Chapter 13

Prosecutorial Discretion and Plea Negotiation

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1. Introduction

This chapter examines the issues of prosecutorial discretion and plea negotiations in the specific context of plea bargaining, which is defined later. However, prior to discussing the specific issues relating to plea bargaining there are a few introductory comments which should be made.

Just as the concept of parole alters the meaning of a custodial sentence, the plea bargaining process potentially undermines the relationship between the seriousness of the actual criminal behaviour and its reflection in a criminal offence or in a sentencing disposition. For example, there is an apparent disparity between the reality of a criminal offence and its legal definition when a more serious charge, such as aggravated assault, is transformed into a lesser charge, such as a simple assault, pursuant to a plea bargain. Both parole and improper plea bargaining contravene the Commission's sentencing goal of achieving real and equitable sentences. The Commission's recommendations illustrate its willingness to support comprehensive changes to the current system in order to achieve the goals of its sentencing policy.

In Chapter 10 the Commission recommended the abolition of parole. In the interests of consistency, a recommendation for the abolition of plea bargaining had to be considered. However, whereas impact analyses have been done on the abolition of parole, there is very little similar research respecting the abolition of plea bargaining. Furthermore, since plea bargaining is an informal process, there is actually not enough knowledge about its effects and implications to warrant drastic changes at this time. Rather than describing actual practice, current pronouncements on plea bargaining consist largely of justifications for its existence and of directives to counsel respecting the conduct of such negotiations. When not concerned with rationalizing plea bargaining, as they so often do, these discussions are prescriptive rather than descriptive of actual practice. In other words, they focus on what the practice should be or should appear to be, as opposed to what it really is.

Finally, other jurisdictions which have implemented sentencing guidelines have found that the impact of plea bargaining on sentencing dispositions

becomes more visible. In Chapter 11, the Commission has recommended the implementation of sentencing guidelines. If, in future, it appeared that these guidelines were being circumvented by plea bargaining practices, it would be incumbent upon the federal and provincial governments to take whatever steps necessary to remedy this problem. The permanent sentencing commission could conduct research and make recommendations to assist the governments in this regard.

2. Definition

There is no definition of plea bargaining in the *Criminal Code*. Therefore, prior to a discussion of the specific problems which arise respecting plea bargaining, it is first necessary to define the various components of the practice.

The Law Reform Commission of Canada (1975; 45) has stated that much of the controversy surrounding plea bargaining results from disagreement as to its elements. The Commission defines a plea bargain as "any agreement by the accused to plead guilty in return for the promise of some benefit". Research undertaken for the Canadian Sentencing Commission indicated that the word "plea bargain" is really a compendious term used to describe a wide diversity of activities which occur among actors in the court system (*Verdun-Jones and Hatch, 1985;* l).[1] As discussed later in greater detail, the Commission's primary concern with plea bargaining focuses on the degree to which the practice undermines its sentencing policy. Thus, it has adopted a very wide definition of the practice to address the exercise of discretion by various actors along the criminal justice continuum. For the purpose of discussion, the Commission has distinguished plea bargaining in terms of three activities: [2]

Charge Bargaining:

a) reduction of the charge to a lesser or included offence;

b) withdrawal or stay of other charges or the promise not to proceed on other possible charges;

c) promise not to charge friends or family of the defendant.

Sentence Bargaining:

a) promise to proceed summarily rather than by way of indictment;

b) promise of a certain sentence recommendation by Crown;

c) promise not to oppose defence counsel's sentence recommendation;

d) promise not to appeal against sentence imposed at trial;

e) promise not to apply for a more severe penalty;

f) promise not to apply for a period of preventative detention under s. 688;

g) promise to make a representation as to the place of imprisonment, type of treatment, etc.;

h) promise to arrange the sentence hearing before a particular judge.

Fact Bargaining:

a) promise not to "volunteer" information detrimental to the accused (e.g., not adducing evidence as to the defendant's previous convictions under ss. 237 and -1 of the *Criminal Code*);

b) promise not to mention a circumstance of the offence that may be interpreted by the judge as an aggravating factor.

(Verdun-Jones and Hatch, 1985; 3)

Although the elements of plea bargaining are presented above in a particular order, the Commission recognizes that each of these activities may occur at different stages in the criminal justice process. For example, fact bargaining may occur either before charges are laid or just before the sentencing hearing. Similarly, charge bargaining may occur either prior to the institution of charges or just before the entry of a plea.

3. The Focus of the Commission's Review of Plea Bargaining

The Commission was directed by paragraph (d)(i) of its terms of reference to examine plea bargaining in the following context:

> **to advise on the use of the guidelines and the relationships which exist and which should exist between the guidelines and other aspects of criminal law and criminal justice, including:**
>
> **i) prosecutorial discretion, plea and charge negotiation.**

As indicated elsewhere in this report, the Commission's mandate also directs it to consider relevant policy principles enunciated in CLICS[3]. Principle (j) in CLICS states that "in order to ensure equality of treatment and accountability, discretion at critical points of the criminal justice process should be governed by appropriate controls" (Canada, 1982; 64). It is clear from the discussion of this principle that reference to "controls" contemplates the formulation of substantive and procedural guidelines contained either in statutes or in administrative directives. The discussion specifically states that sentencing guidelines should be developed with a view to reflecting such concerns as "developing appropriate guidelines for Crown prosecutors, governing the laying of charges and negotiation of pleas, in recognition of the extent to which these processes affect the severity and consistency of sentences" (Canada, 1982; 64-65).

Although the goals of equity and accountability mentioned in principle (j) of CLICS are ideals *per se*, they are functionally related to public confidence

in the criminal process. As indicated by one provincial court judges' association, mechanisms to enhance accountability are crucial to the maintenance of public confidence in the criminal justice system:

> It is the view of the judges that the key to the maintenance of public confidence in the criminal justice system is the need for open, reviewable exercise of responsibility by the police and the Crown; the integrity of the system depends upon its accountability...On the whole, the concern is that it be seen to operate fairly for all parties and that there be no suggestion of impropriety.

The Commission's concerns about plea bargaining focus primarily on the considerable potential that the practice has to undermine proportionality, equity and certainty in sentencing. If one were to refer to statutory provisions respecting sentencing as the formal legal system, one could describe plea negotiations as the informal criminal justice system. In chapters 9 and 11, the Commission has recommended significant changes to the penalty structure and has proposed guidance for the exercise of judicial discretion. The Commission's sentencing policy expressly encompasses the goals of equity, certainty and uniformity in sentencing. The Commission is of the view that, given the detailed recommendations it has made respecting the formal criminal justice system, it would be irresponsible to ignore the very practice which, if left unchecked, could effectively undermine that system.

The Commission's concern about the potential effect of plea bargaining on its sentencing policy is not precipitated just out of an abundance of caution. Indeed, a survey of Crown and defence counsel conducted for the Commission indicates that the practice of plea bargaining is widespread (Research #5). A study paper prepared for the Law Reform Commission of Canada stated that about 90% of criminal cases resulted in pleas of guilty. The paper also indicated that "plea bargaining has replaced the traditional adversary trial process in the majority of cases dealt with by urban courts" (Law Reform Commission of Canada, 1974; 57). Although other research suggests that the influence of plea bargaining on guilty pleas is not as dramatic as this,[4] surveys of criminal justice professionals conducted for the Commission confirmed that plea bargaining has a considerable impact upon sentencing decisions. A national survey of judges revealed that 76% of them felt that plea and sentence negotiations have an impact upon the sentencing process or on the sentences that are imposed (Research #6). A similar percentage of Crown and defence counsel made an even stronger statement by indicating that plea negotiations have a major impact upon the sentencing process. A survey of inmates conducted by the Commission also confirmed the perception that plea bargaining is a very common occurrence (*Ekstedt, 1985;* 46, *Landreville, 1985;* 16).

4. Prosecutorial Authority

The Commission's review of plea bargaining was circumscribed by jurisdictional and practical limitations. There is no clear assignment of legislative competence for prosecutorial authority given in the *Constitution*

Act, 1867.[5] Therefore, this question must be answered by reference to subsections 91(27) and 92(14) of the *Constitution Act, 1867* respecting the legislative competence of the federal and provincial governments concerning criminal law.[6] As indicated in previous chapters, the former subsection confers exclusive legislative authority upon the federal government in relation to criminal law, except the constitution of the courts of criminal jurisdiction.[7] Subsection 92(14) confers upon the provinces exclusive jurisdiction respecting the administration of justice in the province, including the constitution, maintenance and organization of provincial courts both of civil and criminal jurisdiction.[8]

Authority for the prosecution of criminal offences is set out in section 2 of the *Criminal Code* which defines the meaning of "Attorney General". Section 2 provides as follows:

> "Attorney General"
>
> a) with respect to proceedings to which this Act applies, means the Attorney General or Solicitor General of the province in which such proceedings are taken and includes his lawful deputy, and
>
> b) with respect to
>
> i) the Northwest Territories and the Yukon Territory, or
>
> ii) proceedings commenced at the instance of the Government of Canada and conducted by him or on behalf of that government in respect of a contravention of or conspiracy to contravene any Act of Parliament other than this Act or any regulation made thereunder, means the Attorney General of Canada and includes his lawful deputy.

Pursuant to subsection 27(2) of the *Interpretation Act*[9] the provisions of the *Criminal Code* relating to indictable and summary conviction offences apply to indictable and summary conviction offences created by other enactments, except to the extent that the latter otherwise provide.

The current definition of Attorney General is similar to that introduced by the amendment to the *Criminal Code* enacted in 1969.[10] As Stenning notes,[11] the intent of the amendment was to reflect long established practice that the federal Attorney General had prosecutorial authority in relation to federal statutes other than the *Criminal Code* while the provinces were responsible for the prosecution of *Criminal Code* offences. However, when read in conjunction with subsection 27(2) of the *Interpretation Act*, the section created ambiguity in the law by giving rise to two possible interpretations of which level of government had prosecutorial authority over criminal offences. One reading of the section would give provincial governments exclusive authority to prosecute *Criminal Code* offences and *concurrent* authority with the federal authorities to prosecute criminal proceedings in the Northwest Territories, the Yukon and those instituted by the federal government. The other reading of the section

would give the provincial authorities exclusive authority respecting the prosecution of *Criminal Code* offences and the federal government *exclusive* authority respecting the prosecution of proceedings instituted in the Northwest Territories and the Yukon and those initiated by the federal government (Stenning, 1985; 169).

In the years which followed, considerable litigation was generated respecting whether the definition of Attorney General in Section 2 of the *Criminal Code* was competent federal legislation.[12] Four constitutional positions emerged respecting the relative authority of the federal and provincial governments to conduct prosecutions for federal offences.[13] Phillip Stenning concludes that while recent decisions of the Supreme Court of Canada have not conclusively settled the issue, the current position appears to be that the federal and provincial governments have concurrent jurisdiction over the prosecution of federal offences (Stenning, 1985; 189). Further, it appears that this concurrent jurisdiction extends at least to legislation providing for the enforcement and prosecution of offences under the *Narcotic Control Act*, the *Combines Investigation Act* and the *Food and Drugs Act* and is not dependent upon whether the statute containing the offence relies upon the criminal law power of subsection 91(27) of the *Constitution Act* for its constitutional validity (Stenning, 1985; 189).

This rather brief overview of the relative prosecutorial authority of the federal and provincial governments is given to provide a context for the Commission's determination of the scope of its review. The Commission has taken the position that while the legislative authority of federal legislation which purported to subject police and prosecutorial decision-making to judicial scrutiny would probably be upheld, the focus of its inquiry should be restricted to specific mechanisms to enhance accountability and visibility in the conduct of plea negotiations. It has not attempted to give exhaustive guidance respecting the various activities encompassed within its definition of plea bargaining. This approach is consistent with the time and resource limitations faced by the Commission in the course of its review. As a matter of policy, the Commission has decided to focus its recommendations upon those aspects of plea bargaining which bear directly on its sentencing policy and which could undermine the other elements of its package.

5. Issues Relating to Plea Bargaining

The discussion in the chapter will be structured as follows: first, the issues of visibility and accountability in plea bargaining practices will be considered; second, the Commission's policy respecting plea bargaining will be given wherein recommendations will be made to address current problems. The recommendations themselves will relate to the role and activities of specific actors in the plea bargaining process such as victims, the offender, the police, Crown counsel and the judiciary.

5.1 The Visibility of Plea Bargaining

The visibility of plea bargaining relates to the broader question of the visibility of the process by which sentencing decisions are made. The issue is embodied in the age-old maxim that not only must justice be done but it must also be seen to be done. The Commission is of the view that public confidence in the criminal justice system depends in large measure upon enhancing the visibility of decisions made along the criminal justice continuum which affect the final outcome of a disposition for a particular criminal transaction. As noted in Chapter 7, the ultimate sentencing disposition for a particular offence bears little apparent relationship to the original penalty provided for it. This is a problem not only of the current penalty structure but also of the degree to which the public, the victim and the offender are not informed of the process by which discretion is exercised in the determination of sentences. The Commission's recommendations on plea bargaining are premised on the policy that the appearance of justice in the criminal process is as important as the reality of justice. As noted by the Law Reform Commission of Canada (1975; 46):

> Justice should not, and should not be seen to be, something that can be purchased at the bargaining table. Neither the public nor the offender can respect such a system. Once the crown has decided in the public interest to prosecute a charge, bargaining for a plea should not be used as a substitute for judicial adjudication on guilt or sentence.

Enhancing the visibility of plea bargaining is really a question of identifying the locus of decision-making. Thus, if the disposition of a case is effectively determined by an agreement between counsel which is approved by the court, the elements of that decision-making process should be indicated in open court. This would help to dispel the perception that court proceedings are a means to legitimate decisions which are made in private.

A disturbing view of the criminal justice system emerged from a survey of 129 inmates in Quebec institutions. These inmates indicated that in their view the outcome of any particular case was "fixed" in advance of the sentencing hearing. The sentencing decision was orchestrated by the police and Crown counsel who worked in collaboration with defence counsel. These inmates were so concerned about the inability of defence counsel to protect their interests in all or most cases that they recommended the appointment of an independent third party to represent their views during plea negotiations (*Landreville, 1985;* 43). The perception of these inmates was that the sentencing court knew of negotiations but feigned ignorance of them and proceeded to go through the motions of judicial decision-making in order to legitimize the "deal". The Commission has taken the position that it would be irresponsible to dismiss these perceptions as merely those of a biased party. The characterization by inmates of the criminal justice process as a coercive "game" only reinforces the need for enhanced visibility of the discretion exercised by actors in that process.

5.2 The Issue of Accountability

One way to distinguish visibility from accountability is that the former relates to exposing the process by which decisions are made whereas the latter concerns the quality of the decisions themselves. However, the low visibility of plea bargaining decisions also facilitates the lack of accountability in the process. As noted by the Law Reform Commission of Canada (1975; 46):

> The evils of plea bargaining are magnified by the fact that it is generally conducted in secret. Involuntary pleas by accused persons, or unethical conduct by counsel can occur in the bargaining process. These will not be brought to light in court. What is disclosed in court will, at best, be an incomplete story; at worst, it will be an inaccurate story. Nor can the interests of the public or of the victim be protected if all major decisions in a case are made in secret negotiations.

5.2.1 Current Mechanisms for Accountability

There are various controls on plea bargaining provided by the legal profession (the defence bar), by the practice directives of the federal and provincial Ministers of Justice and/or Attorneys General and by the courts. Subsection 534(4) of the *Criminal Code* empowers the sentencing judge to accept a plea of guilty, with the consent of the prosecutor, to an offence with which the offender has not been charged but which arises out of a transaction for which he or she has been charged. Where the court accepts the plea of guilty to the offence (usually a lesser or included offence to that charged), it must find the accused not guilty of the offence with which he or she has been formally charged. The provision thus gives the court the ultimate power to ensure that plea bargaining discussions are consistent with the ends of justice.

Defence counsel are subject to the Canadian Bar Association Code of Professional Conduct. Chapter VIII, paragraph 10 of that Code provides:

> Where, following investigation,
>
> a) a defence lawyer *bona fide* concludes and advises his accused client that an acquittal of the offence charged is uncertain or unlikely,
>
> b) the client is prepared to admit the necessary factual and mental elements,
>
> c) the lawyer fully advises the client of the implications and possible consequences, and particularly of the detachment of the court, and
>
> d) the client so instructs him, it is proper for the lawyer to discuss with the prosecutor and for them tentatively to agree on the entry of a plea of "guilty" to the offence charged or to a lesser or included offence appropriate to the admissions, and also on a disposition or sentence to be proposed to the court. The public interest must not be or appear to be sacrificed in the pursuit of an apparently expedient means of disposing of doubtful cases, and all pertinent circumstances surrounding any tentative agreements, if proceeded with, must be fully and fairly disclosed in open court. The judge must not be involved in any such discussions or tentative agreements, save to be informed thereof.

Most of the Law Societies of the various provinces have adopted the Canadian Bar Association Code of Professional Conduct.[14] If this Code of Professional Conduct can be considered to be a national standard, there would appear to be a number of requirements which must be met before defence counsel are ethically entitled to advise their clients to plead guilty to an offence.

During the course of its review of plea bargaining, the Commission became aware of literature which suggested that considerable discrepancy exists between these standards and actual practice. Two studies have documented the degree to which offenders are isolated from penal negotiations and of their dependency on defence counsel for information and opinion.[15] A Canadian study described those dynamics of plea bargaining which discourage defence counsel from fulfilling their professional obligations to their clients. For example, the study indicated that defence counsel must balance two competing interests: satisfying their client and collaborating with other court actors (Ericson and Baranek, 1982; 123). It further suggested that the appearance of a concession is important as a means of inducing the client to accept the guilty plea (1982; 122). In fact, follow-up interviews with defendants in the study revealed that in some cases they were unsure not only of their *legal* guilt but also of their *factual* guilt (1982; 163). Research conducted for the Commission described the phenomenon of illusory bargaining whereby offenders are induced to plead guilty to some charges by their counsel on the understanding that other charges will be dropped. The illusory bargaining occurs in situations where these other charges are in reality duplicate charges and could not be proceeded with in any event (*Verdun-Jones and Hatch, 1985;* 21). These findings, in conjunction with the suggestion of inmates in Quebec that an independent party be appointed to represent their views during plea negotiations, are illustrative of the degree to which plea bargaining prevents, or at least makes it difficult, for counsel to discharge their professional obligations towards their clients.

The Commission had neither the time nor the resources to ascertain the degree to which these findings are applicable to the entire country. However, it has decided to recommend measures designed to discourage the development or growth of these practices and to enhance visibility, clarity and accountability in the plea bargaining process.

The relative isolation of the offender from the plea bargaining process was confirmed by surveys of Crown, defence counsel and inmates conducted for the Commission. Roughly 70% of the Crown and defence counsel canvassed indicated that the offenders play an insignificant role or no role at all in plea negotiations (Research #5). This finding is consistent with the conclusions reached in each of the three inmate surveys conducted for the Commission. The survey of native inmates revealed that, as a starting point, the process of plea bargaining itself was not understood by these offenders (*Morse and Lock, 1985;* 39). The survey further indicated that while 95% of the respondents had legal representation for plea bargaining, 25% of offenders stated that no one explained the process of plea bargaining to them (*Morse and Lock, 1985;* 41).

The survey of inmates in Quebec confirmed the conclusion in the survey of Crown and defence counsel that the offender plays an insignificant role in plea negotiations. The Quebec inmates indicated that they did not participate in plea bargaining: in their words, they are "part of the game but they do not play" (*Landreville, 1985*; 23). The inmates were also of the opinion that there was a direct correlation between counsel's fees and his or her commitment to the case. These findings are cited not as an unchallenged indictment of the legal profession but as evidence of some degree of discrepancy between standards of professional conduct and the practice of some counsel in participating in plea negotiations.

The conduct of Crown counsel is often governed by guidelines and directives. The individual Crown Attorneys are agents of the federal and provincial Ministers of Justice and/or Attorneys General but, as a matter of practice, these elected officials cannot be expected to monitor the decisions of all prosecutors (although that is generally part of their legislatively defined mandate) (*Verdun-Jones and Hatch, 1985;* 23). The Commission wrote to federal and provincial prosecutorial authorities and requested information about directives issued to Crown prosecutors in their respective jurisdictions concerning plea bargaining. Of the 13 prosecutorial jurisdictions contacted, the Commission received oral and/or written information from about half of them. In order to respect the confidentiality of the directives received, the Commission will discuss their content in a general way as opposed to relating the directives of specific jurisdictions.

A number of jurisdictions distinguished "plea bargaining" from the "proper" exercise of prosecutorial discretion. For example, some authorities prohibited Crown counsel from accepting a plea of guilty to a lesser offence or a lesser number of offences on the basis of expediency. Similarly, counsel were frequently prohibited from agreeing to a specific sentence or to withholding facts or the criminal record from the court. These activities were distinguished from the decision to accept a plea of guilty to a lesser offence because of evidentiary difficulties in proving the more serious offence. In some jurisdictions, the decision to withdraw charges or to stay proceedings, though not prohibited *per se*, was subject to the approval of a more senior official within the provincial or federal prosecutorial bureaucracy. In addition, a number of jurisdictions have specific directives concerning the prosecution of particular offences (e.g., impaired driving offences or domestic assaults).

In addition to specific directives respecting plea negotiations, three provinces (Quebec, New Brunswick and British Columbia) have instituted mechanisms to screen charges prior to their being laid or introduced in court. These programs will be discussed in greater detail in the next part of the chapter which deals with possible solutions to some of the problems associated with plea bargaining.

Research conducted for the Commission respecting the effectiveness of formal regulations to govern the conduct of criminal justice professionals concluded that the guidelines lack the enforceability necessary to be effective

deterrents against illicit or prohibited plea bargaining (*Verdun-Jones and Hatch, 1985;* 24).

A third area pertinent to the issue of accountability concerns the charging practices of the police. Research by Ericson and Baranek (1982) establishes a relationship between plea bargaining and multiple or over-charging. In this context, over-charging can occur by laying a more serious charge in the face of evidence which supports a lesser charge or by laying inappropriate multiple charges which arise out of a single criminal transaction. The authors note:

> ...the police decide to charge with an eye towards outcomes in court. They "frame" the limits as to what is negotiable, and reduce conviction and sentence outcomes by "overcharging", "charging-up", and laying highly questionable charges (p. 71).

The research of Richard Ericson is persuasive in establishing a link between police charging practices and plea bargaining.[16]

The above findings accord with the experience of a number of criminal justice professionals whose views were canvassed in the Commission's national survey. Approximately three-quarters of both the defence and mixed groups (professionals who do part-time Crown work) felt that an offender faced multiple charges relating to a single transaction in over 50% of the cases they handled (Research #5). The exception to this finding concerned defence counsel in New Brunswick who, along with the Crown counsel, said this happened in less than 50% of the cases they handled. As noted above, New Brunswick has a mechanism for screening charges prior to their introduction in court.

When questioned about the relationship between police charging practices and plea negotiations, 79% of the defence and 65% of the mixed group indicated that police lay more (or more serious) charges in order to gain a stronger position in plea negotiations. In contrast, 85% of the Crown counsel and 63% of the defence counsel in New Brunswick indicated that this almost never occurs, or occurs in only a few cases (Research #5).

Two of the inmate surveys conducted for the Commission also established a link between police charging practices and plea negotiations. One study suggested that if over-charging were reduced, plea bargaining might also be reduced on the basis that over-charging was used for the purposes of effecting a bargain (*Ekstedt, 1985;* 46). The perception of inmates in Quebec was that the police bring multiple charges in order to maximize the Crown's leverage in plea bargaining. They suggested this was particularly true in jury trials where excessive charging was used to prejudice the jury against the accused (*Landreville, 1985;* 35). These inmates also suggested that police are encouraged to over-charge in order to enhance their statistical performance concerning the number of cases cleared by charge (*Landreville, 1985*; 35). The effect of institutional pressures on police charging practices has been extensively documented by Ericson (1982).

The research of Ericson and Baranek discusses the degree to which the police orchestrate plea negotiations (1982; 129). These authors suggest that because of the dependency of Crown counsel (due to workloads) on the police and the willingness of defence counsel to rely on police information for expedient disposition of cases, the police version of "the facts" governs plea negotiations. This conclusion accords with the perception of inmates in Quebec about the relative influence of the police on the decisions and actions of Crown counsel (*Landreville, 1985;* 32).

The foregoing discussion about the visibility and accountability of decisions made by counsel, Crown prosecutors and police illustrates the degree to which plea bargaining potentially undermines both the appearance and the reality of justice.

6. The Commission's Policy Respecting Plea Bargaining

Prior to a discussion of the specific recommendations the Commission will make concerning the various actors in the criminal justice process who are either involved in or affected by plea bargaining, there is one preliminary issue to be addressed.

6.1 Abolition/Retention of Plea Bargaining

The current tenor of judicial thinking appears to be that plea bargaining is "not to be regarded with favour".[17] However, there appears to be very little support for either legislative control or legislative prohibition of plea negotiations amongst the judges, Crown and defence counsel canvassed by the Commission (Research #5, #6).

Two reasons why plea bargaining should be retained have emerged from the literature and submissions studied by the Commission. The first reason is premised on the position that plea bargaining should be retained because it is beneficial *per se*. Proponents of this view argue that plea negotiations are essential because they facilitate the expedient disposition of criminal matters and reduce the costs of criminal justice for both the offender and for society. The strongest advocates of this view maintain that without plea bargaining, the machinery of the criminal court would grind to a halt.[18]

The second reason for maintaining plea bargaining is based on an acknowledgement of the problems associated with its abolition. For example, a number of studies have documented distortions in the criminal justice system which emerge with attempts to ban plea bargaining. Research undertaken for the Commission noted two studies which showed that attempts to ban plea bargaining did not lead to its elimination but merely in moving the practice to a different point in the criminal justice process (Church, 1976; McCoy, 1984 cited in *Verdun-Jones and Hatch, 1985*; 10, 11). For example, in one study, the result of a ban on charge bargaining was to encourage judicial involvement

in, and control over, sentence bargaining. The bargaining was not explicit but took the form of suggesting "hypothetical" cases to which the judge would respond with "hypothetical" sentences (Church, 1976 cited in *Verdun-Jones and Hatch, 1985*; 9).

Research undertaken for the Commission concluded that in view of the fact that the criminal justice system is characterized by attempts to achieve many varied and often conflicting goals, it is reasonable to assume that these systems will always generate and perpetuate discretionary decision-making as adaptations to these multiple ends. Plea bargaining appears to allow and facilitate the accommodation of these multiple purposes of criminal justice systems (*Verdun-Jones and Hatch, 1985*; 15). The Commission is in full agreement with this view and has taken the position that it would be far more realistic to recommend methods of enhancing the visibility and accountability of plea bargaining decisions than to recommend the abolition of the practice. These goals guide the Commission's recommendations respecting the individual actors involved in or affected by the plea bargaining process.

6.2 The Victim

From its study of current literature and research on this topic and from submissions received from various victims' groups, the Commission was made aware of the degree to which victims have felt excluded, manipulated and even abused by the criminal justice system. The Commission recognizes the potential which undisclosed plea bargaining arrangements have to obscure for victims the visibility and accountability of sentencing dispositions.

In the course of its deliberations on plea bargaining, the Commission considered whether victims should be accorded a status in sentencing proceedings over and above that of other members of the public. Such a status was recognized in the provisions of the Criminal Law Reform Act, 1984 (Bill C-19)[19] which provided for the use of victim impact statements and procedural mechanisms to allow the victim to address the court in particular circumstances. It is important to note that this enhanced status did not go so far as to accord victims an independent status as parties to the sentencing hearing.

The traditional view is that victims do not have a separate status either in plea negotiations or in the sentencing process. Their views and interests traditionally have been represented by Crown counsel as part of a more general duty to ensure that the disposition of criminal cases accords with the proper administration of justice. Crown counsel are not, strictly speaking, the advocates of victims. This position is illustrated by the directive to Crown counsel in one province which provides that the paramount consideration for prosecutors in plea negotiations in accepting a plea of guilty to a lesser or included offence is the proper administration of justice having regard to the rights of the accused, the protection of the public and the interests of the victim.

The Commission considered mechanisms to enhance the involvement of victims in plea negotiations in terms of two alternatives: first, to accord victims an independent status as parties to plea negotiations; and second, to increase the flow of information between Crown counsel and victims. The Commission rejected the concept of victims becoming independent parties in plea negotiations for a number of reasons. Such a recommendation would be inconsistent with the ultimate responsibility of the Attorney General in each province for the prosecution of *Criminal Code* offences. It also could potentially precipitate an adversarial relationship between Crown counsel and victims. The influence which victims would have on plea negotiations if they were accorded a status as independent parties, might be more illusory than real. It may be that such a provision would merely render them more vulnerable to pressure from either the Crown prosecutor or defence counsel respecting a plea bargain. The victim's opportunities to relate his or her version of the facts to the court may well be restricted so as not to disturb the "deal".

The Commission is of the view that there is considerable room for improving the flow of information between Crown counsel and the victim during plea negotiations. Research undertaken for the Commission suggests that involvement of the victim at sentencing may be a method of controlling bargaining because the court will have the opportunity to compare the victim's version of the case with that presented by counsel. This research further suggests that fact bargaining over aggravating circumstances could be lessened by routine victim input (*Verdun-Jones and Hatch, 1985*; 69).

The Canadian Federal-Provincial Task Force on Justice for Victims of Crime[20] recommended that, when requested to do so, prosecutors should ensure that victims are informed of the outcome of plea bargaining. However, the report recommended that Crown counsel should retain the discretion not to divulge the reasons for the agreement if it would be contrary to the public interest to do so. Some mechanism for victim participation or consultation in plea bargaining is provided in ten states in the United States (*Waller, 1986*; Appendix). Eight states have provisions for notifying the victim about the plea agreement.

In the context of plea bargaining, the Commission is primarily concerned with the exchange of information between the prosecutor and the victim as opposed to direct or indirect victim input into the sentencing hearing. In the Commission's opinion, the provisions in Bill C-19 respecting victim input into sentencing hearings is worthy of further consideration by the government when it considers proposals relating to the evidentiary and procedural aspects of sentencing.

Research on victims undertaken for the Commission recommended that police and prosecutors should set up mechanisms to consult with victims about plea negotiations (*Waller, 1986*; 20). In the context of the relationship between Crown counsel and the victim during the course of plea negotiations the Commission makes two recommendations:

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

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

6.3 The Offender

In its earlier discussion upon the issue of accountability, the Commission indicated the degree to which the offender is isolated from the decision-making process in plea bargaining and the degree to which he or she is dependent upon his or her counsel for advice and information. As noted previously, some of the problems with plea bargaining practices involve a greater need for some defence counsel to disclose options and information to their clients. The Commission has taken the position that it is outside the terms of its mandate and also outside the purview of federal legislative competence to enumerate a code of professional conduct for counsel involved in plea negotiations.

An alternative mechanism for attempting to increase the visibility of plea bargaining for the offender is to determine, prior to the imposition of sentence, whether the offender is voluntarily and knowingly pleading guilty to an offence. Canadian jurisprudence has confirmed the necessity of the sentencing judge satisfying himself or herself of the voluntariness of the plea of guilty.[21] A proposal creating a legislative duty on the sentencing court to inquire into the accused's understanding of the plea was rejected as being too restrictive. Also, such a provision would permit an unscrupulous offender to manipulate the system by claiming that he or she did not understand a plea bargain which in fact had been understood but which the offender subsequently wished to reject.

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

Standing alone, this recommendation may appear to add little to current practice. However, when considered in the context of the Commission's recommendations respecting disclosure of plea agreements, it is anticipated that it will help to demystify the plea bargaining process for offenders.

6.4 The Police

The relationship between police charging practices and plea bargaining is important to the Commission's sentencing policy because it affects the quality of charges presented to the court. Consistency between the factual elements of a crime and its description as an offence is obviously important to preserving the integrity of a sentencing scheme which is rooted in the principles of proportionality and equity. As noted earlier, police charging practices have a very important role in shaping plea negotiations and thus provisions to maximize the quality of charges are worthy of specific consideration.

The Commission has focused on three mechanisms to enhance the quality of police charging. The Commission is not concerned with multiple charges *per se* but with charges which are inflated or duplicated for the purpose of maximizing leverage in plea negotiations.

The first recommendation made by the Commission concerns the formulation of guidelines by federal and provincial prosecutorial authorities respecting over-charging and inappropriate multiple charging. The Commission encourages collaboration amongst authorities in the formulation of these guidelines to ensure, to the greatest extent possible, that they are uniform across the country.

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

One model for consideration is patterned after guidance developed by the Washington Sentencing Guidelines Commission. The Canadian Sentencing Commission is suggesting these guidelines as examples of the types of directives which could be formulated by the relevant federal and provincial authorites. The Commission is not hereby proposing that prosecutorial guidelines should be embodied in legislation. The guidance in the Washington system is as follows:

> Selection of Charges/Degree of Charge
>
> (1) The prosecutor should file charges which adequately describe the nature of defendant's conduct. Other offences may be charged only if they are necessary to ensure that the charges:
>
> a) Will significantly enhance the strength of the state's case at trial; or
>
> b) Will result in restitution to all victims.
>
> (2) The prosecutor should not overcharge to obtain a guilty plea. Overcharging includes:
>
> a) Charging a higher degree;
>
> b) Charging additional counts.
>
> This standard is mentioned to direct prosecutors to charge those crimes which demonstrate the nature and seriousness of the defendant's criminal conduct, but to decline to charge crimes which are not necessary to such an indication.

> Crimes which do not merge as a matter of law, but which arise from the same course of conduct, do not all have to be charged.[22]

Other proposals for consideration have been taken from directives currently in place in some provinces. For example, one province has formulated the following policy on multiple charging practices:

a) In any given factual situation the prosecution should proceed only with the *most* appropriate charge or charges.

b) Charges more serious than disclosed should not be laid to induce guilty pleas to lesser offences.

c) Charges should not be reduced merely to facilitate the handling of a case, without good justification for the reduction. A check with head office is recommended.

The wording of the directive could be modified to reflect its nature as an instruction to police on charging practices.

The second mechanism recommended by the Commission to enhance the quality of police charging practices concerns the institution of a process to screen charges prior to their being laid by police. Such a mechanism is currently in place in British Columbia, Quebec and New Brunswick. For example, in New Brunswick, the Public Prosecutions Policy Manual directs Crown counsel to scrutinize and give their consent to all charges before they are laid by the police.

The manual indicates that the prosecutor's major role is to determine whether a criminal offence is disclosed by the police investigation, whether a *prima facie* case is made out and whether a prosecution is justified in the circumstances. The manual directs the prosecutor to insist upon being provided with a full police report or court brief in order to make these decisions. The manual re-affirms the absolute right of police officers to lay charges, even in the face of opposition from Crown counsel. In these circumstances prosecutors are directed to contact more senior officials to determine whether the charges should be stayed. The manual strictly prohibits Crown counsel from engaging in plea bargaining.

It seems that the screening mechanism has discouraged plea bargaining in New Brunswick. The sample of Crown and defence counsel from that province were the only respondents in a national survey of criminal justice professionals to indicate that plea negotiations had a minor impact upon the sentencing process (Research #5). Also, Crown counsel from New Brunswick were the only prosecutors to indicate a provincial policy of prohibiting the conduct of plea negotiations in relation to specific offences. Most dramatically, the New Brunswick Crown and defence counsel were the only respondents who indicated that the police do not lay more or more serious charges in order to gain a stronger position in plea negotiations (Research #5).

The Law Reform Commission of Canada (1976; 56) has recommended that the prosecution should be involved in the charging process.

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

In making this recommendation the Commission is aware of the difficulty of requiring in northern and remote areas that charges be screened by Crown counsel in all cases. Certainly the screening process for each jurisdiction could be modified to reflect the specific needs and problems which arise in that area. Also, as indicated in the description of the New Brunswick process, the preparation of full and accurate police reports is important to the ability of Crown counsel to effectively screen charges. Thus, if governments are seriously committed to improving the quality of charges and of reducing the abuses of plea bargaining generated by inappropriate or excessive charges, they must provide sufficient resources to enable law enforcement officials to prepare full and accurate police reports.

Finally, the third avenue which the Commission is recommending for the improvement of charging practices is the need for greater and improved internal review mechanisms within the police forces themselves. The Ouimet Committee proposed that guidelines should be enunciated by senior officials in police forces respecting the exercise of police discretion to invoke the criminal process.[23] The Law Reform Commission of Canada has made recommendations respecting the exercise of police discretion, although these proposals relate primarily to the diversion of offenders from the criminal process entirely. However, one of their recommendations pertinent to the quality of police charging practices is as follows:

> We recommend: that ministers responsible for policing, charge their police commission with the development of police guidelines on the appropriate use of discretion. These guidelines should provide the framework for the development of specific instructions by police departments in relation to actual community resources. There is a role for the federal government in assisting in the development of model schemes (Law Reform Commission of Canada, 1976; 55).

Therefore :

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

6.5 Crown Prosecutors

The ultimate discretion respecting the prosecution of criminal charges is vested in the Crown prosecutor.[24] These counsel thus have the greatest ability to either enhance or obscure the visibility of plea bargaining practices for the public and the victim.

The Commission's recommendations focus on two proposals to enhance the visibility and accountability of the exercise of prosecutorial discretion. The first relates to the formulation of guidelines respecting the exercise of this discretion. The second addresses specific procedures to disclose the contents of the plea bargain to the court. The Canadian Association of Chiefs of Police indicated in its brief to the Commission that the current directives from the office of the various Attorneys General are not effective controls against improper alteration of charges by Crown counsel during the course of plea bargaining. The Association recommended additional controls over the discretionary power of the Crown to redefine the essential nature of criminal cases either by substituting lesser charges for more serious ones or by accepting guilty pleas respecting one or more minor offences in exchange for the withdrawal of one or more charges of greater severity. The Association further recommended that where the charge, as originally laid, is properly supported by available information, no substitution or selective prosecution of minor charges for more serious matters should be permitted. They also suggested that in the event of a guilty plea, all factors, both those agreed upon and those which could be proved if disputed, should be brought to the attention of the judge and the practice of submitting an agreed statement of facts should be abolished.

The Law Reform Commission of Canada has recommended that the Attorneys General of the provinces and territories develop and publish policy guidelines for charging, pre-trial settlements and the conduct of prosecutions (1977; 56). The Canadian Sentencing Commission has taken the position that, to the greatest extent possible, there should be uniformity of approach across Canada respecting plea bargaining practices. This can be effected through collaboration amongst federal and provincial authorities in the formulation of guidelines. The Commission agrees with the spirit of the Law Reform Commission recommendation that greater visibility should be given to directives concerning the general exercise of prosecutorial discretion.

In a national survey of judges conducted by the Commission, 52% of the respondents favoured some change in the way prosecutorial discretion is exercised and controlled (Research #6). This position is consistent with the submission of one of the provincial court judges' associations which contended that consideration should be given to provisions which might restrict prosecutorial discretion in appropriate cases, e.g., to avoid the abuse of the Crown laying an information for a lesser offence in the face of facts supporting a more serious offence.

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

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

The above recommendations are concerned with the exercise of prosecutorial discretion rather than with the disclosure of plea bargaining decisions *per se*. In examining the latter issue, the Commission considered a number of proposals. One possible approach is to formalize the plea negotiation process through specific channels and/or by reference to a plea bargain agreement. One recommendation advanced in Australia is to formalize plea negotiations with the object of reaching a plea agreement.[25] Under this scheme, negotiators would conduct negotiations on a without prejudice basis with the proviso that any clear and unequivocal admission by the accused (in writing and witnessed by that person and his negotiator) would be admissible as evidence in any proceedings. Disputed matters could be referred to a judge or magistrate in open court or, on consent of all parties, in chambers. On a referral of a disputed matter, the court would be empowered to express its view in the presence of both negotiators on any one or more of the following: the relevant law; the attitude of the parties and their negotiators; the desirability of an agreement being reached; available sentencing options (either in general or specific terms); and the admissibility of evidence and the procedure to be adopted at trial. The content and effect of the plea agreements would also be the subject of specific enumeration.[26]

There was support among inmates for the plea bargaining process to be more open and for the judge to be a participant in it (*Landreville, 1985*; 43); (*Ekstedt, 1985*; 46). The Quebec inmates supported the idea of formalized plea negotiations held in the presence of the parties, an independent negotiator for the offender (aside from defence counsel) and the judge. The inmates contended that the latter should preside at the negotiations. The inmates recommended that any agreement reached as a result of the negotiatons should be reduced to writing (*Landreville, 1985*; 43,44). Formal plea agreements are also provided in the *Washington Sentencing Reform Act, 1981*.[27]

The Commission has taken the position that it would not be helpful to recommend a formalized plea negotiation process or the mandatory use of written plea agreements. Some of the elements of these schemes are useful, however, as examples of the kinds of provisions which could be used in the Canadian context in order to enhance the visibility of the plea negotiation process.

13.9 The Commission recommends a mechanism whereby the Crown prosecutor would be required to justify in open court a plea bargain

agreement reached by the parties either in private or in chambers unless, in the public interest, such justification should be done in chambers.

The "mechanism" referred to in the Commission's recommendation could take a variety of forms. One possibility is that the prosecutor could be required to make an oral presentation to the court indicating the facts which the Crown is in a position to prove respecting the offence and why the charge to which the offender proposes to plead guilty is appropriate. This presentation could include an undertaking by the Crown that efforts had been made to contact the victim, and that the Crown had considered a report from the victim respecting the impact of the offence. These matters would be disclosed in open court unless, in the public interest, they should be disclosed in chambers. Formal or informal directives could be drafted respecting examples of situations where it would be considered to be contrary to the public interest to openly disclose the reasons for the acceptance of a plea bargain (e.g., where disclosure of the offender's cooperation in a criminal investigation would jeopardize the investigation or the safety of either the offender or of third persons). To ensure that the offender had been fully apprised of the proceedings, defence counsel could be required to confirm to the court that he or she had fully discussed the plea negotiations with the offender and that the offender understood the consequences of entering a plea of guilty. The court could be directed to verify these matters through oral examination of the offender.

Another mechanism for disclosing the contexts of plea negotiations would be to require the above-noted information to be reduced to writing and submitted to the court. In accepting a plea agreement, the court would be required to verbally indicate the factors which it had relied upon in accepting the agreement. Further procedures could be developed to permit information of a sensitive or confidential nature to be exempted from disclosure. The test for such exemption could relate to the degree of prejudice or danger occasioned to the offender or relevant third parties by such disclosure.

These proposals are consistent with Rule VIII, paragraph 10 of the Canadian Bar Association Code of Professional Conduct which requires that all pertinent circumstances surrounding any tentative agreement must be fully and fairly disclosed in open court.

6.6 The Judiciary

The Commission has taken the position that the judicial review of prosecutorial discretion must be distinguished from the judge's right to ask for more or better information during the course of the sentencing hearing. The latter relates to evidence and procedure at the sentencing hearing and thus is outside the Commission's mandate.

There is jurisprudential authority for the proposition that the sentencing court should not be an active participant in plea negotiations either in

chambers or in open court.[28] This does not preclude the court from being advised in chambers of information which cannot, in the public interest or specific interest of the offender, be revealed in open court.[29] There is conflicting judicial opinion in Canada respecting whether it is proper for the sentencing judge to indicate, prior to a plea, whether he or she agrees with the sentence proposed by one of the parties.[30] There is clear authority in Canada for the acceptance of a joint submission by counsel.[31] Further, it is clear that the trial or sentencing court has authority to decline to follow a joint submission or a submission made by the Crown or defence pursuant to a plea bargain.[32]

The survey of sentencing judges conducted by the Commission found that 58% of judges indicated that they were never involved in plea and sentence negotiations (Research #6). This finding is consistent with the views expressed by Crown and defence counsel in the Commission's survey of these professionals. Over 80% of the respondents said that most plea negotiations are initiated by defence counsel (Research #5). In the experience of most respondents, judges do not play a very active role in plea negotiations (Research #5). Eighty-nine percent of both the defence and Crown counsel and 100% of the mixed group stated that the judge is never directly involved, or is occasionally involved either in chambers or in court. However, respondents from both Ontario and Quebec were less likely than respondents from other provinces to say that the judge is never involved. It appears from the questionnaire that judges tend to favour submissions from both the defence and Crown to the type or quantum of sentence to impose. The vast majority of respondents stated that judges will always, or in most cases, accept a joint submission in cases where there have been plea negotiations. While the defence and mixed groups in the survey approved of cases where judges give an advance indication of the sentences they are likely to give, Crown counsel did not. The majority of respondents in all groups disapproved of cases where the judge participates in the negotiations (Research #5).

The finding in the survey of criminal justice professionals that judges generally do not play a very active role in plea negotiations is in direct conflict with the perception of inmates which emerged from the inmate surveys that the judge is the most important actor in the sentencing process (*Ekstedt, 1985*; 35).

The issue of the role of the judge in the plea negotiation process can be distinguished in terms of two activities: active judicial participation in plea negotiations and judicial review or acceptance of agreements which have been reached by Crown and defence counsel. Rule VIII, paragraph 10 of the Canadian Bar Association Code of Professional Conduct indicates that the judge should not be actively involved in plea negotiations. A similar provision is found in the reform proposals of various foreign jurisdictions studied by the Commission.[33]

The basic concern with active judicial participation in plea bargaining is the erosion of the judge's role as an objective, non-partisan arbitrator. One rationale for involving the judge in the negotiation process is that it would

enhance the intelligence of the guilty plea by informing the defendant of the anticipated sentence prior to the entry of the plea. However, as one study notes, the actual effect of such intervention could have the opposite effect. This research suggests that because the judge is an authoritative, dominating figure in the process (which is confirmed by the results of the inmate survey in British Columbia concerning inmate perception of the importance of the judge in sentencing), the court's intervention could effectively coerce the accused into accepting the agreement and pleading guilty.[34] The paper further notes that the coercive nature of judicial participation in plea negotiations could impair the voluntariness of the defendant's participation in the bargaining process. The latter is essential to the self-determination value of plea bargaining.[35] This study also suggests that judicial involvement in plea negotiations could shift the focus of bargaining from the two parties to the judge and the parties. The result could be a mini-trial with its inherent evidentiary and procedural complications.[36]

The Law Reform Commission of Canada assesses judicial involvement in plea negotiations in the following terms:

> In a sense, judicial involvement in plea bargaining is the worst possible approach to the problem. It is an approach that should legitimize as a legal institution a practice which degrades the administration of justice (1975; 48).

One of the provincial court judges' associations indicated in its submission to the Commission that the majority of judges do not agree with an in-court plea bargaining process in which the judge is an active participant.

In the view of all of the above considerations, the Commission makes the following recommendations:

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

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

If adopted, it is anticipated that recommendation 13.11 would complement the current subsection 534(4) of the *Criminal Code* by addressing the issue of agreements reached between counsel which relate to matters other than the acceptance of a plea of guilty to a lesser or included offence.

The issue of judicial approval of agreements reached independently by the parties must be considered in the context of the recent enactment of section 553.1 of the *Criminal Law Amendment Act, 1985*[37] which requires a pre-

hearing conference to be held in any case which is to be tried with a jury. The conference is to be held to "consider such matters as will promote a fair and expeditious trial". The provision is permissive with respect to non-jury proceedings and permits such a hearing to be held with the consent of all the parties. It must be stressed that pre-trial conferences are not *per se* forums for plea bargaining. The purpose of the pre-trial conference is to narrow the issues which are in dispute and thereby more accurately predict the time needed for the disposition of the matter by trial. At the pre-hearing conference, defence counsel obtains disclosure of the Crown's evidence and the prosecution has an opportunity to assess the strength of its case. These assessments may induce the parties to conduct plea negotiations.

As noted by the submission of one provincial court judges' association, the major concern about pre-hearing conferences is the issue of public accountability for decisions reached at these hearings. In the Commission's view, there are two issues respecting the pre-hearing conferences: the judge's role in such negotiations; and mechanisms to enhance the visibility of decisions reached at pre-hearing conferences. It is the Commission's position that in view of the recent enactment of section 553.1 of the *Criminal Code*, the court should be empowered to consider agreements which have been formulated by the parties as a result of the pre-hearing conference. However, section 553.1 should not be used to compel the parties to enter into plea negotiations.

The earlier discussion and recommendation for disclosure of plea agreements in open court applies equally to the specific issue of enhancing the visibility of plea agreements reached in camera. However, additional proposals may be worthy of consideration to specifically address the disclosure of discussions at the pre-hearing conferences which have resulted in a plea agreement. One such provision advanced in the submission of a judge who has had considerable experience with pre-trial proceedings, is a suggestion that no disposition or order arising out of the pre-hearing conference should be made except with full disclosure in open court of the facts and considerations upon which such disposition or order was based.

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

The Commission's policy respecting judicial involvement in plea bargaining may be summarized as one of discouraging active judicial participation in decisions which precipitate or finalize such bargains. However, this does not preclude the judiciary from considering plea agreements which have been reached independently by the parties pursuant to a pre-hearing conference or private negotiations. In all but the most exceptional cases, the facts and considerations which have led the parties to accept the agreement should be disclosed in open court.

7. Information Requirements

In its opening remarks in this chapter the Commission referred to the paucity of information concerning the effects and implications of plea bargaining. Research undertaken for the Commission recommended that an in-depth analysis of the nature and extent of plea bargaining in Canada should be conducted (*Verdun-Jones and Hatch, 1985;* 53). The Commission is in agreement with this proposal.

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

Information on current plea bargaining practices will also be pertinent to future assessments of the impact of the practice on the Commission's proposed sentencing guidelines.

8. Conclusion

In the foregoing discussion, the Commission has considered the degree to which plea bargaining has the potential to undermine its formal sentencing policy and public understanding of the sentencing process. For example, the principle of proportionality in the assessment of sentences may be circumvented by charging practices which unjustifiably encourage pleas to lesser offences. Similarly, predictability, clarity and uniformity of approach in reaching sentencing decisions can be undermined by a practice which primarily takes place in private.

The Commission's policy respecting prosecutorial discretion and plea negotiations focuses on enhancing the visibility of the process by which plea agreements are made as opposed to giving detailed guidance respecting the exercise of police and prosecutorial discretion in particular circumstances. It is the Commission's view that increased visibility will encourage greater public accountability of the actors involved in the plea bargaining process. The Commission's recommendations respecting the mechanisms to effect these goals are of a general nature. The Commission is of the opinion that federal and provincial prosecutorial authorities are the most appropriate bodies to give detailed guidance to the police and prosecutors respecting the exercise of discretion which bears upon plea negotiations. The Commission is hopeful that through mutual co-operation they may be able to formulate national guidance on basic plea bargaining practices. This will ensure, to the greatest extent possible, that there is equity and consistency in the criminal justice system's informal response to the disposition of criminal charges.

9. List of Recommendations

13.1 The Commission recommends that the interests of the victim in plea negotiations continue to be represented by Crown counsel. To encourage

uniformity of practice across Canada, the responsible federal and provincial prosecutorial authorities should develop guidelines which direct Crown counsel to keep victims fully informed of plea negotiations and sentencing proceedings and to represent their views.

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

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

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

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

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

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

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

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

13.10 The Commission recommends that the trial or sentencing judge never be a participant in the plea negotiation process. This recommendation is not intended to preclude the judge from having the discretion to

indicate in chambers the general nature of the disposition or sentence which is likely to be imposed upon the offender in the event of a plea of guilty.

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

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

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

Endnotes

1. Verdun-Jones, S. and Hatch, A.J. 1985. *Plea Bargaining and Sentencing Guidelines. Ottawa: The Canadian Sentencing Commission.* The Commission drew heavily from this report in the course of formulating its recommendations on plea bargaining.
2. *Verdun-Jones and Hatch*, 1985; 3.
3. Canada (1982). *The Criminal Law in Canadian Society.* Ottawa: Government of Canada.
4. This conclusion is contradicted by research undertaken for the Commission. The research criticizes "many commentators who erroneously assume that 90% of the conviction rates in most jurisdictions are the result of guilty pleas and that almost all of these are the result of plea bargaining" (*Verdun-Jones and Hatch, 1985*; 7).
5. Schedule B of the *Canada Act, 1982* (U.K.), c. 11.
6. Stenning, P.C. (1985). *Appearing for the Crown.* Montreal: Browns's Legal Publications, 166.
7. Subsection 91(27) provides as follows:

> ## Powers of Parliament
>
> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, -
>
> (27) The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

8. Subsection 92(14) provides as follows:

> ## Exclusive Powers of Provincial Legislatures
>
> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say -
>
> (14) The Administration of Justice in the Province, including the Constitution, Maintenance and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

9. R.S.C. 1970, c. I-23, Subsection 27(2) provides:

> (2). All the provisions of the *Criminal Code* relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of the *Criminal Code* relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides.

10. S.C. 1968-69, c. 38, s. 2(1) cited in Stenning, P.C. (1985). *Appearing for the Crown.* Montreal: Brown's Legal Publications, 167.
11. Stenning, P.C. (1985). *Appearing for the Crown.* Montreal: Brown's Legal Publications, 168.
12. See *Re Collins and The Queen* (1973), 13 C.C.C. (2d) 172 (S.C.C.); *R v. Pelletier* (1974), 18 C.C.C. (2d) 516 (S.C.C.); *R v. Hauser* (1979), 8 C.R. (3d) 89 (S.C.C.); *R v. Aziz* (1981), 57 C.C.C. (2d) 97 (S.C.C.); *A.G. of Canada v. C.N. Transportation Ltd. et al.; A.G. of Canada v. C.P. Transport Co. Ltd. et al. and A.G. of Ontario et al.* (1983), 7 C.C.C. (3d) 449 (S.C.C.); *R v. His Honour Judge Wetmore and Attorney General for Ontario et al.* (1983), 7 C.C.C. (3d) 507 (S.C.C.).

13. Phillip Stenning describes these four constitutional positions as follows:

(1) Legislative competence with respect to the prosecutorial function in relation to *all* federal laws, regardless of their constitutional basis in Section 91, might be held to be reserved exclusively to the federal Parliament. This was the "extreme federal" position.

(2) Legislative competence with respect to the prosecutorial function in relation to *all* federal laws, regardless of their constitutional basis in Section 91, might be held to arise from the "administration of justice in the province" power under Section 92(14), and thus to be reserved exclusively to the provincial legislatures. This was the "extreme provincial" position.

(3) If a "special relationship" was recognized to exist between Sections 91(27) and 92(14), legislative competence with respect to the prosecutorial function might be held to be reserved exclusively to the provincial legislatures under Section 92(14) with respect to all "criminal " prosecutions, but reserved exclusively to the federal Parliament under Section 91 with respect to all prosecutions under federal laws which did not depend on the "criminal law power" of Section 91(27) for their constitutional validity. This was the "separate jurisdictions" position.

(4) Legislative competence with respect to the prosecutorial function might be held to arise *both* from the federal "criminal law power" under Section 91(27) *and* from the provincial "administration of justice in the province" power under Section 92(14), being an aspect of each head of legislative authority. In this case, both the federal Parliament and the provincial legislatures might be held to have constitutional authority to enact legislation with respect to the prosecutorial function in cases under federal laws. Under such circumstances, the constitutional doctrine of "paramountcy" would operate, according to which valid federal legislation would be recognized as paramount over otherwise valid provincial legislation on the same matter, to the extent that there was inconsistency between the two and to the extent of such inconsistency. In such circumstances, federal legislation would be held to have "occupied the field" and inconsistent provincial legislation, while not constitutionally invalid, would be held to be "inoperative". This was the "concurrent jurisdiction" position, and could be argued for in one of two forms. Either "full concurrency" over the prosecution function with respect to prosecutions under *all* federal laws could be recognized, or a more limited concurrency, which was confined to the prosecution function with respect only to prosecutions under laws which depend for their constitutional validity on the "criminal law power" of Section 91(27), could be recognized. For those who argued for "partial concurrency" only, legislative authority in relation to the prosecution function with respect to "non-criminal" federal laws, was held to reside exclusively with the federal Parliament.

Cited in Stenning, P.C. (1985). *Appearing for the Crown.* Montreal: Brown's Legal Publications, 172-173.

14. The Commission wrote to the various provincial law societies and requested information about directives concerning plea bargaining. Of the provinces which responded to the Commission' s written and oral inquiries, the following jurisdictions had adopted the Canadian Bar Association Code of Professional Conduct: New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland, Manitoba, Saskatchewan, the Yukon and the Northwest Territories. Only British Columbia had developed its own code of professional conduct for legal counsel in that province.

15. Ericson, R. and Baranek, P. (1982). *The Ordering of Justice: A Study of Accused Persons as Dependents in the Criminal Process.* Toronto: University of Toronto Press; see also Baldwin, J. & McConville, M. (1977). *Negotiated Justice: Pressures on Defendants to Plead Guilty.* London: Martin Robertson.

16. Ericson, R. (1981). *Making Crime: A Study of Police Detective Work.* Toronto: Butterworths.

17. The Comments of Mr. Justice Hugessen in *A.G. Can. v. Roy* (1972), 18 C.R.N.S. 89 (Que. Q.B.) at pages 92-93.

18. Judge Graburn's comments in Law Society of Upper Canada Special Lectures (1969), p. 301 cited in Ferguson, G. and Roberts, D. (1974). Plea Bargaining Directions for Canadian Reform. *Canadian Bar Review, 3,* 521.

19. Bill C-19 received first reading on February 7, 1984 and subsequently died on the order paper.

20. Canadian Federal-Provincial Task Force on Justice for Victims of Crime (1983). *Report.* Ottawa: Minister of Supply and Services, 128.

21. *A.G. Can. v. Roy* (1972), 18 C.R.N.S. 89 (Que. Q.B.), at pp. 92-93.

22. State of Washington Sentencing Reform Act of 1981 cited by *Verdun-Jones and Hatch, (1985).* Appendix D, 104.

23. Canadian Committee on Corrections (1969). *Report.* Ottawa: Queen's Printer, 46.

24. See *R v. Smythe* (1971), 3 C.C.C. (2d) 366 (S.C.C.); *Re Baldwin and Bauer and The Queen* (1980), 54 C.C.C. (2d) 85 (Ont. H.C.J.); *R v. Stanger; R v. Bramwell (1983), 7 C.C.C. (3d) 337 (Alta. C.A.); R v. Saikaly* (1979), 52 C.C.C. (2d) 191 (Ont. C.A.). This position is also expressly represented in the various provincial statutes governing the actions of Crown prosecutors. See, for example, *Department of the Attorney General Act*, R.S.A. 1980, c. D-13, s. 2(h); *The Department of Justice Act*, R.S. Nlfd. 1970, c. 85, s. 10(c).

25. Borick, K. (1985). *Plea Bargaining*. Paper presented to the International Criminal Law Congress, October 6-11, 1985, Adelaide, Australia p. 29.

26. Borick, 1985; 30.

27. Cited in *Verdun-Jones and Hatch*, 1985; Appendix D.

28. See *R v. Wood* (1975), 26 C.C.C. (2d) 100 (Alta. C.A.); see also Panel Session on Plea Discussions, Law Society of Upper Canada Special Lectures (1969), p. 299 at p. 307 cited by Ferguson G. and Roberts, D. (1974) Plea Bargaining: Directions for Canadian Reform. *The Canadian Bar Review, 3*, 555.

29. Ruby, C. (1980). *Sentencing*. (2nd ed.) Toronto: Butterworths, 76.

30. Nadin-Davis, P. (1982). *Sentencing in Canada*. Ottawa: Carswell 542 – 543.

31. Nadin-Davis, P. (1982). *Sentencing in Canada*. Ottawa: Carswell, 541; see also *R. v. Simoneau* (1978), 40 C.C.C. (2d) 307 (Man. C.A.).

32. Nadin-Davis, P. (1982). *Sentencing in Canada*. Ottawa: Carswell, 541; see also *Brosseau v. The Queen*, [1969] S.C.R. 181; (S.C.C.) *Adgey v. The Queen* (1973), 23 C.R.N.S. 298 (S.C.C.); *R. v. Pooley* (1974), 27 C.R.N.S. 63 (B.C.S.C.); *A.G. Can. v. Roy* (1972), 18 C.R.N.S. 89 (Que. Q.B.).

33. See State of Washington Sentencing Reform Act of 1981 cited by *Verdun-Jones and Hatch, (1985)*. See also Victorian Shorter Trials Committee recommendations cited in Plea Negotiations and Practices (1985). A paper prepared for the International Criminal Law Congress, October 6-11, 1985, Adelaide, Australia. See also Rules for U.S. District Courts: Rule 11 cited by *Verdun-Jones and Hatch*, 1985; Appendix C.

34. *Harvard Law Review*, (1977). Plea Bargaining and the Transformation of the Criminal Process. Vol. 90, No. 3, 585.

35. *Harvard Law Review*, (1977). Plea Bargaining and the Transformation of the Criminal Process. Vol 90, No. 3, 585.

36. *Harvard Law Review*, (1977). Plea Bargaining and the Transformation of the Criminal Process. Vol. 90, No. 3, 585.

37. S.C. 1985, c. 19, s. 127. Section 553.1 provides as follows:

> 553.1(1) Subject to subsection (2), on application by the prosecutor or the accused or on its own motion, the court before which, or the judge, provincial court judge or justice before whom, any proceedings are to be held may, with the consent of the prosecutor and the accused, order that a conference between the prosecutor and the accused or counsel for the accused, to be presided over by the court, judge, provincial court judge or justice, be held prior to the proceedings to consider such matters as will promote a fair and expeditious hearing.
>
> (2) In any case to be tried with a jury, a judge of the court before which the accused is to be tried shall, prior to the trial, order that a conference between the prosecutor and the accused or counsel for the accused, to be presided over by a judge of that court, be held in accordance with the rules of court made under section 438 to consider such matters as will promote a fair and expeditious trial.

Part III

Implementation

Chapter 14

Permanent Sentencing Commission and Implementation Issues

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Chapter 14

Permanent Sentencing Commission and Implementation Issues

As is pointed out elsewhere in this report, many of the problems with the Canadian sentencing process stem from, or are at least exacerbated by, the lack of a clear and coherent sentencing policy. As we have discussed, the piecemeal and inconsistent implementation of policies and programs over the years has militated against a unified approach to sentencing and resulted in inconsistencies and even contradictions among the various components of the system. Inconsistency is further compounded by a lack of co-ordination between the legislative, executive and judicial branches of government, all of whom have a vital role to play in the development and implementation of sentencing policy and programming. There is clearly a need for a specialized body to oversee and co-ordinate sentencing policy in Canada.

One specific and very serious deficiency of our sentencing process and a major contributor to sentence disparity is the lack of adequate information and data to support sentencing decisions. Despite the generally acknowledged need for such information and even a few attempts to organize an adequate information system, the sorry state of the prevailing situation clearly demonstrates the need for a specialized body responsible for the establishment and maintenance of an adequate information system. Considering Canadian history and experience in this regard, it appears most unlikely that we will ever realize the implementation of a satisfactory sentencing information system unless a specialized body is specifically mandated to do the task. This chapter will address the issues relating to the establishment of a permanent sentencing commission and to the development of adequate information systems. It will also address two other issues which are crucial to the implementation of its recommendations. These issues relate to the impact of the Commission's recommendations on the administration of justice by the provinces and some of the steps which should be followed in implementing the Commission's recommendations.

1. The Permanent Sentencing Commission

The Commission is proposing a major reform of the sentencing process in Canada. Given the adoption of these reforms by Parliament and the

Government of Canada there will clearly be a need (as indeed there is in the current system) to monitor closely and evaluate the effectiveness and consequences of the reform measures. Furthermore, there will be the corollary ongoing need for review of maximum penalties, categorization of offences and sentencing range guidelines. Again, it is urged that the only way to ensure that the requisite attention is given to ongoing evaluation and updating is to entrust this task to a specialized body. Co-ordination, evaluation and review are long-term requirements which cannot be accomplished by an *ad hoc* body such as this Commission but rather must be the mandate of one having permanency. Evaluation and review are essential components of effective reform.

As indicated in Chapter 11, the formulation of a comprehensive set of guidelines governing sentence length and ranges will require additional research and consultation. Hence, there is a need for an ongoing body not only to complete the guidelines but to review and update them from time to time as warranted. As previously indicated, other components of our criminal law and sentencing process, such as maximum penalties and categorization of offences, will require continuous monitoring and updating. Again, we stress that if we are to ensure consistency and continuity in this regard these tasks are best entrusted to a specialized body.

A permanent sentencing commission would complement the work of provincial and territorial Courts of Appeal. The Commission would be primarily responsible for the formulation, review and updating of national sentencing guidelines while the Courts of Appeal would be responsible for the application, review and amendment, where necessary, of the guidelines in their respective jurisdictions. The need for such a commission to ensure uniformity and consistency of approach across the country cannot be over-emphasized nor can the crucial role which the Appeal Courts will play in providing direction for the application of the guidelines to particular cases and making needed modifications where warranted. This is the partnership which can best balance the need for greater uniformity and equality of justice in Canada with the maintenance of a sufficient degree of flexibility to allow for individualization of sentences in appropriate cases. In this partnership lies the greatest promise for a uniformity of approach which would reduce unwarranted disparity while retaining the ultimate authority of the courts to determine sentences in particular cases.

All of this suggests a need for a permanent and specially constituted body to overview the entire sentencing process. Due to the importance and complexity of sentencing and the magnitude of the task to be accomplished, it is clear that no body presently in existence could fulfill such a mandate. What is required is a Commission whose sole mandate is sentencing, if we are to achieve the aforementioned reform and information goals. Such a Commission must have the flexibility and capability not only to conduct research but to implement and evaluate reform measures. In addition, such a Commission must possess one other indispensable attribute. Unlike government departments or agencies it must have the high degree of independence necessary to fulfill a leading and co-ordinating role among the various branches and levels of

government and which will allow it to consider and balance the varied and often conflicting views of the numerous institutions, groups and individuals who have an interest in our criminal justice system.

The creation of such a body (although generally with a more restrictive mandate) has proven very beneficial in other jurisdictions, particularly in a number of American states[1]. Given the magnitude and diversity of our country, the different levels of government and the various agencies involved in the criminal justice system, there is an even greater need in Canada for effective and ongoing co-ordination in the development and implementation of coherent and consistent sentencing policy. The numerous submissions made to the Commission displayed the highest degree of consensus in suggesting the creation of a permanent sentencing commission.

14.1 The Commission recommends that the *Criminal Code* be amended to provide for the establishment and maintenance of a permanent sentencing commission.

1.1 Duties and Powers

Although, as indicated above, one of the first tasks of the permanent sentencing commission would be to complete the formulation of sentencing guidelines, it would be mandated and authorized to:

a) Establish and administer a specialized sentencing information system. This would obviously be done in consultation and in co-operation with the Canadian Centre for Justice Statistics, relevant federal and provincial government departments and agencies and would include:

- the collection of sentencing data from various federal and provincial government sources, the courts, the Canadian Police Information Centre, etc.
- the analysis and dissemination of sentencing data to sentencing judges and others involved in the criminal justice system.
- the evaluation of sentencing guidelines to determine their degree of applicability and relevance in particular cases as well as their effect on the use of incarceration and community sanctions.

b) Develop and revise national guidelines for presumptive type and range of sentences for specific offences and/or categories of offences.

c) Make recommendations to Parliament regarding the revision of maximum penalties, the structure of particular offences, the categorization of offences as to degree of seriousness and other matters relating to sentencing.

d) Make recommendations to the Minister of Justice for the improvement or reform of sentencing laws and procedures.

e) Provide the Minister of Justice with information, research material and study results concerning sentencing.

f) Provide (for the purpose of its consideration of any guideline judgment) at the request of a Court of Appeal, information relevant to the establishment and issue of guidelines.

g) Assist, to the extent possible, members of the judiciary and other criminal justice professionals and administrators with conferences and seminars on sentencing.

h) Convene members of the judiciary for consultation in the formulation of recommendations regarding consistency of approach in sentencing and the development and revision of sentencing guidelines. Consultation with an advisory council of judges from various levels of courts would be compulsory prior to reporting to the House of Commons.

i) Consult with federal and provincial governments, the judiciary, bar associations, institutions and persons engaged in teaching and conducting research on matters relevant to criminal law, and other professional or interested organizations and persons including members of the public. This would include inviting proposals and submissions and holding public hearings when necessary.

j) Initiate and carry out, on its own or by contract, such studies and research as the Commission deems necessary for the proper discharge of its functions.

k) Prepare each year and submit to the Minister of Justice an annual report of its activities, which the Minister would table in Parliament.

1.2 Structure and Organization:

1.2.1 Membership:

- The Commission would consist of a Chairperson, a Vice-Chairperson and at least five other members for a minimum of seven members.

- All members would be appointed by Order in Council including the designation of the Chairperson and Vice-Chairperson.

- The Chairperson would be a judge and would also be the chief executive officer of the Commission.

- The majority of members would be judges selected from various levels of courts.

- The other members would be selected from as wide a range as possible of relevant constituencies. The membership of the Commission could be set at

greater than seven to ensure adequate representation from interested sectors.

- All members, except the Chairperson, would serve on a part-time basis. The Chairperson would serve full-time, at least at the beginning and thereafter as necessary.

1.2.2 Term of Office:

- Initially it is recommended that varying terms of five, four and three years be established. Thereafter all terms would be three years. This will result in appointments being staggered and thus ensure a measure of continuity.
- A member would be eligible for re-appointment.
- Each member would be removable for cause only by Order in Council.

1.2.3 Remuneration of Members:

- The members of the Commission, except in the case of a person in receipt of a salary under the *Judges Act*[2], would be paid such salary as is fixed by the Governor in Council or, in applicable cases, reimbursement of salary would be made to the employer.
- All members of the Commission would be paid reasonable travelling and living expenses as fixed by the Governor in Council, while absent from their ordinary place of residence in the performance of their duties.

1.2.4 Staffing:

- The Commission would be authorized to hire such officers and employees as are necessary or advisable for the proper conduct of its work. The Commission would not require a large staff, although initially until a complete set of guidelines is developed a larger staff may be required.
- The Commission would be authorized to engage the services of legal counsel, researchers and other professional and technical advisors or experts as deemed necessary or advisable.
- Support services would be provided as required.

1.2.5 Head Office and Meetings:

- The head office of the Commission would be located in the National Capital Region.

- The Commission would meet as frequently as necessary for the proper conduct of its work but would be required to meet a minimum of three times a year. Meetings could be held in such places as are deemed necessary or expedient.

- A majority of members would constitute a quorum for Commission meetings and decision-making.

1.2.6 Financial and Other Resources:

- All amounts required for the payment of salaries, operation of programs and the operation and administration of the Commission would be paid out of monies appropriated by Parliament for this purpose.

- It is anticipated that excluding the cost of establishing and operating the sentencing information system, for its basic operation and research the Commission would require personnel and financial resources in the vicinity of $800,000.00 per year. The costs of establishing and operating the sentencing information system are discussed later in this Chapter.

- The Commission would, wherever appropriate, make use of technical and other information, advice and assistance available from departments, branches and agencies of the Government of Canada and every such department, branch and agency would be required to make available to the Commission all such information, advice and assistance as may be necessary to enable it to properly discharge its duties.

1.3 Conclusion

The foregoing discussion underlines the need for a permanent and independent sentencing commission and proposes its basic constitution and operation. Such a commission is felt to be essential to the continued improvement of our sentencing process and the enhancement of equity and justice in sentencing. The cost of establishing and operating such a commission is fairly modest. Given the high cost of operating our criminal justice system in general and the cost of incarcerating offenders in particular, there is no question that the contribution of such a commission to the co-ordination and consistent formulation and application of sentencing policy is of paramount importance. In the long-term the enhancement of social justice and the financial dividends resulting from a unified and consistent approach (e.g., restraint in the use of imprisonment) should greatly outweigh the cost of maintaining such a Commission.

2. Information Systems

After assigning to this Commission the responsibility of investigating and advising on the use of guidelines in sentencing, the terms of reference

acknowledge the importance of sentencing information for carrying out this responsibility. Specifically, the Canadian Sentencing Commission is given the responsibility:

> (e) **to advise, in consultation with the Canadian Centre for Justice Statistics, on the development and implementation of information systems necessary for the most efficacious use and updating of the guidelines.**

This Commission had frequent contact with the Executive Director and various officials of the Canadian Centre for Justice Statistics. In addition, the Commission carried out two separate studies of information systems. First, a detailed study of three sentencing commissions in the United States (Washington, Pennsylvania, and Minnesota) was carried out for the Commission. In conjunction with that project, a member of the staff of the Canadian Centre for Justice Statistics and a member of the research staff of the Canadian Sentencing Commission were able to visit some of these commissions. Second, a detailed study — analyzing the potential needs of a permanent sentencing commission in light of Canadian experience in the area of court data and U.S. experience with sentencing commissions — was carried out for this Commission.

Obviously, as with everything else to do with sentencing, the issues and the recommendations were considered in light of the unique features of the criminal justice system in Canada. Thus, although it was useful to the Commission to know what was going on in other jurisdictions, the structure and needs of the criminal justice systems in the various states that were studied were quite different from those in Canada. In particular, of course, the nature of the guidelines that were implemented by the Commissions in the United States, the meaning of a sentence of imprisonment, the structure of the offences, and the structure and jurisdiction of the trial and appeal courts are all quite different in the United States.

2.1 The Need for Sentencing Information

This report noted in Chapter 3 that sentencing in Canada takes place in a relative vacuum of information about current practice. Neither judges nor policy makers have systematic information about current practice. There are a number of independent reasons why the permanent sentencing commission which has been recommended by this commission will need sentencing information. Among them are the following:

a) In developing guidelines, one important factor for the permanent sentencing commission to consider is current sentencing practice.

b) In evaluating the operation of guidelines, the permanent sentencing commission would need to have information about the relationship of actual sentencing practice to the guidelines. For example, information about the proportion of sentences outside

the guidelines and the nature of those cases would help determine whether the guidelines needed to be changed. Thus, the permanent sentencing commission would need sufficient information about each case to evaluate those sentences within, and those departing from the guidelines.

c) The set of changes recommended by this Commission could have a dramatic and unplanned impact on the size of Canada's prison population if all of the recommendations were not implemented in conjunction with one another. It is important in the short run, and, indeed, in the long run, to collect information on sentencing practices in order to be able to anticipate any undesired changes in imprisonment rates.

d) The permanent sentencing commission should also provide judges with some detailed information about current practice (see the "guideline sheets" described in Chapter 11).

e) A sentencing information system that was comprehensive and up to date would allow the permanent sentencing commission to report on a regular basis to Parliament and to the Canadian public on sentencing patterns and on changes in sentencing patterns as the result of having guidelines.

f) To help identify any other problems in sentencing.

In Canada at the moment, there are no nation-wide systems for making detailed sentencing information available. On a one-time-only basis, this Commission was able to gather sufficient information to make its own recommendations for guidelines on some offences. Such *ad hoc* collections of data are sufficient for some purposes, but are far from ideal.

The ideal is quite simple to describe: using the offender as the unit of analysis, a rather limited amount of information would be gathered on cases for each offender sentenced in a criminal matter in Canada. The advantage of using the offender as the unit of analysis is that it allows the permanent sentencing commission to gather data on sentences and also on the factors which may have led the judge to determine sentence (e.g., the offender's prior criminal record). These data would be collected at the court level using a format which was the same across the country. They would be processed centrally for use not only by the permanent sentencing commission but by others with a legitimate interest in sentencing.

Although such an ideal system is easy to describe, it is not easy to implement. Some of the major difficulties have been described in Chapter 3. Since an ideal national sentencing system is unlikely to exist in Canada within the next decade, some might argue that the implementation of the reforms suggested in this report should be delayed until an adequate sentencing information system is in place. To argue this, however, is to ignore one critical fact: each week in Canada judges are sentencing thousands of people. This is being done in the absence of comprehensive information about sentencing

practice across the country. Hence it is wrong to argue that we should wait; sentencing cannot wait for up to a decade (or more) until complete information might be available.

Sentencing commissions in the United States that have developed extensive presumptive guidelines for criminal offences have often had to do so in the absence of complete and comprehensive information. Often the original guidelines were developed on the basis of detailed knowledge of only a few thousand cases spread across many offences. Initially follow-up information on the impact of guidelines in the United States was usually more complete, but still not ideal. In Canada, the choices are to recommend progress in the absence of complete certainty or to recommend that there be no progress at all. Needless to say, the Commission recommends that we forge ahead with necessary reform.

2.2 An Outline of Information Needs

There are an almost infinite number of dimensions on which cases can vary. Sentencing commissions in other countries have sometimes decided to collect initial data on a very large number of variables. Their reasons for doing this are complex, but in large part seem to be related to the fact that the principles which were to guide sentencing were not fully developed at the time they were collecting initial data. In terms of implementing a sentencing information system to support the recommendations of this Commission, such a large array of information on each case would not be necessary. Indeed, some U.S. commissions have found it impossible to collect data on all variables that they first listed as being important. All that is really necessary is information directly related to the limited number of principles which are being proposed as the guides to sentencing.

A review of the proposals made by this Commission for guiding sentencing decisions would suggest the following as a minimum set of information:

Statistical Data

a) Offence(s) of conviction.

b) Sentence(s): type of sanction (e.g., fines, probation, custody).

c) Sentence(s): *quantum* of sanction (e.g., amount of fine, length of custody).

d) The rate of sentences complying with and departing from the guidelines.

e) Variations in the prison population.

Legal Data

f) Some indication of the seriousness of the particular instance of the offence (as noted, perhaps, by the judge in the reasons for sentence) in relation to the sentence imposed.

g) An indication of the seriousness of the offender's criminal record, if any, as it was known to the court (as noted, perhaps, by the judge in the reasons for sentence) in relation to the sentence imposed.

h) Presence of important aggravating and/or mitigating circumstances including reasons for departure from the guidelines (if applicable).

Items a), b) and c) above are clearly important in order to identify main trends in current sentencing practice. Item d) is a basic measurement of the extent to which the guidelines are followed. Item e) is the main way to evaluate what is one of the most important effects of the implementation of the Commission's recommendations. Items f) and g) are important in understanding the sentences with respect to the guidelines, especially in the instances of offences which carry the "qualified in" and "qualified out" presumptions. Information about the criminal record and the seriousness of the offence, in these offences, determines the nature of the appropriate (presumptive) sanction. Item h) is central to understanding the reasons for variation within the guidelines and departures from them. In classifying items f), g) and h) as legal data, we do not want to imply that the permanent sentencing commission cannot derive meaningful statistics from their collection. We only want to indicate that these data need first to be extracted from written judgments and other sources in order to be later processed according to statistical methods.

Obviously, additional information would be helpful in trying to get a more complete understanding of the determinants of sentencing and to be able to identify issues or problems easily. However, the information that is listed above is quite adequate and, indeed, is more complete than Canada has and most countries have ever enjoyed, on a systematic nation-wide basis.

Having said that such information would be necessary to have on each case does not, however, mean that every offender in Canada must be sampled. Gathering information on all criminal cases would be ideal, but not strictly necessary for this purpose alone. Instead, it might well make sense to sample offences and court locations in order to get a comprehensive, but not exhorbitantly expensive, picture of sentencing. Samples could be drawn on a regular and continuing basis with some variation in location of sampled courts across time. As pointed out earlier, such sampling seems to have been the rule rather than the exception in the early days of the sentencing commissions in the United States.

2.3 The Administration of a Sentencing Information System

This Commission has recommended that one of the responsibilities of the permanent sentencing commission be to collect relevant sentencing information in order to be able to carry out the various functions related to guidelines. It is recommended that the power to do this be vested explicitly in the permanent

sentencing commission. This is not to say that the commission would collect all data on its own, with its own resources. However, it must have the authority to collect such data.

Chapter 3 contained a brief description of the regrettable position in which we find ourselves in Canada with respect to sentencing data. There are a number of practical and political reasons why this has occurred which are not relevant here.

However, at this time, the Canadian Centre for Justice Statistics is working with the provinces to attempt to draw from the provinces' own computerized information systems the information that it had been collecting directly two decades ago. Although this does ensure that there is no unnecessary duplication of effort, it means that the Canadian Centre for Justice Statistics is dependent on the development in the provinces of a variety of different automated data systems. This is necessarily a slow process and even when a system is in place, it takes time for it to become operational in all parts of the province (e.g., especially in smaller or more remote communities). In any case, however, it is extremely unlikely that the Canadian Centre for Justice Statistics would be able to collect information other than the sentence attached to each offence of conviction. The additional information noted above (items f), g) and h)) would have to be collected in some other manner.

Due to the limitation of current systems, it is critical that the permanent sentencing commission have the authority to collect data in line with its own immediate needs. It is interesting to note that even though various state jurisdictions in the United States did not have a split jurisdiction to deal with, as we have here in Canada, they nevertheless found themselves very much in the same position as we are presently. As a consequence, some American state sentencing commissions were given the authority through legislation (*Hann, 1985*; 9) to collect sentencing data and as a result developed their own data-gathering capabilities (*Hann, 1985*; 5). The sentencing commission in Pennsylvania was given the power in its enabling legislation to get data from the relevant state agencies, publish these data (and analyses of them) and make recommendations to the legislature in areas related to data collection (*Hann, 1985*; 6-8).

There is, however, an additional reason for giving the permanent sentencing commission the authority to collect sentencing data on its own authority. The needs of the permanent sentencing commission are much more specific than those of other agencies. The data collection programs of other agencies are in a sense too broad and at the same time too narrow for the permanent sentencing commission's requirements. For instance, the court data collection program which is progressively being implemented by the Canadian Centre for Justice Statistics is comprehensive and it encompasses the gathering of information which is not immediately relevant for the permanent sentencing commission. This program will not, by its very nature, collect data on prison populations, which the permanent sentencing commission must obtain from other sources. Unless the permanent sentencing commission had its own

organizational and financial capabilities in the area of data-gathering and analysis, it would have no way of ensuring that it would be able to collect the data to fulfill its mandate.

Finally, no matter what legislative authority is given to any institution to collect sentencing data in Canada, the effort will not be successful unless co-operation is received not only from all provinces and territories, but also across the various levels of court in all jurisdictions. As the necessary providers of information are themselves spread across administrative groups (e.g., judges and court clerks are responsible to quite different authorities), a great deal of co-operation is necessary. One advantage of giving the permanent sentencing commission direct authority to collect sentencing data is that the relationship between the data being collected and the need for it will be very clear. With the purpose and need for the data being clear, it is likely that full co-operation would be easier to obtain.

If the permanent sentencing commission were given its own authority to carry out data collection, it could also monitor the data coming in to see quickly and in detail whether there were problems in interpreting the guidance from the commission. At the same time, of course, the commission could ensure that the data that were coming in were of sufficient quality to allow the commission to do its work.

For most of its purposes, the permanent sentencing commission would not need to have a considerable amount of data (such as those data noted above) on each case. Although it would be better to have these data collected on all cases, it is unlikely that this would happen in the foreseeable future. It would be sufficient for data to be collected on a sampling basis.

For other needs, however, the permanent sentencing commission would have to carry out *ad hoc* studies on special topics. An example of the kind of study that the commission might want to carry out would be to investigate differences in the use of certain dispositions. It might be that two jurisdictions differed markedly on their sentencing for a particular offence. This might turn out to be due to differences in the availability of certain programs, it could be because of differences in the nature of the particular offences coming before the courts, or it could signal the need for more explicit guidance from the commission itself. Special studies would probably be the most appropriate way of dealing with such questions.

2.4 Information for Decision-Makers

The permanent sentencing commission would also have the responsibility of collecting information relevant to the needs of judges in their decisions on sentencing. Such information could include details about current sentencing practice (including reasons for departures from guidelines), relevant information from Courts of Appeal, information about the availability of community sanctions, and outcome measures such as the probability of

successful completion of a community sanction for particular kinds of offenders.

An obvious advantage of having such information coming from the permanent sentencing commission is that the commission would consist not only of a majority of judges (who would have first-hand knowledge of the information needs of other judges) but would also come from the organization whose responsibility it was to improve the structure in which sentencing was occurring. Thus, the permanent sentencing commission would be seen as not only providing guidance to the sentencing judges but also would provide judges with the kind of information that a majority of judges in recent surveys have indicated that they would find helpful.

2.5 Setting Up an Information System: The Necessary Steps

One of the responsibilities that the Canadian Centre for Justice Statistics has had since its formation in 1981 was the creation of a system for collecting sentencing statistics. The process is not complete and it is difficult to know when it will be. In addition, all of the data necessary for carrying out the functions of the permanent sentencing commmission will not be collected by this central system. Clearly, the permanent sentencing commission will have to collect some data on its own initiative. On the other hand, the permanent sentencing commission would be ill-advised to attempt to create its own permanent data-gathering structure that duplicates or is in competition with the work of the Canadian Centre for Justice Statistics.

14.2 The Commission recommends that the permanent sentencing commission be given the independent authority to collect the data necessary to carry out its mandate. This would include the authority, similar to that given to Statistics Canada, to enlist the co-operation of the provinces.

In order to do this, the permanent sentencing commission would be well advised to work closely with the Canadian Centre for Justice Statistics since it would maintain its primary role in the gathering of national statistics on sentencing.

14.3 The Commission recommends that the permanent sentencing commission rely, where necessary in the early years, on special *ad hoc* surveys of sentencing practice.

Such surveys may be conducted in the field of what we have described as legal data. Whether these surveys are carried out by the permanent sentencing commission itself, or are supervised by the staff and carried out by a private contractor, or are carried out in co-operation with the Canadian Centre for Justice Statistics is not important. What is important, is that such surveys be carried out under the control of the permanent sentencing commission. It is expected that the permanent sentencing commission's needs could be met in

this area with an annual budget of approximately three hundred thousand dollars.

In the long run, it would be expected that the permanent sentencing commission would be an important client of the Canadian Centre for Justice Statistics. At the moment, important governmental clients of the Canadian Centre for Justice Statistics sit on various councils and committees within the Canadian Centre for Justice Statistics to offer guidance and advice. It is not recommended that the permanent sentencing commission have any such formal relationship with the Canadian Centre for Justice Statistics at the outset. The permanent sentencing commission might well wish to monitor this situation over the years to see if a more formal link would be useful.

Because of its need for an independent capability in the area of sentencing data:

14.4 The Commission recommends that a budget sufficient for collecting the sentencing data necessary to carry out its responsibilities be allocated to the permanent sentencing commission.

In the long term, it is possible that the permanent sentencing commission would find it in its interest to purchase such services from the Canadian Centre for Justice Statistics.

Finally, it is likely that the permanent sentencing commission would always need to have some data collection of its own. Thus, in addition to the budget to get basic sentencing information, the permanent sentencing commission would have to be given an additional research capability (in the form of a budget). It is expected that this could be carried out, on a continuing basis, within the suggested annual operating costs of $800,000 mentioned earlier in section 1.2.6.

3. Impact of the Recommendations on Provincial Institutions

Information systems are not the only connection between the Commission's proposals and matters which are under provincial jurisdiction. The Commission's recommendations involving more restraint in the use of incarceration should result, among other things, in shorter terms of incarceration. As it is well known, offenders receiving custodial sentences of less than two years serve their term in a provincial prison; if the sentence is two years or more, it is served in a federal penitentiary. A reduction in the length of custodial sentences may bring about a shift in prisoner populations from federal to provincial institutions. Should this occur, it is possible that the resulting pressure on the provincial correctional system will be offset by the impact of other recommendations made by the Commission including:

a) The recommendations concerning payment of fines will drastically reduce imprisonment for defaulting on a fine, which is a burden on the provincial system.

b) The elimination of all minimum penalties, except for murder and high treason, will also reduce the volume of incarceration in provincial institutions.

c) The guidelines recommended by the Commission will also contribute very signficantly to reduce the pressure on provincial custodial institutions. For example, thousands of cases involving numerous offences under the *Criminal Code* and related statutes (e.g., obstructing justice - ss. 133(3), failure to appear – ss. 133(4) & (5), dangerous driving – ss. 234 & 234(1), failure to comply to probation order – s. 666, and possession of narcotics – s. 3, *Narcotic Control Act*) presently result in sentences which are served in provincial jails. Under the Commission's proposal all these offences are assigned a qualified or an unqualified presumption of non-custody.

d) The Commission's emphasis on the necessity of increasing the use of community sanctions should also result in reducing the size of provincial prison populations. It is recognized, however, that the responsibility for the establishment and operation of community-based programs fall to the provinces.

The impact of the Commission's recommendations on the size of prison populations will have to be closely monitored by the permanent sentencing commission. If, despite all the measures which we have just listed above, the size of provincial prison populations should significantly increase because of a reduction in the length of custodial sentences, the two-year line dividing provincial and federal incarceration could be set at a lower point. This measure would cause a shift of a proportion of the provincial jail population to the federal system. We have seen in the historical chapter that the dividing line of two years was determined rather arbitrarily. We might mention that a lower dividing threshold between sentences served in federal and provincial institutions might well be more consistent with the Commission's proposed categorization of offences and maximum penalties.

There is one further point on which the Commission's recommendations involve matters of provincial jurisdiction. This is the issue of introducing more visibility and more accountability into the plea-negotiation process. It would be desirable that the provinces co-operate in the formulation of common standards for plea-negotiations in order to ensure that the highest degree equality and equity prevail across the country.

4. Implementation and Operational Costs

The terms of reference do not require the Commission to examine or analyze the cost implications of its proposals. However, given the importance of this exercise and the realization by the members of the Commission that change cannot be effected without cost, it was felt advisable to comment briefly on the nature of the costs and cost-sharing of the proposals. The following comments are offered regarding implementation and operational costs.

4.1 Implementation Costs

A number of the Commission's proposals will entail costs in the nature of capital "start-up" costs. Most of these implementation costs will result in ultimate decreases in the operational costs. For example, the Commission has recommended a greater use of "open custody" sanctions. This necessarily implies that in those jurisdictions where no open custody facilities exist (e.g., work camps, community training residences, etc.) that such facilities and programs should be instituted. In the long-run however, according to our proposals, an increased use of open custody facilities must result in a decrease in the demand for the more expensive, secure custody facilities.

With the effective exercise of restraint in the use of incarceration will come a consequential need for programs to support the increased use of community sanctions. This will call for additional and new programs.

The establishment of a national information system also clearly has cost implications for both the federal government and the provinces. If, for example, sentencing data requirements are to be met in each province across the country, costs will be greatest to those provinces currently using the least sophisticated data collection methods.

A final example of implementation costs are those costs involved in the training, education, and orientation or re-orientation of all persons central to the operation of the criminal justice system. Included in these numbers would be judges, lawyers, police officers, probation and parole officers, court workers, other professionals and volunteers working in the criminal justice system. While the Commission has not specifically discussed the need for adequate educational programs to assist in resolving problems of disparity and inequity in sentencing, it does nevertheless recognize the crucial importance of such programs; not only for the ongoing improvement of the sentencing process generally, but for the smooth and effective implementation of reform measures. In addition, there is a need for public education programs to inform members of the public of the changes to the sentencing process.

4.2 Operational Costs

The package of sentencing reform proposed by the Commission would, if implemented, not require any overall increase in operational costs. If the proposals in their entirety are adopted, there should be a resulting overall shift from more costly carceral sanctions to new community programs. It is expected that as a result of the guidelines proposed by the Commission, this shift will occur without causing a widening-of-the-net effect. The creation of a permanent sentencing commission will necessarily involve operational costs, but again, these costs should not result in a net increase in operating costs, given the nature of savings that will result from restraint in the use of imprisonment as a sanction. The abolition of full parole and the reduction of

mandatory supervision are other operating costs that will ultimately be substantially reduced.

4.3 Conclusion

The implementation of the Commission's recommendations will certainly result in the realignment of the costs of administering criminal justice programs particularly with regard to incarceration and community sanctions. It is expected that a significant portion of these costs will shift to the provinces thereby increasing their financial responsibility. While there will also be increased costs for the federal government (e.g., the establishment and operation of the permanent sentencing commission) there should as well be corresponding significant savings (e.g., restraint in the use of incarceration, elimination of parole and reduction of mandatory supervision). Accordingly, the Commission urges the federal government to assist the provinces with both initial start-up costs and ongoing operational costs. While it is not the role of the Commission to suggest specific funding programs, it recognizes the responsibility of the federal government to assist provinces in the implementation of national policy and principles. The establishment of criminal law policy goes beyond merely passing legislation and leaving its implementation to the provinces.

The Neilson Task Force Report has stressed the importance of the criminal justice system as a joint responsibility that accordingly requires that costs be shared by federal and provincial jurisdictions. The implementation of the *Young Offenders Act* is an example of how the federal government has accepted the responsibility of cost-sharing in the area of criminal justice reform. The Task Force summarizes the importance of this function as follows:

> Finally, based on the foregoing relationships with the provinces in this sector of shared jurisdictions, the study team believes emphasis should be placed on a more co-operative, fact-based footing. Services, wherever possible, could be shared, and every effort made to develop new criminal law on a co-operative basis, tying consultation to criteria such as jointly developed costing data and providing for the joint development of demonstration projects. (pp.21-22)

The Commission has only highlighted some of the cost implications of its proposals. The Commission is of the view that if the government were to implement this proposed integrated set of reforms, that there should not be any increase in overall long-term criminal justice spending. As we have pointed out, there will, however, be start-up and implementation costs. Hence, it is important that as the federal and provincial governments share jurisdiction in the implementation of criminial justice reforms that they also share the responsibility for and the costs of such reforms. In conclusion, the Commission is hopeful that the principle of shared responsibility in the implementation of criminal justice reforms will continue to be the guiding policy.

5. An Agenda for Change: Some Considerations

It is not within the power of a Commission of Inquiry to proceed to the implementation of its own recommendations. Without going into the provision of a detailed timetable for the eventual implementation of its proposal, if adopted, the Commission would like nonetheless to make a number of points and suggestions with respect to the implementation of its recommendations. The most crucial requirement is that no legislative modification of the maximum penalties and of the provisions relating to parole and remission be implemented before all presumptive guideline ranges are finalized by the permanent sentencing commission. Other considerations follow:

a) Creation of a Permanent Sentencing Commission

One of the first steps will be the enactment of legislation necessary to authorize the establishment of the permanent sentencing commission and to give it the legal powers which it needs to develop adequate sentencing information systems.

b) Finalization of Sentencing Range Guidelines

The initial task of the permanent sentencing commission will be to finalize the sentencing range guidelines in conformity with the recommendations and the prototypes developed by this Commission. Custodial ranges should be determined for all offences for which there is a presumption involving the potential use of incarceration ("in", "qualified in", and "qualified out"). The permanent sentencing commission may have to consult with other bodies involved in criminal law review in order to finalize the numerical ranges. The permanent sentencing commission should also coordinate its operations with the Canadian Centre for Justice Statistics and other relevant bodies in order to implement in the most efficient way its sentencing information systems.

c) Consultation

It is expected that in formulating the sentencing range guidelines and the implementation of adequate sentencing information systems, the permanent sentencing commission will consult with relevant federal and provincial departments and agencies as well as with professional and other parties interested in the criminal justice system. Meanwhile, we anticipate that the Minister of Justice will have initiated consultations on the Commission's recommendations shortly after publication of the report.

d) Approval of Guidelines by the House of Commons

This procedure has been described in detail in Chapter 11. As we have previously stressed, the adoption of the sentencing guidelines should proceed with a view to their concurrent

implementation with the other legislative changes resulting from the Commission's proposals.

6. List of Recommendations

14.1 The Commission recommends that the *Criminal Code* be amended to provide for the establishment and maintenance of a permanent sentencing commission.

14.2 The Commission recommends that the permanent sentencing commission be given the independent authority to collect the data necessary to carry out its mandate. This would include the authority, similar to that given to Statistics Canada, to enlist the co-operation of the provinces.

14.3 The Commission recommends that the permanent sentencing commission rely, where necessary in the early years, on special *ad hoc* surveys of sentencing practice.

14.4 The Commission recommends that a budget sufficient for collecting the sentencing data necessary to carry out its responsibilities be allocated to the permanent sentencing commission.

Endnotes

1. States with sentencing commissions include: Florida, Maine, Minnesota, Pennsylvania, South Carolina and the State of Washington.
2. *The Judges Act*, R.S.C. 1970, c. 159.

Chapter 15

Conclusion

A conclusion is usually devoted to summarizing the main points which have been made in a book or a report. Here such a conclusion would be redundant because a summary has already been provided at the beginning. In the general introduction to the second part of this report, the Commission stated what it intended to achieve in formulating its recommendations. In this conclusion, we shall reflect briefly upon the main features of the integrated set of reforms proposed by this Commission.

One of the conclusions to emerge from the Commission's research program is that the current system is more complex than efficient. The growth in costs and complexity of the criminal justice system has not been matched by a corresponding increase in benefits to society. It might even be argued that the inordinate complexity of the system is too high a price to pay for the meagre results now achieved by that system. For example, despite the stated objective of the current system to individualize sentences and the corresponding multiplication of rules and programs to facilitate such individualization, in reality the sentencing process still operates according to the principles of a very plain logic by which all sanctions are defined in terms of incarceration or alternatives thereto.

The criminal justice system generates its own needs and devotes a significant part of its energy to fulfilling these artificially-created needs rather than meeting the demands of the community. Thus, early release has been used in a number of jurisdictions more as a tool to ease the pressure created by the increase in prison populations than as an instrument to protect the public and rehabilitate the offender. Actually, not only does the complexity of the sentencing process make it remote from the general public's understanding, but it also screens the strengths and weaknesses of the process, thereby obstructing attempts at precise evaluation.

In accordance with this assessment, the Commission has undertaken to simplify the sentencing process and to make recommendations that would bridge the gap between the letter and intent of the law on the one hand and its actual application on the other. In performing this task the Commission was led to draw an important distinction between two different kinds of complexity.

The first may be described as the unintended result of the piecemeal approach that was previously taken in amending sentencing law and practice. Incremental measures were added one to the other without any apparent attempt to see how they fitted together in a consistent pattern. The maze of rules governing early release is a prime example of the kind of complexity which needlessly undermines the sentencing process. Another example is the use of concurrent and consecutive sentences. These unnecessary complications can be simplified in a way that will improve the sentencing process.

There is however another sort of complexity built into the sentencing process which is an essential and permanent aspect of its operation. The imposition of sanctions upon members of society is a difficult decision which involves the consideration of many factors. Dealing with human behaviour is an extremely complex exercise and accordingly, in striving to make sentencing more understandable and predictable, one must be careful not to over-simplify the decision-making process. In recommending presumptive guidelines, the Commission was wary of limiting the choice to either "in" or "out" and hence recommends four levels of presumptive dispositions. The Commission is firmly convinced that, despite its obvious desirability, simplification of the operation of the sentencing process should not be accomplished at the expense of the principles of fundamental justice. Issues such as the decision to incarcerate an offender, the enhancement of custodial sentences and sentencing for multiple convictions cannot be over-simplified. They have been the subject of careful and in-depth deliberation and the Commission's recommendations on these matters and others should be assessed with as much care as was given to their formulation.

It has often been stressed in this report that the Commission's recommendations form an integrated whole designed to achieve a balance between unfettered discretion and a model of mandatory sentences. While achieving a proper balance is admittedly a difficult and delicate task, in this endeavour the Commission was anxious to avoid either extreme, and especially so with regard to sentencing guidelines. One option would have been to steer away from its terms of reference and to relinquish entirely to the Courts of Appeal the development of sentencing policy and guidance. This option would have amounted to little more than continuing the *status quo*, ignoring the problems which the Commission found to be associated with the current state of sentencing. Indeed, this Commission would never have been appointed nor allowed to spend public funds if the present state of affairs had been thought to be, in the main, satisfactory. A more extreme option would have been to depart abruptly from Canadian judicial tradition and propose a model of sentencing guidelines (such as a grid or a mathematical equation), which relied heavily on the computation of numerical scores and offered little flexibility.

Instead of recommending that no real change take place or proposing reforms which would have been foreign to our judicial tradition, the Commission has developed recommendations that constitute a middle ground. Middle-range solutions are by their very nature vulnerable to criticism from two sides. They can be said to provide either too much guidance or not enough.

In favouring the middle ground, the Commission made a choice that was very deliberate. This option was chosen because of its reasonableness and also because it was in line with this country's tradition of solving problems. An attempt to change the focus of the Commission's recommendations – either by bringing them closer to the *status quo* or nearer to the more radical options which were explicitly rejected – would upset that balance between judicial and democratic institutions deemed essential by this Commission.

Two obvious questions come to mind when assessing the meaning of this integrated set of recommendations. First, in recommending that maximum penalties be decreased, is the Commission not thereby proposing the adoption of a more lenient attitude towards crime? Second, in recommending presumptive sentencing guidelines, is it not thereby taking sentencing decisions away from the judiciary? These two questions are so closely connected that they may be addressed by a common answer.

Although the Commission recommends that maximum penalties be decreased, the proposed maxima are still much higher than the average sentences imposed under current practice. Furthermore, the Commission recommends that any offender receiving a sentence of imprisonment must spend at least 75% of his or her sentence in custody. If sentences were to remain at their current level, this last recommendation would have the consequence of significantly increasing prison populations within a short period of time. Hence, what is at risk here is not undue restraint but more severity in the imposition of sanctions. In order to offset an increase in the overall severity of sanctions, the Commission proposes several different measures, including: a sentencing rationale which gives priority to the principles of proportionality and restraint; sentencing guidelines; an increase in the use of community sanctions and a substantial reduction in the use of incarceration for fine defaulters. The power to apply or to resist these measures rests entirely where it has always been and where it should continue to lie: in the hands of the judiciary. No element of these recommendations compels a judge to determine a sentence by any method or principle other than what the judge perceives to be just. The judges are provided with presumptive guidelines which were carefully designed to fit the standard cases and which will be regularly updated. A judge retains full discretion to assess whether a given case is uncommon enough to warrant a departure from the guidelines. If the trial judge reaches such a conclusion, he or she must state explicitly the reasons which support it. Once the trial judge has complied with this requirement, the only remaining consequence is that the decision and supporting reasons may be reviewed on appeal. This is entirely consistent with present judicial tradition.

Throughout its deliberations and in the formulation of its recommendations, the Commission was constantly concerned that its proposals be realistic and feasible. This report has already noted that since the Ouimet Committee reported in 1969, there have been many calls for the requirement that judges provide written reasons for all sentences of imprisonment. This recommendation has yet to be implemented. According to an August, 1986 report issued by the Solicitor General of the Province of Quebec, 18,347 offenders were

sentenced to a provincial term of incarceration in Quebec, during the fiscal year of 1985-86 (*Rapport du Comité d'étude sur les solutions de rechange à l'incarcération* p. 57). This figure (which refers to incarceration in provincial institutions in the province of Quebec) is indicative of the very high number of custodial sentences imposed every year in the whole of Canada. Even granting that the requirement to justify sentences of custody may reduce significantly the use of incarceration, courts will either be compelled to provide very short and perfunctory justifications or they will be faced with dispatching an overwhelming caseload. For all its merits, it may be that the requirement to justify all sentences of incarceration has never been implemented because of problems of feasibility. The Commission's recommendation to issue general guidelines on the use of incarceration and to require explicit reasons only in the case of departures from the guidelines is much more realistic than the obligation to provide reasons for all individual custodial sentences.

There is one more significant advantage to the Commission's recommendations. Any requirement that judges justify in writing all sentences of incarceration rests at least in part on the implicit assumption that injustice usually occurs when a custodial sentence disproportionate to the offence of conviction is imposed on an offender. However, injustice can also result if custody is not imposed when it would be entirely warranted by the seriousness of the offence and the degree of responsibility of the offender. Under the Commission's proposals, a judge who would depart from a presumption of imprisonment (an "in" or a "qualified in") would no less have to justify his/her decision than a judge imposing a custodial sentence which does not comply with the guidelines. Even though the Commission strongly advocates restraint in the use of incarceration, its recommended guidelines nonetheless, have no built-in bias favouring undue leniency.

The Commission has devoted careful attention to articulating a reform of sentencing which is feasible and can be implemented without unduly taxing government resources. The view that Commission reports are more successful in enriching libraries than changing the system is frequently expressed. While the Commission cannot determine the fate of its recommendations, it can at least state explicitly that its report was not written in the spirit of enhancing the level of sentencing scholarship, but rather with a view to reforming the sentencing process in a realistic manner. In striving to provide the basis for a common approach to sentencing, the Commission has recommended guidelines to provide the necessary structure and guidance for the exercise of discretion throughout the process. More visibility and accountability in the process are an inevitable and important aspect of these recommendations. In the final analysis, if these reforms serve to enhance public understanding of and confidence in the process, the Commission will have accomplished an important aim in the on-going need for evaluation and reform of sentencing in Canada.