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THE GUILTY PLEA AND SUMMARY JUSTICE

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THE GUILTY PLEA AND SUMMARY JUSTICE

Introduction

For those who study criminal law, criminal trial procedure with its panoply of legal rights represents the crowning glory of the Canadian justice system. The adversarial criminal trial process is seen as a model because it deliberately sets out to balance the power of the State and the weakness of the accused so as to ensure a fair assessment of guilt and innocence. Recent trends in criminal process show, however, that for all its virtues the trial process is now a relatively rare occurrence, and that seventy to ninety-five percent of cases today are resolved through guilty pleas and a summary process lacking all the vaunted checks and balance of the criminal trial.

The trend towards a summary process dependent on guilty pleas has quietly shifted the entire focus of criminal procedure from its traditional foundation in trial process. When an accused is arraigned and chooses to plead guilty he thereby waives the traditional protections of the criminal trial: the rights to a jury trial, to the presumption of innocence, to confront his accusers, to present witnesses in his defence, and to remain silent. At the same time the guilty plea serves as an admission of all the essential elements of the offence, thereby relieving the Crown of the burden of proving guilt beyond a reasonable doubt. Although the criminal trial process is still regarded as the ideal, the day-to-day functioning of the present criminal justice system, with its heavy dependence on guilty pleas, has become an

overwhelmingly pragmatic affair, lacking in ideological foundation.

The purpose of this thesis is first, to examine the juridical nature of the guilty plea, including the existing procedural and evidentiary rules and safeguards against erroneous conviction by guilty plea; and second, to critique the guilty plea process in light of concerns about coercion, recent constitutional developments and other models of summary criminal justice. It is hoped that this analysis will demonstrate the need to transform the guilty plea process into a system of summary justice that combines efficiency and adequate protection for the accused.

In Part I of this thesis, the juridical nature of the guilty plea will be revealed through consideration of A) the historical development of the guilty plea; B) the mechanics of the guilty plea process; C) grounds for legal challenge to the validity of the guilty plea; D) the evidentiary role of the guilty plea; and an analysis of the dual nature of the guilty plea as both a procedural and evidentiary device.

Part II consists of a critique of summary process by guilty plea, focusing on A) the element of coercion in the guilty plea process resulting from sentencing and plea bargaining practices; B) the constitutionalization of rights affected by the guilty plea; and C) the need for reevaluation and reform of the existing guilty plea process in light of other models of summary criminal justice.

PART I. THE JURIDICAL NATURE OF THE GUILTY PLEA

Introduction to Part I

This part explores the juridical nature of the guilty plea. This entails a review of its historical origins in the development of the jury trial and the gradual lawyerization of the jury trial; and a comparison with the development of summary criminal process on the Continent. Then the mechanical rules that govern the present day guilty plea process will be described. Next, the mechanisms for challenging the acceptability of the guilty plea will be examined, to ascertain the criteria or indicia for waiver of procedural rights by guilty plea. The evidentiary aspects of the guilty plea will then be considered, focusing on the role of the guilty plea as an admission. Finally, the ambiguity and uncertainty in the existing rules governing the guilty plea process will be explained by the lack of recognition of the dual nature of the guilty plea as both a procedural and evidentiary device.

Chapter 1. HISTORICAL DEVELOPMENT OF THE GUILTY PLEA PROCESS

The history of the guilty plea is inextricably tied to the history of criminal procedure in general, and the search for a satisfactory method of establishing guilt, in particular. History suggests that whenever criminal procedure and the laws of proof become too complex and demanding, something akin to guilty pleas and plea bargaining will insinuate itself into the system to facilitate the resolution of criminal matters.¹

A. Precursors of the guilty plea in early trial process

Early criminal procedure was preoccupied with the difficult task of proving that the accused actually committed the crime as alleged. Anglo Saxon law dealt with this problem differently depending on whether the accused was caught in the act (hand havingness) or not (non hand havingness). If a criminal was caught in the act, no trial was necessary. Every man had the privilege of summary capture and execution of the criminal, or could turn the criminal over to the Crown for punishment. If the accused was not caught in the act, but was merely suspected, he would face a definite accusatory procedure and upon

¹ Thus, one finds some parallels in the dependence of early Continental inquisition process on coerced confessions, and the prevalence of the guilty plea in the modern adversarial criminal procedure of Canada, England and the United States: J.H. Langbein, Torture and the Law of Proof (1977).

conviction, a much less severe punishment.² In this early trial procedure the court itself had little to do with the weighing of proof. The old modes of proof, by ordeal³ or by oath⁴, were appeals to supernatural powers for the determination of guilt or innocence.

In the eleventh and twelfth centuries the preliminary procedures for all modes of trial were essentially the same. Foster wrote:

"The plaintiff or accuser stated his claim in the customary way, and to support it produced suit (secta): a body of witnesses, usually his friends or relatives, that was a sign of the sincerity of his claim. The defendant then denied the claim, item by item, also in words ordained by custom. Instead of proceeding to hear evidence and give judgment, the members of the court simply decided which party was to swear to the justice of his cause, and how the truth of that oath was to be put to the proof. These decisions were probably also a matter of custom."⁵

The court could then choose from among four methods of proof: (1) trial by witness, whereby the case would be won by the side with the more numerous and consistent witnesses; (2) wager of law or compurgation,

² For example, a thief caught in the act would face death, slavery or ransom, whereas a person adjudged to have committed theft would only be made to pay back the value of the property stolen and, if he was a recidivist, to suffer corporal punishment. In the course of the tenth century the more lenient punishment for non hand havingness was replaced by punishments of death and forfeiture: Goebel, Jr., Felony and Misdemeanour. A Study in the History of Criminal Law (1937) at 347.

³ Within this term are included such ordeals as the hot iron, water and judicial combat. II Pollock & Maitland, The History of English Law Before the Time of Edward I (1895), at 556.

⁴ Id. Within this term are included trial using oath helpers and oaths of witness.

⁵ Foster, "Trial by Jury: The Thirteenth Century Crisis in Criminal Procedure" (1979), 13 University of British Columbia Law Review 280 at 282-283.

whereby oath helpers would swear to their belief in the defendant's oath; (3) trial by ordeal, for more serious criminal cases, there being four ordeals in Anglo Saxon times: hot iron, hot water, cold water and morsel; and (4) trial by battle, introduced by the Norman conquerors and used inter alia for private prosecutions for crime, called appeals of felony. By the end of the twelfth century only trial by ordeal and trial by battle was being used.⁶

Trial by ordeal and trial by battle could only decide clear issues of guilt or innocence. They left no room for modifying pleas and the court could play no part in decisions of fact.⁷ The legacy of this has been the criminal law's insistence on having a definite issue of fact to be tried.⁸ Thus, wrote Stephen,

In all common cases the pleadings in a criminal trial have always consisted, and still consist, of an indictment engrossed on parchment, and a plea given by the accused person orally in open court, of guilty or not guilty. The requisites of an indictment at common law differed hardly at all from the earliest times till our own ...

Subject to ... [statutory changes since 1822] an indictment under George IV was what an indictment under Edward III, and probably under Edward I, had been.⁹

⁶ Id.

⁷ I J.F. Stephen, A History of the Criminal Law of England (1883) at 297-301.

⁸ A.K.R. Kiralfy (ed.), Historical Introduction to English Law and Institutions (4th ed. 1958) at 352.

⁹ I J.F. Stephen, A History of the Criminal Law of England (1883) at 275.

A plea of guilty would admit everything and supersede all further proceedings. According to Langbein if the culprit admitted guilt, the authorities were not going to waste their time (and God's) by asking for a confirmation of his guilt under ordeal.¹⁰

Despite the severity and inflexibility of the punishment for felony (i.e., death) in ancient common law, "Yet", wrote H.H.A. Cooper "we have the curious phenomenon from the earliest times, of prisoners confessing under circumstances amounting to a self-imposed conviction."¹¹ Bracton described what appears to have been an early form of bargained guilty plea called appeal by approver:

The commonest and most important form of appeal was appeal by approver. If a person accused of any crime, especially robbery chose to plead guilty and to offer to give up his accomplices, he was handed over to the coroner, before whom he confessed his guilt and accused a certain number of other persons. Then the king may "grant him life and limb if he would deliver the country from a certain number of malefactors either by his body" (ie. by killing them upon battle waged) "or by the country" (ie. convicting them before a jury), "or by flight". If he failed to fulfill the conditions he was hanged on his own confession. If he fulfilled the conditions and disposed of the prescribed number of accomplices he had to abjure the realm".¹²

During the twelfth century mistrust of the ordeal was developing at the same time as was recognition of the jury inquest as an

¹⁰ J.H. Langbein, Torture and The Law of Proof (1977) at 7.

¹¹ H.H.A. Cooper, "Plea Bargaining: A Comparative Analysis", [1972] 5 International Law & Politics 423 at 427.

¹² I J.F. Stephen, A History of the Criminal Law of England (1883) at 250, referring to the writings of Bracton. See also, H.H.A. Cooper, "Plea Bargaining: A Comparative Analysis", [1972] 5 International Law & Politics 427 at 432 et seq.

alternative adjudicative procedure.¹³ While final judgment remained in God's hands, the institution of the jury was evolving and gradually arrogating more and more of the decision making function.¹⁴ By 1215 it was unusual for a criminal case, whether by public or private prosecution, to be put to physical proof without the intervention first of a jury.¹⁵ However, because of the traditional belief that God was the ultimate judge of right and wrong, and because trial by inquest was still considered to be a rather exceptional privilege for which money would be paid to the King, it was thought that a jury of mortal men would not have jurisdiction to try a person accused of felony unless he requested the inquest by "putting himself upon the country".¹⁶

Originally the jury's function was to accuse those suspected of crime, whereupon the accused's guilt or innocence would be determined by ordeal or appeal. In 1166 Henry II formally institutionalized the "presenting" jury, using this pre-existing institution to establish royal authority over criminal matters. At the Assizes of Clarendon and Northampton he required that,

"Offenders committing certain grave offences should be "presented" to royal commissioners by jurors from the neighbourhood where the

¹³ II Pollock & Maitland, The History of English Law Before the Time of Edward I (1895) at 556.

¹⁴ R.D. Groot, "The Jury of Presentment Before 1215" (1982), 26 American Journal of Legislative History 1.

¹⁵ R.D. Groot, "The Jury in Private Criminal Prosecutions Before 1215" (1983), 27 American Journal of Legislative History 113 at 140.

¹⁶ I J.F. Stephen, A History of the Criminal Law of England (1883) at 297-301.

crimes were committed, as a public indictment. If the accused persons were caught they were sent to the ordeal, and if they did not come "clean" from the ordeal they were punished. Even if they came clean from the ordeal they were bound to abjure the realm."¹⁷

The verdicts of the jury of presentment were phrased in terms of suspected or not suspected but in many ways were equivalent to later verdicts of guilty or not guilty. The verdict was medial, not final, but had substantial aspects of finality. It was, after all, a collective judgment of the accused's culpability based on the prior knowledge of the jurors.¹⁸ R.D. Groot noted that if the jurors decided favourably to the accused he was virtually certain to avoid further proof by ordeal; but if they rendered a decision unfavourable to the accused, he had to go to proof by ordeal, and even if he cleared himself at the ordeal, the jury's adverse verdict would mean that he would have to abjure the realm.¹⁹

Contemporaneously with the development of the jury of presentment, the jury also found a place in private criminal prosecutions or appeals. By the end of the twelfth century these private prosecutions were

¹⁷ A.K.R. Kiralfy (ed.), Historical Introduction to English Law and its Institutions (4th ed., 1958) at 352.

¹⁸ R.D. Groot, "The Jury of Presentment Before 1215" (1982), 26 American Journal of Legislative History 1 at 24. At this time juries were self-informing.

¹⁹ Id.

terminated more often by jury inquest than by combat or ordeal.²⁰ A person privately accused had a virtual right to interpose a jury between himself and a judgment awarding physical proof.²¹ There was universal recognition that an appellee who sought medial proof by jury should have it. Indeed, R.D. Groot finds no eyre cases in which the request for a jury inquest was refused.²²

It was fortunate for England that the jury of presentment had been expanding its responsibilities over the course of the twelfth century. When in 1215 the Fourth Lateran Council dealt a near fatal blow to English criminal trial procedure by forbidding clerical participation in ordeals,²³ thereby destroying the value of proof by ordeal as the judgment of God, it was the jury that in time came to fill the procedural void and to provide the core mechanism for the future of

²⁰ R.D. Groot, "The Jury in Private Criminal Prosecutions Before 1215" (1983), 27 American Journal of Legislative History 113. Combat was the mode of trial used in appeals unless one of the parties was maimed, female or aged, in which case trial by ordeal would be used instead.

²¹ Id.

²² The jury verdict in appeals functioned like its counterpart in public prosecutions, with a verdict favourable to the accused being virtually final. Where the verdict was unfavourable it was medial only, and the case would be put to physical proof. If the accused successfully purged himself at the ordeal, the unfavourable jury verdict nonetheless was sufficient to require that the accused abjure the realm or provide pledges: R.D. Groot, "The Jury in Private Criminal Prosecutions Before 1215" (1983), 27 American Journal of Legislative History 113.

²³ H. Foster, "Trial by Jury: The Thirteenth Century Crisis in Criminal Procedure" (1979), 13 University of British Columbia Law Review 280 at 283.

English criminal trial procedure.²⁴

The Church's withdrawal from trial by ordeal meant that "The responsibility of putting men to death could no longer be rested comfortably upon God",²⁵ and yet at the time there was nowhere else to lay this responsibility. In effect, no longer was there any means for conclusively proving guilt or innocence. Judges were left by Henry III to experiment in their own discretion as to the procedures to be used in criminal matters. Justices going on eyre in 1219 were merely told by their king,

"to imprison those accused of grave crimes and thought dangerous, but not so as to endanger life or limb; to allow those accused of medium crimes to abjure the realm; and to take security for good behaviour from those accused of lesser offences. No trials were contemplated because no trials were now possible."²⁶

While one might have anticipated that a solution to the sudden lack of a system of proof might have been to resort to coercing admissions of guilt from accused persons, in fact, the opposite approach was taken, and the years subsequent to the Fourth Lateran Council were spent in developing means to induce the accused to submit to trial by jury.

Over the next decades the jury came to be used not just to indict but also to try the accused, but there remained some uncertainty as to

²⁴ R.D. Groot, "The Jury of Presentment Before 1215" (1982), 26 *American Journal of Legislative History* 1 at 1.

²⁵ S.F.C. Milsom, Historical Foundations of the Common Law (1969) at 359.

²⁶ Id.

how a jury of mortals could assume the divine task of determining guilt.

As James Fitzjames Stephen wrote,

"The ordeal being abolished, it is possible that it was thought hard to put a person to death upon a bare accusation without any kind of trial, and that it appeared to be contrary to the nature of an inquest to appoint a jury to try the prisoner unless he applied for it. If, therefore, an accused said nothing at all, the court felt embarrassed. They could not put him to death upon what was felt with increasing distinctness to be a mere accusation. They could not make an inquest pass upon him without his consent."²⁷

Consent to a jury inquest was obtained through formal pleadings:

"The prisoner was first required to hold up his hand, and having done so, or having owned himself to be the person indicted, the substance of the indictment was stated to him, and he was asked the question, "How say you, are you guilty or not guilty?" If he said, "not guilty" the answer was, "Culprit, how will you be tried?" to which the prisoner had to reply, "By God and my country".²⁸

It was considered to be an abuse to force accused persons to put themselves upon their country when they had offered to defend themselves by their bodies, by way of appeal.²⁹ There were three good reasons why an accused might object to trial by jury. First, since a felony conviction carried a death sentence it was thought that there was too much at stake to leave to the decision of twelve fallible men, rather than God. Second, because the jury included persons who knew the

²⁷ I J.F. Stephen, A History of the Criminal Law in England (1883) at 299.

²⁸ I J.F. Stephen, A History of the Criminal Law of England (1883) at 297-298. The accused's answer that he will be tried "by God and my country" preserved until 1827 the memory of trial by ordeal, though the choice of ordeal (trial by God) or jury trial had long been obsolete.

²⁹ I Holdsworth, A History of English Law (7th ed. 1956) at 326-327. The reference is to the views of the author of "Mirror of Justices", a conservative author of the thirteenth century.

accused and had been his accusers, conviction was more certain at a jury trial than at an ordeal, where there was a good chance of "coming clean". Third, and perhaps most important, conviction of felony meant that the felon's family would be disinherited, the felon's land escheating to the lord and chattels escheating to the king.³⁰ If there was no conviction, no forfeiture took place, and the property of the accused was preserved for the heir.³¹ Because of these cogent disincentives to pleading, the justices found that persons accused of felony were not always willing to cooperate and put themselves upon the country. Thus the dilemma for the courts at this time was not whether the accused would plead guilty or not guilty, but whether there would be a plea at all.

At first, when an accused person would not plead, twelve jurors would determine guilt, then twenty-four jurors would assess the first jury's verdict. If found guilty by both juries, the accused would be hanged.³² Perhaps this was considered to be inefficient, because in 1275

³⁰ H. Foster, "Trial by Jury: The Thirteenth Century Crisis in Criminal Procedure" (1979), 13 *University of British Columbia Law Review* 280 at 289 et seq.

³¹ I J.F. Stephen, A History of the Criminal Law of England (1883) at 299.

³² II Hale, The History of the Pleas of the Crown (1736) at 316. I J. Chitty, A Practical Treatise on the Criminal Law (1816) at 424 et seq. J.H. Langbein, Prosecuting Crime in the Renaissance. England, Germany, France (1974) at 52, referring to the case of Elizabeth Caldwell (1604): A man charged jointly with his lover for the murder of her child, refused to plead at the assizes in order to preserve his property from forfeiture, and was pressed to death.

the Statute of Westminster, 3 Edw. 1. c.12., was enacted to provide for extortion of consent to jury trial. It directed that notorious felons who would not put themselves upon the inquest "shall have strong and hard confinement, as they which refuse to stand to the common law of the land".³³

Although this "peine forte et dure" may have already existed at common law,³⁴ with statutory authorization in 1275, it apparently grew in its barbarity. Originally only requiring prison "forte et dure", it evolved into "peine forte et dure", and came to be an alternative form of capital punishment³⁵ for the punishment was so strong and hard as to be fatal.³⁶ Though a judgment of peine forte et dure meant that the accused person might die a horrible death and forfeit his goods, his blood was not corrupted nor his lands forfeited by attainder, as where a conviction of felony had been rendered.³⁷

³³ I J. Chitty, A Practical Treatise on the Criminal Law (1816) at 424 et seq.

³⁴ Id. Chitty suspected the punishment dated from earlier and darker periods of English history.

³⁵ J.H. Langbein, Torture and the Law of Proof (1977) at 76.

³⁶ An accused who refused to plead would be laid upon the prison floor, with his thumbs bound with whipcord. He would be covered with unbearable weights and denied all nourishment except three morsels of bread every other day and three draughts of stagnant water on alternative days. The accused would either starve or be crushed to death unless he agreed to submit to be tried by the country. II Hale, The History of the Pleas of the Crown (1736) at 319.

³⁷ Id. at 316.

Judgment of peine forte et dure was not given hastily, perhaps because the justices sensed its illegitimacy. It would only be imposed where upon arraignment for felony the accused stood obstinately mute, ie., "mute of malice".³⁸ The judge would give the prisoner respite to reconsider his refusal to plead, he would hear witnesses testify under oath as to the prisoner's probable guilt, and he would allow the prisoner the benefit of clergy, if the offence was clergyable, whether or not the prisoner demanded it.³⁹

This barbaric procedure of torturing those who refused to plead lasted until 1772 when it was finally abolished and replaced with the

³⁸ Hale explained the meaning of "standing mute" as follows: "...a man is said to stand mute, when being arraigned for felony or treason, either 1. He answers not at all, or 2. If he answers with such a matter, as is not allowable for answer, and yet will not answer otherwise, or 3. Where he pleads not guilty, but when demanded how he will be tried, either will say nothing, or not put himself upon the country." II Hale, The History of the Pleas of the Crown (1736) at 316. Where the accused stood mute, a jury would be impanelled to enquire whether he stood mute of malice, or dumb ex visitatione Dei. If he were found to be dumb ex visitatione Dei, a plea of not guilty would be entered for him and the court would proceed to trial, with due assistance given to the accused: Blackstone Vol.IV, cited in F. Kaufman, The Admissibility of Confessions (1979, 3d ed.) at 324. If he were found to be obstinately mute, and he was charged either with treason or a misdemeanour, he would be regarded as convicted, as if he had confessed to the accusation. For felonies other than treason, if he were found mute ex malitia he would have judgment of peine forte et dure: Id; II Hale, The History of the Pleas of the Crown (1736); I J. Chitty, A Practical Treatise on the Criminal Law (1816) at 424 et seq. I J.F. Stephen, A History of the Criminal Law of England (1883) at 298.

³⁹ II Hale, The History of the Pleas of the Crown (1736) at 316; I J. Chitty, A Practical Treatise on the Criminal Law (1816), at 414.

rule that a refusal to plead was tantamount to conviction.⁴⁰ Only in 1827 was it enacted that if the accused stood mute in cases of treason, felony or misdemeanour, a plea of not guilty would be entered, and the trial would proceed as if the prisoner had pleaded.⁴¹

Once strong means had been devised to ensure that accused persons would submit to adjudication by jury, the jury's place at the core of English criminal procedure was secure. Thus trial by the countryside, by a petty jury was well established by the end of the thirteenth century, though in a somewhat different form from the jury trial of today. At the outset there was some uncertainty as to whether members of the indicting jury could sit as triers. Since early juries made their decisions not on the basis of sworn testimony so much as upon their own knowledge and opinions, it was thought useful to have the petty jury include members of the indicting jury to ensure that the triers were well informed,⁴² and a juror was liable to be severely

⁴⁰ By 12 Geo. 3. c.20. See, I J.F. Stephen, A History of the Criminal Law of England (1883) at 298; I Holdsworth, A History of English Law (7th ed. 1956); I J. Chitty, A Practical Treatise on the Criminal Law (1816) at 428; G. Williams, The Proof of Guilt (1963) at 13, quoting Palgrave's remarks on the longevity of this practice: "It is a singular proof of the want of attention to any general principles of legislation that a custom equally foolish and barbarous should have continued so long unaltered."

⁴¹ By 7 & 8 Geo. 4 c.28, s.2. See, I Holdsworth, A History of English Law (7th ed. 1956); I J.F. Stephen, A History of the Criminal Law in England (1883) at 298.

⁴² H. Foster, "Trial by Jury: The Thirteenth Century Crisis in Criminal Procedure" (1979), 13 University of British Columbia Law Review 280 after 289; S.F.C. Milsom, Historical Foundations of the Common Law (1969) at 359.

punished if he later acquitted someone whom he had previously accused.⁴³ This issue was resolved in 1352 by a statute providing that an indictor could not sit on the petty jury.⁴⁴ However, until 1670 a trial judge could punish jurors who returned a verdict contrary to his wishes,⁴⁵ and even after that date the trial judge had the means to prevail over jurors, and to counteract their inclinations.⁴⁶

B. The development of the guilty plea

Pleadings in the thirteenth and fourteenth century were similar to modern pleadings and made provision for conviction by consent, akin to a plea of guilty. According to Sir Matthew Hale,

"The prisoner upon his arraignment either confesseth, or pleads, or stands mute ... That which I call a confession is where the defendant upon hearing of his indictment without any other respect confesseth it, this is a conviction."⁴⁷

This confession "operated as a conviction and all that remained for the court was to pass the appropriate sentence".⁴⁸

⁴³ H. Foster, "Trial by Jury: The Thirteenth Century Crisis in Criminal Procedure" (1979), 13 University of British Columbia Law Review 280 at 289.

⁴⁴ Id.

⁴⁵ Bushell's Case (1670) Vaugh. 135, 124 Eng. Rep. 1006 (K.B. 1670).

⁴⁶ J.H. Langbein, "The Criminal Trial Before Lawyers" (1978), 45 University of Chicago Law Review 236.

⁴⁷ H.H.A. Cooper, "Plea Bargaining: A Comparative Analysis", [1979] 5 International Law & Politics 427 at 432-3, quoting from II Hale, The History of the Pleas of the Crown (1736).

⁴⁸ Id.

William Lambard, describing pleadings early in the fifteenth century, identified two types of confessions, one like the modern guilty plea; the other resembling the plea of nolo contendere, now obsolete in Anglo Canadian law but still current in the United States.⁴⁹

"The partie being thus brought in (or otherwise yeelding himselfe) to answere: Justice requireth, that he be heard to speake, and therefore he may (as his case will serve) either confesse, or denie, the offence wherewith he is burdened. And this Confession is of two sorts, Free, or Forced: and that former is of two kinds also, absolute or after a manner.

In the free and open (or absolute) confession, he taketh the fault upo him, and yeeldeth himselfe simply to such paine as the court will inflict for it.

And this free confession is of great force in the law: for if it be upon an Enditement of Batterie, and (after such confession had for the King) the partie beaten will also bring his Action of Trespasse for his owne damage: the shall the defendand be concluded by his former confession upon the Enditement, so that hee shall not be received to say the contrarie. 9 H. 4. 8 & 11. H. 4. 65.

But the other (which I call confession after a maner) is only a not denying, in which the partie doth cunningly, and (after a sort) take the fault upon him, without plainly confessing himselfe guiltie thereof: as where he putteth himselfe in Gratiam Regis, & petit admittis per finem, without any more, sometime (by Protestation that he is not guilty) pleadeth his pardon: and such a confession (if I may so cal it) doth not so conclude him, but that hee may afterward plead Not guiltie in any action brought against him, 9 H. 6. 60 Cur. & 11. H. 4. 65. And yet M. 20 R. 2. (as M. Statham reports) [the] case is generally set downe, that if he once make a fine, he, shall be estopped by it. Neverthelesse I thinke, that the distinction which I have laid) will reconcile the variance."⁵⁰

Although the "confession" or plea of guilty appears to have been

⁴⁹ W.L. Mills, Jr., "Criminal Law - Pleas and Defences - Nolo Contendere" (1951-1952), 30 North Carolina Law Review 407 at 409, referring to William Lambard, Eirenarcha: Or of the Office of the Justices of Peace 511 (4th ed. revised, 1599).

⁵⁰ Id.

long recognized as an option in pleading, in fact few were recorded. Langbein found that the few guilty pleas that were recorded "were typically uttered either in emotional despondency or in the knowledge that benefit-of-clergy would nullify the otherwise applicable sanction".⁵¹ If an accused person tried to gain mercy or leniency by pleading guilty on arraignment typically the court would discourage this, preferring instead that the jury hear the evidence and any favourable circumstances.⁵² Early jury trials followed a relatively speedy procedure so the courts were under no pressure to encourage guilty pleas. Langbein attributed the speed of these jury trials to the following factors: (1) witnesses' recollections were fresh because there were no long pre-trial delays. (2) Pre-trial procedures conducted by Justices of the Peace contributed to the efficiency of courtroom prosecution.⁵³ (3) There were no lawyers for the prosecution and defence, so there were no voir dices, opening and closing remarks, formal examinations and cross examinations, or procedural motions. Instead the trial judge did much of the questioning. (4) The accused gave unsworn testimony in his own defence and was expected to reply to any evidence adduced against him that lay within his knowledge; and the presentation of evidence was business-like, not formalized since common

⁵¹ J.H. Langbein, "The Criminal Trial Before Lawyers" (1978), 45 University of Chicago Law Review 236 at 278.

⁵² Id at 278, referring to II Hale, History of the Pleas of the Crown (1736): "it is usual for the court ... to advise the party to plead and put himself upon his trial, and not presently to record his confession ..."

⁵³ J.H. Langbein, Prosecuting Crime in the Renaissance, England, Germany, France (1974) Part I.

law rules of evidence did not yet exist. (5) Judicial instructions to the jury were perfunctory since the jurors were free to make their decisions upon their own knowledge and opinions; and the legal concepts of standard of proof, presumption of innocence and proof beyond a reasonable doubt were not yet formulated. (6) Further, there were no appeal procedures to prolong final disposition of a criminal matter.⁵⁴

Langbein's study of jury practice at the Old Bailey in the years 1675 to 1735 led him to conclude that jury trials of that time more nearly resembled modern Continental procedure than modern Anglo American procedure.⁵⁵ The English judiciary, however, never achieved the level of bureaucratization required to assume sustained responsibility for investigation of crime. Rather, the judiciary relied on private prosecution and defence to gather and disclose the relevant facts,⁵⁶ and the illiteracy of the English jury meant that decisions could not be made on the basis of a dossier of written evidence, as on the Continent, but could only be made after a full oral hearing.⁵⁷ This reliance on oral

⁵⁴ J.H. Langbein, "The Criminal Trial Before Lawyers" (1978), 45 University of Chicago Law Review 236; J.H. Langbein "Understanding the Short History of Plea Bargaining" (1979), 13 Law & Society 261. Also see, H. Foster, "Trial by Jury: The Thirteenth Century Crisis in Criminal Procedure" (1979), 13 University of British Columbia Law Review 280 at 289.

⁵⁵ J.H. Langbein, "The Criminal Trial Before Lawyers" (1978), 45 University of Chicago Law Review 236 at 315.

⁵⁶ J.H. Langbein, "The Criminal Trial Before Lawyers" (1978), 45 University of Chicago Law Review 236 at 315 et seq.

⁵⁷ C.J. Hamson & T.F.T. Plucknett, The English Trial and Comparative Law. Five Broadcast Talks (1952).

presentation by prosecutor and defence, and the regularization of trial by combat,⁵⁸ set the stage for the emergence in the nineteenth century of the adversarial system. Lawyers would later play a major role in the metamorphosis of English trial by jury into the adversarial process we know today.⁵⁹ However, prosecution and defence counsel did not become regular until the second half of the eighteenth century.

Throughout this period, pleadings remained virtually unchanged. Chitty, writing in 1816, described the guilty plea or "express confession" as "the highest kind of conviction of which the case admits,"⁶⁰ but evidently considered it to be an imprudent plea, suggesting there was no advantage gained by so pleading. He wrote,

"the courts are very reluctant to reserve and record such confessions, especially where the punishment is capital, and will frequently, out of tenderness to the life of the subject, advise the prisoner to retract it, and plead not guilty. And where he freely in court discloses the facts of his case, and demands the opinion of the judges whether they amount to felony, upon which they reply in the affirmative, they will refuse to record the disclosure, and admit him to the full advantage of a trial upon

⁵⁸ G. Williams, The Proof of Guilt (1963) at 25.

⁵⁹ J.H. Langbein called this the "lawyerization" of criminal procedure in "The Criminal Trial Before Lawyers" (1978), 45 University of Chicago Law Review 236. Although lawyers were permitted for persons accused of misdemeanours, to assist in the determination of property law matters, an accused was not allowed counsel at a trial for treason until 1696, and was not allowed counsel at a trial for felony until 1836. When lawyers were permitted to participate it was only to make strictly legal arguments pertaining to the indictment, representations which likely were virtually incomprehensible to the jury: S.F.C. Milsom, Historical Foundations of the Common Law (1969) at 361.

⁶⁰ I J. Chitty, A Practical Treatise on the Criminal Law (1816) at 428-9.

the evidence of the witnesses."⁶¹

The common law of the early nineteenth century continued to recognize two distinct types of "confessions". Chitty affirmed the distinction drawn by Hawkins, between express and implied confessions.⁶² He described the implied confession in these words:

"An implied confession is where, in a case not capital, a defendant does not directly own himself to be guilty, but tacitly admits it by throwing himself on the King's mercy, and desiring to submit to a small fine, which the court may either accept or decline, as they think proper. If they grant the request, an entry is made to this effect, that the defendant "*non vult contendere cum domina regina et posuit se in gratiam curiae*," without compelling him to a more direct confession. The difference in effect between an implied, and an express confession is, that after the latter, not guilty cannot be pleaded to an action of trespass for the same injury; whereas it may at any time be done after the former."⁶³

⁶¹ Id at 429.

⁶² Hawkins described it as follows: "An implied confession is when a defendant, in a case not capital, doth not directly own himself guilty, but in a manner admits it by yielding to the King's mercy, and desiring to submit to a small fine: in which case, if the court think fit to accept of such submission, and make an entry that defendant prosuit se in gratiam regis, without putting him to a direct confession, or plea (which in such cases seems to be left to discretion), the defendant shall not be estopped to plead not guilty to an action for the same fact, as he shall if the entry is quod cognovit indictamentum." II Hawkins, A Treatise of the Pleas of the Crown, b. 2. c.31. s.3/(8th ed. 1824) 466. See also I Burn, Justice of the Peace and Parrish Officer (1766) at 345, quoted in W.L. Mills Jr., "Criminal Law - Pleas and Defences - Nolo Contendere" (1951-1952), 30 North Carolina Law Review 409.

⁶³ I J. Chitty, A Practical Treatise on the Criminal Law (1816) at 431. The implied confession was essentially a plea for mercy.

Although the text writers of the eighteenth and nineteenth century continued to describe the implied confession,⁶⁴ it appears that the last reported English case making use of the plea of non vult contendere was decided in 1702, and that after that time the plea fell into disuse.⁶⁵

Meanwhile, the introduction of lawyers into the English criminal jury trial was wreaking an immense transformation of the manner in which guilt or innocence was to be established. The introduction of lawyers and the formalization of rules of evidence, coupled with the diminution of the trial judge's participation in the trial process turned the jury trial into a cumbersome and time consuming process. This "lawyerization" of the English criminal process eventually laid the seeds for its dependence on conviction by guilty plea and plea bargaining as means of short cutting the trial process, clearing overburdened dockets and

⁶⁴ Authors such as I J. Chitty, A Practical Treatise on the Criminal Law (1816); I Burn, Justice of the Peace and Parrish Officer (1766); and I H.W. Woolrych, The Criminal Law, as amended by the Statutes of 1861, with Pleading, Evidence, Forms of Indictment, Cases and Index (1862).

⁶⁵ T.C. Hayden Jr., The Plea of Nolo Contendere (1965), 25 Maryland Law Review 227. In R. v. Templeman, Holt C.J. had described its function: "After pleading guilty to an indictment, you may give anything in evidence that justifies the fact, or proves him not guilty of the fact; for the entry is non vult contendere cum dominâ Regina, sed posuit se in gratiam Curiae. And it is not like the case where one is found guilty by verdict." 7 Mod. 40; 1 Salk. 55 (1702). Even there, the distinction between express and implied confessions was obscured, and the two types of confessions appear to have been merged into one, with the court having a broad discretion to consider mitigating circumstances. Today the plea of non vult contendere has no place in English criminal procedure, although it continues to be recognized in the United States. See, infra.

keeping the criminal process functioning.⁶⁶ The more time and resources demanded by the jury trial, the greater the incentive for the participants to negotiate an alternative and more expedient resolution of the case. The less control that the trial judge had over the trial process, the less likely there would be a judicial determination of guilt or innocence in every case. Thus, developments intended to improve the fairness of the jury trial in fact resulted in the process becoming less and less available to the accused.

C. Early continental procedure

Modern Continental criminal procedure does not recognize the guilty plea as such. An examination of its development will assist in understanding how the Continental Europeans, unlike the English, eventually arrived at a criminal trial process that was not dependent on the accused consenting to conviction by guilty plea.

At the end of the twelfth century Roman law, as laid down in the Corpus Iuris Civilis, was discovered to Western Europe by Irnerius, who founded the school of the Glossators at Bologna.⁶⁷ Shortly thereafter Canon law as a science began with the publication also at Bologna of Gratian's treatise entitled "Concordia discordantium canonum", otherwise

⁶⁶ J.H. Langbein, "The Criminal Trial Before Lawyers" (1978), 45 University of Chicago Law Review 236.

⁶⁷ F. de Zulueta, The Science of Law, in C. Bailey (ed.), The Legacy of Rome (1923) 173 at 177.

known as the Decretum Gratiani. Canon law continued to develop essentially as a medieval version of Roman law.⁶⁸ This Roman law, with its inquisitorial procedures, was adopted wholesale in Italy and Germany, and universities sprang up throughout Europe to study it. Wrote de Zulueta,

"To the Middle Ages the Roman or Civil Law was nothing vague, but the law of a definite point in time, the death of Justinian (565 A.D.), stated in a definite set of law-books, the Corpus Iuris Civilis".⁶⁹

Thus in Continental Europe the ancient methods of trial by combat were being abandoned in the twelfth century in favour of the inquisition.⁷⁰ There were two cardinal features of this process that distinguished it from the jury system developing in England: first, governmental organs were required to conduct the entire proceeding by virtue of office; and second, these organs had to investigate to establish the objective truth.⁷¹ Stepan wrote,⁷²

"The basic idea in an inquisitorial process is to acquire evidence "out of the mouth" of a suspected person, that is, to extract confession through interrogation."

Two consequences are said to be implicit in this: first, from the time that the investigator began to suspect a person, a presumption of

⁶⁸ Id. at 177-178.

⁶⁹ Id. at 177.

⁷⁰ G. Williams, The Proof of Guilt (1963) at 25.

⁷¹ J.H. Langbein, Prosecuting Crime in the Renaissance, England, Germany, France (1974) at 131.

⁷² J. Stepan, "Possible Lessons from Continental Criminal Procedure", in The Economics of Crime and Punishment, A Conference sponsored by American Enterprise for Public Policy Research (1973) at 183.

guilt arose that the accused had to either confirm by confession or dispel by explanation; and second, because the system depended on the accused's confession there had to be means to induce him to confess.⁷³

The Roman church played a predominant role in the development of inquisition process in response to the spread of heresy in the twelfth century.⁷⁴ Ecclesiastical jurisdiction was based on status (ratione persone) and transaction (ratione materiae), and since all crimes were sinful they were theoretically within the purview of ecclesiastical courts.⁷⁵ To exercise this jurisdiction over matters of heresy trained experts were required. The ancient procedures whereby an injured private victim of crime carried the prosecution were entirely unsuited. Instead prosecution was by officials.⁷⁶

The decision of the Fourth Lateran Council in 1215 no longer to sanction trial by ordeal may have been partly inspired by the newly discovered rationality of Roman law and a desire to bring all crime under the jurisdiction of the Canon law. By withdrawing from trial by ordeal, the Church had removed the mystical foundation from the secular process, leaving it bereft of a system of proof. At first confession was needed to obviate the necessity of the archaic proofs. Since it

⁷³ Id.

⁷⁴ J.H. Langbein, Prosecuting Crime in the Renaissance, England, Germany, France (1974) at 133, 137.

⁷⁵ Id. at 133-134.

⁷⁶ Id. at 137.

operated as a waiver on the essential issue of guilt it spared the court the difficult task of weighing evidence.⁷⁷ Predictably, this led to the development in the thirteenth century of the use of judicial torture to extract confessions.⁷⁸ Thus it appears that both English and Continental European criminal procedure resorted at first to a form of torture to compensate for the loss of their system of proof by ordeal.

Canon law, meanwhile, had been developing a rational, if somewhat artificial, system of proof to replace the ancient appeal to God's judgment. This system was mathematical, limiting judicial discretion so as to give credibility to judgment by men. In order to convict there had to be testimony of two eyewitnesses to the crime or the accused had to confess.⁷⁹ If there was only "half proof", that is, some circumstantial evidence or the testimony of one eyewitness, the court would use torture, not to obtain an abject confession of guilt, but to obtain confession of information about the crime that no innocent person could know.⁸⁰ Judicial torture was resorted to where the accused had not voluntarily confessed and there was only one eyewitness to the crime, and was only used to ensure there was sufficient proof to warrant conviction and punishment. These Canon law rules of proof matured in church courts during the thirteenth century, and gradually they were

⁷⁷ Id at 157.

⁷⁸ J.H. Langbein, Torture and the Law of Proof (1977) at 5.

⁷⁹ Id at 6.

⁸⁰ Id at 5.

incorporated into all major Continental legal systems⁸¹ with the transferring of jurisdiction over crime back to secular courts.

Thus, in Germany the initial impetus for a public criminal process, as compared to the ancient system of private vengeance, came from the Church.⁸² During the fourteenth and fifteenth century inquisition process and judicial torture became commonplace.⁸³ The German Constitutio Criminalis Carolina, promulgated in 1530 or 1532, was designed to reduce the unreliability of coerced confessions by restricting the situations in which torture could be used, and regulating the actual torture when it was to be applied.⁸⁴

⁸¹ J.H. Langbein, Prosecuting Crime in the Renaissance, England, Germany, France (1974).

⁸² J.H. Langbein, Prosecuting Crime in the Renaissance, England, Germany, France (1974).

⁸³ Id.

⁸⁴ Id. at 160 et seq. It laid down that torture could only be used after (1) circumstances that incriminated the accused had been established, (2) any circumstance that exonerated the accused had been explored, and (3) the accused had been examined under mere threat of torture. The Carolina directed that the accused's confession should only be taken down after he had been released from torture; and at least two days after torture and confession he should be brought before a judge and questioned about the truthfulness of his confessions. The trial proceedings envisioned by the Carolina was formal, scripted and theatrical. If the accused had a defence he would state it and pray for judgment; or if he had no defence he might simply plead for mercy. The judgment, based on a dossier compiled during the preliminary questioning and torture, would be read out and execution would follow immediately.

In France the monarchy of the thirteenth century, influenced by the powerful Church, used canon law inquisition process in developing a new, centralized, royal court system. Judicial investigation was characteristic of thirteenth century procedure, and by the fourteenth century, it was entrenched. The complexity of the written procedures of the French royal courts required a large and professional magistracy to administer it.⁸⁵ By 1539, when the Ordonnance Royale (Ordonnance de Villiers-Cotteret, la Grande Ordonnance) was proclaimed to govern the inquisition process, it had become a learned procedure administered by professionals within courts of royal central authority.⁸⁶

In Continental law, as in its prototype, Canon law, there was no plea of guilty per se, but the confession operated in the same way, as a waiver of the requirement of further proof. However, the attitude

⁸⁵ J.H. Langbein, Prosecuting Crime in the Renaissance, England, Germany, France (1974) at 221.

⁸⁶ Id at 223-251. The ordonnance laid down the procedures to be followed by these experts. It described how the procureur should initiate a preliminary inquiry. A dossier would be opened on the accused although he was not yet involved in the inquiry. Then the accused was to be examined, and, if he confessed, he would be estopped from later raising a defence. This was followed by a confrontation process in which, under the control of the procureur, the accused could contradict the testimony of witnesses and bring witnesses in his defence. The dossier, containing the results of this confrontation session, would then go to the procureur for review and his conclusions. If the evidence fell short of full proof, the procureur would make peremptory conclusions and would ask the judge for the examination of the accused under torture. If the procureur concluded that the accused's liability was minimal or civil in nature, he could have the accused remitted to the civil process. If the procureur made definitive conclusions, the judge would pass sentence and unless the accused appealed, he would be executed the same day.

towards the confession was entirely different. Far from discouraging an accused who wished to confess, as would an English judge, the Continental judge welcomed the confession as the "Queen of proofs".⁸⁷ It was seen as the only proof, other than that of two witnesses catching an accused in flagrante delicti, which justified conviction.⁸⁸ It reassured the court and relieved the judge of finding other elements of proof. The strictness of the two witness rule meant that the whole of criminal procedure was oriented towards obtaining confessions; hence the system was heavily dependant on the use of torture to extract confessions and thereby establish guilt.⁸⁹

With the introduction in the sixteenth and seventeenth century of punishments of imprisonment and forced labour, for example, as galley slaves, means to avoid the strictness of the requirements of formal proof were devised. The Continental courts analogized the use of these new punishments, even when applied to very serious crimes, to the ancient procedures for petty crime, which had used non capital sanctions. The Canon law requirements of proof did not apply to petty crimes, so this analogy permitted courts to decide cases on the subjective persuasion of the trier (intime conviction).⁹⁰ Thus, where

⁸⁷ I Dalloz, Répertoire de Droit Pénal et de Procédure Pénale (2me ed. 1981), Aveu - confession - par B. Bouloc at 1.

⁸⁸ Id.

⁸⁹ Id.

⁹⁰ J.H. Langbein, Torture and the Law of Proof (1977) at 49; I Dalloz, Répertoire de Droit Pénal et de Procédure Pénale (2me ed. 1981). Aveu - confession - par B. Bouloc.

full proof could not be made the court had a discretion either to release the accused or subject him to imprisonment or forced labour. Since the courts could now sentence on the basis of circumstantial evidence, the courts' dependence on resort to torture to obtain confessions was slightly lessened.⁹¹

In most of Europe, including France and Germany, inquisition process had evolved by the seventeenth and eighteenth century into an entirely written procedure with no oral hearing. The inquisitor judge was charged with what has been described by one commentator as the psychologically impossible task of investigating with equal care both for and against the accused.⁹² The accused himself was not so much a participant in the process as its object. The continued abuses used to obtain confessions had irreparably sullied the image of Continental procedure.⁹³

Thus, after the French Revolution Napoleon introduced an adversarial element into criminal procedure to allow the accused a

⁹¹ J.H. Langbein, Torture and the Law of Proof (1977) at 49. Of course, this likely was small consolation to accused persons condemned to serve as galley slaves!

⁹² J. Stepan, "Possible Lessons from Continental Criminal Procedure", in The Economics of Crime and Punishment, A Conference sponsored by American Enterprise Institute for Public Policy Research (1973), at 183.

⁹³ I Dalloz, Répertoire de Droit Pénal et de Procédure Pénale (2me ed. 1981). Aveu - confession - par B. Bouloc at 1.

greater opportunity to defend himself.⁹⁴ Napoleon's Code d'Instruction Criminelle of 1808 provided for, first, a secret, written, preliminary investigation by an investigating magistrate who would compile a dossier of evidence; and second, an oral, public, semi-adversarial trial, with the judge interrogating the accused on the basis of the dossier and oral testimony of witnesses. While the accused was no longer legally bound to submit to interrogation, if he refused the court could infer guilt and freely convict him.⁹⁵ The jury or, in non jury cases, the judge, could then evaluate all the evidence freely, according to their own convictions. The principle of intime conviction, by allowing the judge to reach a decision on the basis of all the proofs, meant that the confession was no longer as all-important and decisive as it had previously been. By the second half of the nineteenth century this mixed procedure had been adopted in all European countries.⁹⁶

The French Code de Procédure Pénale now specifies that the confession constitutes only one element of proof to be left to the free appreciation of the judge; and its probative value depends upon the conditions under which it was obtained.⁹⁷ If not given spontaneously, a

⁹⁴ J. Stepan, "Possible Lessons from Continental Criminal Procedure", in The Economics of Crime and Punishment, A Conference sponsored by American Enterprise Institute for Public Policy Research (1973) at 185-186.

⁹⁵ Id.

⁹⁶ Id.

⁹⁷ I Dalloz, Répertoire de Droit Pénal et de Procédure Pénale (2me ed. 1981) Aveu - confession - par B. Bouloc at 5.

confession can be provoked through interrogation, but not extorted through abusive means. The rules of procedure, however, are still directed at obtaining confessions, in that interrogatories form the basis of the procedures of instruction (investigation) and judgment.⁹⁸ "L'aveu constitue un élément de preuve que le juge apprécie souverainement",⁹⁹ and a confession can still serve as the basis for a conviction.

While the confession in modern Continental criminal procedure is in some respects analogous to our guilty plea, the essential difference is that in the Continental system a confession does not interfere with the official nature of the determination of guilt, whereas in our system acceptance of a guilty plea actually relieves the court of the duty to proceed to trial. Stepan wrote,

"Almost no European jurisdiction knows the institution of the guilty plea as a surrogate for trial. This would be inconsistent with the ex officio character of establishing guilt which is essential to the Continental procedure. Confessions, of course - not in theory but in everyday practice - are of basic importance. When the accused has confessed, and sticks to his confession during his trial, other relevant evidence has to be introduced as a rule, but this remaining judicial procedure may be a relatively short and easy affair, if not a formality."¹⁰⁰

⁹⁸ Id at 1 et seq.

⁹⁹ Id at 5.

¹⁰⁰ J. Stepan, "Possible Lessons from Continental Criminal Procedure", in The Economics of Crime and Punishment, A Conference sponsored by American Enterprise Institute for Public Policy Research (1972) at 189-190.

Summary

The history of the guilty plea is bound up with the development of the law of proof. When guilt had to be established by God, through the ordeals, there was no need to force the accused to plead guilty as the Church was a willing participant in the trial process. After the Fourth Lateran Council and the withdrawal of the Church from the criminal process, English criminal procedure was left in a pitiable state. The institution of the jury evolved to fill the need for a new trial process and new modes of proof. However, as it was firmly believed that the determination of guilt was a matter for God alone, an accused had to consent to be tried by jury. Torture was used to extort this "consent". The jury trial was a speedy affair, so once an accused accepted the jurisdiction of the jury, there was no reason to induce him to plead guilty, and indeed, guilty pleas were discouraged. Thus, instead of tacit coercion to induce consent to conviction, as exists today, there was express coercion to force consent to trial by jury.¹⁰¹ It was only with the refinement of the jury trial by the introduction of lawyers, the formalization of the rules of evidence, and the diminution of the trial judge's participation in the trial process, that the jury trial became impracticable. Ironically, the developments intended to improve the fairness of the jury trial created incentives to avoid the trial process altogether by guilty plea.

¹⁰¹ J.H. Langbein, "The Criminal Trial Before Lawyers" (1978), 45 University of Chicago Law Review 236.

One also finds an ironic twist in the development of criminal procedure in Continental Europe. The adoption of the Canon law and its strict rules of proof, meant a heavy dependence on torture to extract the much needed confession. Although the philosophical and political movements of the eighteenth century wrought a transformation of this inquisition process into a non-adversarial inquiry process, the model of judicial control remained, and served to ensure that in every case there would always be a judicial determination of guilt. Hence the irony: it now appears that in a process with its roots in the infamous Church Inquisition, there may be more safeguards against the accused being coerced into self-condemnation by confession or guilty plea than exist under the Anglo Canadian adversarial criminal process.

Chapter 2. THE MECHANICS OF THE GUILTY PLEA

A. Arraignment

Arraignment, according to Archibold,

"consists of three parts, (1) calling the defendant to the bar by name; (2) reading the indictment to him; (3) asking him whether he is guilty or not."¹⁰²

The Criminal Code addresses the guilty plea in one brief section, leaving its details to be worked out by a rich patchwork of case law.

Section 606 states:

(1) An accused who is called upon to plead may plead guilty or not guilty, or the special pleas authorized by this Part and no others.

(2) Where an accused refuses to plead or does not answer directly, the court shall order the clerk of the court to enter a plea of not guilty.¹⁰³

This succinctly reflects the state of English law in 1827, as amended by 7 and 8 Geo. 4. c.28, s.2, changing the earlier rule that refusal to plead resulted automatically in conviction.¹⁰⁴ Writes Archibold,

"The general issue is pleaded by the defendant ore tenus at the bar, in these words, "Not Guilty"; by which plea, without further form, every person, upon being arraigned upon any indictment, is deemed to have put himself upon the country for trial ... If the defendant says that he declines to plead, a plea of not guilty is

¹⁰² Archibold, Pleading, Evidence and Practice in Criminal Cases (42d ed. 1985) at 262.

¹⁰³ Criminal Code R.S.C. 1985, c. C-46.

¹⁰⁴ 12 Geo. 3. c.20.

entered."¹⁰⁵

Subsection 801(1) of the Criminal Code deals with the arraignment process for summary conviction offences, but does not address the situation where an accused refuses to plead. Although subsection 606(2) is not expressly limited to indictable matters, Part XXIV of the Code, dealing with procedures in summary conviction matters, does not appear to incorporate that section. In Doyle v. The Queen,¹⁰⁶ Ritchie J. stated that the Code procedural provisions are an exhaustive statement of the powers of a Magistrate acting under the Code, and that his powers and functions under the Code must be found to have been conferred either expressly or by necessary implication in the Code. In Re Mohammed and the Queen¹⁰⁷ the question arose as to what procedures applied when a person accused of a summary conviction offence refused to plead. Gray J. concluded that subsection 735(1) of the Code (now R.S.C. 1985, c. C-

¹⁰⁵ Archibold, Pleading, Evidence and Practice in Criminal Cases (42d ed. 1985) at 267, citing R. v. Bernard (1858), 8 St. Tr. (N.S.) 887 at 899. The issue as to whether a defendant who will not plead stands mute of malice or by visitation of God still has relevance in England. Thus, the Criminal Law Act, 1967 section 6(1) provides: "Where a person is arraigned on an indictment ... (c) if he stands mute of malice or will not answer directly to the indictment, the court may order a plea of not guilty to be entered on his behalf and he shall be treated as having pleaded not guilty". If a jury of twelve concludes that the accused is mute by visitation of God, the jury must then determine whether the accused is under such a disability that he cannot understand the proceedings, and therefore cannot be tried. In Canada the notions of standing mute of malice or by visitation of God are obsolete. Instead, the issue of fitness to stand trial is addressed under s.543 [now R.S.C. 1985, c. C-46, s.615] of the Code and can be dealt with at any time prior to verdict: Archibold at 288-289.

¹⁰⁶ (1976), 29 C.C.C. (2d) 177 (S.C.C.).

¹⁰⁷ (1985), 19 C.C.C. (3d) 475 (Ont. H.C.).

46, s.800), in providing that "Where the prosecutor and defendant appear, the summary conviction court shall proceed to hold the trial", necessarily implied the power in the court to enter a not guilty plea on behalf of an accused who refused to plead, and then to proceed to hold the trial as directed by section 735. He also noted that there were other examples of Part XVII provisions not specifically imported into Part XXIV, but which necessarily had to be read into summary conviction procedures.

B. Defendant to plead separately to every count

In Regina v. Boyle¹⁰⁸ Goddard, C.J. laid down the rule of practice that

"...when the indictment contains more than one count, each count should be put to the prisoner separately, and he should be asked to plead to each particular count. It should be remembered that every count in an indictment is equivalent to a separate indictment; the prisoner can be tried on one or all of the counts. The verdicts have to be taken separately, and the right practice is that he should be asked to plead to each count as each count is read to him. There can then be no doubt as to which count the prisoner intends to plead...

What I have said is to be taken as applying not only to counts of a different nature but in cases where the indictment contains alternative counts. For instance, where there are counts for stealing and receiving it is much better that the two counts in the indictment should be separately put. If the prisoner pleads Guilty to the count for stealing, there is no need to put the count of receiving; but if he pleads Not Guilty the receiving count should then be put as a separate count and a plea taken upon it."¹⁰⁹

¹⁰⁸ [1954] 2 Q.B. 292 (U.K.C.A.).

¹⁰⁹ Id at 296.

This rule was confirmed in the case of James Ellis¹¹⁰ in which Edmund Davies L.J. stated,

"...if the indictment contains several counts, each must be put to the accused separately and he should be asked to plead to each in turn as it is put to him, the only exception to this being that, if he pleads Guilty to the first of a pair of alternative counts, the second need not be put to him."¹¹¹

C. Guilty plea by defendant's counsel

There is a divergence of opinion in Canada and England as to whether counsel can plead guilty on behalf of a client. In England counsel cannot plead guilty or not guilty for the accused, the accused must himself plead, although it is clearly counsel's duty to assist the accused in making up his mind as to how he should plead.¹¹² In the case of James Ellis, Edmund Davies L.J. stated,

"The common law and statutes make special provision for cases where the accused appears deaf or dumb, or refuses to plead, or is insane, but in the absence of special features of that kind he must be called upon to plead and he must personally answer to the plea.

...[B]efore a criminal trial by judge and jury can be properly launched there must generally be an arraignment of the accused of the offence charged and he must personally answer to it, and .. this cannot be done through counsel or any other person on his behalf.

...[G]reat mischief would ensue if a legal representative was generally regarded as entitled to plead on an accused's behalf. It would open the door to dispute as to whether, for example, counsel had correctly understood and acted upon the instructions which the accused had given him, and, if a

¹¹⁰ (1973), 57 Crim. App. R. 571 (U.K.C.A.).

¹¹¹ Id at 575.

¹¹² Archibold, Pleading, Evidence and Practice in Criminal Cases (42d ed. 1985) at 265.

dispute of that kind arose, the consequential embarrassment and difficulty could be difficult in the extreme."¹¹³

In R. v. Williams¹¹⁴ the English Court of Criminal Appeal emphasized the personal nature of the guilty plea, suggesting a rationale for the rule:

"It is a plea which is self-incriminatory and self-incrimination cannot be vicariously accomplished..."

No qualification of or deviation from the rule that a plea of guilty must come from him who acknowledges guilt is thus permissible. A departure from the rule in a criminal trial would therefore necessarily be a vitiating factor rendering the whole procedure void and ineffectual."¹¹⁵

In Canada the same approach was taken in R. v. Melillo.¹¹⁶ Porter, C.J.O. quashed a conviction that was based upon defence counsel's intimation that his clients were prepared to plead guilty, relying on "the rule established by authority that a plea of guilty must be clear and unambiguous."¹¹⁷

However, the rest of Canadian jurisprudence diverges from English law and does not interpret the above rule as requiring that the accused personally plead. Indeed the prevailing rule in this country appears to be that a plea entered by counsel has the same effect as if entered

¹¹³ [1973] Crim. App. R. 571 (U.K.C.A.) at 573-575.

¹¹⁴ [1977] 1 All E.R. 874.

¹¹⁵ Id at 876-7.

¹¹⁶ (1962), 3 C.C.C. 94 (Ont. C.A.).

¹¹⁷ Id at 96.

by the accused himself.¹¹⁸ One authority for this proposition was a case involving summary conviction procedures. In R. v. McDonald¹¹⁹ the accused was convicted of a breach of the Prohibition Act, P.E.I., 1907, on a guilty plea tendered by counsel, with his consent but in his absence from court. Fitzgerald J. of the Prince Edward Island Supreme Court looked to sections 715 and 720 of the Criminal Code, 1906, which were roughly equivalent to subsections 800(1) and (2) of the present Code. These sections allowed full answer and defence of the accused by counsel, and provided that on the appearance of the complainant and the accused, either personally or by their respective counsel, before the justice, the justice shall proceed to hear and determine the case. Fitzgerald J. concluded,

"...so full and complete is the power given by these two sections to counsel to represent the person charged, that the presence of counsel in Courts prevents the magistrate from enforcing the appearance of the accused there, and that where there is a proper appearance by counsel, attorney, or agent, the justices are bound to hear and determine the same, and, on a plea of guilty, to convict the offender. This statement of the law appears to me so consonant with reason and justice that I have no hesitation in following it."¹²⁰

In Regina v. Kuzmack¹²¹ the accused had been convicted of murder by a jury. On appeal the verdict was set aside as unreasonable, and instead of directing a new trial, the court of appeal substituted a

¹¹⁸ H. Leonoff and D. Deutscher, "The Plea and Related Matters", in V. M. Del Buono, Criminal Procedure in Canada, Studies (1982) at 230.

¹¹⁹ (1913), 11 D.L.R. 710 (P.E.I.S.C.).

¹²⁰ Id at 711.

¹²¹ (1955), 113 C.C.C. 286 (Alta. C.A.).

verdict of guilty of manslaughter. Counsel for the accused had stated that his client would accept a verdict of manslaughter. While three of the justices had nothing to say about counsel's ability to plead for the accused, Clinton J. (with Ford J.A.) made the following comments:

"It is established by authority and by practice that counsel representing an accused can enter a plea of guilty to a charge at the trial in the absence of the accused in a proper case; Galt J. in R. v. Charles Joos 39 Can. C.C. 64, [1931] 1 D.L.R. 1081, quoting from Fitzgerald, J. in R. v. McDonald, 21 Can. C.C. 229 (1913), 11 D.L.R. 710; also R. v. Thompson, Ex p. Martin, (1909), 100 L.T. 970. I understand that if a new trial were ordered counsel, in the presence of the accused, would do this. Such further step seems unnecessary. The case has now been heard twice.

I think that the court should accept from counsel for the accused in this case what amounts virtually to a plea that the accused is guilty of manslaughter mainly for the reasons that the accused is not entitled to an acquittal, and his plea is a waiver of his right to a new trial."¹²²

The decision of the Supreme Court of Canada in Korponay v. The Attorney General of Canada¹²³ appears to confirm in obiter that defence counsel may plead on behalf of a client. One of the issues before the court was whether defence counsel could re-elect trial by judge alone under s.492 of the Code (now replaced by R.S.C. 1985, s.562), on the

¹²² Id at 289-290. See also, Regina v. Dietrich (1970), 11 C.R.N.S. 22 (Ont. C.A.), where the accused argued unsuccessfully on appeal that a plea of guilty entered by his counsel on his behalf at an earlier trial should not have been admitted into evidence against him in the subsequent trial. Gale C.J.O. rejected this submission, apparently concluding that for purposes of admissibility in later proceedings, a guilty plea entered by the accused himself and a guilty plea entered by his counsel were equivalent (at 30 and 31). See also, Regina v. Leonard (1975), 29 C.C.C. (2d) 252 (Ont. C.A.), where Gale C.J.O. reiterated the view that defence counsel could enter a plea of guilty on behalf of an accused person, rejecting the accused's claim that because of his youth the trial judge ought to have made inquiry into whether counsel's plea on his behalf should stand.

¹²³ [1982] 1 S.C.R. 41 (S.C.C.).

accused's behalf. Lamer J., delivering the judgment of the court, concluded that the defence counsel's saying "judge alone" was a clear and unequivocal waiver by the accused through his attorney of the requirement of putting to the accused the words of s.492.¹²⁴ In reaching this conclusion Lamer J. adopted the words of Monnin J.A., speaking for the majority of the Manitoba Court of Appeal in R. v. Matheson:¹²⁵

"I am of the view that what the accused can personally do counsel speaking on his behalf and in his presence can likewise do; otherwise we are diminishing the role of counsel and making a mockery of open trials solemnly conducted in the presence of the accused fully represented by counsel of his choice. It is certainly more expeditious and free from doubt to let a person who is trained and learned in the law inform the court of the election and the plea of the accused, providing it is done in open court and in the hearing of the accused, rather that [sic] to insist that a slow and tedious trial ritual be accomplished only through the mouth of the accused, who may not fully understand the questions raised and who may be hesitant to reply for fear of misunderstanding or mistake. Counsel has a role to play in the courtroom. He should be able to play it to the fullest."¹²⁶ (emphasis added)

In R. v. Sommerfeldt¹²⁷ the Korponay decision was cited as authority for the proposition that counsel could plead on behalf of a client. Sommerfeldt was charged with several counts in two indictments. There was discussion between defence counsel and the trial judge in which counsel purported to enter guilty pleas on the accused's behalf. There was no plea by the accused himself, although he was present. At the end of the discussion the trial judge asked the accused whether he confirmed

¹²⁴ Id at 52 and 53.

¹²⁵ (1979), 13 C.R. (3d) 62 (Man. C.A.).

¹²⁶ Id at 71.

¹²⁷ (1984), 14 C.C.C. (3d) 445 (B.C.C.A.).

the elections and pleas made by his counsel, to which the accused replied "Yes". Later he appealed his convictions on the ground that he had not pleaded guilty. Relying on Korponay Seaton J. found that there had been a plea, although an informal one not in accordance with traditional methods of pleading, and dismissed the appeal.¹²⁸ Esson J.A. agreed with the result but commented,

"I would add this, that I think the case very close to the line because the degree of informality adopted resulted in an element of doubt at one stage as to what the proposed change of plea was. Had it not been for the statement, which came slightly later, by defence counsel to the effect that "my client has pleaded guilty", I would be inclined to hold that the degree of informality here was such as to leave a doubt. I do not think that the decision in Korponay should be read as encouraging informality in matters such as election and plea. Generally, the formalities take a very short time to accomplish and what they do is remove the possibility of doubt as to whether the procedure has been properly carried out and, therefore, as to whether there has been any prejudice to the interests of the accused."¹²⁹

In summary, there is a well established rule in Canada that a guilty plea entered by defence counsel is acceptable. Nevertheless, given that the guilty plea serves both the procedural function of a waiver of trial rights and the evidentiary function of a complete confession of guilt, it is submitted that a requirement that the accused plead personally, might help in verifying that the accused really intended these consequences.

¹²⁸ Id at 448.

¹²⁹ Id.

D. Who should enter a conviction on a guilty plea

If, in a non jury trial or in a jury trial where the accused has not yet been placed in the jury's charge, the accused pleads guilty then it is the trial judge who should enter the verdict. In R. v. Koury and Rivet,¹³⁰ upon arraignment Rivet had pleaded not guilty and Koury had pleaded guilty of robbery. Instead of registering Koury's conviction, the trial judge had proceeded with the trial of Rivet by jury. At the end of the trial the jury had returned a verdict of guilty against Rivet and the trial judge had directed them to return a verdict of guilty against Koury. On appeal it was stated that the preferable practice would have been for the trial judge to register the conviction as soon as Koury had pleaded guilty and then impose sentence on him, or alternatively, remand the accused for sentence. Notwithstanding the irregularity in the case before him, Schroeder J.A. concluded that Koury had never been placed in the jury's charge, what had been done by the jury was really surplusage, and the entry of the verdict was really the act of the trial judge.¹³¹

The same rule applies where the accused pleads guilty to a lesser included offence before being put in the jury's charge. In Bennett v. The Queen¹³², the Supreme Court of Canada affirmed the decision of the

¹³⁰ (1972), 25 C.R.N.S. 75 (Ont. C.A.).

¹³¹ Id at 76.

¹³² (1982), 70 C.C.C. (2d) 575 (S.C.C.).

Ontario Court of Appeal, that pursuant to 534(4) (now R.S.C. 1985, c. C-46, s.606(4)),

"...a person can plead guilty to and be convicted of the lesser and included offence of second degree murder on an indictment of first degree murder, without the intervention of the jury."¹³³

Where an accused, who is already in the charge of a jury, admits guilt, he will not be convicted merely on his admission; the verdict of the jury must be taken.¹³⁴ In Gagné v. R.¹³⁵ the Quebec Court of Appeal confirmed that where in the course of a jury trial the accused pleaded guilty, acceptance or rejection of a guilty plea to the offence charged or to any included or other offence was for the jury to decide because they were seized of the matter. Even if the Crown consented to accept a guilty plea to an included offence, the jury still had the discretion to decide whether it would accept that plea, and that discretion had to be exercised judicially with a full appreciation of the evidence.¹³⁶ Similarly, in Regina v. Kivell,¹³⁷ where the accused pleaded guilty to second degree murder part way through the Crown's case in a trial for

¹³³ Id at 576.

¹³⁴ In the English case of Joe Hancock (1931), 23 Ct. Crim. App. 16, the accused had pleaded not guilty on arraignment for rape, but during the course of the trial he made statements amounting to an admission of the truth of the charge. He was sentenced without the verdict of the jury being taken. On appeal, a new trial was ordered on the ground that once a prisoner was in charge of the jury, his statement that he was guilty was merely evidence on which a jury might act, and therefore a verdict of the jury should have been taken (at 17 and 18).

¹³⁵ [1977] C.A. 146 (Que. C.A.).

¹³⁶ Gagné c. R., [1977] C.A. 146, at 147-149.

¹³⁷ (1985), 21 C.C.C. (3d) 299 (B.C.C.A.).

first degree murder, the British Columbia Court of Appeal confirmed that the decision whether to accept the plea was for the jury because once the accused was placed in charge of a jury, the verdict had to come from it.¹³⁸

E. Equivocal pleas

In Canada any ambiguity in a plea derogates from its acceptability. In the words of subsection 606(1) of the Code, "An accused who is called on to plead may plead guilty or not guilty, or the special pleas authorized by this Part and no others." Archibold wrote,

"It is important that there should be no ambiguity in the plea, and that where the defendant makes some other answer than Not Guilty or Guilty, as the case may be, care should be taken to make sure that he understands the charge and to ascertain to what the plea amounts."¹³⁹

For example, an accused might plead "guilty with an explanation", offering an explanation which either provides a defence or mitigates the offence.¹⁴⁰ "Guilty with an explanation", however, is not a legal concept in Canada. An accused person

"...is not taken to admit having committed the offence with which he is charged unless he pleads "guilty" to that charge in

¹³⁸ Id at 302-303. However, the court ruled that the finding of guilt that a jury made when it accepted a guilty plea was not a "finding" for the purposes of making a recommendation as to parole eligibility under s.670 of the Code (now R.S.C. 1985, c. C-46, s.670) (at 303-306).

¹³⁹ Archibold, Pleading, Evidence and Practice in Criminal Cases. (42d ed. 1985) at 264.

¹⁴⁰ H. Leonoff and D. Deutscher, "The Plea and Related Matters", in V.M. Del Buono, Criminal Procedure in Canada, Studies (1982) at 237.

unmistakable and unambiguous terms."¹⁴¹

It has been suggested that the formality and simplicity of the criminal pleading requirements of the Code dictate that any statement which contradicts the guilty plea, in effect, must be aborted by the court.¹⁴²

In his treatise on sentencing, Ruby wrote,

"Elementary consideration of the purpose and nature of a criminal trial indicate that if there is the slightest doubt whether or not the plea of guilty is really intended, then inquiry should be made and, if warranted, the plea should be changed and a different course taken.

If a plea of "guilty" is in fact both justified and intended, a statement put forward in mitigation which in fact negates one of the elements of the crime may be disregarded by the trial judge. The presence or absence of counsel is an important factor in making such a decision."¹⁴³

It is the court's responsibility to ensure that there is no qualification or condition made by the accused in pleading guilty. A qualified or conditional plea should not be accepted unless after due inquiry the court is satisfied the accused intended to enter an unequivocal guilty plea, and that the accused's explanations raise no defence to the charge.¹⁴⁴

A review of the case law indicates that the rule against equivocal

¹⁴¹ A.E. Popple, Annotation, "Accepting a Plea of Guilty", [1946] 1 C.R. 183 at 183.

¹⁴² R. Ericson and P. Baranek, The Ordering of Justice (1982) at 201.

¹⁴³ C.C. Ruby, Sentencing (2d ed. 1980) at 38.

¹⁴⁴ H. Leonoff and D. Deutscher, "The Plea and Related Matters" in V.M. Del Buono, Criminal Procedure in Canada, Studies (1982) at 236-237, citing R. v. McNabb (1971), 4 C.C.C. (2d) 316 (Sask. C.A.).

pleas is firmly established. Early authority for this rule is found in Rex v. Swett,¹⁴⁵ in which the accused was charged with a vagrancy offence, that of being a disorderly person, i.e., a person who "is in the habit of frequenting ... houses [of "ill fame", etc.] and does not give a satisfactory account of himself or herself" contrary to subsection 238(k) of the Criminal Code, 1906. The accused was convicted at trial on the basis of his statement, "I was there if that makes me guilty", with no other evidence being taken. On appeal Stuart J. quashed the conviction, stating,

"The statement made by the accused was clearly not a plea of guilty. Even if we assume that sub-sec. (k) of sec. 238, creates or describes an offence it is beyond argument that the answer given by the applicant was not an admission that he had committed the offence described. To admit being in a house of ill-fame on a certain occasion is surely not equivalent to an admission that he was in the habit of frequenting it."¹⁴⁶

The leading authority today appears to be the case of Regina v. Durocher.¹⁴⁷ When called upon to plead to a charge of causing bodily harm, Durocher had said, "Guilty with an explanation". He made other exculpatory statements but was convicted on this plea. An appeal against sentence was allowed for unrelated reasons, but the British Columbia Court of Appeal made the following comment regarding the accused's plea:

"It is a first "principle" that a prisoner is not to be taken to admit an offence with which he is charged unless he pleads guilty to that charge in unmistakable and unambiguous terms. There is therefore a responsibility on the Magistrate among other requirements laid down to see that there is no qualification or

¹⁴⁵ (1914), 23 C.C.C. 272 (Alta. S.C.).

¹⁴⁶ Id at 275.

¹⁴⁷ [1964] 1 C.C.C. 17 (B.C.C.A.).

condition on the part of the accused in tendering his plea of guilty. See annotation (1946), 1 C.R. 183.

It is apparent from the record that the learned Magistrate failed in his duty as the plea was not given in unmistakable and unambiguous terms without qualification or condition; nor was the learned Magistrate informed, nor did he inquire in open Court before the plea was accepted as to the facts upon which the accused pleaded guilty.

The accused being without counsel it was all the more necessary that special care should be taken by the learned Magistrate to assure himself that the accused knew exactly what he was doing and intended to plead guilty."¹⁴⁸

In Regina v. Greenlaw (No.2)¹⁴⁹ a conviction entered after holding an inquiry in accordance with the directions in Durocher was upheld on appeal. When the accused pleaded "guilty of possession" to fifteen counts of possession of stolen automobiles, the trial judge had questioned the accused as to whether he was pleading guilty or not guilty and the accused then had pleaded guilty without qualification. In dismissing the appeal against conviction Bridges, C.J. stated,

"I can see no objection, when an accused gives a qualified plea, to the Court informing him he should plead guilty or not guilty. If he still refuses to plead in either manner the Court should then direct a plea of not guilty to be entered."¹⁵⁰

In Regina v. McNabb¹⁵¹ the accused had been convicted on a plea of "Guilty with an explanation" to a charge of escaping lawful custody. The Saskatchewan Court of Appeal allowed an appeal against this

¹⁴⁸ Id at 19.

¹⁴⁹ [1968] 3 C.C.C. 207 (N.B.C.A.).

¹⁵⁰ Id at 208.

¹⁵¹ (1971), 4 C.C.C. (2d) 316 (Sask. C.A.).

conviction, citing R. v. Durocher¹⁵² as authority for the following proposition of law:

"When a qualified on conditional plea is given, the same should not be accepted as a plea of guilty unless the Court is satisfied, after due inquiry, that the qualification or condition does not derogate from the accused's intention to enter an unequivocal plea of guilty."¹⁵³

Culliton C.J.S. found that in the case before him the trial judge had not made the necessary inquiry to justify his acceptance of the plea of "guilty with an explanation" as a sufficient admission of guilt for the purpose of founding a conviction thereon.

Numerous other cases have elicited judicial pronouncements to the same effect. Convictions based on pleas of "Guilty with an explanation" or pleas admitting only part of the facts, or referring to possible defences have been overturned on appeal, unless the trial judge had made sufficient inquiry to ascertain that the accused in fact had the intention to enter an unequivocal guilty plea.¹⁵⁴

¹⁵² [1964] 1 C.C.C. 17.

¹⁵³ (1971), 4 C.C.C. (2d) 316 (Sask. C.A.) at 319.

¹⁵⁴ See, Nasser v. Sa Majesté la Reine, [1965] B.R. 538, allowing an appeal against conviction where the accused, on the advice of a detective had pleaded guilty with an explanation, but had not been given an opportunity to give his explanation before being convicted. In Regina v. Patenaude (1978), 44 C.C.C. 376 (Que. C.A.), the accused was charged with being illegally at large without excuse. Upon arraignment, without the assistance of counsel, he stated "I am going to plead guilty with explanations". After a confused discussion between the accused and the trial judge the accused stated that he would plead guilty so as not to hold things up and because he thought that if he pleaded not guilty he would be convicted anyway. On this basis the accused was convicted. His appeal against conviction was allowed on the ground that the trial judge should have elicited a more precise explanation from the accused and then entered a plea of not guilty.

In contrast to this Canadian jurisprudence is the position in the United States, where there is high judicial authority to the effect that the court has a discretion to accept an equivocal plea as long as there is a factual basis for the plea. In North Carolina v. Alford,¹⁵⁵ the United States Supreme Court held that an admission of guilt was not a constitutional requisite for a state court to impose a criminal penalty based on a plea of guilty. A person accused of crime could voluntarily, knowingly and understandingly consent to the imposition of a prison sentence even if he was unwilling or unable to admit his participation in the acts constituting the crime; and the court could accept such a plea if the record contained a strong factual basis for the plea.¹⁵⁶ The

Again, in Regina v. Matthews, 15 W.C.B. 83 (October 7, 1985) (Nfld. D.C.), an unrepresented accused pleaded "guilty with an explanation", this time to a charge of dangerous driving. His admissions to the court at the time of arraignment were contrary to the allegations of the Crown and, if true, would have provided a legitimate defence. The accused's appeal against conviction was allowed because his plea had not been the unqualified declaration of guilt required by the law. See also, R. v. Neufeld (Doc. No. 4019, Sask. C.A. April 7, 1988).

¹⁵⁵ 400 U.S. 25 (U.S.S.C. 1970). Apparently Alford's guilty plea was motivated by the fact that conviction of murder on a guilty plea carried a maximum penalty of life imprisonment, whereas conviction by a jury carried the possibility of receiving the death penalty. The question of voluntariness of a plea that this case so obviously raises will be discussed infra.

¹⁵⁶ Id., discussed in J. Barkai, "Accuracy Inquiries for all Felony and Misdemeanour Pleas: Voluntary Pleas but Innocent Defendants" (1977), 126 University of Pennsylvania Law Review 88 at 113-114. The strong factual basis test in Alford has not been interpreted to mean that there need be proof beyond a reasonable doubt. The test has been said to be a "a high probability of conviction": Id. at 126, citing Bruce v. United States, 379 F. 2d 113, 120 n. 19 (D.C. Cir. 1967). There has been criticism of the Alford decision, founded mainly on the traditional view that a guilty plea must contain an admission of guilt, and where it does

Alford decision ruled that a court may, not must, accept an equivocal plea: the accused had no absolute right to have his guilty plea accepted, and if the trial judge chose to reject an equivocal plea that decision would be virtually unreviewable.¹⁵⁷

The Americans also continue to recognize another type of equivocal plea formerly available in England, that of nolo contendere.¹⁵⁸ It is an implied, rather than an express confession of guilt, as the accused is merely saying that he does not wish to contend with the prosecutor regarding the charge.¹⁵⁹ While the plea of nolo contendere resolves the issue of whether the accused will take criminal responsibility for the act that is the subject of the charge, it leaves open the question

not contain such an admission, the existence of a "factual basis" is not sufficient to remedy this deficiency. Rather, it is argued, guilt should have to be proved by overwhelming evidence to be beyond a reasonable doubt, or else the equivocal plea should be rejected: Emory, "The Guilty Plea as a Waiver of Rights and an Admission of Guilt" (1971), 44 Temple Law Quarterly 540 at 549-551.

¹⁵⁷ In deciding whether to accept an equivocal plea American courts focus on whether it is voluntarily made and whether there is a factual basis for it: J. Barkai, "Accuracy Inquiries for all felony and misdemeanor pleas: voluntary pleas but innocent defendants" (1977), 126 University of Pennsylvania Law Review 88 at 124-125.

¹⁵⁸ H.C. Black, Black's Law Dictionary (5th ed. 1979), states that "non vult" and "non vult contendere" are different forms of the plea of nolo contendere. Another spelling for the same plea is nolle contendere. As this chapter deals with the plea in the United States today, I have used the form which appears to be currently most used there, namely, nolo contendere.

¹⁵⁹ Id; see also, 21 Am. Jur. 2d Criminal Law, "Plea of Nolo Contendere" ss. 492-499, at pp.812-13.

whether the accused should take responsibility.¹⁶⁰ Unlike the guilty plea, the plea of nolo contendere has no effect beyond the particular case in which it is given.¹⁶¹ A plea of nolo contendere admits the facts for the sole purpose of the criminal prosecution and it does not establish the fact of guilt for any other purpose than the case in which it is pleaded.¹⁶²

¹⁶⁰ By his plea of nolo contendere the accused admits the facts charged in the indictment, and for the purposes of the case it is equivalent to a plea of guilty. The plea of nolo contendere admits all facts which have been well pleaded, so that once it has been accepted, the court does not have to make a determination of guilt and cannot hear evidence on the issue of guilt, but may immediately turn to the issue of sentencing: 21 Am. Jur. 2d, Criminal Law, "Plea of Nolo Contendere" ss.492-499, at pp.822-824. The plea does not waive any rights an accused would have, had he pleaded guilty. He may expressly condition his plea on reserving the right to appeal a specific question of law or jurisdiction, although there is authority to the effect that appeal from a plea of nolo contendere is extremely limited: Id at pp.825-827.

¹⁶¹ Id at p.827.

¹⁶² It cannot be used as an admission in a later civil suit: T.C. Hayden Jr., "The Plea of Nolo Contendere" (1965), 25 Maryland Law Review 227, at 233; M.G. Hermann, Rules of Criminal Procedure for the United States District Courts. Practice Comments (2d ed. 1985) (Release #5, 2/85); nor is it admissible against an accessory at his trial: 21 Am. Jur. 2d, Criminal Law, "Plea of Nolo Contendere" ss.492-499 at p.827. In some jurisdictions in the United States, the fact of the accused's conviction on the basis of a plea of nolo contendere may be shown in another proceeding but the defendant is not estopped from denying the facts to which he pleaded nolo contendere. In other jurisdictions even the fact of his conviction on the basis of a plea of nolo contendere is inadmissible: Id at p.827-829; and W.L. Mills, Jr., "Criminal Law - Pleas and Defenses - Nolo Contendere" (1951-1952), 30 North Carolina Law Review 407 at 413. This is to be contrasted with the guilty plea, which binds the accused in other proceedings: 21 Am. Jur. 2d, Criminal Law, "Plea of Nolo Contendere" ss.492-499 at p.827.

As it was at common law,¹⁶³ the plea of nolo contendere in the United States continues to be essentially a tactical plea made with the objective of mitigating punishment, avoiding the stigma of the guilty plea, minimizing the time, expense and embarrassment involved in defending against a criminal prosecution, and ensuring that the accused will not be estopped from denying the facts in a subsequent civil suit arising out of the same incident.¹⁶⁴ There are important limitations, however, on the availability of the plea of nolo contendere. Not all state courts recognize the plea and in some jurisdictions it is only available for a limited number of offences.¹⁶⁵ Even where the plea is theoretically available, its availability in a particular case is a

¹⁶³ See Hawkins, A Treatise of the Pleas of the Crown 466 (8th ed. 1824).

¹⁶⁴ T.C. Hayden Jr., "The Plea of Nolo Contendere" (1965), 25 Maryland Law Review 227 at 229; 21 Am. Jur. 2d, Criminal Law, "Plea of Nolo Contendere" ss.492-499 at p.814. The plea is particularly useful where the offence charged is regulatory in nature, malum prohibitum rather than malum in se. In such cases it is the accompanying civil claim which settle the real issues of liability. The plea of nolo contendere dispenses with an unnecessarily lengthy criminal trial, as would a guilty plea, but does not estop the accused from denying the facts underlying the charge in a subsequent civil suit: Hayden at 233-237.

¹⁶⁵ In some jurisdictions the plea is only available in misdemeanour cases punishable by fine or for which imprisonment or fine are alternative punishments. In some states it has been held that the plea is not available at all unless specifically provided for by statute. Because of Hawkins' authoritative words describing the implied confession "in a case not capital", no court will accept a plea of nolo contendere to a capital offence unless there is a statutory authorization for this. The federal courts and a number of states will accept the plea in numerous other cases of felony: T.C. Hayden Jr., "The Plea of Nolo Contendere" (1965), 25 Maryland Law Review 227 at 228-229; 21 Am. Jur. 2d, Criminal Law, "Plea of Nolo Contendere" ss.492-499 at pp.814-816.

matter within the broad discretion of the court.¹⁶⁶

The United States Federal Courts will also accept a conditional plea of guilty.¹⁶⁷ The conditional guilty plea is akin to the equivocal

¹⁶⁶ T.C. Hayden Jr., "The Plea of Nolo Contendere" (1965), 25 Maryland Law Review 227 at 229-232; 21 Am. Jur. 2d, Criminal Law, "Plea of Nolo Contendere" ss.492-499 at p.817-818. The United States Federal Rules of Criminal Procedure specifically provide that an accused may only plead nolo contendere with the consent of the court, and the court is only to accept such a plea after due consideration of the views of the parties and the interest of the public in the effective administration of justice: Fed. R. Crim. P. Rule 11(b) (as amended February 28, 1966). Whether a plea of nolo contendere will be accepted by the courts is not easily predictable. For example, there are authoritative statements both to the effect that a plea of nolo contendere should be rejected unless compelling reasons for accepting it are established: M.G. Hermann, Rules of Criminal Procedure for the United States District Courts. Practice Comments (2d ed. 1985) (Release #5, 2/85 at 110, citing U.S. v. Bagliore, 182 F. Supp. 714 at 716 (E.D.N.Y. 1960), and that such a plea should be accepted unless compelling reasons for rejecting it are established: Id., citing U.S. v. Jones, 119 F. Supp. 288 (S.D. Cal. 1954) at 290. Nonetheless, the existence of the following factors in a particular case tends to indicate that acceptance of the plea is more likely: if acceptance would benefit the accused and the public; if public policy favours accepting the plea; if the prosecutor consents to the plea; and if "special considerations" exist, for example, the accused is a "respectable" citizen who is technically guilty but who should not be subjected to penalties intended only for those who wilfully violate the law: T.C. Hayden Jr., "The Plea of Nolo Contendere" (1965), 25 Maryland Law Review 227 at 229-232; 21 Am. Jur. 2d, Criminal Law, "Plea of Nolo Contendere" ss.492-499 at pp.817-818. In deciding whether to accept a plea of nolo contendere, the judge should balance the defendant's need to avoid an acknowledgement of guilt against community, correctional, and penological interests in securing such an admission: M.G. Hermann, Rules of Criminal Procedure for the United States District Courts. Practice Comments (2d.ed. 1985) (Release #5, 2/85) at 98, referring to United States v. Williams, 642 F.2d 136 (5th Cir. 1981). In practice nolo contendere pleas are rarely approved by the courts: Id. In addition to these factors, a plea must be made knowingly and voluntarily: 21 Am. Jur. 2d, Criminal Law, "Plea of Nolo Contendere" ss.492-499 at p.818; see also Fed. R. Crim. P. Rule 11(c) and (d).

¹⁶⁷ Fed. R. Crim. P. Rule 11(a)2.

plea in that the expressed condition derogates from the certainty and decisiveness of the plea of guilty. Thus it would appear to be fundamentally unacceptable in Canada.

In Regina v. Lucas,¹⁶⁸ on a charge of second degree murder, the trial judge had allowed the accused to enter a not guilty plea to the original charge and a conditional plea of guilty to manslaughter with the issue of causation to be tried. After a trial limited to this issue the accused was convicted of manslaughter. On appeal, Martin J. referred to the Supreme Court's decision in Adgey v. The Queen,¹⁶⁹ wherein Laskin J. (as he then was) described the guilty plea as an admission of guilt and a consent to conviction. Martin J. found that Lucas had not intended to enter an unconditional plea of guilty to manslaughter, and that his plea was not unequivocal. He noted the confusion that had arisen out of the conditional plea, with Crown and defence counsel taking opposite views of the extent of the admission thereby intended. He stated that the conditional plea was unknown to our law in that the Code only permitted an accused to plead guilty, not guilty, or one of the special pleas, but no others.

In the United States the accused, by the conditional plea of guilty, reserves in writing the right on appeal from judgment to review the adverse determination of a pre-trial motion challenging

¹⁶⁸ (1983), 9 C.C.C. (3d) 71 (Ont. C.A.) at 76.

¹⁶⁹ (1973), 13 C.C.C. (2d) 177 (S.C.C.) at 182-183.

constitutional or procedural defects, such as a coerced confession, illegal arrest, or illegally obtained evidence.¹⁷⁰ If successful on appeal, the accused will be allowed to withdraw the guilty plea.¹⁷¹ The effect of the conditional plea is that it avoids the necessity of having a trial of the factual issues where the accused's only objection to conviction is a procedural or constitutional matter. In Canada, because conditional guilty pleas are not permitted, unless the accused succeeded on a preliminary motion, there would have to be a full trial, and if convicted, the accused could then raise the procedural or constitutional matter in the court of appeal.¹⁷²

F. Pleading guilty to a lesser or included offence

There is the possibility that after a lengthy and expensive trial an accused will be convicted of some but not all of the offences charged in a multiple count indictment, or may avoid conviction of the full

¹⁷⁰ Only motions that are outcome determinative can be the basis for a conditional plea, and the court will not accept such a plea if the accused has a strong factual defence to the charge.

¹⁷¹ M.G. Hermann, Rules of Criminal Procedure for the United States District Courts, Practice Comments (2d ed. 1985) (Release 35, 2/85) at 97-98. Of course, if the accused does not expressly make the guilty plea conditional on the right to challenge such defects, the guilty plea will serve as a waiver of this right because the conviction is not founded on the coerced confession, illegal arrest, or illegally obtained evidence, etc., but upon the plea itself: Hermes, "Criminal Procedure: Effects of a Plea of Guilty on a Defendant's Constitutional Rights" (1974), 27 *Oklahoma Law Review* 49 at 50-51.

¹⁷² Criminal Code R.S.C. 1985, c. C-46, s.675.

offence charged and yet be found guilty of a lesser included offence.¹⁷³ This gives rise to the kind of pessimism or optimism on the part of the defence counsel and Crown prosecutors¹⁷⁴ that leads to explicit or implicit plea bargaining for guilty pleas to the lesser offences charged in an indictment, or to other offences that are less grave than those charged.

Unlike the situation where the accused tenders a guilty plea to the offence charged, in which case acceptance by the court is all that is required for conviction, where the accused pleads not guilty of the offence charged but guilty of another offence, the consent of the Crown must also be obtained. This additional requirement that the Crown consent, imposed by virtue of s.606(4) of the Criminal Code, introduces a new dynamic to the guilty plea process, opening up the possibility of extrajudicial resolution of criminal matters through plea bargaining.

¹⁷³ Because of the overlapping nature of the definitions of some crimes in our substantive criminal law, proof of certain crimes will necessarily entail proof of other lesser offences, which include some of the elements of the offence charged but lack some of its essentials without which the offence charged is incomplete: Ferguson v. The Queen (1961), 132 C.C.C. 112; [1962] S.C.R. 229 (S.C.C.). The doctrines of double jeopardy and res judicata, and the constitutional protection in subsection 11(h) of the Canadian Charter of Rights and Freedoms restrict the power of a court to convict an accused more than once for the same delict. Where on a charge for the more serious of overlapping offences, it appears that proof falls short of establishing guilt of the offence charged, but proof of a lesser included offence has been made out, section 662 of the Code permits the court to convict the accused of the lesser offence while finding him not guilty of the offence charged.

¹⁷⁴ Whether it is optimism or pessimism depends on whether the accused is factually guilty or not, and whether the Crown has a strong case or not.

The broader implications of plea bargaining will be addressed in Part II of this thesis. The present section will focus only on the mechanical rules for pleading guilty to a lesser included offence.

(a) Pleading guilty to a lesser or included offence charged

First, it is necessary to consider the rules applicable where an accused tries to preclude conviction of the more serious offence charged by pleading guilty to a lesser offence included in the indictment. In the case of Regina v. Cole¹⁷⁵, the accused who was charged with conspiracy to rob, armed robbery and receiving, attempted to plead guilty to a charge of receiving so as to preclude conviction of robbery. The judge refused to allow this, and Cole was tried and convicted of robbery. On appeal counsel for the accused unsuccessfully argued that the simple act of pleading guilty amounted to a conviction, relying on the words of Hale¹⁷⁶ and Hawkins¹⁷⁷. Parkhurst J. disagreed, stating,

"...nowhere is it stated either in Hale or Hawkins when the conviction occurred...In the judgment of the court, it only ranks as a conviction when the defendant is sentenced. This view is, to say the least, in accordance with common sense; it would surprise everyone if on the facts of this case the defendant could prevent his being prosecuted for this very serious charge of armed robbery merely by pleading Guilty to receiving some of the notes."¹⁷⁸

¹⁷⁵ [1965] Crim. App. R. 199 (U.K.C.A.).

¹⁷⁶ To the effect that when "the defendant upon hearing of his indictment without any other respect confesseth it, this is a conviction," Id at 203.

¹⁷⁷ To the effect that "where a person directly confesses crime with which he is charged, which is the highest conviction that can be ..." Id.

¹⁷⁸ Id at 204.

With respect to the appropriate procedure to follow where an accused pleaded guilty to one of alternative, mutually exclusive, counts in a multiple count indictment, Parkhurst J. stated:

"...in the ordinary case a judge should allow the plea of Guilty to stand. In those circumstances the prisoner will only be put in charge of the jury on the serious charge, in this case the armed robbery. If he is acquitted of the armed robbery, then he can be sentenced on the count to which he has pleaded Guilty. If, on the other hand, he is convicted of the armed robbery, then the proper course for the judge is to allow the count to which he has pleaded Guilty to remain on the file and not to proceed to sentence him."¹⁷⁹

In Regina v. St. Jean¹⁸⁰ the accused was charged with breaking, entering and theft, and possession of the same goods that were allegedly stolen. At trial he had pleaded guilty to the possession charge over the Crown's objection, and the trial judge had held that he had no choice but to accept the plea of guilty and to acquit the accused of the more serious charge of theft. The Crown appealed and the Quebec Court of Appeal ordered a new trial. Casey J.A. took the view that the Crown was entitled to submit its evidence in support of both charges, and

"...the accused could not frustrate this right by pleading guilty to the lesser offence nor was the trial Judge, on this plea, entitled to prevent the Crown from proceeding on the greater charge."¹⁸¹

¹⁷⁹ Id at 204-205. The fact that the accused cannot on his own modify the charge against him by pleading guilty to a lesser and included offence, but needs the consent of the Crown, provides the basis for plea bargaining, according to J. Fortin, Preuve Pénale (1984) at 395.

¹⁸⁰ (1970), 15 C.R.N.S. 194 (Que. C.A.).

¹⁸¹ Id at 197.

Hyde J.A. adopted the reasoning of the English Court of Criminal Appeal in Regina v. Cole¹⁸² as "eminently sensible and appropriate under our law."¹⁸³ In the result the conviction of possession was left to stand, as there had been no appeal against it, and the acquittal of break, enter and theft was quashed and a new trial was ordered on that charge.¹⁸⁴

In Regina v. Loyer and Blouin¹⁸⁵, the accused was charged with two overlapping offences: attempted robbery and possession of a weapon for the purpose of committing an offence. Upon arraignment the accused pleaded guilty to the less serious possession charge and not guilty of attempted robbery. The Crown then adduced evidence to support the charge of attempted robbery. The trial judge found that attempted robbery had been proved but entered an acquittal on that charge on the theory that because of the pre-existing guilty plea to the possession charge, a conviction of attempted robbery would have infringed the rule against multiple convictions, as laid down in Kienapple v. The Queen¹⁸⁶. On appeal to the Supreme Court of Canada Laskin C.J.C., delivering the

¹⁸² [1965] Crim. App. R. 199 (U.K.C.A.).

¹⁸³ (1970), 15 C.R.N.S. 194 (Que. C.A.) at 199. In concurring reasons Rivard J.A. stated (at 200), "It was, however, unlawful for the trial Judge to hold that because he had accepted a plea of guilty on a charge of unlawful possession, he had no jurisdiction to proceed to try the accused on the charge of breaking, entering, and theft."

¹⁸⁴ The appeal court thus left to the trial judge the question whether conviction on both counts would offend the rules against double jeopardy.

¹⁸⁵ (1978), 40 C.C.C. (2d) 291 (S.C.C.).

¹⁸⁶ (1974), 15 C.C.C. (2d) 524 (S.C.C.).

judgment of the court in Loyer and Blouin, held that

"The Kienapple doctrine cannot apply to bar a conviction of the more serious offence of which (as here) the accused would otherwise, on the evidence, be found guilty simply by offering a plea of guilty to the less serious offence and having the plea accepted."¹⁸⁷

Laskin C.J.C. then proceeded to give some guidance as to the application of the Kienapple principle, generally, and where a guilty plea to the lesser of multiple charges was tendered. He stated,

"When a trial before a Judge alone or before a Judge and jury proceeds on two or more counts of offences of different degrees of gravity, and the same delict or matter underlies the offence in two of the counts, so as to invite application of the rule against multiple convictions, the trial Judge should direct himself or direct the jury that if he or they find the accused guilty on the more serious charge, there should be an acquittal on the less serious one; but if he or they should acquit on the more serious charge, the question of culpability on the less serious charge should be pursued and a verdict rendered on the merits.

Again, if at the trial, there is a plea of guilty to the more serious charge, and a conviction is registered, an acquittal should be entered or directed on the less serious, alternative charge. However, if, as was the case here, the accused pleads guilty to the less serious charge, the plea should be held in abeyance pending the trial on the more serious offence. If there is a finding of guilty on that charge, and a conviction is entered accordingly, the plea already offered on the less serious charge should be struck out and an acquittal directed."¹⁸⁸

Laskin C.J.C. cited with approval the English case of Regina v. Cole¹⁸⁹ noting the factual similarities between that case and the one before him. Following the practice rule laid down in Cole, Laskin C.J.C. then entered a conviction on the charge of attempted armed

¹⁸⁷ (1978), 40 C.C.C. (2d) 291 (S.C.C.) at 294.

¹⁸⁸ Id at 294-295.

¹⁸⁹ [1965] Crim. App. R. 199 (U.K.C.A.).

robbery, in accordance with the finding of the trial judge; he set aside the conviction on the charge of possession of an offensive weapon, and remitted the case to the Quebec Court of Appeal for sentencing on the attempted armed robbery charge.

The rule allowing the trial judge to hold a guilty plea in abeyance until all the evidence has been heard before having to decide whether a conviction can be registered for the more serious crime or whether the guilty plea to the less serious offence should, after all, be accepted, only applies to situations where the accused has been charged with two or more overlapping offences with the same underlying delict.

(b) Pleading guilty to a lesser or included offence not charged

The second situation to consider is that where the accused pleads not guilty to the offence charged but guilty of a lesser included offence which was not charged. In the case of Regina v. Hazeltine¹⁹⁰, the accused was charged with wounding with intent. Upon arraignment he pleaded, "Not Guilty, but Guilty of unlawful wounding." The Crown refused to accept the plea. When the accused was put in charge of the jury, the trial judge told them that the accused had pleaded not guilty to the charge. At the end of the case, the trial judge told them that they need not consider the possibility of a verdict of guilty of unlawful wounding. They returned a verdict of not guilty of wounding with intent, and the trial judge then proceeded to sentence the accused

¹⁹⁰ [1967] Crim. App. R. 351 (U.K.C.A.).

for unlawful wounding, on the basis that his guilty plea to that offence was still effective.

On appeal from this conviction, Salmon L.J. noted that an accused could plead guilty to a lesser offence than the one charged, by virtue of section 39(1) of the English Criminal Justice Administration Act.¹⁹¹ This provision was meant to remove the anomalous requirement of holding a full scale trial in order to obtain a verdict of guilty of an included offence, where the accused was willing to plead guilty of such an offence. However, Salmon L.J. noted, it did not get rid of the rule that there could be only one effective plea to any one count:

"Accordingly, if an accused person pleads Not Guilty to wounding with intent, but Guilty of unlawful wounding and counsel for the prosecution or the judge takes the view that that plea ought not to be accepted and the trial proceeds, the plea of Guilty to unlawful wounding is deemed to be withdrawn and the only plea is the plea of Not Guilty to wounding with intent."¹⁹²

It was then for the jury to decide, based on the evidence, whether the accused was guilty of the offence charged, and if not, whether he was guilty of any other included offence. Salmon L.J. distinguished the case before him from Regina v. Cole¹⁹³ on the ground that Cole dealt with a multiple count indictment containing overlapping offences, one of which was more serious than the other, whereas the present case dealt

¹⁹¹ 1914 (4 & 5 Geo. 5, c. 58): "Where a prisoner is arraigned on an indictment for any offence, and can lawfully be convicted on such indictment of some other offence not charged in such indictment, he may plead Not Guilty of the offence charged in the indictment, but Guilty of some other offence."

¹⁹² [1967] Crim. App. R. 351 (U.K.C.A.) at 355.

¹⁹³ [1965] Crim. App. R. 199 (U.K.C.A.).

with only one indivisible count to which the only effective plea was that of not guilty, the rejected plea of guilty to unlawful wounding being a nullity.¹⁸⁴

In Canada, there was no such provision as section 39(1) of the English Criminal Justice Administration Act when Dietrich¹⁸⁵, who was charged with capital murder, attempted to plead guilty to the included offence of non-capital murder. Nonetheless, the plea was accepted by the trial judge with the Crown's consent, and the accused was convicted and sentenced for the included offence. On appeal by the accused, the conviction was quashed and a new trial ordered. The Court of Appeal of Ontario stated,

"A plea can be made only to a count in an indictment and an attempt to plead to an included offence is a nullity. The accused is given in charge of the jury and a verdict is their duty and responsibility. If the accused is prepared to plead guilty to an offence which is included in the offence charged and both Crown and Judge are willing to accept such guilty plea, sufficient evidence should be introduced to enable the jury, after a charge by the Judge on the law applicable to the included charge, to reach a verdict of guilty of the included offence."¹⁸⁶

It was stated that only where an accused pleaded guilty to one of several counts on a multiple count indictment (as in Cole, St. Jean and Loyer and Blouin, supra) could the plea be accepted without the necessity of obtaining a jury verdict.

¹⁸⁴ Yet it was said to be open to the Crown to call evidence of that guilty plea in order to show the inconsistency between this admission of malice and his subsequent claim of self defence: [1967] Cr. App. R. 351 at 356 (U.K.C.A.).

¹⁸⁵ R v. Dietrich, [1968] 4 C.C.C. 361 (Ont. C.A.).

¹⁸⁶ Id at 365.

The Court of Appeal's decision in Dietrich meant that where an accused pleaded guilty to any offence not specifically charged, the Crown still had to adduce evidence to convince a jury of the accused's guilt. In 1968, this inconvenience was remedied by an amendment to the Criminal Code permitting the acceptance of a guilty plea to an included offence without the necessity of a trial process where the Crown, the accused and the Court were satisfied with such a plea.¹⁹⁷ The provision now reads as follows:

"606(4) Notwithstanding any other provision of this Act, where an accused or defendant pleads not guilty of the offence charged but guilty of any other offence arising out of the same transaction, whether or not it is an included offence, the court may, with the consent of the prosecutor, accept such a plea of guilty and, if such plea is accepted, the court shall find the accused or defendant not guilty of the offence charged and find him guilty of the offence in respect of which the plea of guilty was accepted and enter those findings in the record of the court."

The courts have had some difficulty in interpreting this provision. In R c. Gagné¹⁹⁸ the Quebec Court of Appeal construed it narrowly, holding that even where the Crown consented to a guilty plea to an included offence, the jury seized of the matter would still have to make a finding of guilt or innocence on the offence charged, based on a full appreciation of the evidence, and only when the jury had acquitted the accused of the offence charged could they accept the guilty plea to the included offence. Bernier J. stated,

"Je suis donc d'avis que le plaidoyer de culpabilité pour une

¹⁹⁷ H. Leonoff and D. Deutscher, "The Pleas and Related Matters", in V.M. Del Buono, Criminal Procedure in Canada, Studies (1982) at 237-8.

¹⁹⁸ [1977] C.A. 146 (Que. C.A.).

infraction autre ne dispense pas le jury de se prononcer sur l'infraction faisant l'objet de l'inculpation; s'il en vient à la conclusion que, d'après la preuve soumise, cette infraction a été établie, il doit trouver le prévenu coupable de l'infraction faisant l'objet de l'inculpation, et alors refuser le plaidoyer de culpabilité pour une infraction autre."¹⁹⁹

The ruling in Gagné meant that the anticipated efficiency of this section in speedily resolving criminal prosecutions where guilt was not seriously contested and only the gravity of the charge was in issue, was largely nullified. There has been strong criticism of the decision in Gagné. With respect to Bernier J.'s view that the trial judge could hold a guilty plea to an included offence in reserve while the jury reached a verdict on the offence charged, Fortin stated the following,

"Cette interprétation fait violence au texte de l'article 534(4) C. cr., dans la mesure où le législateur prévoit le plaidoyer de culpabilité quant à l'infraction incluse en substitution du procès sur l'infraction reprochée. Certes, le tribunal n'est pas tenu de recevoir le plaidoyer, mais s'il décide de ne pas le recevoir et de continuer le procès sur l'infraction reprochée, le plaidoyer offert ne devrait pas recevoir son effet en tant que tel. Tout au plus, pourrait-il avoir l'effet d'une admission informelle dont la preuve devrait être faite, et que l'inculpé pourrait réfuter."²⁰⁰

Bernier J. also ruled that an unaccepted guilty plea to a lesser offence relieved the Crown of proving those elements, thereby eliminating the possibility of a complete acquittal. Leonoff and Deutscher criticized this position on the ground that it was contrary to the presumption of innocence and the requirement that the Crown must prove guilt beyond a reasonable doubt.²⁰¹

¹⁹⁹ Id at 148.

²⁰⁰ J. Fortin, Preuve Pénale (1984) at 399.

²⁰¹ H. Leonoff and D. Deutscher, The Pleas and Related Matters, in V.M. Del Buono, Criminal Procedure in Canada, Studies (1982) at 240-241. They also disagreed with Bernier J.'s view that a factual finding to sustain a plea of guilty made after the jury has been

Leonoff and Deutscher also disagreed with Bernier J.'s comments to the effect that it would be wrong for the court to accept a guilty plea to an included offence when the essential elements of the offence charged had been proved. They argued that in this situation the trial judge had the same discretion as with respect to accepting or rejecting guilty pleas generally, although s.534(4) (now s.606(4)) was not meant to permit the court to usurp the traditional function of the Crown to decide what charge the accused would be called upon to answer.²⁰² However, they noted that there was authority in England to support Bernier J.'s view that the court had a discretion to accept or reject a guilty plea to an included offence.²⁰³

impanelled must be made by the jury. Leonoff and Deutscher argued that a guilty plea made in these circumstances should be dealt with by the judge in the absence of the jury. If the Crown and the judge agreed to accept the guilty plea, they argued, the guilty plea should be made again before the jury and then the judge should direct them to return a verdict of not guilty of the offence charged and guilty of the included offence: Id at 238-239.

²⁰² Id at 239-240. See, R. v. O. (C.H.) (1987), 83 A.R. 33 (Alta. Youth Ct.), holding that on a guilty plea to an included offence it must be shown that the facts do not support guilt of the greater offence.

²⁰³ In R. v. Soanes, [1948] 1 All E.R. 289 (cited in H. Leonoff and D. Deutscher, "Pleas and Related Matters", in V.M. Del Buono, Criminal Procedure in Canada, Studies (1982) at 239), it was held that where nothing appeared on the dispositions which could be said to reduce the crime from the more serious offence charged to a lesser offence the court could insist that the Crown present the offence charged in the indictment and leave it to the jury to decide.

Another interpretation problem that arose with respect to this provision was how to deal with a guilty plea to an included offence where the Crown did not consent to accept the plea. In Regina v. Pentiluk and MacDonald²⁰⁴ the accused were charged jointly with two charges of non-capital murder. Pentiluk pleaded not guilty to the offences charged but guilty of manslaughter. The Crown prosecutor was not asked whether he consented to the guilty plea, the plea was endorsed on the indictment and the trial proceeded. In his charge to the jury the trial judge appeared to treat Pentiluk's initial plea to manslaughter as a valid guilty plea relieving the Crown of the burden of proving the killing. On appeal against conviction, Martin J.A. stated,

"We are all of the view that when the plea of guilty to the included offence of manslaughter was not accepted, it should not have been recorded. It was not effective as a plea of guilty and could only be considered as an admission if proper proof of its having been made was placed before the jury trying the accused.

...
The trial judge is not empowered to accept a plea of guilty to an included offence under s. 534(6) [now s.606(4)] unless the prosecutor consents. Where the prosecutor consents and the court, in its discretion, accepts the plea to the lesser offence, s. 534(6) requires the court to find the accused not guilty of the offence charged. Where the accused pleads not guilty to the offence charged but guilty to the included offence, and the plea of guilty to the included offence is not accepted, the only plea that has been made is one of not guilty. The plea of guilty to the included offence is not in accordance with the provisions of s. 534(6) and is a nullity."²⁰⁵

²⁰⁴ (1974), 28 C.R.N.S. 324 (Ont. C.A.), aff'd in MacDonald v. The Queen (1977), 75 D.L.R. (3d) 107 (S.C.C.).

²⁰⁵ Id at 328, referring with approval to Regina v. Hazeltine, [1967] Cr. App. R. 351 (U.K.C.A.).

Martin J.A. found that, although the procedure followed by the trial judge was irregular and not authorized by the Code, in the circumstances of the case no substantial wrong or miscarriage of justice had occurred, and so he dismissed the appeal.

In R. v. Dobson²⁰⁶ Martin J.A. affirmed his holding in Pentiluk and MacDonald. Dobson was charged with first degree murder but on arraignment in the presence of the jury he had pleaded not guilty to that charge, and guilty of second degree murder. The Crown would not consent to the guilty plea. The trial judge endorsed the record, "Not Guilty to first degree murder - but guilty to the included offence of second degree murder." The accused was convicted after trial of first degree murder. On appeal against conviction Martin J.A. noted that when the guilty plea to the included offence was not accepted by the Crown it was a nullity and should not have been endorsed on the record. Despite this procedural irregularity the Court of Appeal found that, as the jury was entitled to consider the "guilty" plea as an admission by Dobson, no substantial wrong or miscarriage of justice had occurred. Accordingly, Dobson's appeal was dismissed.²⁰⁷

Another source of some confusion in interpreting s.606(4) is the meaning of the phrase "any other offence". In its original form, this

²⁰⁶ (1985), 19 C.C.C. (3d) 93 (Ont. C.A.).

²⁰⁷ Id at 94-95. It may be questioned whether the use of a rejected guilty plea as evidence of guilt is appropriate. Arguably, the tendered plea, once rejected, should be treated as a nullity for both procedural and evidentiary purposes.

section permitted the acceptance of a plea of guilty to an "included or other offence".²⁰⁸ In Regina v. Hogarth²⁰⁹ the accused was charged with stealing an automobile of a value exceeding \$200 and upon arraignment pleaded not guilty of theft but guilty of driving without the vehicle owner's consent. The Crown consented to the plea and the trial judge registered a conviction. On appeal Evans J. noted that following the decision in Dietrich²¹⁰ section 534(6) (now s.606(4)) was enacted to enable the Court in certain circumstances to accept a guilty plea to an included or other offence. Evans J. considered that it was not reasonable to suppose that Parliament intended that a judge could accept a plea of guilty to any offence whatsoever. He stated,

"On any reasonable construction the new provision in the Code is limited to an acceptance of a guilty plea to: (a) an included offence; or (b) any other offence of which the accused could, by law, be convicted on the indictment before the Court. ... "Other offence" would also encompass any offence which is included by virtue of the manner in which the indictment is phrased."²¹¹

Thus, had the present indictment been phrased to include the offence of taking an automobile without the owner's consent, the trial judge would have been able to accept the guilty plea as made. Since this was not

²⁰⁸ Section 534(6) of the Criminal Code, as amended in 1968, 1968-69, C. 38, s. 46, provided: Notwithstanding any other provision of this Act, where an accused pleads not guilty of the offence charged but guilty of an included or other offence, the court may in its discretion with the consent of the prosecutor accept such plea of guilty and, where such plea is accepted, shall find the accused not guilty of the offence charged.

²⁰⁹ (1976), 31 C.C.C. (2d) 232 (Ont. C.A.).

²¹⁰ [1968] 4 C.C.C. 361 (Ont. C.A.).

²¹¹ (1976), 31 C.C.C. (2d) 232 (Ont. C.A.) at 234; H. Leonoff and D. Deutscher, "The Pleas and Related Matters", in V.M. Del Buono, Criminal Procedure in Canada, Studies (1982) at 240-241.

the case the conviction was quashed for lack of jurisdiction.

An issue arises as to whether an accused charged with an indictable offence, who pleads not guilty of that offence but guilty of a lesser, hybrid offence, is entitled to have the guilty plea treated as a summary conviction matter. In Regina v. Wardley²¹², Wardley, who was charged with the indictable offence of possession of a narcotic for the purpose of trafficking, pleaded not guilty to the offence charged but guilty of the included offence of simple possession which was a hybrid offence. The trial judge treated the possession offence as a summary conviction offence and imposed a minimal sentence. On a Crown appeal against sentence the Ontario Court of Appeal held that as the accused had been charged with an indictable offence the accused's plea of guilty to the included offence of possession constituted a guilty plea to the indictable offence of possession.

Finally, an issue arises as to whether a jury must intervene in respect to a guilty plea to an included offence within the exclusive jurisdiction of judge and jury. In Bennett v. The Queen²¹³, the Supreme Court of Canada affirmed a decision of the Ontario Court of Appeal, holding that, by virtue of section 534(4) (now s.606(4)), a person could plead guilty to and be convicted of the lesser and included offence of second degree murder on an indictment of first degree murder, without

²¹² (1978), 43 C.C.C. (2d) 345 (Ont. C.A.). See also R. v. Yaworski (1959), 124 C.C.C. 151 (Man. C.A.).

²¹³ (1982), 70 C.C.C. (2d) 575 (S.C.C.).

the intervention of a jury.²¹⁴ Thus, the period of ineligibility for parole was a decision for the trial judge, not the jury, in the circumstances.²¹⁵

G. Evidence at the sentencing hearing

When a trial court accepts a plea of guilty it finds itself in the difficult position of having to determine a sentence that fits the crime while possessing only minimal information about that crime. Given the amount of discretion that the trial court has in respect to sentencing and given the paucity of information about the circumstances of the crime (perhaps no more than the charge, the accused's plea of guilty and a police report), it is only natural that the trial court will seek more information to assist in properly exercising this discretion. Indeed, there appear to be some offences which can vary so greatly in seriousness, that the trial court may be required as a matter of law to hear evidence to decide on the correct sentence for a particular case. Thus, the question arises (1) as to the relevancy of certain information introduced for sentencing purposes; (2) as to the necessity, for purposes of sentencing, of holding an inquiry into the circumstances of

²¹⁴ Id at 576.

²¹⁵ But see, Regina v. T.R. (No. 2) (1984), 11 C.C.C. (3d) 49 (Alta. Q.B.) at 58-59, holding that on a charge of first degree murder, a plea of guilty to the delinquency of manslaughter, entered by the accused and accepted by the trial judge, was not a plea entered in accordance with s.534(4) of the Code (now s.606(4)). Thus, the juvenile court judge was subsequently able to waive the case up to adult court for trial on the original murder charge, without offending s.534(4).

the offence; and (3) as to the standard of proof which the Crown should meet at a sentencing hearing after a guilty plea.

Dealing first with the issue of relevancy, problems may occur when a trial court allows evidence introduced at the sentencing hearing to influence it into imposing a punishment for other offences as well as for the one for which the accused was actually convicted. In the case of Albert Bright²¹⁶ the accused pleaded guilty to and was convicted of an offence under the Defence of the Realm Act of attempting to collect information with regard to the manufacture of war materials, without lawful excuse. The sentence for such an offence was up to life imprisonment, but if the court found that the offence was committed with intent to assist the enemy then the death penalty could, but did not have to, be imposed. The indictment did not charge that the appellant had such an intention. In passing sentence, the trial judge heard evidence from two soldiers which convinced him that the accused had intended to assist the enemy, and therefore he imposed a sentence of life imprisonment.

On appeal against sentence only, the appeal court affirmed that the trial judge was entitled to hear witnesses to assist in ascertaining the accused's motives and the sentence that was due. However, they found that the trial judge's stated reasons for imposing life imprisonment clearly indicated that he was influenced by the assumption

²¹⁶ [1916] Ct. Crim. App. 69 (U.K.C.A.).

that the accused had committed the acts charged with intent to assist the enemy, an aggravating factor which should not have been taken into account because it had not been charged in the indictment. Therefore, the sentence was reduced.

The Saskatchewan Court of Appeal followed Rex v. Bright in the case of Rex v. Whepdale.²¹⁷ In passing sentence on a guilty plea to a charge of robbery with violence, the trial judge took into account the testimony of the complainant, and imposed a particularly severe punishment. On appeal against the sentence, Turgeon, J.A. affirmed that the trial judge could hear evidence of the complainant in order to form an opinion as to the degree of the accused's guilt and the appropriate sentence to be imposed. He continued,

"But a judge following this procedure must avoid the danger of giving consideration, in passing sentence, to aggravating circumstances disclosed by such evidence which may change the character of the offence charged against the prisoner. He must avoid the error of sentencing the prisoner in reality for the commission of a greater offence than the one with which he has been charged."²¹⁸

In the circumstances, Turgeon, J.A. reduced the sentence.

Second, there is the issue of the necessity, for sentencing purposes, of holding some kind of inquiry into the circumstances of the offence. There appear to be some cases where the definition of the offence covers such a broad range of conduct that a trial judge must

²¹⁷ (1927), 49 C.C.C. 62 (Sask. C.A.).

²¹⁸ Id at 63.

inquire into the circumstances of the particular offence in order to determine the appropriate sentence. One such offence was indecent assault (since replaced by sexual assault). In Regina v. Underhill²¹⁹ the accused had pleaded guilty to indecent assault upon a nine year old girl. Without hearing any evidence or having the circumstances of the offence stated, the magistrate thereupon sentenced the accused to two years imprisonment. On an appeal against sentence Bridges J., delivering the judgment of the New Brunswick Court of Appeal, expressed concern about the paucity of information before the magistrate on which to found so severe a sentence. He went on to give some guidance as to the proper approach to sentencing after a plea of guilty:

"Indecent assault is an offence which may vary greatly in seriousness and I think that in such cases, as in most criminal cases where a plea of guilty has been entered, the Judge or Magistrate hearing the case should have a statement of the circumstances and previous character of the prisoner made to him in the presence of the prisoner by the prosecuting counsel or public officer who investigated the crime. If any of the facts so stated are questioned by the prisoner the Judge or Magistrate should either direct proper proof to be given or should ignore such facts in deciding the proper punishment to be imposed upon the prisoner."²²⁰

Because of the lack of material relevant to sentencing, the appeal court held a sentencing hearing, which led them to conclude that the "most revolting nature" of the offence committed by the accused in fact did warrant the sentence imposed by the Magistrate.

²¹⁹ (1955), 114 C.C.C. 320 (N.B.C.A.).

²²⁰ Id at 321.

In Regina v. Doiron²²¹ the accused had been charged with robbery and common assault. The accused had pleaded not guilty of robbery but guilty of common assault, and Crown counsel had withdrawn the robbery charge. Prior to sentencing the trial judge was interviewed by counsel for the Crown and for the defence with regard to sentence, and at that time both counsel agreed that the accused had two prior convictions. The next day at the sentencing hearing, the trial judge heard submissions from defence counsel and imposed a sentence of imprisonment for one year. On this occasion no prior convictions were mentioned nor were the circumstances of the offence stated to the court. The trial judge, having charged the grand jury which had found a true bill on both counts, apparently felt he was familiar enough with the case. On appeal, it was revealed that the accused in fact had only one prior conviction under the Criminal Code.

Bridges J.A. stated that the practice laid down in R. v. Underhill to be followed by Crown counsel where an accused pleaded guilty of an offence before a magistrate, should also apply in the case of a trial upon an indictment, or before a judge alone, where a plea of guilty was made. Bridges J. A. stated,

"The circumstances, disclosed by the evidence at the preliminary inquiry and by any additional testimony which the Crown may have intended to adduce, should be stated to the Court and the accused given the opportunity of denying any of the alleged facts. It is not, in our opinion, sufficient for the Judge, in determining sentence to consider the evidence taken at the preliminary inquiry without giving the accused an opportunity of being heard in respect to the circumstances such evidence discloses.

²²¹ (1958), 124 C.C.C. 156 (N.B.C.A.).

Where after a conviction, on a plea of guilty or after a trial, the Crown desires prior convictions to be taken into consideration in the imposition of the sentence, such previous convictions should be presented to the Court in the presence of the accused who should be given an opportunity to deny them. In case of denial, proper proof of any previous conviction should be given if it is to be taken into consideration by the Court, when imposing sentence."²²²

As in Underhill, the appeal court heard evidence with respect to sentence. They noted that the accused had only been convicted of common assault and that the robbery charge had been withdrawn. Therefore, however probable it was that the accused had also committed robbery, that could not be considered in determining the proper sentence for the assault. Bridges J.A. concluded that one years' imprisonment was appropriate for what he found to be "a very reprehensible common assault", and so dismissed the appeal.

While asserting the requirement that there be some kind of a sentencing hearing to ascertain the circumstances of the offence where an accused has pleaded guilty, neither the Underhill nor the Doiron case addressed the question of the standard of proof to be met by Crown counsel if the accused disputed the Crown's allegations. This third issue of the burden of proof at a sentencing hearing was considered by the Ontario Court of Appeal in Regina v. Cieslak.²²³

Cieslak had pleaded guilty to having sexual intercourse with a female not his wife and under the age of fourteen years. Crown counsel

²²² Id at 157-158.

²²³ (1977), 37 C.C.C. (2d) 7 (Ont. C.A.).

had then called the investigating officer who recounted what the complainant had told him, to the effect that there had been a "near rape". Defence counsel had then related facts given to him by the accused and another witness, suggesting that the complainant had lied about her age and been a willing participant. Crown counsel had not then called the complainant as a witness to prove his version of the facts. The appeal court stated that the correct practice for the purpose of assisting a trial court in deciding upon an appropriate sentence where an accused had pleaded guilty was as follows. The investigating officer or Crown counsel should state the facts, even though the facts so stated would be largely hearsay; but if the accused challenged the facts then Crown counsel would have to prove them on a balance of probabilities.²²⁴ The Court of Appeal dealt with the case before them on the basis that the accused had undoubtedly committed the offence but that the precise circumstances under which it occurred had not been proved. Therefore they reduced the sentence imposed by the trial judge.

Two years later, in the case of Regina v. Gardiner,²²⁵ two of the justices of appeal who decided the Cieslak case were at pains to discount the obiter statements made in that case about the burden of proof on the Crown at a sentencing hearing. Gardiner had pleaded guilty to a charge of assault causing bodily harm to his wife. Before

²²⁴ Id at 9.

²²⁵ (1979), 52 C.C.C. (2d) 183 (Ont. C.A.), affirmed (1982), 68 C.C.C. (2d) 477 (S.C.C.).

sentencing the trial judge heard conflicting evidence from the accused and his wife as to the seriousness of the assault. In addressing himself to the conflicting evidence the trial judge accepted the obiter in Cieslak to the effect that the Crown only need establish aggravating factors on a balance of probabilities. Jessup J.A., delivering the judgment on appeal, stated,

"In our view, that obiter was in error and that [sic] in the case of sentencing where a Judge is faced with conflicting evidence going to the gravity of the offence the onus on the Crown is to prove the aggravating facts beyond a reasonable doubt."²²⁶

Because it was impossible to ascertain the fitness of the sentence without knowing whether the aggravating factors found by the trial judge would have been found by him if he had applied the correct onus of proof, the Court of Appeal remitted the case to the trial judge to make the necessary findings of fact with respect to the existence or not of those aggravating factors.

The ruling in Gardiner was cited with approval by the Manitoba Court of Appeal in Regina v. Parenteau.²²⁷ Parenteau pleaded guilty to a charge of rape. At the sentencing hearing it became apparent that Crown and defence differed on two significant points: the Crown alleged that the accused had used a knife to intimidate the complainant and raped her four times whereas the accused submitted that he did not have a knife and raped her only once. Although neither the Crown nor the accused

²²⁶ Id at 184. Numerous authorities were cited in support of this proposition.

²²⁷ (1980), 52 C.C.C. (2d) 188 (Man. C.A.).

called any evidence to support their positions, the trial judge accepted the Crown's version of the facts and sentenced the accused to seven years' imprisonment.

On appeal against sentence Matas J.A. stated that where facts relevant to sentencing were presented by way of representations of counsel, and the accused denied important facts affecting the gravity of the offence, it was incumbent upon the Crown to prove those facts beyond a reasonable doubt. He continued,

"There is no onus on the accused to call evidence to refute the statements made by Crown counsel. This is consistent with the general principle applicable in criminal prosecutions requiring the Crown to prove its case beyond a reasonable doubt."²²⁸

The appeal court concluded that it would be unfair to the accused to remit the matter for further hearing because there was nothing on the record to indicate that Crown counsel had not had the opportunity at the sentencing hearing to call evidence in support of his allegations. Instead, the appeal court examined the facts disclosed by the record and reduced the sentence to four and a half years' imprisonment.²²⁹

The confusion created by Cieslak and Gardiner was finally resolved by the Supreme Court of Canada in 1982,²³⁰ when it confirmed the Ontario Court of Appeal's decision in the Gardiner case, rejecting their holding

²²⁸ Id at 190.

²²⁹ Id at 191.

²³⁰ Regina v. Gardiner (1982), 68 C.C.C. (2d) 477 (S.C.C.).

in Cieslak.²³¹ Dickson J. (as he then was), writing for the majority, reviewed the Commonwealth case law on the question of the burden of proof, all of which tended to the conclusion that where an accused disputed the existence of aggravating factors at the sentencing hearing, the accused was entitled to the benefit of any reasonable doubt, just as on the issue of guilt or innocence at trial. Dickson J. stated that sentencing was part of the fact-finding, decision-making process of the criminal law and, with as many as 85% of offenders pleading guilty, sentencing was, in respect to most offenders, the only significant decision the criminal justice system was called upon to make.²³² Dickson J. stated,

"One of the hardest tasks confronting a trial judge is sentencing. The stakes are high for society and for the individual. Sentencing is the critical stage of the criminal justice system, and it is manifest that the judge should not be denied an opportunity to obtain relevant information by the imposition of all the restrictive evidential rules common to a trial. Yet the obtaining and weighing of such evidence should be fair. A substantial liberty interest of the offender is involved and the information obtained should be accurate and reliable."²³³

Dickson J. noted that this need to inform the trial judge had resulted in a relaxation of the strict rules of evidence at the sentencing hearing. However, he did not see this as justifying a lessening of the standard of proof as well. This was because the facts which justified the sanction were no less important than the facts which

²³¹ In the Supreme Court a major issue of contention was whether that court even had jurisdiction to hear an appeal against sentence, and this point was decided in the affirmative by only four of the seven justices.

²³² Id at 514.

²³³ Id at 513-514.

justified the conviction, and both ought to be subjected to the same burden of proof.²³⁴ Indeed, he considered that the informality of the sentencing procedure as to admissibility of evidence and the wide discretion given to the trial judge in passing sentence were factors militating in favour of the retention of the criminal standard of proof beyond a reasonable doubt at sentencing.²³⁵

Dickson J. stated that the plea of guilty could only be interpreted as an admission of the essential legal ingredients of the offence admitted by the plea. Therefore any other facts relied on by the Crown to show aggravation had to be established by the Crown. The procedure for doing this could be informal where the facts were undisputed, but otherwise, the facts would have to be resolved by "ordinary legal principles governing criminal proceedings including resolving relevant doubt in favour of the offender."²³⁶ He rejected the Crown's argument that the need for administrative efficiency would justify a lesser standard of proof at the sentencing hearing, stating,

"...the administrative efficiency argument is not sufficient to overcome such a basic tenet suffusing our entire criminal justice system as the standard of proof beyond a reasonable doubt."²³⁷

These rules on the factors relevant to sentencing, the need for an adequate sentencing hearing and the applicable burden of proof also

²³⁴ Id at 514.

²³⁵ Id at 515.

²³⁶ Id at 514.

²³⁷ Id at 515.

apply where an accused has been convicted after a full trial. However, in the context of convictions based on guilty pleas, where there is virtually no meaningful judicial inquiry into the circumstances of the offence prior to conviction, these sentencing rules assume a special importance. In reality, as Dickson J. suggests, the sentencing hearing may be the only "trial" that the vast majority of accused will ever receive. Accordingly, it is essential that great care be taken in sentencing those convicted by guilty plea.

Chapter 3. LEGAL CHALLENGES TO THE VALIDITY OF THE GUILTY PLEA

A. Withdrawal of a plea of guilty

1. Withdrawal of the plea prior to sentencing

Once an accused has entered a plea of guilty to a charge he does not have a right to withdraw that plea. However, the trial judge has a discretion to permit an accused to change an unequivocal guilty plea to one of not guilty at any time before sentencing. If the trial judge exercises this discretion judicially, an appeal court will not interfere.²³⁸ Once sentence has been imposed, the trial judge no longer has jurisdiction to entertain an application to withdraw a guilty plea, although the appellate court has a discretion to allow a change of plea at any stage.²³⁹

There are three situations in which a trial judge might order the case to proceed as though the accused had pleaded not guilty: 1) where the accused did not appreciate the nature of the charge or did not intend to admit guilt, 2) where, on the facts, the accused could not in

²³⁸ Archibold, Pleading, Evidence and Practice in Criminal Cases (42d ed. 1985) at 293-4, citing R. v. Dodd, Pack and others (1982), 74 Cr. App. R. 50 (U.K.C.A.). See also, R. v. Horbacio (January 25, 1989), Doc. No. 467/88 (Man. C.A.): withdrawal before sentence in trial judge's discretion and that discretion will not lightly be interfered with.

²³⁹ E. Ewaschuk, Criminal Pleadings and Practice in Canada (1983) at 325-326.

law be convicted, and 3) where the trial judge feels there is some other valid ground for exercising his discretion. The first and third grounds for permitting a change of plea are discretionary and a heavy onus lies on the accused to establish the existence of these grounds. The second ground however, is mandatory, imposing a duty on the trial judge to substitute a plea of not guilty where the facts do not support the charge.²⁴⁰

The leading English authority for the trial judge's discretion to allow a change of plea is Rex v. Plummer,²⁴¹ holding that, where a prisoner had pleaded guilty to an indictment, the trial court had jurisdiction to permit withdrawal of the plea of guilty before judgment. In this case it was said that the accused's conviction on a guilty plea could not stand because his co-accused, charged with conspiring with him, had been acquitted.²⁴² The trial judge's power to allow the accused to withdraw a guilty plea was said to be discretionary so that if the trial judge had exercised this discretion, the reviewing court would have had no power to interfere. Here, however, the trial judge had not

²⁴⁰ H. Leonoff & D. Deutscher, "The Pleas and Related Matters", in V.M. Del Buono (ed.), Criminal Procedure in Canada, Studies (1982) at 231-232.

²⁴¹ [1902] 2 K.B. 339 (U.K.K.B.).

²⁴² This proposition has since been refuted by the Supreme Court of Canada in R. v. Guimond (1979), 25 N.R. 91 (S.C.C.). See also, R. v. Ropchan (1986), 1 Y.R. 225 (Y.T.S.C.), holding that a trial judge may accept a guilty plea from an accessory to murder before conviction of the alleged perpetrator.

exercised his discretion.²⁴³

A somewhat similar situation arose in Ontario in The King v. Walter Herbert,²⁴⁴ in which Meredith C.J.O. found that the verdict of acquittal of Herbert's co-accused was absolutely inconsistent with Herbert's conviction on his guilty plea. Therefore, Herbert, who had not yet been sentenced, was allowed to change his plea of guilty to one of not guilty. This case demonstrated the discretion of the trial judge, extending up to the time of sentencing, to permit a change of plea where there were valid grounds to do so. The subsequent revelation that conviction on the guilty plea would result in two completely contradictory verdicts, justified allowing the change of plea.

In the case of Thomas McNally,²⁴⁵ the accused at his sentencing hearing asked to withdraw his plea of guilty to charges of breaking and larceny, but gave no grounds for wanting to do so. The trial judge refused to allow him to change his plea. On appeal to the Court of Criminal Appeal, Goddard L.C.J. noted that McNally had been caught red-handed in a factory by the police and that his motive for attempting to change his plea was to be a nuisance. Indeed the case was only placed on the court list as an appeal so as to give the court "the opportunity of stating perfectly firmly what is the position with regard to a

²⁴³ Id at 349.

²⁴⁴ (1903), 6 C.C.C. 214 (Ont. S.C.), cited in C. Snyder, "Plea of Guilty to Murder" (1937), 67 C.C.C. 5 at 11-12.

²⁴⁵ [1954] Cr. App. R. 90 (U.K.C.A.).

prisoner who desires to change his plea."²⁴⁶ Goddard L.C.J. described the trial court's discretion to permit withdrawal of a guilty plea prior to sentence as follows:

"The question whether a plea is to be withdrawn or not is entirely a matter for the learned judge. The judge is not bound to allow it to be withdrawn. If he came to the conclusion that there was a question of mistake or misunderstanding, or that it would be desirable on any ground that the prisoner should be allowed to join issue, no doubt he would allow him to do it ... Once the sentence has been pronounced there is no power in the court to allow the plea to be withdrawn."²⁴⁷

Goddard L.C.J. found that in this case the trial judge, having all the facts before him, could see there was no ground for allowing a change of plea, and had properly exercised his discretion in refusing to permit the guilty plea to be withdrawn.

In Canada, the trial court's discretion to permit a change of plea prior to sentencing was described in R. v. Richmond as amounting to a duty in some circumstances:²⁴⁸

"Even though a prisoner has pleaded guilty, yet if while the case is still in course of being dealt with and the proceedings are not closed it plainly appears that the accused never intended to admit the truth of a fact which is an essential ingredient in his guilt and therefore pleaded guilty under a misapprehension of what constituted guilt, it is, I think, clearly the duty of any presiding Judge or Magistrate to offer to allow him to withdraw his plea if he so desires and to enter a plea of 'not guilty'."

²⁴⁶ Id at 93.

²⁴⁷ Id at 94. See also, R. v. Roy (November 9, 1988) Doc. No. 4287 (Sask. C.A.): withdrawal of guilty plea before sentence not allowed where no tenable basis; R. v. Lennie, [1987] N.W.T.R. 41 (N.W.T. Terr. Ct.).

²⁴⁸ (1917), 39 D.L.R. 117 at 119, per Stuart J.

This rule was applied in Rex v. Milina.²⁴⁹ Milina had pleaded guilty to a charge of possession of a loaded gun for a purpose dangerous to the public peace. However, after hearing evidence adduced by a Crown witness, defence counsel asked the court to allow his client to withdraw the guilty plea, but the trial judge decided to accept the plea. A majority of the British Columbia Court of Appeal held that there had been no proper exercise of the trial judge's discretion to permit a withdrawal of the plea. Sidney Smith J.A. cited R. v. Richmond, as expressing the applicable legal rule. He stated,²⁵⁰

"I am of the opinion that this language may be properly applied to the present case. Indeed this case is a fortiori for here there had not even been an acceptance of the plea of "guilty" when the application was made to change it to "not guilty."

As the trial judge had not exercised his discretion to permit withdrawal of the plea, a new trial was ordered.

In Regina v. Kavanagh,²⁵¹ the accused, who was twenty one years old and unrepresented, pleaded guilty to auto theft. The magistrate convicted him and remanded him for sentence. At the sentence hearing, the accused asked the magistrate what he had pleaded, and when told that he had pleaded guilty, asked to withdraw the plea on the ground that he had been under the influence of phenobarbital at the time he pleaded. The magistrate told the accused that he could not change his plea and after remanding the case a second time, pronounced sentence. On appeal

²⁴⁹ (1946), 86 C.C.C. 374 (B.C.C.A.).

²⁵⁰ (1946), 86 C.C.C. 374 (B.C.C.A.) at 383.

²⁵¹ (1955), 114 C.C.C. 378 (Ont. C.A.).

to the Ontario Court of Appeal, Pickup C.J.O. noted that the record did not disclose the magistrate's reasons for refusing to allow the change of plea. Pickup C.J.O. stated,

"... If the learned Magistrate refused the change of plea because, in his opinion, he could not permit a plea of guilty to be withdrawn after verdict, he erred because he had power, in his discretion, to allow the change of plea at any time before sentence."²⁵²

The Ontario Court of Appeal allowed the accused's appeal and ordered a new trial, stating,

"This Court is always loath to interfere with the exercise of a judicial discretion by trial tribunal in such a matter, but I am in doubt whether the learned Magistrate was purporting to exercise his discretion."²⁵³

The court was of the view that the magistrate should have exercised the discretion to permit withdrawal of the guilty plea because, aside from the guilty plea apparently having been made under the influence of phenobarbital, there was no evidence whatever of guilt, and the accused had requested permission to change his plea at the first opportunity.

In Regina v. Gagné,²⁵⁴ the accused initially pleaded guilty and the case was remanded for sentencing, but at the sentencing hearing he asked to be allowed to change his plea on the ground that he had pleaded guilty because a police constable had "advised him that he had no choice

²⁵² Id at 379. See also, R. v. MacAdam (1986), 60 Nfld. & P.E.I.R. 332 (P.E.I.S.C.), allowing withdrawal of a guilty plea where the accused suffered memory loss as result of accident and entered guilty plea on basis of what others told him about accident.

²⁵³ Id at 379-380.

²⁵⁴ (1956), 117 C.C.C. 97 (Alta. S.C. App. Div.).

but to plead guilty and if he pleaded guilty he would get off a lot easier."²⁵⁵ The magistrate dealt with this application by hearing evidence from the appellant and all the police officers who had had anything to do with the appellant on the day he pleaded guilty. In the course of the application to change his plea, the accused did not suggest that the inculpatory statements he had made to the police were false, that he was not guilty, or that he had any defence to the charge. Johnson J.A., speaking for the majority, stated,

"While I do not wish to be understood as saying that an accused must show that he has a defence before being allowed to change his plea, surely the absence of any repudiation of a full and complete confession is a matter that can be taken into account by the Judge or Magistrate hearing the application for a change of plea."²⁵⁶

Johnson J.A. noted that a guilty plea had to be "express and voluntary" to be valid, and that when an accused applied to change his plea, an inquiry into the matter had to be held. The magistrate's inquiry had been exhaustive and had established that the plea was voluntary; therefore, the magistrate had properly exercised his discretion to refuse to allow a change of plea. Johnson J.A., in dismissing the appeal, stated that "...an appellate Court has no right to overrule a decision arrived at by the exercise of judicial discretion."²⁵⁷

Clinton and Ford J.J. dissented on the ground that the magistrate had not properly exercised his discretion because instead of restricting

²⁵⁵ Id at 103, per Johnson J.A.

²⁵⁶ Id at 105.

²⁵⁷ Id at 104.

the inquiry to the issue of the voluntariness of the accused's plea, the magistrate had focused the inquiry on the issue of the accused's guilt. The two dissenting justices considered that there were circumstances in the case that created a reasonable doubt as to the voluntariness of the accused's guilty plea and therefore they would have quashed the conviction and ordered a new trial.

In Regina v. Sode²⁵⁸ the accused pleaded guilty to a charge of trafficking in marijuana but on the day set for sentencing he moved to withdraw his plea. The trial Judge heard evidence in support of the motion but declined to exercise his discretion to allow the change of plea. The accused was later sentenced. He appealed his conviction arguing that a change of plea should have been allowed because he had pleaded guilty under pressure from his lawyer and his father.

Coffin J.A., who delivered the judgment of the Nova Scotia Court of Appeal, stated that the decision to permit withdrawal of a guilty plea rested in the discretion of the trial judge and if exercised judicially, an appeal court would not lightly interfere.²⁵⁹ He concluded that, as the accused was already experienced in the criminal courts, and as there was no suggestion that the accused did not know the nature of the charge or the effect of the guilty plea, the trial judge had

²⁵⁸ (1974), 22 C.C.C. (2d) 329 (N.S.C.A.).

²⁵⁹ Referring to Thibodeau v. The Queen, [1955] S.C.R. 646 (S.C.C.) at 653, discussed infra.

exercised his discretion judicially.²⁶⁰

In the case of Lamoureux v. R.²⁶¹ the accused had pleaded guilty to a charge of theft, but at the sentence hearing defence counsel moved to withdraw the plea because he had improperly pressured the accused to plead guilty in view of certain handwriting evidence that pointed to the accused's guilt. The trial judge refused to allow a change of plea on the ground that there had been adequate pretrial disclosure of the Crown's case and the accused had been represented by counsel, so that he had not been taken by surprise but knew what was happening and had freely and voluntarily pleaded guilty.

On appeal, Rothman J. concluded that although an accused who was represented by counsel at arraignment had a particularly heavy burden in requesting a change of plea, where it was shown that counsel applied improper pressure to induce the accused to plead guilty over his claim of innocence, the accused had discharged that burden. Therefore the appeal was allowed.

In Regina v. Santos²⁶² the accused had initially pleaded guilty to two charges of sexual assault, although he maintained that the complainant had consented to the acts. His subsequent application to

²⁶⁰ (1974), 22 C.C.C. (2d) 329 at 334.

²⁶¹ (1984), 40 C.R. (3d) 369 (Que. C.A.).

²⁶² (1985), 34 Man. R. (2d) 9 (Man. C.A.).

change his plea was rejected by the trial judge on the ground that he only had a discretion to allow a change of plea where the accused established that the plea had been entered in error under improper inducements or threats. On appeal the Manitoba Court of Appeal allowed the accused's application to withdraw his guilty pleas. The court held that the trial judge had erred in restricting his discretion to cases of improper inducements, that he should have considered the material before him which indicated the accused had never intended to admit that the sexual acts were non-consensual, and that he should have allowed the accused to change his pleas.

In Regina v. Hepditch²⁶³ it was held that where an accused sought to withdraw a guilty plea on grounds of error or misunderstanding he had to show not only that there was merit in this request but also that he had a reasonable defence to the charge. In this case the appeal court found that accused had not offered any evidence to refute culpability so his request to withdraw his guilty plea had been properly refused by the trial judge.

2. Change of plea on a trial de novo

In Regina v. Sanders²⁶⁴ the British Columbia Court of Appeal considered whether, on appeal by way of trial de novo, an accused had

²⁶³ (1985), 53 Nfld. & P.E.I.R. 134 (Nfld. D.C.).

²⁶⁴ (1953), 106 C.C.C. 76 (B.C.C.A.).

the right to change his original plea of guilty of drunk driving to a plea of not guilty. It was held that the accused did not have a right to change his plea and have an appeal on the merits. The court reasoned that the guilty plea was an admission that the matters alleged in the information were true, so the accused could not claim to be aggrieved simply because the court accepted his admission. To allow the accused "blandly" to change his plea to not guilty so as to get a trial on the merits just because he did not like the consequences of his original guilty plea seemed "to be playing fast and loose with the administration of justice",²⁶⁵ stated Sidney Smith J.A.. The guilty plea acted as an estoppel to the accused's right to a trial de novo. However, the accused still had a right of appeal under special circumstances to show that his plea was entered without proper understanding of the charge or was induced by threats or otherwise. If the plea was shown to be irregular then the matter would be sent back to the Magistrate for a trial on the merits.

This same issue was considered by the Supreme Court of Canada some years later in the case of The Queen v. Bamsey.²⁶⁶ The accused had pleaded guilty to impaired driving and was convicted, then appealed on the ground that his conviction was contrary to the evidence and contrary to the law in that the magistrate had not applied the principle of proof beyond a reasonable doubt. On appeal by way of trial de novo the county

²⁶⁵ Id at 82.

²⁶⁶ [1960] S.C.R. 294 (S.C.C.).

court judge accepted a plea of not guilty and allowed the appeal. A Crown appeal against this decision was dismissed by the Court of Appeal of British Columbia. On further appeal to the Supreme Court of Canada Ritchie J., delivering the judgment of the Court, stated that appeal by way of trial de novo did not include arraignment and plea but an accused person who had been convicted on his own guilty plea was, on an appeal by way of trial de novo,

"...in exactly the same position procedurally as he was immediately after pleading "guilty" before the magistrate and before he had been convicted. This being so, he may change his plea if he can satisfy the Appeal Court that there are valid grounds for his being permitted to do so."²⁶⁷

The Supreme Court did not consider the accused's grounds of appeal to be adequate to justify allowing a change of plea, in that they contained "a self-evident contradiction in terms."²⁶⁸ Ritchie J. stated,

"Far from the conviction being contrary to law, it was the verdict which the law required the magistrate to enter after the plea of "guilty"... , and there is, therefore, no room for the application of the principle of reasonable doubt and it is idle for a defendant to complain that the conviction was contrary to the evidence and to the weight of the evidence because the conviction was not based on evidence but on the "guilty" plea."²⁶⁹

²⁶⁷ Id at 298, citing Thibodeau v. The Queen, [1955] S.C.R. 646.

²⁶⁸ Id at 299.

²⁶⁹ Id. In so holding, Ritchie J. appears to have characterized the guilty plea as a procedural device, implicitly rejecting the view that the guilty plea was an evidentiary device substituting for proof beyond a reasonable doubt.

Bamsey was confirmed by the Supreme Court of Canada in the case of Tennen v. The Queen,²⁷⁰. Tennen had pleaded guilty through her counsel to two informations charging failure to pay the sales tax required by the Excise Tax Act, and had been convicted and fined \$1200. On an appeal by way of trial de novo she sought to have her guilty pleas withdrawn and convictions set aside on the grounds that she had pleaded guilty by mistake and under duress, and had a good defence to the charges. The County Court Judge hearing her appeal found no exceptional circumstances in the case and declined to allow a change of plea. The Ontario Court of Appeal dismissed a further appeal by the accused.

On appeal to the Supreme Court of Canada, Ritchie J. affirmed what was stated in Bamsey, that arraignment and plea formed no essential part of an appeal by way of trial de novo, but that an accused who pleaded guilty in a summary conviction court had the same right to apply for leave to change his plea before the appeal court as he would have had in the court of first instance before sentence.²⁷¹ Ritchie J. stated,

"...the decision whether or not permission to withdraw a plea of guilty should be given rests in the discretion of the Judge to whom the application for such permission is made and ... this discretion, if exercised judicially, will not be lightly interfered with."²⁷²

²⁷⁰ (1960), 125 C.C.C. 336 (S.C.C.).

²⁷¹ Id at 340.

²⁷² (1960), 125 C.C.C. 336 (S.C.C.) at 341; citing Thibodeau v. The Queen, [1955] S.C.R. 646 (S.C.C.) at 653-4, per Cartwright J., as authority for the proposition that at any time before sentence the trial judge has power to permit a plea of guilty to be withdrawn.

Ritchie J. concluded that the County Court Judge had not precluded the accused from adducing evidence and had not misdirected himself with respect to his right to allow a change of plea. Having properly exercised his discretion to decline to strike out the guilty plea, the appeal was dismissed.

This was followed in Regina v. Corcoran.²⁷³ The accused alleged that he had pleaded guilty to a charge of impaired driving as a result of misunderstanding of the law and the consequences of conviction, due to representations by the police. O'Hearn Co. Ct. J., referring to the cases of Sanders, Bamsey and Tennen, supra, stated that on appeal the guilty plea acted as an estoppel to prevent the accused from denying the underlying facts. However, a guilty plea could be set aside if refusal to do so would amount to a miscarriage of justice. Finding this was such a case, O'Hearn Co. Ct. J. permitted the accused to withdraw his guilty plea.

Regina v. Barr²⁷⁴ was another case in which an accused, after being convicted on a guilty plea, sought to contest his guilt on an appeal by way of trial de novo. Relying on Bamsey, supra, Cullen D.C.J. stated that the accused would only be permitted to change his plea if he could satisfy the appeal court that there were valid grounds for letting him do so. Cullen D.C.J. stated that the appellant would have to

"...satisfy the court that the plea of guilty in the court below

²⁷³ (1967), 2 C.R.N.S. 160 (N.S. Co. Ct).

²⁷⁴ (1967), 64 W.W.R. 57 (Alta. D.C.).

resulted from threats, inducements, or a misunderstanding of the charge, or from some other motive or cause which makes the plea essentially wrong, and resulted in injustice."²⁷⁵

In the exercise of his discretion Cullen D.C.J. dismissed the appeal because he was not persuaded that the appellant had in fact misunderstood the charge or been threatened or pressured into pleading guilty.

In Regina v. Behr²⁷⁶ the appellant had plead guilty at trial to a charge of possession of obscene pictures for the purpose of distribution but had appealed by way of trial de novo, asking to withdraw his guilty plea. The District Court Judge mistakenly refused to allow the change of plea on the ground that he had no such discretion. He was overturned on appeal on the ground that the special circumstances leading up to the guilty plea were such that to refuse the appellant the right to change his plea and proceed to trial de novo would not have had the appearance of justice being done to the appellant.

3. Rejection of a plea over the accused's objection

Reviewing courts are more willing to interfere with the exercise of judicial discretion where the trial court has rejected a guilty plea either on its own initiative or at the request of Crown counsel and over the accused's objections, than where the trial court has refused an

²⁷⁵ Id at 61.

²⁷⁶ [1968] 2 C.C.C. 151 (Ont.C.A.).

accused's request to withdraw a guilty plea.

In Re de Silva and the Queen²⁷⁷ the accused pleaded guilty to a charge of assault. When the Crown began outlining the facts it became apparent that there was disagreement between Crown and defence counsel as to how the offence occurred and the number of blows struck by the accused. On his own initiative the trial judge struck the guilty plea and ordered a plea of not guilty to be entered. When the trial judge refused defence counsel's request to have the matter adjourned to a new trial judge, counsel served an application for a writ of prohibition against the trial judge proceeding with the case.

The Ontario Court of Appeal granted an order of prohibition and directed a new trial before another judge. They found that the disagreements as to the facts did not detract from the guilty plea and the accused's admissions through his counsel, whereby the accused had admitted the essential elements of the offence. They considered that, since defence counsel had not requested that the plea be struck, the trial judge should have treated the factual disagreement as a matter going to sentencing not culpability.

In Re Harrison and the Queen²⁷⁸ the Ontario High Court allowed an application by the accused for certiorari to quash the trial judge's

²⁷⁷ (1985), 18 C.C.C. (3d) 102 (Ont. C.A.).

²⁷⁸ 13 W.C.B. 283 (January 2, 1985, Ont. H.C.), affirmed 14 W.C.B. 362 (June 5, 1985, Ont. C.A.).

order setting aside convictions based on the accused's pleas of guilty. The trial judge had set aside the convictions because he had wanted to make the sentencing for those convictions consecutive to the sentence for another conviction in a different jurisdiction. By reason of the decision in Regina v. Paul²⁷⁹ the judge was precluded from imposing consecutive sentences. In striking the guilty pleas and convictions the trial judge had indicated he was not prepared to accept the limitations on his power and that had he been aware of the Paul decision at the time of conviction of the accused, he would have proceeded to sentencing at once.

White J. of the Ontario High Court noted that while a trial judge has a wide discretion to set aside a guilty plea, that discretion was not unfettered and did not give the trial judge the right to set aside a guilty plea just because he would have preferred not to follow a rule of law laid down by the Supreme Court which dictated that in the circumstances sentences were to be concurrent. A plea of guilty supported by uncontested facts could only be set aside for some extraordinarily demanding reason. Here there had been no improper conduct on the part of the accused or his counsel and so the trial judge had wrongly exercised his discretion. This decision was affirmed by the Ontario Court of Appeal.

²⁷⁹ (1982), 67 C.C.C. (2d) 97 (S.C.C.).

In the recent case of Regina v. Lortie,²⁸⁰ Ducros J. refused to accept Lortie's guilty pleas on the ground that Lortie possibly had a defence of insanity. Subsequently Ducros J. withdrew from the case on the Crown's request, and Lortie then pleaded guilty before Desjardins J. to reduced charges of second degree murder in respect to the killings and to nine charges of attempted murder. There appear to have been plea negotiations between defence counsel and the Crown, involving pleas of guilty in exchange for reduced charges and possibly, recommendations as to conditions of imprisonment. The fact that Ducros J. was asked to withdraw from the case suggests that it may be unacceptable for a trial judge to reject a guilty plea on the ground that the defence of insanity may be available, where neither defence nor prosecution are interested in leading evidence in support of that defence.

In some instances it is the Crown rather than the accused that seeks to have a guilty plea rejected by the court. In these cases the operative rule is that the trial judge has a discretion to accept or reject the guilty plea. The Crown may seek to have a guilty plea rejected in order to be able to lead evidence that the accused was insane at the time the offence was committed. Thus, in Re Regina and Scroggie²⁸¹ where the trial judge, faced with such an application by Crown counsel, ruled that he could not reject the guilty plea, a writ

²⁸⁰ March 18, 1987, Canadian Press - Quebec judge accepts Lortie's pleas.

²⁸¹ (1974), 15 C.C.C. (2d) 309 (B.C.S.C.). Regina v. Simpson (1977), 35 C.C.C. (2d) 337 (Ont. C.A.).

of mandamus was granted directing him to exercise his discretion. In Re Regina and Pooley²⁸² the accused, represented by counsel, had pleaded guilty to possession of a revolver, but the Crown had asked the trial judge not to accept the guilty plea because there was evidence that the accused was insane at the time of commission of the offence. The trial judge noted that he had a discretion as to whether he would accept or reject the plea and as to whether he would hear further evidence but in the particular case he did not consider it necessary to enter into such an inquiry. On application for judicial review it was held that mandamus was not available to compel the trial judge to reconsider when he had properly exercised his discretion.

In Regina v. Johnston et al.²⁸³ the Crown sought to stay proceedings after the accused had pleaded guilty so as to permit the Crown to prosecute the accused in a different province. The Ontario District Court stated that it was not for the Crown to direct the court how to conduct the case and that only in the most unusual of circumstances would a court accede to such a request by the Crown. In particular, they were loath to strike a guilty plea amply supported by evidence, and they considered it would be improper to do so in the absence of a request by the accused. Therefore the court decided they would proceed to sentencing unless the Crown chose to stay the proceedings.

²⁸² (1974), 17 C.C.C. (2d) 168 (B.C.S.C.).

²⁸³ 15 W.C.B. 321 (November 1, 1985, Ont. D.C.).

4. Withdrawal of a plea after sentence, on appeal

Even if an accused does not apply prior to sentencing to have a guilty plea withdrawn it may yet be possible to persuade an appeal court to set aside the guilty plea on appeal. Whether the appeal proceedings are for a summary conviction or indictable offence will depend not on what the accused pleaded guilty to but on the nature of the original offence charged.²⁸⁴

In the United Kingdom, in the case of Rex v. Forde²⁸⁵ Avory J. of the Court of Criminal Appeal defined the narrow grounds upon which an accused could appeal to that court against a conviction based on a plea of guilty. He stated,

"A plea of guilty having been recorded, this Court can only entertain an appeal against conviction if it appears (1) That the appellant did not appreciate the nature of the charge, or did not intend to admit that he was guilty of it; or (2) That upon the admitted facts he could not in law have been convicted of the offence charged."²⁸⁶

Canadian courts have accepted somewhat broader grounds for allowing a change of plea on appeal. In Adgey v. The Queen²⁸⁷ Dickson J., writing

²⁸⁴ Regina v. Yaworski (1959), 31 C.R. 55 (Man. C.A.). The proper course for attacking a guilty plea after sentence is by appeal not certiorari: Regina v. Kennedy (1957), 119 C.C.C. 200 (Ont. C.A.).

²⁸⁵ [1923] Crim. Ct. A. 99.

²⁸⁶ Id at 102-103. In Regina v. Savory (1966), 47 C.R. (Canada) 7 (N.S.S.C. App.), the Nova Scotia Court of Appeal adopted the standard enunciated by Avory J. in Rex v. Forde for determining whether a guilty plea could be set aside on appeal.

²⁸⁷ (1973), 13 C.C.C. (2d) 177 (S.C.C.).

the majority reasons of the Supreme Court of Canada, considered that the case of R. v. Forde²⁸⁸ had defined too narrowly the grounds upon which a court might entertain an appeal against a conviction based on a guilty plea. Instead, Dickson J. applied the rule laid down in R. v. Bamsey²⁸⁹ to the effect that an accused could change his plea if he could satisfy the appeal court that there were valid grounds for his being permitted to do so. Without exhaustively defining those "valid grounds", Dickson J. indicated circumstances that might justify permitting a change of plea:

"If the trial Judge chooses to hear evidence, for the purpose of satisfying himself that the charges are well founded or in order to have a factual background prior to imposing sentence, the evidence may indicate the accused never intended to admit to a fact which is an essential ingredient of the offence with which he is charged or he may have misapprehended the effect of the guilty plea or never intended to plead guilty at all, in any of which events the Judge may, in his discretion, direct that a plea of not guilty be entered or permit the accused to withdraw his original plea and enter a new one."²⁹⁰

However, the discretion exercised by the trial judge was one which, if exercised judicially, would not be lightly interfered with. Dickson J. concluded in the case before him that it was within the discretion of the trial judge to accept or reject the accused's explanations in deciding whether to strike the pleas of guilty to charges of false pretence and break and enter and theft, and that he would not disturb the exercise of that discretion.

²⁸⁸ (1923), 17 Cr. App. R. 99.

²⁸⁹ (1960), 125 C.C.C. 329 (S.C.C.).

²⁹⁰ (1973), 13 C.C.C. (2d) 177 (S.C.C.) at 189.

The accused faces a heavy burden in establishing on appeal that there are grounds for setting aside a guilty plea. It may be necessary to convince the court that the accused did not appreciate the nature of the charge, did not intend to admit guilt, or that upon the admitted facts in law there should not have been a conviction of the offence.²⁸¹ The accused must establish that there is some ground such as mistake, misunderstanding or a dispute as to the facts supporting guilt, to be permitted to withdraw a plea of guilty.²⁸² Where threats have been used to induce a guilty plea the court will allow an accused to withdraw the plea, but the accused must establish the involuntary nature of the plea because a plea of guilty made in open court would be presumed voluntary.²⁸³ An appeal court may also permit an accused to withdraw a plea of guilty where it was entered because of representations as to the leniency of the expected sentence.²⁸⁴ However, Salhany suggested that an appeal court might be reluctant to permit withdrawal of the plea on this

²⁸¹ Archibold, Pleading, Evidence and Practice in Criminal Cases (42d ed. 1985) at 265-266. For recent examples, see R. v. Hughes (1987), 76 A.R. 294 (Alta. C.A.) (alleged coercion by police); R. v. Savard, Doc. No. Edmonton 8703-0026-A, Alta. C.A., January 5, 1988 (alleged lack of understanding); R. v. Boutilier (1986), 75 N.S.R. (2d) 157 (N.S.C.A.) (alleged lack of understanding of consequences).

²⁸² E. Ewaschuk, "Annotation: Change of Plea: Regina v. Corcoran" 2 C.R.N.S. 168 at 171-172.

²⁸³ P. McWilliams, Canadian Criminal Evidence (2d ed. 1984) at 418-419.

²⁸⁴ R. Salhany, Canadian Criminal Procedure (3d ed. 1978) at 170-171, citing Weiner v. The Queen, [1962] Que. Q.B.356; Courtois v. The Queen, [1962] Que. Q.B. 364; and R. v. Ballegeer, [1969] 3 C.C.C. 353 (Man. C.A.). See also, R. v. Morrell (January 18, 1989), Doc. Nos. 4212, 4224, 4243 (Sask. C.A.). The issue of plea bargaining to which this relates, is discussed infra.

ground unless it was established that there was actually some doubt about the accused's guilt:

"The attitude of the court here is that having been convicted of the offence (notwithstanding that the conviction is based on the plea of guilty) the presumption of innocence no longer remains, and it is the duty then of the accused to raise some doubt as to his actual guilt."²⁹⁵

An accused who only attempts to obtain permission to withdraw a guilty plea from an appeal court has a heavy onus to meet. The cases discussed in this section indicate that withdrawal likely will not be permitted unless it is established that (1) the accused was unrepresented at trial and can demonstrate serious lack of understanding; or (2) the trial judge, Crown counsel or defence counsel committed an egregious error resulting in a miscarriage of justice; or (3) the guilty plea was unsupported in law or in fact.

First, the presence or absence of defence counsel appears to be an important factor in determining whether or not an accused understood the guilty plea process or should be allowed to withdraw a guilty plea on appeal.

In Regina v. Greenlaw (No.2)²⁹⁶ the accused appealed against his conviction of possession of a stolen automobile alleging that he had been under the influence of largactil at the time of pleading and had

²⁹⁵ R. Salhany, Canadian Criminal Procedure (3d ed. 1978) at 171.

²⁹⁶ [1968] 3 C.C.C. 207 (N.B.C.A.).

not appreciated what he was doing. The New Brunswick Court of Appeal rejected this contention on the grounds that the evidence did not indicate the appellant had been mentally impaired at the relevant time and he had been represented by counsel who advised him to plead guilty.

It has been held in two cases involving s.2(c)(ii) of the Canadian Bill of Rights²⁹⁷ that where an accused has been denied the right to retain and instruct counsel without delay upon arrest, he may be allowed to withdraw his plea of guilty on appeal.²⁹⁸ In Regina v. Ballegeer the Manitoba Court of Appeal found that the denial by the police of the accused's right upon arrest to retain and instruct counsel without delay under section 2(c)(ii) of the Canadian Bill of Rights²⁹⁹ vitiated his plea of guilty to the charge of theft. The court found that the police

²⁹⁷ Can. Stat. 1960 c.44, Section 2: "Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to...(c) deprive a person who has been arrested or detained (ii) of the right to retain and instruct counsel without delay..."

²⁹⁸ Regina v. Martel, 64 W.W.R. (n.s.) 152 (Alta. D.C.); and R. v. Ballegeer, [1969] 3 C.C.C. 353 (Man. C.A.). By permitting withdrawal of a guilty plea in these circumstances, the appeal court also effectively gave a remedy for the violation of the rights of the accused: G. MacKinnon, "Criminal Procedure: Grounds for Change of Plea on Appeal from Summary Conviction: Denial of Right to Retain Counsel Without Delay under Canadian Bill of Rights: Regina v. Martel, 64 W.W.R. (n.s.). 152 (Alta. Dist. Ct. 1968)" (1969), 3 Ottawa Law Review 700.

²⁹⁹ 1960 (Can.), c.44.

officer obtained a confession from the accused by actively and deliberately denying his right to counsel and by holding out to him the hope of reward if he would sign the confession and the threat of punishment if he refused to sign it. The accused's affidavit on appeal set forth facts which, if true, indicated that he did not commit the offence but that, having signed the confession, he felt he had no choice but to plead guilty. Freedman J.A. noted that while "there is a heavy onus on an accused who, after pleading guilty in Court and after having been sentenced, seeks leave to change his plea to one of not guilty and to be given a new trial,"³⁰⁰ the accused had satisfactorily met this onus in the case before him.

In the case of Pilon c. Sa majesté la Reine³⁰¹ the accused, who had been convicted on a guilty plea, asked to be allowed to withdraw that plea because she had had no lawyer at the time of arraignment; she had been under the influence of alcohol; a police officer had advised her to plead guilty as the sentence would be only nominal; and because, therefore, her guilty plea was not a free and voluntary act. In the absence of any contrary facts presented by the Crown, the Court of Appeal found that the facts alleged by the accused established that her guilty plea was not given freely and voluntarily with knowledge of its consequences. Accordingly the court allowed her appeal.

³⁰⁰ (1968), 3 C.C.C. 353 (Man.C.A.) at 354.

³⁰¹ [1969] B.R. 523 (Que.C.A.).

Regina v. Patenaude³⁰² was another case in which the absence of counsel, and consequent misunderstanding, was found on appeal to vitiate the accused's guilty plea. The accused was charged with being illegally at large without excuse. In fact he had been at large legally but was taken in custody so that he was unable to meet one of the terms of his parole which was to report at a set time and place. The accused was not represented by counsel. At first he pleaded "guilty with explanations", but after discussions with the trial judge apparently became convinced that as he likely would be found guilty anyway he ought to plead guilty. On appeal the guilty plea was set aside and a new trial ordered because the incomplete explanations that the accused had attempted to give for his complex situation raised a doubt as to his guilt. Mayrand J.A. explained the relevant principle in this way:

"When an accused appears before the Court without counsel, and does not understand either the nature or consequences of a plea of guilty and gives in to his desire to put an end to the trial rather than set forth the reasons for his conduct, there is a need to set aside his plea of guilty."³⁰³

The lack of counsel at the time of arraignment does not invariably result in permission to withdraw the guilty plea on appeal. If the accused has had prior experience in the criminal courts, the view seems to be that they should understand the arraignment process. Thus, in R. v. Matthews³⁰⁴ the accused, who had pleaded guilty of theft without the aid of counsel, was not permitted to withdraw his plea on appeal on

³⁰² (1978), 44 C.C.C. 376 (Que. C.A.), discussed supra in respect to equivocal pleas.

³⁰³ Id at 382.

³⁰⁴ (1971), 1 Nfld & P.E.I. Reports 486 (P.E.I. C.A.).

grounds of lack of understanding. After obtaining a jail physician's satisfactory assessment of the accused's mental and emotional health, Trainor C.J. dismissed the appeal, stating,

"In light of foregoing opinion and the fact that the appellant has already been before the courts on different occasions, there does not appear to be any solid basis for the contention that the appellant did not understand the effect of his plea of guilty before the trial Magistrate."³⁰⁵

An accused who has been ably represented by counsel at first instance may have considerable difficulty obtaining permission to withdraw a guilty plea on appeal. In Regina v. Elliott,³⁰⁶ the accused, who had been convicted of non-capital murder on his guilty plea, appealed, asking to be permitted to withdraw his guilty plea on grounds of misunderstanding and judicial error in that the trial judge had failed to ensure the accused understood the consequences of the guilty plea and to inquire into the facts underlying the charge. The Court of Appeal found that there was no support for these allegations in the record. Rather, the record disclosed that the accused's counsel at trial was experienced and capable; he had advised the trial judge that he had reviewed the evidence and the law, and explained the mandatory life sentence to the accused, and had received instructions to plead guilty; the accused had pleaded guilty in person; an agreed statement of facts signed by the accused, his lawyer and the Crown was read in court in the presence of the accused, and his lawyer advised the court that the statement of facts was admitted. In dismissing the appeal,

³⁰⁵ Id at 487.

³⁰⁶ (1975), 28 C.C.C. (2d) 546 (Ont. C.A.).

Kelly J.A. stated,

"The record contains nothing to support the allegation made by counsel appearing before us on behalf of the defendant, nor to raise any doubts as to the plea being a voluntary act by a person fully aware of the consequences of his plea and competent to make a decision with respect thereto. The agreed statement of facts would support no other finding than guilty as charged."³⁰⁷

Similarly, in Regina v. Saunders³⁰⁸ a nineteen year old appealed against conviction based on a guilty plea, alleging misunderstanding. The Nova Scotia Court of Appeal dismissed the accused's appeal because he had been represented by counsel at trial and there was no evidence that he was under any misapprehension as to the effect or consequences of the guilty plea.³⁰⁹

Second, an accused might be permitted to withdraw a guilty plea on appeal if it could be shown that there was a serious error or impropriety committed by defence counsel, Crown counsel or the trial judge, which resulted in a miscarriage of justice. Under this rubric will be considered the effect of coercion on the appeal court's decision to permit withdrawal of a guilty plea.

³⁰⁷ Id at 550.

³⁰⁸ (1984), 65 N.S.R. (2d) 337 (N.S.C.A.).

³⁰⁹ Where the accused is classed as a young offender, however, the Young Offenders Act, 1980-81-82-83 (Can.), c.110, s.19(1) makes it imperative that the trial court hear evidence to satisfy itself that the facts support the charge, before accepting a plea of guilty. Therefore, in the context of young offenders it is not enough that the trial judge briefly question the accused to ensure that the accused understands the charge, if there is no statement of facts supporting the charge: Regina v. K. (1985), 18 C.C.C. (3d) 94 (N.S.C.A.).

In Regina v. Hohmann³¹⁰ the Saskatchewan Court of Appeal allowed the accused's appeal against conviction based on his own guilty plea because of the irregularity of the trial judge's conduct at the time of plea. The accused, without the assistance of counsel, had pleaded not guilty to a charge of wilfully discharging a firearm, but had told the trial judge that he did not understand the word "wilfully". Instead of explaining the term to him, the trial judge had told the R.C.M.P. officer in charge of the prosecution to take the accused to another room and explain the meaning to him there. When they returned to the courtroom the accused pleaded guilty, but made exculpatory statements prior to sentencing. On appeal, Hill C.J.S. stated that this procedure was objectionable because it was the Magistrate's duty to ensure that the accused fully understood the charge before accepting the change of plea, and it had been unfair to delegate this responsibility to the police officer.³¹¹ Moreover, Hall C.J.S. could not see how, in light of the accused's exculpatory statement, the Magistrate could have felt justified in accepting the guilty plea.

Where the trial judge has interfered with defence counsel's ability to put forward a defence and this causes the accused to plead guilty, an appeal court will be inclined to allow a change of plea to remedy the judicial impropriety. In R. v. Toussaint,³¹² the accused was charged

³¹⁰ (1961), 130 C.C.C. 410 (Sask. C.A.).

³¹¹ Id at 411.

³¹² (1984), 16 C.C.C. (3d) 544 (Que. C.A.).

with murder and his defence was that he had only assaulted the victim but that subsequently someone else must have killed him. Defence counsel attempted to make submissions advancing this theory, but the trial judge forbade him from referring to it because in his view it was not supported by the evidence. During a half hour recess defence counsel persuaded the accused to plead guilty because the trial judge had removed his only defence. On appeal from conviction on the guilty plea affidavits were filed by the accused and his trial lawyer, which indicated that the accused had never intended to plead guilty and only did so because his lawyer had convinced him that he had no other choice.

The Quebec Court of Appeal allowed the accused's appeal, holding that for justice to be seen to be done, the verdict of guilty could not rest on this guilty plea. Monet J.A. stated,

"The case in its entirety, particularly the undenied facts established by the above-mentioned affidavits, convinces me of the fragile nature of the plea of guilty. I am of the view that in light of the evidence and the circumstances of this case, that in all justice, this plea cannot form the basis of the verdict of guilty found by the jury and accepted by the judge, not to mention the punishment subsequently imposed."³¹³

Vallerand J.A. noted that a guilty plea entered on the advice of counsel would not readily be set aside unless the conduct of defence counsel had caused the accused a serious injustice or resulted in serious judicial error. He found that defence counsel had erred in succumbing to the trial judge's pressure and in advising the accused to plead guilty in the circumstances and with so little time for

³¹³ Id at 548.

reflection. Vallerand J.A. concluded that the trial judge's conduct had resulted in a precipitate guilty plea which had to be set aside in order for justice to be done and to be seen to be done.

In the case of Regina v. Hansen³¹⁴ there had been negotiations between Crown and defence counsel and by the time the matter came up for trial the accused had agreed to plead guilty to second degree murder, primarily to avoid the risk of a preferred indictment for first degree murder. The fact that the option of preferring an indictment had been rejected by the Attorney General was not communicated to the accused. After some inquiry the trial judge had convicted the accused on his guilty plea. On appeal the accused sought to withdraw this guilty plea.

Matas J.A. delivering the majority opinion allowing the appeal, noted that the principle of finality of criminal proceedings must be balanced against the need to ensure that the guilty plea has been properly entered, bearing in mind its serious connotations. He found that in this case the basic error of the Crown in relying on the potential to lay an indictment for a more serious offence adversely affected all the subsequent proceedings, in spite of the trial judge's attempt to clear up the matter as best as he could. Matas J.A. stated,

"His appreciation of the charge before him and his choice of alternatives were coloured by a false assumption about the potential laying of a more serious charge... Under these circumstances, it would be unfair to hold appellant to his guilty

³¹⁴ (1977), 37 C.C.C. (2d) 371 (Man. C.A.).

plea."³¹⁵

Matas J.A. also noted the accused's disturbed mental state might provide a defence to the charge.

Where an accused, who was represented by defence counsel, pleaded guilty unhappily and reluctantly after receiving "strong advice" from his counsel the appeal court would be most unwilling to declare the plea a nullity unless it could be shown that the accused had actually lost the power to make a voluntary and deliberate choice.³¹⁶

However pressure from a third party does not appear to constitute grounds for a change of plea on appeal. In Guerin v. The King³¹⁷ the accused asked to have his guilty plea set aside on the ground that he had been induced to plead guilty by a third party, but the justices of the Quebec King's Bench dismissed his appeal stating that this ground was not a reason in law to reject the guilty plea. St. Germain J. stated,³¹⁸

"If a conviction cannot be set aside because the accused pleaded guilty upon the advice of counsel, there is surely no more reason to set aside a conviction upon the ground that the intervention of a third party who induced the accused to plead guilty may have affected the sentence."

³¹⁵ Id at 376.

³¹⁶ Archibold, Pleading, Evidence and Practice in Criminal Cases (42d ed. 1985) at 266, referring to R. v. Peace, [1976] Crim. L.R. 119, (U.K.C.A.).

³¹⁷ (1933), 60 C.C.C.350 (Que. K.B.).

³¹⁸ (1933), 60 C.C.C. 350 (Que. K.B.) at 351.

Walsh J. explained that a guilty plea, like a confession, would only be set aside if it were shown "to have been offered involuntarily, and to have been induced by a person in authority, who might have been in a position to hold out a promise of favour or advantage."³¹⁹ This decision was reaffirmed in Colligan v. The Queen.³²⁰ The Quebec Queen's Bench refused leave to appeal a conviction based on a guilty plea, entered with the assistance of counsel, where the accused claimed that he was innocent and had only pleaded guilty under pressure from his three co-accused.

The presence of counsel does not necessarily validate the accused's plea of guilty, especially where counsel has acted improperly in inducing the guilty plea. In Regina v. Stork and Toews³²¹ one lawyer had been hired by one Stenson to represent him and two other co-accused, namely Stork and Toews, and another lawyer had been hired to represent a fourth co-accused named Bruce, on a charge of conspiracy to traffic in cannabis resin. Defence counsel struck a deal with the Crown whereby the charges would be stayed against the two paying clients, Stenson and Bruce, in exchange for guilty pleas being entered by Stork and Toews. Subsequently, Stork and Toews appealed against conviction, asking to withdraw their guilty pleas. Citing the test in R. v. Bamsey³²², Farris

³¹⁹ Id at 352.

³²⁰ (1955), 113 C.C.C. 168 (Que. Q.B.).

³²¹ (1975), 24 C.C.C. (2d) 210 (B.C.C.A.).

³²² [1960] S.C.R. 294 (S.C.C.).

C.J.B.C. found that there were valid grounds for permitting a change of plea on appeal in this case as the guilty pleas had been obtained under circumstances having an appearance of unfairness. He pointed out that the lawyer for Stenson, Stork and Toews had been in a position of hopeless conflict of interest: the man who paid him went free while his non-paying clients went to jail for five or eight years.

Third, where the facts alleged on appeal disclose that no offence known to law has been committed, or where an essential element of the offence is missing, or where it appears that the accused has a good defence and only pleaded guilty because of a misapprehension of the requirements of the law, an appeal court will allow a change of plea.

Thus in Regina v. Laurie³²³ the accused had pleaded guilty and been convicted of possession of a narcotic for the purpose of trafficking, but it was subsequently discovered that the pills seized contained saccharin and not a narcotic. The New Brunswick Court of Appeal held that as the appellant did not actually have a narcotic in his possession, his conviction could not stand notwithstanding that he presumably had a criminal intent to traffick in a narcotic at the time the seizure was made.³²⁴

³²³ (1978), 42 C.C.C. (2d) 311 (N.B.C.A.).

³²⁴ Id at 312.

Similarly, in R v. Pepper³²⁵ it was held that if the information laid against the accused is so defective as not to constitute an offence under the Criminal Code, a plea of guilty to the defective information will not be viewed as a waiver by the accused of any objection to the charge, and no punishment can be meted out to her.

Where a conviction based on a guilty plea is not supported by the law it should be set aside. Thus, if the Supreme Court of Canada gives a definitive ruling on the correct interpretation of a law, a guilty plea based on the discredited interpretation of that law may be set aside. In Regina v. Grainger³²⁶ the accused pleaded guilty on the basis of existing case law³²⁷ to a charge of keeping a common betting house, relating to the use of a hotel room for an evening of betting. Subsequently, the Supreme Court of Canada ruled that a single use of premises was not sufficient for a conviction, but frequent or habitual use of the premises had to be shown.³²⁸ In dealing with Grainger's appeal, Houlden J.A. concluded that if, as was indicated in the statement of facts read to the provincial court judge, the room was rented for one night only, then the case was indistinguishable from Rockert. Thus, the accused had not committed an offence under the Code,

³²⁵ V.M. Del Buono, Canadian Criminal Procedure, Cases, Notes and Materials (1981) at 502, referring to R. v. Pepper (1909), 15 C.C.C. 314.

³²⁶ (1978), 42 C.C.C. (2d) 119 (Ont. C.A.).

³²⁷ R. v. Rockert et al. (1976), 32 C.C.C. (2d) 60 (Ont. C.A.).

³²⁸ R. v. Rockert et al. (Feb. 7, 1978, S.C.C.).

and his guilty plea had to be quashed.

In the case of Antoine v. R.³²⁹ the accused had been convicted on his guilty plea of extortion and sentenced to twelve months in prison, in connection with his attempt to recover some of the \$559,000 of which his notary had defrauded him. He appealed his conviction on the grounds that he had been persuaded to plead guilty by defence counsel who had said he would receive a more lenient sentence than he in fact received, and that he had a defence to the charge in that he did not know that threats of violence would be used on the victim. He claimed not really to have understood the nature and consequences of his plea, nor to have intended to admit guilt. He claimed to have attempted to discuss withdrawal of his guilty plea with his lawyer prior to sentence but that his lawyer would not meet with him.

Rothman and Vallerand J.J. of the Quebec Court of Appeal did not consider these circumstances sufficient to justify permitting a change of plea on appeal. Rothman J.A. reviewed the essential facts of the case and found that the explanation given to the trial judge at the time of sentencing was not one which would have required the judge to doubt his admission; at most it was an attempt to minimize the degree of violence that he had wanted his co-accused to use or threaten to use. Accordingly his appeal was dismissed.

³²⁹ (1984), 40 C.R. (3d) 375 (Que. C.A.).

Summary

At first instance, an accused wishing to withdraw a plea of guilty must persuade the trial court to exercise its discretion in favour of the accused. If unsuccessful, it will be virtually impossible to persuade an appeal court to reverse the trial court's decision in this regard, unless the trial court had not exercised the relevant discretion at all or had not exercised it judicially.

An accused who attempts only on appeal to obtain permission to withdraw a guilty plea faces a considerable challenge. Withdrawal may only be permitted if the accused can establish a compelling case, for example, that the accused was unrepresented at trial and lacked understanding of the process; or the trial judge, Crown counsel or defence counsel committed an egregious error resulting in a miscarriage of justice; or the guilty plea was unsupported in law or in fact.

Some of these cases suggest that once an accused person has pleaded guilty the presumption of innocence disappears and a presumption of guilt replaces it. The accused then is in the position of having to rebut this presumption by showing that the plea was the result of error or improper pressure and that in fact there was a good defence on the merits of the case. This additional requirement, whether explicitly or implicitly demanded, that the accused have a good defence, means that an accused who has plead guilty through error or improper inducement is thereby denied the right to insist that the Crown prove guilt beyond a

reasonable doubt.

This additional requirement also demonstrates judicial confusion about the evidentiary and procedural role of the guilty plea. An accused who asks to withdraw a guilty plea on grounds of misunderstanding or duress, is complaining about the procedural aspects of the plea, that is, that it did not, in the circumstances of the case, constitute a valid waiver of the accused's trial rights. The court, on the other hand, in focusing on the factual basis of the plea, ignores its procedural function, thereby treating it simply as an evidentiary device, substituting for proof beyond a reasonable doubt. Given that the guilty plea serves both a procedural and evidentiary role, it would seem that a better approach when an accused seeks to withdraw a guilty plea might be to allow a change of plea if the guilty plea was defective for either procedural or evidentiary reasons.

These cases indicate that the main reasons for an accused to request permission to withdraw a guilty plea are misunderstanding, improper pressure and the absence of a legal or factual foundation for conviction. The content of these three factors are further explored in the following section.

B. Indicia of the acceptability or unacceptability of the guilty plea

The Criminal Code does not appear to recognize that there may be complications for a trial judge in deciding whether or not to accept a

guilty plea. The Code does not set out any criteria for the acceptance of a guilty plea even though the decision to accept or reject a guilty plea has far reaching consequences for the accused and the criminal process in general. Conviction on a guilty plea means that the accused virtually convicts himself with little or no meaningful, objective adjudication of the question of actual guilt or innocence. By pleading guilty the accused abandons the right to have the Crown prove guilt beyond a reasonable doubt, the right of non compellability as a witness, the right to remain silent, and the right to offer full answer and defence to a charge.³³⁰

Given the serious consequences of the guilty plea one would expect there to be sufficient safeguards in the guilty plea process to ensure that an accused would be convicted only after receiving fair treatment from the court and only if the accused was actually guilty. One might expect that this notion of fair treatment would include a requirement that the accused be fully apprised of the legal rights being surrendered and the value of those rights; that the accused be given the opportunity to make a completely voluntary plea of guilty; that the accused be fully informed of the nature of the offence, its constituent elements and the range of possible punishments; and that there be an opportunity to

³³⁰ Adgey v. The Queen (1973), 13 C.C.C. (2d) 177 (S.C.C.) at 183, per Laskin J. (as he then was) in dissent.

present the accused's version of events.³³¹ To ensure that only those who were in fact guilty were convicted by their guilty plea would require the court to make a careful inquiry into the facts of the case to ascertain whether they satisfied the constituent elements of the offence charged, and whether these elements were negated by any defence or excused by any justification. It might also require some weighing of evidence although, if there appeared to be a serious factual dispute between the Crown prosecutor and the accused, it would seem that the trial judge would have no choice but to enter a plea of not guilty. The ideal requirements of fair treatment and actual guilt would appear to dictate some form of judicial inquiry at the time the plea is tendered.

In searching for the indicia of the acceptability or unacceptability of the guilty plea one enters a realm of judge-made law,³³² where the rules developed on an ad hoc basis, with the result that they are somewhat lacking in principle and consistency. There are, however, three generalizations that can be made.

³³¹ C. Ruby, Sentencing (2d ed. 1980) at 39, referring to R. v. Voorwinde (1975), 29 C.C.C. (2d) 413 (B.C.C.A.); H. Leonoff and D. Deutscher, "The Pleas and Related Matters", in V.M. Del Buono (ed.), Criminal Procedure in Canada, Studies (1982) at 233.

³³² Adgey v. The Queen (1973), 13 C.C.C. (2d) 177 (S.C.C.) at 183 per Laskin J. (as he then was) in dissent; Re Regina and Scroggie (1974), 15 C.C.C. (2d) 309 (B.C.S.C.).

First, the courts invariably describe the acceptance or rejection of a guilty plea as being a matter of judicial discretion.³³³ The guilty plea process is said to be largely in the discretion of the trial judge, and if this discretion is exercised, "it will not be lightly interfered with" on appeal.³³⁴ On occasion the mere assertion by the trial judge that this discretion has been exercised has been enough to uphold the conviction;³³⁵ at other times the appeal courts have been more stringent.³³⁶ This point has been addressed in the preceding section.

The second generalization that can be made is that, without strictly limiting judicial discretion, the courts refer to one or more of the following principles (depending on the facts involved in the case before them), as being relevant to the decision whether or not to accept a guilty plea: the accused must know the exact nature of the charge against him and understand the effect of the guilty plea;³³⁷ the accused's plea must be a voluntary act;³³⁸ and there must be a factual

³³³ Adgey v. The Queen (1973), 13 C.C.C. (2d) 177 (S.C.C.) at 188, per Dickson J. (as he then was). See also, R. v. Stark (1986), 75 N.S.R. (2d) 308 (N.S.C.A.).

³³⁴ Regina v. Gagné (1956), 117 C.C.C. 97 (Alta. S.C. App. Div.).

³³⁵ Re Regina and Pooley (1974), 17 C.C.C. (2d) 168 (B.C.S.C.).

³³⁶ Regina v. Hohmann (1961), 130 C.C.C. 410 (Sask. C.A.); Regina v. Haines (1960), 127 C.C.C. 125 (B.C.C.A.).

³³⁷ Rex v. Milina (1946), 86 C.C.C. 374 (B.C.C.A.).

³³⁸ Regina v. Kavanagh (1955), 114 C.C.C. 378 (Ont. C.A.).

basis for the charge and the plea.³³⁹

There are no real guidelines as to what factors are relevant to an inquiry into understanding and voluntariness. For example, it is not clear whether the existence of a plea bargain or a coerced confession is enough to vitiate voluntariness; whether the knowledge requirement means that the accused must know the exact charge, all the elements of the offence charged, the immediate and collateral consequences of the plea, the likelihood of conviction at trial, etc. Sometimes it appears that the courts embark on an investigation of the facts of the case as though proving the likelihood of actual guilt will substantiate the voluntariness and understanding with which the accused pleaded.³⁴⁰

Where the court proceeds from the knowledge/voluntariness inquiry to an inquiry into the factual basis of the charge and plea, there is even less guidance. The appeal courts have expressed the view that a judge who embarks on such inquiry is stepping onto treacherous ground,³⁴¹ but have not spelled out what the pitfalls are. The difficulty encountered in making such inquiry is in knowing what types of evidence should be considered and what standard of proof should be applied - is it proof beyond a reasonable doubt, the balance of probabilities, or a

³³⁹ R. v. Sampson (1980), 26 Nfld. & P.E.I.R. 356 (Nfld. C.A.).

³⁴⁰ Regina v. Gagné (1956), 177 C.C.C. 97 (Alta. S.C. App. Div.).

³⁴¹ Regina v. Fraser and Louie (1971), 17 C.R.N.S. 165 (B.C.C.A.).

prima facie case? This uncertainty arises because the plea of guilty itself presumably goes some distance towards satisfying the onus that is usually on the Crown, to prove guilt beyond a reasonable doubt.

A third generalization that can be made about the indicia of acceptability and unacceptability is that there appears to be a certain tension in the operation of the first two generalizations, ie., between the trial judge's exercise of discretion and any concerns about understanding, voluntariness or factual basis, which the appeal courts tend to resolve in favour of deference to the trial judge's discretion.³⁴²

Thus the decision whether to conduct an inquiry into knowledge, voluntariness and factual accuracy is said to be discretionary.³⁴³ The case law does not establish that there is a definite duty on the court to make inquiry into whether a guilty plea is made knowingly and voluntarily, and has a factual basis, except, perhaps, where the accused is not represented by counsel.³⁴⁴ It has been held that

"In the case of an undefended defendant who pleads guilty care

³⁴² This may be because the guilty plea is viewed as a necessary device for speeding the processing of cases through the criminal justice system. As such it may be seen to justify some compromising of the ideal requirements of the guilty plea in favour of the rapid resolution of criminal cases.

³⁴³ Brousseau v. The Queen, [1968] S.C.R. 181 (S.C.C.).

³⁴⁴ Rex v. Milina (1946), 86 C.C.C. 374 (B.C.C.A.); Brousseau v. Queen, [1968] S.C.R. 181 (S.C.C.). See also, E. Ewaschuk, "Annotation: Change of Plea: Regina v. Corcoran" 2 C.R.N.S. 168; E. Ewaschuk, Criminal Pleadings and Practice in Canada (1983) at 324-325.

should always be taken to see that he understands the elements of the crime to which he is pleading guilty, especially if the depositions disclose that he has a good defence."³⁴⁵

A review of the case law indicates how these indicia of acceptability and unacceptability, especially considerations of voluntariness, understanding and factual basis, have been applied in practice.

In Rex v. Steckley³⁴⁶ the accused, a father and son, had, on the day of the alleged offence, pleaded guilty without the assistance of counsel to a charge of kidnapping a girl who was the daughter of the older accused and the sister of the younger. On appeal against conviction Kelly J. observed that no evidence had been taken before the magistrate from which he could judge the nature of the accused's acts which were said to have constituted the offence charged, and that counsel for the Crown on appeal had conceded that whatever the accused may have been guilty of, it was not kidnapping. In quashing the convictions Kelly J. stated,

"Having regard to the expedition with which the proceedings were taken and carried to completion - to say the least of it, they were hasty - and having in mind the gravity of the offence charged, and the Crown's admission, it is not easy to believe that these men, unrepresented by counsel, and it may be, so far as the record shews, without any advice, could have appreciated the character of the charge preferred against them when they pleaded "guilty", if they did so plead. To uphold a conviction under such circumstances, and thus leave the accused subject to the consequences of such conviction, would be contrary to what a sense

³⁴⁵ Archibold, Pleading, Evidence and Practice in Criminal Cases (42d ed. 1985) at 265, referring to R. v. Griffiths (1932), 23 Cr. App. R. 153.

³⁴⁶ (1914), 23 C.C.C. 263 (Ont. H.C.).

of justice demands."³⁴⁷

In this brief statement Kelly J.A. expressed concern about all aspects of the acceptability of these guilty pleas: the accused's apparent lack of understanding of the meaning and consequences of conviction on the charge of kidnapping, exacerbated by the absence of defence counsel; the questionable voluntariness of pleas of guilty to such a serious crime, extracted with such haste and without the assistance of defence counsel; and the doubtful factual and legal foundation for the convictions.

The case of Rex v. Bliss³⁴⁸ illustrates how judicial inquiry when a guilty plea is tendered can effectively address the issues of understanding, voluntariness and factual basis. Bliss pleaded guilty to murder, which at the time carried the punishment of death. Jeffrey J. who presided at the hearing of the case was concerned about convicting on the basis of a guilty plea for such a serious offence and so embarked on a detailed inquiry into the acceptability of the guilty plea. He addressed Bliss personally to determine whether he understood the charge to which he was pleading and appreciated the consequences of the plea. Jeffrey J. described the offence with which Bliss was charged, using the language of the sections of the Criminal Code, and asked Bliss whether he understood, and whether he still insisted on pleading guilty. The accused replied in the affirmative. Then Jeffrey

³⁴⁷ Id at 264.

³⁴⁸ (1936), 67 C.C.C. 1 (Ont. S.C.).

J. questioned the accused's lawyer to determine whether he had explained to his client the nature of the offence, and whether the lawyer thought that Bliss thoroughly appreciated the situation he was in and the seriousness of the results of his plea. The lawyer replied affirmatively to all these questions, stating that he had been advising the accused in relation to this charge for a period of six months. Next, Jeffrey J. read through the evidence taken at the coroner's inquest and the preliminary inquiry with a view to ascertaining whether there was a possible defence for the accused, but found that the evidence, if not contradicted, pointed to only one conclusion i.e., that the accused had committed the murder.

Jeffrey J. noted a plea of guilty would not be accepted if there was a doubt in the trial judge's mind that the accused did not thoroughly appreciate the nature and consequences of the plea. He concluded:

"The accused has at all times admitted his guilt to the police, to his counsel, and now on being arraigned has made a confession of guilt to the Court. I am of the opinion that the accused does thoroughly appreciate he has pleaded guilty to the murder of Mildred Susan Johnston, and also appreciates that there can only be one result, namely, the death sentence."³⁴⁹

Accordingly, a conviction was entered based on the guilty plea, and the sentence of death was passed, and eventually executed. An annotation to the Bliss case, written by Cecil Snyder,³⁵⁰ Crown counsel in that case, referred to several other instances in which accused persons had

³⁴⁹ Id at 4.

³⁵⁰ (1936), 67 C.C.C. 5.

been convicted of capital offences merely on their own guilty pleas, as confirming the regularity of the proceedings followed by Jeffrey J. in Bliss.³⁵¹

In a series of decisions the British Columbia Court of Appeal considered whether it was necessary for the trial judge to hold an inquiry to ascertain the acceptability of a guilty plea. After initial support for a judicial inquiry to ensure that the plea was intelligently and voluntarily made and had a factual basis, the court reconsidered, treating the holding of such inquiry as a matter of judicial discretion. In Rex v. Johnson and Creanza,³⁵² the accused appealed against their

³⁵¹ The editor's note that followed this annotation ((1936), 67 C.C.C. 14) raised fundamental issues, questioning whether a guilty plea should ever be accepted and allowed to form the entire foundation for a conviction. The editor posed the question as follows: "One of the cardinal principles of British justice has always been that a man is innocent until he is proven guilty. Is a plea of guilty proof of guilt...". The editor's primary concern apparently was the risk of conviction absent a factual basis to support the guilty plea, where the plea amounted to a false confession induced by mental disorder, a desire to shield others, undue pressure from the authorities or a misunderstanding as to the true meaning of the offence charged. While acknowledging the practicality of convicting on a guilty plea, the editor considered this to be contrary to the rule that "A man is innocent until proven guilty"(at 15). He wrote, "As a matter of expediency, of course, a plea of guilty is best proof, but from the viewpoint of scientific and humanitarian jurisprudence, it is submitted that it should never be permitted without at least very substantial corroboration (if at all);..."(at 14). He referred to the Perry case of 1660, (at 15 et seq., no citation is given for this case) otherwise known as "The Campden Wonder", in which three people were executed for murder on the basis of a false confession, as corroboration for his distrust of confessions as a means of determining guilt or innocence.

³⁵² (1945), 85 C.C.C. 56 (B.C.C.A.). The members of the court were O'Halloran, Robertson and Bird J.J.A.

convictions on guilty pleas to charges of breaking and entering and theft on the grounds that they had not understood the charges, and that if the trial judge had given due weight to the dispositions before him he would not have accepted their guilty pleas. O'Halloran J.A., delivering the judgment of the court, stated:

"We agree that a plea of guilty ought not to be accepted unless the Judge or Magistrate is sufficiently informed in open Court of the facts upon which the accused pleads guilty, to assure himself that the accused is pleading guilty to the offence with which he is charged..."³⁵³

However, he concluded that in this case there had not been a miscarriage of justice and therefore dismissed the appeal.

In Rex v. Hand (No.1),³⁵⁴ the accused, convicted on his guilty plea of unlawfully having carnal knowledge of a four year old girl, sought leave to appeal on the ground that he had not understood the effect of the plea. Bird J.A. who delivered the judgment of the court found that the guilty plea was made by the accused

"... without any clear understanding of the effect of the plea... in that he did not thereby intend to admit that strict proof could be made of every fact necessary to establish guilt."³⁵⁵

Bird J.A. also found that the affidavits filed in support of the motion for leave indicated that the accused had a good defence. Bird J.A. reiterated what was said by O'Halloran J.A. in Johnson and Creanza, that in order to ensure the accused understood the offence to which he

³⁵³ Id at 57.

³⁵⁴ [1946] 3 D.L.R. 128 (B.C.C.A.). The members of the court were O'Halloran, Sidney Smith and Bird J.J.A.

³⁵⁵ Id at 129.

pleaded guilty, the plea ought not to have been accepted unless the trial judge was sufficiently informed in open court of the facts upon which it was based. Bird J.A. considered this "particularly essential" where the offence carried a maximum sentence of life imprisonment and whipping.

In Rex v. Milina,³⁵⁶ the accused had pleaded guilty to a charge of having a loaded automatic pistol in his possession for a purpose dangerous to the public peace. Then the magistrate, in attempting to follow the directions of Johnson and Creanza, had proceeded to hear the arresting officer describe the circumstances of the offence before accepting the guilty plea. In his report to the Court of Appeal he stated, "Having heard this evidence I decided to accept the plea of guilty in spite of the belated protest of his counsel that I should allow him to change his plea."

On appeal against conviction, Sidney Smith J.A., delivering the majority decision, observed that some misunderstanding had resulted from the language in Hand and Johnson and Creanza. He restated the rule applicable where an accused pleaded guilty:

"...when an accused person pleads guilty it is not the law that the Magistrate must go into the facts in order to satisfy himself that the accused is in fact guilty. If that were so there would be an end at once to any efficacy in a plea of guilty.

What the quoted language does mean is that upon a plea of guilty the Magistrate should satisfy himself that the accused knows

³⁵⁶ (1946) 86 C.C.C. 374 (B.C.C.A.). The members of the court were Sloan C.J., Robertson, Sidney Smith J.J.A. (for majority); and O'Halloran and Bird J.J.A. (in dissent).

exactly what he is doing when he so pleads, and knows and understands the exact nature of the offence with which he is charged. And the accused must plead guilty in "plain, unambiguous and unmistakable terms:" R. v. Golathan (1915), 84 L.J.K.B. 758, per Lord Reading C.J. The cases will be rare indeed in which a Magistrate will feel obliged to make any special enquiry when the accused, as here, is represented by counsel. The circumstances which are contemplated by the expressions used in the above cases are those in which the accused may be a foreigner, or illiterate, or the charge is one of unusual complexity or of an unusually grave nature."³⁵⁷

Sidney Smith J.A. noted that in this case there could have been no complaint if the magistrate had simply accepted the guilty plea rather than proceeding to hear evidence. However, once he had heard evidence which exculpated the accused and had been asked by counsel to permit withdrawal of the guilty plea, the magistrate ought to have exercised his discretion to permit withdrawal of the plea. The magistrate had wrongly interpreted the Johnson and Creanza and Hand cases in thinking he could not reject the guilty plea if he had heard any evidence that supported it. As there had been no proper exercise of his discretion, the appeal was allowed and a new trial ordered.³⁵⁸

³⁵⁷ Id at 381.

³⁵⁸ O'Halloran and Bird J.J.A. dissented on the grounds that, in their view, the magistrate had properly exercised his discretion by refusing to allow a change of plea and that this discretion should not lightly be interfered with. They considered that the requirements of Johnson and Creanza and Hand could have been satisfied in this and most other cases by having Crown counsel recite a statement of facts in open Court, rather than having to examine witnesses under oath.

In Rex v. Gordon,³⁵⁹ the accused pleaded guilty without the aid of counsel to a charge of forcible entry. On appeal from conviction defence counsel argued that the facts stated by the Crown witness after the accused had pleaded guilty did not disclose an essential ingredient of the offence charged, that is, an intent to deprive the occupant of possession of the premises. The British Columbia Court of Appeal agreed that the magistrate had misconceived the nature of the offence of forcible entry. O'Halloran J.A. stated:

"In my judgment a plea of guilty ought not to be accepted unless it is clear that the accused understands the nature of the offence to which he pleads guilty. It is equally important that the Court do not accept that plea of guilty until it appears the foundational facts disclose the presence of the essential ingredients of the crime charged."³⁶⁰

In Rex v. Belton³⁶¹ the accused had pleaded guilty without the assistance of counsel to a charge of having an automatic pistol for a purpose dangerous to the public peace. No explanation of the charge was given to the accused by the magistrate taking his plea. An adjournment was granted to the Crown to obtain information relevant to sentencing. Upon the resumption of the trial the accused, then represented by counsel, asked leave to withdraw his plea of guilty on the ground that he had not understood the nature of the charge. Leave was refused by the magistrate. The British Columbia Court of Appeal noted that because of the subtlety and complexity of the various weapons offences in the Code the magistrate ought to have been particularly

³⁵⁹ (1947), 88 C.C.C. 413 (B.C.C.A.).

³⁶⁰ Id at 416.

³⁶¹ (1947), 89 C.C.C. 356 (B.C.C.A.).

solicitous in ensuring that the accused understood the substance of the charge against him. Bird J.A. referred to R. v. Milina and R. v. Hand and stated:

"To apply the test there laid down I think the accused must be furnished in open Court with a sufficient explanation of the nature of the offence prescribed by the Code section, to permit his understanding of it, or some enquiry must be made of the accused to determine from his answers the extent of his knowledge and understanding, before the Magistrate can be so satisfied. In the circumstances found here such knowledge and understanding is not to be inferred in my opinion from the mere plea of guilty once read to him and without explanation of any kind.

Here the possibility of misunderstanding in my opinion was far greater than in the circumstances related in the Milina case, for this accused was not represented by counsel when the plea was entered and no explanation or description of the offence was furnished to him.

Consequently I think the Magistrate had no sufficient material before him upon which to exercise discretion when he refused leave to change the plea."³⁶²

Accordingly, the appeal was allowed and a new trial ordered.

In Regina v. Haines³⁶³ the accused pleaded guilty without the assistance of counsel to a charge that, being over the age of 18, he had unlawfully seduced a girl of previously chaste character who was over the age of 16 but under the age of 18 years. Haines appealed from his conviction on the ground that he had pleaded guilty without fully appreciating the essential ingredients of the offence and without clearly understanding the nature and effect of the guilty plea; that he had pleaded guilty under inducements by the police who had said they

³⁶² Id at 359.

³⁶³ (1960), 127 C.C.C. 125 (B.C.C.A.).

would make it easier for him if he pleaded guilty; and that essential elements of the offence charged were absent.

The British Columbia Court of Appeal found that the magistrate had failed to comply with the requirements laid down in R. v. Johnson and Creanza, R. v. Hand, and R. v. Milina. Coady J. stated,

"Considering the nature of the offence charged here and that the accused was not represented by counsel it was all the more necessary for the learned Magistrate to have taken special care to satisfy himself that the accused knew exactly what he was doing when he pleaded and knew and understood the exact nature of the offence with which he was charged before accepting the plea of guilty."³⁶⁴

Dealing with the other grounds of appeal, Coady J.A. noted that there was some evidence to support the accused's contention that his plea had been improperly induced, and that there remained some question whether the essential elements of the offence could be established. Therefore, leave was granted to the accused to withdraw his guilty plea and a new trial was ordered.

In the case of Regina v. Karas,³⁶⁵ the accused who was Hungarian and could not read or write English, without the assistance of counsel, pleaded guilty to two counts of forgery and one count of uttering a forged document. He subsequently appealed against conviction on the grounds that he had pleaded guilty without appreciating the significance of the guilty pleas and that the magistrate had made no inquiry to

³⁶⁴ Id at 126-127.

³⁶⁵ (1961), 131 C.C.C. 414 (B.C.C.A.).

determine whether the facts supported the charge. Karas' ability to understand the charges, impaired by lack of familiarity with both the law and the English language, raised serious questions about whether there was a factual basis for the convictions, because if the accused was unable to read or write English, it seemed unlikely that he could have committed forgery.

The British Columbia Court of Appeal found nothing in the record to indicate that the Magistrate at any time made inquiry into the facts on which the charge was based. Citing R. v. Hand (No. 1) and R. v. Milina Desbrisay C.J. stated:

"The learned Magistrate failed in the duty which this Court has held lies upon a trial Court, particularly, in cases such as this where a foreigner is involved, that before accepting a plea of guilty it ought to be assured by sufficient information furnished in open Court that the accused fully understands the nature of the charges to which he is asked to plead."³⁶⁶

Accordingly the appeal was allowed, the conviction quashed and a new trial ordered.

In the case of Regina v. Fraser and Louie³⁶⁷ the two accused without the assistance of counsel pleaded guilty to robbery by stealing, using violence. A peace officer was then called as witness for the Crown, and described the circumstances of the offence. After some discussion in which Fraser said he had only "bugged" the complainant a little, but "never hurt him or anything... never forced him or shoved him or

³⁶⁶ Id at 414.

³⁶⁷ (1971), 17 C.R.N.S. 164 (B.C.C.A.).

anything", Fraser affirmed that he had grabbed the complainant and forcibly taken the money.

On appeal against conviction, Branca J.A. approved the manner in which the magistrate had taken the pleas, stating,

"There was in this case no question of a complicated charge; no question associated with difficulties of language or ignorance.

The record discloses to me, and again I refer only to that part of the record which preceded the actual taking of the plea, that the Provincial Court Judge had taken adequate measures, in the interests of justice and of a fair trial to each accused, to satisfy himself that each appellant knew what he was doing during the course of the arraignment and plea and that each understood the exact nature of the simple charge made against him. That was all that the presiding Provincial Court Judge had to do. Each appellant pleaded guilty in plain, unambiguous and unmistakable language..."³⁶⁸

Branca J.A. found however, that the same problem had arisen in this case as in Rex v. Milina, i.e., the trial judge, by entering into a further inquiry about the facts underlying the charge, had permitted the accused to make qualifications that threw into doubt the propriety of their guilty pleas. The questions asked by Fraser indicated that he disputed that any violence had been used whereas use of violence was an essential element of the offence of robbery charged. Branca J.A. stated:

"It was therefore at this juncture, in the interests of justice and of a fair trial to the appellant Fraser, that the Provincial Court Judge should have realized that the plea which had been recorded was suspect. He should then have changed the recorded plea of guilty in the case of Fraser to one of not guilty or should have told Fraser in the circumstances that he was dissatisfied with the plea of guilty and have asked Fraser whether he desired to

³⁶⁸ Id at 170.

withdraw that plea and enter a plea of not guilty."³⁶⁹
Branca J.A. stated that the magistrate ought to have allowed Louie the same opportunity to withdraw his guilty plea. He allowed the appeals of both accused, and ordered a new trial.

In the case of Regina v. Voorwinde³⁷⁰ the accused was charged with having stolen a quantity of gasoline. He only pleaded guilty after the trial judge misdirected him as to the requirements for liability as a party to an offence under ss.21(1) and (2) of the Criminal Code. Voorwinde's appeal to the British Columbia Court of Appeal was allowed. Robertson and Taggart J.J.A. found that the facts disclosed by Voorwinde at the time of plea did not support a conviction under s. 21(2) of the Code because he had done absolutely nothing to assist the perpetrator of the offence in the commission of the offence. Taggart J.A. added that, when counsel for the Crown subsequently disclosed the facts of the offence, the trial judge should have stopped the proceedings and permitted a change of plea so that the Crown would have to elicit such facts as would support a conviction. Thus, in this case the accused's misunderstanding of the charge resulting from the trial judge's misdirection vitiated the guilty plea.

³⁶⁹ Id at 172.

³⁷⁰ (1975), 29 C.C.C. (2d) 413 (B.C.C.A.).

In Regina v. Donaldson³⁷¹ the accused pleaded guilty to a charge of false pretences, and was convicted, but during the sentencing hearing made assertions suggesting he had a defence. His appeal against conviction was allowed by the British Columbia Court of Appeal on the ground that his assertions in speaking to sentence should have alerted the trial judge to the fact that he claimed a defence on the merits and therefore the trial judge should have ordered the guilty plea withdrawn.

The risks associated with accepting a guilty plea without a sufficient inquiry into the circumstances of the plea and of the offences charged are particularly acute when the charges themselves are defective. This was illustrated by the Manitoba Queen's Bench in Regina v. Veltri.³⁷² Veltri, an immigrant from Italy, had pleaded guilty without the assistance of counsel to two charges of contributing to the delinquency of two female juveniles. Halfway through serving his sentence, when deportation proceedings were brought against him on account of the convictions, he brought application for a writ of habeas corpus with certiorari in aid to quash the convictions on the grounds (1) that the information had not set forth the nature of the acts of the accused constituting the offences; and (2) that the Judge should not have acted on the plea of guilty in view of the exculpatory statement made by the accused.

³⁷¹ (Nov. 2, 1984) 13 W.C.B. 124 (B.C.C.A.).

³⁷² [1963] 3 C.C.C. 145 (Man. Q.B.).

On appeal, Bastin J. found that the charges were defective in that they did not give notice to the accused of the offences and that therefore he had pleaded guilty without knowing the nature of the offences with which he was charged. Bastin J. stated,

"...the law is clear that if an accused has pleaded guilty under a misapprehension as to the elements of the offence charged, it is the duty of the presiding Judge on perceiving this to enter a plea of not guilty."³⁷³

Bastin J. also considered that the trial judge should have amended the guilty pleas to not guilty pleas upon hearing the accused's exculpatory statement, and then proceeded with the trial, particularly as the accused was without counsel and was a newcomer to Canada.

In Brosseau v. The Queen³⁷⁴ the Supreme Court of Canada had to address the question whether a trial judge had erred in law in accepting a guilty plea to non-capital murder without making inquiry into understanding, voluntariness and factual accuracy. Brosseau, a twenty-two year old Cree Indian with a grade II education, with the assistance of legal counsel and an interpreter pleaded guilty to non-capital murder and was sentenced to life imprisonment. Subsequently he sought to withdraw the plea on the grounds that he had not understood the charge and the consequences of his guilty plea; that he had only pleaded guilty out of fear because his lawyer had told him that if he did not plead guilty he would be sentenced to be hanged; and that he had a defence to the charge.

³⁷³ Id at 148.

³⁷⁴ [1969] S.C.R. 181 (S.C.C.).

On appeal, Brosseau's trial lawyer, a Mr. Mousseau, swore an affidavit stating that a tentative arrangement had been worked out with the Crown as a result of which it was suggested that the original charge of capital murder be reduced to non-capital murder. He had strongly recommended that Brosseau plead guilty to non-capital murder because, although the sentence of life imprisonment was mandatory, there was the possibility of obtaining parole within a few years. In his affidavit Brosseau's lawyer reached the following conclusion:

"9. That Mr. Brosseau's circumstances are such that, in my opinion, notwithstanding the above, it may well be that he was throughout incapable of understanding or appreciating the nature and consequences of the plea instantly recorded; that his background is such that he cannot be regarded other than as a true 'primitive'."³⁷⁵

There was also an affidavit by a psychiatric consultant who described Brosseau as having "a Borderline I.Q. - that is, just above the Defective level".³⁷⁶

Brosseau swore an affidavit stating, among other things, that he was drunk at the time of the offence and did not know what he did; that he did not believe he had killed the victim because they had got along well during the six years Brosseau had worked for him; that his lawyer told him, after he had originally pleaded not guilty to non-capital murder, that if he was found guilty he could be sentenced to be hanged but if he pleaded guilty he would get life imprisonment; and that he

³⁷⁵ Id at 188, quoting from the affidavit of Mr. Mousseau.

³⁷⁶ Id, quoting from the psychiatric consultant's affidavit.

pleaded guilty because he was afraid of being hanged but he had not understood that the judge had to impose a life sentence.³⁷⁷

Cartwright, C.J. who delivered the reasons of the majority of the Supreme Court of Canada, took the view that the appeal to the Supreme Court of Canada was limited to review of errors of law, so that the conviction could only be quashed by the Supreme Court if as a matter of law the trial judge was bound to hold an inquiry when a guilty plea was tendered. Cartwright C.J. stated:

"No doubt when a plea of guilty is offered and there is any reason to doubt that the accused understands what he is doing, the judge or magistrate will make inquiry to ascertain whether he does so and the extent of the inquiry will vary with the seriousness of the charge to which the accused is pleading."³⁷⁸

He cited Rex v. Bliss as an example of the careful inquiry appropriate where the charge is murder and the death penalty is mandatory. Cartwright, C.J. noted that some confusion had arisen as a result of the reasoning in Rex v. Hand (No. 1), which had subsequently been clarified in Rex v. Milina. Cartwright C.J. approved the ruling in Milina that there was no duty upon the trial judge to make inquiry to satisfy himself that the accused was in fact guilty, provided that the judge was satisfied that the accused knew exactly what he was doing, knew and understood the exact nature of the offence charged, and pleaded guilty in plain, unambiguous and unmistakable terms; and that only in rare cases, where, for example, the accused was a foreigner, illiterate,

³⁷⁷ Id at 186, Cartwright C.J.'s summary of Brosseau's affidavit.

³⁷⁸ Id at 188-189.

or the charge was unusually complex or grave, would the trial judge feel obliged to make special inquiry even though the accused was represented by counsel. However, Cartwright C.J. was not prepared to go so far as to recognize a rule of law that such inquiry had to be made in a case such as the one before him. He stated:

"Failure to make due inquiry may well be a ground on which the Court of Appeal will exercise its jurisdiction to allow the plea of guilty to be withdrawn if it is made to appear that the accused did not fully appreciate the nature of the charge or the effect of his plea or if the matter is left in doubt; but in my opinion, it cannot be said that where, as in the case at bar, an accused is represented by counsel and tenders a plea of guilty to non-capital murder, the trial Judge before accepting it is bound, as a matter of law, to interrogate the accused."³⁷⁹

Spence J. dissented, arguing that there was in fact a duty in law on the trial judge to satisfy himself that the accused understood the nature of the charge and the effect of the plea before he was entitled to accept a plea of guilty. He agreed that the cases would be rare in which the trial judge would feel obliged to make special inquiry where the accused was represented by counsel. However, he considered that the case before him was one in which such special inquiry ought to have been made, given the unusual gravity of the charge of non-capital murder, and the fact that the accused was a Cree Indian who was illiterate and primitive. In such a case he considered that it was not enough for the trial judge to rely on counsel,

"... for in so doing the trial judge could not satisfy himself that the accused knew either the nature of the plea or the consequences thereof. Therefore, in failing to so satisfy himself, the learned trial judge was wrong in law."³⁸⁰

³⁷⁹ [1969] S.C.R. 181 (S.C.C.) at 190.

³⁸⁰ Id at 191.

The Supreme Court of Canada considered once again the indicia of acceptability and unacceptability of a guilty plea in the case of Adgey v. The Queen.³⁸¹ The accused, who was twenty one years old and only represented at the time of his trial by duty counsel, had pleaded guilty to a total of ten charges of fraud, break, enter and theft, obtaining by false pretences, theft under \$50, unlawful possession and careless driving. Certain comments made by the accused after plea suggested that he was uncertain about how to plead, and had an explanation for the false pretences charges and possibly a defence to the break, enter and theft charge. However, no request for a change of plea was made during the hearing and duty counsel directed his remarks only to the issue of sentencing. On appeal to the Ontario Court of Appeal the conviction on the possession charge was set aside and an acquittal entered. The issue on appeal to the Supreme Court of Canada was whether, having heard the accused's explanation, the trial judge erred in law in failing to strike the remaining guilty pleas.

Dickson J., as he then was, delivering the majority decision, dismissed the appeal. He stated:

"There are two stages in the proceedings in which, so far as accepting a plea of guilty is concerned, the discretion of the trial Judge comes into play: first, when the charge is read to the accused and a plea of guilty is entered, and, secondly, following the hearing of evidence, if the Judge chooses to hear evidence. When a plea of guilty is entered by the accused or someone on his behalf, the trial Judge may or may not accept that plea."³⁸²

³⁸¹ (1973), 13 C.C.C. (2d) 177 (S.C.C.).

³⁸² Id at 188.

Dickson J. reaffirmed Brosseau v. The Queen and R. v. Milina, ruling that a trial judge was not bound as a matter of law in all cases to conduct an inquiry after a guilty plea had been entered. This decision clearly deferred to the exercise of judicial discretion, relegating consideration of the intelligent, voluntary and accurate nature of the guilty plea to a subordinate role in the determination of the acceptability or unacceptability of a guilty plea.

Laskin J. with Spence J. concurring, wrote a strong dissent in which he argued that the acceptability of a guilty plea depended on it being intelligent, voluntary and accurate. He considered that the fact that an accused was or was not represented by counsel was material to the duty that lay upon the trial judge in relation to pleas of guilty. He took the view that representation by duty counsel was not the same as representation by counsel retained by the accused himself and that, therefore, the trial judge ought to have inquired whether the duty counsel had had an opportunity to consult with the accused and to ascertain the factual basis for the charges, and whether the accused had been willing to be represented by the duty counsel and to have had him speak on his behalf in respect to the guilty pleas entered on the advice of duty counsel.³⁸³ The fact that no such inquiry was made was, in Laskin J.'s view, sufficient to justify ordering a new trial.

³⁸³ Id at 180-181.

Even on the assumption that the accused had been fully represented by duty counsel, Laskin J. considered that the trial judge had erred in not entering "not guilty" pleas when the accused had indicated just after pleading guilty that he wished to challenge the charges and his guilty pleas thereto. Laskin J. stated:

"This is entirely apart from the prior obligation that rests upon a trial Judge to seek assurance, especially from an unrepresented accused, that any plea of guilty is voluntary and based on an appreciation of the nature of the charges and of the consequences of the plea."³⁸⁴

Laskin J. contrasted the Canadian Criminal Code which was silent on the subject of the criteria for the acceptability of the guilty plea, with Rule 11 of the United States Federal Rules of Criminal Procedure and s.600 of the Queensland Criminal Code, both of which were quite explicit in setting standards for acceptance of pleas of guilty.

He interpreted R. v. Forde,³⁸⁵ as meaning that an appellate court should interfere to set aside a conviction based on a guilty plea if (1) the accused did not understand the nature of the charge, (2) the accused did not unequivocally plead guilty, or (3) on the facts offered in support of the charge the accused could not in law have been convicted of the offence charged. Laskin J. considered that the first two propositions imposed a duty on the trial judge prior to entry of the plea to satisfy himself that the accused understood the charge and was unequivocally pleading guilty to that charge, whereas the third

³⁸⁴ Id at 180.

³⁸⁵ (1923), 17 Cr. App. R. 99.

proposition which related to the factual accuracy of the plea depended on the facts being put before the trial judge following the plea so that he could ascertain the factual accuracy of the plea.

Laskin J. emphasized the importance of the trial judge's duty to inquire by explaining the critical role that the plea of guilty played in delineating an accused person's procedural rights:

"A plea of guilty carries an admission that the accused so pleading has committed the crime charged and a consent to a conviction being entered without any trial. The accused by such a plea relieves the Crown of the burden to prove guilt beyond a reasonable doubt, abandons his non-compellability as a witness and his right to remain silent and surrenders his right to offer full answer and defence to a charge. It is important, therefore, that the plea be made voluntarily and upon a full understanding of the nature of the charge and its consequences and that it be unequivocal. In these respects, representation by counsel is an important consideration; but since the plea is that of the accused and not of his counsel, a trial judge should still satisfy himself of the matters above-mentioned. These do not immediately engage any factual issues which might, however, arise if the accused seeks to qualify his guilty plea by explanatory comments either at the time it is entered or later before termination of the proceedings."³⁸⁶

Laskin J. expressed certain reservations about both the result and the underlying proposition of law in the majority reasons in Brosseau v. The Queen:

"If in the Brosseau case no inquiry at all was required because the accused was represented by counsel, I can think of no case in which an inquiry would be necessary when there is counsel, unless the inquiry is precipitated by some remonstrance by the accused at the time he pleads guilty or later in the proceedings, as, for example, when the Crown narrates facts relevant to sentence. If the sentence is mandatory, the narration becomes unnecessary although it was given in the Brosseau case; and if there is no narration, then, according to the Brosseau case, matters so grave as whether an accused understands the charge against him, and appreciates the consequences and voluntarily accepts them without trial, require no initiative of inquiry by the trial judge but are

³⁸⁶ Id at 183.

satisfied by the mere presence of counsel when the accused pleads guilty. This is a situation which, in its generality, I find unacceptable."³⁸⁷

Laskin J. took the view that the duty of the trial judge to make inquiry into the accused's understanding and appreciation of the guilty plea and into its unequivocal nature had to be complemented by a duty on the Crown to adduce facts which, if taken to be true, would support the charge and conviction.³⁸⁸ This was so because the narration by the Crown and any remonstrance that it might elicit from the accused could raise a question as to the factual accuracy of the plea, in terms of the accused's understanding and intention to plead guilty.³⁸⁹ Laskin J. found that with respect to the charge of break and enter and theft, the facts as narrated by the Crown raised a sufficient doubt that the elements of the offence could be established, so that the trial judge should not have accepted the guilty plea.

With respect to the pleas of guilty to the other charges, Laskin J. held that they were vitiated by the failure of the trial judge to make any inquiry at all of the accused or his counsel as to whether he understood the charges and appreciated the consequences of pleading guilty, and as to whether he was unequivocal in admitting guilt. Laskin J. was of the view that even where an accused was represented, the trial judge called upon to enter a conviction without trial was duty bound to

³⁸⁷ Id at 184-185.

³⁸⁸ Id at 185-186.

³⁸⁹ Id.

make sufficient inquiry so as to be "certain that the accused is fully aware of what is involved in, and is content to stand by, his plea of guilty".³⁹⁰ Laskin J. specifically rejected both consideration for the sensitivity of defence counsel and for the fact that the guilty plea served as the major mechanism for disposition of criminal charges, as reasons to justify a trial judge's decision not to make inquiry. In his view, the reasons for having the trial judge seek "confirmation of the voluntariness, understanding and appreciation of consequences where guilty pleas are offered"³⁹¹ stood above any such considerations.

Adgey was followed in the case of Regina v. Leonard.³⁹² Leonard, a sixteen year old unilingual francophone whose counsel had pleaded guilty on his behalf in the course of proceedings conducted in English, sought to have his conviction overturned on appeal, because there had been no inquiry into whether counsel's plea truly represented the intentions of the accused. After the guilty plea had been entered a substantial amount of evidence was introduced by the Crown to establish the factual basis for the charge. Gale C.J.O. held that, although the trial judge had a discretion to investigate whether the plea by counsel on the accused's behalf should stand, having regard to the principles laid down by the majority in Adgey v. The Queen, he had been under no obligation to do so in the circumstances of the case. Accordingly the appeal was

³⁹⁰ Id at 186.

³⁹¹ Id at 187.

³⁹² (1975), 29 C.C.C. (2d) 252 (Ont. C.A.).

dismissed.

One of the circumstances that Gale C.J.O. thought was critical to the decision whether to allow a change of plea was the fact that no objection was taken either by the accused or his counsel to the evidence that was introduced subsequent to the guilty plea.³⁹³ Gale C.J.O.'s decision to dismiss the appeal appears to have been based in part on the view expressed in the Brosseau case that when an accused was represented by counsel the trial judge was generally entitled to assume that the accused understood the charge and the consequences of the guilty plea; and in part on the view that if there was a strong factual basis for a guilty plea, questions of the voluntariness and understanding of the plea would be given little or no weight. This approach may be questionable where it is defence counsel rather than the accused who pleads ostensibly on the accused's behalf but in a language the accused does not understand.

In the case of R v. Abraham,³⁹⁴ the accused, a 17 year old native Indian girl and first-time offender, had pleaded guilty and been convicted of a total of fourteen charges of break and enter, damage to property and theft. On appeal she alleged that the magistrate had erred

³⁹³ It might be arguable, however, that as Leonard's complaint on appeal was that he had not understood the proceedings or intended to plead guilty, this failure to make objection should not have been decisive, especially as the proceedings were held in English.

³⁹⁴ (1977), 12 Nfld. & P.E.I.R. 216 (Nfld. C.A.).

in law in failing to conduct an inquiry to ensure that the accused appreciated the nature of the charges and the consequences of the pleas entered. Abraham's affidavit in support of her appeal stated that her mother tongue was Montagnais and she had difficulty understanding English. Nowhere in the appeal court reasons was it mentioned whether Abraham had the assistance of counsel at the time of her arraignment, but the fact that nothing was said on this point whereas mention was made of the presence of an interpreter, strongly suggests that she was unrepresented. The Newfoundland Court of Appeal accepted what the magistrate stated in his report, i.e. that Abraham appeared to have a working knowledge of conversational English, that there had been an interpreter on hand, and that he had only accepted her guilty pleas after being satisfied that she understood the nature of the charges against her. Furlong C.J. cited at length from Dickson J.'s reasons in Adgey v. The Queen and summarized the position in law as follows:

"... once the Magistrate has satisfied himself that the accused person knows what he [sic] is about then he has discharged his obligations to the full. If he is not satisfied then he should, and I am certain that a wise Magistrate would always make due inquiries of the prisoner as to his [sic] understanding or lack of it and explain the matter in sufficient detail to ensure that the accused person is fully conscious of the charges of which he [sic] is accused".³⁹⁵

However, Furlong C.J. was not prepared to go so far as to say that the Magistrate need inform the accused of the possible punishments for the offences charged. In the result this ground of appeal was

³⁹⁵ Id at 220.

dismissed.³⁹⁶

Summary

Many of these decisions indicate a certain wariness towards inquiring into the basis for a guilty plea. The message conveyed by these judgments is that a trial judge who enters into such an inquiry opens Pandora's box. In effect, the less that the trial judge knows about the reasons and factual basis for the guilty plea the better. It is enough that the trial judge confirm that the accused understands the exact nature of the offence charged and that the accused pleads unequivocally thereto. The majority decision in Milina, as with many of the other decisions, appears to have been motivated by a desire to ensure the "efficacy" of the guilty plea. If no real inquiry is held, no difficult questions are likely to arise concerning the voluntariness and factual basis of the plea, and there is less chance that the accused will be alerted to the fact that it might be advisable to change the plea to one of not guilty and have a trial of the issues. Without such inquiry the guilty plea is more likely to be accepted by the court as the basis for a conviction, ensuring cheap and speedy resolution of criminal matters.

³⁹⁶ Arguably, Furlong C.J.'s limitation on the notion of understanding was unjustified, considering the relevance of possible sentence to the decision whether or not to plead guilty.

The assumption underlying the rule laid down in Milina appears to have been that, without such an inquiry, there was no reason to doubt the propriety of the guilty plea so the court could move swiftly to conviction and sentence, but it is arguable that this assumption is unreliable. It may be more reasonable to assume that without an inquiry there is no basis for confidence that the guilty plea has been properly made. On this view, consistent with the approach advocated by Laskin J. in Adgey, an inquiry ought to be made in every case. While this might reduce the immediate efficacy of the guilty plea, a consequential reduction in appeals from convictions based on guilty pleas might compensate for this.

It is submitted that the majority of the Supreme Court of Canada has not yet shown leadership in developing appropriate criteria for the acceptability of the guilty plea. Instead they appear to have accepted the arguments of administrative expedience voiced by the British Columbia Court of Appeal in Milina as taking precedence over concerns for procedural fairness to the accused. The views expressed by the dissenting members of the Supreme Court of Canada in Brousseau and Adgey appear to be more consistent with principle, especially in light of the subsequent constitutionalization of many of the procedural rights affected by the plea of guilty.

The reasoning of the majority of the Supreme Court of Canada in Brousseau v. The Queen could be criticized on several levels. First, it could be criticized for placing undue emphasis on the desire for speedy

resolution of criminal matters and finality. Cartwright C.J.'s rejection of the idea that there was a rule of law requiring the trial judge to make an inquiry appears to have been rooted in a concern that imposing such a duty on the trial judge would slow down the guilty plea process and reduce the certainty of convictions. Second, the majority decision could be criticized for condoning an undue derogation from the trial judge's responsibilities in accepting a guilty plea, in favour of greater reliance on the presence of defence counsel. In effect, where the accused was represented by counsel at the arraignment the trial judge could abdicate his responsibility to ensure that the plea was properly entered, and could rely on the mere presence of counsel as some sort of guarantee that the plea was made knowingly, voluntarily, and with the necessary factual basis to support a conviction of the offence charged.³⁹⁷

Laskin J.'s dissent in Adgey v. The Queen demonstrated that he took

³⁹⁷ C. Gottselig, "Plea of not guilty - duty of magistrate before accepting plea - charge of non-capital murder-accused an illiterate Indian - represented by counsel" (1971), 36 Saskatchewan Law Review 192. One might also question the finding of the majority that Brosseau's case did not even fall within that narrow class of cases identified in Milina, in which special inquiry was said to be required. If special inquiry was not required for Brosseau it is difficult to imagine a case in which such inquiry would be needed. Brosseau's plea of guilty was suspect in all respects: linguistic, cultural, educational and psychological factors suggested that Brosseau did not understand the charge against him or the effect of his guilty plea; the abrupt change of plea under coercion from his lawyer and his fear of the death penalty suggested that his guilty plea was not a voluntary act; and his claim that he was drunk at the time of the alleged killing and that he did not know what happened suggested that he had a defence to the charge and that there may not have been an adequate factual basis to support his conviction.

a fundamentally different approach to the acceptability of a guilty plea than did the majority of the Supreme Court. Instead of viewing the guilty plea as simply a matter of conviction by consent and the holding of judicial inquiry into the circumstances of a guilty plea as being completely discretionary, Laskin J. focused on the profound procedural consequences of the guilty plea, and concluded that a higher standard of acceptability was in order. Viewing the guilty plea as the nexus between charge and conviction, Laskin J. recognized the need for special care and sufficient inquiry when receiving such a plea, even from an accused who was represented by counsel. With the constitutionalization of many criminal procedural rights in the Canadian Charter of Rights and Freedoms, Laskin J.'s references to the American constitutional requirements for acceptance of a guilty plea would appear to gain in their authority and relevance. Since the advent of the Charter, considerations of expediency, apparently uppermost in the minds of the majority of the court in Adgey, may no longer be sufficient in themselves to justify accepting a constitutionally defective guilty plea.³⁹⁸

³⁹⁸ Singh v. M.E.I., [1985] 1 S.C.R. 177 (S.C.C.); R. v. Oakes, [1986] 1 S.C.R. 103 (S.C.C.).

Chapter 4. THE GUILTY PLEA AS AN EVIDENTIARY DEVICE

In the preceding discussion of the notion of the acceptability of the guilty plea it appeared that the courts, in focusing on the accused's understanding of the effects of the guilty plea and on the voluntariness of the plea, were treating it mainly as a procedural device resulting in the waiver of the accused's trial rights. Only when the courts turned their attention to the existence of a factual basis for the plea, did the courts consider the evidentiary role of the guilty plea, whereby it substituted for proof beyond a reasonable doubt. The juridical nature of the guilty plea cannot be fully understood without recognizing its dual nature as a procedural and evidentiary device. Having considered in some depth the procedural rules relevant to the guilty plea and the guilty plea's role as a procedural device, the purpose of this chapter is to elucidate the evidentiary aspects of the guilty plea.

A. The guilty plea as an admission

Evidentiary concepts are engaged by the plea of guilty because by entering a plea of guilty the accused admits to having committed the offence and consents to a conviction being entered without the necessity of a trial. The guilty plea is an admission by the accused of all the material averments charged in the indictment, and relieves the Crown of

having to make formal proof.³⁹⁹ Thus by pleading guilty to the charge against him the accused makes a formal admission in open court of all the facts that otherwise would need to be proved against him, thereby providing the complete evidentiary basis for his own conviction. Fortin described the guilty plea as "l'aveu par excellence":

«L'inculpé qui plaide coupable renonce à la tenue du procès auquel il a droit, admet que la poursuite a la preuve de tous les éléments tant matériels que légaux de l'inculpation, ce qui comporte l'admission que ces preuves sont à la fois admissibles et suffisantes, et reconnaît qu'il n'a pas de moyens de preuve à faire valoir à l'encontre de l'inculpation. Le plaidoyer de culpabilité est donc l'aveu par excellence.»⁴⁰⁰

The plea of guilty, however, differs from an admission of fact or law in the ordinary sense in that strict proof is required of an admission dealing with a matter of law. The guilty plea on the other hand admits that strict proof of such matters of law can be made and of everything else necessary to fasten the crime on the prisoner, thereby precluding the necessity of proof.⁴⁰¹ For example, in the case of Rex v. Roop⁴⁰² an accused's plea of guilty to a charge of bigamy was upheld without the Crown having to establish the validity of the first marriage at the time of the second marriage.

³⁹⁹ H. Leonoff & D. Deutscher, "The Pleas and Related Matters", in V.M. Del Buono, Criminal Procedure in Canada, Studies (1982) at 230-231. See also, Re United States of America and McMahon (1978), 40 C.C.C. (2d) 250 (F.C.A.), where evidence of a plea of guilty made in the United States was accepted as proof of conviction for the purposes of an extradition hearing.

⁴⁰⁰ J. Fortin, Preuve Pénale (1984) at 395.

⁴⁰¹ Rex v. Roop (1924), 42 C.C.C. 344 (N.S.S.Ct.).

⁴⁰² Id.

The guilty plea does not admit every fact alleged by the Crown but only such as constitute the essential elements of the offence as charged, so the accused may still require the Crown to prove the existence of any aggravating factors.⁴⁰³ Also, as we have seen, a guilty plea to the offence charged does not permit the court to sentence the accused for an aggravated version of that offence which was not charged. Thus in Rex v. Drysdale⁴⁰⁴ it was held that since the information only charged the accused with the offence of simple possession of intoxicating liquor, and not the aggravated offence of possession of liquor valued over \$50, the accused in pleading guilty had not pleaded guilty to the aggravated offence and could not be punished as though he had. The same court held in Rex v. Mackenzie⁴⁰⁵, that where the accused had pleaded guilty to the information as charged, his plea was an admission of every statement and circumstance that the information contained, so that the accused could not be heard to contend that the plea of guilty was to some lesser version of the offence than the one actually charged by the words of the information.

The fact that the guilty plea acts an admission contributes to the accused's difficulty in appealing against a conviction based thereon.

⁴⁰³ H. Leonoff & D. Deutscher, "The Pleas and Related Matters", in V.M. Del Buono, Criminal Procedure in Canada, Studies (1982) at 231.

⁴⁰⁴ [1933] 1 D.L.R. 60 (N.S.S.Ct.).

⁴⁰⁵ (1935), 65 C.C.C. 104 (N.S.S.Ct.).

Thus in Regina v. Sanders⁴⁰⁶ the British Columbia Court of Appeal stated that the accused's guilty plea acted as an estoppel as to the facts, thereby barring an appeal on the merits. Robertson J.A. cited with approval the Nova Scotia Court of Appeal in R. v. Stone⁴⁰⁷ where it was stated:

"A plea of guilty is an admission that the matters alleged in the information are true. The accused cannot complain or be an aggrieved person because the Court accepted his admission. It seems to be recognized that there may be exceptional circumstances where the admission ostensibly made by the plea of guilty does not express the real intention of the accused and the plea consequently loses its force as an admission."

Robertson J.A. concluded that unless special circumstances were shown to exist, ie., that the plea was entered without proper understanding of the charge, or was induced by threats or promises, the accused who was convicted on his own guilty plea would have no appeal at all. This indicates that the evidentiary value of a guilty plea may, in exceptional circumstances, be vitiated by procedural defects such as lack of understanding or involuntariness.

For a guilty plea to be acceptable it must be a complete admission of all the necessary legal ingredients of the charge, thereby dispensing with the need for proof of these elements.⁴⁰⁸ Once accepted, a guilty plea is an admission of all the essential elements of the offence and is a sufficient foundation on its own to support a conviction, without

⁴⁰⁶ (1953), 106 C.C.C. 76 (B.C.C.A.).

⁴⁰⁷ (1932), 58 C.C.C. 262 (N.S.C.A.) at 268.

⁴⁰⁸ Regina v. Lucas (1983), 9 C.C.C. (3d) 71 (Ont. C.A.) at 76.

there being any need for corroboration of the facts so admitted. Before accepting the plea, however, the prudent trial judge will make some inquiry into the voluntariness and understanding with which the plea was entered and into the factual basis for the plea.⁴⁰⁹ Thus the trial judge may in his discretion, ask the prosecutor for some description of the facts of the case, and ask the accused for confirmation of those facts, in order to ensure that the guilty plea is appropriate in the circumstances.⁴¹⁰ As we have seen in the discussion of the concept of acceptability of the guilty plea, supra, if it appears that the accused never intended to admit essential ingredients of the charge the trial judge should allow the accused to withdraw his plea of guilty.⁴¹¹ Thus a plea of guilty accompanied by a protestation of innocence would be unacceptable in Canada.

That is not the case in the United States, however, where it was held in North Carolina v. Alford⁴¹² that a state court could accept a guilty plea where the accused proclaimed his innocence. The U.S. Supreme Court drew an analogy between this kind of plea and the plea of

⁴⁰⁹ Rex v. Johnson and Creanza (1945), 85 C.C.C. 56 (B.C.C.A.); Rex v. Hand (No.1), [1946] 3 D.L.R. 128 (B.C.C.A.); Rex v. Gordon (1947), 88 C.C.C. 413 (B.C.C.A.); but see Rex v. Milina (1946), 86 C.C.C. 374 (B.C.C.A.), holding that such inquiry was discretionary, and would rarely be necessary where the accused was represented by counsel.

⁴¹⁰ Rex v. Milina (1946), 86 C.C.C. 374 (B.C.C.A.); Brosseau v. The Queen, [1968] S.C.R. 181 (S.C.C.); Adgey v. The Queen (1973), 13 C.C.C. (2d) 177 (S.C.C.).

⁴¹¹ Rex v. Milina (1946), 86 C.C.C. 374 (B.C.C.A.).

⁴¹² 400 U.S. 25 (1970) (U.S.S.C.).

nolo contendere, the latter plea being viewed not as an express admission of guilt but as a consent by the accused to being punished as though he were guilty, coupled with a prayer for leniency. The court determined from the existence of the plea of nolo contendere in American law that an express admission of guilt was not constitutionally required for conviction.⁴¹³

This decision cast considerable doubt on the traditional view, which still holds in Canada, that the guilty plea was an admission of guilt.⁴¹⁴ It appeared to be inconsistent with the traditional focus of the entire adversary system which, by means of the presumption of innocence, the standard of proof beyond a reasonable doubt, the burden of proof being on the prosecution, and exclusionary rules of evidence, had been heavily weighted against convicting the innocent.⁴¹⁵ In the ordinary case where the accused pleaded guilty and did not

⁴¹³ Id at 35-36 n.8 and 37-38. The plea of nolo contendere is a formal declaration by the accused that he will not contend with the prosecuting authority under the charge: 21 Am.Jur. 2d ss.492 at 812-13. The difference, however, is that the plea of nolo contendere only acts as an "implied admission" for the purpose of the case in which it is made, and does not estop the accused from denying the facts in a subsequent civil suit: T.C. Hayden Jr., "The Plea of Nolo Contendere" (1965), 25 Maryland Law Review 227 at 233. See also, IV Wigmore on Evidence (3d ed. 1940) at 58, where it is stated, "A pleading, or other litigious allegation (such as a plea of "nolo contendere" or case stated), may be in its terms merely hypothetical or ambiguous, and may therefore not be interpretable as an admission."

⁴¹⁴ Emory, "The Guilty Plea as a Waiver of Rights and an Admission of Guilt" (1971), 44 Temple Law Quarterly 540 at 540.

⁴¹⁵ J. Barkai, "Accuracy Inquiries for all felony and misdemeanor pleas: Voluntary pleas but innocent defendants" (1977), 126 University of Pennsylvania Law Review 88 at 99.

simultaneously claim innocence, the guilty plea included an admission of guilt and a waiver of constitutional trial rights, and therefore could be said to meet, or at least fairly substitute for, the standard of proof beyond a reasonable doubt.⁴¹⁶ But where the accused claimed innocence, it was difficult to see what would satisfy the standard of proof beyond a reasonable doubt. The requirement that there be a strong factual basis to corroborate the plea in the face of the accused's protestations of innocence was intended to ensure that only the guilty would be convicted.⁴¹⁷ Arguably, something more than a factual basis ought to have been required. Emory suggested there should be "overwhelming evidence".⁴¹⁸ Uviller took the view that there would have to be at least credible and admissible evidence that was legally sufficient to support a verdict of guilty, and that the trial judge would have to resolve any disputed factual issues in a mini trial on a standard of "clear and convincing" evidence.⁴¹⁹

Because Canadian law does not recognize the plea of nolo contendere it seems doubtful that the result in Alford could be justified in this country. Here, it is submitted, the guilty plea retains its character

⁴¹⁶ H. Emory, "The Guilty Plea as a Waiver of Rights and an Admission of Guilt" (1971), 44 Temple Law Quarterly 540 at 548.

⁴¹⁷ J. Barkai, "Accuracy Inquiries for all felony and misdemeanor pleas: Voluntary pleas but innocent defendants" (1977), 126 University of Pennsylvania Law Review 88 at 100.

⁴¹⁸ H. Emory, "The Guilty Plea as a Waiver of Rights and an Admission of Guilt" (1971), 44 Temple Law Quarterly 540 at 550.

⁴¹⁹ H. Uviller, "Pleading Guilty: A Critique of Four Models" (1977), 44 Law & Contemporary Problems 102 at 125-126.

as both an admission and a consent to conviction.

Even where the accused does not claim innocence at the time of plea, an inquiry into accuracy or factual basis is definitely beneficial to the guilty plea process. The inquiry will assist the trial judge in assessing the acceptability of the guilty plea, in terms of its evidentiary and procedural role. It will indicate whether the guilty plea is supported by the facts, and may indicate the voluntary and intelligent nature of the accused's plea,⁴²⁰ by discovering the innocent accused who pleads guilty because of an erroneous belief as to guilt or who concludes that it is better to plead guilty in spite of factual innocence.⁴²¹ The accuracy inquiry will likely simplify the task of appellate review, and in many instances may obviate the necessity for such review.

B. The guilty plea as evidence against a co-accused

Where two persons are jointly charged and on arraignment one pleads guilty and the other not guilty, the question arises as to the effect of the one accused's plea on the disposition of the co-accused's case. Generally, the courts try to differentiate between the two cases holding that the guilty plea of one co-accused is not evidence against the other

⁴²⁰ Id at 126.

⁴²¹ J. Barkai, "Accuracy Inquiries for all Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants" (1977), 126 University of Pennsylvania Law Review 88 at 95-97.

accused. However, there are ways in which the plea of one accused may indirectly effect the disposition of the other accused's case.

One accomplice may seek charge or sentencing concessions in exchange for pleading guilty and giving testimony against a co-accused. Because of the strong psychological pressures that may have induced the accomplice to plead guilty and testify against a co-accused, this testimony generally will be treated with caution. The courts have developed guidelines for accepting such guilty pleas so as to minimize the pressure on the accomplice testifying against a co-accused and thereby to reduce the unreliability of that testimony. Thus, the courts have expressed a preference for completely disposing of the charges against the accomplice who wishes to plead guilty, before calling that person as a Crown witness.⁴²² Whether an accomplice pleads guilty upon arraignment or at some later stage in the trial, if Crown counsel and the trial judge are prepared to accept the guilty plea, it should be entered on the record, a conviction should be registered and the accomplice should be sentenced, before being allowed to testify against the co-accused.⁴²³ Although this rule of practice may not yet have

⁴²² Wilfred Tomey, [1909] Crim. App. R. 329 (U.K.C.A.); Regina v. McKee (1960), 126 C.C.C. 251 (Ont. C.A.); William Augustine Pipe, [1966] Cr. App. R. 17; Regina v. Koury and Rivet (1972), 25 C.R.N.S. 75 (Ont. C.A.).

⁴²³ Wilfred Tomey, [1909] Crim. App. R. 329 (U.K.C.A.); Rex v. Canning (1937), 68 C.C.C. 321 (S.C.C.) per Kerwin J.; Regina v. McKee (1960), 126 C.C.C. 251 (Ont. C.A.); William Augustine Pipe, [1966] Cr. App. R. 17; Regina v. Koury and Rivet (1972), 25 C.R.N.S. 75 (Ont. C.A.); Regina v. Caulfield (1972), 10 C.C.C. (2d) 539 (Alta. C.A.).

crystallized into a rule of law,⁴²⁴ the calling of one accomplice to testify against a co-accused when charges are outstanding against the first accused,⁴²⁵ or the first accused's guilty plea has not yet been accepted,⁴²⁶ or the first accused has not yet been sentenced on the guilty plea,⁴²⁷ has been universally condemned. It is questionable, however, whether these guidelines in fact can do much to reduce the pressures that induce an accomplice to turn Crown witness or to enhance the reliability of accomplice testimony.

On occasion, instead of introducing the testimony of an accomplice who has pleaded guilty, the Crown has attempted to rely on the mere fact that the accomplice pleaded guilty as evidence of the guilt of a co-accused. Because such evidence tends to be highly prejudicial to the outcome of the co-accused's trial the courts have ruled it inadmissible as against the co-accused,⁴²⁸ and a conviction founded on such evidence would be set aside on appeal. For example, in R. v. Gale⁴²⁹ the Crown,

⁴²⁴ Regina v. Williams (1974), 21 C.C.C. (2d) 1 (Court Martial Appeal Court).

⁴²⁵ William Augustine Pipe, [1966] Cr. App. R. 17.

⁴²⁶ Regina v. Koury and Rivet (1972), 25 C.R.N.S. 75 (Ont. C.A.).

⁴²⁷ Rex v. Canning (1937), 68 C.C.C. 321 (S.C.C.) per Kerwin J.; Regina v. Caulfield (1972), 10 C.C.C. (2d) 539 (Alta. C.A.); Regina v. Williams (1974), 21 C.C.C. (2d) 1 (Court Martial Appeal Court).

⁴²⁸ R v. Lessard (1979), 50 C.C.C. (2d) 175 (Que. C.A.); R. v. Dixon (1984), 16 C.C.C. (3d) 431 (B.C.C.A.); R. v. Gale (1984), 42 C.R. (3d) 94 (B.C.C.A.).

⁴²⁹ (1984), 42 C.R. (3d) 94 (B.C.C.A.).

in order to establish Gale's participation in a robbery, had relied on evidence that there had been an association between Gale and two co-accused who had pleaded guilty to robbery. On appeal Gale's conviction was quashed because the verdict was unreasonable and not supported by the evidence.

Where the co-accused are jointly tried and one pleads guilty, the trial judge must be careful to direct the jury that the guilty plea of one accused is not evidence against the others. Thus in Regina v. Pentiluk and MacDonald⁴³⁰ the Ontario Court of Appeal found that the trial judge had erred in failing to direct the jury that Pentiluk's admission that he had entered a guilty plea (which the court had not accepted) was not evidence against his co-accused, MacDonald. The court concluded, however, that since MacDonald's defence was that his co-accused had committed the two murders charged but that MacDonald was not a party to the crimes, no miscarriage of justice had resulted from the trial judge's error. A similar approach was taken in Regina v. MacGregor⁴³¹. MacGregor and three others were charged with second degree murder, arising out of a robbery. At the close of the accused's defence during which MacGregor had raised an alibi, the three other accused with the Crown's consent pleaded guilty of manslaughter. The trial judge then directed the jury to return a verdict of not guilty of murder but guilty of manslaughter against the three co-accused. The trial of

⁴³⁰ (1974), 28 C.R.N.S. 324 (Ont. C.A.).

⁴³¹ (1981), 64 C.C.C. (2d) 353 (Ont. C.A.).

MacGregor then continued, and he was convicted of second degree murder. On appeal the Ontario Court of Appeal found that the trial judge had erred in failing to instruct the jury that in considering the case against MacGregor they should disregard the pleas of guilty by the co-accused and that those pleas were not in any way to be taken into account in considering the case against MacGregor. However, the court found that in the circumstances of the case this failure did not result in any real prejudice to the appellant because the evidence against him had been so overwhelming.

In Regina v. May⁴³² the Ontario Court of Appeal ruled that pleas of guilty or convictions of other alleged co-conspirators were not admissible against the appellant to prove the existence of a conspiracy.⁴³³ As there had been other overwhelming admissible evidence as to the existence of the conspiracy the court held that no miscarriage of justice had in fact occurred.

C. The admissibility of a rejected or withdrawn guilty plea

If the trial judge or prosecutor does not accept a plea of guilty tendered under s.606(4) of the Code; if after due inquiry the trial judge rejects a plea of guilty to the offence charged; or if the trial judge upon application permits the accused to withdraw a guilty plea,

⁴³² (1984), 13 C.C.C. (3d) 257 (Ont. C.A.).

⁴³³ Id at 260.

the judge will enter a plea of not guilty on the record and the accused will be put to trial on the offence charged. This section will examine the question whether in these situations the original plea is admissible against the accused in the subsequent trial and, if it is admissible, whether it is conclusive proof of guilt.

In addressing this issue it is worthwhile to bear in mind that a guilty plea is not always a reliable indicator of factual guilt. Two examples will serve to illustrate this point. First, an accused who pleads not guilty of the offence charged but guilty of some "other" offence, may be motivated by a desire to minimize exposure to punishment in the face of a strong Crown case. Thus, the guilty plea may not be offered as a real admission but simply as a tactical device, fulfilling a role more akin to the American plea of nolo contendere than to a true confession. If this plea is rejected by the court, can it nevertheless be treated as an unconditional admission of all factual and legal circumstances required for conviction of the "other" offence, so as to preclude the chance of a complete acquittal and to obviate the necessity of the Crown proving any elements common to that "other" offence and the offence charged?

Second, where an accused pleads guilty to the offence charged but the plea is rejected by the court, or the court allows the accused to withdraw it, this will be because inquiry has disclosed some error in the plea. The accused may have pleaded guilty because of a misunderstanding of the factual and legal requirements for a conviction

of the offence charged; or of the applicable rights to trial; or because of undue pressures brought to bear by defence counsel, Crown counsel, an accomplice, the police or even the trial judge. If for any of these valid reasons the court, in the exercise of its discretion, permits the accused to withdraw a guilty plea and substitute a plea of not guilty, can the withdrawn guilty plea be introduced in evidence against the accused at his subsequent trial, or does the error render the plea a nullity for all purposes?

The case law to date has not fully resolved these issues, suggesting that a guilty plea is usually, but not always, admissible at the subsequent trial. It may be that the Charter guarantees against being compelled to be a witness against oneself (s.11(c)), and against self-incrimination (s.13), and the presumption of innocence (s.11(d)) will, in the future, suggest an appropriate balance between the state's interest in admitting relevant evidence and the accused's interest in having a fair trial. The case law on the admissibility of withdrawn or rejected guilty pleas has not yet explored this possibility. It is interesting to note, however, that the Supreme Court of Canada has considered the applicability of these rights to the question of the admissibility at a new trial of admissions short of a guilty plea, made by the accused at his first trial on the same charge.⁴³⁴ Later in this chapter, the possibility of applying this reasoning to the context of withdrawn and rejected guilty pleas will be explored.

⁴³⁴ Dubois v. The Queen (1985), 18 C.R.R. 1 (S.C.C.).

1. Rejected guilty plea to other offence

This section will consider the effect of a guilty plea where an accused has attempted to take advantage of s.606(4) of the Criminal Code, by pleading not guilty to the offence charged but guilty of another offence, but the guilty plea has not been accepted. In particular, does the plea serve as an admission so as to effectively preclude a complete acquittal? This question arose in England in the case of Clifford Hazeltine,⁴³⁵ in connection with a similar provision in the Criminal Justice Administration Act 1914⁴³⁶ allowing for a plea of guilty to an included offence instead of the offence charged. Hazeltine had pleaded not guilty to the charge of wounding with intent, but guilty of unlawful wounding. The prosecution had refused to accept the plea of guilty to unlawful wounding so the case went to trial. In summing up the trial judge told the jury they need not consider the question of unlawful wounding, and the jury returned a verdict of not guilty on the charge. The trial judge then treated the plea of guilty to unlawful wounding as still in effect and proceeded to sentence the accused for that offence.

On appeal Salmon L.J. found the procedure to have been irregular and quashed the conviction. He emphasized that the Act of 1914 had in

⁴³⁵ (1967) 51 Cr. App. R. 351 (U.K.C.A.).

⁴³⁶ (4 & 5 Geo. 5, c.58) s.39.

no way affected the rule that there could be only one plea to a count. Accordingly, when the plea of guilty to unlawful wounding was not accepted, it was deemed to be withdrawn and the only effective plea was that of not guilty to wounding with intent. The jury had then to consider the evidence and at the end of the case decide whether the accused was guilty of the offence charged or, if not, guilty of the included offence of unlawful wounding. The original plea of guilty to unlawful wounding, once rejected, was a nullity, and could not be used as it was here, to found an automatic conviction. Salmon L.J. explained, however, that the earlier plea of guilty was an admission that what the accused had done was unlawful and malicious, and it was wholly inconsistent with a defence that what the accused had done was accidental or in self defence. Therefore, if the accused testified and gave evidence that was inconsistent with the admission already made by the plea of guilty, the prosecution ought to cross-examine him on that admission.

A similar issue arose in Ontario in the case of Regina v. Pentiluk and MacDonald.⁴³⁷ In charging the jury the trial judge had referred to Pentiluk's rejected pleas of guilty to manslaughter as admissions which relieved the prosecution of the burden of proving the killings. Martin J.A. ruled that the pleas of guilty to manslaughter, once rejected, were a nullity. He stated that the rejected plea

"...was not effective as a plea of guilty and could only be

⁴³⁷ (1974). 28 C.R.N.S. 324 (Ont. C.A.). Macdonald's appeal to the Supreme Court was dismissed: MacDonald v. The Queen (1977), 75 D.L.R. (3d) 107 (S.C.C.).

considered as an admission if proper proof of its having been made was placed before the jury trying the accused."⁴³⁸

Martin J.A. noted that in fact, the accused had admitted during cross-examination that he had pleaded guilty to manslaughter, thereby dispensing with the need in this case to have extrinsic evidence to prove the plea so as to make it available as an admission.

In Gagné v. R.⁴³⁹ Bernier J. expressed the view that it would be an improper exercise of discretion to accept a tendered guilty plea to an included offence if all the essential elements of the offence charged had been proved. He was of the view that the jury should not decide whether to accept a guilty plea to the included offence of manslaughter until they had heard all the evidence on the original charge of murder. In effect, then, the guilty plea would be held in reserve, and used in such a manner as to preclude total acquittal of the accused.⁴⁴⁰

This decision was strongly criticized by Fortin⁴⁴¹ and Leonoff and Deutscher⁴⁴² as defeating the purpose of s.534(4) (now s.606(4)) of the Code. Leonoff and Deutscher disagreed with Bernier J.'s view that a guilty plea to an included offence, whether or not it is accepted,

⁴³⁸ Id at 328.

⁴³⁹ [1977] C.A. 146 (Que. C.A.).

⁴⁴⁰ Id at 148.

⁴⁴¹ J. Fortin, Preuve Pénale (1984) at 399.

⁴⁴² H. Leonoff & D. Deutscher, "The Pleas and Related Matters," in V.M. del Buono, Criminal Procedure in Canada, Studies (1982) at 238-239.

relieves the Crown of the burden of proving the elements of the included offence and eliminates the possibility of a complete acquittal. Like Fortin,⁴⁴³ they preferred the approach taken in R. v. Hazeltine⁴⁴⁴ and R. v. Pentiluk and MacDonald,⁴⁴⁵ whereby a rejected plea of guilty to an included offence can be proved as an admission but does not automatically preclude an acquittal:

"If Parliament had intended that the use of s.534(4) would result in an automatic conviction, whether the plea was accepted or not, Parliament surely would have said so explicitly; to hold otherwise flies in the face of the presumption of innocence, and the requirement that the Crown must prove its case beyond a reasonable doubt."⁴⁴⁶

It is arguable that even allowing the rejected guilty plea to be introduced as an admission goes too far when one considers the possible motives for making that plea. It is more likely that the plea is made as a tactical measure to try and minimize the damage that may result to the accused from persuasive Crown evidence, rather than as a sudden act of contrition. As such, the accused probably intends it to be a procedural device, not an evidentiary device at all.

Also, in deciding whether to enter the plea the accused is subjected to pressures that may affect the voluntariness of his plea: on the one hand, the fear that a rejected guilty plea can be used as an

⁴⁴³ J. Fortin, Preuve Pénale (1984) at 399.

⁴⁴⁴ [1967] Cr. App. R. 351 (U.K.C.A.).

⁴⁴⁵ (1974), 28 C.R.N.S. 324 (Ont. C.A.).

⁴⁴⁶ H. Leonoff & D. Deutscher, "The Pleas and Related Matters," in V.M. del Buono, Criminal Procedure in Canada, Studies (1982) at 240-241.

admission at trial acts as a powerful disincentive to pleading guilty; on the other hand, the knowledge that if he is convicted on a guilty plea he will fair better in sentencing than if he is convicted after trial, acts as a strong incentive to plead guilty. Thus, even if the courts hold that a rejected guilty plea is technically admissible, arguments might be advanced on behalf of the accused to the effect that the rejected plea ought to be given little or no weight because it could not reasonably be considered to be a true confession of guilt.

In this regard, it is interesting to note that, according to Sheehan,⁴⁴⁷ in Scotland a guilty plea to one of several charges which is rejected by the court, cannot be referred to by the prosecutor at the subsequent trial on the charges. Once rejected the guilty plea is of no effect. Further, even if a guilty plea to one of several charges is accepted, the fact that the accused pleaded guilty cannot be mentioned at the trial of the remaining charges, with the result that the prosecutor may have to prove that that offence was committed anyway, in order to establish the commission of the other charges being tried.

Wigmore observed that the American authorities were divided on the question of the admissibility in subsequent proceedings of a withdrawn plea of guilty, the reasons on opposite sides having been powerfully expounded.⁴⁴⁸ He cited the case of Kircheval v. U.S.⁴⁴⁹ as authority for

⁴⁴⁷ A.V. Sheehan, Criminal Procedure in Scotland and France (1975) at 117.

⁴⁴⁸ IV Wigmore on Evidence (3d ed. 1940) at 66.

the view that a plea, once annulled, ceased to be evidence, and that a court which permitted it to be given weight would, in effect, be reinstating it pro tanto. In Kircheval a plea of guilty to using the mails to defraud had been obtained through the unfair representations of the prosecutor and the trial judge had therefore allowed it to be withdrawn. Then, at the trial on a plea of not guilty, the former guilty plea was received in evidence. On appeal this was held to be error. Wigmore considered the reasoning in this case as incorrect in legal theory.

He preferred the approach of the majority in State v. Carta⁴⁵⁰ and People v. Steinmetz⁴⁵¹, according to which a withdrawn guilty plea was admissible.⁴⁵² In State v. Carta, the accused's withdrawn plea of guilty to a charge of "assault to kill" was held admissible, being merely an extra-judicial admission inconsistent with the accused's subsequent plea of self-defence. In People v. Steinmetz the trial court had given the accused permission to withdraw a guilty plea on a charge of grand larceny. At the trial the accused was convicted of grand larceny in the first degree, and on appeal it was held that the withdrawn guilty plea

⁴⁴⁹ 274 U.S. 220, 71 L.Ed. 1009, 47 Sup. 582 (1927) (U.S.S.C.). Wigmore also cites People v. Ryan 82 Cal. 617 (1889); State v. Meyers 99 Mo. 117 (1889); and Heath v. State 23 Okl.Cr. 382 (1923) as examples where a withdrawn guilty plea was held to have been improperly admitted.

⁴⁵⁰ 90 Conn. 79 (1916).

⁴⁵¹ 240 N.Y. 411, 148 N.E. 597 (1925).

⁴⁵² IV Wigmore on Evidence (3d ed. 1940) at 66-68.

was properly treated as admissible against him. Crane J., in the majority, noted that by his guilty plea the accused had admitted not merely a conclusion of law, but also the facts upon which that conclusion was based. Until the plea was withdrawn it stood as a conclusive admission of his guilt, upon which the judgment of the court would follow. Once the court permitted the guilty plea to be withdrawn it was no longer conclusive but it did not cease to be evidence, and Crane J. saw no reason why it ought not be treated as any other admission made in or out of court, guarded and protected by the same rules of evidence. He wrote,

"If knowingly and voluntarily made, it was a statement or confession of guilt having the same force and effect as if made outside of Court to an officer or a stranger.... A plea of guilty made in open Court, under the advice frequently of counsel, and at all times under the supervision of painstaking judges is at least as valuable as is evidence regarding the admission of acts and deeds made out of Court to policemen or interested parties. Treating such pleas as other admissions or confessions having weight only when voluntarily made and to be supported by additional proof of the crime charged before conviction can be had, we remove the objection that the plea in Court has in its nature rather a conclusive element because made in Court and that other evidence may be rendered unnecessary."⁴⁵³

Lehman J., in dissent, considered that the admission of the guilty plea as evidence, after the court had granted permission for its withdrawal, effectively destroyed the presumption of innocence because it placed upon the accused the burden of explanation. He was of the view that, unless the favour granted by the court in allowing the guilty plea to be withdrawn was to be transformed into a trap, by necessary implication it had to include the favour that the accused would be

⁴⁵³ 240 N.Y. 411, 148 N.E. 597 (1925), extracted in IV Wigmore on Evidence (3d ed. 1940) at 66.

restored to the same position as if the guilty plea had never been tendered. Otherwise the presumption of innocence at the trial would in effect be destroyed by the very plea that had been withdrawn.⁴⁵⁴

Wigmore favoured the majority view in People v. Steinmetz, that a withdrawn guilty plea was just one more piece of evidence to be considered by the court in determining guilt or innocence. As such, however, he commented, it had to be put in evidence at the proper time, and could not be commented on in argument unless it had been formally offered in "due season" and the accused had had at least some chance to give an explanation.⁴⁵⁵ It is to be noted that R. 11(e)(6) of the U.S. Federal Rules of Criminal Procedure now provides that evidence of a plea of guilty which has been withdrawn is not admissible in any civil or criminal proceeding except in very narrow circumstances, one of which is perjury.⁴⁵⁶

2. Rejected guilty plea to the offence charged

In Thibodeau v. The Queen⁴⁵⁷ the Supreme Court of Canada took a strong stand against the admissibility of a withdrawn plea of guilty at

⁴⁵⁴ Id at 67-68.

⁴⁵⁵ Id at 68, citing Folger v. Boyinton, 67 Wis. 447, 30 N.W. 715.

⁴⁵⁶ M.G. Hermann, Rules of Criminal Procedure for the United States District Courts (2d ed. 1985) at 93-97.

⁴⁵⁷ [1955] S.C.R. 646 (S.C.C.).

the subsequent trial. Thibodeau had been arrested and charged with breaking and entering with intent to commit theft. The next day he was arraigned and, without the assistance of counsel, pleaded guilty. The judge accepted the plea but adjourned the case for sentencing. Before sentence was passed, Thibodeau retained counsel who requested and was granted permission to withdraw the plea of guilty and enter a plea of not guilty. At his trial before a different judge Thibodeau was eventually convicted of the offence charged on the basis of an accomplice's testimony, which the trial judge considered to be corroborated by (1) an admission made by the accused and received in evidence after a voir dire, and (2) by the fact, admitted in cross-examination, that the accused had previously entered a guilty plea which was withdrawn by leave of the court. Thibodeau's conviction was upheld by the Quebec Court of Appeal but quashed on appeal to the Supreme Court.

Cartwright J. and Fauteux J., who wrote the reasons of the court, confirmed that prior to sentencing a trial judge had power to permit a plea of guilty to be withdrawn, and that the trial judge's discretion to permit withdrawal of the plea, if exercised judicially, would not be lightly interfered with by an appeal court. Fauteux J. considered that this rule should also guide a trial judge in deciding the question of the admissibility at trial of the withdrawn guilty plea. He concluded that it was illegal to admit the fact that the accused had at first pleaded guilty as evidence corroborative of the accomplice's

testimony.⁴⁵⁸ Similarly, Cartwright J. stated,

"It is, I think, an inference that may fairly be drawn from the dearth of authority that whenever it has been tendered the courts have refused to admit evidence that an accused had entered a plea of guilty to the charge upon which he was on trial which had later been withdrawn by leave of the Court. It is highly improbable that such evidence should have been admitted and no redress sought in an appellate tribunal. Be that as it may, I am of the opinion that, where a plea of guilty has been withdrawn and a plea of not guilty substituted by leave of the Court, the Judge before whom the case comes to trial following the plea of not guilty should assume that the Judge who granted leave to change the plea did so on sufficient grounds and should treat the original plea, for all purposes, as if it had never been made."⁴⁵⁹

Cartwright J. referred to Wigmore's analysis of this issue and stated that he preferred the reasoning of those judges who held that such evidence was inadmissible. Cartwright J. adopted the words of Wheeler J., dissenting in the case of State v. Carta,⁴⁶⁰ where he had pointed out that the withdrawal of the guilty plea was permitted because the plea was originally improperly entered, and that therefore no untoward judicial effect ought to result from judicial rectification of a judicial wrong. Accordingly, Wheeler J. had reasoned, the withdrawn guilty plea ought not to be admitted in the subsequent trial because to do so would put the accused under a heavy cloud of suspicion and deprive him of his right to be presumed innocent. For these reasons, Cartwright J. held as follows:

"...on the trial of an accused who has pleaded not guilty evidence that he had previously pleaded guilty to the charge but had been allowed to withdraw such plea is legally inadmissible, from which it, of course, follows that evidence of the former plea can neither be given for the prosecution nor elicited from the accused in

⁴⁵⁸ Id at 657.

⁴⁵⁹ Id at 654.

⁴⁶⁰ 96 Atl. 411 (1916) at 415.

cross-examination."⁴⁶¹

This was affirmed in obiter by Beetz J. in Boulet v. Regina, where he stated,⁴⁶²

"Néanmoins, la preuve d'un plaidoyer de culpabilité retiré avec la permission du tribunal est inadmissible dans une procédure subséquente..."

It is difficult to imagine how the Supreme Court might have stated the rule any more clearly, and yet we find in subsequent cases that lower courts have whittled away at Thibodeau, narrowing its application to its facts, and creating exceptions.

The first such incursion into the rule laid down in Thibodeau was made by the Ontario Court of Appeal in Regina v. Dietrich.⁴⁶³ In that case the accused, upon a charge of capital murder, had pleaded guilty to non-capital murder and been convicted. On appeal, the conviction had been quashed on the ground that the whole proceeding had been a

⁴⁶¹ [1955] S.C.R. 646 (S.C.C.) at 655; followed in Regina v. Catholique (1979), 49 C.C.C. (2d) 65 (N.W.T.S.Ct.). In that case the accused initially pleaded guilty to an offence under the Snowdrift Liquor Prohibition Regulations N.W.T. Reg. 319-78, and was given a sentence in excess of that authorized by law. On appeal it appeared he might have a defence to the charge. Leave was granted for the guilty plea to be withdrawn, and the appeal was directed to be by way of trial de novo. Citing Thibodeau, Tallis J. stated at 67: "I attach no weight to the fact that the appellant initially entered a plea of guilty which he was permitted to withdraw on this appeal. Once the original plea has been withdrawn, it must be treated, for all purposes as if it had never been made. Evidence that an accused had previously pleaded guilty to the charge but has been allowed to withdraw such plea is legally inadmissible to support the prosecution's case on the trial itself."

⁴⁶² [1978] 1 S.C.R. 332 (S.C.C.) at 344.

⁴⁶³ (1970), 11 C.R.N.S. 22 (Ont. C.A.).

nullity because the jury should have returned the verdict of guilty to the lesser included offence, whether upon the accused's guilty plea to that offence or upon the evidence adduced at trial. A new trial was ordered, and at the second trial, on a charge of non-capital murder, the trial judge had permitted Crown counsel to bring to the jury's attention the fact that the accused had pleaded guilty of non capital murder at his first trial. The accused was convicted and appealed.

Relying on case law pertaining to the admissibility at a new trial of admissions made at an earlier trial, Gale C.J.O., who delivered the judgment of the court, stated:

"As a general rule in both civil and criminal cases a statement against self interest made by a party relevant to an issue in the action in the proceeding may, subject to certain exclusions or conditions, be admitted in evidence against him. We have not been referred to any reported case where the circumstances were comparable to those in the case at bar."⁴⁶⁴

Gale C.J.O. distinguished Thibodeau v. The Queen from the case before him on the ground that Thibodeau had involved the exercise of discretion by the trial judge in permitting withdrawal of the guilty plea, whereas in Dietrich's case no such judicial discretion had been invoked and the judgment of the court of appeal which had declared Dietrich's conviction illegal did not have the effect of nullifying his act of pleading guilty at that first trial. Gale C.J.O. concluded,

"The cases referred to other than Thibodeau establish that testimony or statements of an accused on a previous trial or occasion may be treated as an admission at a subsequent trial for the same offence. It is difficult to see why a plea given at an abortive trial of this type should stand in any different

⁴⁶⁴ Id at 27.

position."⁴⁶⁵

The fact that the admission of the guilty plea had the effect of forcing Dietrich to testify at the subsequent trial was not considered to be a sufficient reason to refuse its admission. Gale C.J.O. also rejected the argument by defence counsel that by reason of the prejudicial nature of the guilty plea its admission should have been refused. Noting that in one sense its admission might be unfair, Gale C.J.O. considered that in the general circumstances of the administration of justice it was not: the plea had been formally entered on the advice of counsel and at the subsequent trial the accused had an opportunity to try to explain it away. Thus its probative value was such as to outweigh whatever possible prejudicial effect it might have.⁴⁶⁶

In an annotation to Regina v. Dietrich, Stenning accused the Ontario Court of Appeal of

"...undertaking a kind of judicial hair-splitting exercise in order to be able to distinguish Thibodeau and arrive at the solution it clearly preferred, namely, of ruling Dietrich's former "guilty" plea admissible."⁴⁶⁷

Stenning argued that the distinction drawn by Gale C.J.O., ie., that Thibodeau involved the exercise of judicial discretion whereas Dietrich did not (Stenning called it judicial "indiscretion" that Dietrich's

⁴⁶⁵ Id at 29-30.

⁴³⁶ Id at 31.

⁴⁶⁷ P.C. Stenning, "Annotation. Admissibility of guilty pleas and psychiatric evidence of capacity for veracity" (1970), 11 C.R.N.S. 43 at 44.

guilty plea was allowed at all), could not be supported either logically or in principle. Stenning considered it strange that an accused should be in a worse position when the trial judge made a mistake than when he made the mistake himself.

He rejected the distinction, implicit in Gale C.J.O's reasons, between guilty pleas that are substantively invalid (Thibodeau) and those that are procedurally invalid (Dietrich), and argued that both ought to be treated in the same way:

"It seems to the present author that in Thibodeau and in the present case the former pleas should, for one reason or another, never have been made at all in the first place - in Thibodeau because it was made by an accused who "didn't really know what he was doing", and in the present case because it could not legally have been accepted under the circumstances. The admissions to which they amount should therefore either be admissible in both cases or in neither."⁴⁶⁸

Stenning did not reach any firm conclusions on the policy question whether withdrawn guilty pleas ought to be admitted. He noted that while admitting such pleas might give the accused an opportunity to explain to the jury facts which might anyway come to their knowledge, allowing the Crown to introduce evidence of a former plea virtually forced the accused to testify.

In cases involving frauds upon the administration of justice the courts have followed Dietrich rather than Thibodeau so as to allow the former plea of guilty to be introduced in evidence against the accused in a subsequent trial on a charge of perjury or obstructing justice.

⁴⁶⁸ Id at 46.

This was the approach in Regina v. Gushue (No.3),⁴⁶⁹ the facts of which were as follows. On an earlier occasion Gushue had been tried for and acquitted of a murder alleged to have occurred in the course of a robbery. Subsequently Gushue confessed to the shooting and the robbery, and was then charged with the robbery and perjury committed by him at the murder trial. He pleaded guilty of robbery and was convicted, but later appealed against this conviction arguing that because of his acquittal of murder the issue of robbery involving the same facts was res judicata. At the trial for perjury the Crown sought to adduce evidence of this guilty plea. Defence counsel argued that in the interests of a fair trial the guilty plea to robbery ought not be introduced in evidence.

In deciding this evidentiary issue, Graburn Co. Ct. J. showed a marked preference for the result in Dietrich than that in Thibodeau. In fact, he appears to have treated Thibodeau as an exception, not as an expression of a general rule on the admissibility of prior guilty pleas. Without reference to authority he stated,

"As a matter of law, as a general rule, a solemn admission of guilt, whether tendered by an accused personally or tendered through his counsel before a court having jurisdiction to entertain the charge and accept the plea, is admissible in a subsequent proceeding if otherwise relevant to an issue in the subsequent

⁴⁶⁹ (1975), 30 C.R.N.S. 173 (Ont. Co. Ct.). The earlier case of R. v. Falconer and Mann (1970), 4 C.C.C. 362 (B.C.C.A.), is also noteworthy in this regard. Although neither Thibodeau nor Dietrich was mentioned, the British Columbia Court of Appeal appears to have adopted the same approach as in Dietrich. They held that a guilty plea to dangerous driving resulting in a conviction, which had been offered in order to shift the blame from the true culprit, was admissible in the subsequent trial on a charge of attempting to pervert the course of justice.

proceeding; and I think that proposition does not require authority."⁴⁷⁰

He then referred to cases involving ordinary admissions made by an accused at an earlier trial, as authority for his view that

"...it seems to be common ground that, in most instances, a solemn plea of guilty is admissible if otherwise relevant in a subsequent trial."⁴⁷¹

Because in the case before him there was, to his mind, no question of a judicial withdrawal of the guilty plea, Graburn Co. Ct. J. applied Dietrich rather than Thibodeau. He interpreted Dietrich to mean that, even if the trial for robbery was declared abortive on appeal on grounds of res judicata, the plea of guilty to robbery, once entered and not withdrawn, would be admissible at the second trial or other proceedings, if it was relevant to those proceedings.⁴⁷² This case was appealed to the Ontario Court of Appeal, and then to the Supreme Court of Canada but Graburn Co. Ct. J.'s remarks remain uncontradicted. The focus of these appeals was on deciding that the giving of false testimony was a policy exception to the defence of issue estoppel unless it was a colourable attempt to retry the accused for the same offence. Therefore, the defence of res judicata was not available as an answer to the robbery charge. The perjury charge was not before the Supreme Court, having been dismissed in the lower courts for unrelated reasons. In the result, the evidentiary issue that Graburn Co. Ct. J. had commented on

⁴⁷⁰ (1975), 30 C.R.N.S. 173 (Ont. Co. Ct.) at 176.

⁴⁷¹ Id.

⁴⁷² Id. at 177-178.

became moot.⁴⁷³

It has been suggested that Dietrich and Gushue ought to be restricted to their facts so as to avoid making "grave and unnecessary inroads into the presumption of innocence."⁴⁷⁴ It has been pointed out that in neither case was there any suggestion that the guilty plea was not made voluntarily or with knowledge of the nature and consequences of the plea; and that at the subsequent trials the pleas were clearly relevant and probative. Thus, it has been argued, these cases could be isolated as a narrow exception based on the existence of a technical defect in the proceedings only. Where, however, the guilty plea itself is for some reason suspect, then it is tainted and unreliable, and ought

⁴⁷³ (1976), 35 C.R.N.S. 304 (Ont. C.A.); (1979), 16 C.R. (3d) 39 (S.C.C.). Gushue was followed in Regina v. Boross (1984), 12 C.C.C. (3d) 480 (Alta. C.A.), on the question of issue estoppel. At his trial for theft Boross had initially denied his guilt and then pleaded guilty and confessed in an unsworn dock statement to having fabricated his defence. He was then charged with perjury. McClung J.A. stated that in order to prove intent to mislead, "It has long been settled that in perjury prosecutions all testimony given by the accused during the trial in which his impugned evidence was offered must be put in evidence." (at 490). Presumably this would include the guilty plea itself which had resulted in his earlier conviction. See also, IV Wigmore on Evidence (3d ed. 1940) at 59, where it is suggested that it would be proper to offer an accused's guilty plea in evidence in a subsequent criminal case. See also R.11(e)(6) of the U.S. Federal Rules of Criminal Procedure which makes an exception to the inadmissibility of a withdrawn guilty plea for cases involving perjury: M.G. Hermann, Rules of Criminal Procedure for the United States District Courts (2d ed. 1985) at 93-97.

⁴⁷⁴ H. Leonoff and D. Deutscher, "The Plea and Related Matters," in V.M. Del Buono (ed.), Criminal Procedure in Canada, Studies (1982) 230 at 244.

not to be admitted in subsequent proceedings.⁴⁷⁵

3. Admissibility at a new trial of evidence from the first trial

Until the passage of the Charter, the general rule with respect to the admissibility at a subsequent trial of an accused's inculpatory statements made in an earlier trial, was that these statements could properly be given in evidence at the new trial as evidence of admissions by the accused.⁴⁷⁶ This was so even where the earlier proceeding had been declared a mistrial⁴⁷⁷ or where the accused had retracted the admission.⁴⁷⁸

⁴⁷⁵ Id; H. Leonoff, "The Guilty Plea: An Overview" (1982), 3 Crown Counsel Review 7 at 9.

⁴⁷⁶ Regina v. Brown (No.2), [1963] 3 C.C.C. 326 (N.W.T.C.A.) per Johnson J. in dissent; appeal allowed [1963] S.C.R. vi (S.C.C.).

⁴⁷⁷ The King v. Deakin (Decision No.2) (1912), 19 C.C.C. 274 (B.C.C.A.); Marcotte v. The King (1949), 97 C.C.C. 310 (Que. C.A.); appeal to the Supreme Court of Canada quashed for want of jurisdiction (1950), 98 C.C.C. 81 (S.C.C.).

⁴⁷⁸ IV Wigmore on Evidence (3d ed. 1940) at 61-62, citing Boots v. Canine 94 Ind. 408 (1883) at 416 per Elliot J.: "Even in criminal cases, an admission made by the accused before the examining magistrate is not rendered incompetent by a subsequent withdrawal. The withdrawal of an admission may, in proper cases, go in explanation, but it cannot change the rule as to its competency... If it did, then criminals might destroy evidence by retraction, and parties escape admissions by a like course. The law tolerates no such illogical procedure."

Thus, in The King v. Deakin (Decision No.2)⁴⁷⁹ where the accused had been granted a new trial the British Columbia Court of Appeal held that the examination, cross-examination, re-examination and examination by the judge of the accused could be offered as admission evidence by the prosecution. In Marcotte v. The King⁴⁸⁰ the Quebec Court of Appeal applied the general rule as to confessions,

"...that any declaration made by an accused voluntarily and freely, and without any physical or moral constraint, whether before or during his trial may validly be admitted as evidence..."⁴⁸¹

The appeal court saw no good reason to treat admissions made in court as being any less reliable than confessions made out of court.⁴⁸² Accordingly, they held that depositions given by the accused before a court of justice in the earlier trial, which trial had been declared invalid, could be used in evidence against the accused at his second trial for the same offence.

That an accused's voluntary statement made under oath in a judicial proceeding may be used against the accused in any other judicial proceeding was confirmed by the Supreme Court of Canada in Regina v. Brown (No.2)⁴⁸³ when they allowed the Crown's appeal from the decision of

⁴⁷⁹ (1912), 19 C.C.C. 274 (B.C.C.A.).

⁴⁸⁰ (1949), 97 C.C.C. 310 (Que. C.A.); appeal to the Supreme Court of Canada quashed for want of jurisdiction (1950), 98 C.C.C. 81 (S.C.C.).

⁴⁸¹ Id, per St. Jacques J. at 312.

⁴⁸² Id, per Bissonnette J. at 334-335.

⁴⁸³ [1963] S.C.R. vi (S.C.C.), allowing an appeal from [1963] 3 C.C.C. 326 (N.W.T.C.A.).

the North West Territories Court of Appeal and adopted the dissenting reasons of Johnson J. The majority of the Court of Appeal had disagreed with Wigmore, Deakin and Marcotte. In their view the ordering of a new trial meant the accused was entitled to a completely fresh trial; the first trial on a charge of murder being a mis-trial was no trial at all, and void ab initio so that evidence from that trial ought not to be admissible at the new trial on a charge of manslaughter. The accused was not compellable as a witness for the Crown at either trial, and therefore to admit at the new trial his testimony from the first trial would be tantamount to compelling him to give evidence against himself.⁴⁸⁴

In dissenting reasons, Johnson J.A. had argued that to admit such evidence at the new trial did not amount to compelling the accused to testify as a Crown witness because the privilege against self incrimination applied to the time when the questions were put to the accused, not to the use which the prosecutor sought to make of the answers once they had been given.⁴⁸⁵ To the suggestion that the ordering of a new trial had rendered the former trial a nullity so that no evidence from that trial could be legally used, Johnson J. responded,

"A "nullity" is a proper word to describe the conviction in this case but the fact of the evidence taken at the first trial is not destroyed when the conviction is quashed and a new trial ordered. Neither is the evidence itself. Certainly if it were alleged that perjured evidence had been given, the ordering of a new trial would not be a bar to prosecution for it. If the accused's evidence had contained admissions of other offences such admissions could be

⁴⁸⁴ [1963] 3 C.C.C. 326 (N.W.T.C.A.) at 335-336.

⁴⁸⁵ Id at 338.

used in prosecutions for the admitted offences."⁴⁸⁶

Johnson J. concluded that the evidence of the accused's testimony at the trial for murder was not wrongly admitted at the new trial for manslaughter. In a terse, two sentence decision, the Supreme Court of Canada allowed the appeal for the dissenting reasons which Johnson J. had given in the North West Territories Court of Appeal.

This, then, was the state of Canadian law on such admissions until the constitutionalization in the Canadian Charter Of Rights and Freedoms of the right of non-compellability, the right not to incriminate oneself and the right to be presumed innocent. In 1985, the Supreme Court had an opportunity to reconsider its judgment in Brown (No.2) in light of these Charter rights, and they concluded that the rule as to admissibility expressed in Brown (No.2) was no longer valid. In Dubois v. The Queen⁴⁸⁷ the accused had made admissions at his trial on a charge of second degree murder and was convicted. On appeal he was granted a new trial because of the trial judge's misdirection to the jury. At the new trial, the Crown read in Dubois' testimony from the first trial over the objection of defence counsel. Dubois did not testify at this trial, nor did he call any evidence, and he was again convicted. He appealed against conviction on the sole ground that in view of s.13 of the Charter the trial judge had erred in admitting into evidence as part of the Crown's case, his testimony from the earlier trial. The Alberta

⁴⁸⁶ Id at 340.

⁴⁸⁷ (1985), 18 C.R.R. 1 (S.C.C.).

Court of Appeal dismissed the appeal, and Dubois made a further appeal to the Supreme Court of Canada.

Lamer J., delivering the reasons of the majority of the court, considered that the Charter right to be presumed innocent (s.11(d)) and the right of non-compellability (s.11(c)) were closely related to the guarantee in s.13 of the Charter of the right not to have one's previous testimony used to incriminate one in other proceedings. He stated,

"Hence, the purpose of s.13, when the section is viewed in the context of s.11(c) and (d), is to protect individuals from being indirectly compelled to incriminate themselves, to ensure that the Crown will not be able to do indirectly that which s.11(c) prohibits."⁴⁸⁸

Taking a purposive approach to the interpretation of s.13, Lamer J. held that the section did not require that the incriminating character of the evidence be evaluated in the first proceedings as well as in the second. He considered that it was sufficient proof of the incriminating nature of the evidence that the Crown should seek to introduce it as part of the Crown's case. However, he left open the question whether the words "used to incriminate" in s.13 would include resort to the previous testimony for the purpose of cross-examining an accused who had chosen to take the stand in the second proceeding. Finally, Lamer J. held that a retrial for the same offence or one included therein, ordered by a court of appeal, was "any other proceedings" for the purposes of s.13 protection. He stated,

"I do not see how the evidence given by the accused to meet the case as it was in the first trial could become part of the Crown's case against the accused in the second trial, without being in

⁴⁸⁸ Id at 8.

violation of s.11(d), and to a lesser extent to s.11(c). For, the accused is being conscripted to help the Crown in discharging its burden of "a case to meet", and is thereby denied his or her right to stand mute until a case has been made out.

To allow the prosecution to use, as part of its case, the accused's previous testimony would, in effect, allow the Crown to do indirectly what it is estopped from doing directly by s.11(c), ie. to compel the accused to testify. It would also permit an indirect violation of the right of the accused to be presumed innocent and remain silent until proven guilty by the prosecution, as guaranteed by s.11(d) of the Charter....To hold that a new trial is not "any other proceeding[s]" within the meaning of s.13 would in fact authorize an interpretation of a Charter right which would imply a violation of another Charter right. Such a result should be avoided."⁴⁸⁹

Lamer J. explained his refusal to follow the Supreme Court's earlier decision in Regina v. Brown (No.2) on two grounds, first, Brown was decided before the Charter came into force; and second, he considered it unclear to what extent Johnson J.'s dissent, adopted by the Supreme Court, was dependent upon the fact that Brown had not objected to answer in the first proceedings, thereby failing to bring himself within the limited statutory protection in s.5(2) of the Canada Evidence Act.⁴⁹⁰ Lamer J. suggested that under the Charter Brown might well have been decided differently.

It remains to be seen whether the majority reasons in Dubois v. The Queen will be adapted to answer the question of the admissibility at a new trial of a guilty plea offered in the earlier proceeding. It would seem only logical that if an ordinary admission made in the earlier proceeding is inadmissible by virtue of the combined effect of

⁴⁸⁹ Dubois v. The Queen (1985), 18 C.R.R. 1 (S.C.C.) at 13-14.

⁴⁹⁰ R.S.C. 1970, c. E-10, as amended.

ss.11(c), 11(d) and 13 of the Charter, a fortiori a guilty plea, the "admission par excellence", ought to be inadmissible. Arguably, this should be so regardless of whether the guilty plea (1) was ever withdrawn by the accused with the permission of the court, or (2) was rejected by the court, or (3) was accepted and resulted in a conviction subsequently quashed because of procedural error.

Dubois appears to be consistent with Thibodeau and inconsistent with Dietrich. It may be arguable, on the basis of Dubois, that the admissibility distinction drawn in Dietrich between a guilty plea which has been withdrawn by permission of the court and a guilty plea resulting in a conviction which is overturned for procedural error, is no longer sustainable; and that ss. 11(c), 11(d) and 13 of the Charter now render either kind of guilty plea inadmissible at the subsequent trial. Dubois suggests that, regardless of the reason for ordering a new trial, the Charter will prevent the admission at the new trial of evidence of a guilty plea given at an earlier trial. Admittedly, where the trial judge has rejected a guilty plea or allowed the accused to withdraw it, and then proceeded to trial on a plea of not guilty, s.13 may not be available to the accused to prevent the admission of evidence of his guilty plea because there would be only one proceeding, not two, as required by s.13. There is the suggestion in Dubois, however, that an argument based on ss.11(c) and (d) of the Charter might meet with some success.

D. Admissibility of the guilty plea in civil proceedings

Although, like any other conviction, a plea of guilty made in criminal proceedings is not conclusive proof of liability for the purposes of civil proceedings arising out of the same facts, it would seem to be proper to admit evidence of the guilty plea in the subsequent civil case.⁴⁹¹ Being an admission against interest a guilty plea is admissible in evidence, but the person against whom it is tendered may testify to show that it should be accorded little weight.⁴⁹² In this regard, the position of the guilty plea is to be contrasted with that of the American plea of nolo contendere. Generally, evidence of a plea of nolo contendere is not admissible against the defendant who made the plea in any subsequent civil or criminal proceeding.⁴⁹³

⁴⁹¹ IV Wigmore on Evidence (3d ed. 1940) at 59, citing numerous American cases, among them: Engstrom v. Nelson 41 N.D. 530, 171 N.W. 90 (1919) "battery; defendant's conviction upon a plea of guilty to a criminal charge for the same act, admitted" Guevara v. Almario 56 P.I. 476 (1932) "civil action for libel; criminal conviction on a plea of guilty admitting authorship, received."

⁴⁹² H. Leonoff and D. Deutscher, "The Plea and Related Matters," in V.M. del Buono (ed.), Criminal Procedure in Canada. Studies (1982) at 245.

⁴⁹³ M.G. Hermann, Rules of Criminal procedure for the United States District Courts, Practice Comments (2d ed. 1985) at 93-97 (referring to the U.S. Federal Rules of Criminal Procedure Rule 11(e)(6)) and at 110-111. See also IV Wigmore on Evidence (3d ed. 1940) at 58. Naturally, the inadmissibility of the plea of nolo contendere in subsequent civil proceedings is a factor to be considered by the trial judge in deciding whether to accept the plea of nolo contendere when it is offered.

In obiter in the case of English v. Richmond and Pulver; Laing v. Richmond and Pulver,⁴⁹⁴ the Supreme Court of Canada considered the admissibility in a civil proceeding of evidence of a guilty plea. Before the civil proceedings arising out of a motor vehicle accident were commenced by English, he had been charged with the Criminal Code offence of dangerous driving in connection with the same accident. A plea arrangement was worked out whereby English pleaded guilty to the Highway Traffic Act offence of careless driving in exchange for the Crown withdrawing the criminal charge. At the civil trial English was cross-examined about these charges and admitted to having pleaded guilty. Ultimately English's claim was dismissed, and he appealed.

Since the trial judge did not consider the evidence of the guilty plea in arriving at his decision the Supreme Court of Canada considered the question of its admissibility to be only of academic interest. Nonetheless in obiter the court adopted a statement made by Lord Goddard in the English case of Hollington v. Hewthorn & Co.:⁴⁹⁵

"It may frequently happen that where bigamy or any other crime has to be proved in a civil proceeding, the prisoner on his trial had pleaded guilty. Proof of the confession by a witness present at the trial is admissible because an admission can always be given in evidence against the party who made it. In the present case, had the defendant before the magistrates pleaded guilty or made some admission in giving evidence that would have supported the plaintiff's case, this could have been proved, but not the result of the trial."

Locke J. stated,

"I think that the evidence was relevant and admissible as showing

⁴⁹⁴ (1956), 3 D.L.R. (2d) 385 (S.C.C.).

⁴⁹⁵ Id at 387, citing [1943] K.B. 587 (U.K.C.A.) at 599-600.

conduct of the appellant English which, on the face of it, was inconsistent with his evidence at the trial, directed to showing that he was not at fault. Its weight, however, was negligible in view of the evidence as to the circumstances in which the plea of guilty was made."⁴⁸⁶

Without specifically referring to the Supreme Court's decision in English v. Richmond and Pulver, Laing v. Richmond and Pulver, Wilson J. of the British Columbia Supreme Court reached similar conclusions in the case of Cromarty v. Monteith.⁴⁸⁷ In this case the plaintiff had sued for damages arising out of an assault by the defendant. Wilson J. stated,

"The plea of guilty is receivable in evidence as an admission against interest but it is not conclusive. It must be regarded as would any other admission by a litigant, and evidence of the circumstances under which it was made must be received in order to decide upon the weight to be attached to it. The fact that the admission had been made in a judicial proceeding is a factor to be considered, but any presumption which might arise from this circumstance might be rebutted by evidence, for instance, that the plea had been induced by fraud or threats. The defendant may also, I think, be heard in a subsequent civil trial, to say that the admission was made under a misapprehension of law... But I think that once the admission is placed on record, it is incumbent upon the litigant to prove the existence of circumstances which detract from its apparent affect."⁴⁸⁸

The obiter statement in English v. Richmond and Pulver; Laing v. Richmond and Pulver on the admissibility of guilty pleas in civil proceedings was explicitly followed by the Ontario Court of Appeal in Re Charlton.⁴⁸⁹ The issue in this case was whether Oliver Charlton was entitled to share in the estate of his wife, notwithstanding that he had been convicted on his guilty plea of manslaughter in connection with

⁴⁸⁶ (1956), 3 D.L.R. (2d) 385 (S.C.C.) at 392-393.

⁴⁸⁷ (1957), 8 D.L.R. (2d) 112 (B.C.S.C.).

⁴⁸⁸ Id at 114.

⁴⁸⁹ (1968), 3 D.L.R. (3d) 623 (Ont. C.A.).

her death. The trial judge had refused to hold a trial of the issue as to whether Oliver Charlton was criminally responsible for his wife's death, holding on the basis of the guilty plea that he had killed her by his own criminal conduct.

On appeal to the Ontario Court of Appeal Jessup J. found that the trial judge had erred by giving conclusive effect to the plea of guilty. Citing English v. Richmond and Pulver; Laing v. Richmond and Pulver, Jessup J.A. stated:

"If the result of a criminal trial is not conclusive in a subsequent civil proceeding arising from the same facts I can see no basis in principle and I find no authority that an admission or confession in the criminal trial is nevertheless conclusive in subsequent civil proceedings. It is undoubtedly evidence of very great weight but a plea of guilty like any admission, and notwithstanding its solemnity, is capable of explanation... The circumstances under which it is alleged the present plea was made may be capable of diminishing its otherwise overwhelming force.

In my opinion, therefore, the question of whether or not Oliver Robin Charlton feloniously killed his wife is a question of fact not necessarily concluded by his plea of guilty of manslaughter in her death."⁵⁰⁰

Thus, while the case law as to the inadmissibility of a guilty plea in a subsequent criminal trial is not free from doubt, the issue as to the inadmissibility of a guilty plea in a civil proceeding seems fairly well settled. It would seem that the arguments against admissibility are less compelling in the civil context than at a new trial on the same criminal charge, given the inapplicability of the presumption of innocence and the absence of penal consequences for an adverse decision in civil proceedings.

⁵⁰⁰ (1968), 3 D.L.R. (3d) 623 (Ont. C.A.) at 626.

Conclusion of Part I

The characterization of a guilty plea as an admission tends to direct the conclusion that the guilty plea operates as an evidentiary device. On the other hand, the characterization of the guilty plea process as a substitution for the full trial process indicates that the guilty plea is a procedural device. In fact it can be demonstrated that the guilty plea partakes of both procedural and evidentiary aspects, being both a waiver of trial rights and an admission of guilt, and therefore its characterization as only either a procedural or evidentiary device is not wholly accurate.

The paradigm example of the dual nature of the guilty plea relates to the applicable standard of proof. Where an accused pleads not guilty upon arraignment, the case will as a matter of course proceed to trial, at which the accused will be accorded all relevant trial rights and the prosecutor will have to establish beyond a reasonable doubt all the essential elements of the offence. Where, however, the accused upon arraignment pleads guilty, the accused waives all applicable trial rights and the prosecutor is relieved of having to establish proof of guilt beyond a reasonable doubt. The trial court may seek to assure itself that the accused's waiver was knowingly and voluntarily made and that there is a factual basis for conviction.

While the trial court's inquiry into the circumstances of the offence and of the guilty plea serves both an evidentiary and a

procedural function, this purely discretionary inquiry hardly approximates the procedural and evidentiary standards applied at trial.

The trial court's acceptance of a guilty plea and the entering of a conviction thereupon should be a confirmation of both the procedural and evidentiary regularity of the plea. There are cases, however, where a trial court accepts the guilty plea notwithstanding having reservations about the evidentiary aspects of the plea (ie., as to the factual basis underlying the guilty plea); or about procedural aspects of the plea (ie., as to the informed and voluntary waiver of procedural rights); or about both evidentiary and procedural aspects.

Where the trial court accepts a guilty plea in spite of expressed doubts about both its evidentiary and procedural regularity, this is likely because of a false assumption that it has no discretion to reject a guilty plea at all, or at least, not after it has been initially accepted but prior to sentence. This is clearly an error and ought to be overruled on appeal as a failure to exercise the discretion to reject such a guilty plea.

If the trial court accepts the guilty plea in spite of doubts about its factual accuracy this in effect treats the guilty plea as a strictly procedural device, unsupported by evidentiary considerations. Implicit in the acceptance of such a plea is the view that an accused has complete freedom of choice at the time of arraignment, and may be convicted on a guilty plea whether or not this is justified by the facts

of the case. The trial court may rationalize the decision to accept the plea by saying that the guilty plea is itself a complete admission of all the essential elements of the offence charged so that it is entitled to be given greater weight than any contradictory facts which subsequently come to light. A conviction in these circumstances might be upheld on appeal as a proper exercise of the trial judge's discretion.

Where the trial court accepts a guilty plea that is supported by the facts, but which resulted from procedural irregularities, it is in effect saying that the critical aspect of the guilty plea is its factual accuracy, and once that has been satisfactorily established, procedural irregularities may be discounted. Thus a guilty plea may be accepted even though the accused did not intend to waive the applicable rights to trial, did not understand the proceedings because of the absence of competent counsel, language difficulties, intoxication, etc., or was subjected to improper pressures to induce the plea of guilty. A conviction in these circumstances might be upheld on appeal on the basis that it did not result in a substantial miscarriage of justice, pursuant to s.686 (1)(b)(iii) of the Criminal Code.

Whether or not the appeal court specifically relies on s. 686 (1)(b)(iii) it is questionable that a guilty plea fraught with procedural errors should be sustained on appeal on the basis that there appeared to be facts in support of the charge. This is because the procedural safeguards on a plea of guilty are so minimal that any defect

tends seriously to impair the acceptability of the guilty plea. This is unlike the situation at trial, where there may be a margin of error in that a procedural error may sometimes be compensated for by other circumstances, including a full hearing of the evidence. In the cases where a trial court has rejected a guilty plea, or an appeal court has sets aside a conviction based on a guilty plea, the courts have tended to justify their actions by reliance on the existence of either procedural or evidentiary defects affecting the guilty plea, without going so far as to articulate a complete theory of the procedural and evidentiary requirements for an acceptable guilty plea.

The case law on the acceptability of a guilty plea has never been synthesized into a coherent theory. Sometimes the courts have viewed the guilty plea as a matter strictly within the accused's prerogative, to waive the right to trial and be convicted on the admission. At other times the courts have been more concerned about the accused's factual guilt than about procedural defects. That two such diametrically opposed approaches have been tolerated demonstrates the absolute failure of the jurisprudence to come to terms with the real nature of the guilty plea. One cannot but remark upon the fact that an institution of such overwhelming importance to the functioning of our criminal justice system as the guilty plea should be so utterly lacking in theory and rationale.

There is only so far that a careful review of the case law can take us. The effort to tease strands of theory from the confusion of the

case law only serves to point out that there are these two fundamentally different approaches to the acceptability of the guilty plea, which have not been reconciled.

The advent of the Canadian Charter of Rights and Freedoms has resulted in a broadening and a constitutionalization of both the procedural and evidentiary safeguards that previously existed in criminal law. This may elevate the level of analysis applicable to the guilty plea process. The Charter may have added a crucial new element to the theory of the guilty plea. The Charter may provide the means to transform the long standing notions of the limitations of law, and to resolve and reunify the weak strands of conflicting theory on the nature of the guilty plea. Unlike the usual incremental changes made to statute or case law, the Charter permits a profound systemic modification, affecting even the rule-making matrix. By providing a set of basic principles against which all specific rules must be measured, the Charter completely inverts the traditional inductive and analogic method of legal analysis. Thus, with respect to the study of the guilty plea, one is no longer limited to attempting to compile a complete picture from the mass of relevant decisions. With the Charter, one can go much further, to ask how the general principles of the Charter affect the specific rules relating to the guilty plea.

PART II. CRITIQUE OF SUMMARY PROCESS BY GUILTY PLEA

Introduction to Part II

In this second part of the thesis the guilty plea process will be analyzed from both a systemic and a constitutional perspective, to identify the shortcomings of existing rules on the acceptability of the guilty plea, and to suggest directions for reform. The first chapter will focus on systemic coercion in the guilty plea process, through sentencing concessions and plea bargaining. The second chapter considers the impact of the Canadian Charter of Rights and Freedoms on the guilty plea process, and draws lessons from the experience in the United States with the U.S. Constitution. The third chapter is a comparative critique of the guilty plea process as a system of summary process. Finally, the conclusion focuses on the inadequacy of the existing guilty plea process as a means of achieving summary justice.

Chapter 5. THE ELEMENT OF COERCION IN THE GUILTY PLEA PROCESS

The element of coercion enters into the guilty plea process in various ways, undermining the reliability of the guilty plea as a free admission of guilt. In this chapter the two most important forms of coercion will be considered: first, the covert inducement that arises from the knowledge that those who plead guilty receive lighter sentences than those who are convicted at trial; and second, the overt inducement offered to an accused in the form of a plea bargain.

A. The effect of the guilty plea on sentencing

One of the most compelling reasons for pleading guilty is the well-founded expectation that the guilty plea will act as a mitigating factor in sentencing, resulting in a lesser sentence than that which might have been imposed had the accused pleaded not guilty, and been convicted after a full trial.⁵⁰¹

⁵⁰¹ For example, in a U.S. study conducted by the Yale Law Journal in the fifties, 66% of 140 judges surveyed considered the accused's plea as a relevant factor in local sentencing procedure. Eighty-seven percent of those said that the accused who pleaded guilty was given a more lenient sentence, between 10% and 95% more lenient: "The Influence of the Defendant's Plea on Judicial Determination of Sentence" (1956-57), 66 Yale Law Journal 204 at 206-207. In the United Kingdom, the courts are not allowed to acknowledge the mitigating effect of a guilty plea, but J. Baldwin and M. McConville claim that this effect is widely recognized and tends to influence the accused's decision on how to plead: "Plea Bargaining and the Court of Appeal", [1979] British Journal of Law and Society 200 at 211-213.

Although the courts are reluctant to acknowledge that they would punish an accused for exercising his right to trial,⁵⁰² they are often willing to consider a guilty plea as a mitigating factor, and they tend to reward guilty pleas by imposing lighter sentences on those persons convicted on their own pleas of guilty than upon those convicted after a full trial. If an accused pleads not guilty and insists on the right to trial and is subsequently convicted, statistics show that the sentence is likely to be more severe than if the accused had pleaded guilty.⁵⁰³ When one weighs this factor along with consideration of the length and uncertainty of the trial process, it is readily apparent how slippery is the concept of voluntariness in this context. Few guilty pleas could be described as entirely voluntary, given that nearly every guilty plea must be influenced to some extent by the hope of gaining a

⁵⁰² S. Verdun-Jones and A. Hatch, "An Overview of Plea Bargaining in Canada, Cautionary Notes for Sentencing Reform", prepared for the Canadian Institute for the Administration of Justice, National Seminar on Sentencing, October 16, 1985. See also, C.C. Ruby, Sentencing (2d ed. 1980) at 174-175; J. Fortin, Preuve Pénale (1984) at 388. In R. v. Jamieson (1975), 61 Cr. App. R. 318, Scarman L.J. stated, "It is necessary that a man should not be sentenced more heavily merely because he exercises his right to trial by jury. It does not accord with justice as it is administered in our courts, that a man should run the risk of a heavier penalty in such circumstances, if the offence does not warrant the sentence passed..."

⁵⁰³ R.V. Ericson and P.M. Baranek, The Ordering of Justice: A Study of Accused Persons as Dependents in the Criminal Process (1982) at 169-170, quoting statistics that indicate that custodial sentences were received by 50% of those who planned guilty pleas from the beginning, 64.6% of those who made last minute changes of plea, and 69.3% of those convicted after pleading not guilty.

sentencing advantage.⁵⁰⁴ The courts have encouraged this effect by ambiguous statements such as that of Salhany Co. Ct. J. in R. v. Layte⁵⁰⁵

"It is a fundamental concept of our system of justice that a person accused of a crime is entitled to demand that the Crown prove his guilt by a fair and impartial trial. There is nothing that the court should ever do to whittle down or undercut that fundamental principle. At the same time, it would be unrealistic not to recognize that if everyone demanded a full and complete trial our system of justice would come to an abrupt halt. It is for that reason that those who are guilty, and wish to so plead, should be given special consideration when they appear before the court."

The implicit message in this statement is that those who are in fact guilty have less of a right to trial than the innocent, and better think twice before invoking the presumption of innocence as a temporary cover. Viewed in this light, reduced sentences for guilty pleas appear to have a detrimental impact on procedural rights. While it may seem eminently reasonable to reward an accused person who co-operates in the resolution of a criminal matter, this practice raises the spectre of coercion in the guilty plea process. The opposing interests in ensuring that the accused's procedural rights are respected and in having a swift and efficient criminal justice system, are difficult, if not impossible, to reconcile. In this regard Ruby notes,

"...a serious problem remains in permitting a reduction of sentence upon a guilty plea because of the essential principle that a person shall not be penalized for insisting upon his right to a jury trial and a plea of not guilty. There is some logical difficulty in understanding how it is that, at least from the perspective of a co-accused, it can be said that one is not being punished for pleading not guilty, when he notes that his co-accused received a lower sentence in return for a plea of guilty. There is also a serious question whether this principle encourages unduly pleas of

⁵⁰⁴ Id at 218-219.

⁵⁰⁵ (1983), 38 C.R. (3d) 204 (Ont. Co. Ct.).

guilty in cases where they are not otherwise warranted...The problem perhaps remains insoluble."⁵⁰⁶

In Australia, too, concern has been voiced about the incompatibility of treating a guilty plea as a mitigating factor while insisting that the guilty plea be voluntary. Sallman writes,

"At one level the argument is that the adversary system provides the defendant with a clear choice of plea, and given the fact that there is this choice there should be no difference in the penalties to be expected. To the extent that there is a difference the choice is not an unencumbered one. There is an incentive to plead guilty which in many cases may raise serious doubt about the voluntariness of the plea and give rise to the possibility of defendants, who have a defence (or a possible defence), pleading guilty because of the penalty repercussions. Of course, the higher the level of the "discount" the greater is the scope of the doubt about the voluntariness of the plea...

As opposed to this line of argument there is the view apparently espoused by the English courts, [and, one may add, the Canadian courts] and to a lesser extent by Victorian courts, that a guilty plea does justify greater leniency in sentencing than a conviction after a trial. In my view this position is a less respectable one than the opposing view because it appears to be much more based on pragmatic considerations of expediency, and because it runs directly counter to the fundamental adversarial principle that the defendant is to have a clear, voluntary and unimpeded choice of plea which is of course consistent with the idea of the presumption of innocence."⁵⁰⁷

1. The guilty plea as a plea in mitigation

There are at least three justifications for treating the guilty plea as a mitigating factor when sentencing the accused. First of all, to the extent that the guilty plea demonstrates genuine remorse on the

⁵⁰⁶ C.C. Ruby, Sentencing (2d ed. 1980) at 174-175.

⁵⁰⁷ P.A. Sallman, "The Guilty Plea as an Element of Sentencing" Part I (1980), 54 Law Institute Journal 105 at 106.

part of the accused, it is viewed as a first step towards rehabilitation. Therefore, in order to encourage or reward this, the sentence will be mitigated.⁵⁰⁸ Second, even if the guilty plea is not engendered by remorse, but by more pragmatic considerations, such as the overwhelming strength of the case against the accused, a guilty plea may be considered as a mitigating factor if it saves the Crown the expense of a lengthy and complex trial. Indeed, it has been suggested by Langbein and others that the Anglo-American jury trial has evolved into such an elaborate and time consuming proceeding that society can no longer afford to have each accused exercise the right to a full trial. Thus, as a matter of pure administrative convenience guilty pleas are encouraged.⁵⁰⁹ Third, a guilty plea that is not generated by remorse may yet be considered to be a mitigating factor in respect to

⁵⁰⁸ P.A. Sallman, "The Guilty Plea as an Element of Sentencing" - Part I (1980), 54 Law Institute Journal 105 at 106, quoting Lord Parker, C.J. in R. v. Harper, [1967] 3 All E.R. 619 at 619: "It is, however, proper to give an accused a lesser sentence if he has shown genuine remorse amongst other things by pleading guilty". See also "The Influence of the Defendant's Plea on Judicial Determination of Sentence" (1956-57), 66 Yale Law Journal 204 at 209-220.

⁵⁰⁹ J. H. Langbein, "Land Without Plea Bargaining: How the Germans do it" (1979), 78 Michigan Law Review 204 at 205-206. In a letter to the editor of The Times, 25 February 1976, quoted in P.A. Sallman, "The Guilty Plea as an Element in Sentencing" Part I (1980), 54 Law Institute Journal 105 at 107, Glanville Williams wrote, "Although the courts say that they give the discount for the plea, and do not increase the sentence because the defendant fights the case, this is only a verbal point: the substance is that an offender gets a steeper sentence merely because he defends himself - yet the discount is a necessity, because offenders who have no defence must be persuaded not to waste the time of the court and public money: pleas of guilty often save the distress of witnesses in having to give evidence as well as inconvenience and loss of time; and in present conditions such pleas are essential to prevent serious congestion in the courts."

specific charges (for example, sexual assault), because it will save the victim from the humiliation and pain of testifying and being cross-examined at trial.⁵¹⁰

There are also several reasons why the sentence after a full trial tends to be more severe than after a guilty plea. First, a heavier sentence may arise in part from concern that the accused committed perjury at trial, notwithstanding that there has been no conviction of perjury. Second, the accused may be more heavily punished for asserting a frivolous defence which the court viewed as merely a dilatory tactic. Third, the trial judge who convicts after hearing all the evidence will be more aware of all the circumstances of the offence than the trial judge who has only heard the plea of guilty. Thus, where the circumstances of the offence are particularly grave, the trial judge who is apprised of all these facts will be more inclined to impose a severe sentence.⁵¹¹

However meritorious the justifications for a sentencing disparity between those who plead guilty and those who plead not guilty, the inexorable consequence of this disparity will be some injustice. Innocent accused persons, especially those with criminal records, will be encouraged to plead guilty rather than risk the vagaries of a trial;

⁵¹⁰ R.P. Nadin-Davis, Sentencing in Canada (1982) at 173-174, C.C. Ruby, Sentencing (2d ed. 1980) at 174-175.

⁵¹¹ "The Influence of the Defendant's Plea on Judicial Determination of Sentence" (1956-57), 66 Yale Law Journal 204 at 209-220.

and guilty accused persons will be able to obtain sentencing advantages by exploiting the judiciary's predilection for guilty pleas. The fact that a particular trial judge's reaction to a guilty plea may not be predictable does little to ameliorate the coercive effect of knowing that guilty pleas tend to be rewarded.⁵¹²

Recognition of the mitigation effect of the guilty plea was explicit in the English case of R. v. de Haan,⁵¹³ in which the accused, in the course of his trial but prior to having an opportunity to testify, changed his plea from guilty to not guilty. In sentencing the accused the trial judge had expressly stated that the only mitigation that he could find was that the accused had changed his plea and never tried to lie his way out of the offences. On appeal against sentence, Edmund Davies L.J. confirmed that the guilty plea was a mitigating factor and reduced the sentence even further by virtue of that factor, stating,

"If, as is undoubtedly right, a confession of guilt should tell in favour of an accused person, that is clearly in the public interest. We have come to the conclusion that, taking an all round view of the circumstances of this case, to sentence this appellant, grave though the offences are and bad though his record is, to four-and-a-half years is to give inadequate consideration to that mitigating element."⁵¹⁴

⁵¹² Id at 209-221.

⁵¹³ (1967), 52 Cr. App. R. 25 (U.K.C.A.).

⁵¹⁴ Id at 27.

The principle enunciated in de Haan was recognized and applied by the Ontario Court of Appeal in Regina v. Johnston and Tremayne.⁵¹⁵ At their trial Tremayne had pleaded guilty of possession, and Johnston had pleaded guilty of importing and the remaining charges were dismissed. On appeal against sentence, Gale C.J.O., delivering the judgment of the Court of Appeal, held that the trial judge had erred in giving little or no consideration to the fact that the accused had pleaded guilty and thus saved the community a great deal of expense.

Another case in which the Ontario Court of Appeal treated a guilty plea as a mitigating factor was R. v. MacDonald et al.,⁵¹⁶ in which four co-accused had pleaded guilty to stealing with violence. In reducing the trial judge's sentence the Court of Appeal noted that the accused had co-operated with the police and pleaded guilty.

The Quebec Court of Appeal has also recognized the guilty plea as a mitigating factor. In R. v. Tanguay-Dupere⁵¹⁷ the accused was convicted after a seven day trial of conspiring to defraud the creditors of a lumber company, and was sentenced to eight years' imprisonment. On appeal against sentence the Court of Appeal distinguished the case of a co-accused who had received a more lenient sentence on the grounds that, first, the co-accused had been less involved in the crime than had

⁵¹⁵ [1970] 4 C.C.C. 64 (Ont. C.A.).

⁵¹⁶ (1973-74), 16 Crim. L.Q. 143 (Ont. C.A.).

⁵¹⁷ (1971), 13 Crim. L. Q. 436 (Que. C.A.).

Tanguay-Dupere, and second, the other accused had pleaded guilty whereas Tanguay-Dupere had pleaded not guilty, necessitating a lengthy trial and the calling of some forty-one witnesses.

In cases of sexual assault it would appear that a guilty plea will be treated as a mitigating factor because, in addition to saving the court's time and indicating remorse, it saves the complainant from the humiliation of trial. This principle was noted in the case of Regina v. Shanower.⁵¹⁸ The accused had raped a fifteen year old girl who was babysitting his children. He pleaded guilty before Galligan J. who was so impressed by the good character of the accused and the impact of the incident on the accused's family, that he gave him a suspended sentence. On appeal by the Crown, Gale C.J.O. noted several "extenuating circumstances", the first of which was that the accused had pleaded guilty and thus saved the complainant the considerable embarrassment of having to testify at the trial. However, the appeal court did not consider this to be such an exceptional case as to warrant suspending sentence, and imposed a sentence of imprisonment.

In R. v. Truax,⁵¹⁹ a case involving a charge of incest, the Ontario Court of Appeal held that in all the circumstances, including the fact that the accused's guilty plea had spared his daughter the "indignity and shame" of giving evidence at trial, the sentence imposed at trial

⁵¹⁸ (1972), 8 C.C.C. (2d) 527 (Ont. C.A.).

⁵¹⁹ (1979-80), 22 Crim. L.Q. 157 (Ont. C.A.).

had to be reduced. These two cases also suggest the "sanitizing" effect that a guilty plea may have. Although the court mitigated the sentence in each case for the expressed reason that the accused's guilty pleas spared the victims from the ordeal of testifying, it may also have been that the guilty pleas prevented full disclosure of the circumstances of the crime. Without having a full sense of the enormity of the crimes, the court may focus more on the individual circumstances of each accused and therefore may be more inclined to mitigate sentence.

Although it appears to be a well established principle that a guilty plea serves to mitigate punishment this rule is by no means one of universal application. The courts may discount the mitigating effect of a guilty plea where the crime is particularly serious, for example, a complex drug trafficking conspiracy, or where there is little evidence of remorse. Writes Nadin-Davis,

"The fact of the accused's having pleaded guilty is a versatile actor in the sentencing process. It may indicate remorse on the part of the accused, a desire to save witnesses the pain of going through testimony, a willingness to save the expense of a full trial, or the realization by the accused that he is inescapably caught. According to the Court's interpretation of the plea, its treatment may vary."⁵²⁰

Nadin-Davis attempts to reconcile the different interpretations and effects of a guilty plea according to his "tariff" theory, explaining that within the range of plain tariff cases, a guilty plea will be treated as a mitigating factor but where the offence is so grave as to call for an exemplary sentence a guilty plea will have little effect on

⁵²⁰ R.P. Nadin-Davis, Sentencing in Canada (1982) at 173.

sentence.⁵²¹ It may be that reconciliation of the cases is only possible by giving due recognition to the extent of the trial judge's sentencing discretion. In practice it would appear that the effect of a guilty plea depends largely on the trial judge's views as to its import in the particular circumstances of each case.

In the case of Rex v. Carriere et al.⁵²² the Quebec Court of Appeal gave implicit recognition to the principle that a guilty plea made in a timely fashion will mitigate punishment but held that the gravity of the offence still had to be reflected adequately in sentencing. At trial the accused pleaded guilty and were convicted. In imposing relatively light sentences on the accused, the magistrate had been influenced by the sentence of one day and \$700 fine imposed on a co-accused, Brodeur, who had pleaded guilty in advance of all the proceedings and then become a witness for the prosecution. The Court of Appeal considered that the case of Brodeur was not comparable to that to that of the other accused, and accordingly, increased their sentences to reflect more closely the gravity of their conspiracy.

⁵²¹ Id at 174. Nadin-Davis also noted that there would be exceptional cases where, notwithstanding the crime was one of the more serious, the trial judge would feel compelled to give considerable weight to mitigating factors particular to the accused, including his plea of guilty.

⁵²² (1952), 14 C.R. 391 (Que. C.A.).

In Regina v. Spiller,⁵²³ involving a Crown appeal against sentence, the British Columbia Court of Appeal rejected defence counsel's submissions that, based on R. v. deHaan, the accused's guilty plea should be treated as a mitigating factor. In allowing the appeal and increasing the sentence, Robertson J.A. stated,

"With the greatest respect, I do not think that that is a principle of universal application, though it may well be appropriate to apply it in some cases, and I do not think that any significant weight should be given to the plea of guilty here: the respondent knew that she was inescapably caught."⁵²⁴

In Regina v. Wisniewski⁵²⁵ Graburn Co.Ct.J. followed Regina v. Spiller in concluding that in the case before him, the guilty plea was not a significant mitigating factor. He found that Wisniewski's plea of guilty did not spring from a sense of remorse but from the realization that he was inescapably caught.

The case of Regina v. Basha et al.⁵²⁶ was an appeal against sentence by ten co-accused who had pleaded guilty and been convicted of various charges of conspiracy and possession of a narcotic for the purposes of trafficking, and sentenced to terms of imprisonment ranging from three years to nine years. With respect to the argument that the guilty pleas entered by the accused should mitigate their sentences, Gushue J. stated,

⁵²³ [1969] 4 C.C.C. 211 (B.C.C.A.).

⁵²⁴ Id at 215.

⁵²⁵ (1975), 29 C.R.N.S. 342 (Ont. Co. Ct.).

⁵²⁶ (1979), 23 Nfld. & P.E.I.R. 286 (Nfld. C.A.).

"In the first place, I place no significance on the guilty plea. While it may have saved the Crown considerable expense at the trial level, it is obvious that tremendous costs had already been incurred leading up to the laying of the charges. For example, we are told by Crown counsel that approximately 50,000 pages of evidence were produced as the result of telephone monitoring devices alone. I have no doubt that the sole reason for pleading guilty was the overwhelming nature of the Crown evidence against the appellants, and was not due to any philanthropic desire to save the government money or because of any remorse on the part of the appellants. In fact, to the contrary, there appears to have been a total lack of remorse or concern throughout by various co-conspirators."⁵²⁷

2. Bargained guilty pleas and sentencing

The fact that judges tend to treat the plea of guilty itself as a mitigating factor tends to impact on the usefulness of plea bargaining. Thus a plea of guilty in exchange for promises of sentencing concessions from the Crown may not be strictly necessary given the courts' predisposition to reward the guilty plea anyway.⁵²⁸ Indeed, it has been suggested that plea bargaining at best, may only be a means of ensuring that the outcome of the case is no worse than local norms would dictate.⁵²⁹ On the other hand, a plea bargain whereby the accused pleads guilty to a lesser included offence to the one charged may allow the

⁵²⁷ Id at 298.

⁵²⁸ "The Influence of the Defendant's Plea on Judicial Determination of Sentence" (1956-57), 66 Yale Law Journal 204 at 208-209.

⁵²⁹ P.H. Solomon Jr., Criminal Justice Policy, From Research to Reform (1983), at 43, cited in S.N. Verdun-Jones & A.J. Hatch, "An Overview of Plea Bargaining in Canada; Cautionary Notes for Sentencing Reforms", prepared for the Canadian Institute for the Administration of Justice, Oct 16, 1985, at 4-5.

accused a double sentencing advantage if the trial judge treats the guilty plea as a mitigating factor in sentencing on the lesser charge.⁵³⁰ It has been suggested by Ericson and Baranek, however, that even here the bargain may be illusory because the police may overlay higher or multiple charges or add "kicker" charges in order to create a maximal starting position for plea discussions and to induce a guilty plea to the main charge.⁵³¹

Whether the advantages of plea bargaining are real or illusory they are evidently felt to be sufficiently compelling to exert considerable influence on the accused's plea decision. For example, in one study in Birmingham, England, it was found that 71% of persons who pleaded guilty did so because of either an explicit or implicit plea bargain or because their lawyer pressured them into so pleading.⁵³² The pressures on the accused to plea bargain are certainly compounded by the attitudes of defence counsel, the prosecutor and the courts.

It is well-recognized that both the appearance and substance of justice would be destroyed if the trial judge were actively to

⁵³⁰ "The Influence of the Defendant's Plea on Judicial Determination of Sentence" (1956-57), 66 Yale Law Journal 204 at 207-208.

⁵³¹ R.V. Ericson & P.M. Baranek, The Ordering of Justice (1982) at 115 and 160.

⁵³² J. Baldwin & M. McConville, "Conviction by Consent: A Study of Plea Bargaining and Inducements to Plead Guilty in England" (1978), 7 Anglo-American Law Review 271 at 280.

participate in the plea bargaining process, and therefore this is strictly forbidden.⁵³³ McDermid J.A. stated in Regina v. Wood,⁵³⁴

"There is no place in the sentencing procedure for hole-and-corner bargaining...a judge should take no part in any discussion as to sentencing before a plea has been taken, and all the circumstances in regard to the particular case have been placed before him, then having listened to the submission of counsel he should give his decision. To take part in a discussion of sentencing prior to a plea being taken would constitute a grave dereliction of duty."

Indeed, it has been suggested, if judges involve themselves in pressuring an accused to plead guilty it becomes virtually meaningless to talk of the voluntariness of the accused's subsequent plea.⁵³⁵ Nonetheless, there remains some room for the court to indicate its views about the case, and thereby exert implicit pressures upon the accused and defence counsel.⁵³⁶

The courts have been reluctant to curtail the amount of pressure that defence counsel may exert so as to persuade an accused to accept

⁵³³ Regina v. Turner, [1970] 2 All E.R. 281 (U.K.C.A.); Regina v. Wood, [1976] 2 W.W.R. 135 (Alta. C.A.); R. v. Inns, [1975] Crim. L.R. 182 (U.K.C.A.). See also, R. v. Grice, [1977] 66 Cr. App. R. 167; R. v. Atkinson, [1978] 2 All E.R. 460; R. v. Llewellyn (1978), 67 Cr. App. R. 49, cited in J. Baldwin & M. McConville, "Plea Bargaining and the Court of Appeal", [1979] 2 British Journal of Law and Society 200 at 202-204.

⁵³⁴ [1976] 2 W.W.R. 135 (Alta. C.A.) at 144, dissenting on other grounds.

⁵³⁵ J. Baldwin & M. McConville, "Conviction by Consent: A Study of Plea Bargaining and Inducements to Plead Guilty in England" (1978), 7 Anglo-American Law Review 271 at 282.

⁵³⁶ J. Baldwin & M. McConville, "Plea Bargaining and the Court of Appeal", [1979] 2 British Journal of Law and Society 200 at 206-208.

a plea bargain.⁵³⁷ They have also been reluctant to accept the accused's version of pre-trial coercion by defence counsel, unless counsel willingly admits to it.⁵³⁸ Given the fiduciary relationship between defence counsel and client, the pressures exerted by counsel may be the greatest threat to an accused's freedom of choice in pleading, and the most important influence in prompting negotiated pleas of guilty.⁵³⁹ Baldwin and McConville were critical of the attitude of the English criminal justice system towards plea bargaining:

"While lip-service is frequently paid to the notion that a defendant's plea should be freely and voluntarily made, it is clear that the system is actually structured to discourage defendants from exercising their right to put the prosecution to the proof. Judgments about the culpability of defendants are made, not upon an assessment of the evidence in a hearing in which both sides state their case, but upon a presumptive and hostile finding on the basis of the paper evidence in the prosecution's case. To this is added the threat, emanating directly from the judge or indirectly through the lips of the barrister, that a full trial will result in a heavier sentence. All this takes place off the record disabling the defendant from establishing at a later date what occurred, and making appellate review an unconvincing and shallow exercise. Despite attempts to dress this up as a principled search for a just and expeditious disposition, it smacks of a procedure

⁵³⁷ Regina v. Turner, [1970] 2 All E.R. 281 (U.K.C.A.).

⁵³⁸ S.N. Verdun-Jones & S.J. Hatch, "An Overview of Plea Bargaining in Canada; Cautionary Notes for Sentencing Reforms", prepared for the Canadian Institute for the Administration of Justice (1985) at 29-31, referring inter alia to Antoine v. R. (1984), 40 C.R. (3d) 375 (Que. C.A.) and Lamoureux v. R. (1984), 40 C.R. (3d) 230 (Que. C.A.).

⁵³⁹ J. Baldwin & M. McConville, "Conviction by Consent: A Study of Plea Bargaining and Inducements to Plead Guilty in England" (1978), 7 Anglo-American Law Review 271 at 277-78, 283 and 287.

in which basic tenets of criminal justice are brushed aside for reasons of convenience."⁵⁴⁰

It would seem that in Canada and the United States the risk of judicial involvement in plea bargaining is less than in England where the courts retain much of the discretion that on this continent is wielded by the prosecution.⁵⁴¹ Here the bargain would most likely be made between the accused's lawyer and Crown counsel with the trial judge's tacit influence being limited to the well-founded expectation that the judge will sentence more leniently the accused who pleads guilty than one who insists on a full trial.

In Canada and the United States the prosecutor's power to arrange plea bargains stems in large part from an ability to influence the amount of punishment to be meted out to the accused. The prosecutor can do this either by requesting that the trial judge award a more lenient sentence for the offence charged where the accused pleads guilty; or by allowing the accused to plead guilty to a lesser offence which automatically carries a lesser punishment to that prescribed for the offence originally charged.⁵⁴² From the accused's perspective the latter type of plea arrangement is the most favourable as it narrows

⁵⁴⁰ J. Baldwin & M. McConville, "Plea Bargaining and the Court of Appeal" (1979), 2 British Journal of Law and Society 200 at 216-217.

⁵⁴¹ J. Baldwin & M. McConville, "Conviction by Consent: A Study of Plea Bargaining and Inducements to Plead Guilty in England" (1978), 7 Anglo-American Law Review 271 at 272-276.

⁵⁴² "The Influence of the Defendant's Plea on Judicial Determination of Sentence" (1956-57), 66 Yale Law Journal 204 at 205.

the scope of judicial discretion, minimizing the risk that the trial judge will reject the prosecutor's sentencing submissions,⁵⁴³ while opening up the possibility of a dual sentencing advantage involving a reduced charge and judicial mitigation of sentence for the guilty plea.⁵⁴⁴

Verdun-Jones and Hatch⁵⁴⁵ list thirteen forms of plea bargaining, all of which are variations on the prosecutor's power to influence sentence in exchange for the accused's plea of guilty, and any of which may act as a powerful incentive for the accused to plead guilty in the circumstances of a given case:

"Charge Bargaining

- (a) reduction of the charge to a lesser or included offence;
- (b) withdrawal or stay of other charges or the promise not to proceed on other possible charges; and
- (c) promise not to charge friends or family of the defendant.

Sentence Bargaining

- (a) promise to proceed summarily rather than by way of indictment;
- (b) promise of a certain sentence recommendation by the Crown;
- (c) promise not to oppose defence counsel's sentence recommendation;
- (d) promise not to appeal against sentence imposed at trial;
- (e) promise not to apply for a more severe penalty (under s.592 or 740 of the Criminal Code [now R.S.C. 1985, c. C-46, s.665 or 805, respectively]);
- (f) promise not to apply for a period of preventative detention under s.688 [now R.S.C. 1985, c. C-46, s.753];
- (g) promise to make a representation as to the place of imprisonment, type of treatment, etc.; and
- (h) promise to arrange sentencing before a particular judge.

Fact Bargaining

⁵⁴³ Id at 205-206.

⁵⁴⁴ Id at 207-208.

⁵⁴⁵ S.N. Verdun-Jones & A.J. Hatch, "An Overview of Plea Bargaining in Canada; Cautionary Notes for Sentencing Reforms", prepared for the Canadian Institute for the Administration of Justice (October 16, 1985) at 7-8.

- (a) promise not to "volunteer" information detrimental to the accused (eg. not adducing evidence as to the defendant's previous convictions under ss.234 and 236 of the Criminal Code [now R.S.C. 1985, c. C-46, ss.250 and 253, respectively]); and
- (b) promise not to mention a circumstance of the offence that may be interpreted by the judge as an aggravating factor."

Notwithstanding the trial judge's broad sentencing discretion, Verdun-Jones and Hatch state that, where the accused has pleaded guilty, the trial judge is usually receptive to the joint sentencing submissions of defence and Crown counsel, provided they are reasonable, because the trial judge tends to assume that the Crown has superior knowledge of the case upon which to base the sentencing recommendations.⁵⁴⁶ The Crown's recommendation is in no way binding on the trial judge, but if the trial judge intends to impose a heavier sentence, the accused should be so advised and asked whether he wishes to withdraw the guilty plea.⁵⁴⁷ In Attorney-General of Canada v. Roy⁵⁴⁸ Hugessen J. stated,

"Where there has been a plea of guilty and Crown counsel recommends a sentence, a court, before accepting the plea, should satisfy itself that the accused fully understands that his fate is, within the limits set by the law, in the discretion of the judge, and that the latter is not bound by the suggestions or opinions of Crown counsel. If the accused does not understand this, the guilty plea ought not to be accepted."

Another risk factor in plea bargaining is the possibility that the Crown will subsequently attempt to repudiate the bargain by asking for a higher sentence on appeal. It has been authoritatively stated that

⁵⁴⁶ Id at 37-38. But see, R. v. Rubenstein (1987), 24 O.A.C. 309 (Ont. C.A.), stating that joint sentencing submissions will not limit judge's sentencing discretion.

⁵⁴⁷ Regina v. Fleury (1971), 23 C.R.N.S. 164 (Que. C.A.) at 175 per Montgomery J.A.

⁵⁴⁸ (1972), 18 C.R.N.S. 89 (Que. Q.B.) at 92-93.

counsel for the Attorney-General cannot bind the Attorney General by his submission as to sentence so as to preclude the Attorney General from appealing.⁵⁴⁹ Nonetheless, Crown counsel's sentencing submissions will normally give rise to a kind of estoppel precluding later repudiation of the plea bargain. Indeed, where the trial judge has accepted the Crown's sentence recommendations, appeal courts in Canada have expressed reluctance to allow Crown repudiation on appeal unless exceptional circumstances exist.⁵⁵⁰

Thus, in Regina v. Agozzino,⁵⁵¹ the Ontario Court of Appeal refused to give effect to the Crown's repudiation of a plea bargain on appeal. Prior to trial Crown counsel had intimated that he would not seek a jail term if the accused pleaded guilty to a charge of possession of counterfeit money, and this persuaded the accused to enter a guilty plea. In sentencing the accused, the Magistrate indicated that but for the fact Crown counsel did not seek a jail term, he would have imposed one, then imposed a two-year suspended sentence, probation and a fine. On a Crown appeal against sentence the appeal court agreed that the sentence was inadequate but stated that, because the accused and his counsel had been induced to enter a guilty plea by Crown counsel's

⁵⁴⁹ Regina v. Wood, [1976] 2 W.W.R. 135 (Alta. C.A.) at 147 per McDermid J.A.

⁵⁵⁰ Regina v. Fleury (1971), 23 C.R.N.S. 164 (Que. C.A.) per Montgomery J.A.

⁵⁵¹ [1970] 1 C.C.C. 380 (Ont. C.A.).

promise, it would be quite unfair to permit the Crown to change its position by means of an appeal.

In Attorney General of Canada v. Roy⁵⁵² Hugessen J., noting the lack of unanimity of judicial opinion on plea bargaining, attempted to summarize judicial attitudes to Crown repudiation on appeal as follows:

"The Crown, like any other litigant, ought not to be heard to repudiate before an appellate court the position taken by its counsel in the trial court, except for the gravest possible reasons. Such reasons might be where the sentence was an illegal one, or where the Crown can demonstrate that its counsel had in some way been misled, or finally, where it can be shown that the public interest in the orderly administration of justice is outweighed by the gravity of the crime and the gross insufficiency of the sentence."⁵⁵³

Hugessen J. was not satisfied that the Crown had met this test in the case before him. Considering that it was too late for the accused to appeal against his conviction and ask for leave to withdraw his plea of guilty, Hugessen J. stated that the solution for Crown dissatisfaction with the bargain it had made, was for the Crown not to make bargains at all.⁵⁵⁴

In refusing to permit Crown repudiation of a plea bargain on appeal, the Alberta Court of Appeal in Regina v. Wood⁵⁵⁵ focused mainly on the potential prejudice to the accused. Moir J.A. refused the Crown

⁵⁵² (1972), 18 C.R.N.S. 89 (Que. C.A.).

⁵⁵³ Id at 93.

⁵⁵⁴ Id.

⁵⁵⁵ [1976] 2 W.W.R. 135 (Alta. C.A.).

leave to appeal on the ground that it would be unfair to the accused who could not be put back in the position he was in before his plea. He considered that it was an important circumstance that Crown counsel's intimation as to his sentence recommendations had clearly encouraged the accused to plead guilty, and that the evidence disclosed at the sentence hearing could all be used to the accused's prejudice if a new trial were ordered.⁵⁵⁶

B. Accuracy, voluntariness and plea bargaining

In this section the requirements that a guilty plea be voluntary and accurate will be tested in the context of bargained guilty pleas. The purpose of this section is not to attempt a complete exposition and critique of plea bargaining, and indeed, no conclusions are proffered on the much debated question of the "rightness or wrongness" of plea bargaining. Rather the purpose is to demonstrate, through consideration of the concepts of voluntariness and accuracy in bargained pleas, the crucial importance of the court's supervisory role in ensuring the acceptability of guilty pleas.

The trial court's discretion to reject a guilty plea theoretically permits it to ensure that justice and fairness govern the guilty plea process. However, one finds that Canadian courts, while acknowledging the values of understanding, voluntariness and accuracy treat these as

⁵⁵⁶ Id at 147-148.

relatively flexible indicia of the acceptability of a guilty plea, rather than as imposing a definite standard which must be met in every case. They have been inclined to rely on the presence of defence counsel to cure any apparent deficiencies instead of embarking on a judicial enquiry into the circumstances of the plea. Appellate courts, for their part, have been reluctant to fetter the trial court's discretion to accept or reject a guilty plea.⁵⁵⁷ Even in the United States, where the standards of voluntariness, understanding and accuracy have legislative force, accused persons have sometimes been subjected to overwhelming pressures to negotiate for their conviction on a guilty plea.⁵⁵⁸ The concerns which may arise with respect to the acceptability of a guilty plea, particularly with respect to its voluntariness and accuracy, are magnified when the guilty plea is offered as a result of a plea negotiation between the accused, defence counsel and the prosecutor.⁵⁵⁹

Given the trial court's important supervisory responsibility to ensure that the guilty plea process is just, it would be inappropriate

⁵⁵⁷ Rex v. Milina (1946), 86 C.C.C. 374 (B.C.C.A.); Brosseau v. The Queen, [1968] S.C.R. 181 (S.C.C.); Adgey v. The Queen (1973), 13 C.C.C. (2d) 177 (S.C.C.); J. Fortin, Preuve Pénale (1984) at 400-401.

⁵⁵⁸ Brady v. United States (1970), 397 U.S. 742 (U.S.S.C.); Parker v. North Carolina (1970), 397 U.S. 790 (U.S.S.C.); North Carolina v. Alford (1970), 400 U.S. 25 (U.S.S.C.).

⁵⁵⁹ Arguably, the Crown Attorney's duty of impartiality offers some protection in Canada against the more blatant forms of coercion that might be used to induce a guilty plea in the United States.

to treat the bargained guilty plea as a matter strictly within the accused's prerogative. Consideration of both the procedural and evidentiary aspects of the guilty plea demonstrates that the trial court ought to assure itself that the bargained guilty plea is not coerced, and refuse to accept one that is. This is because coercion vitiates the waiver of procedural rights and the reliability of the plea as a substitute for proof beyond a reasonable doubt. A fortiori, a coerced guilty plea accompanied by protestations of innocence would be unacceptable. Absent recognition of the dual aspects of the guilty plea, the courts may permit both voluntariness and accuracy to be sacrificed by the accused, defence counsel and the Crown prosecutor for the sake of achieving a plea agreement. The plea agreement arranged between prosecution and defence counsel may result from concerns unrelated to the merits of the case; and the accused may perceive that the advantage to be gained from the plea bargain, or the disadvantage to be avoided by the plea bargain, is so great that it is worth pleading guilty, notwithstanding an unwillingness or inability to confess to the crime.

1. Plea bargaining in Canada

Ericson and Baranek found that accused persons who were either legally innocent, or who considered themselves to be innocent, would nonetheless be induced to plead guilty because of a perceived risk, sometimes forcefully argued by their lawyer, of facing worse consequences if a not guilty plea was entered and the person was found

guilty at trial.⁵⁶⁰ They found that the accused tended to defer to their lawyer's judgment of the suitability of entering a bargained guilty plea, in spite of their personal feeling that they were not guilty, because the accused had no other source of knowledge and opinion to rely upon. This lack of ability to assess objectively their lawyers' advice, led some accused to plead guilty at counsel's suggestion even when there was no bargain arranged with the prosecutor to sweeten the choice of plea.⁵⁶¹

Ericson and Baranek found that an additional inducement to pleading guilty was the availability of illusory bargains whereby an accused charged with several offences involving the same incident or transaction would be encouraged to plead guilty to the main charge in exchange for the dropping of ancillary or overlapping charges⁵⁶² for which a conviction could not be registered anyway, due to the effect of the rule in Kienapple.⁵⁶³ Indeed, the authors suggested that "plea bargaining" on behalf of an accused was always more illusory than real. They stated,

"The question of whether a "deal" or "bargain" is obtained must be answered ultimately in terms of the perceptions of the various actors. Defence lawyers, crown attorneys, and police officers can judge an agreement based upon their "recipe" knowledge of the local court and its tariff structure as they use it in any particular case. The accused, without this "recipe" knowledge, and without

⁵⁶⁰ R.V. Ericson and P.M. Baranek, The Ordering of Justice: A Study of Accused Persons as Dependents in the Criminal Process (1982) at 158.

⁵⁶¹ Id at 160.

⁵⁶² Id at 115-116.

⁵⁶³ Kienapple v. The Queen (1974), 15 C.C.C. (2d) 524 (S.C.C.).

even a peek at the plea transaction process, is forced to make his assessment from a distance. To the extent that the criminal control agents reach an agreement that merely reflects the going rate, and to the extent the accused is nevertheless made to believe that he got a bargain [as the authors document], the term "plea bargaining" can be seen as another source of mystification for keeping the accused in order."⁵⁶⁴

Verdun-Jones and Hatch identified several factors tending to facilitate and encourage plea bargaining in Canada. First, a relationship of trust was developed between courtroom actors as a result of their close proximity and experience of successive and successful bargains, and this allowed each party to be confident that the others would uphold their end of a deal. The accused who, of course, was not a party to this trust relationship, needed to be represented by a lawyer in order to take advantage of the negotiating process.⁵⁶⁵ Secondly, the fact that the Code might contain overlapping offences relevant to a particular occurrence, and might provide for included offences, coupled with the discretion police had in laying charges, permitted some manipulation of the charges through the plea negotiation process.⁵⁶⁶ Third, because the accused was an outsider to the criminal justice system, defence counsel was in a strong position to persuade an accused to plead guilty and accept a plea bargain, even if the bargain offered

⁵⁶⁴ R.V. Ericson & P.M. Baranek, The Ordering of Justice: A Study of Accused Persons as Dependents in the Criminal Process (1982) at 116-117.

⁵⁶⁵ S.N. Verdun-Jones & A.J. Hatch, "An Overview of Plea Bargaining in Canada; Cautionary Notes for Sentencing Reform," prepared for the Canadian Institute for the Administration of Justice, National Seminar on Sentencing (Oct. 16, 1985) at 46-47.

⁵⁶⁶ Id at 47-48.

no substantial benefit to the accused.⁵⁶⁷ The fourth facilitating factor identified was the ability of courtroom actors to limit the information made available to the trial judge (eg. both Crown and defence might omit to mention aggravating factors or a past record, or they might emphasize mitigating factors), thereby tending to minimize any doubts that might otherwise arise about the acceptability of the guilty plea.⁵⁶⁸ Fifth, the relatively passive role which had traditionally been assigned to the trial judge in the guilty plea process such that there was not requirement to make full inquiry into the circumstances of the plea, created an environment in which bargains could be struck between Crown and defence counsel without the interference, supervision, or even awareness of the trial judge.⁵⁶⁹

On the other hand, Verdun-Jones and Hatch noted three factors in the Canadian criminal justice system that might tend to discourage plea bargaining. First, because of the trial judge's broad sentencing discretion there was uncertainty as to whether a bargain would be upheld by the court. Second, the Crown could appeal against the trial judge's sentence, thereby repudiating on appeal any bargain made at first instance.⁵⁷⁰ Third, the courts were inclined to impose concurrent rather

⁵⁶⁷ Id at 48.

⁵⁶⁸ Id at 49.

⁵⁶⁹ Id at 27-29.

⁵⁷⁰ In those cases where the Crown has not fulfilled their part of the bargain at trial, some courts have either enforced the agreement or permitted the accused to withdraw the guilty plea and go to trial: Id at 23-24, citing R. v. Brown (1972), 8 C.C.C. (2d) 227; R. v. Smith, [1975] 3 W.W.R. 454 (B.S.S.C.); R.

than consecutive sentences, where there were convictions on multiple charges, which tended to limit the advantage to be gained by the Crown dropping some charges in exchange for a guilty plea on others.⁵⁷¹

Because there is reason to fear that a court might look unfavourably upon a bargained plea where the inducements were strong and the Crown case very weak, it is reasonable to expect that an implicit term of such a bargain may be that it not be disclosed by the accused in open court.⁵⁷² This denial that there have been negotiations has been referred to as a "pious fraud" on both the court and the criminal justice system.⁵⁷³ Certainly, without knowledge of such crucial information the trial judge is in a difficult position to make an assessment of the voluntariness of the accused's waiver of the right to trial. Nor will a reviewing court be in a strong position to decide a subsequent appeal against conviction on the guilty plea.⁵⁷⁴

v. Ahtom, [1928] 2 D.L.R. 748 (N.S.C.A.); R. v. Stone (1932), 58 C.C.C. 262 (N.S.S.C.); R. v. Morrison (1981), 63 C.C.C. (2d) 527 (N.S.S.C.). The appeal courts have tended to limit the ability of the Crown to repudiate an agreement on appeal to "exceptional circumstances". Id at 24-26.

⁵⁷¹ Id at 44-45.

⁵⁷² S.M. Davis, "The Guilty Plea Process: Exploring the Issues of Voluntariness and Accuracy" (1972), 6 Valparaiso University Law Review 111 at 119.

⁵⁷³ Id.

⁵⁷⁴ Id at 121.

Neither the Criminal Code nor Canadian jurisprudence to date clearly endorses or prohibits plea bargaining.⁵⁷⁵ Fortin referred to the practice of plea bargaining in Canada in these words:

"Cette pratique fait partie des moeurs même si le Code criminel n'en dit rien, mais son acceptabilité ne fait pas l'unanimité. Il est difficile d'en cerner les contours en raison de son peu de visibilité et de l'absence à peu près complète de contrôle judiciaire direct."⁵⁷⁶

Some judicial criticism of the practice has been voiced,⁵⁷⁷ although other cases suggest judicial ambivalence.⁵⁷⁸ Judicial concern has been expressed about reduction of a charge merely to avoid a mandatory minimum sentence where the Crown had the means to prove the original charge.⁵⁷⁹ It has been suggested that the trial judge has some power to control plea bargaining through the discretion to accept or reject a

⁵⁷⁵ S.N. Verdun-Jones & A.J. Hatch, "An Overview of Plea Bargaining in Canada; Cautionary Notes for Sentencing Reform," prepared for the Canadian Institute for the Administration of Justice, National Seminar on Sentencing (Oct. 16, 1985) at 21.

⁵⁷⁶ J. Fortin, Preuve Pénale (1984) at 396.

⁵⁷⁷ S.N. Verdun-Jones & A.J. Hatch, "An Overview of Plea Bargaining in Canada; Cautionary Notes for Sentencing Reform," prepared for the Canadian Institute for the Administration of Justice, National Seminar on Sentencing (Oct. 16, 1985) at 21, discussing Perkins and Pigeau v. The Queen (1976), 35 C.R.N.S. 22 (Que. C.A.); A.G. Canada v. Roy (1972), 18 C.R.N.S. 89 (Que. C.B.); R. v. Wood, [1976] 2 W.W.R. 135 (Alta. C.A.).

⁵⁷⁸ Id at 21-22, discussing R. v. Zelensky et al. (1979), 41 C.C.C. (2d) 97 (S.C.C.); R. v. Dubien, 67 C.C.C. (2d) 341 (Ont. C.A.).

⁵⁷⁹ Id at 10, citing Perkins and Pigeau v. The Queen (1976), 35 C.R.N.S. 22 (Que. C.A.).

guilty plea tendered under what is now s.606(4) of the Code.⁵⁸⁰ However, judicial supervision is difficult because of the invisibility of plea bargaining.

Fortin considered that this clandestine practice carried many risks affecting the fairness of prosecutorial conduct and the voluntariness of the resulting bargained guilty pleas. These dangers were worsened by the fact that there was little opportunity for the trial judge to ascertain the terms and circumstances of an agreement, and to supervise the conduct of the prosecution. Bargains struck beyond the reach of judicial scrutiny were susceptible to being influenced by many factors unrelated to the interests of justice, and as a consequence, the reliability of a bargained guilty plea, in terms of its voluntariness and factual accuracy, might be highly suspect.⁵⁸¹

2. Plea bargaining in England

Plea bargaining in England, while not as widespread as in the United States or even in Canada, appears to be equally problematic.⁵⁸²

⁵⁸⁰ Id at 10-11, citing, as an example, R. v. Gray (1981), 24 C.R. (3d) 109 (Sask. Prov. Ct.), where the trial judge would not consider a plea to a count of common assault as the victim had in fact suffered bodily harm.

⁵⁸¹ J. Fortin, Preuve Pénale (1984) at 396-398.

⁵⁸² R.V. Ericson & P.M. Baranek, The Ordering of Justice: A Study of Accused Persons as Dependents in the Criminal Process (1982) at 112.

Baldwin and McConville⁵⁸³ noted that plea bargaining in England had not reached the same level as in the United States because there were several factors inhibiting its use. First, in England there was a much more flexible sentencing structure than in the United States, and prosecution counsel were not permitted to make specific sentence recommendations to the court; therefore there could be no bargaining over sentence. Second, it was fundamental in England that the charge match the facts, so that the Crown prosecutor's ability to reduce charges as part of a bargain was quite restricted. Third, the courts of England had retained much of the discretion which in the United States was exercised by the prosecutor.⁵⁸⁴

Baldwin and McConville found that there were similarities between the English and American systems in the factors which tended to encourage plea bargaining: first, the considerable pressures of work for prosecutors, with administrative efficiency depending on a steady stream of guilty pleas; second, in both jurisdictions accused were pressured to plead guilty by the well-known fact that judges would be

⁵⁸³ J. Baldwin & C. McConville, "Conviction by Consent: A Study of Plea Bargaining and Inducements to Plead Guilty in England" (1978), 7 *Anglo-American Law Review* 271.

⁵⁸⁴ *Id* at 272-273. H.H.A. Cooper, "Plea Bargaining: A Comparative Analysis", [1972] 5 *International Law and Politics* 427 at 437-438, suggested a further factor inhibiting plea bargaining was greater disclosure of the prosecution case at pre-trial stage. However, the English trial judge's greater discretion caused problems of its own, as it would appear that one of the English appellate courts' greatest concerns about plea bargaining was judicial involvement therein: *R. v. Turner* [1970] 2 All E.R. 281; 54 *Crim. App. R.* 352 (U.K.C.A.).

more lenient to those who did not insist on trial; third, prosecutors would charge fully, creating a climate conducive to bargaining; and fourth, defence counsel would advise the accused in such a forceful manner as to induce a guilty plea.⁵⁸⁵

As a result of their study of committal papers and interviews with accused persons after conviction based on guilty pleas, Baldwin and McConville observed that the guilty plea was not an accurate method of determining guilt. They found that guilty pleas had been entered in cases involving factual disputes that would have best been resolved by a jury, and in cases where there was not even a sound basis for the charge. Their study also found that fifty eight percent of accused who had been convicted on a guilty plea still considered themselves innocent.⁵⁸⁶ They stated,

"The most important point here, it seems to us, is not so much whether any defendant was in fact innocent... but rather that the defendants in questions ought not to have been deprived of the opportunity of having their cases determined by a jury... it is wholly wrong, in our view, that defendants, who were involved in cases in which serious and contentious issues would have been raised, should have been subjected to pressure of an irresistible nature to plead guilty."⁵⁸⁷

Baldwin and McConville tested the existing practice of plea bargaining in England against three fundamental principles morally associated with the British legal system:

⁵⁸⁵ J. Baldwin and C. McConville, "Conviction by Consent: A Study of Plea Bargaining and Inducements to Plead Guilty in England" (1978), 7 *Anglo-American Law Review* 271 at 276-278.

⁵⁸⁶ *Id* at 284.

⁵⁸⁷ *Id* at 286.

" (1) that a record be taken of the proceedings in criminal cases; (2) that the defendant's choice of plea be free and voluntary; (3) that each case be disposed of according to the evidence."⁵⁸⁸

They found that none of these principles were fully satisfied in proceedings involving bargained guilty pleas. There tended to be disagreement or confusion about what took place in pre trial discussions between defence counsel, prosecutor and judge, making assertion of rights on appeal very difficult.⁵⁸⁹ While trial judges were not allowed to pressure an accused into pleading guilty, their well known practice of giving more lenient sentences for conviction on a guilty plea than after trial, tended to exert a powerful influence on the accused's decision to plead guilty.⁵⁹⁰ Further, the English courts permitted defence counsel to use a substantial degree of persuasion in advising an accused to plead guilty.⁵⁹¹ Baldwin and McConville also found that the presumption of innocence appeared to have little relevance to the context of negotiated pleas, with only "...a perfunctory regard for the mechanism of establishing a case."⁵⁹² They concluded,

"...current procedures in out-of-court plea settlements provide in themselves a devastating critique of the bargaining system. The reason for this is not the secrecy that surrounds such dealings (though this is reason enough to question them), rather it is because out-of-court plea settlement is not calculated to avoid

⁵⁸⁸ J. Baldwin and M. McConville, "Plea Bargaining and the Court of Appeal" (1979), 6 British Journal of Law and Society 200 at 209.

⁵⁸⁹ Id at 209-211.

⁵⁹⁰ Id at 212.

⁵⁹¹ Id at 212-215.

⁵⁹² Id at 216.

unjust outcomes. Indeed, one might argue that it is so designed that injustice is likely to be a standard feature."⁵⁹³

3. Plea bargaining in the United States

Because much of the critical literature on plea bargaining is American the problems of plea bargaining in the United States are considered in some detail. While there are significant institutional differences between the American district attorney and the Canadian Crown prosecutor, and differences in the volume and character of plea bargaining in the United States and Canada, the key issues of ensuring voluntariness and accuracy are the same.⁵⁹⁴ Thus criticisms of the

⁵⁹³ Id.

⁵⁹⁴ See, F.D. Cousineau and S.N. Verdun-Jones, "Evaluating Research into Plea Bargaining in Canada and the United States: Pitfalls Facing the Policy Makers" (1979), 21 Canadian Journal of Criminology 293. In this critical review of the literature on the plea bargaining phenomenon in the United States and Canada Cousineau and Verdun-Jones cast doubt on many of the assumptions upon which this literature is based. In particular, they pointed out that there was no foundation for the assumption that plea bargaining was a necessary evil in a criminal justice system on the brink of collapse because of overwhelming caseloads, and, that, to the contrary, there was evidence to suggest that an increase in the trial rate would not necessarily involve an increase in court resources. They refuted the assumptions that high rates of guilty pleas and low trial rates, heavy criminal caseloads, and the practice of plea bargaining were of relatively recent origin. They also questioned the general applicability of theories derived from examining plea bargaining practices in a single jurisdiction. Cousineau and Verdun-Jones concluded that the most critical defect of the literature was its failure to analyze plea bargaining in the context of the entire criminal justice system. They suggested that in the future, "A major priority must be the development of a broad systems approach to the whole area of criminal justice research and policy making." (at 305).

ineffective protections against coercion and conviction of the innocent in the United States have relevance to the issue of plea bargaining in Canada.

The United States Supreme Court appears to have accepted, without any proof, that plea bargaining was an inevitable and essential feature of the American criminal justice system.⁵⁸⁵ The court implied that all that was required to keep plea bargaining within the bounds of procedural and constitutional acceptability was some "proper administration". The court stated in Santobello v. New York⁵⁸⁶ that

"...the disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining" is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subject to a full scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities."

This would appear to be the theoretical foundation for subsection (e) of section 11 of the United States Federal Rules of Criminal Procedure, regulating the acceptance of bargained guilty pleas. The approach in Rule 11(e) is to lay down guidelines to increase the visibility of the process, and thereby, minimize the risk that an accused will be misled or confused as to the consequences of pleading

⁵⁸⁵ F.D. Cousineau & S. N. Verdun-Jones, "Evaluating Research into Plea Bargaining in Canada and the United States: Pitfalls Facing the Policy Makers" (1979), 21 Canadian Journal of Criminology 293 at 298. See also, S.M. Davis, "The Guilty Plea Process: Exploring the Issues of Voluntariness and Accuracy" (1972), 6 Valparaiso University Law Review 111 at 117-118.

⁵⁸⁶ (1971), 404 U.S. 257 (U.S.S.C.) at 260. See M.G. Hermann, Rules of Criminal Procedure for the United States District Courts (2d ed. 1985) at 102-102.1.

guilty.⁵⁹⁷ The judicial approbation of plea bargaining also appears to be confirmed by subsection (d) of Rule 11, which distinguishes threats and promises made in the course of plea bargaining from other forms of coercion which may affect the voluntariness of a subsequent guilty plea.⁵⁹⁸ Subdivision (e) gives recognition to the propriety of plea discussions and plea agreements if they are disclosed in open court, and subject to being accepted or rejected by the trial judge.⁵⁹⁹ The detailed requirements of subsection (e) of Rule 11 also ensure that the prosecutor is held strictly to the terms of the bargain and that the accused is not unwittingly drawn into a bargain that the prosecutor cannot honour.⁶⁰⁰

Subsection (d) and (e) of Rule 11 provide as follows:

"(d) Insuring that the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

(e) Plea Agreement Procedure

(i) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage

⁵⁹⁷ M.G. Hermann, Rules of Criminal Procedure for the United States District Courts (2d ed. 1985) at 102.1 and 117.

⁵⁹⁸ However, it may be that subdivision (d) was designed to allow a court to reject an agreement reached by an unrepresented defendant unless the court is satisfied acceptance will adequately protect the accused's rights and the interests of justice: Id at 117.

⁵⁹⁹ Id at 114 and 116.

⁶⁰⁰ Id at 102.3.

in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

- (A) move for dismissal of other charges; or
- (B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
- (C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement [see (3) and (4) below], or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision e(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement..."

The additional requirement in subsection (f) of Rule 11 that a court should not enter judgment on any guilty plea without first making inquiry to satisfy it that there is a factual basis for the plea, serves to control the scope of plea bargaining by ensuring that there is some factual support for the plea that is entered. It has been held that the

factual basis requirement necessitates that there be a factual basis for every element of the crime to which the accused pleaded,⁶⁰¹ although it need not be met through the accused's own admission.⁶⁰² As subdivision (f) does not specify any particular type of inquiry, an inquiry might be made of the accused, prosecutor, defence attorney, or by any other means that is appropriate in the circumstances of the case.⁶⁰³

It has been held that voluntariness with respect to the decision to plead guilty does not require that the accused's decision reflect a "wholly unrestrained will", but that it constitute in the circumstances, an intelligent choice between available alternatives.⁶⁰⁴ Thus, this notion of voluntariness itself is relatively constrained, and a certain degree of coercion of the accused by the prosecutor will be permitted. Hence the United States Supreme Court has held that it is permissible for a prosecutor to threaten the accused with more serious charges warranted by the evidence if the accused will not plead guilty to the crime as charged, because this is merely presenting the accused with the unpleasant alternatives.⁶⁰⁵ The court has suggested, however, that a

⁶⁰¹ Id at 99, citing United States v. Glass, 720 F 2d 21 (8th Cir. 1983).

⁶⁰² Id at 99, citing North Carolina v. Alford (1970), 400 U.S. 25 (U.S.S.C.).

⁶⁰³ Id at 121.

⁶⁰⁴ R.B. McNamara, Constitutional Limitations on Criminal Procedure (1982) at 184-185, citing Rosado v. Civiletti, 621 F 2d 1179 (2d Cir. 1980); Brady v. United States (1970), 397 U.S. 742.

⁶⁰⁵ Id at 185, citing Bordenkircher v. Hayes (1978), 434 U.S. 35 (U.S.S.C.).

prosecutor should not charge a more serious offence after negotiations break down without giving the accused notice of this possibility.⁶⁰⁶ A prosecutor is, of course, permitted to encourage a guilty plea by offering a more lenient sentence or threatening a harsher sentence if the accused goes to trial,⁶⁰⁷ and may even resort to threats or promises to the accused's family or loved ones in order to induce a guilty plea.⁶⁰⁸

Further, there is no specific penalty which is so severe (eg. the death penalty) that threatening it automatically renders the guilty plea involuntary, unless it can be shown that the accused was so gripped by fear of the penalty or hope of leniency that he could not rationally choose how to plead.⁶⁰⁹ However, it would seem that the courts permit greater coercion by prosecutors than by legislators.⁶¹⁰ Thus, in limited circumstances a statutory scheme which punishes those who exercise their right to have a trial may be unconstitutional. For example, in United States v. Jackson,⁶¹¹ a case which the Supreme Court of the United States

⁶⁰⁶ Id.

⁶⁰⁷ Id. at 186.

⁶⁰⁸ Id. at 188-189.

⁶⁰⁹ Id. at 186, citing Brady v. United States (1970), 397 U.S. 742 (U.S.S.C.); North Carolina v. Alford (1970), 400 U.S. 25 (U.S.S.C.).

⁶¹⁰ Id. at 188.

⁶¹¹ (1968) 390 U.S. 570 (U.S.S.C.), cited in R.B. McNamara, Constitutional Limitations on Criminal Procedure (1982) at 187.

was subsequently at pains to distinguish,⁶¹² the sentencing portion of the federal kidnapping statute which provided that the maximum penalty for conviction on a guilty plea was life imprisonment whereas an accused convicted at trial could be sentenced to death, was struck down for needlessly encouraging guilty pleas and jury waivers.

The requirement that the guilty plea be voluntary includes the crucial element that the accused understand the crime and the consequences of pleading guilty so that the plea amounts to an intelligent admission of the crime charged.⁶¹³ If the record of proceedings does not "affirmatively show" that the guilty plea was intelligently and voluntarily made, and if the validity of the plea is subsequently questioned, the government bears the burden of showing its acceptability.⁶¹⁴ Accordingly, Rule 11(g) of the U.S. Federal Rules of Criminal Procedure requires that where an accused pleads guilty or nolo contendere, a verbatim record of the proceedings be made, including the court's advice to the accused, the inquiry into the voluntariness of the

⁶¹² Id at 187-188, citing Corbitt v. New Jersey (1978), 439 U.S. 212 (U.S.S.C.).

⁶¹³ Id at 189-191. It also means that a prosecutor cannot demand specific performance of a plea bargain. The requirement that a guilty plea be intelligently made necessitates that it be knowingly made, and that it be a voluntary and rational choice among the alternatives available to the accused. As well, the guilty plea being a waiver of constitutional rights, it is necessary for the accused to be competent to effect such waiver.

⁶¹⁴ Id at 195, citing Boykin v. Alabama (1969), 395 U.S. 238 (U.S.S.C.).

plea and any plea agreement, and the inquiry into the accuracy of the plea.⁶¹⁵

Thus it appears that Rule 11 of the Federal Rules of Criminal Procedure allows plea bargaining to continue virtually unrestrained, but adds a layer of judicial inquiry at the arraignment stage, to review the terms of the plea bargain in the broader context of an inquiry into the acceptability of the resultant guilty plea. There is in this Rule no censure of the practice of plea bargaining. Indeed, there is implicit in the Rule and the surrounding case law, the view that plea bargaining is essential to the modern American justice system, and that this justifies some discreet compromising of constitutional values. Because this approach artificially limits consideration of voluntariness and accuracy, it has been heavily criticized as a solution to the problem of plea bargaining.

Davis⁶¹⁶ suggested that, notwithstanding the frequent references to voluntariness as being an essential element for the acceptability of a plea, the case law in fact revealed that the concept of voluntariness was illusory and obscured the more exact requirement that the plea be accurate. While steadfastly maintaining that voluntariness was an essential factor in the acceptability of a guilty plea, the United

⁶¹⁵ M.G. Hermann, Rules of Criminal Procedure for the United States District Courts (2d ed. 1985) at 97, 106.1 and 122.

⁶¹⁶ S.M. Davis, "The Guilty Plea Process: Exploring the Issues of Voluntariness and Accuracy" (1972), 6 Valparaiso University Law Review 111 at 125.

States Supreme Court appears to have been content to obfuscate on this issue where there was sufficient evidence of actual guilt.⁶¹⁷ Thus in the Brady trilogy cases,⁶¹⁸ the Supreme Court found guilty pleas, entered in circumstances which might well have been viewed as highly coercive, to be voluntary. The test enunciated in Brady v. United States was as follows:

"[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes)."⁶¹⁹

This test, in allowing some considerable latitude for plea bargaining, necessarily made the voluntariness standard subordinate to considerations of pragmatism and expediency. Thus the accuracy requirement, in demanding some evidence that the accused actually

⁶¹⁷ Id at 123-125.

⁶¹⁸ Id at 124, citing North Carolina v. Alford (1970), 400 U.S. 25 (U.S.S.C.); Brady v. United States (1970), 397 U.S. 742 (U.S.S.C.); Parker v. North Carolina (1970), 397 U.S. 790 (U.S.S.C.). For example, in Alford the accused agreed to plead guilty in order to avoid probable imposition of the death sentence. At the time of entering his plea, Alford protested his innocence, saying, "I pleaded guilty on second degree murder because they say there is too much evidence, but I ain't shot no man, but I take the fault for the other man. We never had an argument in our life and I just pleaded guilty because they say if I didn't they would gas me for it, and that is all." (footnote 2). The United States Supreme Court upheld the guilty plea as representing an informed and voluntary choice by the accused, effectively disregarding the highly coercive nature of the choice which had been put to Alford. This reasoning failed to recognize how susceptible an accused might be to accept a plea bargain rather than face the risks of fighting for his innocence.

⁶¹⁹ (1970), 397 U.S. 742 (U.S.S.C.) at 755.

committed the offence to which he pleads guilty, only serves the purpose of corroborating the guilty plea, whether it be truly voluntary or the result of allowable coercion; and of sorting out those "voluntary" guilty pleas which have no basis in fact.⁶²⁰ Davis argued that in the context of plea bargaining, the difficulties in ascertaining whether the standards of voluntariness and accuracy had been met were compounded by the strength of the inducements offered to the accused in exchange for a guilty plea,⁶²¹ and by the conspiratorial and clandestine nature of the plea bargaining process itself.

MacDonald⁶²² argued that the differences in sentencing of persons convicted on a guilty plea or convicted after trial, and the prosecution's use of charge reduction offers to induce guilty pleas, had the effect of imposing a penalty on an accused for exercising his constitutional right to trial. Further the plea bargaining process gave little regard to factual guilt, with prosecutors ignoring the presumption of innocence and making their best offers to accused against whom the case was the weakest. MacDonald cautioned,

⁶²⁰ S.M. Davis, "The Guilty Plea Process: Exploring the Issues of Voluntariness and Accuracy" (1972), 6 Valparaiso University Law Review 111 at 125-127.

⁶²¹ Id at 129.

⁶²² M. MacDonald, "Guilty Pleas and the Criminal Process: Encouragement or Coercion?" (1979), 48 University of Cincinnati Law Review 567.

"To think that an innocent defendant charged with a serious crime is not likely to plead guilty to a drastically reduced charge with a light penalty is to ignore reality."⁶²³

Similarly, Finkelstein⁶²⁴ found that accused persons who considered themselves to be innocent were often persuaded by a particularly good offer, to plead guilty and forego their right to, and avoid the risk of, a trial.⁶²⁵ His survey of plea bargaining practices in the United States Federal Courts led him to conclude that the relationship between voluntariness and accuracy needed to be seriously considered in assessing the acceptability, from a constitutional and ethical standpoint, of a guilty plea.⁶²⁶ His analysis of statistical data on rates of conviction, acquittal and guilty pleas demonstrated that at least one third of persons pleading guilty in federal jurisdictions with a high rate of guilty pleas, would have escaped conviction if they had insisted on a trial.⁶²⁷ Finkelstein thus pointed out the irony in the fact that while

"...our formal adversary system is hedged with protections claimed to be vital for the accused - including the privilege against self-incrimination and the requirement of proof beyond a reasonable doubt - it appears that informal, and less visible, administrative practices have been used to induce convictions by "consent" in a

⁶²³ Id at 573.

⁶²⁴ M.O. Finkelstein, "A Statistical Analysis of Guilty Plea Practices in the Federal Courts" (1975), 89 Harvard Law Review 293.

⁶²⁵ Id at 293-295.

⁶²⁶ Id at 295.

⁶²⁷ Id at 309-310.

significant number of cases in which the protections of the formal system would have precluded a condemnation."⁶²⁸

Finkelstein's study demonstrated the very serious risk that in high volume, high guilty plea jurisdictions, prosecutors were using overwhelming pressure to induce guilty pleas to settle their weakest cases.⁶²⁹ Finkelstein pointed out that the factual basis determination by the trial judge usually depended on a brief, one-sided review of the prosecutor's evidence. Therefore it provided little assurance of the reliability of the guilty plea. Similarly, reliance on the accused's guilty plea as a confession of culpability could be very risky, depending on the strength of the inducements to plead guilty.⁶³⁰

Alschuler explored the coercive nature of plea bargaining, giving the following example of an innocent accused's dilemma:⁶³¹

"San Francisco defense attorney Benjamin M. Davis recently represented a man charged with kidnapping and forcible rape. The defendant was innocent, Davis says, and after investigating the case Davis was confident of an acquittal. The prosecutor, who seems to have shared the defence attorney's opinion on this point, offered to permit a guilty plea to simple battery. Conviction on this charge would not have led to a greater sentence than thirty days' imprisonment, and there was every likelihood that the defendant would be granted probation. When Davis informed his client of this offer, he emphasized that conviction at trial seemed highly improbable. The defendant's reply was simple: "I can't take the chance"."

⁶²⁸ Id at 311.

⁶²⁹ Id at 310.

⁶³⁰ Id.

⁶³¹ Alschuler, "The Prosecutor's Role in Plea Bargaining" (1968), 88 University of Chicago Law Review 36 at 61, cited in K. Kipnis, "Criminal Justice and the Negotiated Plea" (1976), 8 Ethics 93 at 98.

Kipnis likened the coercive nature of the prosecutor's offer of such a bargain to an accused to that of the gunman who demands, "Your money or your life":

"Both the gunman and the prosecutor require persons to make hard choices between a very certain smaller imposition and an uncertain greater imposition. In the gunman situation I must choose between the very certain loss of my money and the difficult-to-assess probability that my assailant is willing and able to kill me if I resist. As a defendant I am forced to choose between a very certain smaller punishment and a substantially greater punishment with a difficult-to-assess probability. As the size of the certain smaller imposition comes down and the magnitude and probability of the larger imposition increases, it becomes more and more reasonable to choose the former... Davis' client must decide whether to accept a very certain, very minor punishment or to chance a ruined life. Of course the gunman's victim can try to overpower his assailant and the defendant can attempt to clear himself at trial. But the same considerations that will drive reasonable people to give in to the gunman compel one to accept the prosecutor's offer."⁶³²

Kipnis suggests that this present a moral dilemma for defence counsel. If bargains are an option, it is difficult to see how counsel can fairly advise an innocent accused to go to trial and face the risk of conviction and a heavy sentence, when the bargained guilty plea offers such relatively certain and minimal risks.

At the same time, a serious distortion of the values inherent in the traditional system of criminal justice is effected by allowing prosecutor and defence counsel to bargain for the resolution of a criminal charge. Under a system of bargained justice, the optimum agreement from the accused's perspective is one in which, despite compelling evidence of guilt of a serious criminal offence, the accused

⁶³² K. Kipnis, "Criminal Justice and the Negotiated Plea" (1976), 8 Ethics 93 at 98-99.

is allowed to plead to a substantially reduced charge, with the prosecutor making submissions in support of minimal punishment. From the prosecutor's perspective, the optimum bargain appears to be one where the accused agrees to plead guilty to the charge, in spite of the absence of strong evidence upon which to found a conviction if the matter were to go to trial. The pursuit of these kinds of agreements may be totally inconsistent with, on the one hand, the presumption of innocence and the requirement of proof beyond a reasonable doubt, and on the other, the social policy underlying the imposition of criminal law sanctions. Plea bargaining appears to be antithetical to the fundamental notion that in the criminal law context, a person ought, within the limits of justice, to get what he or she deserves.⁶³³

Kipnis suggested that people should be appalled by the role of bargaining in criminal law and its incompatibility with the two principles institutionalized in the liberal-democratic approach to criminal justice, ie. that only those who are clearly guilty of certain serious wrongdoing deserve an officially administered and proportional punishment; and that certain basic liberties should be respected in bringing the guilty to justice.⁶³⁴ Kipnis argued that disregard of these principles would result in systemic injustice. He identified plea bargaining with its focus on compromise rather than exactitude as being

⁶³³ Id at 104.

⁶³⁴ Id at 101-102.

"systemic carelessness in the administration of punishment."⁶³⁵ Using the example of a person charged with armed robbery, an offence for which he said a person might receive five to seven years imprisonment if convicted by a jury, Kipnis pointed out the unsatisfactory nature of plea bargains. In this example, the prosecutor offers to accept a guilty plea to a low-grade felony with only a probationary sentence. If the accused is guilty and accepts the bargain, he will receive far less punishment than is deserved; whereas if he is innocent, and accepts the bargain, he will be unfairly punished for something he did not do. In both cases, Kipnis' first principle of "desert" is violated. If one can assume the justice of the trial process and the sentences imposed upon conviction after a trial, then it is clear that plea bargaining will never, barring accidents, result in justice being done.⁶³⁶

Kipnis pointed out that in the context of a bargained plea the only protection of the innocent was the requirement of a factual basis. However, the high proportion of persons who asserted their innocence after conviction by guilty plea,⁶³⁷ indicated that the factual basis standard was seriously deficient. Kipnis concluded,

"Now it is one thing to show to a judge that there are facts which support a plea of guilty and quite another to prove to twelve jurors in an adversary proceeding guilt beyond a reasonable doubt. Plea bargaining substantially erodes the standards of guilt and it

⁶³⁵ Id at 103.

⁶³⁶ Id at 103-104.

⁶³⁷ Id at 105, referring to A.S. Blumberg, Criminal Justice (1967) at 91: In a study of 724 defendants who had pleaded guilty, only 13.1 percent admitted guilt to an interviewer, while 51.6 percent asserted their innocence.

is reasonable to assume that the sloppier we are in establishing guilt, the more likely it is that innocent persons will be convicted. So apart from having no reason whatever to believe that the guilty are receiving the punishment they deserve, we have far less reason to believe that the convicted are guilty in the first place than we would after a trial."⁶³⁸

Langbein drew parallels between plea bargaining and some of the most coercive practices in the history of criminal procedure. In one article he compared it to the use of torture in medieval Continental Europe.⁶³⁹ The availability of torture and the forced confession as a substitute means of gathering evidence helped preserve the medieval European law of proof for cases where there were two eyewitnesses or the accused had voluntarily confessed.⁶⁴⁰ Langbein suggested this paralleled developments in American criminal procedure which had so complicated and formalized criminal trials that they became too expensive and time consuming to be universally available. Instead of insuring that every accused would be accorded a fair trial, these developments in fact had insured that the trial process could not possibly be available to every accused person. As a result the vast majority of cases were settled by the entering of coerced guilty pleas, without the benefit of any of the elaborate procedural safeguards of a full trial.⁶⁴¹ Langbein argued that coercing accused persons to plead

⁶³⁸ K. Kipnis, "Criminal Justice and the Negotiated Plea" (1976), 8 Ethics 93 at 106.

⁶³⁹ J.H. Langbein, "Torture and Plea Bargaining" (1978), University of Chicago Law Review 3.

⁶⁴⁰ Id at 3-8, 12.

⁶⁴¹ Id at 10-13. Langbein also compared the American prosecuting attorney's almost limitless power to investigate, prosecute and settle criminal matters without independent adjudication by a judge, to that of the medieval inquisitor: Id

guilty sacrificed all the values that the criminal trial process was meant to serve:⁶⁴²

"Like the medieval European lawyers before us, we have been unable to admit that our theory of proof has resulted in a level of procedural complexity and safeguard that renders our trial procedure unworkable in all but exceptional cases. We have responded to the breakdown of our formal system of proof by taking steps to perpetuate the ideology of the failed system, steps that closely resemble those taken by the architects of the law of torture. Like the medieval Europeans, we have presumed an unworkable trial procedure in form, we have devised a substitute non trial procedure to subvert the formal procedure, and we have arranged to place defendants under fierce pressure to "choose" the substitute."⁶⁴³

He compared Rule 11(d) of the Federal Rules of Criminal Procedure, which required a court to ascertain the voluntariness of a guilty plea without regard to whether it was induced by a plea bargain, with the medieval European rule that an accused had to repeat his confession voluntarily, but under threat of being tortured again if he recanted.⁶⁴⁴ Langbein considered the safeguard in the "voluntariness" requirement in Rule 11(d) to be illusory because it excluded from consideration the plea agreement which was itself the source of coercion.⁶⁴⁵ He also demonstrated the inadequacy of the factual basis inquiry, provided for in Rule 11(f), as a means of ensuring the accuracy of the guilty plea.⁶⁴⁶ It did not come close to the standard of proof of guilt beyond a

at 17-18.

⁶⁴² Id at 21.

⁶⁴³ Id at 20.

⁶⁴⁴ Id at 14.

⁶⁴⁵ Id.

⁶⁴⁶ Id at 15-16.

reasonable doubt, but rather, like medieval verification of forced confession, only required some corroboration of suspicion. While the degree of coercion in plea bargaining was substantially less than in the use of torture, common to both coerced guilty pleas and forced confessions was their intrinsic unreliability.⁶⁴⁷

George Pugh pointed out the irony of the American criminal justice system, under which, in theory, guilt or innocence was determined at a trial conducted in accordance with a full panoply of procedural safeguards, whereas, in reality, some eighty to ninety-five percent of convictions were obtained as a result not of trials but of guilty pleas, usually induced by plea bargaining.⁶⁴⁸ Thus, guilt was often determined by negotiation between defence counsel and the district attorney outside the procedural rules of the trial process.⁶⁴⁹

Ostrow also remarked upon the stark contrast between the American ideal of trial process and the reality of a guilty plea process aided by plea bargaining:⁶⁵⁰

"Trial is the paradigmatic process for administering criminal justice in the United States. Its hallmark is the constitutional and statutory rights that serve as obstacles to conviction. Even

⁶⁴⁷ Id at 16.

⁶⁴⁸ G.W. Pugh, "Ruminations Re Reform of American Criminal Justice (Especially Our Guilty Plea System): Reflections Derived from a Study of the French System" (1976), 36 Louisiana Law Review 947 at 948.

⁶⁴⁹ Id at 949.

⁶⁵⁰ E.J. Ostrow, "The Case for Preplea Disclosure" (1981), 90 The Yale Law Journal 1581.

though these rights weight the trial process in the defendant's favour, few defendants choose to stand trial. Most convictions result from guilty pleas.

The guilty plea process, unlike the trial process, is not weighted to disfavour conviction. No elaborate set of constitutional and statutory protection surrounds the defendant's threshold decision whether or not to stand trial. Rather, the primary obstacle to conviction by plea is the defendant's own perception of his chance of acquittal. Indeed, the preponderance of guilty-plea convictions is due chiefly to prosecutors implicitly and explicitly offering defendants advantages that appear to outweigh that chance."⁶⁵¹

Ostrow criticized the fact that in spite of the importance of the accused's ability to accurately assess the chances of acquittal at trial, there were no procedures to ensure disclosure of the prosecution case to the accused prior to the plea decision.⁶⁵² Without access to this information the accused was susceptible to overestimating the strength of the prosecution case, to "bluffing" by the prosecution, and to misrepresentation by defence counsel, all of which tended to give the prosecution a substantial bargaining advantage and to increase the likelihood that the accused would plead guilty.⁶⁵³

Ostrow found that the guilty plea process did not ensure factual accuracy. This was because trial judges tended to accept bargained pleas with only a cursory review of accuracy. Further, although the factual basis had to be established by an admission of guilt or by other evidence, the U.S. Constitution and Federal Rules gave no guidance as to the type of evidence to be considered or as to the applicable

⁶⁵¹ Id at 1581-1582.

⁶⁵² Id at 1583.

⁶⁵³ Id at 1584-1588.

standard of proof. Finally, the accused's admission was itself highly unreliable given the existence of strong incentives to lie.⁶⁵⁴ Ostrow concluded as follows:

"The present criminal justice system offers defendants many inducements to plead guilty, but affords them only minimal safeguards against unfair or inaccurate convictions. Moreover, prosecutors and defense attorneys can abuse the interests of defendants by taking advantage of the imbalance of information that pervades the criminal process. Despite these inadequacies, the current guilty-plea process, which gains what legitimacy it has from the defendant's consent to waive trial, does not require that the defendant be given a meaningful opportunity to make his consent fully informed."⁶⁵⁵

Cooper⁶⁵⁶ suggested that there was inherent in the adversarial criminal justice system the potential for plea bargaining to become an important adjustment mechanism to ensure public satisfaction with the results of the justice system. He argued that plea bargaining was so entrenched in the United States because the results of the formal criminal justice system were generally viewed as unsatisfactory:

"A satisfactory system of criminal justice administration must match its factual determinations as closely as possible to the realities of the events which it is judging. The prevalence of plea bargaining suggests that the system is not presently capable of matching objective and legal reality to the satisfaction of those involved in the legal drama. Society feels that defective procedures allow the guilty to slip through the net; hence the pressures upon its principal agent, the District Attorney, to cut corners in order to catch some of those who would otherwise escape. The prisoner, on the other hand, feels oppressed by the system, which he sees as preventing him from making an adequate defense of his position. Currently, in the United States, the formal

⁶⁵⁴ Id at 1601.

⁶⁵⁵ Id at 1622.

⁶⁵⁶ H.H.A. Cooper, "Plea-Bargaining: A Comparative Analysis", [1972] 5 International Law and Politics 427.

procedures have failed by these criteria and the informal methods of plea-bargaining have produced greater satisfaction."⁶⁵⁷

In the United States lawyers have written with a growing sense of self doubt about the appalling contrast between their ideal of the constitutionally sanctioned criminal trial process and the all pervasive reality of an alternate summary process by which accused persons desperately bargain away their trial rights in the hope of gaining some advantage. The American courts and legislators have responded by imposing the standards of voluntariness, understanding, and factual accuracy on the guilty plea process. However, there have been grave compromises in the application of these criteria, with the objective of preserving the guilty plea process as an administratively necessary alternative to trial.

Summary

While the Canadian authors have not been prepared to concede that plea bargaining is as widespread and problematic as in the United States, it would appear that it is already considered by practising criminal lawyers to be somewhat inevitable in an overcrowded criminal justice system, where prosecutors have considerable discretion in charging and recommending sentence, and where the courts have sanctioned sentence reductions for guilty pleas.⁶⁵⁸ With some seventy to ninety

⁶⁵⁷ Id at 447-448.

⁶⁵⁸ K. Makin, "Plea Bargaining" *The Globe and Mail* (September 8, 1986) pp.1, 8.

five percent of all cases being resolved through guilty pleas (depending on local pressures and practices),⁶⁵⁹ the absence of any procedural rules to regulate the plea bargaining process would seem to be a serious deficiency in Canadian law.

In the absence of regulation of the plea bargaining process the pressures to plead guilty may be extreme. Aside from the possibility of improper threats as to what may happen if the accused does not cooperate, the prospect of conviction of a lesser offence than the one charged, of a shorter punishment than if the accused insists on going to trial, of a speedy resolution of an otherwise protracted ordeal, and of avoiding the uncertainty and risk of going to trial, may all have a powerful influence on the accused's plea decision. So great may be the inducements to plead guilty that even the innocent accused may feel that the advantage lies not in insisting on a claim of innocence but in striking a deal with the prosecutor and entering a guilty plea.

Because the guilty plea process is so susceptible to pressures that detract from the acceptability of the guilty plea, the conscientious performance of the trial judge's supervisory role is crucial. Unless

⁶⁵⁹ J. Fortin, Preuve Pénale (1984) at 387; Arbour and Taman, Criminal Procedure, Cases, Text & Materials (1980) at 405; Zander, "Acquittal Rates and Not Guilty Pleas: What do the Statistics Mean?", [1974] Criminal Law Review 401; A.B.A. Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty (App. Draft 1968) at 1-2; Newmann, Conviction. The Determination of Guilt or Innocence Without Trial (1966) at 3; S. Davis, "The Guilty Plea Process: Exploring the Issues of Voluntariness and Accuracy" (1972), 6 Valparaiso University Law Review 111 at 111.

the trial judge makes inquiry into the circumstances of the plea and any plea bargain there is no reason to assume that the guilty plea is voluntary, intelligent and accurate, and therefore no basis upon which to accept it as a legitimate means of resolving a criminal matter.

Thus, the casual approach to guilty plea hearings condoned in Brosseau v. The Queen⁶⁵⁰ and Adgey v. The Queen,⁶⁶¹ whereby the trial judge is under no obligation to make any inquiry unless something occurs which raises some doubt about the reliability of the plea, appears to be inadequate to deal with the phenomenon of plea bargaining. Indeed, it may be a veritable invitation for Crown and defence to disguise the most egregious bargains under a thin veneer of acceptability.

Finally, the suggestion, made by certain American commentators, that the trial process is becoming unworkable and that therefore the course of the future lies in embracing the guilty plea process, may not be entirely acceptable to Canadians on the threshold of a new constitutional era. The fact that the Canadian Charter of Rights and Freedoms so recently enshrined many of the procedural rights associated with the criminal trial process suggests that for Canadians the ideal criminal process may still be the jury trial. On this view the guilty plea process and plea bargaining ought to be judged against that ideal, rather than against considerations of administrative expediency.

⁶⁵⁰ [1968] S.C.R. 181 (S.C.C.).

⁶⁶¹ (1973), 13 C.C.C. (2d) 177 (S.C.C.).

Chapter 6. THE CONSTITUTIONALIZATION OF THE GUILTY PLEA

Prior to the enactment of the Charter of Rights and Freedoms, the rights affected by the plea of guilty were viewed simply as procedural rights to which an accused person was entitled but which the accused was free to waive either for tactical considerations or reasons of conscience. Thus a conviction based on a guilty plea was viewed as nothing more than a conviction by consent. It was assumed that an accused pleading guilty had made an intelligent and informed decision about the most sensible course of action to take, and the courts were extremely reluctant to second guess this decision by embarking on an elaborate inquiry into whether the accused was well-informed, was acting voluntarily, and whether there was a factual basis for the guilty plea.⁶⁶²

Before the Charter came into force the courts had not considered that the profound impact of the guilty plea on an accused's procedural rights should imply a corresponding duty upon the trial court to ensure that the accused fully understood the meaning and consequences of the guilty plea. The courts' failure to consider the existence of such an obligation was evident in all the cases on challenges to the acceptability of the guilty plea, discussed supra.

⁶⁶² Brosseau v. The Queen, [1968] S.C.R. 181 (S.C.C.); Adgey v. The Queen (1973), 13 C.C.C. (2d) 177 (S.C.C.).

Nor had the Bill of Rights been used to strengthen the procedural safeguards in the guilty plea process. Indeed, with few exceptions,⁶⁶³ the Bill of Rights does not appear to have been argued in the guilty plea cases decided since its coming into force. Therefore any special inquiry at this time into the potential impact of the Bill of Rights on the guilty plea process would seem to be intrinsically futile, given that in the twenty two years of its pre-eminence as Canada's domestic code of human rights, it so rarely served to assist a person put in jeopardy by oppressive state action,⁶⁶⁴ and given that it was not even considered in the Supreme Court of Canada decisions affirming the existing guilty plea process.⁶⁶⁵ Unless the Charter could breathe new life into the procedural rights of an accused, it would seem that the significance of the guilty plea process might be condemned to remain unfathomed.

By virtue of the Charter of Rights many of the procedural rights which an accused forgoes by pleading guilty are now constitutionalized, either by specific provisions such as section 11(c) (non compellability),⁶⁶⁶ section 11(d) (presumption of innocence),⁶⁶⁷ section

⁶⁶³ R. v. Ballegeer, [1969] 3 C.C.C. 353 (Man. C.A.); Regina v. Martel, 64 W.W.R. (n.s.) 152 (Alta. Dist. Ct.).

⁶⁶⁴ Regina v. Drybones, [1970] S.C.R. 282 (S.C.C.), being perhaps the most profoundly irreconcilable exception.

⁶⁶⁵ Brosseau v. The Queen, [1969] S.C.R. 181 (S.C.C.); Adgey v. The Queen (1973), 13 C.C.C. (2d) 17 (S.C.C.).

⁶⁶⁶ Section 11. Any person charged with an offence has the right... (c) not to be compelled to be a witness in proceedings against that person in respect of the offence.

11(f) (right to a jury trial where the offence is punishable by five years imprisonment or more),⁶⁶⁸ and section 13 (right against self-incrimination)⁶⁶⁹, or by the more general right in section 7 not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice.⁶⁷⁰

Despite the apparent relevance of these Charter provisions to the guilty plea process no case to date has considered how these constitutional rights may impact upon the legitimacy of the guilty plea process. Nor have the courts considered whether the notion of "conviction by consent" can withstand constitutional scrutiny, or whether a more stringent test of waiver is required with respect to constitutional rights than has hitherto been applied to the waiver of pre-Charter procedural rights.

⁶⁶⁷ Section 11. Any person charged with an offence has the right... (d) to be presumed innocent until proven guilty, according to law in a fair and public hearing by an independent and impartial tribunal.

⁶⁶⁸ Section 11. Any person charged with an offence has the right... (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.

⁶⁶⁹ Section 13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that person in any other proceedings, except in a prosecution for perjury or for giving of contradictory evidence.

⁶⁷⁰ Section 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The purpose of this chapter is to explore these questions, extrapolating from existing Charter case law a constitutional framework for the guilty plea process. The chapter will commence by examining the Charter jurisprudence on procedural fairness. This will be followed by a consideration of the issue of waiver of procedural and constitutional rights. Finally, there is a comparative note on the American constitutional law relevant to the guilty plea, with particular focus on the notion of waiver of rights by guilty plea.

A. Procedural fairness under the Charter

1. The right against self-incrimination

Perhaps the clearest indication that the guilty plea process may not go unscathed by Charter review can be found in the Supreme Court's interpretation of the s.13 guarantee against self-incrimination, in respect to the use on a retrial of the accused's previous testimony. In Dubois v. The Queen⁶⁷¹ Lamer J., for the majority, stated that,

"...the purpose of s.13, when the section is viewed in the context of s.11(c) and (d), is to protect individuals from being indirectly compelled to incriminate themselves, to ensure that the Crown will not be able to do indirectly that which s.11(c) prohibits. It guarantees the right not to have a person's previous testimony used to incriminate him or her in other proceedings."⁶⁷²

The majority concluded that the reference in s.13 to "other proceedings" had to include a retrial of the same offence or one

⁶⁷¹ (1985), 18 C.R.R. 1 (S.C.C.).

⁶⁷² Id at 8.

included therein. They reasoned that any other interpretation would have defeated the purposes of ss.13, 11(c) and 11(d) in that the accused would effectively have been conscripted to help the Crown in discharging its burden of "a case to be met" and thereby would have been denied the right to stand mute until a case had been made out.⁶⁷³ Such an interpretation would have permitted an indirect violation of s.11(c) by compelling the accused to testify, and of s.11(d) by forcing the accused to overcome a presumption of guilt raised by the introduction of the earlier testimony. Therefore the court held that the Crown could not introduce at a subsequent retrial the accused's testimony at the first trial. In reaching this decision, however, the Supreme Court left open the question whether the words "used to incriminate" in s.13 included use of the previous testimony to cross-examine an accused who chose to testify at the new trial.

The majority distinguished the case of R. v. Brown (No.2)⁶⁷⁴ which had previously been authority for the view that an accused's testimony from the first trial was admissible against the accused at the retrial. They did so on the basis that it was unclear what were the facts relied upon in reaching the decision in Brown and also, on the basis that the Charter permitted a fresh approach to the question of the admissibility at a new trial of an accused's earlier testimony.

⁶⁷³ Id at 13.

⁶⁷⁴ [1963] 3 C.C.C. 326 (N.W.T.C.A.), reversed in [1963] 3 C.C.C. 341 (S.C.C.).

In Dubois the Supreme Court's judgment focused on the fundamental unfairness of permitting the Crown to use the accused's earlier testimony so as to create a presumption of guilt against the accused at the new trial. This approach was neither radical nor new, but merely an application of the general principle of the law of evidence, that in determining a question of admissibility of evidence, relevance and fairness must be balanced against each other in the trial judge's exercise of discretion.⁶⁷⁵ Thus, even before the Charter, it might have been argued that, the Dietrich⁶⁷⁶ case notwithstanding, a trial judge had a discretion not to admit at a new trial the earlier guilty plea, because its probative value was far outweighed by its prejudicial effect on the presumption of innocence and on the accused's ability to have a fair trial.

Be that as it may, the Charter analysis in Dubois appears to be applicable to the question of the admissibility at a new trial of a guilty plea tendered by the accused at the first trial. Because of its unambiguous and conclusive nature, the admission of a guilty plea has an even more gravely prejudicial effect on the accused's rights under ss.11(c), 11(d) and 13 of the Charter. Therefore it is arguable that the Supreme Court's decision in Thibodeau v. The Queen⁶⁷⁷ should be reaffirmed as expressing the correct general approach to the

⁶⁷⁵ J. Fortin, Preuve Pénale (1984) at 52-53.

⁶⁷⁶ (1970), 11 C.R.N.S. 22 (Ont. C.A.).

⁶⁷⁷ [1955] S.C.R. 646 (S.C.C.).

admissibility of a guilty plea in the Charter era. The technical distinction drawn in Regina v. Dietrich, between the admissibility of a guilty plea withdrawn by permission of the court and the admissibility of a guilty plea resulting in a conviction which is subsequently overturned for procedural error, ought to be rejected as no longer sustainable because it does not protect against blatant violations of Charter rights in respect to noncompellibility, self-incrimination, the presumption of innocence and, generally, the principles of fundamental justice.

2. The principles of fundamental justice

The cases interpreting s.7 of the Charter have not dealt specifically with the guilty plea process. However, they have begun to explore the concept of fundamental justice, both in its procedural and substantive aspects. The courts have cautiously tried to avoid making broad, ill-considered, statements of principle, and therefore, have left the theoretical impact of s.7 of the Charter largely unarticulated. In order to attempt to understand the theoretical implications of s.7, it is necessary to read "between the lines" of what the courts have written, and to draw in the linkages between the individual cases. Only by this process can one gather from the meagre jurisprudence an indication of how s.7 may ultimately impact on the guilty plea process.

While conceding that s.7 of the Charter might provide some additional protection of procedural rights beyond the protection of

natural justice, the courts in their early decisions interpreting s.7 were anxious to distinguish "the principles of fundamental justice" from the American concept of "due process," and to exclude any notion of "substantive due process" from the content of s.7.⁶⁷⁸ Thus for the most part, the courts held that such rights as they found to be protected by the Charter were already protected by the Bill of Rights or the principles of natural justice.

In the cases dealing with the issue whether there is a Charter right to counsel, the courts have been reluctant to interpret the principles of fundamental justice as providing any greater right than existed at common law. Thus, in Joplin v. Chief Constable of the City of Vancouver et al.⁶⁷⁹ McEachern C.J.S.C. considered that fundamental justice meant "justice and fairness, nothing more and nothing less."⁶⁸⁰ He found that for the purposes of the issue at hand, ie. whether there was a right to counsel at a police disciplinary hearing, notwithstanding Police (Discipline) Regulations to the contrary, the Charter provided no greater remedy than did the common law. He concluded that the common law right to justice and fairness did include such a right, and that

⁶⁷⁸ For example, R. v. Holman (1982), 28 C.R. (3d) 378 (B.C. Prov. Ct.); Re Jamieson and R. (1982), 70 C.C.C. (2d) 430 (Que. S.C.); Re Mason; Mason v. Canada (1983), 35 C.R. (3d) 393 (Ont. H.C.) at 397; R. v. Hayden (1983), 33 C.R. (3d) 363 (Man. Prov. Ct.); Latham v. Solicitor General of Canada (1984), 39 C.R. (3d) 78 (F.C.T.D.); Regina v. Powell et al. (1984), 9 C.R.R. 54 (Alta. Prov. Ct.) at 56-57.

⁶⁷⁹ (1982), 4 C.R.R. 208 (B.C.S.C.).

⁶⁸⁰ Id at 212.

therefore, the Regulation purporting to limit that right was ultra vires.⁶⁸¹

Similarly, in Re Deutsch and the Law Society of Upper Canada Legal Aid Fund⁶⁸² Craig J. expressed the view in Obiter that s.7 and/or 11(d) of the Charter only entrenched the right to funded counsel in a limited and indirect way. According to him, s.7, which entrenched the accused's right not to be deprived of his liberty except in accordance with the principles of fundamental justice, and s.11(d), which entrenched the right to a fair trial, only entrenched the right to funded counsel as it was enjoyed at common law. Thus, there was a Charter right to funded counsel in the "rare" cases where legal aid had been denied and the trial judge was satisfied that, because of the seriousness and complexity of the case, the accused could not receive a fair trial without counsel.⁶⁸³

The Ontario Court of Appeal in The Queen v. Rowbotham et al.⁶⁸⁴ took much the same approach to the question whether ss.7 and 11(d) of the Charter entrenched a right to funded counsel. The court stated that the framers of the Charter did not expressly constitutionalize the right of

⁶⁸¹ Id at 220-221.

⁶⁸² (1985), 16 C.R.R. 349 (Ont. H.C.).

⁶⁸³ Id at 358.

⁶⁸⁴ (March 22, 1988, Ont. C.A.). See also, Panacui v. Legal Aid Society of Alberta (1987), 54 Alta. L.R. (2d) 342 (Alta. Q.B.).

an indigent accused to funded counsel, because existing legal aid plans were generally considered to be adequate. They added,

"However, in cases not falling within provincial legal aid plans, ss.7 and 11(d) of the Charter, which guarantee an accused a fair trial in accordance with the principle of fundamental justice, require funded counsel to be provided if the accused wishes counsel, but cannot pay a lawyer, and representation of the accused by counsel is essential to a fair trial."⁶⁸⁵

In addressing the question of the appropriate remedy for a violation of this right, the court clearly indicated that it viewed this limited Charter right as being virtually equivalent to the accused's pre-existing common law right.⁶⁸⁶ They stated,

"...there may be rare circumstances in which legal aid is denied but the trial judge, after an examination of the means of the accused, is satisfied that the accused, because of the length and complexity of the proceedings or for other reasons, cannot afford to retain counsel to the extent necessary to ensure a fair trial. In those circumstances, even before the advent of the Charter, the trial judge had the power to stay proceedings until counsel for the accused was provided. Such a stay is clearly an appropriate remedy under s.24(1) of the Charter."⁶⁸⁷

In other contexts s.7 of the Charter has been given an equally narrow interpretation. In Re Potma and the Queen⁶⁸⁸ the Ontario Court of Appeal considered that the concepts of "fundamental justice" and "fair hearing", relevant to the availability for independent testing by the accused of ampoules used to analyze his breath samples, were the same whether considered under ss.7 and 11(d) of the Charter, under

⁶⁸⁵ Id at 104.

⁶⁸⁶ Id at 110-112, including the reference to Re Ewing and Kearny and the Queen (1974), 18 C.C.C. (2d) 356 (B.C.C.A.) at 365-366.

⁶⁸⁷ Id at 110-111.

⁶⁸⁸ (1983), 3 C.R.R. 252 (Ont. C.A.)..

ss.2(e) and 2(f) of the Bill of Rights, or under the common law. Robins J. noted that the right to make full answer and defence, the opportunity adequately to state one's case, had long been recognized as an essential ingredient of a fair trial.⁶⁸⁹ In the case of Duke v. The Queen⁶⁹⁰ the Supreme Court had held that the right to "a fair hearing in accordance with the principles of fundamental justice" in s.2(e) of the Bill of Rights meant

"...generally, that the tribunal which adjudicates upon [a person's] rights must act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case."⁶⁹¹

Robins J. described the concept of "fundamental justice" in s.7 of the Charter as being,

"like "natural justice" or "fair play,"... a compendious expression intended to guarantee the basic right of citizens in a free society to a fair procedure."⁶⁹²

Although the court held that this issue had been conclusively decided in the case of Duke v. The Queen under the Bill of Rights, they were careful to point out that the principles of fundamental justice recognized by the Charter were not immutable. Robins J. stated,

"The principles or standards of fairness essential to the attainment of fundamental justice are in no sense static, and will continue as they have in the past to evolve and develop in response

⁶⁸⁹ Id at 260.

⁶⁹⁰ (1972), 7 C.C.C. (2d) 474 (S.C.C.).

⁶⁹¹ Id at 479.

⁶⁹² Re Potma and the Queen (1983), 3 C.R.R. 252 (Ont. C.A.) at 260.

to society's changing perception of what is arbitrary, unfair or unjust."⁶⁹³

The notion that s.7 of the Charter allows for an evolutionary rather than revolutionary development of the content of procedural rights already recognized at common law and in the Bill of Rights was echoed by Dubin J.A. in R. v. Young.⁶⁹⁴ He noted that in s.7, of the Charter, unlike in s.2(e) of the Bill of Rights fundamental justice was not limited to the right to a fair hearing.⁶⁹⁵ He held that by virtue of s.7 there was

"...a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings. It is a power, however, of special application which can only be exercised in the clearest cases."⁶⁹⁶

He found that the circumstances of the case before him were such as to warrant an exercise of this discretion.

In Regina v. Corbett⁶⁹⁷ Craig J.A., relying on common law concepts, articulated a conservative interpretation of "fairness" in ss.7 and 11(d) of the Charter. He stated,

"I think that in submitting that an accused does not receive a fair trial within the meaning of s.7 or is not proven guilty according to law in a "fair" hearing by an independent and impartial tribunal [within the meaning of s.11(d)] if he is liable to be cross-

⁶⁹³ Id.

⁶⁹⁴ (1984), 40 C.R. (3d) 289 (Ont. C.A.).

⁶⁹⁵ Id at 317-319.

⁶⁹⁶ Id at 329-330.

⁶⁹⁷ (1984), 13 C.R.R. 250 (B.C.C.A.).

examined on his previous record, [counsel for the accused] takes too narrow a view of the word "fair". He seems to regard fairness solely from the point of view of the accused. We cannot so restrict the concept of fairness. Fairness is a relative term and involves consideration of the interests of the State as well as of the interest of the accused. I think this was the prevailing view before the Charter came into force, and I think, also, that this view is implicit in s.7 and s.11(d)...The phrase "principles of fundamental justice" in s.7 and the phrase "fair... hearing" in s.11(d) surely include justice and fairness from the State's point of view as well as from the accused's point of view. It would be unfair, particularly in a case such as this, to allow a case to go to the jury on the basis that the principal Crown witnesses should not be believed because they have criminal records, but that the accused should be believed because he does not, apparently, have a criminal record, although, in fact, he may have a criminal record."⁶⁹⁸

The Ontario Court of Appeal in Re United States of America and Smith⁶⁹⁹ was also of the view that s.7 and s.11(d) of the Charter had not wrought a significant change in the procedural rights available to an accused. The issue in Smith was whether ss.7 and 11(d) gave an alleged fugitive the right to cross examination on affidavits introduced at an extradition hearing. Houlden J.A. noted that because the presumption of innocence was unaffected by the results of the extradition hearing, s.11(d) of the Charter had no application to such a proceeding. He observed that the question of a right to cross-examine had already been decided unfavourably for the fugitive in respect to the concept of fundamental justice under s.2(e) of the Bill of Rights in the case of Re State of Wisconsin and Armstrong.⁷⁰⁰ Houlden J.A. concluded that the same approach was applicable under the Charter: having regard

⁶⁹⁸ Id at 265-266.

⁶⁹⁹ (1984), 8 C.R.R. 245 (Ont. C.A.); leave to appeal refused (May 17, 1984, S.C.C.).

⁷⁰⁰ (1973), 10 C.C.C. (2d) 271 (F.C.A.).

to the nature of extradition proceedings, being a mere inquiry to determine whether there was a sufficient case against a fugitive to justify his committal, the refusal of cross-examination was not in itself contrary to the principles of fundamental justice, even though s.7 might have some application to extradition proceedings.⁷⁰¹ In the alternative, Houlden J.A. ruled that if s.7 did grant a right to cross-examine witnesses in an interlocutory or preliminary proceeding, such right was not absolute and was subject to reasonable limits. Evidence as to the practice of other countries satisfied him that the limitations on the right to cross-examine were reasonable and justifiable under s.1 of the Charter.

The view expressed in these early Charter cases, that s.7 was little more than co-extensive with the procedural rights recognized at common law, under the concepts of natural justice and fairness, and under the Canadian Bill of Rights, would have added little support for the contention that s.7 of the Charter imposed a more stringent standard of acceptability for the guilty plea. However, subsequent decisions indicate that s.7 provides somewhat greater protection to an accused than was available at common law.

Some of the caution of the lower courts in interpreting s.7 of the Charter was reflected in the Supreme Court of Canada in the case of Re

⁷⁰¹ Re United States of America and Smith (1984), 8 C.R.R. 245 (Ont. C.A.) at 267.

Singh and Minister of Employment and Immigration,⁷⁰² in which only three of the six member court based their decision that s.71(1) of the Immigration Act, 1976 was of no force and effect on s.7 of the Charter,⁷⁰³ while the remaining three members reached the same result under s.2(e) of the Bill of Rights.⁷⁰⁴ All were agreed, however, that where there was risk to life, liberty or security of the person at the hands of a foreign power, a person was entitled to a fair adjudication into the merits of the claim for refugee status.

Wilson J., writing for herself and two other members of the court, found that s.7 of the Charter had been violated because the refugee claimant had not been given an adequate opportunity to state his case for refugee status and to know the case he had to meet.⁷⁰⁵ Having found a prima facie violation of s.7 rights, Wilson J. went on to consider the evidence adduced in support of s.1 arguments. She was not at all favourably disposed to accepting consideration of administrative convenience as a justification for overriding s.7 rights, stating,

"...I have considerable doubt that the type of utilitarian consideration brought forward... can constitute a justification for a limitation on the rights set out in the Charter. Certainly the guarantees of the Charter would be illusory if they could be ignored because it was administratively convenient to do so...The principles of natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in s.7

⁷⁰² (1985), 17 D.L.R. (4th) 422 (S.C.C.).

⁷⁰³ Wilson J., with Dickson and Lamer J.J. concurring.

⁷⁰⁴ Beetz J., with Estey and McIntyre J.J. concurring.

⁷⁰⁵ Id at 465.

implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles."⁷⁰⁶

In Reference Re s.94(a) of the Motor Vehicle Act (British Columbia),⁷⁰⁷ the Supreme Court of Canada considered at some length the scope of s.7. The specific question before the court in the Motor Vehicle Reference was whether an absolute liability offence with a mandatory minimum term of imprisonment violated s.7 of the Charter. The court was unanimous in holding that such a provision did offend s.7, a determination which involved consideration of both the procedural and substantive content of s.7 rights. For present purposes only the Court's views on the procedural content of s.7 need be considered.

Lamer J., writing for himself, Dickson C.J.C., Beetz, Chouinard and Le Dain J.J., prefaced his analysis of the meaning of s.7 by reiterating the Supreme Court's view that the proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one involving generous rather than legalistic interpretation.⁷⁰⁸ Lamer J. stated,

"In the framework of a purposive analysis, designed to ascertain the purpose of the s.7 guarantee and "the interests it was meant to protect" (R. v. Big M Drug Mart Ltd.), it is clear to me that the interests which are meant to be protected by the words "and the right not to be deprived thereof except in accordance with the

⁷⁰⁶ Id at 469. Wilson J. stated further, that even if such considerations were of some relevance under s.1, the arguments tendered in the case at bar were not sufficiently compelling to constitute a justification: Id at 470.

⁷⁰⁷ (1985), 18 C.R.R. 30 (S.C.C.).

⁷⁰⁸ Hunter et al. v. Southam Inc., [1984] 2 S.C.R. 145 (S.C.C.); R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 (S.C.C.); R. v. Therens, [1985] 1 S.C.R. 613 (S.C.C.).

principles of fundamental justice" of s.7 are the life, liberty and security of the person. The principles of fundamental justice, on the other hand, are not a protected interest, but rather a qualifier of the right not to be deprived of life, liberty and security of the person.

...As a qualifier, the phrase serves to establish the parameters of the interests but it cannot be interpreted so narrowly as to frustrate or stultify them. For the narrower the meaning given to "principles of fundamental justice" the greater will be the possibility that individuals may be deprived of these most basic rights."⁷⁰⁹

Lamer J. rejected the view that "the principles of fundamental justice" simply meant natural justice because this would deprive the right to life, liberty and security of the person of much of its scope.⁷¹⁰ Without describing specifically the content of s.7, Lamer J. defined in general terms the meaning of the "principles of fundamental justice". He stated,

"...Many [of the principles of fundamental justice] have been developed over time as presumptions of the common law, others have found expression in the international conventions on human rights. All have been recognized as essential elements of a system for the administration of justice which is founded upon a belief in "the dignity and worth of the human person"...

It is this common thread which, in my view, must guide us in determining the scope and content of "principles of fundamental justice." In other words, the principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system."⁷¹¹

Lamer J. further explained,

"Whether any given principle may be said to be a principle of fundamental justice within the meaning of s.7 will rest upon an

⁷⁰⁹ Reference Re s.94(2) Motor Vehicle Act (British Columbia) (1985), 18 C.R.R. 30 (S.C.C.) at 43-44.

⁷¹⁰ Id at 44-45. McIntyre J. agreed that fundamental justice involved more than natural justice (at 69).

⁷¹¹ Id at 45.

analysis of the nature, source, rationale and essential role of that principle within the judicial process and in our legal system, as it evolves.

Consequently, those words cannot be given an exhaustive content or simple enumerative definition, but will take on concrete meaning as the courts address alleged violations of s.7."⁷¹²

Wilson J. did not agree with Lamer J.'s description of the phrase "in accordance with the principles of fundamental justice" as being a qualification of the right to life, liberty and security of the person. Rather, she viewed the purpose of the phrase as being to protect the right against deprivation unless such deprivation was effected in accordance with the principles of fundamental justice.⁷¹³ With respect to the meaning of s.7 "principles of fundamental justice," she stated that one could assume that the legislature was familiar with the related concepts of natural justice and due process when it rejected those formulations in favour of "principles of fundamental justice". Acknowledging the interpretative difficulties of this new phrase, Wilson J. concluded that s.7 at least meant that

"...if the citizen is to be guaranteed his right to life, liberty and security of the person - then he certainly should not be deprived of it by means of a violation of a fundamental tenet of our justice system."⁷¹⁴

The Supreme Court's decision in the B.C. Motor Vehicle Act Reference has been criticized as "exceedingly vague" on the meaning of

⁷¹² Id at 53.

⁷¹³ Id at 65-66.

⁷¹⁴ Id at 66. Regarding the substantive content of s.7 see: Vaillancourt v. R., [1987] 2 S.C.R. 636; Schwartz v. R., [1988] 2 S.C.R. 443; and Whyte v. R., [1988] 2 S.C.R. 3 (S.C.C.).

fundamental justice.⁷¹⁵ The view, shared by the majority of the court, that this term referred to the basic tenets of our justice system did very little to assist in the application of this concept to the facts of a particular case. Nonetheless, in all probability, it was impossible to give a more precise formulation that would be satisfactory in all cases that might arise in the future.

The Supreme Court in the B.C. Motor Vehicle Act case gave no express indication that pre-Charter procedures might have to be improved in order to comply with s.7. Rather, there was only a reiteration of the view, already articulated in Singh v. Minister of Employment and Immigration,⁷¹⁶ that a person could not be deprived of the right to life, liberty or security of the person unless the principles of fundamental justice have been complied with. This, of course, merely restated the words of s.7 itself. The court also explained that the principles of fundamental justice included the fundamental principles of justice existing before the Charter came into force, but did not specify what else might be included. In her judgment, Wilson J. had pondered inconclusively on the difference in meaning between "principles of fundamental justice" and "fundamental principles of justice," and it may be that the ambiguity of the chosen phrase was intended to prevent courts restricting the scope of s.7 to common law principles with all

⁷¹⁵ P.W. Hogg, "The Meaning of Fundamental Justice" 18 C.R.R. 70 at 70.

⁷¹⁶ (1985), 17 D.L.R. (4th) 422 (S.C.C.) at 463.

their defects, and to invite courts to take a more principled and purposive approach to the idea of justice.

It was clear, however, from the result in the B.C. Motor Vehicle Act Case, that s.7 of the Charter permitted some re-evaluation and refocusing of pre-Charter procedural rights. In that case the established principle that a person should not be punished when he had not really done anything wrong, which until the Charter, could be excluded by enactment of an absolute liability offence, was all of a sudden given precedence over the clear legislative intent in s.94(2) of the British Columbia Motor Vehicle Act. This result effectively demonstrated what the court was hard-pressed to articulate, ie.: that for the most part the principles of fundamental justice existed at common law, but were sometimes overridden by legislation or limited by judicial exception; therefore, when applying these principles in the Charter context it might be necessary to liberate them from their legislated or common law limitations, and thereby permit them to take their place as fundamental and governing principles of justice.⁷¹⁷

This approach was more evident in Regina v. Oakes.⁷¹⁸ The Supreme Court stated that it was important to take a purposive approach to the interpretation of s.11(d) of the Charter. The court noted that at

⁷¹⁷ See D.M. Paccioco, Charter Principles and Proof in Criminal Cases (1987) at 75-77; L. Tremblay, "Section 7 of the Charter: Substantive Due Process?" (1984), 18 *University of British Columbia Law Review* 201.

⁷¹⁸ [1986] 1 S.C.R. 103 (S.C.C.).

common law the presumption of innocence had enjoyed long standing recognition but had been subject to certain statutory exceptions,⁷¹⁹ such as the presumption in s.8 of the Narcotic Control Act that if a court found an accused had been in possession of a narcotic, the accused was presumed to have been in possession for the purpose of trafficking.⁷²⁰ The Supreme Court struck down this presumption, and in so doing went far beyond the scope of the pre-Charter presumption of innocence.

Dickson C.J.C., delivering the judgment for himself, Chouinard, Lamer, Wilson and Le Dain JJ., described the values protected by the presumption of innocence in these broad terms:

"The presumption of innocence is a hallowed principle lying at the very heart of criminal law. Although protected expressly in s.11(d) of the Charter, the presumption of innocence is referable and integral to the general protection of life, liberty and security of the person contained in s.7 of the Charter (see Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, per Lamer J.) The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism by the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise."⁷²¹

⁷¹⁹ Id at 120-123, citing Woolmington v. Director of Public Prosecutions, [1935] A.C. 462 (U.K.H.L.).

⁷²⁰ R.S.C. 1970, c. N-1.

⁷²¹ Regina v. Oakes, [1986] 1 S.C.R. 103 (S.C.C.) at 119-120.

After reviewing the common law, Article 11 of the Universal Declaration of Human Rights,⁷²² and Article 14(2) of the International Covenant on Civil and Political Rights, 1966, Dickson C.J.C. defined the minimum content of the presumption of innocence in s.11(d) as follows:

"First, an individual must be proved guilty beyond a reasonable doubt. Second, it is the State which must bear the burden of proof...Third, criminal prosecutions must be carried out in accordance with lawful procedures and fairness."⁷²³

Dickson C.J.C. rejected pre Charter case law holding that the presumption of innocence was subject to statutory limitations.⁷²⁴ He stated,

"In Canada, we have tempered parliamentary supremacy by entrenching important rights and freedoms in the Constitution. Viscount Sankey's statutory exception proviso is clearly not applicable in this context and would subvert the very purpose of the entrenchment of the presumption of innocence in the Charter...Section 8 of the Narcotic Control Act is not rendered constitutionally valid simply by virtue of the fact that it is a statutory provision."⁷²⁵

In Oakes the Supreme Court also articulated a test for the purposes of s.1 of the Charter for reviewing laws that prima facie violated Charter rights. Dickson C.J.C. noted, that, having regard to the fact

⁷²² Adopted December 10, 1948, by the General Assembly of the United Nations.

⁷²³ Regina v. Oakes, [1986] 1 S.C.R. 103 (S.C.C.) at 121.

⁷²⁴ See, R. v. Appleby, [1972] S.C.R. 303 (S.C.C.), the leading case decided under s.2(f) of the Bill of Rights, in which the Supreme Court had rejected the argument that the presumption of innocence is s.2(f) had been violated by a statutory presumption because in Woolmington v. Director of Public Prosecutions, [1935] A.C. 462 (U.K.H.L.), the presumption of innocence had been held to be subject to statutory exceptions.

⁷²⁵ Regina v. Oakes, [1986] 1 S.C.R. 103 (S.C.C.) at 125.

that s.1 is invoked to justify a violation of a constitutional right or freedom which the Charter was designed to protect, where evidence was required to prove the constituent elements of the s.1 inquiry, such justificatory evidence would have to be "cogent and persuasive," establishing "a very high degree of probability."⁷²⁶ He identified two central criteria of justification. First, the objective had to be sufficiently important to warrant overriding a constitutionally protected right or freedom. Second, the means chosen to achieve the objective had to satisfy a three part test of proportionality: first, the means chosen had to be rationally connected to the objective in that they were carefully designed to achieve the objective, and not be arbitrary, unfair or based on irrational considerations; second, the means had to impair as little as possible the right or freedom in question; third, there had to be a proportionality between the effects of the measures and the objective.⁷²⁷ Dickson C.J.C. concluded that s.1 justification had not been established in the case before him in that, notwithstanding the importance of the objective of s.8 of the Narcotic Control Act, the means chosen did not satisfy the first part of the proportionality test.⁷²⁸ The Oakes test of justification, modified somewhat by the Supreme Court in Edwards Books and Art Ltd. v. The

⁷²⁶ Id at 138.

⁷²⁷ Id at 138-139.

⁷²⁸ Id at 139-142.

Queen⁷²⁹ and subsequent case law, has been applied by members of that court to instances where a prima facie violation of s.7 has been made out.⁷³⁰

The case of Oakes clearly demonstrates how under the Charter common law precedents are no longer strictly binding but have become a kind of springboard for the analysis of "fundamental justice." Thus the common law is relevant under the Charter, but where it falls short of the principles of fundamental justice, the courts, taking a purposive approach to the Charter, have to look beyond the common law for guidance as to the content of the Charter rights. This approach is equally

⁷²⁹ [1986] 2 S.C.R. 713 (S.C.C.) at 768-769 per Dickson C.J.C., interpreting Oakes: "Two requirements must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the legislative objective which the limitation is designed to promote must be of sufficient importance to warrant overriding a constitutional right. It must bear on a "pressing and substantial concern". Second, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective, they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights. The Court stated that the nature of the proportionality test would vary depending on the circumstances. Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement the Court has been careful to avoid rigid and inflexible standards."

⁷³⁰ Jones v. The Queen et al., [1986] 2 S.C.R. 284 (S.C.C.) at 322; Morgentaler et al. v. The Queen and A.G. Canada (1988), 62 C.R. (3d) 1 (S.C.C.). Wilson J. maintained reservations about the availability of s.1 justification in circumstances where a person had been deprived of the right to life, liberty or security of the person in a manner violative of the principles of fundamental justice, until Morgentaler.

applicable to analysis under s.11(d) and s.7, and presumably, to any other section of the Charter.

In Jones v. The Queen et al.⁷³¹ the majority of the Supreme Court considered that a provision of the Alberta School Act making school attendance compulsory unless an exemption had been obtained under the Act did not violate s.7 of the Charter. La Forest J., writing for Dickson C.J., Lamer J. and himself, considered the administrative structure of the School Act to be satisfactory for s.7 purposes. He wrote,

"Some pragmatism is involved in balancing between fairness and efficiency. The provinces must be given room to make choices regarding the administrative structure that will suit their needs unless the use of such structure is in itself so manifestly unfair, having regard to the decisions it is called upon to make, as to violate the principles of fundamental justice."⁷³²

In two recent cases the Ontario Court of Appeal has considered the scope of s.7 rights in the criminal law context. In R. v. Seaboyer; R. v. Gayme,⁷³³ the court interpreted s.7 principles of fundamental justice as protecting the fundamental to right make full answer and defence. In R. v. Stoddart⁷³⁴ the Ontario Court of Appeal interpreted s.7 as meaning that everyone had the right to a fair trial but not that every rule governing that trial, when examined individually would be fair to

⁷³¹ Id.

⁷³² Id at 304.

⁷³³ (1987), 58 C.R. 289 (Ont. C.A.); leave to appeal granted (May 16, 1988, S.C.C.).

⁷³⁴ (1987), 59 C.R. (3d) 134 (Ont. C.A.).

that person. It only assured that any individual rule which was so unfair as to cause an unfair trial would have to be struck down.⁷³⁵ The court ruled that the question of fairness of a trial involved a global assessment of the procedures available to an accused and would not necessarily turn on the fairness or unfairness of any one particular rule.

The last case to be considered in determining the scope and meaning of the procedural aspects of the principles of fundamental justice is Morgentaler et al. v. The Queen and A.G. Canada.⁷³⁶ The case involved issues of both procedural and substantive fundamental justice, but the majority of the Supreme Court, indeed, everyone except Wilson J., who chose to address the substantive issue of women's reproductive choice, preferred to deal with the case on the narrower ground of procedural inconsistency with the Charter.

The court explored the meaning of security of the person, Dickson C.J.C. ruling that state interference with bodily integrity and state imposed psychological trauma, at least in the criminal law context, constituted a breach of security of the person. He found that s.251 of the Code was a prima facie violation of women's security of the person in part because the defence contained therein was practically

⁷³⁵ Id, citing R. v. Piraino (1982), 67 C.C.C. (2d) 28 at 29-30.

⁷³⁶ (1988), 62 C.R. (3d) 1 (S.C.C.).

illusory.⁷³⁷ Dickson C.J.C. found that the difficulties which prevented women from gaining the benefit of the defence in s.251(4) were in large measure the result of the administrative structures and procedures established by s.251 itself. Referring to the words of La Forest J. in Jones v. The Queen et al.⁷³⁸ Dickson C.J.C. stated,

"...Parliament must be given room to design an appropriate administrative and procedural structure for bringing into operation a particular defence to criminal liability. But if that structure is "so manifestly unfair, having regard to the decisions it is called upon to make, as to violate the principles of fundamental justice," that structure must be struck down. In the present case, the structure -- the system regulating access to therapeutic abortions -- is manifestly unfair."⁷³⁹

Having concluded that the procedures created by s.251 did not comport with the principles of fundamental justice, Dickson C.J. turned to s.1 of the Charter, and concluded that the means chosen to advance the objective of balancing women's priorities and aspirations and the government's interest in the protection of the foetus did not satisfy the three elements of proportionality which form the second aspect of the Oakes test.⁷⁴⁰

Wilson J. interpreted the rights to liberty and security of the person in s.7 of the Charter as protecting a woman's right to choose whether or not to reproduce, and found that these fundamental rights

⁷³⁷ Id at 30-31.

⁷³⁸ [1986] 2 S.C.R. 284 (S.C.C.) at 304.

⁷³⁹ Morgentaler et al. v. The Queen and A.G. Canada (1988), 62 C.R. (3d) 1 (S.C.C.) at 32.

⁷⁴⁰ Id at 34.

were violated by s.251 of the Code. Turning to s.1 she concluded that as s.251 was a complete denial of the woman's constitutionally protected right under s.7, not merely a limitation on it, it could not meet the proportionality test in Oakes.⁷⁴¹

Beetz J., writing for Estey J. and himself, ruled that the defence in s.251(4) of the Code had become an entrenched minimum standard of protection for pregnant women when the right to life, liberty and security of person was enshrined in s.7 of the Charter.⁷⁴² McIntyre J., in dissent with LaForest J., expressed concern that the majority were manufacturing out of whole cloth a constitutional right for pregnant women to choose whether to carry a foetus to term.⁷⁴³ He found that an historical review of the law did not disclose that there had ever been a general right to abortion in Canada. Nor did he find that an interpretive approach to the Charter afforded support for the entrenchment of a constitutional right of abortion.⁷⁴⁴

The Morgentaler decision clearly demonstrates the importance of procedural fairness in the criminal law context. The decision also reveals how far the court has advanced in interpreting s.7 and the "principles of fundamental justice". McIntyre J.'s dissenting comment

⁷⁴¹ Id at 116-117.

⁷⁴² Id at 45.

⁷⁴³ Id at 84.

⁷⁴⁴ Id at 88.

that the common law did not support recognition of a right of pregnant women to chose whether or not to carry a foetus to term was quite accurate. The majority judges, however, were not exactly constructing such a right out of whole cloth, as McIntyre J. had charged; it was just that they did not feel themselves constrained by the unsatisfactory state of the relevant pre-Charter law. Rather, through their liberal interpretation of the concept of security of the person, of the requirements of fundamental justice, and of the effect of entrenchment, they went some distance towards acknowledging such a right. In so doing, they gave a clear indication that the remedial scope of s.7 might be broad indeed.

Summary

The foregoing review of Charter jurisprudence suggests that the courts are beginning to grasp that procedural fairness under the Charter is a more expansive and principled concept than had heretofore been recognized by the common law. Thus the courts have begun to use s.7 to refine and reform common law and statutory rules that offend this more idealized conception of fundamental justice.

If the Charter does invite a more principled approach to the interpretation of the notion of fundamental justice than was possible at common law, then there would seem to be scope for re-evaluation and refocusing of the present guilty plea process. It would seem that a court could look beyond common law notions of conviction by consent to

reconsider whether one word from the accused should be sufficient to substitute for the presumption of innocence, trial by one's peers, a fair trial, full answer and defence, proof beyond a reasonable doubt, etc. The Supreme Court's decisions in Brosseau⁷⁴⁵ and Adgey,⁷⁴⁶ articulating the principles of common law justice, could be reassessed against the less pragmatic standard of fundamental justice in s.7 of the Charter.

Applying s.7 to the guilty plea process one finds that a criminal prosecution clearly is within the ambit of s.7 as it involves risk to the liberty⁷⁴⁷ and security of the person.⁷⁴⁸ Therefore, an accused ought only to be deprived of liberty or security of the person by a process which is in accordance with the principles of fundamental justice. What might be the principles of fundamental justice in the guilty plea context? It might be argued that these principles must include all of an accused's procedural rights at common law, and under the Bill of Rights, and all relevant Charter rights. By the guilty plea, however, the accused is taken to have waived all these rights. It would seem then, that in order for the principles of fundamental justice to have any practical application to the guilty plea process, there would have

⁷⁴⁵ Brosseau v. The Queen, [1969] S.C.R. 181 (S.C.C.).

⁷⁴⁶ Adgey V. The Queen (1973), 13 C.C.C. (2d) 17 (S.C.C.).

⁷⁴⁷ Reference Re s.94(2) Motor Vehicle Act (1985), 18 C.R.R. 30 (S.C.C.).

⁷⁴⁸ Singh et al. v. Minister of Employment and Immigration (1985), 17 D.L.R. (4th) 422 (S.C.C.); Morgentaler et al. v. R. (1988), 62 C.R. (3d) 1 (S.C.C.) per Dickson C.J.

to be careful adjudication of this critical act of waiver. Therefore, fundamental justice would seem to require that a trial judge not accept a guilty plea until convinced, through discussion with the accused and his counsel, first, that the accused understood the consequences of acceptance of the guilty plea and the effect that the guilty plea would have on all procedural and constitutional rights; second, that the accused was voluntarily pleading guilty; and third, that the facts of the case justify conviction.

Arguably, the existence of a factual basis for a conviction based on a guilty plea must be a requirement of the principles of fundamental justice because many of the procedural rights recognized by the criminal justice system and the Charter aim to ensure that the innocent are not convicted. Where an accused pleads not guilty the presumption of innocence, the exclusionary rules of evidence, and the burden on the State to prove guilt beyond a reasonable doubt come into play to guard against the wrongful conviction of the innocent. But an accused who pleads guilty thereby waives these rights; and without a factual basis requirement, there would be no way to avoid the mistaken conviction of the innocent.⁷⁴⁹ Such an important objective as avoiding the conviction of the innocent would not appear to be a matter within the accused's prerogative and therefore ought not to be treated as waivable at the accused's option. Accordingly, the trial judge ought to make such

⁷⁴⁹ Barkai, "Accuracy Inquiries for all felony and misdemeanour pleas: Voluntary Pleas but Innocent Defendants" (1977), 126 University of Pennsylvania Law Review 88 at 111.

inquiry as to ascertain whether the accused has a defence, and if not, whether there is a factual basis for conviction on the charge.

The risk of unintentional violation of Charter rights is acute in the context of the guilty plea process because the simple act of pleading guilty substitutes for the whole panoply of procedural and constitutional rights associated with a criminal trial. The guilty plea also precludes the accused from asserting any violations of procedural rights that antedate the trial. Clearly, much is left unsaid by a simple plea of guilty, and without a careful inquiry into these matters a trial judge cannot possibly be sure that any deprivation of liberty or security of the person resulting from conviction will actually have been in accordance with the principles of fundamental justice. Such assurance cannot be found in the mere fact that the accused is represented by counsel or insists on pleading guilty because neither of these facts provides objective assurance that the tendered guilty plea is intelligent, voluntary and accurate. Rather, it would seem to be necessary that the trial judge personally canvass these matters with the accused. Only then could a trial judge feel confident that the accused had been accorded a fair process.

Being a waiver of rights, the guilty plea is unlikely to be accompanied by protestations by the accused or defence counsel that the plea is not intelligent, voluntary or accurate. Such protestations are more likely to arise somewhat later, perhaps after the Crown has read in a statement of facts which the accused contests, or after a form of

sentence has been imposed which the accused had not expected, or after the accused has had an opportunity to reflect on the case. Therefore, it may be quite erroneous to assume that the plea demonstrates that the accused, or even defence counsel, had fully canvassed the accused's rights and liabilities under the law. This is, however, exactly what the common law permits a trial judge to assume, leaving the holding of an inquiry into the circumstances of the guilty plea to the trial judge's discretion. It is submitted that the constitutionalization of the rights affected by the guilty plea suggests that such inquiry ought now to be mandatory, not discretionary, to ensure that their waiver is valid. Unless a full inquiry is held there is a serious risk that the accused may be unwittingly denied a hearing in accordance with the principles of fundamental justice.

It would seem, therefore, that the trial judge must play an active part in the guilty plea process to ensure that the accused's rights to fundamental justice and a fair trial have been protected. Such inquiry might lengthen the guilty plea process but it would still take substantially less time than a full trial on a plea of not guilty. Anyway, Singh⁷⁵⁰ would suggest that the administrative convenience of accepting guilty pleas as offered, with little or no inquiry into the circumstances of the plea, may not be a sufficient justification for the

⁷⁵⁰ Singh et al. v. Minister of Employment and Immigration (1985), 17 D.L.R. (4th) 422 (S.C.C.) at 469-470.

violation of s.7 rights, and in Morgentaler⁷⁵¹ Dickson C.J.C. indicated that arguments of administrative convenience could carry little weight in the context of the criminal law. Therefore, any such arguments made in support of curtailing inquiry into the circumstances of the guilty plea may be inappropriate. Anyway, reasonable administrative efficiency can be achieved while according to the accused their Charter rights. The guilty plea may be acceptable in lieu of a full trial provided that the trial judge's inquiry into the plea demonstrates that it is appropriate in the circumstances.

B. Waiver of constitutional rights by guilty plea

The last section examined the constitutionalization of the procedural rights affected by the guilty plea. This next section will consider the crucial question as to the waivability of those rights by the plea of guilty.

In his seminal work on the Charter, published very shortly after the passage of the Charter, and before the Charter's provisions had been subjected to judicial analysis, Morris Manning expressed the view that

"Section 11(d) does not preclude a plea of guilty. It is equally clear that an individual cannot be deemed by his plea of guilty to have waived any of his rights to a fair hearing. The right to a fair hearing or trial, like the right to liberty of the person (of

⁷⁵¹ Morgentaler et al. v. The Queen and A.G. Canada (1988), 62 C.R. (3d) 1 (S.C.C.) at 32.

which it is a constituent part) is too important in a democratic society for it to be waived."⁷⁵²

This statement implies that an accused is entitled to waive his right not to incriminate himself, to be presumed innocent until proven guilty, to a jury trial, to confront his accusers, and to make full answer and defence, provided that in so doing the accused does not in effect waive the right to a fair hearing. While the general rule is that a person has the right to waive the advantage of a law made solely for the benefit and protection of the individual in his private capacity, which may be dispensed with without infringing any public right or public policy,⁷⁵³ constitutional rights may be qualitatively different from other statutory rights in that they embody a socially acceptable balance of state power and individual freedom. Therefore, Manning suggests, some Charter rights may not be waivable by the individual, and those which are may only be waivable in limited circumstances. Subsequent case law suggests that while a constitutional right may be waivable the courts may have some discretion to refuse to give effect to the waiver.⁷⁵⁴

⁷⁵² M. Manning, Rights, Freedoms and the Courts. A Practical Analysis of the Constitution Act, 1982 (1983) at 404.

⁷⁵³ Maxwell on The Interpretation of Statutes (12th ed. 1969) at 328; Korponay v. A.G. Canada, [1982] S.C.R. 41 (S.C.C.) at 48.

⁷⁵⁴ See Turpin & Siddiqui v. The Queen (May 4, 1989, S.C.C.), discussed infra, suggesting that the accused's right to waive Charter rights may be unfettered by public interest concerns.

An individual's right to waive statutory or common law rights is circumscribed by judicial discretion, as Lamer J., delivering the judgment of the court, explained in Korponay v. The Queen,⁷⁵⁵

"Some procedural requirements are enacted for the protection of the rights of one of the parties, Crown and accused, and others for both. A party may waive a procedural requirement enacted for his benefit, the concurrence of both being required when enacted for both... Paramount to such a right is that of the trial judge to require compliance notwithstanding a desire to waive, he being the ultimate judge of what procedural safeguards need nevertheless be respected in order to protect the certainty and the integrity of the judicial process."

Lamer J. adopted the common law standard for the acceptance of a guilty plea as the model for waiver of procedural rights. He stated that the validity of any waiver

"...is dependent upon it being clear and unequivocal that the person is waiving the procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process. This has long been recognized, as is illustrated by many cases, and particularly so by those dealing with a judge's duties as regards a plea of guilty, which is the waiver by an accused of the right to put the Crown's case to the test of a trial. (See amongst others, Adgey, v. The Queen, [1975] 2 S.C.R. 426; Brosseau v. The Queen, [1969] S.C.R. 181). The judge's duties concerning any waiver are no different than those on a plea of guilty. The factors he will take into account in determining whether the accused has clearly and unequivocally made an informed decision to waive his rights will vary depending on the nature of the procedural requirements being waived and the importance of the right it was enacted to protect."⁷⁵⁶ (Lamer J.'s emphasis)

It was surprising that Lamer J. should have taken the standard established in Brosseau and Adgey as the model for waiver of procedural

⁷⁵⁵ [1982] S.C.R. 41 (S.C.C.) at 48. The issue was as to waiver of the procedural requirements for reelection of mode of trial under the Criminal Code.

⁷⁵⁶ Id at 49-50.

rights, given the superficial level of judicial inquiry condoned by the Supreme Court in those cases.

In Regina v. Heaslip⁷⁵⁷ Martin J.A., delivering the judgment of the Ontario Court of Appeal, applied the standard laid down in Korponay v. the Queen to the question of the waivability of the constitutional right to be tried within a reasonable time in s.11(b) of the Charter. After reiterating the standard laid down in Korponay, Martin J.A. stated,

"Speaking generally, and subject to the overriding right of the Court to protect the integrity of the judicial process and society's interest in ensuring that accused persons are tried within a reasonable time, an accused may waive his constitutional right to be tried within a reasonable time. Mr. Doherty [for the Crown] conceded that mere silence or failure to object will not be construed as a waiver, and that there is a presumption against waiver of fundamental constitutional rights which must be overcome by the party asserting waiver."⁷⁵⁸

The court considered that where the alleged waiver was of a constitutional right, the court's assessment of what the integrity of the judicial process and society's interest required was particularly important. Thus, they held that there could be a violation of s.11(b) rights notwithstanding apparent acquiescence by the accused in the delay. Martin J.A. explained this result as follows:

"Unquestionably the failure of an accused to object to delay may be a factor of considerable importance to be weighed against him in determining whether he has been deprived of his constitutional right to be tried within a reasonable time. Failure to object to

⁷⁵⁷ (1983), 7 C.R.R. 257 (Ont. C.A.).

⁷⁵⁸ Id at 269, followed in Petrovic v. The Queen (1984), 12 C.R.R. 98 (Ont. C.A.).

delay is not, however, controlling, where the delay is attributable to negligence on the part of the Crown."⁷⁵⁹

In the cases of Regina v. Gladue,⁷⁶⁰ Regina v. Crate,⁷⁶¹ and Regina v. Bryant,⁷⁶² three provincial courts of appeal considered whether a statutory deemed waiver of the right to jury trial⁷⁶³ constituted an adequate waiver of the constitutional right to trial by jury in s.11(f) of the Charter. In Gladue and Crate, the British Columbia and Alberta Courts of Appeal accepted the validity of the deemed waiver on the view that s.11(f) merely gave the accused a choice of mode of trial and the deemed re-election resulted from the accused's own conduct in failing to appear for trial. In Bryant, however, the Ontario Court of Appeal rejected this concept of deemed waiver, holding that s.526.1 on its face infringed s.11(f) of the Charter and could not be justified under s.1. Citing Korponay v. A.G. Canada, the court described the Charter right as

"...a right given to an accused which prevails unless he or she voluntarily chooses not to utilize it by electing another mode of trial. This is demonstrated by the vigilance of Canadian courts in ensuring that any waiver of jury trial by an accused is voluntary and made with full understanding...

I cannot fail to note the serious implications of the Crown's argument. If it prevailed, it might be possible to legislate the denial of Charter rights simply by providing that persons whose

⁷⁵⁹ Id at 277.

⁷⁶⁰ (1982), 4 C.R.R. 183 (B.C.S.C.).

⁷⁶¹ (1983), 6 C.R.R. 353 (Alta. C.A.).

⁷⁶² (1984) 11 C.R.R. 219 (Ont. C.A.).

⁷⁶³ Section 526.1 of the Criminal Code (now R.S.C. 1985, c. C-46 s.598) deemed an accused who had elected trial by judge and jury but who without satisfactory excuse failed to appear for trial, to have re-elected to be tried by judge alone.

rights are taken away by statute are concurrently deemed to have waived them. Charter rights cannot be destroyed in this fashion."⁷⁶⁴

Therefore, the court held that s.526.1 did not result in a valid waiver of the right to a jury trial. Arguably, the approach in Bryant was more consistent with the purposive and generous interpretation of Charter rights than Gladue and Crate. The notion of statutory deemed waiver of rights would appear to be incompatible with the constitutional entrenchment of procedural rights.

Without even referring to the decision of the Ontario Court of Appeal in Bryant, a differently constituted court in Regina v. Czuczman⁷⁶⁵ upheld the deemed waiver under s.431(1) of the Criminal Code (now R.S.C. 1985, c. C-46, s.474) of the accused's right to be present at trial where the accused has absconded during the course of the trial. Brooke J.A. described the right of an accused to be present at trial to face the accusers and cross-examine them, to make full answer and defence, and to participate in the trial as fundamental. However, he noted that this right was not unqualified, stating,

"But, constitutional rights are not absolute and their scope must be measured against the corresponding rights of others and of society in the due administration of justice. Accordingly, the question whether s.431.1(1) offends the sections of the Charter must be tested having regard to these other rights."⁷⁶⁶

⁷⁶⁴ (1984), 11 C.R.R. 219 (Ont. C.A.) at 224. See also concurring reasons by Arnup J.A. at 237.

⁷⁶⁵ (1986), 19 C.R.R. 107 (Ont. C.A.).

⁷⁶⁶ Id at 110.

Brooke J.A. noted that at common law an accused who deliberately absconded after the trial had begun was held to have waived the right to be present at trial, and that a similar rule had been held to be constitutional in the United States. Citing his court's decision in R. v. Heaslip as authority for the proposition that a constitutional right may be waived, Brooke J.A. concluded that s.431.1(1) of the Code did not offend either s.7 or s.11(d) of the Charter.⁷⁶⁷

Although Bryant and Czuczman appear to be irreconcilable, the difference in result may be attributable to the historic and widespread recognition that by absconding an accused effectively waived the right to be present at the trial, whereas there was less support in "free and democratic societies" for imposing a deemed waiver of the right to jury trial on those who failed without satisfactory excuse, to appear for trial.

In Clarkson v. The Queen⁷⁶⁸ the Supreme Court of Canada addressed for the first time the question of the standard for waiver of a Charter right. The Crown's case at trial had relied heavily on incriminating statements made by Clarkson while intoxicated and without counsel; but they were ruled inadmissible and since the remaining evidence against the accused was circumstantial and weak, the jury acquitted her. On

⁷⁶⁷ Id at 112.

⁷⁶⁸ (1986), 19 C.R.R. 209 (S.C.C.). Only McIntyre J., who agreed in the result, refused to consider the application of the Charter to the facts of the case.

appeal to the New Brunswick Court of Appeal it was held that the statements were admissible but on further appeal to the Supreme Court of Canada the statements were ruled inadmissible. Wilson J., delivering the judgment of five of the seven member court, considered the different tests as to the admissibility of an intoxicated confession, ie., on the one hand, that an accused must be capable of comprehending what she is saying, and on the other hand, that an accused must be capable of understanding the consequences of what she is saying, Wilson J. stated,

"The tension between the concern over the probative value of evidence and the concern over police conduct and fairness in obtaining the evidence may not, however, have to be resolved in this case as the issue may be effectively pre-empted by the second issue raised by the appellant, namely, the alleged violation of her constitutional right to counsel."⁷⁶⁹

Wilson J. turned then to the question whether the accused had waived her right to counsel or whether the police had violated it by extracting an intoxicated confession. She noted that in R. v. Therens⁷⁷⁰ the Supreme Court had stated that the purpose of the s.10(b) right was to ensure that an accused was treated fairly in the criminal process. She found that s.10(b) was unconcerned with the probative value of evidence obtained by the police but was aimed at ensuring that the accused was made aware of the right to counsel when being "detained by the police in a situation which may give rise to a "significant legal consequence"⁷⁷¹ Recalling the high standard for waiver of statutory

⁷⁶⁹ Id at 216.

⁷⁷⁰ [1985] 1 S.C.R. 613 (S.C.C.).

⁷⁷¹ (1986), 19 C.R.R. 209 (S.C.C.) at 217, referring to the words of Le Dain J. in R. v. Therens, [1985] 1 S.C.R. 613 (S.C.C.) at 641-642.

procedural guarantees laid down in Korponay v. A.G. Canada, which required full knowledge of the right and of the effect of the waiver, Wilson J. stated,

"Given the concern for fair treatment of an accused person which underlies such constitutional civil liberties as the right to counsel in s.10(b) of the Charter, it is evident that any alleged waiver of this right by an accused must be carefully considered and that the accused's awareness of the consequences of what he or she was saying is crucial."⁷⁷²

She then referred to the American case law on waiver of constitutional rights which held that for a valid waiver of the right to counsel the accused had to be not only cognizant of the consequences of waiving the right in a general way, but also aware of the legal specificities of the case, such that there was a presumption against waiver where the accused was perceived at the time of waiver as not having been able to understand its full implications.⁷⁷³

Wilson J. concluded that, because the purpose of the s.10(b) right to counsel was to ensure fair treatment of the accused, waiver of this right could only be valid if the accused understood the consequences of such waiver. She stated:

"Whether or not one goes as far as requiring an accused to be tuned in to the legal intricacies of the case before accepting as valid a waiver of the right to counsel, it is clear that the waiver of the s.10(b) right by an intoxicated accused must pass some form of "awareness of consequences" test... While this constitutional guarantee cannot be forced upon an unwilling accused, any voluntary

⁷⁷² (1986), 19 C.R.R. 209 (S.C.C.) at 217.

⁷⁷³ Id at 217-218.

waiver in order to be valid and effective must be premised on a true appreciation of the consequences of giving up the right."⁷⁷⁴

Wilson J. held that since the trial judge had found as fact that the accused's confession could not pass the "awareness of consequences" test, the test for a valid waiver of the right to counsel had not been met and the continued questioning of the accused constituted a violation of s.10(b) of the Charter. Because the continued questioning was a blatant violation of the accused's s.10(b) rights and a flagrant exploitation of her intoxicated condition, Wilson J. held that the appropriate remedy was exclusion of the confession under s.24(2) of the Charter.

In the case of Regina v. McAvena⁷⁷⁵ the Saskatchewan Court of Appeal considered whether an accused person's s.10(b) rights had been effectively waived even though the accused was suffering from a concussion and therefore incapable of understanding at the time that he was read his rights. Bayda C.J. stated that the principle enunciated in Clarkson v. The Queen to the effect that a valid waiver of the right to counsel must be premised on an accused's "true appreciation of the consequences of giving up the right" gave rise to the corollary that the accused must be effectively informed of the substance of the right and must necessarily be capable of appreciating and understanding the substance of the right.⁷⁷⁶

⁷⁷⁴ Id at 218.

⁷⁷⁵ (1987), 34 C.C.C. (3d) 461 (Sask. C.A.).

⁷⁷⁶ Id at 469.

He was of the view that for an accused to be informed of his s.10(b) rights it was not enough that the right to counsel was recited to him and that he only appeared to understand. Rather, s.10(b) imposed a duty on the peace officer accurately to describe the right, in language the accused could understand, at a time when he was capable of appreciating the right, and in sufficient time to allow the accused to obtain and instruct counsel before yielding up incriminating evidence.⁷⁷⁷ Bayda C.J.C. concluded that the accused's s.10(b) rights had been violated by the peace officer's failure to inform the accused of his rights at a time when he was capable of understanding and appreciating the right to counsel, and it was irrelevant that the officer committed the violation unwittingly.⁷⁷⁸

Regina v. Manninen⁷⁷⁹ examined further the question of waiver in respect to the s.10(b) right to counsel. In this case, the accused had not been allowed to consult a lawyer until six hours after his arrest, in spite of repeated demands to speak to counsel. In the course of his interrogation he had made incriminating statements. At trial, the incriminating statements were ruled admissible and the accused was

⁷⁷⁷ Regina v. McAvena (1987), 34 C.C.C. (3d) 461 (Sask. C.A.) at 468.

⁷⁷⁸ However, he did not consider this to be an appropriate case in which to grant relief under s.24(2) of the Charter because there had not been any unfairness to the accused.

⁷⁷⁹ (1987), 34 C.C.C. (3d) 385 (S.C.C.).

convicted. On appeal the statements were ruled inadmissible, the convictions were quashed and a new trial ordered.

On further appeal Lamer J., delivering the judgment of the Supreme Court of Canada, stated that s.10(b) of the Charter imposed two duties on the police in addition to the duty to inform the detainee of his rights.⁷⁸⁰ First, since the detainee was in the control of the police, the police had to provide a reasonable opportunity for the detainee to exercise his right to retain and instruct counsel without delay. Second, s.10(b) imposed a duty on the police to cease questioning or otherwise attempting to elicit evidence from the detainee until a reasonable opportunity to retain and instruct counsel and obtain counsel's advice had been provided. Both aspects of the accused's right to counsel had been infringed. Lamer J. stated,

"While a person may implicitly waive his rights under s.10(b), the standard will be very high... In my view, the respondent's conduct did not constitute an implied waiver of the right to counsel. It seems that he did not intend to waive his right, as he clearly asserted it at the beginning and at the end of the questioning. Rather, the form of the questioning, was such as to elicit involuntary answers... In addition, where a detainee has positively asserted his desire to exercise his right to counsel and the police have ignored his request and have proceeded to question him, he is likely to feel that his right has no effect and that he must answer. Finally, the respondent had the right not to be asked questions, and he must not be held to have implicitly waived that right simply because he answered the questions. Otherwise, the right not to be asked questions would only exist where the detainee refused to answer and thus where there is no need for any remedy or exclusionary rule."⁷⁸¹

⁷⁸⁰ Id at 391-393; R. v. Brydges (1990), 103 N.R. 282 (S.C.C.).

⁷⁸¹ Id at 393; also, Black v. R. (1989), 70 C.R. (3d) 97 (S.C.C.).

Lamer J. ruled that the incriminating statements by the accused were a direct consequence of deliberate and flagrant violations of his s.10(b) rights, and that their admission at trial went to the very fairness of the trial, and tended to bring the administration of justice into disrepute. Accordingly a new trial was ordered with such evidence to be excluded.

In Turpin & Siddiqui v. The Queen et al.⁷⁸² Wilson J., delivering the reasons of the Supreme Court, ruled that the right to the "benefit" of a jury trial in s.11(f) of the Charter, having been enacted to protect the interests of the accused, implicitly permitted the accused to waive the right where it seemed to be in the accused's best interests to do so. Further, Wilson J. held that an accused could not be compelled to take advantage of a constitutional right intended for the benefit of the accused, simply because the right had a public interest aspect. She distinguished American and Australian decisions which denied the individual's ability to waive the right to a jury trial on grounds of a collective interest in the utilization of a jury for serious criminal charges. She stated,

"To prevent an individual from waiving his or her right to the benefit of a jury trial is clearly to elevate the interests of society over the interests of the individual. This is normally achieved under the Charter through the application of s.1 and not through reading a limit into the right itself."⁷⁸³

⁷⁸² (May 4, 1989, S.C.C.) (unreported) at pp.16-21.

⁷⁸³ Id at 25.

Wilson J. concluded, however, that the power to waive the right to a jury trial did not constitute a constitutional right to a non jury trial and, therefore, the Criminal Code provisions requiring a jury trial on a murder charge did not violate the accused's s.11(f) rights.⁷⁸⁴

Summary

Canadian courts have not yet considered how, or to what extent a guilty plea will operate so as to waive constitutional rights that would have been available had the accused pleaded not guilty. It is clear, however, that in the pre-Charter era an accused could waive all his procedural trial rights simply by the act of pleading guilty, and the courts were not bound to make any inquiry into whether the plea was voluntarily and intelligently made, unless the accused was unrepresented or there was some reason to suspect he did not understand what he was doing. In effect, there appears to have been a presumption of validity operating with respect to the guilty plea and the consequent waiver of procedural rights, and no great judicial concern about the extent of the rights surrendered by guilty plea. Although Lamer J. looked to this case law to find support for holding that a waiver must be unequivocal and knowingly made, the factual circumstances of such cases as Brosseau v. The Queen⁷⁸⁵ demonstrate with alarming clarity the inadequacy of that standard in ensuring a fair result.

⁷⁸⁴ Id at 26-31.

⁷⁸⁵ [1968], S.C.R. 181 (S.C.C.).

Now that so many of the procedural rights affected by the guilty plea have been constitutionalized it is necessary to reassess the standards of acceptability and waiver in respect to the guilty plea. In the few cases dealing with waiver of constitutional rights decided after the passage of the Canadian Charter of Rights and Freedoms, the courts have demonstrated great solicitude in determining whether an accused had effectively waived a Charter right. Indeed, in Heaslip the Ontario Court of Appeal suggested that there was a presumption against waiver of fundamental constitutional rights; and in Clarkson the Supreme Court of Canada recognized the need for an especially high standard for the waiver of constitutional rights. To be effective, then, a waiver of constitutional rights must be clear and unequivocal, made with full knowledge of the rights being waived and full appreciation of the effect of the waiver on those rights.⁷⁸⁶ Mere silence is not enough to constitute a waiver of a constitutional right,⁷⁸⁷ and, while the courts have acknowledged the possibility of implicit waiver, the standard is very high and implicit waiver will not be found where the accused explicitly asserts the right.⁷⁸⁸

⁷⁸⁶ Korponay v. The Queen, [1982] 1 S.C.R. 41 (S.C.C.); Clarkson v. The Queen (1986), 19 C.R.R. 209 (S.C.C.); Regina v. McAvena (1987), 34 C.C.C. (3d) 461 (Sask. C.A.).

⁷⁸⁷ Regina v. Heaslip (1983), 7 C.R.R. 257 (Ont. C.A.).

⁷⁸⁸ Regina v. Manninen (1987), 34 C.C.C. (3d) 385 (S.C.C.).

It would seem that this special higher standard for waiver of constitutional rights should apply a fortiori where the accused, by pleading guilty, waives virtually all of the constitutionally protected trial rights. If one applies this standard to the guilty plea, as opposed to applying the standard of acceptability for a guilty plea to the waiver of rights, as Lamer J. would have the courts do, it would seem that the trial judge ought not to accept a guilty plea until it is clear that the accused understands the range of constitutional rights which will be lost by virtue of the plea, and that the accused is voluntarily choosing to waive those rights. Accordingly, the trial judge ought to have to explain the effect of the guilty plea on the accused's right to be presumed innocent, against self incrimination, to a jury trial if the charge is a serious one, to make full answer and defence, to a fair trial in accordance with the principles of fundamental justice, and to contest any pre-trial violations of the accused's other Charter rights. Thus it would seem that there ought to be quite a considerable burden of inquiry and explanation on the trial judge before accepting a guilty plea, to ensure valid waiver by the accused of the rights affected by the guilty plea.

Given the profound impact of the guilty plea on numerous constitutional rights it is arguable that the discretionary standards posed in Brosseau v. The Queen⁷⁸⁹ and Adgey v. The Queen⁷⁹⁰ are no longer

⁷⁸⁹ [1968] S.C.R. 181 (S.C.C.).

⁷⁹⁰ (1973), 13 C.C.C. (2d) 177 (S.C.C.).

sufficient. This suggests that the Supreme Court's reference in Korponay to the duties of a trial judge when accepting a guilty plea as providing a model for the courts to follow when accepting a waiver of a right, may not have been appropriate. It is submitted that the trial judge's inquiry on a guilty plea may now have to go further than was laid down in Adgey and Brosseau so as to review with the accused all the rights, both procedural and constitutional, affected by the plea, and thereby ensure that the guilty plea constitutes a valid waiver of these rights.

A waiver of a constitutional right may not always be given effect to where there is legislation inconsistent with the waiver, as in Turpin & Siddiqui, or where the court considers that there is an important public interest in giving effect to the right, as in Heaslip. Thus the accused's power to waive his rights is to some extent constrained by legislation and the court's discretion to accept or reject the accused's waiver.⁷⁹¹ Applying the reasoning in Turpin & Siddiqui v. The Queen to the guilty plea process, it would seem that the accused's right to waive the constitutional right to a procedure in accordance with the principles of fundamental justice (s.7) and to a fair hearing (s.11(d)) would not encompass the right to insist on a trial that violates the principles of fundamental justice or the right to insist on having an unfair hearing. Rather, notwithstanding the accused's power of waiver, the trial judge would retain the authority and duty to ensure that

⁷⁹¹ Korponay v. The Queen, [1982] 1 S.C.R. 41 (S.C.C.).

justice was done. This might mean, therefore, that in some circumstances the accused's waiver would not be given effect to by the court. Again, this points to the need for judicial inquiry into the circumstances of the plea, not only to determine if the waiver of trial rights is voluntarily and understandingly made, but also to determine whether the guilty plea will result in a just disposition of the case consistent with constitutional objectives.

C. Constitutional rights affected by guilty plea in the United States

A brief review of the American jurisprudence relating to the guilty plea process indicates that there have been substantial advances made in the recognition and protection of constitutional rights affected by the guilty plea process. These advances were brought about largely as a result of the application of the due process clause of the Fourteenth Amendment to the guilty plea process.⁷⁸² The Fourteenth Amendment to the United States Constitution provides, in part that "No State shall ... deprive any person of life, liberty, or property, without due process of law;" with power given to Congress "to enforce, by appropriate legislation, the provisions of this article". The Fifth Amendment to the U.S. Constitution imposes similar restraints on the Federal government by declaring that "No person shall ... be deprived of life, liberty, or property, without due process of law".

⁷⁸² Pennsylvania ex rel. Herman v. Cloudy (1956), 350 U.S. 116 (U.S.S.C.).

Originally quite a narrow concept,⁷⁹³ due process in the Fourteenth Amendment came to be broadly interpreted out of necessity. This was because the United States Supreme Court had held that the United States Bill of Rights, which listed specific rights, applied only to the federal government.⁷⁹⁴ The concept of due process in the Fourteenth Amendment had to be adapted to make the rights declared in the first eight Amendments applicable where state action was involved. Thus due process came to have both a procedural and a substantive aspect. Its procedural meaning was held to be "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,"⁷⁹⁵ or all that is "implicit in the concept of ordered liberty."⁷⁹⁶

⁷⁹³ The concept of due process derives from Magna Carta, which provided in part that "No free man shall be taken and imprisoned... except ... by the law of the land", and from a statute of Edward III extending Magna Carta, which stated that no man should be harmed in any way except "by due process of law". In commenting on Magna Carta in his Institutes, Coke asserted the identity of the two phrases, "law of the land" and "due process of law", and stated that they were intended to protect the subject from the oppressive use of authority. Subsequently, Locke and Blackstone made use of these concepts in their writings. The American colonists, influenced by their ideas, included the due process clause in the United States Constitution: W.S. Tarnopolsky, The Canadian Bill of Rights (2d ed. 1978) at 222-223.

⁷⁹⁴ Id at 225, citing Barron v. Baltimore (1833), 7 Pet. 243 (U.S.S.C.).

⁷⁹⁵ W.S. Tarnopolsky, The Canadian Bill of Rights (2d ed. 1978) at 225, citing Powell v. Alabama (1932), 287 U.S. 45 (U.S.S.C.) at 67.

⁷⁹⁶ W.S. Tarnopolsky, The Canadian Bill of Rights (2d ed. 1978) at 225, citing Wolf v. Colorado (1949) 338 U.S. 25 (U.S.S.C.). See also, M.L. Friedland, "Legal Rights under the Charter" (1981-1982), 24 Criminal Law Quarterly 430 at 432.

In the context of the guilty plea process the requirements that an accused understand the charge and that the plea be voluntary have long been recognized as crucial elements of due process, requiring the accused's assent to plead guilty, understanding of the charges and understanding of the consequences of the plea.⁷⁸⁷ Nonetheless, it used to be the position that assuming its voluntary and understanding nature, a guilty plea resulted in conviction by consent, and as such was unassailable on constitutional grounds. Thus, in Sorenson v. State,⁷⁸⁸ the Wisconsin Appeal Court stated,

"In a criminal case if a plea of guilty is understandingly entered by a sane adult defendant no further trial than the proper pronouncement of a sentence is required. There is no issue to be tried, no need for a jury, nor for the waiver of a jury trial either orally or in writing, nor need the plea of guilty be in writing. The reception of such a plea and a lawful sentence thereon violates no guaranty of either our own or the federal constitution but on the other hand constitutes due process of law."

Subsequently the United States Supreme Court recognized the vitiating effect of coercion on an accused's apparent consent to conviction. They held in Pennsylvania ex rel. Herman v. Cloudy⁷⁸⁹ that a conviction based on a coerced guilty plea deprived the accused of

⁷⁸⁷ "The Trial Judge's Satisfaction as to Voluntariness and Understanding of Guilty Pleas", [1970] Washington University Law Quarterly 289 at 304-305, citing Kercheval v. United States (1927), 274 U.S. 220 (U.S.S.C.) at 223; Smith v. O'Grady (1941), 312 U.S. 329 (U.S.S.C.) at 334.

⁷⁸⁸ (1922), 178 Wis. 197 (Wisc. App. Ct.) at 201, cited in Newman, Conviction. The Determination of Guilt or Innocence Without Trial (1966) at 25.

⁷⁸⁹ (1956), 350 U.S. 116 (U.S.S.C.). See also, C.D. Milstein, "Constitution Attacks on a Guilty Plea Motivated by a Coerced Confession" (1971), 44 Temple Law Quarterly 426 at 430-431.

life, liberty and security of the person without a fair hearing as guaranteed by the due process clause of the Fourteenth Amendment. As a result, the requirements that the accused understand the charge and that the plea be voluntary came to be viewed as crucial elements of due process. These elements were established by inquiry into 1) whether the accused assented to plead guilty, 2) the accused's understanding of the nature of the charge, and 3) the accused's understanding of the consequences of the plea.⁸⁰⁰

A uniform standard for the acceptability of guilty pleas was achieved through the requirements of the Federal Court Rules of Criminal Procedure and through the judicial application of similar criteria to the guilty plea process in state courts. Rule 11 of the Federal Rules of Criminal Procedure provides in part,

"A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea... The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."⁸⁰¹

The requirements of Rule 11 are threefold: that the court consider (1) whether the guilty plea was made voluntarily, (2) whether it was made with understanding of the nature of the charge and the consequences

⁸⁰⁰ Note, "The Trial Judge's Satisfaction as to Voluntariness and Understanding of Guilty Pleas", [1970] Washington University Law Quarterly 289 at 304-305.

⁸⁰¹ Rule 11 of the Federal Rules of Criminal Procedure (as amended February 28, 1966).

of the plea, and (3) whether there was a factual basis for the plea. In McCarthy v. United States,⁸⁰² the United States Supreme Court held that the failure of a Federal Court Judge to comply with the procedural requirements of Rule 11 was automatic reversible error. Shortly thereafter the Supreme Court imposed similar requirements on state courts receiving guilty pleas, on the basis that the guilty plea constituted a waiver of the accused's constitutional rights and therefore federal standards governed its validity. The court held in Boykin v. Alabama⁸⁰³ that a valid state criminal conviction based on a plea of guilty required an affirmative showing on the trial court record that the defendant's plea was given voluntarily and with understanding. The court said that due process required:

"...The utmost solicitude of which the courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences."⁸⁰⁴

The court suggested that such canvassing would achieve two important objectives: first, it would insure that the accused did not improvidently or involuntarily waive his constitutional right to a jury trial, to confront witnesses, and his privilege against self-incrimination; and second, it would tend to both facilitate and deter

⁸⁰² (1969), 394 U.S. 459 (U.S.S.C.).

⁸⁰³ (1969), 395 U.S. 238 (U.S.S.C.). See, "The Trial Judge's Satisfaction as to Voluntariness and Understanding of Guilty Pleas", [1970] Washington University Law Quarterly 289.

⁸⁰⁴ Boykin v. Alabama (1969), 395 U.S. 238 (U.S.S.C.) at 243-244.

appellate proceedings on the plea.⁸⁰⁵ Because in Boykin the record disclosed no inquiry whatsoever, reversal was automatic. A year later in North Carolina v. Alford,⁸⁰⁶ the Supreme Court held that the requirement of a factual basis for a guilty plea applied to state courts as well as federal courts.

There has been considerable doubt about the nature and function of the factual basis requirement under Rule 11 of the U.S. Federal Rules of Criminal Procedure. The debate has centred on the question whether factual basis is meant to corroborate the guilty plea and establish guilt beyond a reasonable doubt, or whether it just serves to ensure that the accused was acting voluntarily and intelligently in pleading guilty.

Uviller⁸⁰⁷ argued that the so-called factual basis requirement did not really establish a factual basis. Rather it just amounted to the trial judge's conclusion that the prosecution's case against the accused was strong and the accused was wise (ie. acting voluntarily and intelligently) to plead guilty rather than go to trial.⁸⁰⁸ He considered that if the plea of guilty contained an admission of guilt, the factual basis requirement would be satisfied where the credible and admissible

⁸⁰⁵ Id.

⁸⁰⁶ (1970), 400 U.S. 25 (U.S.S.C.).

⁸⁰⁷ R. Uviller, "Pleading Guilty, A Critique of Four Models" (1977), 41 Law and Contemporary Problems 102.

⁸⁰⁸ Id. at 118-126.

evidence was legally sufficient to support a guilty verdict. If the accused protested innocence or claimed the availability of a defence he suggested the court would have to sift the evidence and "weigh credibility by more careful methods than recorded or reported proof alone would allow".⁸⁰⁹

Emory⁸¹⁰ was of the view that normally the guilty plea itself met the standard of proof beyond a reasonable doubt because the guilty plea usually included an admission of guilt as well as a waiver of constitutional rights. However, if the guilty plea was accompanied by a protestation of innocence, the admission was lacking, so there would have to be "overwhelming evidence" to support the guilty plea and establish guilt beyond a reasonable doubt. Otherwise the judge would have to reject the plea and proceed to trial.⁸¹¹

Barkai contended that the factual basis requirement was essential in an adversarial system of criminal justice, and was another expression of the underlying principle that innocent persons should not be erroneously convicted. He pointed out that without a factual basis inquiry, where an accused pleaded guilty, waiving the right to trial, there would be no way to prevent the mistaken conviction of the

⁸⁰⁹ Id at 131.

⁸¹⁰ Emory, "The Guilty Plea as a Waiver of Rights and an Admission of Guilt" (1971), 44 Temple Law Quarterly 540.

⁸¹¹ Id at 541.

innocent.⁸¹² Barkai suggested that the factual basis inquiry required that the accuracy of the guilty plea be established on the record. All elements of the crime would have to be tested by the most reliable method available, the usual order of reliability being (1) interrogation of the accused, (2) testimony of witnesses, (3) statements of counsel, (4) presentence or probation reports; and only admissible evidence ought to be considered. Barkai proposed that the standard of proof would be equal to the proof necessary to defeat a motion for a directed verdict of acquittal.⁸¹³

⁸¹² J. Barkai, "Accuracy Inquiries for all Felony and Misdemeanour Pleas: Voluntary Pleas but Innocent Defendants?" (1977), 126 University of Pennsylvania Law Review 88 at 95, 99-100. Barkai explored two possible factual basis inquiry procedures. Under the one authorized by Rule 11 of the U.S. Federal Rules of Criminal Procedure, which Barkai described as the "trial-factual-basis procedure", the failure to establish a factual basis automatically resulted in rejection of the guilty plea and the accused having to stand trial. Under the second model, called the "notice-factual-basis procedure", the accused was simply informed of the factual basis defect in the plea and given the option of standing trial or having the plea accepted despite the defect: Id at 98.

⁸¹³ Id at 132. Barkai proposed that, even if the plea did not meet the factual basis standard, the trial judge might still accept it if, after having informed the accused of the deficiency, it was established on the record that the accused rationally chose to plead guilty and the judge had concluded there was a probability of conviction at trial. Barkai considered that leaving the choice to an accused where there was a deficiency in the factual basis was justified because the fact that a factual basis was not established at the time of pleading guilty did not necessarily guarantee that the accused would be acquitted at trial. It is submitted, however, that to treat the accuracy criterion as optional fails to take account of the dual nature of the guilty plea. As the guilty plea serves both an evidentiary and procedural function, it would seem that voluntariness, understanding and accuracy should always be mandatory requirements, not alternative options.

D. Waiver of rights by guilty plea in the United States

The United States Supreme Court has recognized that by the simple act of pleading guilty, an accused effectively waives the right to a jury trial, to confront the accusers, to present witnesses in defence, to remain silent, and to be convicted only on proof beyond all reasonable doubt.⁸¹⁴ In the United States a guilty plea also operates as a waiver of the accused's right to challenge any deprivations of federal constitutional rights that antedated the plea,⁸¹⁵ that is, a guilty plea effectively waives the accused's right to object to a coerced confession, illegal arrest, illegally obtained evidence, the manner of arrest, and so on.⁸¹⁶ The reason the guilty plea serves as a waiver of these rights is that ultimately the conviction is not based on the evidence obtained in violation of those rights but is based on the guilty plea itself.⁸¹⁷ It has also been pointed out that a guilty

⁸¹⁴ Santobello v. New York 404 U.S. 254 (1971) (U.S.S.C.) at 264 per Douglas J. See also R.B. McNamara, Constitutional Limitations on Criminal Procedure (1982) at 179; J.N. Hermes, "Criminal Procedure: Effects of a Plea of Guilty on a Defendant's Constitutional Rights" (1974), 27 Oklahoma Law Review 49 at 49-51; D.M. Kolko, "The Waivability by Guilty Plea of Retroactively Endowed Constitutional Rights" (1977), 44 Albany Law Review 115 at 120.

⁸¹⁵ R.B. McNamara, Constitutional Limitations on Criminal Procedure (1982) at 179.

⁸¹⁶ J.N. Hermes, "Criminal Procedure: Effects of a Plea of Guilty on a Defendant's Constitutional Rights" (1974), 29 Oklahoma Law Review 49 at 50-51.

⁸¹⁷ Id.

plea waives rights unknown at the time of plea, but subsequently recognized by the courts and given retroactive application.⁸¹⁸

American courts impose strict waiver standards to guard against the frivolous abdication of procedural and constitutional rights.⁸¹⁹ In Johnson v. Zerbst⁸²⁰ it was stated,

"A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege... Courts indulge every reasonable presumption against waiver of fundamental constitutional rights... [Courts] do not presume acquiescence in the loss of fundamental rights."

In that case it was held that, although rights may be waived, such waiver must be intelligent, deliberate and done with full understanding of the consequences.⁸²¹

⁸¹⁸ D.M. Kolko, "The Waivability by Guilty Plea of Retroactively Endowed Constitutional Rights" (1977), 41 Albany Law Review 115. This article is a critique of the "Brady trilogy": Brady v. United States (1970), 397 U.S. 742 (U.S.S.C.); McMann v. Richardson (1970), 397 U.S. 759 (U.S.S.C.); Parker v. North Carolina (1970), 397 U.S. 790 (U.S.S.C.). See also, P. Westen, "Away from Waiver: A Rationale for Forfeiture of Constitutional Rights in Criminal Procedure" (1977), 75 Michigan Law Review 1214; S.A. Saltzburg, "Pleas of Guilty and the Loss of Constitutional Rights: The Current Price of Pleading Guilty" (1978), 76 Michigan Law Review 1265; P. Westen, "Forfeiture by Guilty Plea - A Reply" (1978), 76 Michigan Law Review 1308.

⁸¹⁹ D.M. Kolko, "The Waivability by Guilty Plea of Retroactively Endowed Constitutional Rights" (1977), 41 Albany Law Review 115 at 117.

⁸²⁰ (1938), 304 U.S. 458 (U.S.S.C.) at 464, cited in D.M. Kolko, "The Waivability by Guilty Plea of Retroactively Endowed Constitutional Rights" (1977), 41 Albany Law Review 115 at 117.

⁸²¹ Id.

A guilty plea serves as a waiver of an accused's constitutional rights. Therefore, federal standards are applied to the acceptability of the guilty plea, whether in federal or state court,⁸²² to require that the plea be voluntarily and intelligently made.⁸²³ The same standard of voluntary and intelligent waiver would also apply to any constitutional rights being implicitly waived by virtue of the plea of guilty.⁸²⁴ As it is not permissible in the United States to presume waiver from a silent record⁸²⁵, it would seem that the court must as a matter of record ensure that the accused is informed of the rights he is waiving by pleading guilty.⁸²⁶ The accused ought to be specifically advised of the State's burden of proof, the presumption of innocence, the right to challenge the testimony of accusers and rebut their testimony with a defence, and the protection against self-incrimination.⁸²⁷

⁸²² Boykin v. Alabama (1969), 395 U.S. 236 (U.S.S.C.); R.B. McNamara, Constitutional Limitations on Criminal Procedure (1982) at 179.

⁸²³ Brady v. United States (1970), 397 U.S. 742 (U.S.S.C.); R.B. McNamara, Constitutional Limitations on Criminal Procedure (1982) at 179-180. See also, Notes, "The Trial Judge's Satisfaction as to Voluntariness and Understanding of Guilty Pleas", [1970] Washington Law Quarterly 289 at 321-322.

⁸²⁴ J.N. Hermes, "Criminal Procedure: Effects of a Plea of Guilty on a Defendant's Constitutional Rights" (1974), 27 Oklahoma Law Review 49 at 51-52.

⁸²⁵ Carnley v. Cochran (1962), 369 U.S. 506 (U.S.S.C.).

⁸²⁶ J.N. Hermes, "Criminal Procedure: Effects of a Plea of Guilty on a Defendant's Constitutional Rights" (1974), 27 Oklahoma Law Review 49 at 51-52.

⁸²⁷ Notes, "the Trial Judge's Satisfaction as to Voluntariness and Understanding of Guilty Pleas", [1970] Washington Law Quarterly 289 at 321-322.

In effect, an accused in the United States has a constitutional right to withdraw his guilty plea if the record does not affirmatively show that it was made intelligently and voluntarily,⁸²⁸ and it is reversible error to accept a plea of guilty from a person not competent to waive his constitutional rights.⁸²⁹ Accordingly both state and federal courts hold detailed inquiries into the acceptability of the guilty plea.⁸³⁰

There must be an affirmative waiver of these requirements on the record prior to acceptance of the guilty plea.⁸³¹ Rule 11(c) of the Federal Rules of Criminal Procedure requires that before accepting a guilty plea, the court must address the accused personally in open court and inform him of, and determine that he understands, inter alia:

"(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine

⁸²⁸ R.B. McNamara, Constitutional Limitations on Criminal Procedure (1982) at 179-180.

⁸²⁹ Notes, "the Trial Judge's Satisfaction as to Voluntariness and Understanding of Guilty Pleas", [1970] Washington Law Quarterly 289 at 299.

⁸³⁰ R.B. McNamara, Constitutional Limitations on Criminal Procedure (1982) at 179-180. See also, J.N. Hermes, "Criminal Procedure: Effects of a Plea of Guilty on a Defendant's Constitutional Rights" (1974), 27 Oklahoma Law Review 49 at 52-53, citing Boykin v. Alabama (1969), 395 U.S. 238; Cameron v. State, 513 P. 2d 591 (Okla. Cr. 1973); Smith v. Oklahoma City 513 P. 2d 1327 (Okla. Cr. 1973).

⁸³¹ R.B. McNamara, Constitutional Limitations on Criminal Procedure (1982) at 179-180.

witnesses against him, and the right not to be compelled to incriminate himself."⁸³²

The advice and explanation of trial-related constitutional rights must be meaningful, and counsel, if not the court, should ascertain whether the accused appreciates the significance of waiving these rights.⁸³³

Where the accused is represented by counsel, counsel should advise him of the waivers resulting from a plea of guilty.⁸³⁴ Where, however, the accused waives the right to assistance of counsel at the arraignment, the trial judge must not only fully advise the accused of the rights being waived by the guilty plea, but also ensure that the waiver of counsel is made voluntarily and intelligently, with knowledge of the nature of the charges, any included offences, the range of punishments, any possible defences, and any mitigating factors.⁸³⁵

The Supreme Court has permitted some compromising of the standards of voluntariness and accuracy in favour of an intelligent waiver of constitutional rights. They held in North Carolina v. Alford⁸³⁶ that an accused could voluntarily, knowingly and understandingly consent to

⁸³² M.G. Hermann, Rules of Criminal Procedure for the United States District Courts, Practice Comments (2d ed. 1985) at 94.

⁸³³ Id at 101.

⁸³⁴ Id at 105.

⁸³⁵ Notes, "The Trial Judge's Satisfaction as to Voluntariness and Understanding of Guilty Pleas", [1970] Washington Law Quarterly 289 at 326-328, referring to Von Moltke v. Gillies (1947), 332 U.S. 708 (U.S.S.C.) at 724.

⁸³⁶ (1970), 400 U.S. 25 (U.S.S.C.).

conviction even if he was unwilling or unable to admit participation in the acts constituting the crime, and the court could accept the plea if the record contained a strong factual basis for the plea. The court considered that a guilty plea was intelligent in the constitutional sense, if it was a voluntary and rational choice among the alternative courses of action open to the defendant.⁸³⁷ While this rule may create a risk of conviction of the innocent it has been argued that it maximizes the accused's freedom of choice and ensures that the trial judge is made aware of all facts relevant to the acceptability of the guilty plea.⁸³⁸ O'Brien⁸³⁹ stated,

"...an inflexible rule which prohibits the acceptance of a guilty plea containing protestations of innocence is not necessarily protective of the criminal defendant's constitutional rights. Compliance with such a mandate poses no difficulty for the criminal defendant who, with the advice of counsel, is predisposed to make no statement inconsistent with the entrance of his guilty plea. However, that same rule presents an obstacle to acceptance of the plea where the defendant, although ready to enter a plea, finds it necessary to couple such plea with a simultaneous disclaimer of guilt. Such a disclaimer may, under certain circumstances, be indicative of a lack of volition or intelligent choice. However, the holding in the principle case allows the trial judge to accept an equivocal plea of guilty where all relevant circumstances point to the voluntary and intelligent nature of the plea. The effect of the opinion is to promote the disclosure of all relevant circumstances to the trial judge, including those which may be inconsistent with the plea, so that the judge may determine the voluntariness and intelligence of the plea in a more meaningful context."

⁸³⁷ Id at 31, discussed in R.B. McNamara, Constitutional Limitations of Criminal Procedure (1982) at 190.

⁸³⁸ North Carolina v. Alford (1970), 400 U.S. 25 (U.S.S.C.) at 37-38, discussed in R.B. McNamara, Constitutional Limitations on Criminal Procedure (1982) at 186, See also, W.J. O'Brien, "Constitutionality of an Equivocal Guilty Plea" (1973), 8 Gonzaga Law Review 332 at 332-336.

⁸³⁹ W.J. O'Brien, "Constitutionality of an Equivocal Plea" (1973), 8 Gonzaga Law Review 332 at 338.

Besides waiving the accused's trial-related constitutional rights, a guilty plea effectively waives the right to challenge violations of other constitutional rights which antedate the plea. However, under Rule 11(a)(2) of the Federal Rules of Criminal Procedure, and in some states (for example, New York State) it is possible for the accused to enter a conditional plea of guilty, expressly reserving the right on appeal from judgment to review the adverse determination of any pre-trial motion. Thus, an accused could enter a conditional plea of guilty while reserving the right to raise a violation of constitutional rights on review.⁸⁴⁰ It has been suggested that this rule promotes judicial efficiency and the enforcement of constitutional rights by allowing the accused to plead guilty in circumstances where, in the absence of the rule, a plea of not guilty would have to be entered in order to be able to assert the constitutional right on appeal.⁸⁴¹ In cases where conviction or acquittal turns on whether there has been a violation of a constitutional right, a successful determination of the constitutional challenge on appeal would likely result in dismissal of the charges, thus obviating the necessity of a trial.⁸⁴²

⁸⁴⁰ M.G. Hermann, Rules of Criminal Procedure for the United States District Courts, Practice Comments (2d ed. 1985) at 93; N.Y. Code of Crim. Proc. ss. 813-c (McKinney Supp. 1970), cited in J.N. Hermes, "Criminal Procedure: Effects of a Plea of Guilty on a Defendant's Constitutional Rights" (1974), 27 *Oklahoma Law Review* 49 at 54.

⁸⁴¹ J.N. Hermes, "Criminal Procedure: Effects of a Plea of Guilty on a Defendant's Constitutional Rights" (1974), 27 *Oklahoma Law Review* 49 at 54-55.

⁸⁴² Id at 55.

Summary

This review of Canadian and American jurisprudence on the constitutional aspects of the guilty plea indicates that the American courts have already explored in considerable depth the constitutional requirements for the acceptability of a guilty plea, whereas the Canadian courts have barely broached the subject to date. The American jurisprudence may foreshadow what can be expected in Canada once the constitutional impact of the guilty plea is recognized.

Given the inadequacy from a constitutional perspective of the existing standards for acceptance of a guilty plea in Canada, it may be useful to borrow from the American experience. Recent developments in Canadian jurisprudence on the waiver of constitutional rights are not inconsistent with the general approach in the United States.⁸⁴³ However, it is clear that there is yet a long way to go. It would be helpful if Canadian courts were to recognize that the guilty plea serves as a waiver of important procedural and constitutional rights relevant to the trial and pre trial process. The courts ought then to take a more active role in ensuring the validity of this waiver by guilty plea, by making careful judicial inquiry at the time the plea is tendered to ascertain whether it is intelligently, voluntarily and accurately made.

⁸⁴³ However, some aspects of the American approach may not be readily transplanted to Canadian soil. In particular, their heavy dependence on negotiated guilty pleas has compromised the standards of acceptability of the guilty plea to the extent that an accused who considers himself innocent may nonetheless make the tactical decision to plead guilty. Arguably, this situation would present problems of principle, along the lines alluded to by Manning, and in Korponay and Heaslip.

Chapter 7. REEVALUATION AND REFORM OF THE GUILTY PLEA PROCESS

In spite of its practical significance as the most common means of resolving criminal matters, strangely, in Canada there is a dearth of legislative or jurisprudential guidance on the acceptability of the guilty plea.⁸⁴⁴ There has been no concerted effort to reconcile the idealized adversarial criminal process with its built-in constitutional protections for the accused, and the existing guilty plea process with its dependence on the accused's total abdication of all procedural rights.

This final chapter will attempt to demonstrate the pressing need to reevaluate and reform the existing guilty plea process so as to make it accord with fundamental criminal law principles. First, this chapter will address the inconsistency between the ideal of the adversarial criminal process and the reality that the majority of accused are convicted on their own guilty pleas with little or no "in-court" testing of the reliability of those pleas (A). Second, the guilty plea process will be compared with Continental summary criminal procedures which follow an inquisitorial model, requiring a detailed judicial inquiry even in cases where the accused does not contest guilt (B). Third, and last of all, options for improving the guilty plea process and the standards of acceptability for the guilty plea will be explored in order to assist in the development of a constitutionally sound system of summary criminal justice (C).

⁸⁴⁴ J. Fortin, Preuve Pénale (1984) at 388.

A. The adversarial model and the reality of the guilty plea

There is a grave discrepancy between the ideal of adversarial criminal trial process, and the reality that most accused are convicted on a guilty plea without any trial at all. Pugh described this discrepancy as follows:

"In theory, the guilt or innocence of an accused in our system is to be determined at trial. It is there that the defendant is accorded those major protective safeguards which characterize our system and are seen by us to validate the verdict - the presumption of innocence, right of confrontation and compulsory process, right to counsel, the jury, privilege against self-incrimination, etc. Realistically analyzed, however, in light of how our system really functions today, is this an accurate perception? It has been reported that approximately 80-95 percent of convictions are obtained as the result (either explicitly or implicitly) of plea bargains, or to use a nicer phrase - "plea discussions". It is therefore only in a very small percentage of our total cases that guilt is in fact determined by a trial, with all of its vaunted traditional safeguards protecting against an unjust conviction. Therefore, guilt is often determined by negotiation between defence counsel and the district attorney in light of the risks each must face if he undergoes the uncertainties of a trial."⁸⁴⁵

The adversarial model of criminal process which governs trial procedures on a plea of not guilty, also affects the procedures that will be followed when an accused pleads guilty at arraignment. Leask⁸⁴⁶ described this adversary process as follows,

⁸⁴⁵ Pugh, "Ruminations Re Reform of American Criminal Justice (Especially our Guilty Plea System): Reflections Derived from a Study of the French System" (1976), 36 Louisiana Law Review 947 at 948-949.

⁸⁴⁶ P. Leask, "Topic No.4 The Relative Merits and Present Day Suitability of the Adversary (or Accusatorial), Inquisitorial, Mediatorial and other systems of Trial for Breaches of the Criminal Law and for the Resolution of Disputes" Nov. 1974), International Bar Journal 87 at 88-89.

"In the adversary system as it appears to function today... it is normal for the parties to be represented by lawyers. The parties' role at trial itself is therefore confined to giving evidence and to giving instructions to their lawyers for the conduct of the case. The judges' role in the adversary process is a relatively passive one of ensuring that lawyers of the parties obey the procedural rules, resolving any disputes between those lawyers about the applicability of procedural rules to the instant dispute and giving a decision on the dispute after hearing all the matters raised by the lawyers. The most important participants in an adversary procedure are the lawyers. They are responsible for gathering the evidence, deciding how it is to be presented, determining what is not going to be presented, through cross-examination testing the evidence called by the opposing lawyer, and making submissions to the judge as to the proper interpretation to be placed on the evidence and law applicable to the case. In the adversary system, there is a theoretical assumption that each party knows what is best for him.

There is an equally theoretical assumption that all lawyers are equally competent. Although judges generally do have the power to question witnesses or even to call witnesses not called by the parties, it is normal in adversary systems of procedure for the judge to exercise these powers very sparingly if at all. The theory of the adversary system is that each party will do his utmost, within the limits permitted by the system, to attempt to win and will also do his best to pinpoint the flaws in his opponent's case. In the clash between the opposing versions of the dispute the judge will be able to detect the truth."

In the guilty plea situation one finds the trial court passively relying on opposing counsel to bring to light any factors that may detract from the prima facie acceptability of the tendered plea. The applicability of the adversarial model to the guilty plea process is, however, highly questionable. Since the guilty plea is often the result of an express or an implicit bargain between prosecutor and defence counsel there will not be much dispute between the parties, so that the trial judge is left with an inadequate basis upon which to assess the acceptability of the guilty plea. Further, the mere fact that prosecuting and defence counsel agree on the result is no guarantee that the interests of justice are being served. Indeed their motives for

agreeing on the guilty plea may be quite inimical to concerns of justice. Pugh described the problem as follows,

"Presumably the goal of the judicial process is justice - justice in its fullest meaning - with the myriad philosophical and practical aspects that enter into crime and punishment. Instead of such ethereal factors, a prosecuting attorney often may have much more practical personal problems of immediate concern - not only his crowded dockets, but also the pressures brought by the press, the victim and his family and friends, and the defendant and his. Similarly, defense counsel, especially the public defender, may be overcome by the press of numbers, the desire to establish a principle, or achieve a modus vivendi with his likewise overworked opponent. What I am trying to say is that in the practical bargaining process between defense counsel and prosecuting attorney, all of society's legitimate interests may not be sufficiently represented. Extraneous inappropriate influences may too often inject themselves."⁸⁴⁷

The absence of contest between Crown and defence in the guilty plea process means that there will be no opportunity to test the acceptability of the guilty plea unless the trial judge assumes an actively inquisitorial role. While Canadian courts have a discretion to put aside their attitude of reserve when dealing with a guilty plea,⁸⁴⁸ the applicable standard for judicial inquiry laid down by the Supreme Court in Brosseau v. The Queen⁸⁴⁹ and Adgey v. The Queen⁸⁵⁰ was very low. Even in the United States, where more stringent standards for acceptance of a guilty plea have been articulated the standards of voluntariness and accuracy are in fact applied in a relatively

⁸⁴⁷ Id at 967.

⁸⁴⁸ J. Fortin, Preuve Pénale (1984) at 389.

⁸⁴⁹ [1968] S.C.R. 181 (S.C.C.).

⁸⁵⁰ [1975] 2 S.C.R. 426 (S.C.C.).

superficial manner, which will not necessarily disclose the pressures that induced the plea or all the pertinent facts of the case.⁸⁵¹

Ericson and Baranek considered that the prevalence of disposition by guilty plea in Canada revealed that the ideal of an adversarial system based on due process was only "a myth".⁸⁵² They stated,

"The ideal of an adversarial system is that the accused is innocent until proven guilty, with the onus on the state to prove guilt according to fair (due process) procedures embodied in the principle of legality...

With the vast majority of cases being disposed of by guilty pleas after out-of-court plea transactions, the general belief is that adversariness is on the decline and that we are moving closer in practice to the inquisitorial system of certain continental European countries... These arguments ignore historical data showing that guilty plea decisions have been the norm since the formalization of criminal control at the beginning of the nineteenth century..."⁸⁵³

The authors concluded, "A call for the return to adversarial rights for the accused misses the point that they never had many".⁸⁵⁴

⁸⁵¹ S. Davis, "The Guilty Plea Process: Exploring the Issues of Voluntariness and Accuracy" (1972), 6 Valparaiso University Law Review 111 at 129.

⁸⁵² R. Ericson & P. Baranek, The Ordering of Justice. A Study of Accused as Dependents in the Criminal Process (1982) at 222.

⁸⁵³ Id at 222-223.

⁸⁵⁴ R. Ericson & P. Baranek, The Ordering of Justice. A Study of Accused as Dependents in the Criminal Process (1982) at 241.

That guilty pleas are not a new phenomenon is borne out by the research of Cousineau and Verdun-Jones.⁸⁵⁵ Rather than suggesting any particular progression away from adversariness or toward an inquisitorial process, the prevalence of the guilty plea process may merely indicate a willingness on the part of the legislature and the courtroom actors to have cases disposed of by a less onerous process than that dictated by the adversary model. In other words, the guilty plea process is not seen as a short form equivalent to the full adversarial hearing, but is simply a matter of expedience.

Given the relative infrequency of the use of the adversary trial process as a means of resolving criminal disputes, perhaps it would be more reasonable to describe the guilty plea process as the norm, with the trial process being an exemplary proceeding to be used only rarely, as an illustration of the idealized direction and focus of the criminal law. For example, it has been suggested that the guilty plea process "preserves the meaningfulness of the trial process for those cases in which there is a real basis for dispute."⁸⁵⁶

⁸⁵⁵ F. Cousineau and F. Verdun-Jones, "Evaluating Research into Plea Bargaining in Canada and the United States: Pitfalls Facing the Policy Makers" (1979), 21 Canadian Journal of Criminology 293.

⁸⁵⁶ Enkes, "Perspectives on Plea Bargaining", in President's Commission on Law Enforcement and Administration of Justice Task Force Report: The Courts (1967) at 117, cited in S. Davis, "The Guilty Plea Process: Exploring the Issues of Voluntariness and Accuracy" (1972), 6 Valparaiso University Law Review 111 at 118.

While this view may be consistent with actual practice it would appear to be at odds with the recent constitutionalization of criminal procedural rights in the Charter. There is nothing in the Charter to suggest that these rights would be satisfied by the provision of a full trial to only a token few accused. The constitutionalization of criminal procedural rights would appear to imply a strong reaffirmation and enlargement of the common law presumption of innocence, proof beyond a reasonable doubt, full answer and defence, trial by jury and other principles of fundamental justice. Traditionally these values have been more closely realized in the adversarial trial process with its panoply of procedural and evidentiary safeguards for the accused, than in the guilty plea process. In the past the procedural and evidentiary safeguards were blurred and confused in the guilty plea process. The plea itself was accepted as a simple admission with little consideration for the accused's need to understand its procedural consequences. With the constitutionalization of criminal procedural rights, it is arguable that similar procedural, evidentiary and constitutional safeguards should apply whether the accused pleads guilty or not guilty. Arguably, there is now a constitutional requirement of equivalency between the trial process and the guilty plea process.

This does not mean that the adversarial model is necessarily suited to the guilty plea process. Leask stated that the inquisitorial system was the best means of finding the truth whereas the adversary system

gave the most impressive display of "justice being done".⁸⁵⁷ However, in the guilty plea context, the adversarial model serves no purpose and may inhibit full discovery of the circumstances of the guilty plea and of the offence: justice will not be seen to be done.

Volkman-Schluck also demonstrated that in the context of conviction by guilty plea the adversary system completely failed to serve any truth-finding role,

"While the Continental process aims at determining the truth, the adversary system's goal is to settle the dispute created by the prosecutor's allegation that the defendant has committed a crime. If one assumes that the adversary process is a litigation between parties, it is logical that the parties should be able to limit the subject of the dispute or even to come to a settlement without adjudication by a court. Therefore, plea bargaining is not a strange element within the adversary procedure. On the other hand, in the non-adversary procedure, in which the inherent goal is that the facts and the defendant's guilt be judicially ascertained, plea bargaining has no place. This statement does not, of course, mean that finding the truth is an irrelevant or superfluous concept in the adversary model. On the contrary, the United States Supreme Court has frequently emphasized that the basic purpose of a trial is the determination of truth. It should, however, be noted that the great majority of cases in the adversary system are disposed of by guilty plea. In only a small percentage of instances is the truth-finding process of a trial utilized."⁸⁵⁸

Given the failure of the adversarial model in the guilty plea context, what seems to be required to achieve some level of equivalency between the trial and guilty plea processes, is a judicial investigation

⁸⁵⁷ P. Leask, "Topic No.4 The Relative Merits and Present Day Suitability of the Adversary (or Accusatorial), Inquisitorial, Mediatorial and other Systems of Trial for Breaches of the Criminal Law and for the Resolution of Disputes" (Nov. 1974) International Bar Journal 87 at 91.

⁸⁵⁸ T. Volkman-Schluck, "Continental European criminal Procedures: True or Illusive Model?" (1981), 9 American Journal of Criminal Law 1 at 4-5.

of the facts of the case and the reasons for the guilty plea, to permit judicial verification of the acceptability of the guilty plea. In the following pages the use of the inquisitorial model for summary criminal proceedings in Europe will be examined. It is submitted that this model demonstrates the efficacy and fairness, in the guilty plea context, of conducting a judicial inquiry before founding a conviction upon an accused's admission and consent.

B. The inquisitorial or non adversarial model

The criminal procedures of Continental Europe today are substantially different from the infamous inquisitorial procedures of the ancien régime. Transformed by the ideals of liberalism, the philosophy of the age of enlightenment, and the inclusion of jury trials and oral proof in open court, the European inquisitorial process evolved into what might better be described as a non adversarial process.⁸⁵⁹

Schlesinger wrote,

"As a result of the teachings of 18th-century thinkers such as Montesquieu, and of events set in motion by the French Revolution, most continental legal systems long ago adopted the very centerpiece of the common law adversary process: the jury trial in criminal cases... Moreover, many of the continental countries, by adhering to the European Convention on Human Rights, have subjected themselves to general standards of procedural fairness quite comparable to our due process notions."⁸⁶⁰

⁸⁵⁹ T. Volkmann-Schluck, "Continental European Criminal Procedures: True or Illusive Model?" (1981), 9 American Journal of Criminal Law 1 at 3.

⁸⁶⁰ R. Schlesinger, "Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience" (1976), 26 Buffalo Law Review 361 at 363-364. The European Convention on Human Rights also bears comparison with the Canadian Charter of Rights and Freedoms.

The inquisitorial system itself was in effect transformed into a type of accusatorial process because the interrogatoire was no longer only a means of instruction, ie., of compiling a dossier against the accused, but also became a means of defence.⁸⁶¹ The formal rules of proof and the abusive methods used to extract the all-important confession, fell into serious disrepute and were rejected,⁸⁶² and replaced in all cases by the principle of intime conviction which neither required nor excluded any particular element of proof, but left the matter of evaluating evidence to the "intime conviction des juges".⁸⁶³ The confession was expressly made subject to this rule by the French Code of Criminal Procedure which specified that "l'aveu, comme tout élément de preuve, est laissé à la libre appréciation des juges."⁸⁶⁴

Even though the formal requirements of a confession were abolished, the entire investigatory criminal process still tends to encourage confessions,⁸⁶⁵ and the confession retains the potential to be a

⁸⁶¹ I Dalloz, "Aveu", in Repertoire de Droit Pénal et de Procédure Pénale (2me ed. 1981) at 1, para.4; G. Brouwer, "Inquisitorial and Adversary Procedures - a Comparative Analysis" (1981), 55 The Australian Law Journal 207 at 207.

⁸⁶² I Dalloz, "Aveu", in Repertoire de Droit Pénal et de Procédure Pénale (2me ed. 1981) at 1, para. 4.

⁸⁶³ Id at 1, para. 6.

⁸⁶⁴ Id; also, G.Brouwer, "Inquisitorial and Adversary Procedures - a Comparative Analysis" (1981), 55 The Australian Law Journal 207 at 209.

⁸⁶⁵ I. Dalloz, "Aveu", in Repertoire de Droit Pénal et de Procédure Pénale (2me ed. 1981) at 1-2, para. 10.

significant element of proof under the French criminal procedure, depending on the circumstances in which it is offered:⁸⁶⁶

"...l'aveu peut constituer un element de conviction s'il a été fourni sans contrainte d'aucune sorte, matérielle ou morale, en pleine connaissance de cause, par un inculqué ou un prévenu conscient de ses paroles."⁸⁶⁷

Also, although a confession may be provoked by the interrogation process, it may not be extorted.⁸⁶⁸ The detailed interrogation of the accused under French criminal procedure is considered a normal part of the investigation into an offence. It is considered as being conducive to the discovery of the truth and as permitting the accused to make known his point of view, thereby ensuring that the dossier going to court is balanced.⁸⁶⁹

The mere fact that an accused confesses does not operate, as does an accepted guilty plea, so as to preclude the holding of a trial.⁸⁷⁰ In all but the most minor cases, a French court will only reach its decision on culpability after an examination of all the facts,

⁸⁶⁶ Id at 1, para. 7-9.

⁸⁶⁷ Id at 1, para. 7.

⁸⁶⁸ Id at 1, para. 10. At the accused's first interrogation he must be warned that he is not required to make a statement, and advised of his right to counsel. At subsequent interrogations, unless the accused waives this right, he can only be interrogated in the presence of his counsel: G. Brouwer, "Inquisitorial and Adversary Procedures - a Comparative Analysis" (1981), 55 *The Australian Law Journal* 207 at 214.

⁸⁶⁹ A. Sheehan, Criminal Procedure in Scotland and France (1975) at 26 et seq.

⁸⁷⁰ R. Schlesinger, "Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience" (1976), 26 *Buffalo Law Review* 361 at 382.

regardless of the attitude of the accused.⁸⁷¹ Pugh stated that in the French procedure, "...there is generally no guilty plea available to short cut the system."⁸⁷² The criminal trial judge plays an active role in delving for pertinent evidence both during the preliminary investigation by the examining magistrate as well as during the contradictory, trial phase, and is not precluded by a confession from pursuing this investigatory role.⁸⁷³ Further, while the prosecuting attorney and defence counsel may actively participate during interrogations, the examining magistrate at all times retains control of the proceedings.⁸⁷⁴ Brouwer noted the irony in the fact that the present-day French investigatory process appears to attach less importance to the accused's confession than does the so-called "adversary" system with its inquisitorial-like dependence on the guilty plea process.⁸⁷⁵

In West Germany also it would appear that the fact that an accused confesses will not preclude the holding of a full trial. Langbein wrote,

⁸⁷¹ A. Sheehan, Criminal Procedure in Scotland and France (1975) at 26.

⁸⁷² G. Pugh, "Ruminations Re Reform of American Criminal Justice (Especially Our Guilty Plea System): Reflections Derived from a Study of the French System" (1976), 36 Louisiana Law Review 947 at 949.

⁸⁷³ G. Brouwer, "Inquisitorial and Adversary Procedures - a Comparative Analysis" (1981), 55 The Australian Law Journal 207 at 209.

⁸⁷⁴ Id at 215.

⁸⁷⁵ Id at 222.

"The court's duty of independent investigation, coupled with the principle of orality and immediacy, oblige the court to satisfy itself of the guilt of the accused by means of an oral public trial, regardless of whether the accused confesses before or during trial."⁸⁷⁶

Langbein suggested that the high rate of confessions in Germany - they occurred in some forty one per cent of cases tried - resulted not because of any hope of reward, but because there was no advantage to be wrung from the system by withholding the confession.⁸⁷⁷ In fact, it is forbidden in Germany to punish more leniently an accused who confesses, solely on account of the confession, because this tends to pressure accused persons to confess.⁸⁷⁸

Simply because the accused's confession will not preclude the holding of a trial to establish guilt, the European systems of criminal procedure, unlike the American and Canadian criminal justice systems, seem to be immune from being supplanted by plea bargaining. There are two factors which tend to strengthen the European systems against plea bargaining.

First, plea bargaining does not seem to have become a problem under Continental criminal procedure because the Europeans have devised other means of dealing with petty crimes. There is the possibility of resolving a minor criminal matter through an administrative process

⁸⁷⁶ J. Langbein, Comparative Criminal Procedure: Germany (1977) at 73-74.

⁸⁷⁷ J. Langbein, "Land Without Plea Bargaining: How the Germans do it" (1979) 78 Michigan Law Review 204 at 218-219.

⁸⁷⁸ Id at 221.

instead of getting full judicial treatment. For example, in West Germany there is a penal order process for petty crimes, whereby the accused may accept the prosecutor's proposed disposition of the case (already approved by a judge) and thus avoid the necessity of a trial.⁸⁷⁹ Another example is found in France, where in the most minor cases before the tribunal de police, the court merely asks the accused if he admits the facts, and if he does, proceeds to penalty without any further examination of the evidence.⁸⁸⁰ In France there is also the process of correctionalization whereby a criminal matter can be tried by the tribunal correctionnel rather than in the cour d'assises, if the defendant, the court and the victim agree with the prosecutor's decision to do this. A further example is that of the Norwegian patale unnlatelyse, a process by which a prosecutor who has received a detailed confession and is convinced of the accused's guilt, may levy a guilty judgment without the involvement of the court. However, no imprisonment or fine may be imposed as a result of patale unnlatelyse.⁸⁸¹

A second reason why plea bargaining appears not to be a problem in Europe is that the European prosecutor lacks the wide discretion of an

⁸⁷⁹ J. Stepan, "Possible Lessons from Continental Criminal Procedure", in The Economics of Crime and Punishment, A Conference sponsored by American Enterprise Institute for Public Policy Research (1973) at 195-199; W. Felstiner and A. Drew, European Alternatives to Criminal Trials and Their Applicability in the United States (1978).

⁸⁸⁰ A. Sheehan, Criminal Procedure in Scotland and France (1975) at 26 et seq.

⁸⁸¹ W. Felstiner and A. Drew, European Alternatives to Criminal Trials and Their Applicability in the United States (1979) at 7.

American or Canadian prosecutor.⁸⁸² Given the West German and Austrian "principle of legality", which requires the prosecutor to prosecute all provable non-petty crimes, the practice of plea bargaining would be clearly inconsistent with the duties of the public prosecutor. Indeed, a European observer might conclude that the wide discretion of the prosecutor in America or Canada leads to the violation of law and of the principle of equal justice.⁸⁸³ This Legalitatzsprinzip only applies to the most serious crimes and in respect to less serious infractions the German system provides more scope for accommodation through the penal order and discretionary non prosecution.⁸⁸⁴ The prosecutor's election to proceed by way of penal order or discretionary non prosecution is, however, subject to the obtaining of court approval for this course of action.

Goldstein and Marcus contended, that, notwithstanding the inquisitorial ideal of judicial supervision of the investigation of crime in Europe, this role had become largely mythological, with prosecutors and judges relying heavily on the police to develop the dossier.⁸⁸⁵ They concluded that although an accused could not completely

⁸⁸² J. Stepan, "Possible Lessons from Continental Criminal Procedure", in The Economics of Crime and Punishment, A Conference sponsored by American Enterprise Institute for Public Policy Research (1973) at 195.

⁸⁸³ Id at 190.

⁸⁸⁴ J. Langbein, Comparative Criminal Procedure. Germany (1977) at 87-100.

⁸⁸⁵ A. Goldstein & M. Marcus, "The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany" (1977), 87 Yale Law Journal 240 at 246-250.

avoid trial by confessing, and although defence counsel could not make discretionary arrangements with the prosecution to resolve a criminal matter, the accused could affect the nature of his trial by how much he cooperated. They considered that discretion operated covertly in the European criminal processes, in the form of the penal order in West Germany, and in correctionalization in France, so that these summary processes were in fact "functional analogies to the guilty plea and plea bargaining".⁸⁸⁶ They described the penal order as "a direct analogue of the American guilty plea",⁸⁸⁷ and also found analogies to the guilty plea in the treatment of more serious crimes. They wrote,

"Even in more serious cases, a more subtle analogue can be perceived. [In Germany t]he uncontested trial is brief; few witnesses are called; and the judge sees his task in calling witnesses less as developing the facts as confirming the confession. In Italy, uncontested trials are commonly used to corroborate the dossier quickly rather than to test or develop the facts that it presents. And when guilt is uncontested in the French Correctional Court, the trial is reduced to a perfunctory proceeding. The prosecutor may well not call a single corroborating witness. The accused makes his statement, the lawyers their speeches, and sentencing swiftly follows."⁸⁸⁸

Goldstein and Marcus considered that the Continental European prosecutor had sufficient discretion to engage in conduct akin to plea bargaining.⁸⁸⁹ They postulated that Continental European prosecutors and police were able to avoid the rigours of the rule of compulsory prosecution in Germany and Italy by failing to gather the evidence necessary to support a charge, and in France by the process of

⁸⁸⁶ Id at 264.

⁸⁸⁷ Id at 267.

⁸⁸⁸ Id at 267-268.

⁸⁸⁹ Id at 269-279.

correctionalization. They considered that judges and prosecutors in Continental systems of criminal procedure were more passive and reactive than their counterparts in the United States, and that as a consequence of this passivity the police emerged as the dominant force in the making of investigation and charging decisions.⁸⁸⁰ Because of their interpretation of Continental law and practice, Goldstein and Marcus rejected the inquisitorial model as offering any solutions for the American problems relating to police powers, prosecutorial discretion and guilty pleas. In a subsequent defence of this article, they summarized their perspective as follows,

"We looked to Continental criminal procedure precisely because it is there that a more active and effective judicial role is claimed. But our findings suggest the need to learn the limits of what judges and other officials can do and to assess the risk that judicial control may drive decisions into hiding in the inevitable cracks among the provisions of a code of criminal procedure."⁸⁸¹

Goldstein and Marcus' assessment of Continental European criminal procedure spawned a heated academic debate as to the proper interpretation of European law and practice and as to their usefulness in solving the problematic guilty plea process in the United States. Langbein and Weinreb argued that Goldstein and Marcus' descriptions of continental criminal procedure were substantially misleading and that the analogies they drew between American and Continental procedures ignored differences in the selection, training and professional codes

⁸⁸⁰ Id at 282.

⁸⁸¹ A. Goldstein & M. Marcus, "Comment on Continental Criminal Procedure" (1978), 87 Yale Law Journal 1570 at 1576-1577.

of foreign officials as well as in the institutional structures in which they acted.⁸⁹²

Contrary to Goldstein and Marcus' descriptions of European procedures, Langbein and Weinreb stated that in France there was an investigation under the direction of a magistrate in respect to any délits for which the procureur believed the police investigation was incomplete and in respect to all cases in which the state intended to prove a crime.⁸⁹³ The resulting dossier was unlike an American police report, because it was intended for use as part of the evidentiary basis for the judgment. The dossier provided a complete and formally correct investigatory record of the inculpatory and exculpatory evidence, and it was available to the defendant as well as the prosecution.⁸⁹⁴ Langbein and Weinreb contended that there was no evidence that accused persons were subjected to pressure akin to plea bargaining to induce them not to contest charges, the procureurs denied engaging in such practices, and there was no talk between the accused and the procureur of trading a confession for the reduction or correctionalization of charges.⁸⁹⁵ The authors denied that correctionalization was like plea bargaining because the procureur made the decision to correctionalize without discussing it with the accused, and because an accused who

⁸⁹² J. Langbein & L. Weinreb, "Continental Criminal Procedure: "Myth" and Reality" (1978), 87 Yale Law Journal 1549 at 1550.

⁸⁹³ Id at 1552-1553.

⁸⁹⁴ Id at 1553-1554.

⁸⁹⁵ Id at 1556-1557.

accepted correctionalization did not have to agree with the prosecution's version of the facts, as would an accused who entered into a plea bargain.⁸⁹⁶

Langbein and Weinreb also contended that West German criminal procedure had very successfully eliminated discretion from the prosecution of serious crimes, in that the Code of Criminal Procedure of that country required that all felonies and all misdemeanours that could not be excused as minor or of no public interest had to be prosecuted to the extent that there was a sufficient factual basis.⁸⁹⁷ The authors pointed out that a crucial corollary of the Legalitatsprinzip was that there could be no charge or plea bargaining over serious crimes. They stated,

"The prosecutor who is duty-bound to prosecute in every such case lacks authority, for example, to offer to reduce the charge in return for a concession of guilt. The rule of compulsory prosecution requires him to take the case to trial in its strongest and most inclusive form. If he does not, the court is empowered to correct his error. And even if the accused admits his guilt, a trial must be held at which proof will be taken to establish the material facts.

German trial procedure is relatively rapid, so the prosecutor has no particular incentive to try to avoid trial even if he could. The prosecutor's pretrial dossier facilitates the trial, because the trial judge works from it when he interrogates witnesses and the accused. The prosecutor is under a duty to investigate thoroughly and impartially, and the dossier contains exculpatory as well as inculpatory evidence. It is made available in advance of the trial to the accused and his defense counsel, who can by motion require the prosecutor to investigate defensive claims and evidence that he has overlooked on his own. Surprise and forensic

⁸⁹⁶ Id at 1557-1558.

⁸⁹⁷ Id at 1561-1562.

strategy are largely eliminated from the trial, which is usually straightforward and speedy."⁸⁹⁸

Where the accused confessed at trial, the hearing might be somewhat shorter because the court would then only call some of the potential witnesses and if they confirmed what the accused had confessed, the court would not need to call the remaining witnesses.⁸⁹⁹

Langbein and Weinreb disagreed with Goldstein and Marcus' contention that the German penal order was a direct analogue of the American guilty plea for several reasons. First, the penal order was only available for minor offences punishable by fine or suspension of driver's license; second, there was no bargaining over the penal order - it was offered on a take-it-or-leave-it basis; third, the rejection by an accused of disposition by a penal order would virtually never lead to a heavier penalty being imposed if the accused was convicted at trial; and fourth, there was no pressure placed on the accused to waive the right to trial.⁹⁰⁰

The authors considered that because Continental European legal systems had developed reasonable and workable procedures for dealing with cases where guilt was not strongly disputed, these systems might

⁸⁹⁸ Id at 1562-1563.

⁸⁹⁹ Id at 1566.

⁹⁰⁰ Id at 1565-1566. See also J. Langbein, Comparative Criminal Procedure: Germany (1977) at 87-100. See also, T. Volkmann-Schluck, "Continental European Criminal Procedures: True or Illusive Model?" (1981), 9 American Journal of Criminal Law 1 at 28-30.

well offer some guidance as to how to master the guilty plea problem in the United States. They maintained,

"...we think there is far more to be learned from other countries' experience, particularly that of France and Germany which we know best, than Goldstein and Marcus allow. Summary procedures for determining guilt are not necessarily all alike just because they are the primary means of disposing of large numbers of cases. It is no less important to ask which system "more fairly and accurately searches out the truth" when we are comparing modes of simple, swift process than when we are comparing more painstaking procedures."⁹⁰¹

Volkman-Schluck also disagreed with Goldstein and Marcus' attempts to equate European summary criminal procedures and the American guilty plea. In comparing Continental European and American criminal procedures, he identified four characteristics of American adversarial procedure which made it possible for the judicial process to turn into a "de facto non-trial disposition procedure":⁹⁰² first, the excessive cost and complexity of jury trials; second, the prosecutor's broad discretion and control over the charging process; third, the adversarial nature of the proceedings which permitted the parties - prosecutor and accused - to settle informally; and fourth, sentence reductions for those who pleaded guilty instead of going to trial. Volkman-Schluck argued that the Continental criminal procedure lacked these characteristics, thereby reducing the tendency for plea bargaining to develop. The non adversarial system was less complex, and balanced safeguards and efficiency more rationally than in the adversarial model;

⁹⁰¹ J. Langbein & L. Weinreb, "Continental Criminal Procedure: "Myth" and Reality" (1978), 87 Yale Law Journal 1549 at 1568-1569.

⁹⁰² T. Volkman-Schluck, "Continental European Criminal Procedures: True or Illusive Model?" (1981), 9 American Journal of Criminal Law 1 at 25.

prosecutorial discretion was limited by procedural and institutional devices; there was no private character to the non adversary procedure, so the court was not bound by the parties' allegations and evaluation of the facts; and the accused would be tried regardless of whether there was a confession of guilt.⁹⁰³

Volkman-Schluck disagreed with Goldstein and Marcus' contention that French correctionalization and German penal orders were analogous to American plea bargaining.⁹⁰⁴ He pointed out that with correctionalization, the accused still received a full trial: correctionalization was merely designed so as to reserve the more elaborate procedures of the cour d'assises for the most complex and serious cases.⁹⁰⁵ He also demonstrated the significant differences between the German penal order and conditional dismissal and American plea bargaining. The conditional dismissal applied only where an accused was suspected of a petty crime and guilt was minor. In such a case the prosecutor, with the court's consent could offer to refrain from further prosecution if the accused would compensate the victim or pay money to the state or a charity. If the accused accepted, there would be no criminal record for the offence.⁹⁰⁶ Thus there was no element of bargaining between the prosecutor and the accused. Volkman-Schluck concluded,

⁹⁰³ Id at 26.

⁹⁰⁴ Id.

⁹⁰⁵ Id at 26-28.

⁹⁰⁶ Id at 28-30.

"Although procedural discretion exists both de jure and de facto in Continental European countries, it is limited by procedural or institutional means and does not reach the freedom from normative restraints that American prosecutors have. Therefore, although Continental systems do provide simple models of procedure which avoid the costly and burdensome public trial, plea bargaining as such does not exist in non-adversary procedures."⁹⁰⁷

The lesson that may be learned from this brief examination of Continental European criminal procedure is that it is possible to retain the integrity of a criminal justice process while assuring relatively speedy disposition of cases. It appears that the institutionalization of the judicial investigative role in Europe tends to improve the quality of summary justice by ensuring that before a conviction is registered there has been a judicial examination of the facts of the case, including both inculpatory and exculpatory evidence. Indeed, just because the investigative process is so thorough, trials in both contested and uncontested matters are relatively brief, and the possibility of gaining special advantage by confessing to the crime is reduced.

The guilty plea process on the other hand seriously undermines the ideals of the Canadian adversarial criminal process, and threatens the integrity of our system of criminal justice. Extreme pressures are imposed on the accused to plead guilty and there is only the most cursory judicial review of the "acceptability" of the guilty plea. The inadequacy of this judicial examination is exacerbated by the courts' misconception of their role in the guilty plea process. Assuming that they should not enter into the fray, they depend on the adversarial

⁹⁰⁷ Id at 31.

relationship between prosecutor and defence counsel to draw out the truth; but since prosecution and defence are more or less in agreement on the disposition of the case, the trial judge likely will not receive the information necessary to judge the appropriateness of the tendered plea. Because of this erroneous adherence to the adversarial model in the guilty plea process, trial courts maintain a misconceived attitude of aloofness and may unwittingly condone serious injustice.

C. Setting standards for the guilty plea process

In the preceding pages the problems with the guilty plea process have been explored. One finds the guilty plea process, which claims its legitimacy by analogy to adversarial trial process and the notion of waiver, is in fact a travesty of the adversarial trial process, lacking all of its guarantees of procedural fairness and its safeguards against wrongful conviction. The case law reveals that because the procedural and evidentiary nature of the guilty plea has not been appreciated, the courts have not been able to develop a comprehensive theory of the guilty plea, or adequate guidelines or criteria for the acceptability of a guilty plea. As a result, the courts have not coped well with the central issues of understanding, voluntariness and accuracy. Instead of treating these as mandatory conditions of acceptability, the courts have referred to one or other of them as seemed appropriate, thereby treating them more as alternative or optional criteria. Worse still, the courts often have been unwilling to even consider the question of acceptability on the ground that the

decision to accept or reject a guilty plea is a matter within the broad discretion of the trial judge. The recent entrenchment of many of the traditional criminal law principles in the Charter has not yet caused a judicial reevaluation of the guilty plea process, although there are persuasive arguments to be made that such reevaluation is now constitutionally mandated.

American courts, guided by the constitutional requirements of due process, have recognized the need for inquiry into the accused's understanding, the voluntary nature of the plea and its factual accuracy. However, even with general agreement on the relevant criteria for acceptability of the guilty plea, the American courts and commentators have had difficulty devising a procedure which will elicit the necessary information.⁹⁰⁸ These difficulties have been exacerbated by the adversarial relationship between prosecuting and defence counsel and the justice system's heavy reliance on the secret processes of plea bargaining.

There have been numerous proposals suggesting ways to ensure the intelligent, voluntary and accurate nature of the guilty plea, many of them calling for greater pre-trial disclosure and a stronger judicial role in investigating the circumstances of the guilty plea. A review of these proposals will be useful to any endeavour to reform the guilty plea process in Canada.

⁹⁰⁸ Notes, "The Trial Judge's Satisfaction as to Voluntariness and Understanding of Guilty Pleas", [1970] Washington University Law Quarterly 289 at 289-294.

It has also been suggested that the courts could themselves improve the voluntariness of the guilty plea by ceasing the subtly coercive practice of rewarding accused who pleaded guilty with lighter sentences than those given to accused who were convicted after trial. An American study⁸⁰⁹ found that the well known judicial practice of reducing sentence where an accused pleaded guilty had a coercive effect on the accused's plea decision. The authors argued that this was incompatible with the constitutional guarantee of due process. They considered that the suggested rationalizations for punishing those who pleaded guilty more leniently than those who were convicted at trial were flawed, and were not even uniformly applied. Accordingly, they recommended that in order to avoid the inequities and uncertainty resulting from this practice, the courts should not award sentencing concessions to those accused who pleaded guilty.⁸¹⁰

In another study⁸¹¹ it was found that there was widespread support in the legal community for the holding of a detailed inquiry into voluntariness and understanding at the time of tendering of a guilty

⁸⁰⁹ "The Influence of the Defendant's Plea on Judicial Determination of Sentence" (1956-57), 66 Yale Law Journal 204.

⁸¹⁰ Id at 221-222.

⁸¹¹ Notes, "The Trial Judge's Satisfaction as to Voluntariness and Understanding of Guilty Pleas", [1970] Washington University Law Quarterly 289 at 289-294.

plea. The questionnaire, approved by judges and lawyers surveyed, directed the inquiry by the trial judge to the following matters:⁹¹²

"General Competency

1. Personal Data (including such things as age, education, employment, and marital status)
2. Mental Health (for example: whether subject to any prior treatment for a mental disorder)
3. Addictions, Narcotic or Alcoholic
4. Prior Convictions

Voluntariness - Knowledge of the Consequences of the Plea

5. Are you voluntarily and understandingly entering this plea?
6. Threats, Coercion, Duress
7. Threats of prosecution of others
8. Promises of sentence concessions
9. Plea Bargains with prosecutor
10. Specific Maximum and Minimum Sentence Range
11. Concurrent and/or Consecutive Sentencing Possibilities (where appropriate)
12. Parole Eligibility (especially if limited or not available)
13. Qualification under special sentencing statutes (such as Habitual Offender or Youthful Offender statutes)
14. Collateral Consequences of Plea
15. Constitutional Right to Impartial Jury
16. Constitutional Right to Confront and Cross-Examine his Accusers
17. Constitutional Right Against Self-Incrimination
18. Constitutional Right to Compulsory Process for Witnesses
19. Specific Nature of the Charges in the Indictment
20. Lesser Included Offenses
21. Circumstances Under Which a Plea May be Withdrawn
22. Extent of Consultation with Counsel re all the Above
23. Extent of Defendant's Understanding that Judge not Bound to Honour Recommendations of Prosecutor

Waiver of Counsel (where applicable)

24. Constitutional Right to Assistance by Counsel
25. Whether defendant understands that an attorney could better ascertain admissibility of evidence against the defendant and is better equipped to prevent the admission of illegally obtained evidence in trial
26. Whether defendant understands that an attorney is capable of discovering other defenses to the charges and for the presentation of mitigating circumstances to the Court
27. Any Threats or Promises in Return for the Waiver of Appointment of an Attorney."

⁹¹² Id at 295-296.

It was suggested that this questionnaire could itself form the basis of the trial judge's inquiry into the validity of the guilty plea.⁹¹³ Despite the claim to be addressing both understanding and voluntariness, it would seem that this questionnaire focused more on voluntariness than understanding.

The proposals offered by Holley⁹¹⁴ were aimed at ensuring the accused's understanding of the guilty plea process. First, he proposed that the state develop written descriptions in layperson's terms of the elements of each crime, normative sentencing consequences for each crime and possible exceptions, and the applicable substantive law defences that would negate factual guilt or prohibit further prosecution.⁹¹⁵ The accused would receive this description shortly after arrest so that an informed decision could be made as to what plea was warranted. Second, Holley proposed that if the accused pleaded guilty the focus of the trial judge's inquiry ought to be on ascertaining the actual legal knowledge that the accused had at the time of plea. To find this out the trial judge would have to ask what were the accused's sources of legal knowledge, what the accused understood the law required the state

⁹¹³ Id at 332. Conlyn, "The Supreme Court's Changed View of the Guilty Plea" (1973), 4 Memphis State University Law Review 79, also supported the use of a questionnaire to elicit the pertinent facts underlying a guilty plea.

⁹¹⁴ D. Holley, "Ignorance and Innocence: The Current State Court Standards to Determine if a Guilty Plea has been decided upon by an Informed Accused and Proposed Reforms" (1981), 7 Thurgood Marshall Law Review 1.

⁹¹⁵ Id at 51.

to prove in order to establish guilt beyond a reasonable doubt, and what the accused had done to justify the court in accepting the guilty plea. If the accused described conduct adequate to satisfy the judge of the reasonable probability of guilt, the judge would then ask whether the accused knew of any applicable defences. Then the judge would ask the accused's lawyer and the state prosecutor if they knew of any applicable defences. If there were none the judge would find the accused guilty beyond a reasonable doubt. If there was a defence the judge would have to decide whether or not to accept the guilty plea anyway. Next the judge would ask the accused what the range of sentencing was for the offence charged, and what the accused expected to receive. If the accused's answers were accurate the judge would proceed to sentencing, but if the accused did not understand some aspect of the law, the trial judge would have to explain it.⁹¹⁶

The strength of Holley's recommendation was that it would have ensured that an accused was well informed before becoming entangled in the guilty plea process; and it would have forced the trial judge to evaluate the individual accused's level of understanding, instead of being able to rely on a standardized recitation of rights, without making any real effort to ascertain whether the accused truly had understood.

⁹¹⁶ Id at 53-56.

Newman argued that the focus on the voluntary or consensual nature of a guilty plea should not obscure the fundamental criminal law objective of legal and factual accuracy in the plea. He wrote,

"A basic purpose of conviction procedures, whether by trial or by plea, is to separate accurately the guilty defendants from the innocent. Certainly the trial process is characterized by elaborate rules designed to insure that every safeguard is taken to avoid convicting an innocent person. Procedural requirements in the guilty plea process, however, are much less elaborate, and the customary emphasis on "voluntariness" as the test for proper conviction tends to obscure the more specific objective of accuracy of the plea in both law and practice."⁹¹⁷

Newman also observed that certain judicial practices would aid the fairness of the process, and ensure the voluntariness and understanding of the guilty plea.⁹¹⁸ These were advising the accused of the consequences of the guilty plea, ensuring that the accused had sufficient time to contemplate the plea decision, assigning counsel to advise and conduct proceedings on behalf of the accused, requiring the prosecutor to honour any plea bargain, and refusing to accept a guilty plea from an accused deserving of more lenient treatment.⁹¹⁹

Hermes advocated a thorough inquiry into the factual basis for a guilty plea because the benefits to be derived from such inquiry outweighed any loss of efficiency in the guilty plea process.⁹²⁰ The

⁹¹⁷ Newman, Conviction. The Determination of Guilt or Innocence Without Trial (1966) at 10.

⁹¹⁸ Id at 32.

⁹¹⁹ Id at 32-38, 47-57.

⁹²⁰ J. Hermes, "Criminal Procedure: Effects of a Plea of Guilty on a Defendant's Constitutional Rights" (1974), 27 *Oklahoma Law Review* 49 at 54.

advantages identified by him were, first, the factual basis inquiry ensured that the accused had committed an offence at least as serious as that charged; second, the inquiry would reveal the extent of charge reduction through plea bargaining; third, it ensured a more accurate and complete record of the conviction process, which aided the finality of the conviction; and fourth, the inquiry would assist the court in determining the accused's competency and the voluntariness of the guilty plea.⁹²¹

Judicial inquiry into understanding, voluntariness and accuracy may substantially improve the fairness of the guilty plea process. However there is concern that this inquiry alone will not eliminate the risks of misunderstanding, coercion and factual inaccuracy in the guilty plea process because there are institutional impediments that may still undermine the acceptability of the guilty plea.⁹²² Some authors have suggested that institutional adjustments, such as improving pre-trial disclosure and strengthening judicial control over the guilty plea process, are also needed. This need is particularly acute in respect to plea bargaining and the problems it creates for the voluntariness and accuracy of guilty pleas. The Continental European non adversarial model has proved useful in suggesting some possible institutional

⁹²¹ Id, referring to American Bar Association, Standards Relating to Pleas of Guilty, (Approved Draft, 1968). See also R. Epstein, "Criminal Law - Guilty Pleas - Factual Basis Determination not Mandatory when a Court accepts a Plea of Guilty or Nolo Contendere" (1976), 4 Florida State University Law Review 384 at 392.

⁹²² E. Ostrow, "The Case for Pre Plea Disclosure" (1981), 90 Yale Law Journal 1581 at 1607.

adjustments to the guilty plea process. Of greatest relevance have been European rules permitting disclosure of the prosecution's case to the accused prior to trial⁹²³ and requiring judicial supervision, before and at trial, of the investigatory, fact finding process.

Verdun-Jones and Hatch reviewed various attempts to prohibit or regulate plea bargaining in the United States and concluded from this that any attempts at complete prohibition of the practice of plea bargaining were bound to fail because of the "discretion ridden" nature of the criminal justice system.⁹²⁴ They wrote,

⁹²³ J. Stepan, "Possible Lessons from Continental Criminal Procedure", in The Economics of Crime and Punishment, A Conference sponsored by American Enterprise Institute for Public Policy Research (1973) at 181 et seq; R. Schlesinger, "Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience" (1976), 26 Buffalo Law Review 361 at 367.

⁹²⁴ S.N. Verdun-Jones & A.J. Hatch, "An Overview of Plea Bargaining in Canada; Cautionary Notes for Sentencing Reform," prepared for the Canadian Institute for the Administration of Justice, National Seminar on Sentencing (Oct. 16, 1985) at 60. For example, one study had found that when plea bargaining by prosecutors in relation to drug trafficking was forbidden, the bargaining process had been assumed reluctantly by trial judges unable to cope with overcrowded dockets: Id at 50-55, citing T. Church, "Plea Bargains, Concessions and the Courts: An analysis of a Quasi-Experiment" (1976), 10 Law and Society Review 377. The advantages gained by reducing prosecutorial and police discretion were found to be substantially outweighed by the effect on judicial conduct. In another American study, involving a prohibition on plea bargaining in respect to twenty-five of the most serious felonies in the Superior Courts, it was found that the prohibition caused a shift in caseloads to the lower level municipal courts, with the prosecutors having virtually unfettered discretion to plea bargain in that arena: Id at 55-57, citing C. McCoy, "Determinate Sentencing, Plea Bargaining Bans, and Hydraulic Discretion in California" (1984), 9 Justice System Journal 256-275. Verdun-Jones and Hatch stated that studies such as these indicated the tenacity of plea bargaining, and even, perhaps, its inevitability in a discretionary criminal justice system.

"Given the fact that criminal justice systems are characterized by attempts to achieve many varied and often conflicting goals, it seems reasonable to assume that these systems will always generate and perpetuate discretionary decision-making processes as adaptations to these multiple ends. Plea bargaining appears to allow, and indeed facilitate, the accommodation of these multiple purposes of criminal justice systems."⁹²⁵

Therefore, the authors concluded, rather than making useless attempts to eradicate plea bargaining and thereby merely relocating the exercise of discretion to another stage in the process, it would be better to regulate it through the mechanism of a pretrial conference.⁹²⁶ They suggested that pre-trial disclosure would provide a "tailor-made opportunity" for defence and Crown counsel to discuss the evidence and procedure. This would tend to facilitate plea bargaining, but the level of fairness of such bargains would be enhanced by the defence counsel's greater knowledge of the prosecution's case.⁹²⁷ They suggested that plea bargains resulting from a pretrial conference tended to engender more satisfaction among participants because the results depended more on the actual strength of the case for the prosecution and for the defence.⁹²⁸

⁹²⁵ Id at 61.

⁹²⁶ Id at 60.

⁹²⁷ Id at 12-13.

⁹²⁸ Id at 59, citing two studies, A.M. Heinz and W.A. Kersteller, "Pretrial Settlement Conference: Evaluation of a Reform in Plea Bargaining" (1979), 3 Law and Society Review 349; K.A. Farr, "Administration and Justice: Maintaining Balance through an Institutionalized Negotiation Process" (1984), 22 Criminology 291. A pilot study conducted in Montreal found that formalized pretrial discovery doubled the rate of guilty pleas and tripled the number of charges withdrawn by the prosecution: Id at 12-13, citing M. Rizkella, "Pre-Trial Discovery: Evaluation of the Montreal Pilot Project", Unpublished Law Reform Commission of Canada Study Paper (1980).

Ostrow observed that judicial review of the circumstances of a guilty plea to ascertain voluntariness, accuracy and factual basis was rarely capable on its own of uncovering grounds for rejecting the plea.⁹²⁹ Instead, she advocated pre-plea disclosure of the prosecution's case as a means of ensuring the fairness of the guilty plea process. This would remedy the information imbalance as between prosecution and defence and would allow an accused to better appreciate the chances of acquittal at trial and, therefore, to make a more informed plea decision. This in turn would result in fairer plea bargains and a somewhat reduced risk of coerced guilty pleas.⁹³⁰ She stated,

"To exercise his consent rationally and to protect himself against unfair and inaccurate conviction, the defendant must be given an opportunity to assess his chances of acquittal and thus to evaluate the consideration being given in return for his plea. The information needed for making such an assessment is commonly within the exclusive possession of the prosecutor. A commitment to the notion of consent therefore requires that the prosecutor provide the defendant with that information."⁹³¹

Ostrow recommended that pre-plea disclosure should be broad, touching all evidence relevant to the accused's chances of acquittal. Thus the prosecutor ought to disclose all evidence likely to be presented at trial, both exculpatory and inculpatory, including impeachment evidence, information affecting the admissibility of evidence, and information considered relevant to sentencing. Further, this broad duty of disclosure ought to be subjected to a stringent standard of review when a conviction by guilty plea was put in

⁹²⁹ E. Ostrow, "The Case for Pre Plea Disclosure" (1981), 90 Yale Law Journal 1581 at 1607.

⁹³⁰ Id at 1590, 1606 et seq.

⁹³¹ Id at 1622.

question.⁹³² Ostrow was of the view that concerns that pre-plea disclosure would facilitate perjury by the accused, disadvantage the prosecution, and possibly lead to harassment of witnesses, were substantially outweighed by the advantages that pre-plea disclosure would bring to the criminal justice system by way of clarification of issues, elimination of surprise, exposure of untenable arguments and discovery of fruitful investigatory avenues.⁹³³

Davis considered that, until plea bargaining and the guilty plea process became more visible, the issues of voluntariness and accuracy would not be flushed out, and the propriety of the process would be difficult to review.⁹³⁴ He suggested that greater visibility of the process, for example, by freeing the accused from the inclination to disavow that any agreement had been made, would make the process more subject to judicial control. He proposed that there be greater participation by the judge, involving an in-depth inquiry into the plea negotiation process and the facts of the case.⁹³⁵ He suggested that in reviewing a bargained guilty plea the trial judge ought to have regard to the public interest and correctional objectives.⁹³⁶ However, because of the "subtle, yet coercive, influence" that the judge might

⁹³² Id at 1615-1617.

⁹³³ Id at 1620.

⁹³⁴ S. Davis, "The Guilty Plea Process: Exploring the Issues of Voluntariness and Accuracy" (1972) 6 Valparaiso University Law Review 111 at 130.

⁹³⁵ Id at 130-132.

⁹³⁶ Id at 133.

unwittingly or intentionally have upon an accused, Davis warned against any direct judicial participation in the plea negotiations themselves.⁹³⁷

Pugh accepted that under existing conditions in the criminal justice system, negotiated pleas were a necessity, but suggested that the guilty plea process could be improved by more regulation and judicial participation.⁹³⁸ He doubted the efficacy of the adversary system in providing a system of summary criminal justice which was true to the aims of the criminal law.⁹³⁹ Pugh was of the view that the criminal process was too adversarial and that it would be preferable to have a more impartial investigation of crime with full disclosure of the results of investigation.⁹⁴⁰ He recommended that the plea negotiation process be subjected to greater societal regulation, not merely at the time of judicial reception of a bargained plea, but also during the negotiation process itself.⁹⁴¹ Pugh considered that there were lessons

⁹³⁷ Id at 132.

⁹³⁸ G.W. Pugh, "Ruminations Re Reform of American Criminal Justice (Especially Our Guilty Plea System): Reflections Derived from a Study of the French System" (1976), 36 Louisiana Law Review 947 at 950.

⁹³⁹ Id.

⁹⁴⁰ Id at 950-952. See also, R.B. Schlesinger, "Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience" (1976), 26 Buffalo Law Review 361. Schlesinger also favoured broad pretrial disclosure as a means of improving the fairness of plea bargaining and the guilty plea process.

⁹⁴¹ Id at 967. Pugh proposed that there should be an optional non adversarial plea negotiation process, supervised by a judicial officer, available to the accused. This would involve a judicial officer reviewing the file and stating the maximum punishment the accused would face in a non adversarial process, having regard to the interests of society and of the accused: Id

to be learned from the French criminal process, which would improve the American guilty plea process.⁹⁴² He stated,

"...if we are to be true to the notion that ours is a government of laws and not of men, then the plea negotiation process must be subjected to far more societal regulation. It is submitted that it is insufficient simply to regulate the judicial reception and scrutiny of a bargain previously arrived at via unsupervised negotiations. If society is to control the plea bargaining process, the process itself must be far more open.

If...we develop impartial, more effective investigatory procedures, and broad discovery and disclosure requirements, plea bargaining procedures would be much safer, provided the process is adequately supervised by the court. The factual basis for both the guilty plea and any lighter sentence imposed would be made more evident. Further, if we adopt something akin to an examining magistrate, he would be an ideal person to supervise or direct plea bargaining procedures."⁹⁴³

Schlesinger⁹⁴⁴ also argued that reformers should look to the Continental criminal procedures for ways to improve the American criminal justice system. In particular, he focused on pretrial disclosure and the right to silence. Schlesinger argued that the effect of unlimited discovery and discouragement of silence in continental criminal process was that issues tended to be clarified before trial; an innocent accused was better placed to meet whatever evidence there was against him and to obtain an early dismissal of charges; and an

at 968-969. Pugh conceded that this might tend to coerce accused into opting for the non adversarial process, but considered the judicial inquiry would minimize the risk of injustice to the accused, and was a substantial improvement over dispositions negotiated by defence counsel and prosecutors in an adversarial process: Id at 970.

⁹⁴² Id at 957-970.

⁹⁴³ Id at 967-968.

⁹⁴⁴ R.B. Schlesinger, "Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience" (1976), 26 Buffalo Law Review 361.

accused who was clearly guilty would be inclined to see the futility of denying guilt and so would confess and focus defence submissions on any mitigating factors.⁹⁴⁵ He stated,

"That the rules governing the ascertainment of truth have a powerful impact upon the expeditiousness with which cases flow through the criminal justice system will become clear to anyone who spends just a few hours in a French courtroom. There the observer will find that although the continental systems do not recognize a plea of guilty, so that no defendant can be convicted or sentenced without an actual trial, most criminal cases are handled with surprising dispatch... The explanation is that, for reasons I described, the defendants in the vast majority of cases have confessed prior to trial, with the result that the precious hours or minutes of the trial itself can be devoted almost exclusively to an exploration of the factors which affect the measure of punishment. In this way, the French system is able to process the ever-growing mass of routine cases without throwing justice and judicial dignity to the winds - without, in other words, resorting to the plea bargain."⁹⁴⁶

⁹⁴⁵ Id at 381.

⁹⁴⁶ Id at 382.

GENERAL CONCLUSION

It is hoped that this detailed analysis of the guilty plea will serve to demonstrate the need for reevaluation and reform of the guilty plea process.

The criminal jury trial functioned as an effective and expeditious means of resolving criminal matters until excessive refinement of the rules of procedure and evidence made it a time consuming and cumbersome process. Thus the rules designed to ensure fairness and accuracy made the process impractical. Guilty pleas and plea bargaining developed as a means to bypass the time consuming formalities of the jury trial. This eventually led to the criminal trial becoming a relatively rare occurrence, with the vast majority of criminal cases being resolved by guilty plea in a rapid process lacking in appropriate safeguards.

This guilty plea process, being now by far the most common means of resolving criminal cases, is not something that can be dismissed as unimportant. Indeed, it is widely asserted that, because of overcrowded court dockets, the entire criminal justice system depends for its survival upon the availability of this short cut to conviction. Instead of devising a summary trial process to speed up the disposition of less serious charges, while still according to all accused persons the benefit of a trial on the issue of guilt or innocence, Canada and other countries with a common law tradition have simply allowed the accused, regardless of the seriousness of the offence charged, to waive trial and

proceed directly to conviction and sentence. Thus most convictions are founded on the accused's apparent consent; but this consent may be highly suspect because of systemic coercion in the guilty plea process: the voluntariness of the accused's waiver of trial rights may be vitiated by express or implied pressure from the prosecutor, police, defence counsel, or the trial judge.

Canadian courts have endorsed this notion of conviction by consent by assuming a laissez faire approach first, to the accused's choice of plea; second, to the issue of whether there need be inquiry into the justifiability of accepting the tendered guilty plea; and third, to the availability of appellate review of the trial judge's decision to accept a guilty plea. Thus, in Canada only in rare cases where the guilty plea is patently suspect is there any obligation to inquire into its acceptability. This judicial attitude of reserve has meant that the case law has not greatly advanced understanding of the guilty plea. In particular, the courts have not given due consideration to the waiver of trial rights affected by the guilty plea; nor have they developed an analytical approach to the guilty plea which would recognize its dual nature as both a procedural and evidentiary device.

The recent constitutionalization of criminal law principles in Canada invites a reevaluation of the guilty plea process. Many of the procedural rights waived by the guilty plea have now attained constitutional status suggesting that greater attention should be paid to the question of waiver. The experience of the United States in

respect to the constitutionalization of the guilty plea process is helpful in anticipating the possible impact of the Charter on the guilty plea process. The constitutional standards of acceptability of the guilty plea developed in the United States, requiring that it be intelligent, voluntary and accurate, appear to be directly applicable to the Canadian context.

However, even constitutional entrenchment may not be capable of solving all the problems in the guilty plea process. Institutional impediments in the adversarial process may need to be overcome by borrowing from the Continental European model of non adversarial criminal process. In particular, allowing greater pre-trial disclosure of the prosecution case, and requiring greater judicial control over the guilty plea hearing would make the inquiry into understanding, voluntariness and accuracy more meaningful.

This critique may suggest to some readers that the entire guilty plea process ought to be replaced by a new legislated system of summary trial process for lesser offences, while reserving the existing trial process for only the more serious crimes. Analysis of such a proposition goes well beyond the focus of this paper, however. For present purposes, it is sufficient to offer a few suggestions which would improve the quality of the guilty plea process in Canada, and reduce the coercive power of plea bargaining.

It is submitted that the strictly adversarial model of the guilty plea process, in which the prosecution is under no obligation to disclose the strength of its case, and the trial judge is under no obligation to test the acceptability of the plea, ought to be rejected. Instead, the accused should be allowed access to the prosecution's case before trial; and the trial court should assume an active and inquisitive role in determining whether a guilty plea is acceptable or not. In so doing, the trial court should satisfy itself of the accused's understanding, the voluntariness of the plea, and the existence of supporting facts to justify conviction.

Because the understanding and voluntariness inquiry relates to important constitutional and procedural rights being waived by the guilty plea, it should be done meticulously, so as to assure the trial court that the accused really understands the full import of the guilty plea, really intends to admit guilt, and means to waive all the rights associated with a full trial on the merits. In this regard the assistance of defence counsel would appear to be essential. Further, plea bargains ought to be disclosed to the trial court so that the trial court can review the bargain to ascertain whether it is so coercive as to affect the voluntariness of the accused's guilty plea.

The accuracy requirement should be directed to satisfying the fundamental criminal law principle that the accused only be convicted of an offence known to law, in respect to which the accused's guilt has been proved beyond a reasonable doubt. The guilty plea alone is

unlikely to satisfy this high standard of proof, and therefore the trial court should hear other evidence to ascertain the justifiability of accepting the guilty plea in the circumstances of the case. If such evidence reveals a clear defence, the trial court should not proceed to conviction on the plea, but ought to enter a not guilty plea and proceed to trial.

In pursuing its supervisory role over the guilty plea process, the trial court should not, of course, become a participant in any plea negotiations because this would automatically deprive the court of its objectivity towards the case. For the same reason, it would seem that the practice of rewarding guilty pleas with lighter sentences ought to be abolished, and replaced by an approach to sentencing in which the accused's procedural choices play no part.

If these suggestions were accepted, it is submitted, the guilty plea process would not become unduly time consuming and complicated. Indeed, the efficacy of the guilty plea as a substitute for full trial would be enhanced. The expenditure of a few more minutes to ascertain whether the guilty plea was an intelligent, voluntary and accurate waiver of trial rights and admission of guilt would reduce the vulnerability to appellate review of convictions based on guilty pleas, and would improve the quality of summary justice immeasurably.

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