Judging a Joint Submission: Comparing the U.S. and Canada on the Judicial Role in Plea Bargaining

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Reliance on plea bargaining can raise serious concerns about the extent to which the administration of criminal justice is governed by legal rule. When convictions are entered following a plea there is no adversarial trial process with all the safeguards and fact-finding that such a process entails. It has been especially well documented in the United States that the factors that shape a plea often have more to do with imbalanced bargaining power than substantive legal content. The power dynamics of plea negotiations raise the spectre of both excessive sentences and the imprisonment of defendants who could well have raised a reasonable doubt about their guilt at trial. William Stuntz described how the law's effect on U.S.-style plea bargaining is even less than conventional wisdom presumes — even the shadow of law is scarcely felt.[1] As Jed Rakoff put it, plea bargaining happens "behind closed doors and with no judicial oversight. The outcome is very largely determined by the prosecutor alone."[2]

The question is the extent to which this U.S. reality appears in Canada. Both systems rely on plea bargaining to resolve the vast majority of criminal cases, suggesting that both systems are heavily dependent on

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1 William J. Stuntz, "Plea Bargaining and Criminal Law's Disappearing Shadow" 117 *Harvard Law Review* 2548 (2003-2004). Stuntz builds on a classic article from Robert H. Mnookin & Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" 88 *Yale Law Journal* 950 (1979), which advanced the thesis that there is a market for settlements in civil cases, and that this market internalizes the governing law. Stuntz outlines how U.S. plea bargains take place in the shadow of prosecutors' preferences, voters' preferences, budget constraints, and other forces — but not in the shadow of the law.

2 Jed S. Rakoff, "Why Innocent People Plea Guilty," *The New York Review of Books*, November 20, 2014.

this efficiency-enhancing practice.[3] But important differences abound. In the U.S. federal system, the dysfunctions of plea bargaining are connected to a particular prosecutorial culture, combined with a sentencing reform movement, sourced in the 1970s, which effectively transferred sentencing discretion from judges to prosecutors.[4] The presence of extensive guideline and mandatory sentencing means that charging decisions almost wholly determine sentence, and for several decades the federal law has mandated near exclusive focus on the features of an offence and prior criminal conduct, rather than mitigating factors.[5] The Canadian sentencing system is significantly different on each of these fronts. These differences have helped to sustain comparative moderation in terms of the severity of sentences that can arise generally and from plea bargaining.

In one respect, however, Canada is different than the U.S. federal system in a way that can generate unexpected severity in at least some cases. The difference has to do with the judicial power to depart from a sentence that is jointly recommended by the defence and the prosecution. Canadian law has long been clear that judges are not bound by a joint sentencing submission and, more significantly, that a judge can impose a sentence that departs from the joint submission (even where the defence and prosecution are entirely *ad idem* as to facts and sentence).[6]

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[3] For comparative, critical perspective on the argument that plea bargaining in its current form is an inevitable practice, given the contemporary pressures of politics and administration in countries like Canada and the U.S., see: Joseph DiLuca, "Expedient McJustice or Principled Alternative Dispute Resolution?" (2005) 50 Crim. L.Q. 14; and Candace McCoy, "Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform" (2005) 50 Crim. L.Q. 67.

[4] For a comprehensive treatment of the complex and problematic ways that US federal prosecutors manipulate the plea bargaining process, see "An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty," *Human Rights Watch*, (2013).

[5] See eg Carissa Byrne Hessick, "Why Are Only Bad Acts Good Sentencing Factors?" 88 *Boston University Law Review*, 1109 (2008).

[6] See *Criminal Code*, R.S.C. 1985, c. C-46, s. 606(1.1).

Canada: Greater Judicial Power to Intervene

The Supreme Court of Canada decision in *R v. Anthony-Cook*, reported above at p. 1, does not challenge the longstanding rule that Canadian judges are ultimately responsible for imposing sentence, even in the face of agreement between counsel.[7] The decision focuses on resolving the conflicting standards that had emerged as to the proper basis for judicial departure from a joint submission, and settles on a high standard for departure. Rather than a test of mere "fitness" that some lower courts had been employing, Justice Moldaver, writing for the court, holds that trial judges can impose a higher sentence only where the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest.[8] Moldaver J. follows the definition of the public interest from *R. v. Druken*, which held that judges can reject a proposed sentence that is so "markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system."[9]

By contrast, most U.S. judges have no power to interfere with or dictate the terms of a plea, whether in the direction of greater severity ("jumping") or moderation ("undercutting"). In the U.S. federal system and most state jurisdictions, the judiciary is precluded from participating in plea bargain negotiations.[10] Where a plea bargain generates a "stipulated sentence" — what Canadians would call a "joint submission" that marks agreement between defence and prosecution as to both facts and sentence — the overseeing judge has no power to interfere with the terms of the plea. She can only accept or reject, but cannot order a different bargain. "Stipulation bargaining" — or the "entering of a plea in return for a binding recommendation" — is considered the "holy grail" of plea bargaining in U.S. federal court.[11] Armed with a stipulated sentence, a defendant can be assured of what is going to happen, unless the judge re-

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[7] 2016 SCC 43.

[8] *Anthony-Cook* at para. 32.

[9] *Anthony-Cook* at para. 33, citing *R. v. Druken*, 2006 NLCA 67 at para. 29.

[10] See eg Rule 11 of the *Federal Rules of Criminal Procedure*.

[11] David Taylor Shannon, "Making your Deal with the Devil: Plea Agreements under the Federal Rules, Federal Sentencing Guidelines, and Department of Justice Policies" (2007) at p. 18 (https://www.fd.org/docs/select-topics/pleas/mak-

jects the plea altogether. Given that the judge does not have the power to enter a different sentence, incentives to reject are lessened.

The U.S. also retains a "back to square one" provision that allows both parties to go back to the *status quo ante*. The court need not accept the stipulated sentence, but the defendant will be allowed to withdraw from the agreement if the court does not.[12] Notably, *Anthony-Cook* establishes that a sentencing judge who is departing from a joint submission should consider whether to allow a defendant to withdraw a guilty plea, but doesn't go so far as to announce a clear rule that a defendant who does not receive the sentence he bargained for can withdraw and proceed to trial.[13]

There is a certain irony when we compare the U.S. and Canadian situation. *Anthony-Cook* is considered a victory for criminal defendants because the case settles on a high standard for when a judge can justifiably depart from a joint submission so as to impose a higher sentence. The presumption of U.S. reformers, in contrast, is that greater judicial involvement will push inevitably in the direction of more lenient sentences. Critics like Rakoff advocate what a few jurisdictions, notably Connecticut and Florida, have begun experimenting with: involving judges in the plea bargaining process.[14] In Canada, we have been more focused on articulating rules to ensure that judges don't tinker with a joint sentence in the direction of greater severity. But we have not questioned the notion that judges have the ultimate authority to impose sentence, no matter the level of agreement brought forward between the defence and prosecution.

U.S.: Prosecutorial Culture and the Absence of Proportionality Doctrine

The fact that strict limits on the judicial role in the U.S. have tended to generate punitive effects is partly explained by prosecutorial culture. The

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12 *Ibid* at p. 19.

13 *Anthony-Cook* at para. 58.

14 Rakoff, *New York Review of Books*.

current U.S. dysfunctions are captured in commentary from a sentencing decision set out below. The author is John Gleeson, a U.S. federal district judge known for his extensive knowledge and critical views about plea bargaining and the law and policy of the U.S. Federal Sentencing Guidelines. Judge Gleeson, a former federal prosecutor himself, describes the everyday practice of prosecutors who threaten defendants with extraordinary sentencing enhancements so as to secure assent to the prosecutor's preferred plea agreement:

> To coerce guilty pleas, and sometimes to coerce cooperation as well, prosecutors routinely threaten ultra-harsh, enhanced mandatory sentences that *no one* — not even the prosecutors themselves — thinks are appropriate. And to demonstrate to defendants generally that those threats are sincere, prosecutors insist on the imposition of the unjust punishments when the threatened defendants refuse to plead guilty.[15]

This lengthy opinion from Judge Gleeson contains a comprehensive history of the prosecutorial power to file prior felony informations — a step that can be taken so as to dramatically increase already-harsh mandatory minimum sentences. As Judge Gleeson describes, federal prosecutors exercise their discretion on this issue not in light of a legitimate factor like the level of moral blameworthiness in the case, but, rather, according to whether the defendant pleads guilty. The effects are severe:

> Prior felony informations don't just tinker with sentencing outcomes; by doubling mandatory minimums and sometimes mandating life in prison, they produce the sentencing equivalent of two-by-four to the forehead. The government's use of them coerces guilty pleas and produces sentences so excessively severe they take your breath away. Prior felony informations have played a key role in helping to place the federal criminal trial on the endangered species list.[16]

In Canada, what Judge Gleeson has described as standard prosecutorial methods to secure quick convictions could amount to an abuse of process, and could justify judicial rebuke either in the form of a stay of proceedings or a sentence below a statutory minimum. Justice Moldaver

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15 *United States v. Kupa*, 2013 U.S. Dist, LEXIS 146922, 9-10 (E.D.N.Y. 2013).

16 *Ibid.*

said exactly this in his dissenting reasons in *R v. Nur*,[17] which was a case concerned with the constitutionality of a mandatory sentence for possessing a loaded prohibited or restricted firearm. The provision at issue was drafted as a hybrid offence, and the mandatory sentence of three years was only at stake where prosecutors opted to proceed by way of indictment. One argument raised in the case was that prosecutors might threaten more minor breaches with prosecution by way of indictment simply so as to secure a guilty plea to a summary offence. The prospect of wrongful convictions is clearly raised when defendants are offered a deal so as to take a harsher sanction off the table.

Justice Moldaver rejected the validity of this concern about prosecutorial manipulation, noting that a residual category of "abuse of process" relates to state conduct that "contravenes fundamental notions of justice and thus undermines the integrity of the judicial process."[18] Moldaver J. said that judges could simply rely on this residual category to address prosecutorial conduct where such conduct could potentially lead to a grossly disproportionate sentence. State action that puts an offender at risk of cruel and unusual punishment necessarily "contravenes fundamental notions of justice" and "undermines the integrity of the judicial process."[19] Moldaver J. continues:

> [169] . . . an improper use of the mandatory minimum in plea bargaining — a concern raised by the majority, which I share — would also warrant the court's intervention. Thus, if a prosecutor proceeded by indictment in order to use the threat of a mandatory minimum to extort a guilty plea, this would likely qualify as an abuse of process and justify a *s. 24(1)* remedy . . . It follows that we do not need to strike down the sentencing scheme to guard against these concerns. . . .

Of course, embedded in Justice Moldaver's approach is the state of Canadian law with respect to constitutional limits on sentence lengths. In the U.S., judicial review of noncapital sentencing is far more deferential to state policy choices. This area of constitutional law has thus far gener-

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[17] 2015 SCC 15.

[18] Quoting *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 73.

[19] *Nur* at para. 163.

ated no real limits in the context of adult sentencing.[20] Judicial review under section 12 of the *Charter* has been far more robust.[21] What this means is that it would be impossible for a U.S. judge to find that prosecutors are manipulating plea bargaining so as to threaten or achieve unconstitutional sentence lengths, given that there appear to be no unconstitutional sentence lengths in the U.S. system. The question of whether plea bargaining can be abused by prosecutors will inevitably be connected to the larger jurisprudential portrait of sentencing in a particular system.[22]

The Difference between Undercutting and Jumping

A final issue arising out of *Anthony-Cook* helps to complete the comparative sketch of the U.S. and Canada on the issue of judicial powers in the face of a plea bargain. The B.C. Civil Liberties Association (BCCLA), represented by Ryan Dalziel and Emily Lapper as intervener in *Anthony-Cook*, put forward a fascinating argument premised on the difference between undercutting and jumping. The BCCLA argued that a different test should apply when a judge imposes a sentence that is below, rather than above, a joint submission. The BCCLA's position was that judges should be permitted to sentence below a joint submission with little restriction:

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[20] See eg *Rummel v. Estelle*, 445 U.S. 263 (1980) upholding a sentence of life with the possibility of parole for a third nonviolent felony, obtaining money by false pretenses; *Hutto v. Davis*, 454 U.S. 370 (1982) (per curiam) upholding a sentence of 40 years for possession of marijuana with intent to distribute and distribution of marijuana; *Harmelin v. Michigan*, 501 U.S. 957 (1991) upholding a life without parole sentence for the possession of 672 grams of cocaine; *Ewing v California*, 538 U.S. 11 (2003) upholding California's "three-strikes" law as it applied to a defendant whose third strike was a minor shoplifting offence.

[21] Beginning with *R. v. Smith*, [1987] 1 S.C.R. 1045, which struck down a 7-year mandatory prison term for a broadly defined drug trafficking offence, on the basis that the provision could generate a grossly disproportionate sanction in a reasonably hypothetical set of cases.

[22] There is, of course, a much larger discussion to have about the conduct of U.S. prosecutors described by Judge Gleeson here and by others elsewhere. For an example of a comprehensive treatment of how both the U.S. rules and practice could be reformed so as to transform plea bargaining into an ethical institution, see Richard Lippke, *The Ethics of Plea Bargaining* (Oxford: Oxford University Press, 2011).

for any reason related to the fitness of the sentence. Only a decision to sentence in excess of the joint submission should attract more careful scrutiny.

In advancing this argument the BCCLA pointed out that the under-enforcement of criminal law is a standard feature of our system.[23] This is undoubtedly true: many crimes are not detected or investigated, and even those that are do not necessarily generate an arrest, a charge, a prosecution, or a sanction. At multiple discretionary points in our system, we permit and in fact expect that many crimes will *not* attract prosecution and punishment. It follows that, while we ought to be scrupulous about over-enforcement, the same concerns do not apply to the widespread situation of the under-enforcement of criminal law. Justice Moldaver largely endorsed this submission, albeit briefly, noting that the "public interest" analysis may not be the same where a judge is opting to sentence below the joint term.[24] Future cases will likely go further to articulate the different considerations that arise in each context.

Conclusion

The injustices of U.S plea bargaining are only partly caused by a lack of judicial oversight. As outlined above, the bigger problem may be the absence of proportionality limits on noncapital sentencing. In Canada, a prosecutor who threatens a grossly disproportionate sentence so as to secure a guilty plea may well commit an abuse of process. In the U.S., the idea of a grossly disproportionate term of imprisonment is all but nonexistent as a matter of constitutional law. It seems that no level of judicial oversight over plea bargains will fully solve the U.S. situation absent related doctrinal change.

Both systems have something to learn from one another on the topic of whether and how to empower judges to review plea bargains. U.S. jurisdictions have long shown a deeper appreciation of how the factors that

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[23] See "Intervener's Factum", British Columbia Civil Liberties Association, at para. 12, citing Benjamin Berger for comprehensive treatment of the theoretical and historical force of this point in "The Abiding Presence of Conscience: Criminal Justice Against the Law and the Modern Constitutional Imagination" (2011) 61 U. Toronto L.J. 579.

[24] *Anthony-Cook* at paras. 52-53.

shape a plea will be largely unknown to a sentencing judge, rendering her interference in any proposed sentence potentially illegitimate. The sentencing judge in *Anthony-Cook*, who entered a two-year plus probation sentence instead of the 18-month joint submission, seemed to be missing that perspective. As Justice Moldaver put it, the sentencing judge in *Anthony-Cook* was guilty of "tinkering" in a fashion that showed little appreciation for the *quid pro quo* of the plea bargain — how the defendant gave up a right to trial in exchange for certainty — and the extent to which the criminal justice system can only function if the agreements struck between counsel are, to a significant degree, respected by courts.[25] As a result, the Supreme Court varied the judge's sentencing decision to bring it into conformity with the joint submission. In the face of full agreement between counsel, the job of the sentencing judge is not to analyze whether the court would have imposed the same sentence following a trial that established the stipulated facts.

The criticisms advanced by Judge Gleeson and many others show that U.S. reformers are right to lament the wholesale transfer of sentencing powers from an independent federal judge to a more politicized public prosecutor. Canadian legal culture has resisted such erosion of the judicial role in the sentencing process, and properly so. But it is worth attending to the potential difference between judicial intervention in the direction of leniency as opposed to severity.

The right balance on the topic of judicial involvement in plea bargaining might have been articulated by the BCCLA in *Anthony-Cook*, in a submission that was at least lightly endorsed by Justice Moldaver. Distinct limits on the judicial power to jump, versus the judicial power to undercut, might serve two legitimate goals that sit in some tension with one another. A high standard for jumping a joint submission preserves the certainty that is the central motivation for defendants to engage in plea bargaining. A broader judicial power to undercut a joint submission may be equally appropriate, given the fairness concerns that arise from the plea bargaining context and the fact that our system is designed to guard against punitive excess more than moderation.

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[25] *Anthony-Cook* at para. 63.