

THE DEFENCE COUNSEL'S ETHICS IN PLEA BARGAINING: LOSING SIGHT OF THE INNOCENT?

Lisanne O. MAURICE*

ABSTRACT:The vast majority of accused who appear before a criminal court in Canada will not proceed to trial and most of those will plead guilty to some offence. This means that a substantial portion of a defence lawyer's cases will be resolved. Sometimes this will occur after months or years of negotiation, sometimes on the court-house steps, but all will involve some form of discussion between Crown and defence. These negotiations have commonly been referred to, by the public and participants in the criminal justice system alike, as "plea bargaining".

Plea bargaining is now an accepted and integral part of our criminal justice system.¹ The process involves an exchange of information between Crown counsel and defence counsel about the strengths and weaknesses of their respective cases and the circumstances of the offence and of the offender.² Experienced Crown and defence counsel use this opportunity to ensure that individual justice is done. Through this process, an accused will surrender his right to trial, with its accompanying procedural safeguards, in exchange for concessions aimed at sentence reduction and certainty.³

For some, the term plea bargaining implies that justice is a commodity that can be bought, sold and bartered and thus negative connotations have resulted. It also inaccurately assumes that plea bargaining relates solely to agreements concerning guilty pleas. Discussions between counsels frequently include a vast array of considerations, much more than negotiated guilty pleas, and sometimes do not, in fact, result in guilty pleas at all⁴.

* *Defence Counsel, Lecturer at the Université de Moncton, Moncton, N.B. CANADA.*

¹ *R v. S.K.*, [1995] O.J. No. 1627, 99 C.C.C. (3d) 376 (Ont CA)

² C. C. Ruby, G. J. Chan, N. R. Hasan, *Sentencing*, (8th ed.), (Markham, Ont: LexisNexis Canada Inc., 2012), at page 69

³ *R v. Oxford*, [2010] N.J. No. 232, 77 C.R. (6th) 364, at para. 56 (N.L.C.A.), and referred to C. C. Ruby, G. J. Chan, N. R. Hasan, *Sentencing*, (8th ed.), (Markham, Ont: LexisNexis Canada Inc., 2012), at page 69

⁴ S.A. Cohen and A.N. Doob, "Public Attitudes to Plea Bargaining" (1989-1990) 32 C.L.Q. 85 lists factors which could be included in "resolution discussions": reduction or withdrawal of charges; agreement not to proceed on other charges; agreement to refer offences to various diversion programs; agreement as to the type of severity of sentence; agreement as to Crown election; agreement not to pursue dangerous offender or long term offender designations; agreement not to rely on previous convictions where to do so would result in a mandatory minimum sentence; agreement not to charge another person or to withdraw charges against another person; agreement not to compel a jury trial; agreement not to seek increased periods of parole-ineligibility; agreement to have the sentencing hearing before a specific advance not to appeal a sentence; some of these practices, such as for example, agreeing in advance not to appeal a sentence, are specifically prohibited by Crown Policy Manuals such as the Federal Prosecution Service Deskbook.

Whether this practice is a blight or a blessing on the criminal justice system has been much debated⁵. Due to its strong focus on efficiency and its resemblance to an "assembly-line conveyor belt"⁶, plea bargaining can be linked to what the American scholar Herbert Packer defined as a crime control model of justice⁷ whereby "the criminal justice process is controlled by prosecutors, with the primary aim being a stream-lined guilty plea".⁸

The defence counsel's role is nonetheless very important in ensuring that the innocent accused does not get "caught" in what could be seen as a criminal factory, especially if the accused decides to "cut their losses" and plead guilty. In this way, defence counsel has a duty to protect the innocent accused's rights and circumvent this incremental descent into poor judgment, not forgetting the image of the criminal justice system itself.

What is the defence counsel's ethics in this process? The main focus of this essay will be on the ethical considerations for defence counsel when engaging in plea bargaining, in the subset of resolution discussions, the negotiated guilty plea, while keeping in mind the risk of wrongful conviction. This essay will show that, to the exception of the Canadian Bar Association Model Code of Professional Conduct, there is little guidance on ethics in the plea bargaining process.

KEYWORDS: *the defence, counsel, ethics, plea bargaining*

JEL CODE: *K 1*

⁵ For example of pros and cons, see J. Di Luca, "Expedient McJustice or Principled Alternative to Dispute Resolution" 50 C.L.Q. 14; C. McCoy, "Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform", (2005) 50 C.L.Q. p. 67; G. Lafontaine & V. Rondinelli, (2005) 50 C.L.Q. p. 108; K. Makin, "Top jurist urges review of "coercive" plea bargaining system" The Globe and Mail (7 March 2011)

⁶ H. L Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968) at 159

⁷ *Ibid*, at p. 159

⁸ A. Flynn, "We've changed our minds: What do you do with a Failed Plea Bargain? A Reflection on R v. Nixon", (June, 2012) 32 W.R.L.S.I. 123, at p. 130