THE HANDLING OF CRIMINAL CASES BY DEFENCE LAWYERS

Robert Poirier
University of Montreal
1988

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Published by authority of the Minister of Justice and Attorney General of Canada

For additional copies, please write or call
Communications and Public Affairs
Department of Justice Canada
Ottawa, Ontario
K1A 0H8

(613) 957-4222

Catalogue No. J23-3/21-1988E
ISBN 0-662-15883-0
ISSN 0836-1797

Également disponible en français

Printed in Canada

JUS-P-469

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INTRODUCTION

It is generally agreed that the lawyer for the defence plays a decisive role in the workings of criminal justice. It is on the basis of a description of the characteristics peculiar to this role that we shall attempt to analyze the practices and procedures involved in settling criminal cases. We shall pay special attention to bargaining practices between the defence and the Crown when there is a guilty plea.

We emphasized the guilty plea in our study because we wanted to look into the question of the discretionary power exercised by agents of the criminal justice system, specifically defence lawyers.

Our study is based on twenty interviews conducted with defence lawyers in the Montreal region. These lawyers work primarily with adults. They are particularly active in the Montreal Court of Sessions of the Peace.[1] The overall information we provide in this study is primarily based on statements made by these lawyers.[2]

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[1]Methodological details concerning data collection are given in Appendix I. The description of our sample is given in Appendix II, where we have reproduced in tabular form the statistical breakdown of the main characteristics of the group of lawyers in question. In Appendix III, we list the main questions asked at the interviews.

[2]We have directly quoted many comments from the defence lawyers in question. These comments are always put in quotation marks and followed by a number, which corresponds to the lawyer who made the statement; the purpose of the numbering system is to preserve the confidentiality of those interviewed.

THE DECISION TO PLEAD GUILTY OR NOT GUILTY

In every criminal case, the lawyer for the defence must come to a decision concerning the charge made against his client, that it is to say he or she must decide whether to plead guilty or not guilty. Criminal proceedings, as well as the work of defence lawyers and Crown prosecutors, will vary depending on which plea is entered. A plea of not guilty will lead to the successive formal stages involved in criminal proceedings: appearance, hearing, trial. Here, the guilt of the accused is at stake and will be determined at the trial stage. Entering a guilty plea brings a stay of proceeding, followed by a final official stage in which the judge hears the arguments (recommendations) of counsel for the Crown and for the defence as to the appropriate sentence. When a guilty plea is entered,the main work of counsel revolves around the sentence itself.

It is common knowledge that the prosecutor and the defence lawyer come to a prior agreement to jointly propose a sentence to the judge. Such an agreement is usually the result of bargaining between the two lawyers. The practices engaged in by the defence lawyer and the Crown prosecutor, which are related to the consequences of entering a guilty plea, will be developed in greater detail in the next section of our study. For now, we

shall simply explain what is involved for both the defence lawyer and his client in deciding whether to plead guilty or not guilty.

Before deciding to plead guilty, it is important for the defence lawyer to assess the evidence against his client: "There is no point in preparing a defence when the person is a dead duck." (01). The strength of the evidence is therefore a determining factor. On the other hand, there may be considerable variation in how the evidence is assessed from one lawyer to another. It appears to us to be difficult to measure the personal suitability of each lawyer to carry out such an assessment (it also does not fall within the terms of reference of our study). However, it is obvious that some lawyers will tend more than others to dispute the charges against their clients: "I have a bit of a reputation as a lawyer who likes to go to trial." (18). "Our philosophy is to take fewer cases, to charge more, and to take things to the limit." (16). The decision to dispute the charges may therefore also sometimes depend on the type of practice preferred by the defence lawyer.

Generally, those who have been charged do not want to dispute the charges against them: "In most cases, clients want to plead guilty." (19). "There are a lot of people who simply want to settle things quickly." (04).

This is all the more true for persons in temporary custody: "When a person is detained, he generally, if he knows he's a goner, wants to settle things quickly and will not let us hold things up for two months on a technicality." (09). In a paper written for the Quebec Bar, the lawyer Michel Proulx argues a similar case: "Detention prior to a trial can be an important factor in the decision to plead guilty. It is for this reason that the Crown hopes, by obtaining a committal, to bring the detainee to revise his original plea." (translation) (Proulx: 1978, p. 49). Doing the opposite has no importance. Releasing the accused will not affect his entering of a not guilty plea: an accused person will not plead not guilty simply because he or she is at large. On the other hand, it provides better conditions for the defence: "We always have more time with persons who are at large and even at the sentencing level, there is always more room to manoeuvre with a person who is at large." (09).

From the defence lawyer's standpoint, the wish of the client cannot be considered a sufficient factor in itself to enter a guilty plea. None of the lawyers interviewed stated that they had ever entered a guilty plea solely on the client's wishes. This factor in fact always requires a minimum evaluation of the evidence. However, if the client wishes to plead guilty, the defence lawyer will probably not exceed this minimal evaluation;

that is to say that under such circumstances, the lawyer will not attempt to do a thorough evaluation of the evidence. This approach is made clear by the moment chosen by the defence lawyer to enter the guilty plea. At the Montreal Court of Sessions of the Peace there are three major stages involved in the preliminary proceedings: appearance, pre-trial discovery, and the preliminary hearing. For the vast majority of the lawyers we met, the preliminary hearing is an extremely important stage for assessing, with a basic level of efficiency, the evidence to be put forward by the Crown: "The preliminary hearing gives a very good idea of the case because the witnesses come to Court and give evidence rather than depositions or written statements." (15). "I consider that the preliminary hearing is the procedure that allows us to determine whether or not we really have a case for the defence." (11). "The preliminary hearing is a procedure whose primary purpose is to give concrete expression to the evidence gathered against an accused person." (translation) (Beaudoin, Fortin and Lussier: 1969, p. 97). In this respect, the preliminary hearing may be clearly distinguished from the pre-trial discovery, which is a stage in the criminal proceedings in which the Crown prosecutor does no more than give a verbal report on the evidence he believes he has against the accused. The client's wish to plead guilty therefore does not prevent a summary evaluation of the evidence as it may be put forward in the pre-trial discovery; it does prevent a substantial evaluation

of the evidence as might take place at a preliminary hearing. One of the lawyers we interviewed explained this very well: "Most of the time, I go to the preliminary hearing stage because that is where I can really assess the evidence against my client, except where my client wants to plead guilty from the outset." (18).

It is possible that the accused may wish to plead not guilty despite the recommendation of the lawyer to do otherwise. If the client remains stubborn on the issue, there are various options open to the lawyer. He may simply refuse to do so: "I am going to say 'go and find another lawyer' because if he pleads not guilty, I will be unable to represent him to the best of my ability because I am certain that he will be found guilty" (02). Theoretically, it is always possible for the accused to find another lawyer who will agree to take proceedings to the trial stage. One of the lawyers interviewed, who defined himself as a lawyer who frequently went to trial, gave the following as an illustration: "Every one of the clients who comes to see me has been to see five lawyers beforehand; when he comes to me it's because he wants to fight the charge and because the others have all told him to plead guilty." (18).

On occasion, the social position of the client leads the defence lawyer to go to trial: "For him, because he was a colonel in the army, it was extremely important that he be found

not guilty, especially before a civilian court." (20). Somewhat later, the same person interviewed added: "For an important client[3], what may appear to be a small matter becomes extremely important." (20). Nevertheless, none of the lawyers interviewed said that they would be tempted to plead guilty when the client's social position was shaky.

A first degree murder charge automatically leads to entering a not guilty plea; the minimum 25-year penalty leaves no room for the possibility of a lighter sentence. Proceedings will then concern the guilt of the accused: "You should never plead guilty to first degree murder because it means 25 years; it's the ultimate penalty in the Criminal Code and you don't plead guilty to it. You say we're going to trial and let's see what happens." (13). "When a person is accused of murder, 9.9 times out of 10, unless the Crown takes the initiative to reduce the charge, it will go to trial because too much is at stake." (14).

We have identified six different factors that can be determining in the decision to plead guilty or not guilty. Some factors apply only to a guilty plea while others apply only to a not guilty plea. A number of factors can apply to either plea. The following table illustrates all of these various situations.

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[3]By "important client", the lawyer interviewed means those who have the financial ability to pay high fees: doctors, judges, senior government officials, politicians, etc.

PLEA:	FACTORS INVOLVED:
Guilty plea:	. Strength of the evidence . Tactics preferred by defence lawyer . Desire of accused to plead guilty . Temporary custody
Not guilty plea:	. Weakness of the evidence . Tactics preferred by defence lawyer . Desire of accused to plead not guilty . "High" social position of accused . First degree murder charge

Note: These factors are not given in order of importance (for example, from the most important to the least important factor). Our research approach, which is a qualitative one, does not allow us to make such classifications.

PROCEDURES STEMMING FROM A GUILTY PLEA

In this section, we shall attempt to explain the different practices and procedures involved in entering a guilty plea.

Before doing so in greater detail, we would like to give a brief definition of the bargaining practices that are closely linked to entering a guilty plea, practices that primarily take place between the defence lawyer and the Crown prosecutor.

On the basis of our interviews, we were able to distinguish two bargaining practices. The first involves the well-known practice of plea-bargaining as it is normally understood. In plea-bargaining, the accused agrees to plead guilty in exchange for a lighter sentence. This "transaction" may involve a reduction in the number of counts or even a reduced charge. In such situations, the Crown agrees to such a reduction in exchange for a guilty plea from the defence. Our definition of plea-bargaining matches that of the Canadian Law Reform Commission: "We define plea-bargaining as any agreement by the accused to plead guilty in return for the promise of some benefit. The parties to the agreement will usually be the accused and Crown counsel, but it is also possible for the police or the court to be party to the bargain." (Law Reform Commission: 1975, p. 45).

The second bargaining practice we wish to discuss involves sentence-bargaining. In sentence-bargaining, the guilty plea is not on the bargaining table. The defence lawyer and his client have already decided to plead guilty. Counsel for the defence and for the Crown meet and discuss the sentence in an attempt to arrive at a common position. Various factors are taken into consideration. (These factors will be analyzed later. As an example, we might mention previous convictions, the seriousness of the offence, and the social position of the accused.) If agreement is not reached, the defence lawyer may attempt to bargain with a new Crown prosecutor (at a later stage of the proceedings) or plead the sentence before a judge in court.

One of our interview subjects believes that sentence-bargaining is much more common than plea-bargaining: "Genuine plea-bargaining is not something we really do here. Real plea-bargaining is when the Crown is willing to come to a compromise on the sentence in exchange for a plea of guilty on one or two counts. Here, more often than not, when we say we're ready to plead guilty it's because the guy is a goner, which means that essentially, the bargaining has much more to do with what kind of sentence the offence really deserves." (07). In his comment, the lawyer does not raise the issue of the reduced charge to which plea-bargaining leads directly (the Crown agrees to reduce the charge on condition that the accused pleads guilty). But

according to much of the information we collected about reduced charges, it would appear that it is not a widespread practice: "It's easier to get the sentence reduced than to get the charge reduced." (15) Bargaining "does not often revolve around reducing the charge, but rather on having the sentence reduced." (12). "When the charge is reduced, the sentence naturally is reduced along with it; but there aren't that many cases in which the charge is reduced and in order for it to be possible, it has to be an appropriate kind of case. If a man enters a bank carrying a submachine gun, you can talk to as many Crown prosecutors as you want, and you won't find one who will be willing to reduce the charge to theft." (19). It would appear that a great deal of bargaining has to do strictly with the sentence without the guilty plea providing any pressure whatever on the Crown. (More details will be provided on this subject in the chapter on sentencing.)

In the following pages, we shall analyze in greater detail how bargaining takes place in practice. To begin with, we shall attempt to locate the role of pleading the sentence in this context (by this we mean the recommendations made to the judge by both lawyers when they have been unable to come to an agreement or when one or other of the lawyers did not want to bargain).

Pleading and Bargaining:

Pleading guilty forces the defence lawyer to make a choice: to bargain with a Crown prosecutor over the sentence or the plea or to plead the sentence before a judge in court. We believe that this is a very important matter because it calls into question the idea of immediately and flatly associating bargaining with waiving the trial. Pleading the sentence is often used as a step following bargaining, as a last resort when agreement cannot be reached with the Crown: "You plead when you have been unable to bargain; if you succeeded in striking a good bargain why would you plead?" (19). This point of view only partly represents the role of pleading, which we believe should be understood much more broadly.

Although it is infrequent, there are lawyers who prefer to plead the sentence rather than plea-bargain: "It's a personal matter, but I prefer to plead my sentences rather than bargain them... I frequently found that when you plead, you get a better sentence." (02). The lawyer also added that this might have been a function of his approach to criminal law, which was to represent a small number of accused persons at the same time and hence to have much more time available for each of them. His success could then be explained as a result of the time he was able to devote to preparing each case.

Speaking of this relation between pleading and bargaining, one of the lawyers interviewed (11) told us that his approach to the two alternatives varied from one city to another. In St-Jérôme, for example, he claimed that it was extremely difficult to come to an agreement with the Crown prosecutors because their proposed sentences were always very heavy. However, the judges appear to be very lenient and the results obtained by pleading were highly satisfactory. In Joliette, on the other hand, the situation is quite different. There, it is easier to bargain than to plead because the proposed sentences are always very light. The same lawyer felt that in Montreal, it varied from case to case and from one Crown prosecutor to another, and that generally speaking, he used bargaining approximately as frequently as he pleaded the sentence.

This would indicate that pleading a sentence may be a procedural approach whose results in terms of the sentence may be compared in some instances to bargaining.

Pleading also plays a very important role in the bargaining process itself. The ability of the defence lawyer to obtain good results for his clients in bargaining is partly linked to his presumed success in pleading. For example, if a defence lawyer is able to obtain relatively light sentences for his clients by pleading, we may assume that Crown prosecutors will generally be willing to bargain with him on the basis of the level of sentence

he has been able to achieve: "The better you are as a lawyer the more good deals you will be able to get because the Crown prosecutors are afraid of you and know that you have the respect of the judges." (08). "If I know that I will be able to get a good sentence by pleading and if the Crown prosecutor knows me and knows that I can do so, that I work well and that the judges believe me and that I have credibility with them, then it's obvious that they'll be willing to go lower." (07). Somewhat later in the interview, the same lawyer added: "It's easier for you to bargain if the other party thinks that you're capable of doing better." (07).

The defence lawyer's reputation in pleading therefore plays an important role; of course the lawyer in question will have to be in the habit of using this procedure and achieving good results with it. Otherwise, the results of bargaining may be affected: "If you bargain all the time, you gain the reputation of someone who bargains all the time and who is afraid, and then you stand to lose some ground." (07).

Specific Recognition of the Parties Involved:

Apart from the accused themselves, there are four major groups who can play a determining role in the bargaining process: the defence lawyers, the Crown prosecutors, the judges, and the police. We have seen how a defence lawyer's reputation in

pleading can have an effect on the sentences he can bargain with Crown prosecutors. This type of evaluation, which is based on the presumed performance of defence lawyers, is certainly one that is fostered by the defence lawyers themselves in their dealings with Crown prosecutors, judges and the police. Almost universally, the lawyers' interviews emphasize the importance of making use of such assessments: "I find that 50 per cent of a criminal lawyer's skills involve knowing the people with whom he works: the judges, the Crown prosecutors, the police officers." (07). We shall attempt to specify the nature of such assessments and the role they may play in the bargaining process.

Crown Prosecutors:

Defence lawyers try to assess the severity of the Crown prosecutors in order to anticipate (approximately) the type of sentence each will be ready to bargain: "Some are tough about everything, some are tough about nothing and others are tough about some things and not about others." (19). A little later, the same interviewer added: "If you know that prosecutor X feels that burglary is worse than the atomic bomb and you have a client who is accused of burglary, then to the greatest extent possible you'll try not to have anything to do with prosecutor X." (19).

From a completely different standpoint, friendly or sympathetic relations between defence lawyers and some Crown

prosecutors can also in some instances affect bargaining. What this amounts to is no more than saying that personal relations between lawyers are not unheard of in social relations in general. Hence it is easy to understand that some lawyers may get along well or get along very badly in handling a criminal case simply for personal reasons (which it would serve no purpose to list here). In view of this, some defence lawyers believe that it is important for their work, and more specifically for being able to deal satisfactorily with the bargaining process, to maintain cordial relations with the Crown: "It is important to have good relations with Crown prosecutors and to get along well with them because when you go to see them you can discuss with them and come to an agreement on a satisfactory and appropriate sentence." (06). "One must remain courteous towards Crown prosecutors even when one disagrees with them." (08). In speaking of bargaining, one of the lawyers interviewed made the following comment: "It is an art that depends on the healthy relations we have with the Crown; the better our relations with the Crown, the better our results. There is no point in fooling ourselves; it's a game of charm and hypocrisy." (09).

These very subjective ways of sizing up Crown prosecutors are tied to a selection strategy. As we are already aware, a criminal proceeding involves a series of successive stages. In many criminal cases, one encounters a different Crown prosecutor

at each separate stage. For offences deemed to be important (e.g. murder, sexual assault and some types of fraud) the same prosecutor may handle all steps from the start to the end of the case. For cases that are considered less important by the Crown Attorney's Office, a new prosecutor appears at each stage of the criminal proceeding. In these cases, the defence will adopt a selection strategy, i.e. will attempt to plead guilty at the stage in the proceedings where the most suitable Crown prosecutor is dealing with the case: "Since the Crown prosecutor changes in each courtroom, we assume that even if things didn't work with one, they might well work with another." (06). In some cases, counsel for the defence can check in advance to see who will be the Crown prosecutor at any given stage: "If you really want to find out, you can, sometimes a week ahead of time, by calling the Crown Attorney's Office and asking which prosecutor will be assigned to which courtroom and hence responsible for the cases on a given date. They tell us because they often think that it's for settlements and that it will avoid the need to subpoena witnesses." (07). Others prefer not to wait for the next stage and decide to plead the sentence before a judge of the court: "If I'm dealing with prosecutor X, I know that I stand a better chance to get the sentence I want than I have of coming to an agreement with him, because to deal with him I'll have to go still higher." (02).

It should be said that there is nothing systematic about this selection strategy. In fact, in the vast majority of cases, defence lawyers get along reasonably well with Crown prosecutors: "I would say that at least 75 per cent of Crown prosecutors will bargain reasonably with me and we will be able to come to an agreement, and that there are perhaps 20 or 25 per cent with whom it is more difficult to deal." (20). "I get along well with 80 to 85 per cent of the Crown prosecutors I deal with." (03).

Judges:

It is also very important for the defence lawyer to know the judges well: "Experience teaches us that it is very often more important to know the judge we are dealing with than it is to know the Criminal Code." (11). A little later, the same interview subject added: "It is not before just any judge that we will be able to settle every kind of problem for every kind of crime." (11).

As with the Crown prosecutors, defence lawyers will attempt to recognize how strict the various judges are. Some lawyers believe that there is a great deal of difference between the judges: "If a given individual were to appear on the same morning before twelve different judges on the same charge, I am not convinced that out of the twelve judges there would be three identical sentences." (11).

In order to predict (approximately) what will be the attitude of the judge to sentencing, the defence lawyer will attempt to identify any social prejudices the judge might have concerning the accused and the various types of charge: "It is important to know your judges, their habits, and any special quirks they may have towards certain types of offence, their prejudices about certain types of accused persons; it can even involve the race or sex of those we represent." (14). "Some judges are stricter about sexual offences, while others take a harder line on property offences; I think each one has areas where sometimes he tends to be a little harsher." (06).

As a result, defence lawyers do the same thing with judges that they do with Crown prosecutors, that is to say they adopt a selection strategy. The lawyer will make an effort to introduce his client to the judge who will be the most sympathetic to his case. This selection process can take place in several different ways. In this connection, we have already identified a number of practices used by defence lawyers, and it must be admitted that most of them are used more to eliminate the "worst" judges than they are to select the "best".

The defence lawyer can select judges in the same way as he selects Crown prosecutors, by taking advantage of the fact that different judges are faced at the various criminal proceedings stages and hence by entering the guilty plea to the judge

considered to be most sympathetic to the client's case. According to one of the lawyers interviewed, this means that the guilty plea must have been prepared from the very outset of proceedings in order to be in a position to benefit from the largest possible number of judges: "If you decide to bargain from the very outset, it is very easy (to select judges) because you will have a pro forma hearing, you will easily get a postponement and hence another pro forma hearing; then there is the preliminary hearing and finally the trial." (19).

At a number of stages in the criminal procedure, the defence lawyer will be able to consult the judges' timetable and know in advance who will be hearing his case. He will thus be able to select a date on the basis of the characteristics of the scheduled judges. This method is not, however, infallible. Sometimes a judge who is supposed to sit on a specific date according to the timetables planned by the administration will be replaced at the last minute. This method of selecting judges is more difficult to apply at the trial stage. Several trial courtrooms operate at the same time. So although the lawyer can choose the date, he cannot choose the courtroom in which his case will be heard: "We can select at the level of the pro forma hearing, and the preliminary hearing because we are able to analyze the judges along with the dates to determine when they will be sitting in which courtroom, except that once we are

dealing with the preliminary hearing, there is a problem in that a trial date is established at that time and we are no longer able to select; there are seven or eight trial courtrooms in use at the same time and we have no advance idea in which our case will be heard" (06).

The selection of judges may also be a bargaining tactic: "There is always a way of coming to an agreement with the Crown by saying that you're ready to settle on a given case but not before a specified judge." (09).

Sometimes the defence lawyer can call upon the judgment of people who are members of the staff at the court: "Let's say that we don't know whether such and such a judge is lenient towards a given type of sentence and that we are in a hurry and the case is being heard by this judge; in such cases we might ask the legal secretary for an opinion... The legal secretaries know things like that because they've been working with the judges for years." (08).

The defence lawyer also attempts to determine the attitude of judges towards sentence-bargaining and guilty pleas. It is important for both parties to anticipate the judge's reaction to any joint sentencing proposal. The reaction may vary from one judge to another: "Some judges will accept a plea-bargaining agreement made with the Crown prosecutor. There are some judges

whom you assume will assess a lighter sentence than you could bargain for with a Crown prosecutor. There are still others whom you know will not accept a plea-bargain that might have been made between counsel for both parties." (03). "You can never promise a client that he's going to get the sentence that will be suggested by the Crown and the defence jointly." (15). "There are judges who make a point of never following the recommendation of the lawyers. They emphasize that they are responsible for sentencing. They feel very uncomfortable when joint sentencing suggestions are made to them." (04).

To deal with this problem, sometimes the two lawyers consult the judge outside of the courtroom concerning the joint sentencing proposal they intend to put forward in court: "If a joint agreement on sentencing appears to us to be sensitive, sometimes we ask the judge if he concurs with the agreement; if we get the impression that he does not agree, then we will not put the proposal to him." (09). Not every judge will accept such a meeting: "There is one judge I never ask to meet because I know in advance that he's going to say no." (20). It would appear, however, that the vast majority of judges do agree to meet both lawyers: "Seventy-five per cent of judges will agree to see you, whether in back, in the hall or even in their office, it doesn't matter where, but they will agree to hear you." (03).

What is the judge's real contribution at such meetings? According to information that we received, the judge does not play an active role in the bargaining. He gives his opinion on the sentence proposed by the two lawyers without really leading discussion or bargaining on the subject. When the judge's opinion runs counter to the joint suggestion by the lawyers, they are invited to take steps to meet a new judge and to submit their suggestion to him in turn: "There are some judges who tell you that they understand your situation but who say that they are simply not ready to accept it and that you should go elsewhere." (10). "There are judges who will tell you that, the way you have explained things, it makes sense and it's not unreasonable. Or he will say no, and that if you plead guilty you can expect to get more than you suggest and that he finds your suggestion unreasonable. If you do not want to plead guilty, I'll give you a postponement and the next time the case comes up make sure that it doesn't come up before me." (02). According to the defence lawyers interviewed, the vast majority of judges will support a joint sentence agreed to between the two lawyers. Also, both lawyers should be present at such meetings. The presence of only one of the two would undermine the judge's credibility.

Once the trial stage is reached, it is difficult for the two lawyers to hope to be able to bring the case before a new judge if the judge sitting refuses to support a joint sentencing

proposal. According to the lawyers interviewed, such a situation may lead to different consequences. Sometimes, the case will follow its course and the defence lawyer will attempt to exonerate his client, in spite of the information given to the judge informally outside of the courtroom. Also, the defence lawyer may appeal the sentence (if the client so desires and, where the case is not one covered by legal aid, if the client has the financial resources to pay for the appeal costs): "We can continue proceedings knowing that we're going to lose but knowing also that we have grounds for an appeal." (18). In other cases, the lawyers will accept the sentence that the judge decides to pass. In still other cases, the judge may decide to remove himself from the case on grounds that he is unsuitable to hear it to the end.

We saw earlier that there was a degree of uncertainty involved in how judges react to a joint sentencing recommendation (however, our interviews appear to show that the vast majority of judges will support a joint sentencing recommendation from both lawyers). The informal meetings requested by lawyers with the judges make it possible to eliminate some of this uncertainty. However, some judges will refuse to meet both lawyers outside of the courtroom. That being the case, uncertainty remains about how they will react to a joint sentencing proposal. This can sometimes mean enormous stakes for the accused: "Once we jointly

proposed a 12-year sentence to a judge and he gave us 20 years; we should have gone to talk to him first." (05).

Police Officers:

Police officers do not play a very active role in the bargaining process: "For a number of years now, there have been directives, to the Montreal police among others, that investigators should not become involved in sentencing because sentencing is the sole jurisdiction of the Crown. Such directives are not always followed to the letter, but let's say that the police are far less involved at this level than they were before." (19). When the defence lawyer wants to enter a guilty plea and bargain on the severity of the sentence, he generally does it on a one-to-one basis with a Crown prosecutor. Canadian writers like Brian Grosman (1969), Richard Ericson and Patricia Baranek (1982) have shown that the police can have a determining influence in the handling of criminal cases. The information controlled by the police, as well as police relations with the accused and Crown prosecutors, are all factors that show the importance of police discretion. Our interviews, which were strictly with defence lawyers, did not give us access to such information. The following comments therefore represent the perception of defence lawyers on this matter.

We have already shown how the strength of the evidence held by the Crown could affect the defence's decision to plead guilty. It should be added that the reputation of the police investigator, with whom rests the responsibility for collecting this evidence, may also be taken into consideration by the defence lawyer and lead him to plead guilty and subsequently to bargain with the Crown (in cases where the defence does not wish to plead the sentence before a judge): "Often when you know that a certain police officer has the case in hand, you know that the case against you is going to be very strong. On the other hand, with other police officers, you know that he's going to mess up the case and that you stand a very good chance of winning your defence." (16).

We have little information about the influence of police investigators on Crown prosecutors. We were told that such influence appeared to be much greater at the Montreal Municipal Court than at the Court of Sessions of the Peace: "When you enter the municipal courtroom you always get the impression that it's a police court and that they are the ones who decide." (02). As a result, bargaining appears to be much more difficult there: "I worked at the Montreal Municipal Court for two and a half years and I can tell you that it was much more like open warfare; opportunities for bargaining were far fewer, and there were even far fewer opportunities for discussing the cases." (09).

At the Montreal Court of Sessions of the Peace, a police investigator may have privileged relations with people in the Crown Attorney's Office and this can allow him to influence the bargaining: "We often see cases in which the Crown prosecutor will come to an agreement with the defence that the police are unhappy with. The police investigator then makes a complaint against the Crown prosecutor to the chief prosecutor, arguing that he settled for three years when he deserved five." (11) In a number of very specific cases, a defence lawyer may ask a police officer to intervene on behalf of his client with the Crown prosecutor: "We may have particularly good relations with certain police officers that might allow us to settle the case favourably, but this is fairly unusual; it is certainly not the rule." (09).

Presenting the Accused:

The stated objective of defence lawyers in entering a guilty plea is to obtain the lightest possible sentences for their clients. That being the case, the presentation of the accused to the Crown prosecutor and the judge is very important: "It's a matter of charm; in other words simply trying to present your client in the best possible light." (03).

There are three types of presentation. The first type involves the accused's general appearance before a judge in

court: well-dressed, correct language, sober attitude: "Most of all, the court prefers an attitude that is calm, that has confidence in the system and that exudes both this confidence and calm." (18). The second type of presentation has to do with the accused's psychological and social characteristics that may lead the Crown and the judge to be lenient. For the defence lawyer, this means bringing out the personality traits of the client that show he is ready for social conformity and integration: "In a criminal case, at the sentencing level, it's very important that the client have a job." (16). In general, two aspects appear to be very important: family circumstances and having a job. These considerations mean that for criminal system officials, the accused's social integration (in terms of conformity) is a sign that he is abandoning his delinquent behaviour. The third type of presentation has to do with the accused's criminal record. The defence lawyer can use the absence of previous convictions (or the absence of serious convictions) to appeal to the leniency of the Crown prosecutor and the judge. A bad criminal record leads to the opposite effect; in other words, the Crown and the judge will tend to pass a heavier sentence: "The more previous convictions that your client has, the tougher and drawn out the bargaining becomes." (02).

SENTENCING

This chapter covers the various aspects of sentencing following the entering of a guilty plea, particularly the bargaining process.

Defence lawyers generally consider bargaining to be a procedure that makes it possible to obtain lighter sentences: "Bargaining allows us to achieve spectacular, really spectacular, results, in the sense that we can get ridiculously light sentences in reasonably serious cases." (09).

We have already described two types of bargaining, one centring solely on sentencing and the other on the guilty plea (for the latter, the sentence is also an important factor in bargaining, but the distinction lies in the presence or absence of the guilty plea used by the defence as part of the bargaining stakes). We shall analyze in greater detail how sentencing is involved in each form of bargaining.

Generally, when bargaining bears strictly on the sentence, the defence lawyer and his client recognize the cogency of the charges and prefer not to go to trial. In such instances, the defence will attempt to choose the Crown prosecutor and judge who are likely to be the most sympathetic to the case or to the accused. The defence also attempts to present a positive image

of the client (in the presentation categories we described earlier: general appearance, social conformity, previous convictions). These are the main tactics available to the defence when it believes that it cannot dispute the charges. They are used with a view to obtaining leniency from the Crown and the judge.

Sometimes the defence also bargains a sentence by bringing into play its right to dispute the charge (according to the information we have gathered, it would appear that this kind of bargaining is much less frequent than bargaining strictly on the sentence). In these instances, the lawyer's position is a difficult one. If the evidence held by the Crown is very weak, the defence may risk bargaining for a light sentence on behalf of the accused when he could have obtained an acquittal. Hence the evidence should be fairly strong to justify entering a guilty plea and fairly weak to justify disputing the charge where there is no agreement with the Crown: "We bargain for a sentence on the basis of weaknesses in the Crown's evidence that are too minor for us to want to proceed, but significant enough for us to be willing to take a chance if we are not offered a good deal." (04).

The defence lawyer may make deals on guilty pleas in exchange for the withdrawal of certain charges (whether of the

same type or not). This makes it possible for the defence and the Crown to agree on a lighter sentence.

The bargaining may also bear on reducing the charge itself, for example from murder to manslaughter, from robbery to theft, from importing a narcotic to possession for the purpose of trafficking, etc. In these instances, the defence lawyer will agree to enter a guilty plea in exchange for a reduced charge. This type of bargaining may have a number of consequences.

The Crown may deliberately lay a more serious charge knowing that there will be bargaining to reduce the charge to a lesser one: "When the Crown prosecutor knows that there is going to be plea-bargaining, he lays a more serious charge because he knows that the person is going to want to plea-bargain for a lesser charge." (10). (The same situation may arise where there is bargaining on reducing the number of charges. In such instances, the Crown deliberately lays more charges. According to Ericson and Boranek, this is a practice frequently used by the police.)

A reduced charge also leads to a lighter sentence. On the other hand, the sentence would have been lighter still if the reduced charge had been the original charge: "If you begin with a charge of possession of a narcotic for the purpose of trafficking and reduce it to simple possession, Crown prosecutors will frequently want more than they would have asked for if the

guy had originally been charged only with possession; nevertheless, it will still be far less than if he were found guilty of possession for the purpose of trafficking." (19).

Sometimes the Crown prosecutor agrees to reduce the charge on condition that the defence and the accused agree to a sentence of a certain quantum: "Occasionally, a Crown prosecutor refuses to reduce the charge unless there is also agreement on the quantum of the sentence to be assessed." (14).

For most of the lawyers we met, sentencing is the essence of bargaining. However, one of the lawyers interviewed considers that reducing the seriousness of the charges is also very important because it is directly involved in the issue of the criminal record: "I always attempt to get something at the level of the charge, to lessen the seriousness of the offence, because we know that it can have an influence later in connection with other offences that might be committed and on the criminal record." (03). In a report written for the Quebec Bar, the lawyer Gilbert Morier also emphasizes that a guilty plea "... has an impact as a legal precedent on any future plea in another case." (translation) (Morier: 1978, p. 33).

For defence lawyers, one of the most important factors in determining the quantum of the sentence is the accused's criminal record: "The criminal record is the key factor in determining

the quantum of the sentence." (09). "Previous convictions are the most important factor. If the accused has a two-page list of previous convictions, it doesn't matter how good a lawyer you are, you can't perform miracles and you can be sure that the person will remain behind bars." (06).

We noted two comments on how previous convictions are taken into account in bargaining.

When the previous convictions are on charges that differ from those being bargained, the effect on the sentence will be less significant than when the previous convictions are for the same charges.

Judges and lawyers take into consideration the sentences that the accused has served for previous convictions. When the accused returns to court as a result of charges for which he has previously been found guilty, the sentence he will obtain will not be less than the sentence he was assessed before: "It would be very unusual to get a lighter sentence than the one you received earlier. If you were given three years for robbery and you are arrested once again for robbery, we know at the outset that you will not be assessed less than three years and that the judge will likely give you a harsher sentence." (02).

At the trial level, some lawyers claim that sentences passed at the Superior Court assizes are harsher than sentences from the

Court of Sessions of the Peace: "When you go before a judge and jury, not only do you get a deluxe trial but also a deluxe sentence." (06). "The sentences of the Superior Court are much harsher than those of the Court of Sessions of the Peace. I once appealed a conviction at the assize Court when the sentence was in my opinion ten times harsher than it would have been had the case been heard at the Court of Sessions of the Peace, and the Appeal Court upheld my appeal." (09).

A NUMBER OF SPECIFIC CASES

In this final chapter, we have collected various sorts of information that were difficult to include in the earlier sections but which are relevant to our subject.

Fees:

For defence lawyers, the usual method of assessing fees involves determining the amount of time they worked, or will work, on the case. However, some lawyers, in specific instances, take into consideration the sentence for which they might be able to bargain with a Crown prosecutor. In these cases, the fees will be established on the basis of the results: "I have clients who come to see me and who pay me to get results; they tell me that if you can get me one year I'll pay up, otherwise I'll go and see someone else." (19). The same interview subject added: "Let's say that the client believes that he might get from one month to three years in jail; he will be willing to pay you a lot more if you can get him weekends instead of three years." (19). "There are guys that I've represented fifteen times. I tell them that the fee will be such and such and they tell me that they'll pay me twice as much if you can get me only this much time. I don't say no; I do whatever is possible." (20).

Agreements:

It is readily understandable that the defence lawyer and his client should not want to see the judge increase a sentence that has been previously bargained between the defence and the Crown prosecutor. As we indicated earlier, where there is uncertainty the two lawyers attempt to meet the judge outside the courtroom to obtain his opinion on the sentence they plan to propose. But there may also be dire consequences for the defence lawyer and the accused where the judge reduces the sentence agreed to between the defence and the Crown prosecutor. One of the lawyers interviewed (11) gave us an example to illustrate very clearly what can happen in such situations. The case in question was sexual assault. The two lawyers had agreed to a three-year sentence. They had taken the precaution of meeting the judge outside the courtroom to obtain his opinion on the sentence. The judge had clearly indicated that he agreed. At the end of the hearing, before imposing the sentence, the judge asked the accused if he wanted to add anything. Despite his lawyer's advice to the contrary, the accused attempted to diminish his responsibility by stating that he had been provoked by the victim. In spite of the contrary evidence from the victim when the Crown had her testify, the judge upheld the accused and reduced the sentence from three years to six months imprisonment. The Crown prosecutor appealed and the Court of Appeal increased

the sentence to five years imprisonment. It is therefore always preferable, according to the defence lawyer, for the judge to pass the sentence agreed to by the two lawyers.

The Practice Courtroom:

At the Montreal Court of Sessions of the Peace, there is, in room 408, what is called a "practice courtroom". To this room are sent all cases that escape the formal steps involved in criminal procedures: "It is a room where there are never any witnesses, where cases can be reheard, where you can plead guilty, assign dates - it's a catchall - everything that can't be put elsewhere is put there." (6). It is in fact a very good place for a defence lawyer who wants to enter a guilty plea. At any stage of the criminal procedure (following appearance and prior to trial) a lawyer who wants to plead guilty need only go to room 408.

There a number of advantages to the room. The same Crown prosecutors and the same judges are always assigned there. This means that it is easier for the defence to select prosecutors and judges: "In room 408 there are always three judges; on Monday it's a certain judge, on Tuesday and Thursday, it's another and on Wednesday and Friday, yet another; it's impossible to go wrong." (06). The same interviewer added: "What I like best about the room is that you get to know the Crown prosecutors who

are assigned there and you can always make arrangements in advance for a good agreement." (06).

It appears that the judges assigned to this courtroom, in the vast majority of cases, approve the joint sentencing proposals made by the two lawyers: "If you put forward an agreement in room 408, 99 per cent of the time the judge will assess this sentence." (17). "Now everything works that way; if you have an agreement and you go to room 408 and your agreement is reasonable, the judge will go along with it." (02).

Court Administration:

Of the lawyers we met, two indicated (one directly and the other indirectly) that in a number of special cases, a defence lawyer may bargain with persons responsible for court administration (Chief Justice and/or Deputy Chief Justice) or the judge who will hear the case. In exchange for a sympathetic judge, the defence lawyer will promise to enter a guilty plea: "Normally you don't know which judge will hear your case when you set a trial date; you don't have the right to say I want that one. Except that sometimes, because the case is a drawn out one, it is in the interest of everyone to settle it and they will occasionally say plead guilty and we'll assign a good judge. But this isn't something that happens every day; it's the exception. It's not every day that you can go to see the Chief Justice to

tell him give me this judge or that judge." (05). "I'm not at all in the habit of meeting judges, whether the Chief Justice or the Deputy Chief Justice, to ask for a specific judge in a given case; it happens but it's not a practice that I use." (15).

Appeals:

We now go somewhat beyond the context of plea-bargaining to describe a number of aspects involving appeals. These appear to us to play an important role in the handling of criminal cases.

The decision not to appeal is often linked to financial considerations. Defence lawyers who discuss this matter all mentioned that appeal costs were always very high: "Very often we have good reasons to appeal but the client does not want to because it's too expensive." (18). "I would appeal much more often if my clients were wealthier; it's not me who's not willing to go along it's the client. He would rather spend his three months in jail than spend $5,000 on appeal costs, so he takes his three months and there is no appeal." (20). Accused persons who are defended by permanent legal aid lawyers don't encounter this kind of problem. However, the appeal must be approved by designated legal aid authorities. An appeal launched by a lawyer in private practice acting under a legal aid contract must also undergo this authorization process. However, lawyers in private

practice claim that legal aid fees are so low that they are unable to take on appeals under such conditions.

Financial considerations are linked to the defence lawyer's working time: "There are perhaps 10 per cent of lawyers who plead before the assizes; it's a financial consideration. If you are in held up in assizes for a month or a month and a half, you have no time for anything else." (13).

The defence lawyers workload may also present problems: "I must admit that perhaps we don't appeal often enough because our case load is too heavy." (This comment was made by a legal aid lawyer.)

It is sometimes difficult for the defence lawyer to appeal a guilty judgment for reasons linked to the manner in which the judge passes judgment. In some cases, it is difficult for the judge to apply "reasonable doubt". As a result, the judge may adopt the middle ground, which consists of passing a judgment of guilty accompanied by a light sentence: "There are judges who never give an acquittal because they do not know whether they should interpret the doubt or not. Thus the easy solution for many judges is to say that the defendant is guilty but to add that they will not be harsh and give a light sentence." (11).

In such a situation, the accused is not interested in appealing because he is satisfied with the sentence: "There are

times when we might have damn good reasons to appeal but, as we say in professional jargon, the judge gave us the benefit of the doubt on the sentence. Hence it is obvious that the client will not want to appeal even if we have the best reasons in the world to appeal; he is happy, it's over, he has got rid of the problem and says I'm going home because I have a suspended sentence for robbery. You're furious because he should never have been found guilty of the robbery in question, but you don't appeal because your client won't allow you to appeal." (14). When the accused is willing to appeal his conviction, it is possible that the Crown might then decide to appeal the sentence. When this happens, the accused can find himself with a harsher sentence: "You always run the risk when you appeal the conviction, when the sentence was light, that the Crown will appeal the sentence; it's something you should always take into consideration." (15). When a situation like this occurs, counsel for the defence and for the Crown may bargain on withdrawing the appeals: "There might be circumstances where an individual has excellent reasons to appeal, but the Crown decides that it is not satisfied with the sentence and enters an appeal on the sentence. What happens then? What might well happen, is that the defence and the Crown might bargain for the Crown to withdraw its appeal of the sentence if the defence is willing to withdraw its appeal on the conviction." (14).

According to the defence lawyers that raised this issue, it is fairly difficult to win cases on appeal. On an appeal of the conviction, one must not only prove that the judge made a mistake, but also that the mistake was a determining factor in the verdict. (18). Those interviewed criticized the Appeal Court for having virtually no representation from judges with experience of criminal law practices: "Of all the current Appeal Court judges, there is only one who has a great deal of criminal experience." (20).

Lastly, a distinction is needed between appeals from the Court of Sessions of the Peace and appeals from the assize Court: "The Appeal Court does not like at all to intervene in a jury verdict; it is much easier to quash a single judge's decision than to quash a jury's verdict." (20). This is true of conviction appeals. As we mentioned already, assize Court sentences appear harsher than Sessions Court sentences. It is therefore possible that at the assize Court, that there are more sentence appeals and that they are easier to win than conviction appeals.

CONCLUSION

To conclude, we shall identify the factors that appear to us to be particularly important in understanding practices involved in settling criminal cases.

- The most frequently used bargaining practice has to do solely with the sentence and does not use the guilty plea as a stake in the bargaining.

- Pleading the sentence (and not the trial) is the alternative practice used by the defence lawyer when there is disagreement with the Crown prosecutor in bargaining solely over the sentence.

- Pleading the sentence is an effective working practice for a number of defence lawyers.

- Judges are regularly consulted outside the courtroom concerning the proposed sentence that the defence lawyer and Crown prosecutor wish to put forward.

- The sentence for a reduced charge (following bargaining) is always lighter than the sentence that would have been assessed on the original charge (prior to the reduction). On the other hand, the sentence would have been lighter still if the reduced charge had been the original charge.

- Where the accused has previous convictions on the same charge as the one for which he is again convicted, the quantum of the sentence he will be assessed for this charge will not be lower than the quantum of the sentences that he was assessed for the previous convictions.

- When certain judges have difficulty interpreting reasonable doubt, they take a middle position which consists of convicting the accused while assessing a light sentence.

- There may be bargaining on withdrawing the appeals made by the defence (appeal of the conviction) and the Crown (appeal of the sentence).

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APPENDIX I METHODOLOGY

Our research is based on twenty interviews with defence lawyers in the Montreal area. We shall define the criteria we used to select these lawyers.

We used homogeneity criteria to define the target population for our research objectives. The persons to be selected were to have the following characteristics: (1) be a lawyer specializing in criminal cases; (2) practise in the Montreal area; (3) practise at the Montreal Court of Sessions of the Peace. The limited framework in which the research could take place explains the choice of such a restricted population.

Following the procedures recommended by Glaser and Strauss (1967), we used heterogeneity criteria to diversify our sample. (Homogeneity criteria make it possible to define a target population, while heterogeneity criteria make it possible to select a varied sample within this target population.) Diversifying the sample makes it possible to obtain a greater variety of information. It also makes it possible to take into account the different sub-groups that there may be in a target population. We chose the following selection criteria: sex (men/women ratio); private practice/legal aid (we wanted to take into account the difference between permanent legal aid lawyers and private practice lawyers representing accused persons under legal aid contracts); year of admission to the Bar (this criterion allows us to obtain a sample of lawyers with varying

years of experience); private practice law firms (we did not select two lawyers from the same office).

To establish our target population (homogeneity criteria) we went to the Montreal Court of Sessions of the Peace and obtained the rolls (timetables for the various criminal cases) in which the names of the defence lawyers are entered. By consulting these rolls (August-September 1984) we established a list of defence lawyers containing approximately 100 names. We obtained the addresses and telephone numbers of these lawyers by consulting the Quebec legal telephone directory (Frenette-Lecoq: 1983). We did a telephone check to make sure that each of the lawyers was in fact a specialist in criminal law and not a civil law lawyer who occasionally handled criminal cases. This procedure eliminated approximately twenty subjects.

We selected women and men separately to obtain a sample of five women and fifteen men. (We do not think that women criminal lawyers represent 25 per cent of defence lawyers, but the restricted size of our sample led us to choose at least five.) Similarly, we selected five permanent legal aid lawyers. It is easy to identify legal aid lawyers from the list provided in the Quebec legal telephone directory. We selected ten lawyers in private practice working for different law firms. It was easy to use the year of admission to the Bar as a selection criterion,

because it is given beside the defence lawyers' names in the legal telephone directory.

The first contact made with the lawyers selected was through a letter sent to them explaining the general objectives of our research and requesting their participation in an interview. The second contact, by telephone, verified whether the lawyer agreed to be interviewed and, if so, under what conditions (time, date, location, etc.). Although eight persons contacted declined, we were able to substitute for them lawyers with the same characteristics.

The length of interview varied from 40 minutes to 2 1/2 hours, with the average approximately 1 1/4 hours. The interviews were held from October 1984 to April 1985. (In a number of instances, the defence lawyers were difficult to reach. We sometimes had to wait several weeks before making telephone contact.)

APPENDIX II

STATISTICAL DESCRIPTION OF THE SAMPLE

Note: We wanted to make sure that the statistical description of the sample would not allow people to identify the interview subjects. For this reason, we did not perform any variable cross-correlations.

Sex

Women:	5	25%
Men:	15	75%

Status

Legal aid (permanent):	5	25%
Private practice:	15	75%

Age

Category:	26 - 30:	2	10%
	31 - 35:	7	35%
	36 - 40:	7	35%
	41 - 45:	3	15%
	46 - 50:	0	0
	51 - 55:	1	5%

Average: 36.9%

Criminal law income
(private practice subjects only)

Percentage of income:	100%:	10	67%
	90%:	2	13%
	80%:	1	7%
	75%:	2	13%

Year of admission to the Bar

Category:	1960-64:	2	10%
	1965-69:	2	10%
	1970-74:	7	35%
	1975-79:	4	20%
	1980-84:	5	25%

Sixties:	4
Seventies:	11
Eighties:	5

APPENDIX III

LIST OF QUESTIONS

Here are the main questions that we asked in the interviews.

General Question:

In general, I am aware of the main stages involved in criminal procedure. I would now like to know how you yourself, based on your professional experience, would prepare and conduct a criminal case.

Questions Concerning Criminal Justice System Officials:

What are your contacts with Crown prosecutors?

What are your contacts with judges?

What are your contacts with the police?

- How is evidence collected by the police?
- Do the police sometimes impede you in your work?

Except for prosecutors, judges and police officers, are there any other persons you feel are very important for your work?

Questions on Clients:

What are your contacts with clients?

- How are meetings with them run?
- Do you experience problems in arranging meetings with them?

- What, in general, are the attitudes of clients?
- Are there any differences between clients?
    - Based on social characteristics?
    - Based on the type of offence of which they are accused?

Do you ever let a client go to another lawyer?

- Under what circumstances?

Approximately how many clients do you meet per month?

With what offences are your clients charged most frequently?

Is there any type of offender that most defence lawyers are not accustomed to dealing with that you handle?

Questions on Plea-bargaining:

What do you think of plea-bargaining?

Generally, what does the bargaining bear upon (sentence, reduced number of charges, reducing the charge itself)?

What are the circumstances that will lead the bargaining to bear on one aspect rather than another?

Questions on the Defence:

Approximately, what percentage of criminal cases lead you all the way to a trial?

Approximately, what is the percentage of criminal cases in which you go as far as a preliminary hearing?

Approximately, what is the percentage of criminal cases in which you strike a deal with the Crown prosecutor?

Where there is disagreement with the Crown prosecutor, what steps do you take?

Approximately, what percentage of your clients are acquitted?