



**VICTIM PARTICIPATION IN THE
PLEA NEGOTIATION PROCESS IN
CANADA: A Review of the Literature
and Four Models for Law Reform**

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Executive Summary

Introduction

In recent years, there has been a clear trend towards recognizing the rights of victims to participate more fully in the criminal justice process. In Canada, significant steps have been taken to ensure that victims are granted the right to participate formally in the sentencing and parole processes through the use of victim impact statements, which may be presented either orally or in written form. However, to date, comparatively little attention has been paid to the question of whether or not victims should be accorded a meaningful role in the process of plea negotiations (or plea bargaining).

In Canada, it appears that about 90% of criminal cases are resolved through the acceptance of guilty pleas: many of these pleas are the direct outcome of successful plea negotiations between Crown and defence counsel. Where a plea bargain has been implemented, the Crown and the accused effectively determine the nature of the charge(s) that will be laid. Since the nature and *quantum* of sentences are primarily based on the charge(s) brought against the accused, it is clear that the parties to a successful plea negotiation enjoy the *de facto* power to exercise a considerable degree of influence over the sentence that is ultimately imposed by the trial judge.

The process of plea negotiations may undoubtedly affect the victim of a crime in a most profound and personal manner. However, in Canada, plea bargaining has not been officially recognized and has, therefore, not been subjected to a regime of open scrutiny by the courts. The process largely takes place behind closed doors and there is, therefore, no opportunity for meaningful victim participation.

In 1987, the Canadian Sentencing Commission recognized the need to address victims' interests during plea negotiations. The Commission proposed that plea negotiations should be opened to a formal process of judicial scrutiny and that victims be accorded a role during this critical decision-making point in the criminal justice system. However, this recommendation has not yet been acted upon.

In sharp contrast to the existing situation in Canada, the federal courts in the United States have developed a coherent system for the judicial regulation of plea negotiations. This system is based on a structure that combines Rule 11 of the *Federal Rules of Criminal Procedure* with significant elements of the *United States Sentencing Guidelines*. Moreover, each state in the United States has developed an equivalent process for the judicial supervision of plea bargaining. Therefore, the practices of both federal and state courts within the United States furnish a wealth of invaluable experience that may be drawn upon in the process of developing potential models for the judicial regulation of plea negotiations in Canada. More specifically, the American experience may inform Canadian policy makers as to the most effective methods of involving victims in the process of plea bargaining.

The present report examines the current legislative and judicial responses to plea bargaining within Canada and identifies the negative consequences that flow from the lack of any formal process for the regulation of this ubiquitous phenomenon in the criminal justice process. The report then investigates whether the regulatory process entrenched in the federal courts of the United States - by Rule 11 of the *Federal Rules of Criminal Procedure* and the *United States Sentencing Guidelines* - may serve as a viable model for the judicial supervision of plea bargaining in Canada. In addition, the report scrutinizes the regulatory regime that has been

established in the State of Arizona because it specifically provides for direct participation by victims in the judicial hearing that is convened in order to determine whether the court will accept or reject a proposed plea agreement. It is suggested that a viable model for the participation of victims in the plea bargaining process in Canada may be forged by combining elements of both Federal Rule 11 and the Arizona statute.

In order to estimate the potential impact of granting the victims of crime a direct role to play in a formal plea bargaining process before Canadian criminal courts, the report examines the jurisprudence and empirical research that has emerged in relation to the introduction of victim impact statements during court proceedings in Canada.

The report concludes by identifying four potential models for the participation of victims in the plea bargaining process. The one that may be the most viable option for Canada is the model that requires that plea bargaining be officially recognized by the Parliament of Canada; that prosecutors be required to consult with victims during the plea bargaining process; and that, while victims should not be accorded a right of veto, they should nevertheless be granted the right to make oral or written presentations to the trial judge concerning their opinions about the terms, and ultimate acceptability, of any proposed plea agreement.

Victims' Rights and the Prosecution of Criminal Cases

International Context

There has been a trend, in many countries, towards enhancing the rights of victims in the prosecution of their cases before the criminal courts.

United Nations Declaration

In 1985, the General Assembly of the United Nations adopted the *Declaration of Basic Principles of Justice for Victims of Crime*. The Declaration imposes a duty upon prosecutors to provide specific information to victims about various aspects of the criminal trial process – including plea bargains and sentencing.

European Initiatives

In March of 2001, The Council of the European Union issued a *Framework Decision*, which addressed the right of victims in the member states to receive information concerning the prosecution of their cases. In the United Kingdom, for example, a *Victims Charter* has been established in order to address the need for the Crown to provide victims with accurate information concerning the progress of their cases and to enable them to submit a “victim personal statement” that is subsequently made available to the police, the Crown Prosecution Service, the defence counsel and the trial court.

Initiatives In the United States

The United States has experienced a conspicuous trend towards the enhancement of the rights of crime victims in relation to the prosecution of their cases. All 50 of the states have enacted victims' rights legislation and the federal Congress has kept pace with the state legislatures with



the enactment of the *Victims' Rights and Protection Act*, 1990. One of the central features of this body of legislation is the right of victims to be kept informed of the status and progress of their cases within the criminal court system. Significantly, in the majority of American jurisdictions, prosecutors are required to consult with – or obtain the views of – victims at the plea agreement stage of the process. In a few states, victims are accorded the right to participate in the plea hearing, during which the trial judge is charged with making the decision whether or not to accept a proposed plea agreement. The strongest victims' rights legislation has been enacted by the State of Arizona, which entitles the victims of a crime to express their views personally at the plea hearing. However, the Arizona legislation explicitly states that the victim does not have the right to veto a proposed plea bargain.

Although the legislative reforms enacted in the United States appear to have substantially enhanced the rights of crime victims during the plea negotiation process, it is nevertheless important to note that, in certain jurisdictions, there is a real question as to the effectiveness of these rights. For example, the legislation does not always make it clear which criminal justice officials are to be held responsible for ensuring that victims are given adequate notification concerning their case. Research conducted in the United States has indicated that the failure to hold specific officials responsible for conveying information to victims has resulted in a situation in which up to 50% of victims are not provided with the necessary information concerning plea bargains. In this respect, it is critical to note that empirical studies have found that when victims are appropriately notified they are more likely to be satisfied with the criminal justice system and with the outcome of their cases.

Canadian Initiatives

Provincial Legislation

All of the provinces and territories in Canada have enacted some form of victims' rights legislation. Most of the relevant statutes make provision for crime victims to be kept informed of the status of their cases during the criminal justice process. However, only two provincial statutes (Ontario and Manitoba) specifically address the rights of a victim to receive information about plea negotiations. In recent legislation, Manitoba has taken the unprecedented step of granting victims the right to be consulted about various aspects of the prosecution of their cases, including "any agreement relating to a disposition of the charge."

In most Canadian jurisdictions, the relevant legislation simply exhorts criminal justice officials to make information available to crime victims, without imposing a specific duty to do so. Furthermore, many of the rights accorded by the legislation are subject to numerous restrictions that leave prosecutors with a considerable degree of discretion whether or not to furnish victims with information that is pertinent to their cases.

Federal Legislation

The most significant legislative initiative, which the Parliament of Canada has taken in relation to victims' rights, is the recognition of the right to submit victim impact statements to the trial courts. Clearly, the relevant amendments to the *Criminal Code* have accorded victims a right to participate in court proceedings in a manner that permits them to articulate the nature of the harm that they have suffered as a result of the crimes committed against them. However, the impact of this particular right could be substantially diminished in those cases which are resolved through plea negotiations where the accused agrees to plead guilty to a lesser charge. The new charge, which does not include all the same elements as the original charge, may limit the

victim's description of the impact on her/his life. Up to 90% of criminal cases are resolved through the acceptance of guilty pleas, many of which are the result of plea negotiations. In the absence of specific provisions in the *Criminal Code* that provide for the judicial regulation of plea negotiations, the victims of crime are completely excluded from this critical stage of the criminal process. This oversight has significant implications for victims' rights since the plea bargaining process may well determine the nature of the charges that are ultimately laid against the accused and thereby exert a significant degree of influence over the nature and scope of the trial judge's sentencing discretion.

Plea Bargaining in Canada

Introduction

A simple definition of plea bargaining is provided by the Law Reform Commission of Canada, which states that a "plea agreement" constitutes "an agreement by the accused to plead guilty in return for the prosecutor's agreeing to take or refrain from taking a particular course of action." More specifically, three categories of plea bargaining may be identified: (1) **Charge bargaining**, which involves promises concerning the nature of the charges to be laid; (2) **Sentence bargaining**, which involves promises relating to the ultimate sentence that may be meted out by the court; and (3) **Fact bargaining**, which involves promises concerning the facts that the Crown may bring to the attention of the trial judge.

The Judicial Response

Until relatively recently, the practice of plea bargaining was "frowned upon" and most criminal justice personnel were loath to admit that it took place at all. However, during the past 15 years, there has been a dramatic shift in attitude. Both the Canadian Sentencing Commission (1987) and the Law Reform Commission of Canada (1989) recommended that the practice become more transparent and ultimately subject to judicial regulation. Furthermore, in *Burlingham* (1995), the Supreme Court of Canada recognized the plea bargain as "an integral element of the Canadian criminal justice process."

A strong sign of the degree to which plea bargaining has now become entrenched as a legitimate element in the criminal justice process is the clearly articulated willingness of Canadian courts to endorse the joint-sentence submissions that are advanced by Crown and defence counsel.

The lack of a formal process for plea bargaining in Canada

In spite of the fact that the judiciary has overtly endorsed the practice of plea bargaining, Canada still has not established a formal process by means of which trial courts are required to scrutinize the contents of a plea bargain and to ensure that there is adequate protection for the rights and interests of all the affected parties. Three negative consequences have been identified as flowing from this situation. First, the failure to formally recognize plea bargaining means that criminal justice officials cannot be held accountable for their actions in relation to this critical criminal justice practice: in particular, accused persons do not have a process by which



they can ensure that the Crown fulfills the promises offered in a plea agreement. Second, the rights of the accused are not fully protected because, at the present time, the judiciary is under no obligation to inquire as to whether or not an accused person entered a guilty plea in a voluntary manner and with full knowledge and understanding of the consequences of such agreement [Bill C-15A, which received Royal Assent on June 4, 2002 and which is being proclaimed in stages, includes a provision which comes into force on September 23, 2002 that will remedy this problem]. Third, the failure to formalize the practice of plea bargaining effectively excludes victims from participation in this critical phase of the criminal justice system.

Federal Rule 11: Viable Legal Framework for the Regulation of Plea Bargaining?

The Legitimization of Plea Bargaining in the United States

In *Santobello v. New York* (1971), the Supreme Court of the United States recognized the constitutionality of plea bargaining and the practice has become firmly entrenched in both state and federal courts. At least 90% of criminal cases in the United States are decided on the basis of guilty pleas, most of which are the outcome of a plea bargain. However, the distinctive characteristic of plea bargaining in the United States rests in the fact that it is subject to overt judicial regulation.

The Implementation of Federal Rule 11

In the federal courts, the practice of plea bargaining is regulated by the provisions of Rule 11 of the *Federal Rules of Criminal Procedure*. Under Rule 11, the courts have a duty to discuss the consequences of a guilty plea with the accused in open court and to ensure that the accused has entered a guilty plea voluntarily and with a full understanding of the consequences of such agreement. Most significantly, if there has been a plea agreement, its contents must be disclosed in open court and the trial judge has the power to accept or reject it. There are three types of promises that the prosecutor can offer an accused person:

- A) Move for dismissal of other charges; or
- B) Make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
- C) Agree that a specific sentence is the appropriate disposition of the case.

It is important to note that a "Type B" plea bargain is not binding on the trial court and that the accused person has no absolute right to withdraw the guilty plea. Nevertheless, it appears that - in practice - the courts routinely implement the non-binding sentence recommendations contained in a "Type B" plea agreement. "Type C" agreements are not encouraged because judges are reluctant to endorse restrictions on the scope of their sentencing discretion.

Federal Rule 11 and the United States Sentencing Guidelines

It is critical to appreciate that the guilty-plea provisions enshrined in Rule 11 must be examined in the context of the *United States Sentencing Guidelines*. These guidelines were designed to limit the extent of sentencing disparity by means of the legislative device of establishing limited ranges of sentencing discretion that are closely tied to the specific charges of which the accused are convicted. Under the terms of the Guidelines, trial judges are placed under a duty to examine whether or not a plea agreement adequately reflects the seriousness of the offence and whether the charges are compatible with what actually happened during the commission of the offence. In the event that such scrutiny reveals that a more serious offence has occurred than that which is reflected in the plea agreement, then the trial judge must apply the sentencing guideline that is applicable to the more serious offence. Moreover, the Guidelines stipulate that judges must review the pre-sentence report before rejecting or accepting a plea bargain. Finally, in cases where judges depart from the Guidelines, judges have the duty to justify and explain such a departure from the “normal” sentencing range.

Empirical Research: Plea Bargaining and Sentencing Guidelines in the Federal Court System of the United States

It is not entirely clear what the impact of the Sentencing Guidelines has been on sentencing practices in the federal courts. It appears that, overall, sentencing disparity has been reduced: however, empirical research suggests that there still remain significant differences in the sentencing patterns of individual trial judges and of individual District Courts in different geographical areas. Of particular interest is the impact that the Sentencing Guidelines have had upon the process of plea bargaining: in this respect, it appears that the Guidelines have – to a certain extent - diminished the benefits of entering a guilty plea. For example, one empirical study suggests that offenders who enter in a plea bargain today can reasonably expect a 20% reduction in their sentence, whereas they might have expected a 30 to 40% reduction in the period before the implementation of the Guidelines. In spite of this development, plea bargaining rates have not been significantly reduced by the application of the Guidelines by the federal courts. However, it is possible that the precise nature of plea bargaining may have been transformed by the advent of the Guidelines.

Finally, empirical research suggests that prosecutors may effectively circumvent the intent of the Guidelines by engaging in, what has been termed, *precharging charge bargaining* – a practice which occurs before charges are filed. In this respect, the unintended consequence of limiting the scope of judicial sentencing discretion through the implementation of the Sentencing Guidelines may well have been to increase the scope of prosecutorial discretion in the period before charges are laid.

Federal Rule 11: Tentative Conclusions

There is little doubt that Federal Rule 11 has created a legal mechanism that permits the overt judicial regulation of plea bargaining, while simultaneously permitting the practice to flourish. However, it is of critical importance to note that Federal Rule 11 must be evaluated in conjunction with the *United States Sentencing Guidelines*. Although the Guidelines have not caused any significant variations in the absolute rates of plea bargaining in the federal court system, it nevertheless appears that the nature of plea bargaining may - to some extent – be undergoing a process of transformation and that prosecutors and defence lawyers have started



to develop strategies that are designed to avoid the full impact of legislative provisions that are intended to reduce their ability to determine the outcome of the sentencing process. It is also important to note that Federal Rule 11 makes no provision for the victim to participate in the formal hearing that is conducted by the trial judge when receiving a plea of guilty by the accused. Therefore, Federal Rule 11 does not *per se* constitute a viable model for achieving victim participation in the plea negotiation process, although it certainly establishes an effective model for the judicial regulation of this process.

Victim Participation in the Criminal Justice System: The Precedent of Victim Impact Statements in the Sentencing Process

In Canada, making provision for the participation of victims in the plea bargaining process would constitute a leap into uncharted waters. However, by examining the Canadian experience with the use of victim impact statements, it may be possible to estimate the potential impact of implementing such a significant reform to the criminal justice process.

Are Victim Impact Statements a Vehicle for Revenge?

Victim impact statements constitute a vehicle by means of which victims may be accorded a meaningful role in the sentencing process. In particular, they furnish victims with the opportunity to articulate the nature and extent of the harm that has been caused by the commission of the crime(s) of which the accused has been convicted. Consequently, some victim impact statements convey powerful and moving stories about the effects of the crime(s) upon the victim. Some critics have asserted that victim impact statements serve as a vehicle for revenge and have raised the concern that an increased degree of victim participation may produce a courtroom environment in which raw “emotion” overwhelms prudent “reason”. Nevertheless, a critical analysis of Canadian court cases reveals that, while judges accept retribution as a valid sentencing goal, they have clearly differentiated it from revenge. The appropriate use of victim impact statements is, therefore, not to facilitate the objective of revenge but rather to ensure that the ultimate sentence is “commensurate” with the degree of harm inflicted on the victim(s) concerned. In this sense, it could be hypothesized that the participation of victims in the plea negotiation process would not be designed to establish a platform for vengeful prosecution but rather to provide potentially valuable information to the court that is charged with the task of deciding whether to accept or reject a proposed plea agreement.

The Influence of Victim Impact Statements on the Sentencing Process: The Emerging Canadian Jurisprudence

It is clear that the Canadian judiciary has been careful to affirm that victim impact statements should not play a direct role in determining the nature or *quantum* of a sentence that is given to a convicted person. However, it appears that the victim impact statement is frequently identified in the case law as being one of many factors that are taken into consideration by trial judges when they make their sentencing decisions. Furthermore, appellate courts have proved themselves to be willing to set aside sentences in those cases where the judge has completely failed to take into consideration the contents of a victim impact statement. Based on current judicial views as to the appropriate use of victim impact statements, it would appear that there would be no support for the suggestion that victims should have a right to veto plea bargains: however, it

would appear that victims could provide valuable information to the trial judge who is charged with deciding whether or not to accept a proposed plea agreement.

Who is the Victim?

In Canada, the definition of the term, “victim,” has – where appropriate - been expanded to include family members and care givers. There is no reason why the current *Criminal Code* definition of “victim” – for the purpose of identifying who is eligible to submit a victim impact statement – should not also be used in the context of victim participation in plea bargaining hearings.

Victim Satisfaction, Victim Participation and the Empirical Research

The benefits of increased victim participation during the sentencing process, through the use of victim impact statements, have been numerous. For example, victim impact statements can provide judges with in-depth information that can significantly assist them in reaching an appropriate sentencing decision. Additionally, victim impact statements may potentially provide a vehicle by means of which victims can ventilate their feelings - a human process that may be important during the healing process.

It frequently has been asserted in the scholarly literature that an increased degree of participation in court proceedings may increase the levels of victim satisfaction with the ultimate disposition of a particular case and with the criminal justice system in general. However, although there is strong evidence to suggest that increased participation in the criminal justice system does indeed lead to increased victim satisfaction, the research studies conducted to date have not been entirely conclusive on this issue.

Conclusions: Four Models of Victim Participation in Plea Bargaining

It appears that, in the future, it is likely that reform efforts will focus upon the task of expanding victim rights during plea negotiations. In Canada, the first step toward this goal would be legislation that ensures that victims are informed in a timely manner concerning the progress of any plea negotiations that may be taking place – a step already in place in Ontario and Manitoba. In addition, this first step would entrench the victim’s right to be to be consulted by Crown counsel about decisions that are made in relation to the prosecution of his or her case (an initiative that has recently been undertaken in the province of Manitoba with the enactment of the *Victims’ Bill of Rights* in 2000).

The second step in the expansion of victims’ rights in relation to plea bargaining would be to introduce a variation of the system that has been established by legislation in Arizona – namely, a system in which victims are granted the right to make oral or written submissions to a formal judicial hearing, that is convened for the specific purpose of accepting or rejecting a proposed plea agreement.

In essence, this report suggests that it is possible to identify four models of victim participation in plea negotiations.



Model 1

- The victim has the right to request basic information about the prosecution of his or her case.
- The onus is on the victim to request such information.
- The victim is not provided with any specific information concerning plea discussions.
- This model reflects the existing law and practice in most Canadian jurisdictions.

Model 2

- The victim has the right to information that is incorporated within Model One.
- The victim has the right to request specific information about any ongoing plea discussions.
- Crown counsel has a duty to consult with the victim about the terms of any proposed agreement.
- This model reflects the legislative framework established by the recently enacted *Manitoba Victims' Bill of Rights* (2000).

Model 3

- The victim has the rights outlined in model two.
- The trial judge must consider any proposed plea agreement in an open hearing.
- The trial judge has the power to accept or reject any proposed plea agreement.
- The victim has the right to make a written or oral submission to the judge during the plea-bargaining hearing.
- The trial judge must receive a pre-sentence report from an independent agency before accepting or rejecting a plea agreement.
- The prosecutor is placed under a duty to inform the court as to what efforts have been made to inform the victim of his or her right to participate in the plea-bargaining hearing and to convey to the court the victims' views (if any) concerning any proposed plea agreement.
- This model closely reflects the existing jurisprudence and practice in the State of Arizona, although many of its elements are also contained in the jurisprudence and practice of the federal courts of the United States.

Model 4

- As in Model 3, the victim has the rights to information, consultation, and participation in an open judicial hearing.
- The victim has the right to veto a proposed plea agreement.
- This model is hypothetical insofar as no jurisdiction in North America has granted victims the right to veto a proposed plea agreement.

These four models serve as a basis for understanding the nature and content of contemporary jurisprudence and practice in Canada and the United States. Furthermore, the models may be used as a means of clarifying potential avenues of reform in Canada. Model 3 which allows victims to take an active role in the plea bargaining process without providing a veto (as in model 4) may be the most viable option for Canada. Implementation of this model will require not only action by Parliament to amend the *Criminal Code* but also legislative action by the various provinces and territories to entrench victims' rights to information and consultation.



1.0 Introduction

In recent years, a considerable degree of attention has been paid to the need to enhance the nature and scope of victims' involvement in the Canadian criminal justice process (Roach, 1999; Young, 2001). Insofar as victims' participation in the criminal trial process is concerned, most of this attention has been focused on the issues surrounding the introduction of victim impact statements at the sentencing stage. Most dramatically, the *Criminal Code* was amended in 1999 so as to permit victims to present impact statements orally and in open court: similar provisions exist in relation to parole hearings, under the *Corrections and Conditional Release Act* (S.C. 1992, c. 20). The growing use of victim impact statements has substantially raised the profile of victims in the judicial process and there has been considerable debate about the influence of these statements in terms of sentencing outcome (Schmallegger, MacAlister, McKenna & Winterdyk, 2000, p. 388).

However, there are compelling reasons to investigate whether victims should be accorded a more formal role at an *earlier* stage in the criminal justice process. In particular, it is necessary to consider whether there is a sound, *prima facie* case for according victims a meaningful role in the process of plea negotiation. This issue assumes a considerable degree of importance in light of the fact that, in countries such as Canada, United States and Australia, it appears that about 90% of the cases are resolved through guilty pleas, that are frequently the direct outcome of successful plea negotiations between prosecuting and defence counsel (Canadian Sentencing Commission, 1987, p. 406; Dick 1997, p. 1035; Colquitt, 2001, p. 700; Klein, 1997, p. 19; Rules of Criminal Procedure, 2000, p. 385, and Seifman & Freidberg, 2001, p. 64). Significantly, the duty of defence counsel in these negotiations is directed solely towards benefiting his or her client and, as Chartrand (1995) has pointed out, this duty is essentially that of obtaining "the best plea bargain," if that client wishes to plead guilty. Similarly, while Crown counsel is supposed to function as a "minister of justice" (Mitchell, 2001), he or she is not considered to be acting on behalf of the victim, but rather on behalf of the state.

The impact and ramifications of plea negotiations within the criminal justice process are undoubtedly far-reaching. Indeed, since the contents of a plea bargain may well determine the nature of the specific charges that are laid against an accused person, it inexorably follows that the act of fashioning a "plea bargain" enables the parties to exert a significant degree of influence on the type - and *quantum* - of any sentence that is ultimately meted out by the trial court.¹ Similarly, the provisions of a plea bargain may frequently dictate the specific type of trial proceeding that will be taken against the accused (for example, summary-conviction, as opposed to indictable, procedures) and, by virtue of this selection, the parties are consequently able to determine the nature and range of sentencing options that will be available to the trial judge.² In addition, the outcome of the plea negotiation process may well affect the extent to

¹ Conviction of the accused upon more serious charges will usually lead to a more severe sentence and *vice versa*. Manson provides an example of a situation in which the exercise of prosecutorial discretion may effectively permit the accused to by pass a mandatory sentence – namely, the decision to not charge the accused with murder, where the homicide was carried out for "compassionate reasons" (Manson (2001: 66-67).

² The sentencing options are considerably more restricted, if summary-conviction procedures are employed.

which Crown and defence counsel “shape the facts,” that are ultimately presented to the trial judge at the sentencing stage: this is yet another plea-bargaining strategy that permits the parties to the agreement to exert a significant impact on the ultimate choice of sentence by the trial judge (Cousineau and Verdun-Jones, 1979 and 1982; Griffiths and Verdun-Jones, 1994; Verdun-Jones and Hatch, 1988 and 1987).

Finally, it is clear that the victim of a crime may well be affected - in a most profound and personal manner - by the ability of the prosecuting and defence counsel to take advantage of a plea bargaining process that effectively empowers them to determine the nature of the specific charge(s), that will ultimately be laid against the accused. For example, it may be a matter of extraordinary significance to the victim of a crime of sexual aggression whether the charge laid accurately reflects “what really happened” rather than a “watered-down” version of events that denies the reality of the victim’s experiences.

It is clear, therefore, that the sentencing hearing is not the only stage in the criminal trial process that directly affects the nature - and *quantum* - of the sentence that is handed down by the trial court: indeed, the plea negotiation process arguably plays a remarkably important part in determining sentence outcome. However, to date victims have only been granted a formal role in the sentencing hearing and relatively little attention has been paid to the question of whether it would be desirable - and sound social policy - to accord them a right of meaningful participation in the plea negotiation process.

In 1987, The Canadian Sentencing Commission made a number of recommendations that addressed the interests of victims in the plea negotiation process. Unfortunately, most of these recommendations have not been formally implemented - even though they may well have paved the way for a noteworthy improvement in the status of victims in the pre-trial stages of the criminal justice process (Brodeur, 1999). However, it would be valuable, for present purposes, to re-visit some of the more important recommendations made by the Commission in relation to plea negotiations – particularly those that touched on victim involvement.

The Commission asserted that victims had the right to be kept fully informed of plea negotiations and that Crown counsel should “represent their views.” Similarly, it was recommended that, “where possible, prior to the acceptance of a plea negotiation, Crown counsel (should) be required to receive and consider a statement of the facts of the offence and its impact on the victim.” However, perhaps the most significant recommendation of the Commission (1987, p. 428) was to make the plea negotiation process one that is both transparent to the public and subject to judicial scrutiny:

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.

This last recommendation appears to have been based on the model that has been developed in the Federal Courts of the United States of America – namely, Rule 11 of the *Federal Rules of Criminal Procedure*. This model was brought to the attention of the Commission by Verdun-Jones and Hatch (1988) and clearly constitutes a valuable starting point for developing reform proposals for implementation in a specifically Canadian context. More importantly, this model



embraces a mechanism that, if further developed, might provide a basis for the involvement of victims in the plea negotiation process in the most transparent of forums – namely, in open court.

Rule 11 operates within the context of an elaborate system of federal sentencing guidelines – a regulatory structure that is markedly absent within the Canadian context. Nevertheless, the model of judicial regulation of plea bargaining, that underlies the combined regimes imposed by Rule 11 and the federal sentencing guidelines, constitutes a valuable template for potential reform of the criminal court process in Canada. Therefore, the present report comprehensively examines the US experience in relation to judicial regulation of plea bargaining and explores the possible means by which this experience might usefully be harnessed in the development of reform proposals that furnish the victims of crime with a constructive role in the plea negotiation process that occurs within the Canadian criminal courts.

The issue of victim participation in the process of plea bargaining is examined in the light of the evolution of victims' rights movements in a number of jurisdictions around the Globe. More specifically, the focus of the analysis is placed on the emerging trend towards granting the victims of crime certain rights in relation to the prosecution of "their" offenders. This trend has manifested itself both at the international and national levels and has resulted both in the promulgation of international declarations and the enactment of specific legislation within various jurisdictions in the World. Particular attention is then paid to the provisions of federal and provincial/territorial legislation within Canada that deal with the rights of victims in relation to the prosecution of cases within the criminal courts.

In Canada, there are very few rights that have been accorded to victims in relation to the plea bargaining process. This situation stems from the fact that, although it is widely recognized that plea negotiations constitute an integral part of the criminal justice process in Canada, they nevertheless have no formal legal status and are not subject to direct judicial regulation. The present report examines the current judicial response to plea bargaining within Canada and identifies the negative consequences for the victims of crime that flow from the lack of any formal process of regulation of this ubiquitous phenomenon in the criminal justice process.

The report then addresses the question as to whether Rule 11 of the *Federal Rules of Criminal Procedure* in the United States may serve as the basis for the development of a satisfactory model for the judicial regulation of plea negotiations in Canada. The operation of Rule 11 is scrutinized in the context of the regime of sentencing guidelines that applies to the federal courts in the United States. While Rule 11 certainly establishes a working template for the effective regulation of plea bargaining by the courts, it does not make provision for direct participation in the process by the victims of crime. The report, therefore, examines legislation in the State of Arizona that unequivocally grants the victims of crime the right to make written or oral presentations to the court that is considering whether to accept or reject a proposed plea agreement. It is suggested that a viable model for the participation of victims in the plea negotiation process in Canada may be forged by combining elements of both Federal Rule 11 and the Arizona legislation.

If consideration is to be given to granting Canadian victims of crime a direct role in a formal, plea bargaining hearing before a court, then it is imperative that some serious attention be devoted to the potential impact that such a fundamental change in criminal procedure may have in the future. To this end, the report examines the jurisprudence and empirical research that has emerged in relation to the introduction of the victim impact statement at the sentencing stage of a criminal trial. By evaluating the impact of victim impact statements on the nature and quantum of sentence and on the levels of victim satisfaction with the court process, the present report

attempts to project the potential consequences of granting Canadian victims of crime the right to participate meaningfully in a formal, judicial hearing that is designed to regulate the practice of plea bargaining.

The report concludes with an examination of four, alternative models of victim involvement in the plea negotiation process. The one that may be the most viable is the model that permits victims to participate directly in a formal, plea negotiation hearing before a judge – but without granting them a right of veto.



2.0 Victims' Rights and the Prosecution of Criminal Cases

2.1 International Context

2.1.1 United Nations Declaration

The recognition of the need to provide the victims of crime with opportunities to play a more active role in the criminal justice process constitutes part of a significant international trend. For example, on November 29th, 1985, the General Assembly of the United Nations adopted the *Declaration of Basic Principles of Justice for Victims of Crime* (United Nations, 1985). Subsequently, the United Nations Commission on Crime Prevention and Criminal Justice developed a handbook to assist states in their implementation of the *Declaration* (United Nations, 1998). Particular attention is paid to the rights of victims in the prosecution phase of the criminal justice process. Indeed, among the specific roles and responsibilities assigned to prosecutors, the *Handbook* (United Nations, 1998, chap. 3.2.2) highlights the duty to provide specific forms of information to victims, including:

- providing notification of the status of the case at key stages in the criminal justice system,
- coordinating, where applicable in the jurisdiction, the inclusion of victim impact information (i.e. written statements, allocution, audio, or video statements) into court proceedings (including plea bargains, pre-sentence reports, and sentencing) with probation authorities and the judiciary.

In recognition of the United Nations' *Declaration of Basic Principles of Justice for Victims of Crime*, Federal and Provincial Ministers Responsible for Criminal Justice agreed that the following principles should guide Canadian society in promoting access to justice, fair treatment and provision of assistance for victims of crime (Department of Justice Canada, 1999):

Table 1

Canadian Statement of Basic Principles of Justice for Victims of Crime	
1	Victims should be treated with courtesy, compassion and with respect for their dignity and privacy and should suffer the minimum of necessary inconvenience from their involvement with the criminal justice system
2	Victims should receive, through formal and informal procedures, prompt and fair redress for the harm which they have suffered
3	Information regarding remedies and the mechanisms to obtain them should be made available to victims
4	Information should be made available to victims about their participation in criminal proceedings and the scheduling, progress and ultimate disposition of the proceedings
5	Where appropriate, the view and concerns of victims should be ascertained and assistance provided throughout the criminal process
6	Where the personal interests of the victim are affected, the views or concerns of the victim should be brought to the attention of the court, where appropriate and consistent with criminal law and procedure
7	Measures should be taken when necessary to ensure the safety of victims and their families and to protect them from intimidation and retaliation
8	Enhanced training should be made available to sensitize criminal justice personnel to the needs and concerns of victims and guidelines developed, where appropriate, for this purpose
9	Victims should be informed of the availability of health and social services and other relevant assistance so that they might continue to receive the necessary medical, psychological and social assistance through existing programs and services
10	Victims should report the crime and cooperate with the law enforcement authorities

2.1.2 European Initiatives

Similarly, in March of 2001, the Council of the European Union issued a *Framework Decision*, which – *inter alia* - addressed the right of victims to receive information concerning the prosecution of their cases within the criminal court process (European Union, 2001). Article 4 deals with the right of victims to be supplied with information “of relevance for the protection of their interests” (such as the availability of support services and legal aid) and provides specifically that:

2. Each Member State shall ensure that victims who expressed a wish to this effect are kept informed of:
 - (a) the outcome of their complaint;
 - (b) relevant factors enabling them, in the event of prosecution, to know the conduct of the criminal proceedings regarding the person prosecuted for



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- offences concerning them, except in exceptional cases where the proper handling of the case may be adversely affected;
- (c) the court's sentence.

Article 10 also encourages each Member State to promote mediation in criminal cases, where such measures are considered appropriate. However, the *Framework Decision* does not include any rights of active participation in criminal proceedings.

In the United Kingdom, there is a *Victims Charter*, that sets out the rights of victims to receive information about the prosecution of their cases as well as their rights of access to relevant support services (Home Office, 1997). The *Charter* was first published in 1990 and was substantially revised in 1996. In a recent review of the *Charter* (Home Office, 2001, pp. 4-5), the United Kingdom Government indicated that among the guiding principles for a new Charter in the future should be the need “to provide accurate and timely information about significant developments in the case” and the need “for victims to be offered the chance to say how they have been affected by the crime, and for this to be taken into account by those making decisions within the justice system.” The review also emphasized that “keeping victims informed of developments in their case is a key priority” and that both the Crown Prosecution Service and National Probation Service have been given the mandate to carry out this task (Home Office, 2001, p. 8; see also Home Office, 2000). In 2001, the Government accorded any victim, who has made a witness statement to the police, the right to submit a written “victim personal statement” that is subsequently made available to the police, the Crown Prosecution Service, the defence and the trial courts (Home Office, No Date).

Similarly, in the Netherlands, formal victim-notification practices have been included as part of the guidelines that police and prosecutors are required to follow (Wemmers, 1999). As is the situation in the United Kingdom, these formal notification practices do not give victims any direct influence over the prosecutors' decision-making process (Wemmers, 1999, p. 176).

2.1.3 Initiatives in the United States

Jurisdictions in the United States have, for the past decade, been in the vanguard of the trend towards ensuring a greater degree of victim involvement in the criminal justice process. These jurisdictions have spotlighted the need to recognize victims' rights in the process of criminal prosecution and, more particularly for the purposes of this report, they have – in one way or another – addressed the question of victim participation in plea negotiations.

All 50 of the various states have enacted victims' rights legislation and 29 of them have actually entrenched these rights within their constitutions. Furthermore, the federal Congress has kept pace with the state legislatures by enacting its own series of victims' rights laws, commencing with the *Victim's Rights and Protection Act* of 1990 (Kilpatrick, Beatty, & Howley, 1998, p. 1).

One of the central features of this body of victims' rights legislation is the right of victims to be informed of the status and progress of their cases within the criminal court system. In most of the state statutes, there is – at least – a requirement that victims be given relevant information about any plea negotiations that are being conducted with the accused in their cases (Welling,

1987, p. 339).³ In a considerable number of states, the victim is entitled to more than mere information. Indeed, at least 29 states “require prosecutors to ‘consult with’ or ‘obtain the views of’ the victims at the plea agreement stage” (US Department of Justice, 1998, Report no. 4, p. 3). For example, Nebraska, South Carolina, and West Virginia have implemented statutes that require the prosecutor to obtain the views of the victim concerning any proposed plea agreement with the accused (Welling, 1987, p. 341). In a similar vein, the *Attorney General Guidelines for Victim and Witness Assistance* (US Department of Justice, 2000, p. 33) place federal prosecutors under a duty to make every reasonable effort to consult with the victims of crime and to provide them – at the earliest opportunity – with notice of the terms of a plea bargain.⁴

In some states, victims are not only given the right to be consulted about the terms of a proposed plea agreement but also the right to participate in the plea hearing that is held before the trial judge. For example, Florida, Minnesota and Rhode Island have legislative provisions that grant victims the right to be present at a plea hearing and to express their views to the trial judge – either orally or in writing (Welling, 1987, pp. 342-3).

Perhaps, the strongest legislation, concerning victims’ rights in the specific context of plea bargaining, has been enacted by the state of Arizona. Under the provisions of the *Arizona Criminal Code (Arizona Revised Statutes, Title 13)*, the victim has the right to be consulted by the prosecution about the terms of a proposed plea agreement. Section 13-4419 stipulates that:

- A. On request of the victim, the prosecuting attorney shall confer with the victim about the disposition of a criminal offense, including the victim’s views about a decision not to proceed with a criminal prosecution, dismissal, plea or sentence negotiations and pretrial diversion programs.
- B. On request of the victim, the prosecuting attorney shall confer with the victim before the commencement of the trial.
- C. **The right of the victim to confer with the prosecuting attorney does not include the right to direct the prosecution of the case.** (Emphasis added).

Although victims do not have the right of veto, the *Arizona Criminal Code* grants them the right to be present at any hearing concerning a plea agreement and to fully express their views to the court before the judge makes a decision whether or not to accept it. This right is enshrined in *Code* section 13-4423 of the *Arizona Criminal Code*, which reads as follows:

- A. On request of the victim, the victim has the right to be present and be heard at any proceeding in which a negotiated plea for the person accused of committing the criminal offense against the victim will be presented to the court.

³ For example, the *California Penal Code* (Section 679.02) provides that the victim of a violent crime has the statutory right to be notified by the prosecutor of “a pending pretrial disposition before a change of plea is entered before a judge.” The victim of any felony may request to be notified of a pretrial disposition. If it is not possible to notify the victim of a pretrial disposition before the change of plea is entered, then the prosecutor’s office or probation department must do so “as soon as possible.”

⁴ Victims have been granted a statutory right to confer with an attorney for the Government: 42 U.S.C. § 10606(b)(5).



- B. *The court shall not accept a plea agreement unless:*
1. The prosecuting attorney advises the court that before requesting the negotiated plea reasonable efforts were made to confer with the victim pursuant to section 13-4419.
 2. Reasonable efforts are made to give the victim notice of the plea proceeding pursuant to section 13-4409 and to inform the victim that the victim has the right to be present and, if present, to be heard.
 3. The prosecuting attorney advises the court that to the best of the prosecutor's knowledge notice requirements of this chapter have been complied with and the prosecutor informs the court of the victim's position, if known, regarding the negotiated plea.

Clearly, the Arizona regime ensures that the victim is no mere passive recipient of information concerning plea negotiations between the prosecutor and the accused. Prosecuting attorneys are required to listen to the views of victims concerning key decisions made in the prosecution of "their" cases and the victims themselves are now entitled to have their voices heard by the courts that make the decision whether or not to accept or reject a plea bargain. The recent case of *State v. Espinosa* (2001) vividly demonstrates the potential impact that these *Criminal Code* provisions may have on the plea bargaining process within Arizona. The accused had initially been offered a favourable plea agreement by the prosecutor. However, when it became clear that the victim and her family objected to the proposed disposition of the case, the prosecutor withdrew the plea offer. The accused was then tried by a jury and found guilty of all of the charges that had been filed by the prosecuting attorney. The accused subsequently sought post-conviction relief, claiming that his rights had been violated when the prosecutor had decided to withdraw the offer of a plea agreement solely on the basis of the victim's wishes. The trial court found that the prosecutor's decision had been "based solely on the victim's and her family's objection to a non-trial disposition" and ruled that the plea offer had been withdrawn "for improper reasons". Therefore, the trial court ruled that there had been violations both of Espinosa's "due process rights" and of the "Separation of Powers Clause of the Arizona Constitution." The trial court then ordered the prosecutor to give Espinosa an opportunity to accept the original plea offer.

On appeal by the State, the Arizona Court of Appeals held (para. 15) that the trial court had "abused its discretion in granting post-conviction relief" and set aside the trial court's order that required the prosecutor to give the defendant the opportunity to accept the plea offer. At the appeal, Espinosa had contended that his rights under the *Arizona Constitution* (Article III) had been infringed - insofar as "the power and authority (to rescind a plea offer) cannot be delegated to the victim." However, the appellate court ruled that the defendant's rights had not been violated since, prior to the trial, he had received ample time to challenge the withdrawal of the offer of the plea agreement and yet had chosen not to raise the issue until after the trial had been completed. The *Espinosa* case is of considerable significance since it furnishes a vivid illustration of the power of the victim to influence the course of plea bargaining in a state that has enacted strong victims' rights legislation. As it turned out, the Court of Appeals did not need to address the constitutional issues surrounding the legitimacy of providing the victim of crime with the right to object to a proposed plea bargain. However, since the legislation clearly states that the victim has no right of veto over prosecutorial discretion, one might well assume that there is no delegation to the victim of the state's power to rescind a plea agreement.

There has recently been strong pressure within the United States to extend the type of victims' rights enshrined in the Arizona legislation to all jurisdictions and to ensure that these rights are rendered effective. For example, the Office for Victims of Crime (US Department of Justice, 1998, report no. 4, p. 10) recommends that all prosecutors should advocate for the rights of victims to have their views heard by judges on plea bargains. It also recommends that "prosecutors should make every effort, if the victim has provided a current address or telephone number, to consult with the victim on the terms of any negotiated plea." The Office for Victims of Crime (US Department of Justice, 1998, report no. 5, p. 8) has also emphasized the need for the judiciary to become more active in promoting the participation of victims in the plea negotiation process and recommends that "judges should facilitate the input of crime victims into plea agreements and resulting sentences, and they should request that prosecuting attorneys demonstrate that reasonable efforts were made to confer with the victim."

Although the legislative developments in US jurisdictions appear to have substantially enhanced the rights of crime victims to have some meaningful input into the process of plea bargaining, it is important to note that there remain fundamental questions concerning the effectiveness of these rights in some US jurisdictions. The precise contents of the victims' rights statutes vary considerably from state to state. In some jurisdictions, the legislature has not made clear which specific criminal justice officials are responsible for ensuring that victims are given adequate notification of their rights and meaningful information about the progress of "their" cases. Without clear guidance from the legislature, the interpretation – and administration - of these victims' rights provisions has been left entirely to the prosecutors themselves (US Department of Justice, 1998, Report no. 4, p. 7).

For example, one study (Beatty, Howley & Kilpatrick, 1997, p. 3) found that approximately 50% of all victims of violent crime had not been informed of plea bargains, even where they had a legal right to be consulted by the prosecuting attorney. In a similar vein, a report by the Office for Victims of Crime (US Department of Justice, 1998, report no. 5, p. 1) notes that, "while plea agreements offer an efficient means for court systems to manage overwhelming case loads, they are routinely formalized without input from, consultation with, or notification of victims, denying millions their rights to be informed about and have input to the justice process." The report (p. 8) deplores this situation, which apparently exists in many US jurisdictions, and points out that "victim input into the plea process is critical because the rapid growth in caseloads over the past two decades has forced courts to use more efficient means of concluding cases." In spite of this identified need for their participation in plea bargaining, as the report notes (p. 9), "the great irony for victims is that this is an area of the criminal justice process in which victims are given fewest opportunities for participation."

It appears that victims of crime place considerable value on the right to be consulted on the terms of a proposed plea bargain with "their" accused. Indeed, in a study conducted by the National Center for Victims of Crime, 1,300 crime victims were surveyed. More than 80% of the respondents considered "discussion whether the defendant's plea to a lesser charge should be accepted" to be "very important to them" (Kilpatrick, Beatty, & Howley, 1998, p. 4). Nevertheless, only about 50% of victims were actually given any information about plea negotiations (Kilpatrick, Beatty, & Howley, 1998, p. 4). It is significant that victims who were notified of their rights were more satisfied with the justice system than those who were not. Similarly, victims who believed that their input had an impact on the outcome of their cases were more satisfied with the criminal justice system (Kilpatrick, Beatty, & Howley, 1998, pp. 8-9).



2.2 Canadian Initiatives

2.2.1 Provincial and Territorial Legislation

Following the international and national trends towards placing a greater degree of emphasis on the recognition of victims' rights in the criminal justice process, the various provinces and territories of Canada have also enacted legislation that addresses this issue (see Table 2, below). In very general terms, these statutes enshrine the right of victims to receive information about the status of their cases within the criminal justice process and establish a legislative framework for the provision of various support services to victims. For example, the preamble to the Ontario *Victims' Bill of Rights*, 1995 (S.O. 1995, c.6) states that:

The people of Ontario believe that victims of crime, who have suffered harm and whose rights and security have been violated by crime, should be treated with compassion and fairness. The people of Ontario further believe that the justice system should operate in a manner that does not increase the suffering of victims of crime and does not discourage victims of crime from participating in the justice process.

The Ontario statute is fairly typical of its counterparts in other territories and provinces in terms of its provisions concerning victims' rights of access to information about the prosecution of their cases. For example, section 2 of the Act states that "victims should have access to information about," *inter alia*, "the progress of investigations that relate to the crime;" "the charges laid with respect to the crime and, if no charges are laid, the reasons why no charges are laid;" "the victim's role in the prosecution;" "court procedures that relate to the prosecution;" "the outcome of all significant proceedings, including any proceedings on appeal;" "the interim release and, in the event of conviction, the sentencing of an accused;" and the right to submit a "victim impact statement to the court." Significantly, for the purposes of the present report, the Ontario Act is only one of two provincial statutes (the other being the Manitoba Act) that specifically addresses the right of a victim to receive information about plea negotiations – namely, details concerning "any pretrial arrangements that are made that relate to a plea that may be entered by the accused at trial" (section 2(1)(x)).

The province of Manitoba has recently implemented part of a new *Victims' Bill of Rights*.⁵ Section 11 of the Act requires that the police respond to a request by the victim for the "name, address, and telephone number of the office responsible for prosecuting the offence." Section 12 then provides that, when victims so request, they must be given certain information about the prosecution of "their" cases. Section 12 covers, for example, details concerning victim impact statements and – most significantly, for the purposes of this report - information about "the process for entering a plea of guilty or not guilty, including the possibility of discussions between the Crown attorney and an accused person, or his or her legal counsel, on a resolution of the charge." Unlike any other jurisdiction in Canada, Manitoba has enacted a right of victims to be

⁵ Bill 32, *The Victims' Rights Amendment Act*, 49 Elizabeth II, 2000. The first phase of the Act was implemented on August 30th, 2001 (the expansion of victims' rights and services is initially limited to offences involving death or serious personal injury): Manitoba Government News Release, August 30th, 2001.

consulted about various aspects of the prosecution of “their” cases. More specifically, section 14 of the Act states that:

At the victim’s request, the Director of Prosecutions must ensure that the victim is consulted on the following, if reasonably possible to do so without unreasonably delaying or prejudicing an investigation or prosecution:

- (a) a decision on whether to lay a charge;
- (b) the use of alternative measures to deal with a person who is alleged to have committed the offence, or the accused person;
- (c) staying the charge against the accused person;
- (d) if the accused person is in custody, an application for release by the person;
- (e) *any agreement relating to a disposition of the charge*;
- (f) any position taken by the Crown in respect of sentencing, if the accused person is found guilty;
- (g) a decision whether to appeal, or the position of the Crown respecting any appeal by the accused person. (Emphasis added).

The new legislation in Manitoba undoubtedly represents a most noteworthy expansion of victims’ rights in relation to their involvement in the prosecution of “their” cases. In particular, the explicit, statutory recognition of the right to be consulted about potential plea agreements between the Crown and the defence constitutes one of the most far-reaching enhancements of victims’ rights that have occurred in any Canadian jurisdiction, during recent years. However, there are, nevertheless, certain constraints that have been placed around the rights to information and consultation. First, the Manitoba legislation unequivocally places the burden upon the victim to request the necessary information or consultation. Therefore, if victims do not actually request such information or consultation, then the prosecutor is under no obligation to provide it. Second, the rights to information and consultation are hedged around with qualifying clauses: for example, the right to consultation, established by section 14 is only to be implemented, “where it is reasonably possible to do so without unreasonably delaying or prejudicing an investigation or prosecution.”

In general, most of the victims’ rights legislation in Canada merely exhorts criminal justice officials to make information available to victims or to consult with victims.⁶ Thus, victims’ rights are frequently circumscribed by language that suggests these rights are far more discretionary than absolute in nature. As Sullivan (1998, p. 7) has noted, a careful examination of the statutory words and terms employed in this body of legislation - such as “should have”, “subject to limits”, “in appropriate circumstances”, “promote” –reveals an underlying reluctance on the part of legislators to require officials to provide critical information to the victims of crime.⁷

⁶ It is important to note that provincial and territorial legislation does not place the right of veto into the victim’s hands.

⁷ The British Columbia legislation represents an exception to this general model insofar as it employs *mandatory*, as opposed to *permissive*, language in dealing with the provision of information to victims. The *Victims of Crime Act* (R.S.B.C. 1996, c. 478) contains three categories of information: (i) information that must be given to all victims automatically; (ii) information that must be given on the request of a victim; and (iii) information that must be given “in appropriate circumstances.”



As a consequence of the lack of mandatory language in most of the provincial and territorial statutes, critics have noted that, in certain jurisdictions, there has been a failure to furnish a significant number of victims with basic information about such fundamental issues as their right to submit a victim impact statement to the court (Sullivan, 1998, p. 22). Furthermore, the various provincial and territorial statutes do not contain any specific mechanism for enforcement of victims' rights to receive information. Significantly, the British Columbia *Victims of Crimes Act* (R.S.B.C. 1996, c. 478) departs from the general model of such legislation by stipulating that certain information *must* be given to the victims of crime (sections 5 to 7): however, it also states explicitly that, while the *Ombudsman Act*, applies to the legislation, the Ombudsman is precluded from investigating any aspect of the exercise of prosecutorial discretion (section 12). The new *Victims' Bill of Rights in Manitoba* establishes a complaints procedure for victims who apply to the Director of Victims' Support Services and it is also possible for victims to complain to the provincial Ombudsman, who must appoint a "Crime Victim Investigator" to deal with such complaints (sections 27 to 31).

On the whole, it appears that victims of crime in most Canadian jurisdictions are still treated as the passive *consumers* of criminal justice services rather than active participants in the decision-making process Kent Roach (1999). This situation is neatly illustrated in the following statement:

Police and prosecutors could treat the new consumer politely and give them information about what was happening. Nevertheless, victims would likely remain frustrated by the lack of control over the end product and by their involuntary status as consumers of criminal justice (Roach, 1999, p. 287).

Sullivan (1998, p. 10) suggests that, at the very least, the applicable provincial and territorial legislation should specify who is responsible for ensuring that victims are informed of their rights. In particular, it is essential that police and prosecutors are made aware of the specific forms of information that they should be providing to the victims of crime.⁸ Finally, there needs to be more effective coordination of the various agencies that provide victim services in order to ensure that critical information is routinely made available to victims.

⁸ The British Columbia legislation does specify that Crown counsel must ensure that a victim is given a reasonable opportunity to present a victim impact to the court (section 4) and identifies specific authorities who are responsible for providing information to the victim about the release of an offender (section 7).

Table 2: Provincial and Territorial legislation Relating to Victims' Rights During Court Proceedings

<p>ALBERTA</p> <p>Victim of Crime Act, S.A. 1996, c.V-33</p>	<p><u>Principles</u></p> <p>S.2 (1) (c) information should be made available to victims about their participation in criminal proceedings and scheduling, progress and ultimate disposition of the proceedings;</p> <p>(d) where appropriate, the views and concerns of victims should be considered and appropriate assistance provided throughout the criminal process;</p> <p>(e) if the personal interests of victims are affected, the views or concerns of the victims should be brought to the attention of the court, where appropriate and consistent with criminal law and procedure.</p> <p><u>Information</u></p> <p>S.4 (1) (a) status of police investigation and prosecution (if it will not hamper investigation);</p> <p>(b) the role of the victim and of the other persons involved in the prosecution of the offence;</p> <p>(c) court procedures;</p> <p>(d) any opportunity for the victims to make representations to the court on the impact of the offence on the victims.</p>
<p>BRITISH COLUMBIA</p> <p>Victim of Crime Act, S.B.C. 1995, c.47.</p>	<p><u>Principles</u></p> <p>S.4 - Presentation of the Victim's Perception of the Impact of the Offence</p> <p>Crown counsel must ensure that a victim is given a reasonable opportunity to have admissible evidence concerning the impact of the offence, as perceived by the victim, presented to the court before a sentence is imposed for the offence.</p> <p><u>Information that must be Offered</u></p> <p>S.5 (a) the structure and operation of the justice system,</p> <p>(b) victim services,</p> <p>(c) the Freedom and Information and Protection of Privacy Act,</p> <p>(d) the Criminal Injury Compensation Act, and</p> <p>(e) this Act.</p> <p><u>Information that Must be Given on Request</u></p> <p>S.6 (c) the reasons why a decision was made respecting charges;</p> <p>(f) the outcome of each court appearance that is likely to affect the final disposition, sentence or bail status of the accused.</p>
<p>MANITOBA</p> <p>The Victim's Bill of Rights (Bill 32), 49 Eliz. II, 2000</p>	<p><u>Part I</u></p> <p><u>General Rights to Information</u></p> <p>S.3: The police must provide information about rights and remedies under the Victim's Bill of Rights - including information about victim impact statements.</p> <p><u>Right to Information and Consultation</u></p> <p>S.4: The police must consult victims about the use of alternative measures and bail conditions.</p> <p>S.7: Upon request, the police must give victims information about the investigation of an offence.</p> <p>S.12: Upon request, the Director of Prosecutions must ensure that information is provided to victims about various aspects of a prosecution (including information about plea negotiations and how to obtain help to file victim impact statements).</p> <p>S.13: Upon request, the Director of Prosecutions must ensure that information is provided to victims about the status of a particular prosecution.</p> <p>S.14: Upon request, the Director of Prosecutions must ensure that victims are consulted about such matters as the laying of a charge; the use of alternative measures, the staying of a charge, any proposed plea agreement, sentencing, and appeals.</p> <p><u>Right to Complain</u></p> <p>The Act establishes an "Accountability and Complaint Process" (ss.27-31).</p>



<p>NEW BRUNSWICK</p> <p>Victims Services Act, S.N.B. 1987, c.v-21, as amended by S.N.B. 1996, c.34</p>	<p><u>Principles</u></p> <p>S.4 (1): The views and concerns of victims should be ascertained and appropriate assistance should be provided to them throughout the criminal process.</p> <p>(2) Where the personal interests of the victims are affected, the views or concerns of the victims should be brought to the attention of the court where appropriate and consistent with criminal law and procedure.</p> <p><u>Information</u></p> <p>S.3 (2): Information should be made available to victims about their participation in criminal proceedings and about the scheduling procedure and ultimate disposition of criminal proceedings.</p>
<p>NEW FOUNDLAND</p> <p>Victims of Crime Services Act, R.S.N. 1990, c.V-5</p>	<p><u>Part I</u></p> <p><u>Principles</u></p> <p>S.9 (2): The views and concerns of victims should be ascertained and appropriate help should be provided to them throughout the criminal process.</p> <p><u>Information</u></p> <p>S.7 (2): Information should be made available to the victim about</p> <ul style="list-style-type: none"> (a) the scope, nature, timing, and progress of the prosecution of the offence of which he or she was the victim; (b) the role of the victim and of other persons involved in the prosecution of the offence; (c) court procedures.
<p>NORTH WEST TERRITORIES</p> <p>Victims of Crime Act, R.S.N.W.T. 1988, c.9</p>	<p><u>Information</u></p> <p>S.5 (c): A Victim Assistance Committee is responsible for promoting the availability of information to a victim about</p> <ul style="list-style-type: none"> (i) the scope, nature, timing and progress of the prosecution of the offence in which he or she was a victim; (ii) the role of the victim in the court proceeding; (iii) the remedies and the social, legal, medical and mental health services available to the victim and the mechanisms to obtain access to them. <p>S.5 (e): The Committee shall promote assistance to victims in bringing their views and concerns to the attention of the court where their personal interests are affected, and where it is consistent with criminal law and procedure.</p>
<p>NUNAVUT</p> <p>Victims of Crime Act, R.S.N.W.T. 1988, c.9 (Supp).</p> <p>As amended under s.76.05 of the Nunavut Act, S.N.W.T. 1998, c.34</p>	<p>Same provisions as the North West Territories.</p>

<p>ONTARIO</p> <p>Victim s' Bill of Rights, S.O . 1995, c.6</p>	<p><u>Information</u></p> <p>S.2 (1):</p> <p>2. Victim s should have access to inform ation about,</p> <ul style="list-style-type: none"> i. the services and rem edies available to victim s of crim e. iv. the progress of investigations that relate to the crim e. v. the specific charges laid or, if no charges are laid , the reasons why they have not been laid . vi. the victim 's role in the prosecution vii. court procedures that relate to the prosecution viii. the dates and places of all significant proceedings that relate to the prosecution , ix. the outcom e of all significant proceedings, including any proceedings on appeal, x. any pretrial arrangem ents that are m ade that relate to a plea that m ay be entered by the accused at trial.
<p>PRINCE EDWARD ISLAND</p> <p>Victim sofCrim eAct, R.S.P.E.I. 1988, c.V-3.1</p>	<p><u>Principles</u></p> <p>2 (d): victim s should be inform ed about the progress of the investigation and prosecution of the offence, court procedures, the role of the victim in court proceedings and the ultim ate disposition of the proceedings;</p> <p>(e) victim s are entitled, w here their personal interests are affected , to have their view s and concerns brought to the attention of the court w here consistent w ith crim inal law and procedure;</p> <p>(h): victim s are entitled to prepare a victim in pact statem ent and have it considered by the court at sentencing.</p>
<p>QUEBEC</p> <p>Act Respecting Assistance for Victim sofCrim e, R.S.Q .c. A-13.2.1 (not yet in force)</p>	<p><u>Information</u></p> <p>S.4: Victim s have a right to be inform ed of:</p> <p>(2) their role in the crim inal justice process, their participation in crim inal proceedings and , on request, of the progress and final disposition of the case.</p> <p>S.5: On request, Victim s have the right to be inform ed of the progress and outcom e of the police investigation . ("if not inconsistent w ith the public interest").</p>
<p>SASKATCHEWAN</p> <p>Victim sofCrim eAct, S.S. 1995, c.V-6.011, as am ended by S.S. 1997, c.24 & S.S. 2000, c.51.</p>	<p><u>Information</u></p> <p>S.4: The Act establishes a victim s' fund that is to be used to support, inter alia, the follow ing principle:</p> <p>(c) The view s and concerns of victim s should be taken into account and appropriate assistance and inform ation should be provided to them throughout the crim inal process.</p>
<p>YUKON</p> <p>Victim Services Act, S.Y. 1992, c.15</p>	<p>Com m unity Victim Services provide general inform ation about the justice system and assists victim s in the preparation of victim -in pact statem ents.</p>



2.2.2 Federal Legislation

In recent years, the Parliament of Canada has enacted a number of critical provisions that grant the victims of crime a greater degree of participation in the decision-making processes of the criminal justice system (Young, 2001). None of these provisions have addressed the question of plea bargaining but they undoubtedly reflect the general international trend towards enhancing the status of victims as major stakeholders in the criminal justice process. As early as 1988, the *Criminal Code* was amended in order to permit the introduction, during the sentencing process, of a written victim impact statement: however, whether or not the information was actually considered was a matter left to the discretion of the trial judge. In 1995, the *Criminal Code* was amended (S.C. 1995, c. 22, s. 6) so as to require sentencing courts to consider written victim impact statements (s. 722(1)). However, this amendment still assigned victims a relatively passive role in the sentencing process and, in order to remedy this unsatisfactory situation, the *Criminal Code* was further amended (s. 722(2.1)) in order to accord victims the right to personally read a victim impact statement in open court or to “present the statement in any other manner that the court considers appropriate” (S.C. 1999, c. 25, s.17).⁹ Furthermore, at the same time, a new provision was added to the *Criminal Code* (s. 722.2), which requires a sentencing judge to inquire whether the victim or victims have been duly informed of their right to submit a victim impact statement and gives the judge the power to grant an adjournment so that a victim impact statement may be prepared or an opportunity made available for the victim to present evidence in court (S.C. 1999, c. 25, s. 18).

Similar legislative initiatives have been enacted by Parliament in relation to other stages of the criminal justice system that fall within federal jurisdiction. For example, under the *Corrections and Conditional Release Act*, provision has been made to “recognize victims formally as an important part of the criminal justice system” (Solicitor General Canada, 1998, p. 5). The Correctional Service of Canada and the National Parole Board are obligated to provide certain information about an offender when victims request it (CCRA, sections 26 and 142). In addition, available victim information must be obtained by CSC case managers and incorporated into the decision-making processes of the NPB and the CSC when they are required to determine and manage the level of risk posed by an offender. An evaluation of these provisions (Solicitor General Canada, 1998, p. 30) concluded that:

Victims are increasingly being recognized, both formally and informally, as an important part of the criminal justice system. Decision-makers in the National Parole Board are using victim-related information to assist in determining risk, and are responding to requests from victims by imposition of additional conditions when the Board members believe they will increase the safety of the victim or other members of the public, and assist management of any risk posed by the offender.

Significantly, a victim satisfaction survey indicated that there was a “fairly high level of victim satisfaction” with the implementation of these victims’ rights (Solicitor General Canada, 1998, p. 30).

⁹ The rationale for this amendment was provided by the Minister of Justice in her response to the Fourteenth Report of the Standing Committee on Justice and Human Rights (Department of Justice Canada, 1998).

In July 2001, the federal policy of permitting victims to participate directly in certain decision-making processes within the criminal justice system was further strengthened by the announcement that victims would now be permitted to submit *oral* statements at National Parole Board Hearings” (Solicitor General Canada, 2001, p. 1).

In recent years, it is clear that the Parliament of Canada has strengthened victims’ rights to the point where victims are now being granted the opportunity to make their voices heard in a number of critical decision-making points in the criminal justice process – particularly, sentencing and parole. Plea bargaining remains an area where the victims are excluded from the process and where their voices are barely heard – if at all. As McGillivray (1997-98, para. 20) aptly points out,

While some prosecutors consult with complainants in plea bargaining, there is no ethical or policy requirement that they do so. Plea bargaining is a closed-door and often hasty process, unmediated by the judiciary.



3.0 Plea Bargaining in Canada

3.1 Introduction

For many years, plea bargaining has been one of the most controversial – and, perhaps, least understood – practices in the Canadian criminal justice system (Griffiths & Verdun-Jones, 1994, p. 317). For criminal justice researchers, **plea bargaining** is a compendious term that describes a broad range of behaviours that may occur among actors in the criminal court system (Verdun-Jones & Hatch, 1988, p. 1). The police, the Crown, and defence counsel may engage in conduct that ranges from simple discussions - through negotiations - to concrete agreements, that are perceived to be binding on the parties. It would be trite to point out that discussions and negotiations may not ultimately lead to any form of agreement between the parties; nevertheless, these activities have generally been considered by researchers to constitute components of the practice of plea bargaining (Griffiths & Verdun-Jones, 1994, p. 318). For the purpose of this report, however, a considerably more circumscribed definition of plea bargaining will be employed. This definition is predicated on the assumption that an unequivocal agreement has been reached between Crown and defence counsel concerning the steps that will be taken by the Crown and the accused in subsequent court proceedings. In this respect, the most serviceable definition has been furnished by the Law Reform Commission of Canada (1989, p. 3-1), which stated that a “plea agreement” constitutes “an agreement by the accused to plead guilty in return for the prosecutor’s agreeing to take or refrain from taking a particular course of action” (see also Cohen & Doob, 1990, p. 85). Broadly speaking, the promises that may be made by Crown counsel fall into three, overlapping categories: (1) promises relating to the nature of the charges to be laid (charge bargaining); (2) promises relating to the ultimate sentence that may be meted out by the court (sentence bargaining); and (3) promises relating to the facts that the Crown may bring to the attention of the trial judge (fact bargaining).

These three categories of plea bargaining encompass a variety of promises that may be offered by the Crown. For example, Verdun-Jones and Hatch (1987, pp. 74-75) set out the following list of possible undertakings, which is by no means definitive:

1. Charge Bargaining

- a) Reduction of the charge to a lesser included offence;
- b) Withdrawal or stay of other charges or the promise not to proceed with other possible charges; or
- c) Promise not to charge friends or family of the defendant; or
- d) Promise to withdraw a charge in return for the defendant's undertaking to enter into a peace bond.¹⁰

2. Sentence Bargaining

- a) Promise to proceed summarily rather than by way of indictment;
- b) Promise to make a specific sentence recommendation;
- c) Promise not to oppose defence counsel's sentence recommendation;
- d) Promise to submit a joint sentencing submission;
- e) Promise not to appeal against sentence imposed at trial;
- f) Promise not to apply for a more severe penalty (for example, by not giving notice to seek a higher range of sentence based on the accused's previous conviction – s. 727 of the Criminal Code);
- g) Promise not to apply to the trial court for a finding that the accused is a dangerous offender (s. 753 of the Criminal Code) or a long-term offender (s. 753.1 of the Criminal Code);
- h) Promise to make a representation as to the place of imprisonment, type of treatment, etc.; or
- i) Promise to arrange the sentence hearing before a particular judge.

3. Fact bargaining

- a) promise not to "volunteer" information detrimental to the accused during the sentencing hearing;
- b) promise not to mention a circumstance of the offence that may be interpreted by the judge as an aggravating factor (see, for example, the aggravating factors listed in s. 718.2 (a) of the Criminal Code).¹¹

3.2 The Judicial Response

During the past thirty years, there has been a veritable sea change in the extent to which the courts have been willing to accept plea bargaining as a legitimate component of the system of criminal justice in Canada (Griffiths & Verdun-Jones, 1994, pp. 319-322). Until the final quarter of the Twentieth Century, plea bargaining was routinely "frowned on" and most criminal justice personnel were loath to admit that it took place at all (Verdun-Jones & Cousineau, 1979). As recently as 1975, the Law Reform Commission of Canada (1975, p. 14) scornfully proclaimed that plea bargaining was "something for which a decent criminal justice system has no place." Significantly, this derisive attitude towards the practice was subsequently echoed by Chief Justice Dickson of the Supreme Court of Canada in his judgment in the *Lyons* case (1987), where he quoted from the very same Law Reform Commission Working Paper: "justice should not be, and should not be seen to be, something that can be purchased at the bargaining table" (para. 103). However, by 1989, the Law Reform Commission had accomplished a remarkable *volte face* and, after boldly asserting that "plea negotiation is not an inherently shameful practice," it even recommended that the practice become more open and accountable (Law

¹⁰ This may occur in cases of domestic violence (see, Bala, 1999).

¹¹ See, for example, Cohen and Doob (1989-90, pp. 86-87).



Reform Commission of Canada, 1989, p. 8). At about the same time, the Canadian Sentencing Commission (1987, p. 428) was also recommending that plea bargaining be recognized as a legitimate practice and subjected to judicial scrutiny and control:

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 (oral or written submission) 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 Supreme Court of Canada has long asserted the need for prosecutorial discretion in the criminal justice system. For example, in *R. v. Jolivet* (2000), the Supreme Court of Canada enthusiastically approved the statement that “(a)s a general principle, we have recognized that for our system of criminal justice to function well, the Crown must possess a fair deal of discretion.” (para. 16). Moreover, in *R. v. Power* (1994), the Supreme Court stated that it is only in extreme circumstances that the courts would be willing to interfere with the exercise of such prosecutorial discretion:

... (c)ourts should be careful before they attempt to “second-guess” the prosecutor’s motives when he or she makes a decision. Where there is conspicuous evidence of improper motives or bad faith or of an act so wrong that it violates the conscience of the community, such that it would genuinely be unfair and indecent to proceed, then, and only then, should courts intervene to prevent an abuse of process which could bring the administration of justice into disrepute. Cases of this nature will be extremely rare” (p. 10).

It is particularly noteworthy that the Supreme Court of Canada has unequivocally indicated that it considers plea bargaining to be a routine element in the exercise of prosecutorial discretion in Canada.¹² For example, in the *Power* case (1994), Justice L’Heureux-Dubé (speaking for a majority of the Justices of the Supreme Court of Canada) clearly included plea bargaining within the domain of discretionary decisions that the Crown is legitimately entitled to make:

Since a myriad of factors can affect a prosecutor’s decision either to bring charges to prosecute, to *plea bargain*, to appeal, etc., courts are ill-equipped to evaluate those decisions properly. (p. 17). (emphasis added)

In a similar vein, Justice L’Heureux-Dubé (at p. 18) strongly endorsed a passage from the judgment of Kozinski J. in *United States v. Redondo-Lemos* (1992):

Such decisions (to charge, to prosecute and to plea-bargain) are normally made as a result of a *careful professional judgment as to the strength of the evidence*, the availability of resources, the visibility of the crime and the possible deterrent effect on the particular defendant and others similarly situated. (emphasis in original)

¹² For general discussion of the exercise of prosecutorial discretion in Canada, see Mitchell (2001).

One year later, in *R. v. Burlingham* (1995), the Supreme Court of Canada went one step further and roundly endorsed the view that plea bargaining was indispensable to the functioning of the Canadian criminal justice system. In the words of Justice Iacobucci,

To the extent that the plea bargain is an integral element of the Canadian criminal process, the Crown and its officers engaged in the plea bargaining process must act honourably and forthrightly. (p. 400). (emphasis added)

Roach (1999) has contended that the Supreme Court of Canada originally paved the way for the legitimization of plea bargaining practices when it established, in the pivotal *Stinchcombe* case (1991), that the accused has a constitutional right to disclosure of information by the Crown. Indeed, as Roach (1999) points out, the Supreme Court expressed the view that complete – and early – disclosure on the part of the prosecution would ultimately encourage the resolution of criminal charges without a trial “through increased numbers of withdrawals and pleas of guilty” (p. 97).

There is little doubt that the tolerant stance adopted by the Supreme Court of Canada towards the practice of plea bargaining has been broadly embraced by the appellate and trial courts of the various provinces and territories. For example, in his account of the reasons underlying the process by means of which plea bargaining has assumed the mantle of respectability within the courts, Roach (1999) has pointed to the marked influence of the Martin Task Force that was established to address the thorny (and, at the time, urgent) issue of court delays in Ontario (Ontario, 1993). The Task Force recommended that, where appropriate, defendants should be routinely encouraged to plead guilty through the offer of sentence discounts (Roach, 1999, pp. 98-99). To this end, trial judges were exhorted to participate in pre-trial conferences that would facilitate plea bargaining – primarily by giving an indication of the perceived appropriateness of any recommended sentence.¹³ Therefore, Roach (1999, p. 99) concludes that the report of the Martin Task Force constitutes powerful evidence that plea bargaining in Ontario “was no longer a ‘dirty secret’ hidden in the corridors of the courtroom but was now openly facilitated in the judge’s office.”¹⁴

It is significant that, in the same year as the Martin Task Force issued its report, the Crown in Ontario made a plea bargain that attracted a considerable degree of public criticism. In the notorious case of *Karla Homolka* (1993), the Crown accepted a plea to a charge of manslaughter and advanced a joint sentencing submission to the effect that the accused should be sentenced to a term of imprisonment of 12 years. The Crown took the view that it was necessary to offer this plea bargain to Karla Homolka, who was considered to be an accomplice to the killings of Kristen French and Leslie Mahaffy by her husband, Paul Bernardo. At the time when the bargain was made, Crown counsel was apparently convinced that, without Homolka’s testimony, it would not be possible to convict Bernardo of the murders. In response to the public expressions of anger at the perceived lenience of Homolka’s sentence, an independent inquiry was established to investigate the circumstances underlying the Homolka plea bargain. Ultimately, the inquiry found that, given its knowledge of the circumstances at the time, the Crown had absolutely no

¹³ Section 625.1 of the *Criminal Code* (R.S.C. 1985, c. C-46) makes provision for a formal pre-trial hearing “to consider the matters that, to promote a fair and expeditious hearing, would be better decided before the start of the proceedings, and other similar matters, and to make arrangements for decisions on those matters.” In the case of jury trials, the pre-trial hearing is mandatory: otherwise, a judge has the discretion to order such a hearing – with the consent of the parties.

¹⁴ The Marshall Commission, in Nova Scotia, also lent its general support to the practice of plea bargaining – subject to certain safeguards. See, Royal Commission on the Donald Marshall, Jr. Prosecution (N.S.) (1989, p. 244-247).



choice but to enter the plea agreement with Homolka's counsel if it wished to ensure the conviction of Paul Bernardo (Galligan, 1996, pp. 215-218). Although there was widespread criticism of the sentence that was jointly recommended by the Crown and defence, the *Homolka* case nevertheless reflects a considerable degree of light on the extent to which plea bargaining has been accepted as a necessary – albeit somewhat unattractive – element in the administration of justice in Ontario. Perhaps, the increasing degree of respectability bestowed on the practice in Ontario is best symbolized by the case of *Boudreau v. Benaiah* (2000), in which the Ontario Court of Appeal upheld a ruling that an accused person was entitled to receive substantial damages from his counsel because the latter failed to properly communicate with the accused concerning the contents of a proposed plea bargain with the Crown.

Another weather vane that points to the entrenchment of plea bargaining as a legitimate element in the fabric of the criminal justice process is the clearly articulated willingness of Canadian courts to endorse joint-sentence submissions that are advanced by both the Crown and defence counsel (Manson, 2001, pp. 204-205). Indeed, the Canadian judiciary has demonstrated a marked reluctance to reject joint sentencing submissions even though it is crystal clear that such submissions are generally predicated on the acceptance of a plea bargain by the accused. For example, the Alberta Court of Appeal has ventured some clear statements of principle concerning joint-sentencing submissions. In *R. v. G.W.C.* (2000), the Court forcefully articulated the view that trial courts should be reluctant to undermine the plea bargaining process by rejecting a joint sentencing submission that has been agreed upon by both Crown and defence counsel. Indeed, Justice Berger stated that,

The obligation of a trial judge to give serious consideration to a joint sentencing submission stems from an attempt to maintain a proper balance between respect for the plea bargain and the sentencing court's role in the administration of justice. The certainty that is required to induce accused persons to waive their rights to a trial can only be achieved in an atmosphere where the courts do not lightly interfere with a negotiated disposition that falls within or is very close to the appropriate range for a given offence. (para. 17)

The Alberta Court of Appeal ruled that joint-sentencing submissions should generally be accepted by the trial judge, "unless they are unfit" or "unreasonable." However, the Court also emphasized that the trial judge must conduct a "careful and diligent inquiry of counsel as to the circumstances of a joint sentencing submission." Without such a detailed inquiry, there would be no basis for determining whether or not there is any "good reason" to reject the submission. In this respect, it is noteworthy that Justice Berger approved a passage from a judgment of the Manitoba Court of Appeal in *Sherlock* (1998), in which Kroft, J.A. stated (para. 32) that "it is important to trial judges and courts of appeal that the nature of the bargain be clearly presented on the record," since "without that assistance, no court can adequately assess the extent to which it should be constrained by the joint recommendation of counsel." Justice Berger also expressed the view (para. 25) that "it is essential that the sentencing judge determine what fact or factors motivated the plea and gave rise to the joint submission."

In *R. v. Hoang* (2001), the Alberta Court of Appeal applied the reasoning expressed in by Justice Berger in *R. v. G.W.C.* (2000) and set aside the sentence of the trial judge because he did not give any reasons for rejecting a joint submission that had been presented by Crown and defence counsel. The Court of Appeal set aside the trial judge's sentences and substituted the less harsh sentences agreed upon in the original joint sentencing submission.

In a similar vein, the B.C. Court of Appeal has recently placed its *imprimatur* on plea bargaining and has sent a clear signal to the trial courts that it is a practice that is deemed to be necessary to the efficient operation of the criminal justice process. In the view of the B.C. Court of Appeal, it is, therefore, essential that trial courts should generally endorse the contents of plea agreements entered into by competent Crown and defence counsel. For example, in *R. v. Bezdan* (2001), Prowse J.A. referred (para. 6) to the “formalized plea-bargaining process which has been adopted by the Provincial Court as part of a Case-Flow Management designed to streamline and expedite the handling of criminal cases.” Further on in her judgment, Madam Justice Prowse stated (para. 15) that:

It is apparent that the administration of criminal justice requires cooperation between counsel and that the court should not be too quick to look behind a plea bargain struck between competent counsel unless there is good reason to do so. In those instances in which the sentencing judge is not prepared to give effect to the proposal, I also agree that it would be appropriate for that judge to give his or her reasons for departing from the “bargain.” (Emphasis added).

Similarly, in *R. v. Pawliuk* (2001), Justice Braidwood of the B.C. Court of Appeal referred to the process of entering into a plea bargain as being “in many ways analogous to the formation of a contract.” In his view,

Once a plea agreement is reached and the accused has fulfilled part of the bargain, it is improper for the Crown to renege on the agreement. This is so for public policy reasons, primarily because withdrawal from the agreement after the accused has given some consideration in exchange for it may in some cases prejudice the ability of the accused to make full answer and defence. (para. 52)

3.3 The Lack of a Formal Process for Plea Bargaining in Canada

Undoubtedly, the members of the Canadian judiciary have now accepted the fact that plea bargaining plays a significant role in the efficient administration of justice and have sustained it by embracing sentencing policies that indirectly give effect to the agreements fashioned by Crown and defence counsel. However, in spite of the recommendations of the Canadian Sentencing Commission (1987) and the Law Reform Commission of Canada (1989), there is still no formal process by means of which Canadian courts are required to scrutinize the contents of a plea bargain and to ensure that there is adequate protection for the rights and interests of all of the affected parties - the Crown, the accused, the victim(s) and members of society in general (Verdun-Jones and Hatch, 1988).¹⁵ The *Criminal Code* (section 625.1) makes provision for the holding of formal, pre-trial hearings before a judge in order “to consider the matters that, to promote a fair and expeditious hearing, would be better decided before the start of the proceedings, and other similar matters, and to make arrangements for decisions on those matters.”¹⁶ However, the *Criminal Code* does not require that the existence of a plea bargain be made known to the court in the course of such a pre-trial hearing: nor does the Code impose a duty on trial judges to investigate the circumstances underlying a plea bargain, if it comes to their attention that one has, in fact, been reached between Crown and defence counsel.¹⁷

¹⁵ The need to protect the interests of the accused is also of critical importance. For example, Miller (1996, p. 56) makes the point that accused persons need protection from the effects of racism on the exercise of prosecutorial discretion in the plea bargaining process.



From the point of view of the accused, the lack of a formal procedure requiring the disclosure of a plea bargain by counsel means that there is currently no independent review of whether they have entered into such an agreement voluntarily and with full knowledge of the potential ramifications (although this particular situation would undoubtedly be remedied if Bill C-15 A, which is currently before Parliament, is ultimately enacted and proclaimed).¹⁶ Furthermore, there is always the possibility that a failure by counsel to inform the trial judge that a plea agreement has been reached will lead to a situation in which the accused duly fulfills his or her part of the bargain but does not ultimately receive a sentence that adequately reflects the expectations that have been fostered by the Crown in order to extract a plea of guilty (Verdun-Jones & Cousineau, 1979, p. 245). This unfortunate situation was clearly present in *R. v. Neale* (2000). In this case, the defendant had agreed to plea guilty to a charge of robbery in exchange for the Crown's undertaking to make a submission in support of a five-year sentence, less the time already spent in custody. Unfortunately, counsel neglected to inform the trial judge that this plea bargain had been reached. Subsequently, the trial judge sentenced the defendant to seven years in prison. Upon the accused's appeal against sentence, Justice Lambert noted (para. 12) the serious consequences that ensued as a consequence of this failure of communication:

If counsel for the Crown or counsel for the defence had told the sentencing judge at the appropriate time that an agreement had been made whereby the accused would plead guilty and, in exchange, the Crown would make a submission that a five year sentence, less remand time, would be appropriate, then under the authorities, the sentencing judge would have been required to give very serious concern and consideration to that submission. I do not doubt that she would have done so. That would be particularly so where a joint submission was made by counsel for the Crown and counsel for the defence.

Even though the accused did not receive the sentence recommended by the Crown (and even though the trial judge was never informed that a plea bargain had been struck) the Court of Appeal nevertheless dismissed the appeal against sentence. As Justice Lambert noted (para. 14),

In my opinion, no injustice is being done to the appellant in this particular case through the processes before the sentencing judge. The sentence is a fit one with the appropriate range and the circumstances of the sentencing were not such as to create any injustice....

While there is a real doubt as to whether or not the accused would perceive this sentencing outcome to be just, it is certainly beyond doubt that such a situation would never have arisen, if

¹⁶ However, it has been held that neither the Crown nor the defence is bound to any particular position that they advance at such a hearing: *R. v. Derksen* (1999), 140 C.C.C. (3d) 184 (Sask. C.A.).

¹⁷ The effect of the structure of the adversarial system of justice on the ethical duties of Crown and defence counsel in Canada is discussed by Mackenzie (1996). There are, of course, profound difficulties when there is a plea discussion process that takes place with an *unrepresented* accused person (Hutchison, 1997).

¹⁸ Section 49 of Bill C-15 A (passed by the House of Commons on October 18th, 2001) provides for an amendment to Section 606 of the *Criminal Code*. This amendment would require the trial judge to ascertain that a guilty plea has been made voluntarily and that the accused understands "that the plea is an admission of the essential elements of the offence;" "the nature and consequences of the plea"; and "that the court is not bound by any agreement between the accused and the prosecutor." Bill C-15A was given third reading by the Senate on March 19th, 2002.

there had been a formal procedure that required the Crown and defence counsel to disclose the existence of any plea agreement and to seek the trial judge's approval of its terms.

While the absence of a mandatory process for the judicial review of plea bargains raises profound questions concerning the protection of the rights of the accused, it is also important to recognize that there is equally no provision in Canadian criminal procedure for the trial judge to take into account the legitimate interests of the victim in the outcome of a case that is ultimately resolved through a plea bargain. While victims now have the right to submit victim impact statements at the sentencing stage, the outcome of a particular case may already have been determined by a plea bargain that has been made well before the victims have their day in court: for example, the choice of the charge(s) laid against the accused following a plea bargain, is a decision that undoubtedly dictates the nature and range of the sentence that may be imposed by the trial court and also constitutes an official statement to the community of "what happened" to the victim of the crime. Once the charge has been laid against the accused, a victim's ability to offer a meaningful contribution to the decision-making process of the criminal court system has been significantly reduced.

At present, the only Canadian jurisdictions that have enacted legislation concerning the role of victims in the plea bargaining process are Manitoba and Ontario. However, the Ontario legislation merely requires that victims "should have access to information" about "any pretrial arrangements that relate to a plea that may be entered by the accused at trial" (*Victims' Bill of Rights*, 1995, c. 6., s. 2(x)). It is significant that the Martin Task Force Report, that was published two years before the enactment of the Ontario *Victims' Bill of Rights*, had recognized that victims should be consulted about plea bargains "where appropriate and feasible". However, as Roach (1999, p. 99) points out, the recommendations of the Martin Task Force were not designed to enhance the level of direct victim participation in the criminal justice process in Ontario and it was made clear that victims should not be given the right to veto an agreement of which they disapproved. According to Roach (1999, p. 99), it was assumed that the exercise of power within the arena of plea bargaining in Ontario was to remain squarely in the hands of the criminal justice professionals and the primary goal of the Task Force in recommending more widespread acceptance of plea bargaining was not that of victim empowerment but rather that of enhancing the efficiency of a court system that would collapse if most defendants decided to exercise their right to a full trial.

In sharp contrast, the Manitoba *Victims' Bill of Rights* (2000) grants victims a definite right to be *consulted* about various aspects of the prosecution of "their" defendants. It remains to be seen whether other Canadian provinces and territories will follow Manitoba's lead in this respect. Undoubtedly, the Manitoba legislation elevates the role of the victim in plea negotiations to a level that is entirely novel within the Canadian context.



4.0 Federal Rule 11: A Viable Legal Framework for the Regulation of Plea Bargaining?

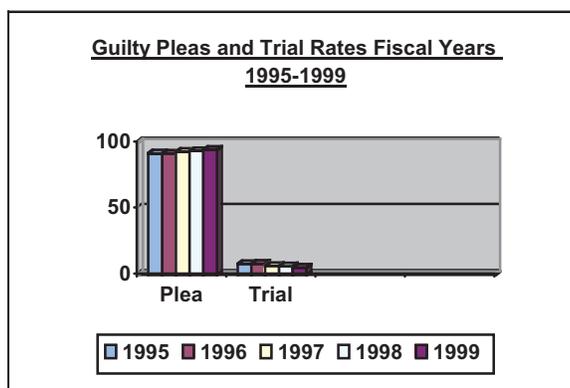
4.1 The Legitimization of Plea Bargaining in the United States

In the case of *Santobello v. New York* (1971), the Supreme Court of the United States affirmed the constitutionality of plea bargaining and actually encouraged prosecutors and defence counsel to participate in the practice because of the significant benefits that may be derived from it. In *Blackledge v. Allison* (1977), the Supreme Court identified these benefits as including the following:

The defendant avoids extended pretrial incarceration and anxieties and uncertainties of trial; he gains a speedy disposition of his case, the chance to acknowledge his guilt and a prompt start in realizing whatever potential there may be for rehabilitation. Judges and prosecutors conserve vital and scarce resources. The public is protected from the risks imposed by those charged with criminal offenses who are at large on bail while awaiting criminal proceedings.

Although the empirical evidence is somewhat scant, it is frequently asserted that at least 90% of all criminal cases in the United States are decided on the basis of guilty pleas, many of which are the result of a plea bargain (Herman, 1997, p. 1; Taha, 2001, p. 252)). For instance, in 1999, 94.6% of all criminal cases in the federal courts were decided on the basis of guilty pleas (US Sentencing Commission, 1999 *Datafile*, OPAFY99, Table 3):

Table 3



However, judicial approbation of plea bargaining in the United States is predicated upon the assumption that it must be properly regulated by the courts (Sigman, 1999, p. 1320-1). Judicial regulation necessarily implies that judges retain the discretion whether or not to accept - or reject - a plea bargain (Welling, 1987, p. 329). Furthermore, judicial scrutiny of plea bargaining ensures that, if the court approves a negotiated plea, then the government is placed under a duty to fulfill the promises that were made by the prosecutor in order to induce the accused to plead guilty (Pan & Kaiser, 2001, p. 1399).

4.2 The Implementation of Federal Rule 11

Insofar as the federal courts are concerned, the mechanism that has been established for the formal regulation of plea bargaining is to be found in Rule 11 of the *Federal Rules of Criminal Procedure* (2000). Rule 11 articulates the various procedures that apply to the entry of a plea by an accused person who appears before a criminal court. Rule 11(c) requires that, *before* a guilty plea is accepted, the trial judge “must address the defendant personally in open court” and inform the defendant of the penalties that may be imposed upon conviction and the potential impact of sentencing guidelines on the court’s ultimate decision concerning sentence.

Furthermore, the court must be satisfied that the accused understands the information with which he or she is provided.¹⁹ Rule 11(d) places the trial judge under a duty to insure that a guilty plea is *voluntary* and to “inquire as to whether the defendant’s willingness to plead guilty or *nolo contendere* results from prior discussions between the attorney for the government and the defendant or the defendant’s attorney.” As the United States Court of Appeals for the Fifth Circuit stated, in *US v. Henry* (1997), “Rule 11 makes elaborate provision to insure that the plea is made voluntarily and intelligently, *i.e.*, that the defendant understands the nature of the charge, his rights, the consequences of the plea, and that there is a factual basis for the plea.”²⁰ A dramatic illustration of the effect of this provision is furnished by *US v. Damon* (1999), in which the Court of Appeals remanded the case back to the trial court to determine whether the accused’s capacity to enter a knowing and voluntary plea had been impaired by an antidepressant drug, that had been administered to Damon following a suicide attempt.

Rule 11(e)(2) clearly states that, if there has been a plea agreement between the parties, then it must be disclosed in open court (or, if good cause is shown, *in camera*) at the time that the plea of guilty is offered by the accused. Rule 11(e)(3) & (4) provides that the court may either accept or reject the plea agreement: it may not seek to modify it.

Under Rule 11(e)(1), the defendant may agree to plead guilty or *nolo contendere* in exchange for a promise by the prosecutor to do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant’s request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

¹⁹ However, it appears that it is difficult for a defendant to withdraw a guilty plea on the basis of an allegation of a lack of understanding of the charges against him or her. In *United States v. Hiltz* (2001), the US Court of Appeal for the First Circuit approved the following statement of the applicable principles: “Where the prosecutor’s statement or the defendant’s description of the facts set forth all the elements of the offense and the conduct of the defendant constitutes that offense, the defendant’s admission that the allegations are true is sufficient evidence that he understands the charge” (para. 10).

²⁰ However, it is not clear that this process is necessarily as thorough as the appellate court suggested in the *Henry* case. For example, a study of six *state* jurisdictions in 1977, found that the average time for accepting felony pleas was just under 10 minutes (McDonald, 1987: 211).



It is vital to recognize that the *consequences* of entering a guilty plea will vary significantly, depending on the specific nature of the plea bargain that has been reached by the parties (Sigman, 1999, p. 1318). Rule 11(e)(2) states that:

If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

If the trial court decides to accept a “Type A” or “Type C” plea bargain, it must “inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement (Rule 11(e)(3)). However, in the case of a “Type B” plea bargain, the court does not really have anything to “accept” or “reject” since the prosecutor merely promises to make a particular sentence recommendation or to refrain from opposing the accused’s sentencing request (Herman, 1997, p. 138). It is for this reason that the court must inform the accused that, if it does not accept the prosecutor’s recommendation or the accused’s request, the accused has no absolute right to withdraw the guilty plea. If the trial judge fails to issue the appropriate warning to the accused and the latter can demonstrate that he or she was ignorant of the nature of a “Type B” plea bargain, then an appellate court will permit the accused to withdraw the guilty plea (*US v. Kennell*, 1994).

Where the trial court decides to *reject* a “Type A” or “Type C” plea bargain, it is required to advise the accused – usually in open court – “that the court is not bound by the plea agreement” and it must “afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of *nolo contendere* the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement” (Rule 11(e)(4)). The operation of this rule is exemplified in the case of *United States v. Fernandez* (1991), in which the accused defendant agreed to plea guilty to a drugs charge in exchange for a promise that the sentence would not exceed six years of imprisonment (Sigman, 1999, p. 1318). However, the defendant failed to fulfill his promise to fully cooperate with the government. As a result, the court sentenced him to six-and-a-half years in prison. The Court of Appeals found that, since the agreement with the government constituted a “Type C” plea bargain, the defendant should have been given an opportunity to withdraw his plea (Herman, 1997, p. 195; Sigman, 1999, p. 1318).

The situation is dramatically different for the defendant who has entered into a “Type B” plea bargain, which consists essentially of a non-binding sentencing recommendation (Herman, 1997, p. 199). Where the court rejects such a plea bargain, the accused has no absolute right to withdraw the guilty plea. For example, in *United States v. Thibodeaux* (1987), the defendant agreed to plea guilty and to cooperate as a witness in exchange for the prosecutor’s sentence recommendation of five years of imprisonment. The trial court subsequently refused to implement the government’s recommendation and imposed a ten-year sentence: the defendant was not permitted to withdraw his plea (Sigman, 1999, p. 1318). However, it is important to note that there may be special circumstances in which the court may permit the accused to withdraw the guilty plea that follows a “Type B” plea bargain: indeed, Federal Rule 32(e) explicitly grants the court a *discretionary* power to permit the accused to withdraw the plea:

If a motion to withdraw a plea of guilty or *nolo contendere* is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason.

The onus is on the accused to show “*fair and just reason*”: hence, the court does not readily exercise its discretionary power to permit withdrawal of the guilty plea (*US v. Badger* (1991)).

Although most defendants would prefer to enter into “Type C” plea bargains because they provide certainty in relation to sentencing outcome, many federal courts reportedly discourage their use because they are perceived as restricting the legitimate scope of judicial sentencing discretion (Sigman, 1999, p. 1319). Furthermore, such plea bargains may be unattractive to the federal trial courts for the reason that, “when judges reject type (C) agreements the case goes back to the trial calendar, which disrupts the docket” (Sigman, 1999, p. 1319). On the face of it, one would expect that few defendants would wish to subject themselves to the level of uncertainty and risk that is engendered by the “Type B” plea bargain. However, it has been suggested (Sigman, 1999, p. 1324) that, in practice, trial judges usually implement the non-binding sentence recommendations contained in “Type B” plea agreements. Furthermore, as Sigman (1999, p. 1324) suggests, the courts are well aware of the fact that the participants in the plea bargaining process – prosecutors and defence lawyers – are “repeat players” and that, if the courts were to routinely refuse to accept the prosecutors’ sentence recommendations, it would seriously impede the ability of prosecuting and defence attorneys to reach plea agreements in the future. Similarly, McDonald (1987, p. 215) points to other practical reasons, that may underlie a general willingness on the part of the trial courts to accept a prosecutor’s sentence recommendation that has induced the accused to plead guilty:

(2) Judges are just as anxious as prosecutors and defense counsel to dispose of cases as quickly as possible. Hence they are subject to strong pressures to find pleas acceptable, which they almost always do. (3) Except in the occasional case of extraordinarily unusual plea agreements, judges are not prone to second guess the agreements worked out by prosecutors. To do so on a regular basis would require the judge to assess the evidentiary strength of the case as well as other tactical matters (such as using the defendant as an informer or for state’s evidence) that fall within the province of the prosecutor.

Federal Rule 11(e)(1) makes provision solely for the “attorney for the government and the attorney for the defendant” to engage in plea negotiations: it does not permit the involvement of judges in such negotiations (Herman, 1997, p. 74). Indeed, Rule 11(e)(1)(C) explicitly states that “the court shall not participate in any such discussions.” Undoubtedly, the task of the trial judge under Rule 11 is to serve as an *independent arbiter* of the plea bargaining process. The trial court is required to ensure that a guilty plea is being made voluntarily and not as a result “of force, threats or promises apart from the agreement” (Pan & Kaiser, 2001, p. 1419).

Moreover, trial judges are placed under a duty to satisfy themselves that there is a factual basis for the guilty plea – namely, “that the conduct which the defendant admits constitutes the offense charged, that all elements of the offense are met, and that any requirements of criminal intent are shown by the proffered evidence” (Herman, 1997, p. 12; Pan & Kaiser, 2001, p. 1422). Finally, the trial courts must ensure that any defendant, who indicates an intention to plead guilty, understands the following, critical issues (Pan & Kaiser, 2001, p. 1418):



- (1) the nature of the charge;
- (2) the mandatory minimum and maximum sentences for the charge, including any special parole, supervised release, and restitution terms;
- (3) the constitutional rights waived²¹ by a guilty plea; and
- (4) that answers to the court's questions, if under oath, on the record, in the presence of the defendant's counsel, may be used against him or her in a subsequent proceeding.

Where trial judges have stepped beyond the boundaries of supervision and have involved themselves in the actual plea negotiations, the accused will have a strong case for appellate relief (Pan & Kaiser, 2001, pp. 1398-1399). Clearly, intrusion of the trial judge into the negotiations for a plea bargain may well open the door to inappropriate coercion of the defendant into pleading guilty (McDonald, 1987, p. 215). For example, in *US v. Casallas* (1995), it was held that the trial court had "impermissibly intervened in plea negotiations" because the judge had informed the defendant of the difference between the potential sentence the could be expected after a trial - as compared with the sentence that would follow a plea bargain - and had subsequently advised the defendant to confer with his attorney (Pan & Kaiser, 2001, p. 1399). A more obvious example of potentially coercive judicial involvement in plea negotiations is to be found in the case of *US v. Rodriguez* (1999), where the judge told the defendant that, if he proceeded with a trial, then he would likely be found guilty (Pan & Kaiser, 2001, p. 1399).

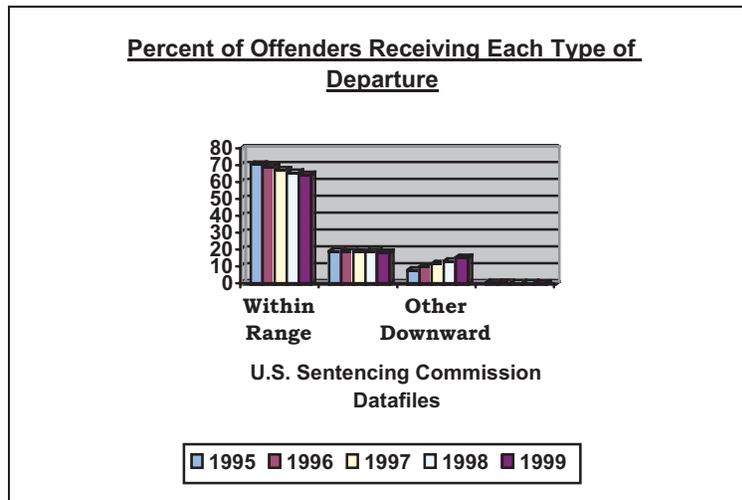
4.3 Federal Rule 11 and the United States Sentencing Guidelines

It is critical to appreciate that the guilty plea provisions, enshrined in Rule 11, must be read in the context of the federal sentencing guidelines (Dick, 1997, p. 1030). The United States Sentencing Guidelines were issued under the authority of the *Sentencing Reform Act* of 1984 (18 U.S.C. 3551-3585; Herman, 1997, p. 77). The Act established the United States Sentencing Commission, which was assigned the onerous task of drafting the Guidelines. In November of 1987, the Guidelines became effective and their effect was to severely circumscribe the pre-existing range of judicial sentencing discretion by "closely tying sentences to the charges of which defendants are convicted" (Taha, 2001, p. 251). One of the primary goals of the Sentencing Guidelines was to put an end to the "widely divergent sentencing practices," which had been fostered by a system of indeterminate sentencing in which judges and parole authorities exercised a relatively untrammelled degree of discretionary power (Karle & Sager, 1991, p. 396). The Guidelines, therefore, implemented a system of determinate sentences and established a "limited range of prison terms, within which the judge could impose a sentence" (Karle & Sager, 1991, p. 397). The trial judge may only depart from this range if she gives a "legally sufficient reason" for doing so (a decision that is open to review by an appellate court) (Herman, 1997, p. 78; Karle & Sager, 1991, p. 397). In 1999, 64.9% of sentences in the federal courts were within the prescribed guideline range. In 34.5% of cases, there was a "downward departure" from the guideline range and in only 0.6% of cases did the courts impose an "upward departure." (US Sentencing Commission, 1999 *Datafile*, OPAFY99, Table 4).

²¹ While the defendant may receive some benefits for pleading guilty, it is imperative to acknowledge that the defendant also waives a number of significant constitutional rights, such as: "raising objections to facts alleged in indictment" (see *U.S. v. Walton*, 1994); "challenges of illegal search and seizure" (See *Gioiosa v. US*, 1982); "challenges to a coerced confession" (see *McMann v. Richardson*, 1970); and "challenges based on denial of due process rights to a speedy trial" (see *Tiemens v. US*) (Pan & Kaiser, 2001:1406-1408).

Table 4

The Sentencing Guidelines unequivocally recognize the inherent legitimacy of the plea bargaining process and provide concrete incentives to those accused persons who plead guilty. For example, §3E1.1 makes explicit provision for a sentence discount where the accused “clearly demonstrates acceptance of responsibility” for commission of the offense. Similarly,



under §5K.1.1, an *additional* discount may be given where the accused has provided “substantial assistance” to the authorities (in relation to “the investigation or prosecution of another person who has committed an offense”). In 1998, such a discount was given to defendants in 18.7% of all sentences handed down by the federal courts (see Table 4).

Nevertheless, while the Guidelines are, in certain respects, “plea-bargaining friendly,” the Sentencing Commission was charged with the task of developing standards that would guide judges in making the decision whether or not to accept a plea bargain. In this respect, it is exceptionally noteworthy that the Commission’s “Commentary” to the Sentencing Guidelines (Chapter 6, Part B) indicates that Congress expected judges “to examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines.” Pursuant to this mandate, it is significant that §6B1.2 of the Sentencing Guidelines sets out certain “Standards for Acceptance of Plea Agreements”. These standards are designed to diminish the extent to which the parties to a plea agreement may manipulate its content in order to avoid the imposition of an appropriate sentence under the Sentencing Guidelines (Dick, 1997, pp. 1039-41). For example, the Policy Statement in the Guidelines indicates that a “Type B” or “Type C” plea (*sentence bargain*) agreement may be accepted by the trial court - provided that the relevant sentence falls “within the applicable guideline range” or “departs from the applicable guideline range for *justifiable* reasons” (emphasis added).

Furthermore, where a “Type A” plea agreement (a *charge bargain*) is involved, the “Policy Statement” stipulates that the court may accept the agreement if, “for reasons stated on the record,” it determines that “the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines.”²² In other words, the trial court must actively inquire whether the charge(s) laid by the prosecutor constitute a fair reflection of “what actually happened” in the case (Dick, 1997, p. 1040; Taha, 2001, p. 251). For example, trial judges are supposed to closely scrutinize any plea agreements, reached in relation to alleged drug offences, in order to ascertain whether the charge(s) laid by the prosecutor may be



deemed appropriate in light of the actual quantity of drugs found on the defendant at the time of his or her arrest (Karle & Sager, 1991, p. 404). This particular scenario was played out in *US v. Eirby* (2001), where the accused - having willingly entered into a "Type B" plea bargain - proceeded to plead guilty to a charge of conspiracy to distribute cocaine base. However, the pre-sentence investigation report indicated that the accused was actually in possession of a greater quantity of crack cocaine than had been indicated either in the indictment or in the plea agreement. Possession of this greater quantity of the drug would have rendered the defendant liable to conviction of a more serious offence, carrying a more severe sentence. The accused was given the opportunity to withdraw his guilty plea but he ultimately declined to do so and was sentenced to a longer prison term than had been envisaged in the original "Type B" plea agreement.²³ The Court of Appeals for the First Circuit rejected Eirby's appeal, noting (para. 23) that the trial judge had warned the accused that the penalty stated in the plea agreement was not sustainable in light of the finding as to the quantity of drugs in his possession and that Eirby had declined the opportunity to withdraw his guilty plea. Cases such as *Eirby* dramatically demonstrate the extent to which, under the Sentencing Guidelines, the trial courts are encouraged to closely monitor the contents of the plea bargains that are fashioned by prosecution and defence attorneys.

The task of ensuring that the contents of a plea bargain are compatible with the established facts of a case is greatly facilitated by §6B1.4 of the Guidelines, which makes provision for a plea agreement to be accompanied by a written stipulation of the facts that are deemed to be relevant to sentencing. Stipulations made under this provision must:

1. set forth the relevant facts and circumstances of the actual offense conduct and offender characteristics;
2. not contain misleading facts; and
3. set forth with meaningful specificity the reasons why the sentencing range resulting from the proposed agreement is appropriate.

Where the written stipulations prove the commission of more serious offences than the offence(s) of which the accused was actually convicted, then *the trial judge must apply the sentencing guideline that is applicable to the more serious offences* (§1B1.2(a)).²⁴ However, there is a limit to the application of this provision: as the Commentary on this guideline indicates (para. 1), the sentence that the court may impose is limited to "the maximum authorized by the statute under which the defendant is convicted."

Furthermore, the Guidelines (§1B1.2(c)) state that, if a plea agreement contains a stipulation that specifically establishes the commission of additional offences, then the court must determine the sentence "as if the defendant had been convicted of additional count(s) charging those offense(s)."

²² Significantly, the Policy Statement provides that acceptance of a "Type A" plea agreement "does not preclude the conduct underlying such charge from being considered under the provisions of §1B.1.3 (Relevant Conduct) in connection with the count(s) of which the defendant is convicted." "Relevant Conduct" refers to the factors that the trial court may consider in determining the applicable sentence range in the Guidelines.

²³ The Court of Appeals for the First Circuit also emphasized (para. 49, endnote 3) that a "Type B" plea bargain was, in any event, only a recommendation to the trial court: "the essence of a non-binding plea agreement is that the judge may override the parties' agreements."

²⁴ The US Sentencing Commission (2001) has forwarded an amendment to Congress that would make it clear that "a factual statement made by the defendant during the plea colloquy must be made as part of the plea agreement in order to be considered as a stipulation for the purposes of §1B1.2(a).

One of the most noteworthy constraints that the Guidelines place upon the application of Federal Rule 11 involves the use by the trial courts of the pre-sentence reports, which are prepared by an independent agency – the US Probation Office. The Sentencing Guidelines (§6A1.1) state that, in most cases, a probation officer must conduct a “presentence investigation and report to the court *before the imposition of sentence*” (emphasis added). In practice, such a report is, indeed, prepared and submitted to the court “in the vast majority of cases” (Herman, 1997, p. 158). It will be recalled that Federal Rule 11(e)(2) stipulates that, when the prosecutor and defence attorney notify the court that a “Type A” or “Type C” plea agreement has been reached between the parties, “the court may accept, or reject the agreement, *or may defer its decision until there has been an opportunity to consider the presentence report*” (emphasis added). This suggests that the court has inherent *discretion* whether or not to defer making a decision about the acceptability of a plea agreement until after it has considered the pre-sentence report.

However, the Sentencing Guidelines (§6B1.1(c)) explicitly state that the trial court is *required* to defer rendering this decision until after it has had an opportunity to consider the pre-sentence report. The fact that an independent pre-sentence report will be made available to a trial judge *before* she considers the acceptability of a proposed plea bargain necessarily suggests that it should be considerably more difficult for the prosecutor and defence lawyers to distort, or withhold, relevant information from the court.

It should be noted that, under the provisions of Rule 11, it is possible for the trial court to accept the accused’s guilty plea while – simultaneously – deferring its decision concerning the acceptability of the proposed plea agreement. If the trial court, having read the pre-sentence report, decides to reject the plea agreement, then Rule 11(e)(4) clearly stipulates that the defendant must automatically be given an opportunity to withdraw his or her guilty plea and that the court must warn the defendant that, should he or she persist in the guilty plea, “the disposition of the case may be less favorable to the defendant than that contemplated by the agreement.” However, the accused does not have an automatic right to withdraw a guilty plea during the period in which the court has deferred making a decision whether or not to accept or reject the plea agreement: indeed, withdrawal during this period may only be permitted where the accused proves that there is a “fair and just reason for doing so” (as stated in Federal Rule 32(e)).

The implications of this particular aspect of the application of Rule 11 are well-illustrated by the case of *United States v. Hyde* (1997), in which the accused had entered into a “Type A” plea agreement (*charge bargain*) with the government prosecutor. After concluding that the accused was “pleading guilty knowingly, voluntarily, and intelligently” and that “there was a factual basis for the plea,” the District Court accepted the guilty plea but deferred making a decision concerning whether or not to accept the plea bargain until after the completion of the pre-sentence report. Before the Court had made its decision concerning the acceptability of the plea bargain, the defendant sought to withdraw his guilty plea. The court held that there was no “fair and just reason” for withdrawing the guilty plea, accepted the plea agreement and proceeded to sentence the defendant. Ultimately, the US Supreme Court ruled that the District Court had been correct in its ruling that the accused had no absolute right to withdraw his guilty plea and that he had not shown any “fair and just reason” to do so (in accordance with Rule 32(e)).



4.4 Empirical Research: Plea Bargaining and Sentencing Guidelines in the Federal Court System of the United States

It is not entirely clear what the impact of the Sentencing Guidelines has been on sentencing in the federal courts. It has been suggested that, “by closely tying sentences to the charges of which defendants are convicted, the guidelines severely constrained judicial sentencing discretion” (Taha, 2001, p. 251). An empirical study by Karle and Sager (1991) found that the Sentencing Guidelines had effectively reduced the extent of sentencing disparity in the federal courts: indeed, trial judges had responded positively to the introduction of the Guidelines by sentencing defendants “within a more limited range” (p. 420). The study also discovered that the judicial application of the Guidelines had effectively implemented Congress’ goal of increasing the harshness of sentences for drug offences (Karle & Sager, 1991, p. 420). However Karle and Sager (1991, p. 420) also found that, while there had been an overall reduction in sentencing disparity, there were nevertheless significant differences in the sentencing patterns of individual trial judges and of the District Courts in different geographical areas. Most of the individual and local disparities stemmed from the exercise by trial judges of their discretion to depart from the usual sentencing range prescribed by the Sentencing Guidelines (Karle & Sager, 1991, p. 433).

For present purposes, the most pressing question is what effect the Sentencing Guidelines have had on plea bargaining practices under the mechanism established by Federal Rule 11? It has been suggested that the Guidelines have imposed strict sentencing rules that fail to take into consideration the dynamics of the plea negotiation process²⁵ (Bibas, 2001). There have also been predictions to the effect that the Guidelines would seriously interfere with plea bargaining by reducing the incentives that are available to the courts as a means of inducing accused persons to plead guilty (Bibas, 2001; Karle & Sager, 1991, p. 394). For example, before the Guidelines were implemented, convicted persons, who entered guilty pleas, enjoyed the benefit of a 30 to 40% reduction in their sentences; however, with the advent of the guidelines, offenders who enter into a plea bargain can normally expect only a 20% reduction in their sentences (Karle & Sager, 1991, pp. 404-405). Furthermore, the discretionary powers of judges have been further constrained by the incorporation within the Guidelines of mandatory minimum sentences for certain offences. Significantly, some judges have publicly decried this “absolute restriction on discretion as incompatible with justice” (Karler & Sager, 1991, p. 429). In addition to prescribing minimum mandatory sentencing, the Guidelines follow a sentencing matrix²⁶ that focuses on the seriousness of the offence and the offender’s criminal history, leaving little room for judges to be able to take into consideration the personal characteristics of the offender (Karle & Sager, 1991, p. 400 & 430). In short, by placing effective restrictions on the exercise of judicial discretion in sentencing, it may be argued that the Sentencing Guidelines “limited judges’ ability to reward guilty pleas with reduced sentences” (Taha, 2001, p. 252).

²⁵ It has been suggested that the Sentencing Commission ought to develop a Guideline that specifically deals with plea bargaining – perhaps “by providing for more substantial reductions pursuant to acceptance of responsibility adjustments” (Dick, 1997:1056).

²⁶ “What ultimately emerged is a sentencing framework that focuses upon the characteristics of the offense and the offender’s criminal history...To determine the appropriate Guidelines sentence, a court consults the Sentencing Table, a two-dimensional matrix formed with two axes – one for the offense level, the other for the criminal history category. Each offense level and criminal history combination renders a specific range of months of incarceration. The maximum of the range does not exceed the minimum by more than 25% or six months, whichever is greater” (Karle & Sager, 1991, p. 400).

In spite of the resolute reduction of judicial sentencing discretion that has been effected by the promulgation of the Sentencing Guidelines, it is significant that Karle & Sager (1991, p. 420) nevertheless found that *plea bargaining rates “have not been measurably affected” by the application of the Guidelines by the federal courts* (see also similar findings by Dunworth & Weisselberg, 1992; Heaney, 1991; Parent, *et al.*, 1996). However, this does not mean that the Sentencing Guidelines have not had any impact on the practice of plea bargaining established by Rule 11. What may have happened is that *the nature of plea bargaining has been transformed by the Guidelines*. As Taha (2001, p. 251) notes, the imposition by the Sentencing Guidelines of effective fetters on judicial sentencing discretion undoubtedly has the potential to shift a considerable degree of power to the prosecutor because she has the power to choose which charges are laid against defendants:

In theory, prosecutors can use this power in plea bargaining by agreeing to drop or not pursue some charges in exchange for defendants agreeing to plead guilty to lesser or fewer charges. This type of plea bargaining is called charge bargaining. Unfettered charge bargaining could result in judicial sentencing discretion just being replaced by prosecutorial charging discretion, undermining the guidelines’ goal of ensuring similar sentences for similarly situated offenders.

Prosecutors are in a position to circumvent the Sentencing Guidelines because, the US Sentencing Commission “decided to base the range of applicable sentences not on the consideration of an offender’s real offense but on the charges of conviction” (Starkweather, 1992, p. 862). However, as noted above, the combined effect of Federal Rule 11 and the Sentencing Guidelines is to require the judiciary to ensure that the charges laid against the defendant fairly reflect the reality of what happened in the case. Furthermore, where the underlying facts in a case point to the commission either of a more serious offence than that which has been charged or of additional counts of the offence actually charged, then the court must take this into account and impose a more severe sentence. The independent pre-sentence report, the requirement that the court postpone its decision concerning the acceptability of a plea bargain until after it has considered the pre-sentence report and the provisions requiring stipulations of fact in the plea agreements all contribute to the power of the courts to control charge bargaining by the prosecution and defence attorneys.

Unfortunately, there is some empirical evidence to the effect that prosecutors have been able to avoid effective judicial control of charge bargaining by engaging in, what has been termed, *precharging charge bargaining* (Taha, 2001; Yellen, 1992). As Taha (2001, p. 252) has noted,

...(P)rosecutors and defense attorneys are better able to hide inappropriate charge bargains from judges, probation officers, and prosecutors’ supervisors if these bargains are made before charges are filed. After charges are filed, it is more likely to appear that charges were reduced as part of a plea bargain, rather than for a legitimate reason such as insufficient evidence.

Undoubtedly, it is extraordinarily difficult to detect a charge bargain that has been reached before a charge has actually been laid against the defendant (Taha, 2001, p. 253) and the consequent lack of judicial scrutiny of the process of precharging charge bargaining opens the door to forms of plea bargaining that may be unduly coercive and potentially unlawful (Colquitt, 2001). However, Taha’s empirical study confirmed that, after the introduction of the Sentencing Guidelines in the federal courts, prosecutors were, indeed, more likely to engage in the practice



of precharging charge bargaining (Taha, 2001, p. 252). In support of this conclusion, Taha (2001, p. 266) points to two findings:

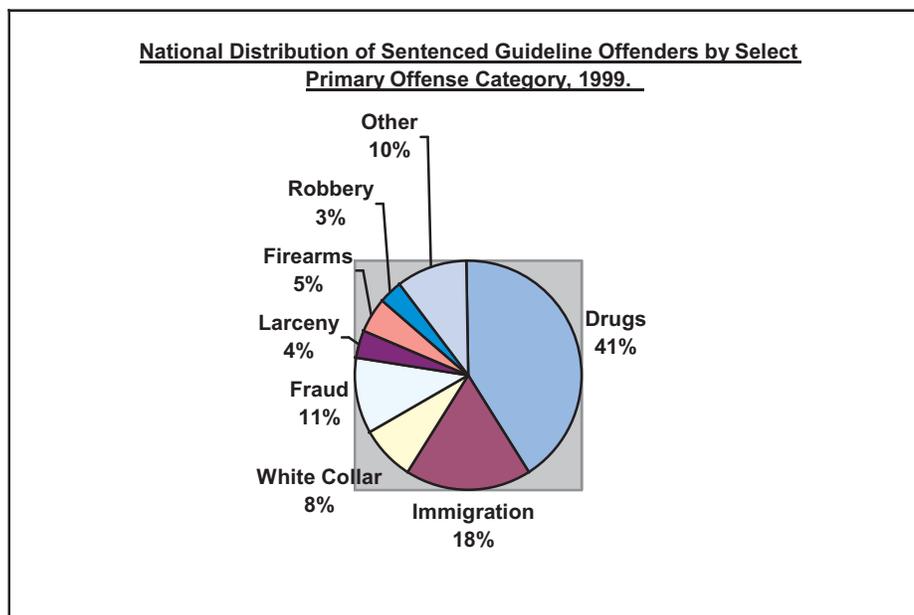
First, more defendants pled guilty to charges that are closer to the charges prosecutors filed. Second, prosecutors filed less serious charges against defendants.

Unfortunately, Taha's data did not include any cases decided after May 1990: hence, it is not entirely clear whether federal judges and probation officers have subsequently been able to develop strategies to combat the use of precharging charge bargaining by prosecutors as a device to circumvent and undermine the federal sentencing guidelines. One method of reducing the likelihood of such strategies achieving success would be to permit victims to comment on any proposed plea bargain at the formal inquiry required by Federal Rule 11. Such victim participation would render it more difficult for the parties to plea agreement to withhold vital information from the sentencing court.

It is necessary to sound a note of caution when discussing the administration of the United States Sentencing Guidelines: more specifically, it is important to recognize that the profile of offenders who are sentenced in the federal courts is greatly influenced by the particular nature of the offences that arise under federal – as opposed to state – jurisdiction. As Table 5 (US Sentencing Commission, 2001) indicates, the majority of federal offenders are sentenced for drug and immigration-related offences - a profile that would be quite different from that which one would find in a "typical" state jurisdiction:

Table 5

Source: US Sentencing Commission, *1999 Datafile*, OPAFY 99.



4.5 Federal Rule 11: Tentative Conclusions

There is little doubt that Federal Rule 11 has created a legal mechanism that permits judicial regulation of plea bargaining, while simultaneously permitting the practice to flourish. Under Rule 11, judges are not permitted to engage in the actual process of plea negotiations: instead, they have the ultimate discretionary power to accept or reject a plea agreement fashioned by the government and defence lawyers. If applied conscientiously, the provisions of Rule 11 ought to ensure that guilty pleas are entered voluntarily and with full knowledge of the consequences. Furthermore, the use of independent pre-sentence reports limits the extent to which the prosecution and defence may distort or withhold information that is necessary for the trial court's full understanding of the considerations that are relevant to the making of the decision whether or not to accept a plea agreement.

However, it is manifest that Federal Rule 11 may only be evaluated in conjunction with the administration by the federal courts of the United States Sentencing Guidelines. The Guidelines unquestionably limit the scope of judicial sentencing discretion and have significantly reduced some of the incentives that may be offered to an accused person in order to induce them to plead guilty. Although there is still sentencing disparity between individual judges and between different judicial districts, it appears that – overall – there has been a reduction in sentencing disparity in the federal courts since the advent of the Sentencing Guidelines. Although considerably more empirical research needs to be undertaken in this area, it appears that the Sentencing Guidelines have not caused any great variation in the *rates* of plea bargaining in the federal court system. However, there is some initial empirical evidence that the *nature* of plea bargaining may – to some extent – be changing and that prosecutors and defence lawyers have started to develop strategies for avoiding the full impact of the Sentencing Guidelines on accused persons who plead guilty. The evolution of the practice of precharging plea bargaining raises many concerns since it is exceptionally difficult to detect and, therefore, profoundly resistant to judicial regulation.

Federal Rule 11 makes no provision for the victim to participate in the formal hearing that is conducted by the trial judge when receiving a plea of guilty by the accused. In the federal court system, victims' voices may be heard directly through the reading of a victim impact statement or indirectly through the vehicle of the pre-sentence report: however, their voices remain silent at the Rule 11 hearing. Arguably, permitting victims to participate in such a hearing would render it more difficult for prosecutors and defence lawyers to undermine the United States Sentencing Guidelines by engaging in the secret practice of precharging plea bargaining.

In short, Federal Rule 11 has created an effective, and well-trying, model for the independent judicial regulation of plea bargaining in the federal courts. However, it does not make any provision for the inclusion of victims in the judicial decision-making process that determines whether or not a particular plea agreement should be accepted or rejected. In this sense, the judicial regulation of the process of plea bargaining in the federal court system lags behind the equivalent legislation in many of the individual states.



5.0 Victim Participation in the Criminal Justice System: The Precedent of Victim Impact Statements in the Sentencing Process

During the final quarter of the twentieth century, a mounting concern for the degree of frustration expressed by many victims of crime led to the development of policies that were explicitly designed to enhance the nature and scope of victim involvement in the criminal justice process (Erez, 1990, p. 20; Finn-DeLuca; 1994, p. 404; & Tobolowsky, 1999, pp. 21-30). In addition to the expansion of victim-compensation schemes, various Canadian jurisdictions implemented “victim-witness programs, social service referral programs, crisis intervention programs, victim advocacy programs and victim-offender mediation programs” (Young, 2001, p. 1). Certainly, one of the most visible - and dramatic - elements among this series of reforms was the introduction of the victim impact statement as a form of direct participation in such critical phases of the criminal justice process as sentencing and parole (Erez, 1990, p. 19; Erez & Roeger, 1995, p. 364; Tobolowsky, 1999, p. 3).²⁷

It might well be argued that a logical “next step” along the road to reform would be to make legal provision for the involvement of victims in the process of plea negotiations. In the Canadian context, the participation of victims in plea bargaining would, of course, constitute a leap into uncharted waters. In order to assess the potential impact of such a significant reform on the functioning of the criminal justice process, it would be fruitful to examine relevant aspects of the Canadian experience with the use of victim impact statements within the confines of the sentencing process. This experience may provide a valuable basis for making projections as to the likely impact of victim participation in plea bargaining on the levels of victim satisfaction with the criminal justice process. Similarly, the debate surrounding the current use of victim impact statements by trial courts in Canada highlights a critical issue, that must be addressed by those who would seek to implement a policy of victim participation in plea bargaining – namely, what is the appropriate weight that should be accorded to victims’ wishes and perspectives by prosecutors and judges in Canada?

5.1 Are Victim Impact Statements a Vehicle for Revenge?

There is little doubt that victim impact statements may chronicle a pattern of suffering that is certain to elicit a strong feeling of sympathy for the victim within the courtroom, where sentencing takes place. Indeed, some of the statements made by victims may legitimately be labeled “horror stories.” For example, in the case of *Jiany-Yaghooby* (1998), the accused set the family house on fire, thereby causing his daughter to suffer injuries that inflicted permanent and severe brain damage. The accused also tried to kill his wife by striking her with a hammer;

²⁷ It should be noted that victim impact statements may not only have a *direct* effect upon such decision-making processes as sentencing and parole but may also have a significant *indirect* effect. Judges and parole board members routinely obtain reports from mental health professionals, who conduct assessments of the offenders concerned. To some extent at least, psychiatrists and psychologists will base their assessments of the risk posed by individual offenders on information derived from victim impact

fortunately, she escaped serious injury. The trial judge referred to the victim impact statement insofar as it dealt with the consequences for the daughter:

Words are not adequate to convey how this otherwise attractive, vital, and energetic young woman is now destined to live out whatever is left of her life span. (para. 8)

In her victim impact statement, the accused's wife briefly described her pain and suffering in the following, poignant terms:

Although I am still alive, I feel I am dead. My life is over. I am alive just for my children, otherwise there is no point of living like this. (para. 9)

In a similar fashion, one of the victims in the case of *Bates* (2000), described the nature of the impact that the crime (criminal harassment) had made upon her life:

You ask how this has affected me. It has affected my whole life and probably will for a long time. Our sleeping patterns still haven't returned to normal and I still feel we must be on the look out as deep down I know it isn't over and won't be for a long time. We are going to change a lot of things in our lives, although we aren't running scared out of town yet. I am changing my license plates, our phone number and anything personal that he may know about. We still must run the store and things must go on but now we have to do it via a secret code just to keep us safe. (para. 33).

Finally, in *R. v. Dale* (1998), Madam Justice Stromberg-Stein of the Supreme Court of B.C. explicitly stated that a "significant aggravating factor" in this case was the "devastating impact that the offence" had on the young victim. The accused – a taxi driver – had sexually assaulted a seventeen-year old female, who was celebrating her graduation from high school. In the words of the trial judge:

A night of celebration turned into an unspeakable nightmare from which the complainant has not recovered. Not surprisingly, she is emotionally scarred, suffers nightmares, and fears being alone (para. 19).

It is of particular significance that the victim impact statement had graphically detailed the extent to which the sexual assault on the complainant had "wrought havoc on (the victim's) life, created problems in all aspects of her life" (para. 8).

The powerful effect that may be triggered by the reception of a victim impact statement in the courtroom has raised some fundamental concerns as to the appropriateness of granting the victim a central role in the sentencing hearing. Indeed, there have been some commentators who have questioned the desirability of permitting victims to influence the outcome of the sentencing process: for example, it has been suggested that victim impact statements "appear to be a symbolic and punitive reform" (Roach, 1999, p. 292). Viewed through this particular lens, an increased level of victim participation during criminal court proceedings has been strongly associated with a sharp focus on retributive sentencing policies (Erez & Rogers, 1995, p. 365). Indeed, some authors have suggested that victim participation in the sentencing process is ultimately designed to produce harsher sentences (Murphy, J. 2000, p. 131; Smith, Watkins & Morgan, 1997, p. 61; Roach, 1999, p. 31; Stevens, 2000, p. 3; Tobolowski, 1999, p. 81; and Young, 2001, p. 15). Furthermore, it has been contended that victim involvement in the sentencing process has opened the door to significant disparities in the dispositions meted out to offenders (Hall, 1001, p. 223).



Some of the more passionate critiques of the use of victim impact statements by the courts have articulated the concern that an increased degree of victim participation may result in a courtroom environment in which raw “emotion” overwhelms cautious “reason” (Donahoe, 1999, p. 3; Erez & Roeger, 1995, p. 366; Murphy, 2000, p. 131; and Rapping, 2000, p. 280). Illustrative of this form of critique is the contention that, in some cases at least, the victims’ display of “grief” constitutes no more than a mask to conceal “cold brutality” – namely, revenge (Rapping, 2000, p. 679).

This stream of disparaging commentary concerning the acceptability of incorporating victim impact statements into the criminal trial process has undoubtedly forced Canadian courts to address the “perplexing question of how to reconcile retribution with our moral aversion to vengeance” (Young, 2001, p. 14). Essentially, the courts appear to have espoused the view that, *while retribution constitutes a significant - and legitimate - goal of sentencing, vengeance does not.*²⁸

The essence of this approach took firm shape in the decision of the Supreme Court of Canada in *R. v. M (C.A.)* (1996) (see, Manson, 2001, pp. 36-37). Chief Justice Lamer, in delivering the judgment of the Court stated that:

Retribution, as an objective of sentencing, represents nothing less than the hallowed principle that criminal punishment, in addition to advancing utilitarian considerations related to deterrence and rehabilitation, should also be imposed to sanction the moral culpability of the offender. In my view, retribution is integrally woven into the existing principles of sentencing in Canadian Law through the fundamental requirement that a sentence imposed be “just and appropriate” under the circumstances. Indeed, it is my profound belief that retribution represents an important unifying principle of our penal law by offering an essential conceptual link between the attribution of criminal liability and the imposition of criminal sanctions. (para. 79).

However, Chief Justice Lamer proceeded to emphasize that there is a world of difference between “vengeance” and “retribution.” In his judgment, he unequivocally proclaimed that “vengeance has no role to play in a civilized system of sentencing.”²⁹ Significantly, the line between “vengeance” and “retribution” was relatively simple for the Chief Justice to draw:

Vengeance, as I understand it, represents an uncalibrated act of harm upon another, frequently motivated by emotion and anger, as a reprisal for harm inflicted upon oneself by that person. Retribution in a criminal context, by contrast, represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the *moral culpability* of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender’s conduct. Furthermore,

²⁸ Unfortunately, some courts have tended to confuse the concepts of retribution and vengeance. For example, in *R. v. Sweeney* (1992), Wood J.A., of the British Columbia Court of Appeal, appeared to treat retribution as though it were synonymous with “revenge.” Justice Wood articulated the view that victim impact statements were never intended to require that sentencing courts adopt a retributive approach. In delivering his concurring judgment, Justice Wood agreed (p. 95) that “there is no role for revenge in a principled system of sentencing” and he advocated, instead, “a balanced, objective approach, separate and detached from the subjective consideration of retribution.” As far as the question of the impact of a crime upon a specific victim is concerned, Justice Wood contended that “the courts have never been insensitive to the suffering which victims of crime must endure” and suggested that:

The dilemma facing the sentencing court is to balance a proper consideration of the consequences of a criminal act against the reality that the criminal justice system was never designed or intended to heal the suffering of the victims of crime. (p. 95).

²⁹ In *R. v. Bunn* (2000), the judgment of the majority of the Supreme Court of Canada referred to the view of the trial judge that it was important to impose a sentence that was not so long as to “cross the border into vengeance” (para. 8).

unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and *nothing more*. (para. 80).

In *R. v. Morrisey* (2000), Justice Gonthier – on behalf of the majority of the Supreme Court of Canada – strongly re-affirmed the importance of the principle of retributive justice in the Canadian sentencing system and noted that it operates to ensure that a trial court metes out a punishment that is “commensurate” with the degree of harm caused by the offender’s crime(s)(para. 48).

In essence, the Supreme Court of Canada has accepted the legitimacy of retribution as a sentencing goal and the role of the victim impact statement would, therefore, appear to be that of providing specific information about the nature and scope of the harm caused by the crime(s) concerned. The appropriate use of the victim impact statement is, therefore, not to facilitate the objective of revenge but rather to ensure that the ultimate punishment is, indeed, “commensurate” with the degree of harm inflicted on the victim(s).

In a similar vein, it would be reasonable to assume that the participation of the victim in the plea bargaining process would not be designed to establish a platform for vengeful prosecution but rather to provide valuable information to the court that is charged with the task of deciding whether or not to accept or reject a proposed plea agreement: in this sense, the objective of victim involvement is to ensure that the charge(s) that are ultimately laid are reasonably “commensurate” with the underlying circumstances that are alleged by the police, witnesses and the alleged victims themselves. Furthermore, it is important to avoid making the assumption that victims would invariably desire to pressure the prosecutor into laying the most severe charges possible or into refusing to enter into any form of plea agreement with the accused. Experience with victim impact statements suggests that victim input into the sentencing process does not invariably lead to increased severity: indeed, it may well work in the opposite direction and lead to a greater degree of lenience (Erez & Roeger, 1995, p. 373; Renke, 1996). It is, therefore, realistic to hypothesize that a certain number of victims would actually support the acceptance of a relatively lenient plea agreement – provided that it reflects an outcome that is acceptable to them. Indeed, it may well be the case that victims of certain offences (e.g., sexual assault) will be particularly willing to endorse a plea agreement if it enables them to avoid undergoing the trauma of testifying in court. Acceptance of the plea agreement may well turn on whether it is likely to contain a sentencing outcome that these victims would perceive as being adequate to protect them from further harm.

For example, a plea agreement may make provision for the accused to receive treatment under the terms of a probation order or conditional sentence. Some victims may regard the reduction of the risk of future harm through the treatment of an abusive, but nevertheless loved, partner as being a far more important goal than seeking a primarily punitive sentence that offers little – or no – prospect of behavioural change over the long term.

5.2 The Influence of Victim Impact Statements on the Sentencing Process: The Emerging Canadian Jurisprudence

While many jurisdictions have introduced victim impact statements into the sentencing process, it is not entirely clear whether these statements exert a significant degree of influence on the severity of the penalty that is ultimately imposed.³⁰ In general, Canadian courts have been careful to suggest that, while victim impact statements provide valuable information, they should



not be viewed as a vehicle by means of which the victim is permitted to play a direct role in determining the nature – or quantum – of the sentence that is meted out by the trial judge.

In *R. v. Labbe* (2001), Justice Bouck, of the B.C. Supreme Court, expressed the view that victim impact statements are essential for two purposes:

First, so the court is more aware of the harm done by the offender to the victim so that the sentencing judge has a better understanding of the offence's gravity. Second, to assure victims that the sentencing process includes them by ensuring they are not irrelevant and forgotten. (para. 51, quoting Paradis, Prov. Ct. J. in *R. v. J.A.F.* (1997)).

However, in *Labbe*, a case of manslaughter, Bouck, J. openly articulated his concerns about the extent to which victim impact statements should have a direct influence on the actual *outcome* of the sentencing process:

It is not clear whether Parliament meant that judges must impose a more severe sentence than is usual for a particular crime if there is a victim impact statement, or a less severe sentence if there is not. Nor is it clear whether the more grievous the loss suffered by the victim, or the surviving family of the victim, the more severe the sentence should be. (para. 47)

According to Bouck, J., “the guiding principle in criminal law is that any criminal offence is not a wrong committed against the person who is harmed, rather it is a wrong against the community as a whole” (para. 48). While victim impact statements may provide valuable information that is of considerable relevance to the sentencing goals articulated in the *Criminal Code*, the severity of the punishment imposed on the offender should not be a direct function of the victim's subjective characterization of his or her degree of suffering:

... To my mind, it matters not if the deceased is young, promising and much-loved, or old, deranged and despised by all who knew him. The law ought not to measure the value of a life taken, for to do so would diminish every person's right to live out his or her appointed span. (para. 52).

In *Bremner* (2000), the B.C. Court of Appeal unequivocally articulated the position that the victim of a criminal offence should have no role in determining either the type of sentence or the *quantum* of punishment that should be imposed on the offender.³¹ In the words of Proudfoot, J.A. (Huddart, J.A. concurring),

There is nothing in the sections of the *Code* that permits a victim to have a role in suggesting the length of sentence or kind of sentence to be imposed... I do not wish to

³⁰ Different considerations apply where the victim impact statement is introduced into such post-sentencing processes as a parole hearing or a court hearing to determine eligibility for parole for a person convicted of first or second degree murder. In these situations, the victim impact statement is relevant not to the victim's past suffering as a consequence of the crime but rather it is relevant to the potential impact of the release of the offender on the victim in the future. For example, in *R. v. Swietlinski* (1994), the Supreme Court of Canada discussed the relevance of victim impact statements to the question of whether or not the period of parole ineligibility for a person convicted of murder should be reduced (in a hearing under, what is now, section 745.63 of the *Criminal Code*). Justice Major, with whom a majority of the Court agreed, stated that:

To the extent that the impact on the victim is relevant to the third enumerated factor in (s. 745.63(1)) – the nature of the offence – this relevance will usually, but not always, have been exhausted at the applicant's initial sentencing hearing. The victim's suffering in the years since the crime was committed does nothing to alter the nature of the offence, and should not automatically be admitted into evidence for this purpose. (p. 471).

detract in any way from victims' ability to put forward to the court "the harm done" or "the physical or emotional loss as a result of the crime" but the *Code* does not enable a tripartite procedure with regard to recommendations for sentencing. The parties on sentencing remain the same as at the trial. (para. 23).

In *Bremner*, the accused had been convicted of four charges of indecent assaults against young men, aged between 13 and 16. He was sentenced to 18 months' imprisonment. Upon the accused's appeal against sentence, the Court of Appeal varied the sentence to a conditional sentence. Reflecting the view that the victim's desire for revenge must not influence the trial judge, Justice Proudfoot stated that,

Those victim impact statements (including that of A.H.) which urged particular sentencing options on the court were clearly not appropriate to be presented at a sentencing proceeding. Moreover, more than one statement sought to achieve personal revenge, something that is not appropriate in the sentencing process. (para. 28).

In a similar vein, the case of *Thornton* (2000) demonstrates that trial courts are loath to suggest that their sentences are directly based on the contents of a victim impact statement – even if it expresses a profound degree of personal suffering. Although the consequences of Thornton's offence were described as being "catastrophic," the trial judge nevertheless did not appear to place much weight on the victim impact statement. The accused had been convicted of dangerous driving causing death and the deceased's mother had filed a victim impact statement - from which the trial judge concluded that, "it is obvious that her son's death has had a traumatic effect on her" (para. 39). In imposing a conditional sentence, Justice Romilly, of the Supreme Court of B.C., simply referred to the victim impact statement as being only one of the many factors that had been taken into consideration. This approach was dramatically illustrated when the trial judge directly addressed the mother of the deceased:

... I just wish to point out that the Court fully understands the loss and pain that you have suffered as a result of this tragic accident. Nothing that we can do can bring your son back to life. The Court can only follow existing jurisprudence and attempt to bring some measure of closure to this sad incident. (para. 43).

However, while Canadian judges have repeatedly emphasized the precept that victims do not have any direct role to play in determining the specific sentence that should be imposed on "their" offenders, the appellate courts have nevertheless taken the initiative to set aside sentences imposed at the trial level, if the trial judge has failed to take into account significant information that has been presented in a victim impact statement. For example, in *Kennedy* (1999), the Ontario Court of Appeal set aside the sentence imposed by the trial judge because he had failed to take into consideration the full impact of the sexual assault upon the complainant, who had made a victim impact statement.³² As Feldman, J.A. (para. 21) stated, in delivering the judgment of the Court, "a sentencing judge is always mindful of the fact that nothing can undo what has already happened to the victim, whereas the system can attempt to address the needs of the perpetrator and the need of society to try to assist the perpetrator to

³¹ In a separate, concurring judgment, Southin, J.A. added some frank remarks concerning the influence of victim impact statements in the sentencing process:

The subjective impact on the particular victim is essentially irrelevant. The doctrine of the eggshell personality, whatever part it properly plays in the assessment of damages in a civil case, is not a proper subject of investigation by a court carrying out the statutory duty of sentencing for a criminal offence. (para. 62).



become a productive and contributing member.” However, the Court then proceeded to emphasize its view that “sentencing is a balancing process” and that, in this particular case,

... the crime was particularly horrific for the victim. So was the aftermath... Contrary to the view of the sentencing judge, in those circumstances, general deterrence became particularly significant as a sentencing factor. It was an error to discount it and to treat this as a case in which the applicable sentencing principles could be properly balanced by the imposition of a sentence at the lowest end of the range for offences of this type. (para. 22).

A similar approach was embraced by the Ontario Court of Appeal in the case of *Bates* (2000), in which it was held that the sentence of the trial court should be set aside because the trial judge had failed to take account of the ongoing effects of the offender’s crimes upon his victim. The Court of Appeal substituted a “penitentiary term” for the suspended sentence that had originally been imposed by the trial judge. The accused had been convicted of criminal harassment, uttering a death threat, three counts of assault and six counts of failure to comply with the terms of various bail orders. The Court noted (para. 30) that crimes involving family violence “are particularly heinous because they are not isolated events in the life of the victim” and noted that, in addition to “continuing abuse,” the victim also “experiences perpetual fear of the offender.” Significantly, the Court emphasized that the victim impact statements that had been prepared in this case graphically demonstrated the ongoing fear that had been created by the accused’s ongoing campaign of harassment:

In addition to the need to consider the safety and security of the victims, the court was required to consider the victim impact statements and the ongoing effects the victims were suffering as a result of the conduct of the respondent. The sentencing judge failed to do so. (para. 46).

It is also noteworthy that appellate courts have taken pains to underscore the view that a trial judge is entitled to place considerable weight on the information presented in a victim impact statement, provided that he or she duly relates this information to the appropriate sentencing principles that have been articulated by Parliament and the appellate courts. For example, in *R. v. Jackson*, (2000), the accused was a police officer, who had been convicted of one count of assault against his wife and one count of careless storage of firearms and ammunition. The trial judge sentenced the accused to a suspended sentence and probation. In justifying this decision, the trial judge made it clear that he had been significantly influenced by certain information contained in the victim impact statement:

In my view the appropriate manner of disposition of this matter on sentence is by way of a suspended sentence and by way of probation. I am concerned about what is expressed in the victim impact statement in terms of the anger that is said to be in the accused and certainly when dealing with his ex-wife. I sensed it in the evidence that I heard at this trial, and that is a concern to me. (para. 7).

³² In light of the Court of Appeal’s view that the trial judge had “erred in principle in this case,” a sentence of *two years less a day* of imprisonment – to be followed by one year of probation – was substituted for the original sentence of *one year* of imprisonment and one year of probation.

The accused appealed to the B.C. Supreme Court and contended that he should have been granted a conditional discharge. However, Justice Cowan upheld the original sentence, concluding (para. 11) that the “trial judge was fully cognisant (*sic*) of the several matters which he had to weigh and consider in deciding upon the appropriate sentence.”

Similarly, in *Tran* (1999), the accused had entered a plea of guilty to manslaughter and had been sentenced to a term of seven years in prison. A victim impact statement had been filed at the sentencing hearing by the deceased’s wife and daughter. This statement was characterized by the trial judge as being “extremely powerful and moving” (para. 3). In light of the contents of the victim impact statement, the trial judge ruled that it was to be considered an aggravating factor that the deceased’s demise had “left his widow and four infant children in a country foreign to them and in a precarious economic circumstance” (para. 5). In affirming the sentence, Justice Braidwood, of the B. C. Court of Appeal, ruled that “there is no indication that undue emphasis was placed on the victim impact statement.” In his view,

... it is an aggravated aspect of this case that the appellant and the deceased were friendly such that he would well know the family responsibilities that his victim had assumed before he stabbed him to death in the presence of the young girl. (para. 18).

A final example of this appellate approach, to the use that is made of victim impact statements by the trial judge, is furnished by the case of *Miclash* (2001), in which the accused had been convicted of sexual assault causing bodily harm against a three-year-old girl. He was sentenced to five years’ imprisonment and the B.C. Court of Appeal subsequently upheld this sentence. Saunders, J.A. noted that “the significant physical damage and emotional trauma is another aggravating factor” (para. 11). These consequences were underscored by the victim impact statement, that “provides insight into the devastation and damage the accused caused the complainant, her sister and her mother” (para. 12). However, Justice Saunders (para. 7) emphasized that the Court of Appeal has “time and time again, said that offences of this type should be severely punished in order to protect children and especially daughters and stepdaughters, and to express the community’s concern and condemnation for this type of behaviour.” In the end result, the Court noted that the trial judge had been correct to emphasize the principles of deterrence and denunciation and it appears that the victim impact statement merely provided information that was relevant to the application of these principles.

Overall, it appears that the growing body of Canadian case law concerning the use of victim impact statements in the sentencing process is predicated on the unequivocal principle that the victim should not be granted any direct role in fixing the nature and quantum of the penalty ultimately meted out by the trial court. However, the appellate courts have undoubtedly varied sentences, where the trial judge has failed to take into account critical information that is contained in victim impact statements and that is considered to be relevant to the application of the basic principles of sentencing that apply in all cases. Furthermore, the appellate courts have been markedly reluctant to hold that a sentence should be set aside because the trial judge has placed undue weight on the contents of a victim impact statement: indeed, such an outcome is only likely to occur where the trial judge has not demonstrated in his or her ruling that all of the other relevant factors were duly considered before the ultimate choice of sentence was made.

Insofar as victim participation in the plea bargaining process is concerned, the Canadian judicial experience with victim impact statements suggests that there would be absolutely no support for the notion that the victim should have the right to veto, or to dictate the terms of, any proposed



plea agreement. However, if Canadian courts were to be assigned the task of accepting or rejecting proposed plea bargains, then it is suggested that the experience that they have gained in relation to victim impact statements in the context of sentencing might well prove to be particularly apposite to this novel situation. More specifically, this experience would appear to indicate that those courts, which are faced with the need to decide whether a proposed plea agreement should be accepted or rejected, will be expected to take into account any information presented by the victim – provided that it is deemed to be relevant in terms of the general principles that will ultimately be articulated for the guidance of judges who are engaged in this new task. Furthermore, as Renke (1996, p. 115) has pointed out in relation to victim impact statements, granting victims the opportunity to actively participate in critical phases of the criminal justice process reflects their rights to “have a voice, to ensure that the real effects of crime are not elided by professional talk” and to “not be forgotten.”

5.3 Who is the Victim?

In the United States, a certain degree of concern has been expressed in relation to the issue of the appropriate scope of the term, “victim,” in the context of victim impact statements.³³ Indeed, it has been suggested that, in many American jurisdictions, the definition of a victim is far too broad and that permitting an excessively broad range of individuals to submit victim impact statements signifies “a disturbing trend toward the unrestricted admissibility of prejudicial evidence at the expense of rational sentencing” (Donahoe, 1999, p. 27). However, according to Sullivan (1998, p. 22) the relevant Canadian legislation employs a more restrictive definition of “victim,” although it is nevertheless “sufficiently broad so that it permits family members of homicide victims to present statements” (Sullivan, 1998, p. 22).³⁴

There is no reason why the current *Criminal Code* definition of “victim” - for the purpose of identifying who is eligible to submit a victim impact statement - should not also be used in the context of victim participation in plea bargaining hearings. Where appropriate, family members should be permitted to provide input into the judicial decision-making process that is designed to determine whether a proposed plea agreement should be accepted or rejected – as is currently the case with victim impact statements. However, further expansion of the legislative definition of “victim” should be considered only with the greatest caution since the presence of too many parties “at the table” may render it extraordinarily difficult to reach an acceptable plea agreement.

³³ The definition as to who is a victim appears to be even broader in the United States than in Canada. The case of *United States v. McVeigh* (1997) set the precedent that not only the direct victims of the bombing - namely, survivors and family members - may submit a victim impact statement, but also the indirect victims - such as the rescuers - could submit a victim impact statement. In this case, at least four or five rescuers were allowed to submit a victim impact statement (Donahoe, 1999, p. 21).

³⁴ See section 722(4) of the *Criminal Code*, in which “victim” is defined in the following manner:

- (a) means a person to whom harm was done or who suffered physical or emotional loss as a result of the commission of the offence; and
- (b) where the person described in paragraph (a) is dead, ill or otherwise incapable of making a statement, ... includes the spouse or common-law partner or any relative of that person, anyone who has in law or fact the custody of that person or is responsible for the care or support of that person or any dependant of that person.

Problems regarding the construction of an appropriate definition of “victim” in the context of victim impact statements have also been reported in Great Britain and Australia (Edwards, 2001, p. 39).



6.0 Victim Satisfaction, Victim Participation and the Empirical Research

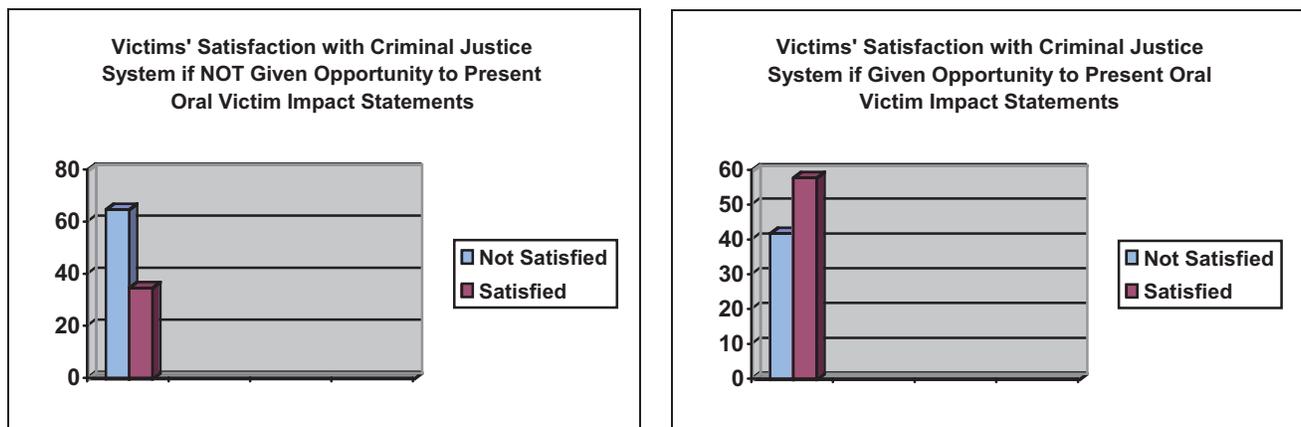
Ironically, the impact of victim impact statements on the sentencing process is undoubtedly limited by the circumstance that a majority of criminal cases are – to a greater or lesser extent – determined by the outcome of a plea bargaining process, from which victims in many jurisdictions (including Canada) are excluded (Kennard, 1989, p. 218). However, it has nevertheless been asserted that there are many benefits to be gleaned by victims from their increased participation in court proceedings through the vehicle of the victim impact statement. For example, victim impact statements may potentially serve as a useful medium through which victims can more fully express how a particular crime has affected their lives. As Chief Justice Rehnquist (of the Supreme Court of the United States) has suggested, victim impact statements can “illuminate each victim’s uniqueness as an individual human being, in order for the jury to determine the loss to the community” (cited in Donahoe, 1999, p. 14). In this sense, the victim impact statement can provide the sentencing judge with in-depth information that can enable him or her to make a more informed decision concerning the imposition of an appropriate sentence.

Furthermore, it has been suggested that victim impact statements offer victims “more control of their lives; satisfying a victim’s desire for retribution; and making the criminal sentencing proceedings more fair by giving consideration to the victim’s needs” (Johnson, 1988, cited in Platt & Kauffman, 2000, p. 632). In a similar vein, it has been contended (e.g., Young, 2001, p. 18) that the sense of control, that victims gain from their participation in the sentencing hearing, ultimately proves to be most beneficial to them as they negotiate their passage through the healing process. As Sobieski (1993, cited in National Center for Victims of Crime, 2002) has suggested, “victim impact statements and other procedures that allow victims to ventilate their feelings are a significant factor in the healing process.” Finally, some commentators have advanced the opinion that increasing the degree of victim participation in the sentencing and parole processes effectively minimizes the deleterious effects of the “secondary victimization,” which victims frequently experience when dealing with the police and prosecutors (Fenwick, 1997, p. 320 and Kelly, 1987, cited in Smith, Watkins & Morgan, 1997, p. 57).

While there is a dearth of comprehensive and methodologically sophisticated empirical studies in this area, it is worthwhile to note that there are some studies that suggest that *increased participation* in court proceedings (through such vehicles as the victim impact statement) *increases victim satisfaction* with the ultimate disposition of “their” cases (Fenwick, 1997, p. 320; Wemmers, 1999, p. 176; & Young, 2001, p. 18). For example, in one particular study (Kilpatrick, Beatty, & Howley, 1998, pp. 7-8), the researchers concluded that:

1. **Victims who were informed of their rights were more satisfied with the justice system than those who were not.**
2. **Victims who thought their participation had an impact on their cases were more satisfied with the system.³⁵ (Emphasis added).**

Similarly, an empirical study by Sobiesk³⁶ (1993, cited in National Center for Victims of Crime: 2002) found that there was a relatively high level of victim dissatisfaction with the criminal justice system, when victims were denied the opportunity to make an oral presentation of their victim impact statement during court proceedings. When victims were excluded from oral participation in the sentencing hearing, the dissatisfaction level rose to 65%, while the corresponding figure was 42%, when such an opportunity was accorded to victims.



Source: National Center for Victims of Crime (2001).

Arguably, victim participation during plea negotiations might also contribute significantly to the overall levels of victim satisfaction with the criminal justice system. This practice has not been the subject of sustained empirical scrutiny. However, one empirical study - conducted in Florida - examined the degree of victim satisfaction, which was expressed by victims in a jurisdiction that permitted them to actively participate in the process of plea negotiation. It was found that increased rates of victim participation in the pre-trial process, particularly during the pre-trial stage, ultimately increased victims' satisfaction with the disposition of their cases³⁷ (Kennard, 1989, p. 436). It is also noteworthy that this study found that, rather than revealing a trend toward harsher punishments, victim participation was associated with a decrease in the severity of the sentence³⁸ and, specifically, in the "use of incarceration" (Kennard, 1989, p. 435).

³⁵ The researchers interviewed 1,308 crime victims in the United States. Victim satisfaction was measured by employing three different scales that "measured overall satisfaction with the criminal justice system, the extent to which victims thought they were informed of their rights, and victims' perceptions of the effectiveness of their impact statements."

³⁶ This study, which surveyed the victims of drunk driving crashes, was published by MADDVOCATE and cited in the National Center for Victims of Crime online publication (2002). 614 persons were interviewed. However, it is important to note that the percentages provided by the National Center for Victims of Crime publication are not presented in a consistent fashion.

³⁷ Nevertheless, it appears that the findings concerning these victims were not significantly different—in a statistical sense - from the findings that emerged from the study of the control group (Kennard, 1989, p. 436). Therefore, the author's conclusions should be treated with a certain degree of skepticism.

³⁸ For example, "a 1981 case study of one hundred criminal cases found that, when victims of various crimes were given the opportunity to select from several viable sentencing alternatives, all but one were willing to accept an alternative to incarceration. In addition, a study of 417 sexual assault victims in a metropolitan Ohio county revealed that victims who implicitly recognized that they had played some role in the offense had a slight tendency to make lenient sentencing recommendations" (Henderson & Gitchoff and Walsh, cited in Kennard, 1989, p. 447).



Nevertheless, the research findings in this area are by no means uniform. Indeed, some researchers have published findings that counter the assumption that increased levels of victim participation - through the provision of information, submission of victim impact statements and participation during plea negotiations – necessarily increase the degree of victims’ satisfaction with the criminal justice system. For example, some studies suggest that providing more information to the victim does not appear to affect the overall levels of victims’ satisfaction with the disposition of their cases nor does it ameliorate the feelings of distress experienced by many victims (Toboslawski, 1999, p. 47)³⁹. Other studies have found that, while some victims who completed a victim impact statement did indeed report that this was an overall positive experience, this form of participation in the judicial process did not actually increase their levels of satisfaction with the handling or disposition of their own, specific cases (Giliberti, 1990, p. 1). Moreover, it has been noted that the impact of victim participation on overall levels of satisfaction may be somewhat circumscribed by the realization, on the part of some victims, that their input did not, in reality, have any significant degree of impact on the nature and quantum of the sentences that were ultimately meted out to “their” offenders (Erez & Rogers,⁴⁰ 1999, p. 223 and Kennard, 1989, p. 435). Furthermore, victims may well view the value of their participation with a vaguely jaundiced eye if it is made clear to them that sentencing guidelines may sharply limit the scope of judicial discretion: indeed, it has been suggested that sentencing guidelines may be perceived as reducing victims’ input to a mere “ritual” (Erez & Rogers, 1999, p. 235).

Although the empirical evidence is – at best – a tad equivocal, there are many commentators who have strongly asserted the need to enhance the nature and scope of victim participation in the criminal justice. It is generally assumed, in these academic quarters, that an increase in such participation is directly related to a rise in the level of victims’ satisfaction with both the criminal justice system, in general, and the disposition of their own cases, in particular (Sanders, Hoyle, Morgan & Cape,⁴¹ 2001, p. 457; Erez & Tontodonato, 1990, cited in Smith, Watkins and Morgan, 1997, p. 58; and Wemmers,⁴² 1999, p. 176). Furthermore, it is widely suggested that even taking the basic step - of providing victims with accurate information concerning their cases - may ultimately help them to cope with the effects of the stress that besets them and to increase their feelings of satisfaction with the criminal justice system (Fenwick, 1997, p. 320; and Wemmers, 1999, p. 176).

³⁹ See Davis, et al.(1984) for more information concerning this study, in which 300 victims were interviewed. Similar findings were documented by Hagan (1982), who interviewed approximately 200 victims.

⁴⁰ The researchers interviewed criminal justice officials in South Australia and concluded that, in general, criminal justice officials merely pay lip service to the importance of victim impact statements.

⁴¹ A study conducted by Morris et al. (1993) - in New Zealand – described a truly participative scheme in which victims feel part of the process and are provided with sufficient information to permit them to gain an understanding of the court process: these victims reported increased levels of satisfaction with the criminal justice system.

⁴² This was an empirical study in which 640 crime victims were interviewed. The researcher employed three satisfaction scales in order to assess “whether the treatment of victims by the police affects their satisfaction and support for the police, and attitude toward the sentencing practices.”

Sanders, Hoyle, Morgan & Cape (2001, pp. 448-9) have neatly summarized the supposed benefits of victim participation in the criminal justice process in the form of the following table:

The Benefits of Victim Participation during Criminal Proceedings
1) Giving victim a 'voice' for therapeutic purposes;
2) enabling the interests and/or views of victims to be taken into account in decision making;
3) ensuring that victims are treated with respect by criminal justice agencies;
4) reducing the stress for victims in criminal proceedings;
5) increasing victim satisfaction with the criminal justice system ;
6) increasing victim co-operation , as a result of any of the above objectives.

Overall, the point has repeatedly been made that a victim, who feels satisfied with the criminal justice system, is considerably more likely to cooperate with, and to support, the criminal justice system (Kennard, 1989, p. 417; and Hall, 1975, cited in Smith, Watkins & Morgan, 1997, p. 60). In this respect, it has been asserted that the "ultimate right," that could be accorded to victims of crime, is the right to "veto" plea bargains which they do not consider to be fair (Kennard, 1989, p. 418). To date, such a suggestion has received no support in any jurisdiction in North America: indeed, even in the State of Arizona, which guarantees the right to active victim participation in plea negotiations, the regulatory legislation clearly specifies that the victim does not have the right to independently make decisions that traditionally fall within the domain of prosecutorial discretion.



7.0 Conclusions: Four Models of Victim Participation in Plea Bargaining

In the foreseeable future, it is likely that reform efforts will focus upon the task of expanding the number of jurisdictions in which victims are accorded a right of active participation in the plea negotiation process. In Canada, the first step, for most provinces and territories, would be the provision of comprehensive - and timely - information to victims about the progress of plea negotiations (a development that has already been implemented in Ontario and Manitoba) and the recognition of the right of victims to be consulted by Crown Counsel (an advance that has already been accomplished in Manitoba with the enactment of the *Victims' Bill of Rights* (2000)).

The next step in the expansion of victims' rights in relation to the plea bargaining process would be to introduce a variation of the Arizona model, in which victims are granted the right to make oral or written submissions to a judicial hearing that is convened for the specific purpose of accepting or rejecting a proposed plea agreement. This second step would indubitably require a fundamental departure from the current Canadian practice of leaving plea bargaining essentially unregulated. It is certainly arguable that victims' participation in the plea negotiation process will only become "meaningful" if it includes their participation in an open hearing before a judge. Such a hearing would be designed to provide the judiciary with the necessary information for the purpose of determining whether or not a proposed plea is acceptable in terms of the public interest in the sound administration of criminal justice. Critical factors in the exercise of judicial decision-making discretion in this arena would, of necessity, include not only the victims' views as to the appropriateness of any proposed disposition of "their" cases but also the background information that might be furnished by victims (information that could ultimately serve as a valuable corrective to any inaccuracies in the version of events that is proffered by the Crown and the defence). As far as the latter consideration is concerned, it is significant that McGillivray (1997-98) has provided strong support for the view that current Canadian plea bargaining practices may result in a significant distortion in the narrative of the "facts of the case" by the Crown and the defence and may result in a sentence that is not commensurate with the true severity of the offence(s) concerned:

The importance of plea bargaining to the administration of justice is such that it cannot be fundamentally contested. Where it results in the suppression or eradication of relevant and potentially determinative information, then the deeply inadequate sentencing which may result brings the administration of justice into disrepute. The court knows that a bargain has been made only because a guilty plea has been tendered; by lawyerly convention, neither the bargain nor its details are disclosed to the court. Where charges are dropped or stayed, the facts supporting those charges are also suppressed. This is a shadowy and problematic area. (para. 20).

It might be useful to analyze potential reforms to the law and practice concerning plea bargaining in terms of various analytical models that might be hypothesized in the context of the specific issue of victim involvement in plea negotiations. This report has analyzed the existing Canadian jurisprudence concerning the practice of plea negotiations and has compared it with the highly regulated system of plea bargaining, that has evolved in the federal and state courts in the United States. In light of this analysis, it is possible to identify four, distinct models of victim participation in plea discussions. The first two models are based on current trends in

Canadian jurisprudence, while the remaining two are based on contemporary law and practice in the United States. The four models are cumulative insofar as Model Two incorporates the main elements of Model One, Model Three incorporates the main elements of Model Two, and Model Four incorporates the main elements of each of the other three models. Models One and Two encapsulate a relatively passive role for victim in the plea bargaining process, while Models Three and Four reflect a comparatively active degree of victim participation in plea discussions.

7.1 Model one

The first model is based on the legislative framework that currently exists in most Canadian provinces and territories. In this model, victims are entitled to receive general information about the progress of the prosecution of “their” defendants, although they must first make a request for such information. In addition, the police and the Crown are required to take the views of victims into account, where they consider it appropriate to do so. There is no specific requirement that the victim be informed about the status of any plea discussions that may take place. Model One, therefore, assigns a distinctly passive role to victims in the prosecution of “their” defendants and does not make any specific provision for the transmission by Crown counsel of information concerning any plea negotiations that might be underway with the defence.

Model One
<ul style="list-style-type: none"> The victim has a right to request basic information about the prosecution of a case: in particular, the status of a pending case; the nature of the charges against the accused; trial and sentencing dates; and the ultimate outcome of the case (including information about the nature and terms of any sentence that is handed down). The onus is on the victim to request relevant information.
<ul style="list-style-type: none"> The victim is not provided with specific information concerning any plea discussions that may be taking place between the Crown and defence counsel.
<ul style="list-style-type: none"> Model One reflects the existing practice and jurisprudence in most Canadian jurisdictions.

7.2 Model Two

The second model incorporates the rights to general information about the status of a prosecution that victims enjoy as an essential feature of Model One. However, Model Two significantly enhances these rights by furnishing victims with the opportunity to request specific information about the status of any ongoing plea discussions (a statutory requirement that currently exists in both Manitoba and Ontario). More significantly, Model Two also imposes a specific duty on Crown Counsel to consult with victims about the terms of any proposed plea agreement: at present, only Manitoba has enacted legislation that incorporates this particular element of Model Two. Although Model Two incorporates a prosecutorial duty to consult with victims, it certainly does not include a right of active victim participation in any phase of the



process of plea discussions that may be taking place between Crown and defence counsel: therefore, Model Two permits victims to assume a relatively passive role in plea bargaining and accords them – at best - a muted voice in shaping the outcome of the process.

M odelTw o	
–	The victim has the right to information that is incorporated within Model One.
–	The victim has the right to information that is incorporated within Model One.
–	The victim has the right to request specific information about any ongoing plea discussions.
–	Model Two reflects the existing legislative framework, established by the recently-enacted Victim s’Bill of Rights (2000) in Manitoba.

7.3 Model Three

Model Three incorporates the rights to information and consultation, which are present in the combination of both Models One and Two. However, Model Three is constructed on the premise that plea bargains must be approved by a judge in an open hearing (as is the case in the US federal courts, under “Rule 11”). Furthermore, Model Three incorporates the requirement that, in general, the trial judge should obtain independent information from a pre-sentence report (prepared by an independent agency) before deciding whether or not to accept or reject a proposed plea agreement (a requirement that currently exists in the US federal courts - as a result of the combined effect of “Rule 11” and the *United States Sentencing Guidelines*). A central feature of Model Three is that it presents the victim with an opportunity to make an oral or written presentation to the trial judge at the hearing that is held to determine whether or not a proposed plea agreement should be accepted. This requirement has not been implemented in plea bargaining hearings held before the federal courts in the United States but it is an essential element in the system of hearings that has been established by legislation in the State of Arizona. Associated with this element of Model Three would be the imposition of a duty on the prosecutor to inform the court of what efforts have been made to inform the victim of his or her right to participate in a plea bargaining hearing and to convey the views of the victim (if known), whenever he or she is not present at the hearing (these are currently legislated requirements in the State of Arizona). Model Three would permit the victims of crime to participate in plea bargaining hearings following a procedure that would be similar to that which operates in the case of sentencing hearings. Clearly, Model Three furnishes crime victims with the opportunity to assume a degree of *active participation* in the process of plea discussions and also provides them with a forum in which their voices will be heard by judges who have the power to accept or reject any proposed plea agreement.⁴³

⁴³ In a recent report, the US Department of Justice’s Office for Victims of Crime (2001) emphasizes the importance for victims of the right to be present during criminal justice proceedings. The report points out that 39 states have granted victims the right to attend such proceedings, including trials. In the words of the report, “for crime victims and their families, the right to be present during criminal justice proceedings is an important one. Victims want to see justice at work” (p.1).

M odelThree	
➤	The victim has the right to request information and the right to be consulted, as provided by M odelTwo.
➤	Plea agreements must be considered by the trial judge in an open hearing. The judge has the power to accept or reject any proposed plea agreement.
➤	The victim has the right to make an oral or written submission to the trial judge during the plea-bargaining hearing.
➤	The trial judge must generally receive a pre-sentence report from an independent agency before deciding whether or not to accept a proposed plea agreement.
➤	The prosecutor is under a duty to inform the court as to what efforts have been made to inform the victim of his or her right to participate in the plea bargaining hearing and to convey to the court the victim's views (if any) concerning any proposed plea agreement.
➤	M odelThree most closely reflects existing jurisprudence and practice in the State of Arizona, although many of the other elements are reflected in the jurisprudence and practice of the federal courts in the United States.

7.4 Model Four

Model Four adds a critical right to the essential elements of Model Three – namely, the *right of a victim to veto a proposed plea agreement*. This particular right would furnish the victim with a considerable degree of power to affect the outcome of a criminal case. However, at present, Model Four is only a hypothetical model, since no North American jurisdiction has yet implemented it in the context of the plea bargaining process. Indeed, even in the State of Arizona (which currently permits the most comprehensive form of victim participation in relation to plea bargaining), the relevant legislation does not grant victims the right to veto a proposed plea agreement. Nevertheless, Model Four does constitute an option for policy makers and legislators to consider as a means of expanding victims' rights in the criminal justice process and, in conceptual terms, it undoubtedly represents the *most active form of victim participation* that might currently be contemplated in relation to the process of plea bargaining.

M odelFour	
❖	As in M odelThree, the victim has the rights to information, consultation, and participation in an open judicial hearing.
❖	The victim has the right to veto any proposed plea agreement.
❖	M odelFour is a hypothetical model: it does not reflect the existing jurisprudence and practice in any North American jurisdiction.



These four models of victim participation in plea bargaining may serve as a basis not only for understanding the nature and content of contemporary jurisprudence and practice in Canada, but also for clarifying future avenues of reform. What is clear is that active participation by victims in the process of plea negotiations in Canada will require fundamental legislative reforms at both the federal and provincial levels of jurisdiction. Hopefully, Models Three and Four furnish Canada's policy makers and legislators with useful signposts as they travel along on the challenging road to future reform.

As model three provides an active role for victims in the plea negotiation process without providing a right to veto such agreements as in model four, this may be the most viable option. Such an initiative would require action by the Parliament of Canada to amend the *Criminal Code* in a manner that would provide for overt judicial regulation of plea negotiations in an open forum; for entrenchment of the right of victims to make written or oral submissions to the court during a plea bargaining hearing; and for the imposition of the requirement that judges should postpone making a decision, as to whether or not to accept a proposed plea bargain, until *after* they have received a pre-sentence report from an independent agency. Implementation of Model Three would also require legislative action by the various provinces and territories. More specifically, provincial and territorial legislatures would need to impose on Crown counsel the duty to provide relevant information to victims about the prosecution of their cases and the duty to consult with victims concerning such issues as plea negotiations. In addition, the provinces and territories would need to provide victim services that would assist victims to prepare statements for plea bargaining hearings and that would ensure that victims fully comprehend their options in this complex – and frequently misunderstood – process.



Appendix A: The Canadian Sentencing Commission Recommendations Concerning Plea Bargaining

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 to 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 the 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 (oral or written submission) 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 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.

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 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.



Appendix B:

State of Arizona: Victims' Bill of Rights

Section 2.1. (A) To preserve and protect victims' rights to justice and due process, a victim of crime has a right:

1. To be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process.
 2. To be informed, upon request, when the accused or convicted person is released from custody or has escaped.
 3. To be present at and, upon request, to be informed of all criminal proceedings where the defendant has the right to be present.
 4. To be heard at any proceeding involving a post-arrest release decision, a negotiated plea, and sentencing.
 5. To refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant.
 6. To confer with the prosecution, after the crime against the victim has been charged, before trial or before any disposition of the case and to be informed of the disposition.
 7. To read pre-sentence reports relating to the crime against the victim when they are available to the defendant.
 8. To receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury.
 9. To be heard at any proceeding when any post-conviction release from confinement is being considered.
 10. To a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence.
 11. To have all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights and to have these rules be subject to amendment or repeal by the legislature to ensure the protection of these rights.
 12. To be informed of victims' constitutional rights.
- (B) A victim's exercise of any right granted by this section shall not be grounds for dismissing any criminal proceeding or setting aside any conviction or sentence.
- (C) "Victim" means a person against whom the criminal offense has been committed or, if the person is killed or incapacitated, the person's spouse, parent, child or other lawful representative, except if the person is in custody for an offense or is the accused.

- (D) The legislature, or the people by initiative or referendum, have the authority to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims by this section, including the authority to extend any of these rights to juvenile proceedings.
- (E) The enumeration in the constitution of certain rights for victims shall not be construed to deny or disparage others granted by the legislature or retained by victims.

Effective March 21, 1946, as amended to December 1, 2000



Appendix C: United States Federal Rules of Criminal procedure

Effective March 21, 1946, as amended to December 1, 2000

Rule 11. Pleas

(a) Alternatives.

(1) *In General.* A defendant may plead guilty, not guilty, or *nolo contendere*. If a defendant refuses to plead or if a defendant organization, as defined in 18 U.S.C. sec. 18, fails to appear, the court shall enter a plea of not guilty.

(2) *Conditional Pleas.* With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or *nolo contendere*, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(b) *nolo contendere.* A defendant may plead *nolo contendere* only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) *Advice to Defendant.* Before accepting a plea of guilty or *nolo contendere*, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

(2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and

(4) that if a plea of guilty or *nolo contendere* is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or *nolo contendere* the defendant waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement; and:

(6) the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence.

(d) *Insuring that the Plea is Voluntary.* The court shall not accept a plea of guilty or *nolo contendere* without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or *nolo contendere* results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant — or the defendant when acting *pro se* — may agree that, upon the defendant's entering a plea of guilty or *nolo contendere* to a charged offense or to a lesser or related offense, the attorney for the government will:

- (A) move to dismiss other charges; or
- (B) recommend, or agree not to oppose the defendant's request, for a particular sentence, or sentencing range, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Any such recommendation or request is not binding on the court; or
- (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Such a plea agreement is binding on the court once it is accepted by the court.

The court shall not participate in any discussions between the parties concerning any such plea agreement.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.



(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of *nolo contendere* the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of Pleas, Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

- (A) a plea of guilty which was later withdrawn;
- (B) a plea of *nolo contendere*;
- (C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or
- (D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or *nolo contendere*, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

(h) Harmless Error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, eff. Aug. 1 and Dec. 1, 1975; Apr. 30, 1979, eff. Aug. 1, 1979, and Dec. 1, 1980; Apr. 28, 1982, eff. Aug. 1, 1982; Apr. 28, 1983, eff. Aug. 1, 1983; Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 9, 1987, eff. Aug. 1, 1987; Nov. 18, 1988; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 26, 1999, eff. Dec. 1, 1999.)



References

- Bala, N. (1999). Legal Responses to domestic violence in Canada and the role of health care professionals. *Syrtaash Collection of Family Law Articles* (SFLRP/2000-004). Online QL, accessed 12/29/01.
- Bibas, S. (2001). Judicial fact-finding and sentence enhancements in a world of guilty pleas. *Yale Law Journal*, 110, 1097 – 1185.
- Brodeur, J.-P. (1999). Sentencing reform: Ten years after the Canadian Sentencing Commission. In: J.V. Roberts & D.P. Cole (Eds.), *Making sense of sentencing*. (pp. 332 - 348). Toronto: University of Toronto Press.
- Canadian Sentencing Commission. (1987). *Sentencing reform: A Canadian approach*. Ontario: Minister of Supply and Services Canada.
- Chartrand, L. (1995). The appropriateness of the lawyer as advocate in contemporary aboriginal justice initiatives. *Alberta Law Review*, 33, 874 – 881.
- Cohen, S. & Doob, A. (1990). Public attitudes to plea bargaining. *Criminal Law Quarterly*, 32, 85 - 109.
- Colquitt, J. (2001). *Ad hoc* plea bargaining. *Tulane Law Review*, 75, 695-776.
- Cousineau, D. & Verdun-Jones, S. (1979). Cleansing the augean stables: A critical analysis of recent trends in the plea bargaining debate in Canada. *Osgoode Hall Law Journal*, 17, 227 - 260.
- Davis, R. & Smith, B. (1994). Effects of victim impact statements on sentencing decision: A test in an urban setting. *Justice Quarterly*, 11, 453 - 469.
- Department of Justice Canada (1998). *Response to the Fourteenth Report of the Standing Committee on Justice and Human Rights: Victims' rights – A voice not a veto*. Ottawa: Department of Justice. Retrieved March 30, 2002, from: <http://www.Canada.justice.gc.ca/en/news/nr/1998/victimsrep.html>.
- Department of Justice Canada (1999). *Canadian Statement of Basic Principles of Justice for Victims of Crime*. Ottawa: Department of Justice. Retrieved March 30, 2002 from: <http://Canada.justice.gc.ca/en/ps/voc/csbp.html>
- Dick, J. (1997). Allowing sentence bargains to fall outside of the Guidelines without valid departures. *Hastings Law Journal*, 48, 1017 - 1057.
- Donahoe, J. (1999). The changing role of victim impact evidence in capital cases. *Western Criminology Review*, 2(1), Article 2. Retrieved April 1, April 2002, from: <http://wcr.sonoma.edu/v2n1/donahoe.html>
- Dunworth, T. & Weisselberg, C.D. (1992). Felony cases and the federal courts: The Guidelines experience. *Southern California Law Review*, 66, 99 - 153.

- Edwards, I. (2001). Victim participation in sentencing: The problems of incoherence. *Howard Journal of Criminal Justice*, 40, 39 - 54.
- Erez, E. (1990). Victim participation in sentencing: Rhetoric and reality. *Journal of Criminal Justice*, 18, 19 - 31.
- Erez, E. & Roeger, L. (1995). Effect of victim impact statements on sentencing patterns and outcomes: The Australian experience. *Journal of Criminal Justice*, 23, 363 - 375.
- Erez, E. & Rogers, L. (1999). Victim impact statements and sentencing outcomes and processes. *British Journal of Criminology*, 39, 216-239.
- European Union (2001). Council framework decision of 15 March 2001 on the standing of victims in criminal proceedings. The Council of the European Union, Document 301F0220. Retrieved April 1, 2002, from:
http://europa.eu.int/eur-lex/en/lif/dat/2001/en_301F0220.html
- Federal Rules of Criminal Procedure (2000). *US Code*, Title 18, as amended to December 1st, 2000. Retrieved April 1, 2002, from:
<http://www.law.ukans.edu/research/frcrimIV.htm>
- Fenwick, H. (1997). Procedural 'rights' of victims of crime: Public or private ordering of the criminal justice process? *Modern Law Review*, 60, 317 - 333.
- Finn-deLuca, V. (1994). Victim participation at sentencing. *Criminal Law Bulletin*, 30, 403 - 428.
- Galligan, P.T. (1996). *Report to the Attorney General of Ontario on Certain Matters Relating to Karla Homolka*. Toronto: ADR Chambers.
- Giliberti, C. (1990). Study probes the effectiveness of victim impact statements. *Justice Research Notes*, 1, 1 - 8.
- Griffiths, C.T., & Verdun-Jones, S.N. (1994). *Canadian Criminal Justice*, 2nd edn. Toronto: Harcourt Brace & Company, Canada.
- Hall, D. (1991). Victims' voices in criminal court: The need for restraint. *American Criminal Law Review*, 28, 223 - 266.
- Heaney-Gerald, W. (1991). The reality of guidelines sentencing: no end to disparity. *American Criminal Law Review*, 28, 161 - 232.
- Herman, N. (1997). *Plea bargaining*. Virginia, Lexis Law Publishing.
- Home Office. (1997). *Victims Charter*. London: Home Office. Retrieved April 1, 2002, from:
<http://www.homeoffice.gov.uk/cpd/pvu/viccomp.htm>
- Home Office. (2000). HM Inspectorate of Probation, Thematic Inspection Report. *The victim perspective: Ensuring the victim matters*. London: Home Office.
- Home Office. (2001). *A review of the Victim's Charter*. London: Home Office Communication Directorate.



-
- Home Office. (No Date). *Making a victim personal statement*. London: Home Office. Retrieved April 1, 2002, from:
<http://www.homeoffice.gov.uk/cpd/pvu/victimstate.pdf>
- Hutchison, S. (1997). *Issues in criminal evidence: Procedure and the Charter; An update on 1996-97 developments*. Alan D. Gold Collection of Criminal Law Articles (ADGN/RP-026). Online, QL. Accessed on 12/29/01.
- Karle, T. W. & Sager, T. (1991). Are the Federal Sentencing Guidelines meeting Congressional goals?: An empirical and case law analysis. *Emory Law Journal*, 40, 393 - 444.
- Kennard, K. (1989). The victim's veto: A way to increase victim impact on criminal case dispositions. *California Law Review*, 77, 417 - 453.
- Kilpatrick, D., Beatty, D. & Smith, S. (1998). *The rights of crime victims – Does legal protection make a difference?* Washington, D.C.: National Institute of Justice, US Department of Justice.
- Klein, A. (1997). *Sentencing Criminals: Alternative sentencing, intermediate sanctions and probation*. Ohio: Anderson Publishing Company.
- Law Reform Commission of Canada. (1975). *Working paper no. 15: Criminal procedure: Control of the process*. Ottawa: Information Canada.
- Law Reform Commission of Canada. (1989). *Working paper no. 60: Plea discussions and agreements*. Ottawa: Law Reform Commission of Canada.
- Lynett, E. & Rogers, R. (2000). Emotions overriding forensic opinions? The potentially biasing effects of victim statements. *Journal of Psychiatry and Law*, 28, 449 - 457.
- Mackenzie, G. (1996). Breaking the dichotomy habit: The adversary system and the ethics of professionalism. *Canadian Journal of Law and Jurisprudence*, 9, 33-50.
- McDonald, W. (1987). Judicial supervision of the guilty plea process. *Judicature*, 70, 203-215.
- McGillivray, A. (1997-98). *R. v. Bauder: Seductive Children, Safe Rapists, and Other Justice Tales*. *Manitoba Law Journal*, 25, 359 - 383.
- Manson, A. (2001). *The Law of Sentencing*. Toronto: Irwin Law.
- Manson, A. (2001). Motivation, the Supreme Court and mandatory sentencing for murder. *Criminal Reports (5th Series)*, 39, 65 - 71.
- Miller, J.G. (1996). *Search and destroy: African-American males in the criminal justice system*. Cambridge: Cambridge University Press.
- Mitchell, G. (2001). "No joy in this for anyone": Reflections on the exercise of prosecutorial discretion in *R. v. Latimer*. *Saskatchewan Law Review*, 64, 491 - 510.
- Murphy, J. (2000). Two cheers for vindictiveness. *Punishment and Society*, 2, 131 - 143.

- National Center for Victims of Crime. (2002). Victim impact statement models – improving communications between the justice system and our nation’s crime victims. Washington, D.C.: National Center for Victims of crime. Retrieved April 1, 2002, from: http://www.ncvc.org/vroom/impact_model.htm
- Pan, J. & Kaiser, M. (2001). Thirtieth annual review of criminal procedure: Guilty pleas. *Georgetown Law Journal*, 89, 1384 - 1437.
- Ontario, Attorney General. (1993). *Report of the Attorney General’s Advisory Committee on Charge Screening, Disclosure and Resolutions Discussions*. Toronto: Queen’s Printer.
- Parent, D., Dunworth, T., McDonald, D. & Rhodes, W. (1996). *Key Legislative Issues in Criminal Justice: The Impact of Sentencing Guidelines*. Washington, D.C.: National Institute of Justice, US Department of Justice.
- Platt & Kauffman (2000). The victim’s rights amendment: A prosecutor’s and, surprisingly, a defence attorney’s support in sentencing. *Maryland Law Review*, 59, 628 - 641.
- Rapping, E. (2000). Television, melodrama, and the rise of the victims’ rights movement. *New York Law School Law Review*, 43, 665 - 690.
- Renke, W.N. (1996). Flappers to rappers: Criminal law in 1921 and 1996. *Alberta Law Review*, 35, 80 - 115.
- Roach, K. (1999). *Due process and victim’s rights: The New Law and Politics of Criminal Justice*. Toronto: University of Toronto Press.
- Royal Commission on the Donald Marshall, Jr. Prosecution (N.S.). (1989). *Royal Commission on the Donald Marshall, Jr. Prosecution: Commissioner’s Report: Findings and Recommendations, Vol 1*. Halifax: Royal Commission.
- Sanders, A., Hoyle, C., Morgan, R. & Cape, E. (2001). Victim impact statements: Don’t work, can’t work. *Criminal Law Review*, 2001, 447 - 458.
- Schmallegger, F., MacAlister, D., Mckenna, P.F., & Winterdyk, J. (2000). *Canadian criminal justice today: An introductory text for the twenty-first century*. Toronto: Prentice-Hall Canada Inc.
- Seifman, R. & Freidberg, A. (2001). Plea bargaining in Victoria: The role of counsel. *Criminal Law Journal*, 25, 64 - 74.
- Sigman, S. (1999). An analysis of Rule 11 plea bargain options. *University of Chicago Law Review*, 66, 1317 - 1340.
- Smith, B., Watkins, E. & Morgan, K. (1997). The effects of victim participation on parole decisions: Results from a southeastern state. *Criminal Justice Policy Review*, 8, 57-74.
- Sobieski, R. (1993). MADD study finds most victims satisfied with law enforcement. *MADDVOCATE, Winter edition 1993*.
- Solicitor General, Canada (2001). Victims to speak at National Parole Board Hearings. Ottawa: Solicitor General, Canada. News Release, May 9, 2001. Retrieved April 1, 2002, from: www.sgc.gc.ca/releases/e20010509.htm



-
- Solicitor General, Canada. (1998). *CCRA 5 Year Review: Provision Relating to Victims*. Retrieved April 1, 2002, from: <http://www.sgc.gc.ca/epub/corr/eccra/evictims/evictims.htm>
- Starkweather, D. (1992). The retributive theory of “just deserts” and victim participation in plea bargaining. *Indiana Law Journal*, 67, 853 - 878.
- Stevens, M. (2000). Victim impact statements considered in sentencing: constitutional concerns. *California Criminal Law Review*, 2, Article 3. Retrieved April 1, 2002, from <http://www.boalt.org/CCLR/v2/v2toc.html>.
- Sullivan, S. (1998). *Balancing the Scales*. Ottawa: Canadian Resource Centre for Victims of Crime, pp. 1-79. Retrieved April 1, 2002, from: http://www.crcvc.ca/Publications/balancing_the_scales.htm
- Taha, A. (2001). The equilibrium effect of legal rule changes: Are the federal sentencing guidelines being circumvented? *International Review of Law and Economics*, 21, 251–269.
- Tobolowski, P. (1999). Victim participation in the criminal justice process. *New England Journal on Criminal and Civil Confinement*, 25, 21-105.
- United Nations. (1985). *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*. GA/Res/40/34. Retrieved April 1, 2002, from: http://www.unhchr.ch/html/menu3/b/h_comp49.htm
- United Nations. (1998). *Handbook for Victims: On the use and application of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*. Retrieved April 1, 2002, from: <http://www.victimology.nl/onlpub/hb/hbook.html>
- US Code (2000). *Title 18 – Crimes and criminal procedure*. Retrieved April 1, 2002, from: <http://www4.law.cornell.edu/uscode/18/>
- US Department of Justice. (2000). *Attorney General Guidelines for Victim and Witness Assistance*. Office for Victims of Crime: Washington, D.C.
- US Department of Justice. (2001). *The Crime Victim’s Right to be Present*. Washington, D.C.: Office for Victims of Crime.
- US Department of Justice, (1998, Report no. 4). *New Directions from the field: Victims’ rights and services for the 21st century*. Office for Victims of Crime: Washington, D.C.
- US Department of Justice, (1998, Report no. 5). *New Directions from the Field: Victims’ Rights and Services for the 21st Century*. Office for Victims of Crime: Washington, D.C.
- US Sentencing Commission. (2001). *Federal Sentencing Statistics, 1999 Fiscal Year*. Retrieved April 1, 2002, from: <http://www.ussc.gov/judpack/1999>.
- Verdun-Jones & Hatch, (1988). *Plea Bargaining and Sentencing Guidelines*. Ontario: Minister of Supply and Services Canada.

- Verdun-Jones, S.N., & Hatch, A.J. (1987). An overview of plea bargaining in Canada: Cautionary notes for sentencing reform. In: H. Dumont (Ed.), *Sentencing: La détermination de la peine*. (pp. 71 – 106) . Cowansville, Québec: Les éditions Yvon Blais Inc.
- Wemmers, J.A. (1999). Victim notification and public support for the criminal justice system. *International Review of Victimology*, 6, 167 - 178.
- Welling, S. (1987). Victim participation in plea bargains. *Washington University Law Quarterly*, 65, 301 - 356.
- Young, A. (2001). *The Role of the Victims in the Criminal Process: A Literature Review – 1989 to 1999*. Ottawa: Department of Justice Canada.



Cases Cited

Canada

- Boudreau v. Benaiah* (2000), 142 C.C.C. (3rd) 97 (Ont. C.A.).
- R. v. Bates* (2000), 146 C.C.C. (3d) 321 (Ont. C.A.).
- R. v. Bezdan*, [2001] B.C.C.A. 215.
- R. v. Bremner* (2000), 146 C.C.C. (3d) 59 (B.C.C.A.).
- R. v. Bunn*, [2000] 1 S.C.R. 183.
- R. v. Burlingham* (1995), 97 C.C.C. (3d) 385 (S.C.C.).
- R. v. Dale* (1998), B.C. Supreme Court, Docket # XO45396 (January 22nd, 1998).
- R. v. Derksen* (1999), 140 C.C.C. (3d) 184 (Sask. C.A.).
- R. v. G.W.C.*, [2000] ABCA 333 (Alta. C.A.), Supplementary Reasons, [2001] A.B.C.A. 41 (Alta. C.A.).
- R. v. Hoang*, [2001] ABCA 87 (Alta. C.A.).
- R. v. Jackson*, [2000] BCSC 94.
- R. v. Jolivet*, (2000), 144 C.C.C. (3d) 97 (S.C.C.).
- R. v. Kennedy* (1999), 140 C.C.C. (3d) 378 (Ont. C.A.).
- R. v. J.A.F.*, [1997] No. 2503 (B.C. Prov. Ct.).
- R. v. Jiany-Yaghooby* [1998], B.C.J. No. 2389 (B.C.C.A.).
- R. v. Labbe* [2000] B.C.J. No. 184 (B.C.S.C.).
- R. v. Lyons*, [1987] 2 S.C.R. 309.
- R. v. Miclash*, (2000), BCSC 1430, appeal dismissed [2001] BCCA 266.
- R. v. Morrissey*, [2000], 2 S.C.R. 90.
- R. v. M (C.A.)* (1996), 105 C.C.C. (3d) 327 (S.C.C.).
- R. v. Neale*, [2000] BCCA 157.
- R. v. Pawliuk*, [2001] BCCA 13.
- R. v. Power* (1994), 89 C.C.C. (3d.) 1 (S.C.C.).
- R. v. Sherlock* (1998), 131 Man. R. (2d) 143 (C.A.).
- R. v. Sweeney* (1992), 71 C.C.C. (3d) 82 (B.C.C.A.).

R. v. Swietlinski (1994), 92 C.C.C. (3d) 449 (S.C.C.).

R. v. Stinchcombe, [1991] 3 S.C.R. 326.

R. v. Thornton, [2000] BCSC 1430.

R. v. Tran, [1999] B.C.C.A.) 367.

United States

Blackledge v. Allison, 431 US 63 (1977).

Booth v. Maryland, 482 US 496 (1987).

Gioiosa v. United States, 684 F.2d 176,180 (1st Cir. 1982)

McMann v. Richardson, 397 US 759 (1970)

Payne v. Tennessee, 501 US 808 (1991).

Santobello v. New York, 404 US 257 (1971)

South Carolina v. Gathers, 490 US 805 (1989)

State v. Espinosa, [2001] AZ-QL131 (Court of Appeals, Arizona).

Tiemens v. United States, US 724 F2d 160, 162 (5th Cir. 1991)

United States v. Badger, 925 F2d 101 (5th Cir. 1991).

United States v. Casallas, 59 F.3d 1173(11th Cir. 1995).

United States v. Damon, September 17th, 1999. No 96-4378 (4th Cir.1999).

United States v. Eirby [2001] CAI-QL310 (1st Cir.2001).

United States v. Fernandez, 960 F.2d 771 (9th Cir. 1991).

United States v. Henry, 113 F.3d 37 (5th Cir. 1997).

United States v. Hiltz, [2001] CAI-QL 285 (1st Cir. 2001).

United States v. Hyde, 520 US 670 (1997).

United States v. Kennell, 15 F3d 134 (9th Cir. 1994).

United States v. McVeigh, 153 F.3d 116 (10th Cir. 1998).

United States v. Redondo-Lemos, 955 F2d 1296 (9th Cir: 1992).

United States v. Rodriguez, 197 F.3d 156 (5th Cir. 1999).

United States v. Thibodeaux, 811 F2d 847 (5th Cir. 1987).

United States v. Walton, 36 F.3d 32, 34 (7th Cir, 1994).