PLEA BARGAINING: WHAT IT IS, WHO IT HELPS, AND ITS ROLE IN R V ANTHONY-COOK by Yuet Al

Plea bargaining is a process in which the "Crown and defence council agree to recommend a particular sentence to the judge, in exchange for the accused entering a plea of guilty.[1] Plea bargaining is a crucially important part of the criminal justice system because when properly conducted, they permit the system to function smoothly and efficiently.[2] They help to resolve a vast majority of criminal cases, contribute to a fair and efficient justice system, and "without them, our justice system would…collapse under its own weight".[3]

Plea bargaining can often provide benefits to all parties participating in the criminal justice system. Lawyers will find that plea bargaining can guarantee a conviction, lead to information or testimony that is valuable to other investigations, allow for the case to be settled out of court, and allow them to maximize their profit by investing less time in the case, if their pay structure is on a per-case basis.[4] Similar to lawyers, police can also benefit from an accused's knowledge of other investigative matters and encourage cooperation with the judicial system. Judges and the wider justice system may find that plea bargaining can save the justice system "precious time, resources, and expenses, which can be channeled into other matters", and therefore is hugely beneficial.[5] Victims will also benefit by saving the time and emotional burden of a lengthy and difficult trial. The accused will have similar benefits of minimizing stress and legal costs. In addition, an accused may find that plea bargaining can provide a recommendation that is "likely to be more lenient than the

[1] *R v Anthony-Cook*, 2016 SCC 43 at para 2.
[2] *Ibid* at para 1.
[3] *Ibid* at paras 2 and 40.
[4] *Ibid* at para 39.
[5] *Ibid* at para 40.

accused might expect after a trial".[6] Plea bargains are therefore arguably the most beneficial for accused individuals.

Despite providing many benefits, plea bargaining is not without a cost. Victims may feel cheated if an accused receives a recommendation that feels too lenient. This can create a slippery slope of questioning the entire administration of justice system. Furthermore, an accused may feel compelled to enter a plea agreement if both parties suggest it is a good idea. This becomes a concern when an accused has mental health issues, addiction problems, or suffers from cognitive or learning disabilities. When the benefits of plea bargains create a system where they are used as an "easy way out" of handling cases, the best option for the accused may not be considered.

Plea bargaining was a central aspect of the case, *R v Anthony-Cook*, where the trial judge rejected the joint submission because it "did not give adequate weight to the principles of denunciation, deterrence, and protection of the public".[7] The original joint submission stated that the accused would serve an additional 18 months in custody and would not face probation upon release because the accused would be supervised by his treatment team and the accused had experienced difficulty complying with multiple reporting obligations due to his mental illness.[8] The trial judge sentenced the accused to two years less a day and probation of three years, out of concern of the appellant's "use of street drugs".[9]

The Supreme Court of Canada found that the trial judge erred in departing from the joint submission proposed by the parties and held that the appropriate legal test that trial judges should apply under joint submission circumstances is the "public interest test". The "public interest test" is

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[6] *Ibid* at para 36.
[7] *Ibid* at para 20.
[8] *Ibid* at paras 15 and 19.
[9] *Ibid* at para 22.

one where "trial judges should not depart from a joint submission unless the proposed sentence would bring the administration of justice into disrepute or is otherwise not in the public interest".[10] The Supreme Court of Canada additionally provided six guidelines to trial judges regarding "the approach they should follow when they are troubled by a joint submission".[11] First, trial judges should view joint submissions on an as-is basis, and assume that if a particular order was not asked for, it was considered and then excluded.[12] Second, trial judges should apply the public interest test when they are considering changing a joint submission, and be cognizant of potential public perception stemming from adjusting the proposed submission.[13] Third, trial judges need to inquire and be informed about the circumstances leading to joint submissions, in particular the benefits and concessions made.[14] Fourth, trial judges should afford counsel the opportunity to make further submissions to address the judge's concerns before a sentence is imposed.[15] Fifth, if a trial judge's concerns about a joint submission is not alleviated, the judge may allow the accused to apply to withdraw their guilty plea.[16] Finally, trial judges who remain unsatisfied by the submissions should provide clear reasons for departing from the joint submission.[17]

Applied to the case at bar, the Supreme Court of Canada found that there was no basis for the trial judge to substitute his opinion because the proposed submission did not run contrary to public interest.[18] In particular, deviating from the recommended sentence by only 6 months

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[10] *Ibid* at para 29.
[11] *Ibid* at para 49.
[12] *Ibid* at para 51.
[13] *Ibid* at para 52.
[14] *Ibid* at para 53.
[15] *Ibid* at para 58.
[16] *Ibid* at para 59.
[17] *Ibid* at para 60.
[18] *Ibid* at para 63.

amounted "to little more than tinkering".[19] The Supreme Court of Canada allowed the appeal and recommended that the joint submission reached between the parties during trial be followed.

It can be observed that of the two disadvantages previously mentioned, *Anthony-Cook* aims to somewhat rectify both. Under the third guideline, trial judges need to inquire and be informed about the circumstances leading to joint submissions with particular focus on the benefits obtained by the Crown or concessions made by the accused. Trial judges may be more aware of joint submissions that have few benefits to the Crown and few concessions made by the accused. These submissions may be seen as too lenient to the accused and greater discretion can be given in supporting these recommendations. The third guideline may also provide additional checkpoints for joint submissions that take advantage of the accused's mental illness, addiction, or disability. Greater discretion may be given in supporting recommendations where the accused makes too many concessions. Despite these inferences, the guideline is vague and greater clarity is required to mitigate these disadvantages. It is our hope that with the guidelines set out in *Anthony-Cook*, the disadvantages of plea bargaining can become farther and few in between and joint submissions can continue to provide expeditious access to justice.

[19] *Ibid.*