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SEEKING JUSTICE BY PLEA: THE PROSECUTOR'S ETHICAL OBLIGATIONS DURING PLEA BARGAINING

*Palma Paciocco**

Canadian Crown prosecutors enjoy tremendous discretionary power. They can leverage this power during plea bargaining by structuring the terms of plea deals and by engaging in aggressive negotiation tactics, thereby exerting a disproportionate influence on plea bargaining processes and outcomes. This article considers how Crowns should wield their power to shape plea bargains in light of their ethical obligation to seek justice. In particular, it considers how Crowns should identify the just case outcomes they will pursue through plea bargaining and assesses which bargaining strategies they should employ or eschew in pursuit of those outcomes. In the process, the article addresses a few especially thorny questions, including: whether Crowns should ever strategically overcharge defendants to facilitate plea negotiations; how Crowns ought to balance the accuracy of criminal charges against the fairness of criminal sentences when the two are in tension; and how Crowns can strike an appropriate balance between plea bargaining fairness and efficient case management. The article offers several concrete policy recommendations aimed at helping Crowns satisfy their ethical obligation to seek justice in the context of plea bargaining.

Les procureurs de la Couronne bénéficient d'un pouvoir discrétionnaire considérable. Ils peuvent tirer profit de ce pouvoir au moment des négociations sur le plaidoyer en utilisant des tactiques agressives, et en structurant les termes des accords sur le plaidoyer, exerçant ainsi une énorme influence sur le processus et le résultat de négociations. Cet article discute l'exercice du pouvoir des procureurs de la Couronne et comment ceux-ci devraient l'utiliser pour façonner les négociations à la lumière de leur obligation éthique de s'assurer que justice soit rendue. Cet article examine en particulier comment les procureurs de la Couronne devraient identifier les résultats considérés justes qu'ils poursuivront lors des négociations sur le plaidoyer et évalue les stratégies de négociation qu'ils devraient adopter ou éviter pour atteindre ces résultats. L'article aborde au passage quelques questions particulièrement épineuses, telles que de savoir comment déterminer si les procureurs devraient toujours surcharger stratégiquement les défendeurs pour faciliter les négociations sur le plaidoyer; comment les procureurs devraient établir un équilibre entre la justesse des accusations criminelles et l'équité des peines criminelles lorsque les deux ne concordent pas; et comment les procureurs peuvent parvenir à un équilibre approprié entre un processus de négociation sur le plaidoyer équitable et une gestion efficace des ressources judiciaires. Finalement, l'article propose quelques recommandations de politiques publiques visant à aider les procureurs de la Couronne à satisfaire à leur obligation éthique de s'assurer que justice soit rendue dans le contexte des négociations sur le plaidoyer.

* Assistant Professor, Osgoode Hall Law School, York University. This article is adapted from portions of my doctoral dissertation, which I wrote as an SJD candidate at Harvard Law School with financial support from the Social Sciences and Humanities Research Council of Canada under the supervision of Professors Jeannie Suk, Ron Sullivan, and Robert Scanlan. I am indebted to my wonderful supervisory team for their tremendous support. I am also grateful to the reference librarians at the Harvard Law School Library, especially Michelle Pearse; to the Graduate Program administrators and staff, especially Jane Fair Bestor; and to my colleagues in the SJD Program. I presented portions of the research from this article at the International Society for the Reform of Criminal Law 30th International Conference, and at the conference on The Legitimate Ambit of Domestic and International Criminalization jointly hosted by the Nathanson Centre on Transnational Human Rights, Crimes and Security, and the Robina Institute of Criminal Law and Criminal Justice. I am thankful to those who organized and attended both conferences. Finally, I am grateful to the editors of this journal and to the anonymous peer reviewers for their very insightful comments and suggestions.