one, the accused, victims, the public, and that ever-so-elusive Pimpernel "the administration of justice" is well served by sometimes a lack of preparation and, unfortunately all too frequent, ethically dubious practices<sup>145</sup> of counsel.

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<sup>140</sup> Canada Law Reform Commission, *Plea Discussions and Agreements* (Working Paper 60, 1989), at p. 7

<sup>141</sup> Canada Law Reform Commission, *Criminal Procedure: Control of the Process* (Working Paper 15, 1975) at p. 46; Canada Law Reform Commission, *Plea Discussions and Agreements* (Working Paper 60, 1989), at p. 7

<sup>142</sup> G. A. Martin, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Ontario Ministry of the Attorney General (1993), at chapter 6, Recommendation 46, at p. 281

<sup>143</sup> *Ibid.*, at p. 290

<sup>144</sup> D. Cole, Introduction, *The Criminal Law Quarterly*, volume 50, numbers 1 & 2, (April 2005) p. 1

<sup>145</sup> *Ibid.* at p. 2

The recommendations in Martin's Report are still applicable. As such, we should be concerned by our present orientation in the real world of the delivery of criminal justice services in Canada. We would not want to adopt Herbert Packer's crime control ideology. Packer had described it being as "the faster the process can separate the guilty from the innocent, the better. For Packer, the pure model would prefer a presumption of guilt and would look like an assembly line and his ideology was classically stated by the noted jurist, Judge Learned Hand, in his oft-quoted 1923 decision in *U.S. v. Garsson*:

Our procedure has been always haunted by the ghost of the innocent man convicted.<sup>146</sup>

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