1 Introduction and Ethical Issues

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I. Introduction

The guilty plea is a significant step taken by accused persons and is a process safeguarded via the oversight of statute and the common law. These measures are in place to ensure that an individual's decision to forego their constitutionally enshrined right to a trial is not made lightly and to prevent wrongful convictions. These safeguards also protect courts, court actors, and Crown attorneys from facilitating any potential miscarriages of justice.

This is a message that will be reiterated throughout the entirety of this text. The decision to plead guilty is a decision that must be made with careful contemplation, weighing the strength of the Crown's case, the personal circumstances of the accused person, and the impact of the direct and ancillary consequences. While a resolution has much symbolic and administrative significance, the procedure of a plea is legally technical and requires a fine-tuned sense of a variety of ethical issues for criminal lawyers. One could view the complexity of the plea procedure as a necessary safeguard to ensuring that guilty pleas are given the significance in the criminal justice system that they deserve. In the absence of technical oversight, the risk remains that false guilty pleas will be entered by unknowing and otherwise unwilling parties. Guilty pleas are also presumed to be voluntary,[1] and to strike a plea, the accused faces a high threshold. Therefore, the decision to plead guilty is of great significance to the justice system and the offender, should not be treated lightly by any justice system participant, and is governed by both statutory and common law safeguards.

Resolving cases with guilty pleas can offer tremendous benefits to the criminal justice system, such as conserving time and resources spent on trials and potentially saving witnesses and complainants from testifying. Preparation for a guilty plea begins for a Crown at the early stages of the file management process with files being "screened" or assessed for early resolution and the management of a file being demarcated by discussions and negotiations that are meant to facilitate a plea of guilt.

The extent and limits to a Crown's negotiating power are outlined in their Crown policy manual, which is meant to create consistency and predictability in both federal and provincial decision-making by prosecutors. Any deviations from what is outlined in the Crown policy manuals must be approved by the appropriate levels of management.

Unlike their Crown counterparts, the defence does not have a playbook like the Crown policy manual. Resolutions are highly individualized, and each time an individual makes the decision to enter a plea and give up their constitutionally enshrined right to a trial, it is meant to be impactful and significant.

In Canada, people plead guilty for many intersecting personal reasons, including overwhelming evidence, the desire to express remorse, the mitigation of a guilty plea,

1 *R v Rayworth*, 2001 CanLII 32774 (ONCA).

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the impact of plea bargaining, and the desire to avoid uncertainty. Ideally, the decision to plead is made after an accused person has contemplated, with the assistance of competent counsel, all of the available defences, the ranges of sentences for the offences that will be pleaded to, and the impact of the collateral consequences on the individual.

The Court wrote in *R v Hoang*:

> The importance of a conviction on the basis of a guilty plea is more than an administrative convenience. It also promotes the values inherent in the criminal trial process. As the American Bar Association stated in *Standards for Criminal Justice*, 2d ed. Vol. 3 (Boston: Little Brown and Company, 1980) 1982 Supp. At 14.5:
>
> > Even if more prosecutors, judges and defence counsel were available and trial of all cases possible, conviction without trial would continue to be a necessary and proper part of the administration of criminal justice. Indeed, the limited use of the trial process for those cases in which the defence has grounds for contesting the matter of guilt aids in preserving the meaningfulness of the presumption of innocence. The frequency of conviction without trial, therefore, not only permits the achievement of legitimate objectives in cases where pleas of guilty are entered, but also enhances the quality of justice in other cases.[2]

What is unspoken is that the justice system relies on guilty pleas. Without pleas, the justice system would collapse under the weight of trial scheduling. There are simply not enough judges, courtrooms, and other support resources to accommodate a situation where everyone charged with an offence decides to go to trial.[3] Overall, guilty pleas have a net benefit impact on the justice system.

Scholars like Christopher Sherrin and Kent Roach have raised alarm bells that when efficiency is prioritized over accuracy, there is potential for wrongful convictions.[4] The *Criminal Code*,[5] ethical codes of conduct, and carefully articulated procedures for engaging in guilty pleas are maintained to safeguard the justice system from these miscarriages of justice.

This chapter will provide an overview of these reasons as a way of foreshadowing the chapters to come and to provide an introduction to the foundational principles of guilty pleas.

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2 *R v Hoang*, 2003 ABCA 251 at para 26. See also *R v Williams*, 2024 ABCJ 215 at para 45.

3 Michelle Alexander, "Go to Trial: Crash the Justice System," *New York Times* (10 March 2012), online: <https://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html>.

4 Christopher Sherrin, "Guilty Pleas from the Innocent" (2011) 30 Windsor Rev Legal Soc Issues 1; Kent Roach, "Canada's False Guilty Pleas: Lessons from the Canadian Registry of Wrongful Convictions" (2023) 4:1 WCLR 16, online: <https://doi.org/10.29173/wclawr92>.

5 RSC 1985, c C-46.

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A guilty plea can benefit both the justice system and the accused.[6] Factors related to guilty pleas include the number of charges and the nature of evidence, plea bargaining, pressure from defence counsel and judges, length and cost of legal proceedings, and pre-trial detention.[7] A guilty plea signifies the formal acceptance of responsibility for a set of facts in a criminal case, the criminal culpability that flows from those facts, and the entirety of the punishment that is attached to the finding of guilt.

Guilty pleas are meant to be clear, unequivocal, and informed. The plea comprehension process will be discussed at length in Chapter 4, The Plea Inquiry and Ethical Issues. The hallmark of an effective and properly completed plea is that the accused person has made the decision to plead, without influence or duress, and is aware of all of the evidence and contextual factors. A resolution process contains two components: (1) the plea being entered, and (2) the sentencing process. While the determination of sentence is an individualized process that is largely determined by factors specific to the offender, the offence, and its facts, social pressures and the will of Parliament also inform how pleas are negotiated and conducted in Canada.

II. A History of Plea Bargaining

For all of the history contained within our modern criminal justice system, much of it is strikingly familiar. A field trip back in time to England's Old Bailey in the 1700s would result in seeing familiar features for many present-day lawyers: a judge on the dais, a witness on the stand, a jury in the box, and an accused in the prisoner's dock. Other aspects of the procedure would present as completely foreign: the duration of a trial was typically 30 minutes, and if they went on any longer, it would be cause for gossip and conversation.[8]

Upon a finding of guilt, the options that the judge had were limited. Most felonies in England carried the death penalty, and most offences were felonies. There was a dearth of plea bargaining because there was a dearth of guilty pleas. As legal historian John Langbein observed:

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6 *R v Anthony-Cook*, 2016 SCC 43; Nancy J King et al, "When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States" (2005) 105:4 Colum L Rev 959; Milica P Piccinato, *Plea Bargaining* (Ottawa: Department of Justice Canada, 2004), online: <https://publications.gc.ca/site/eng/307894/publication.html>; Simon N Verdun-Jones & Adamira A Tijerino, *Victim Participation in the Plea Negotiation Process in Canada: A Review of the Literature and Four Models for Law Reform* (Ottawa: Department of Justice Canada, 2002), online (pdf): <https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr02_5/rr02_5.pdf>.

7 Celesta A Albonetti, "Race and the Probability of Pleading Guilty" (1990) 6:3 J Quantitative Criminology 315; J Baldwin & M McConville, "Plea Bargaining and the Court of Appeal" (1979) 6:2 Brit J Law & Soc 200. See also *R v Nahanee*, 2022 SCC 37.

8 John H Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2003) at 17.

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> A plea-bargaining defendant effectively trades back to the state his right to put the criminal justice system to a time- and resource-consuming trial. But when trials were short and rapid, the Crown had no particular incentive to engage in the exchange.[9]

The prevalence of guilty pleas and plea bargaining has gone hand in hand with the development and increasing complexity of the rules of evidence, as well as the expansion of the role of the defence counsel. This is an irony not lost on some, as "[t]he developments intended to improve the fairness of the jury trial created incentives to avoid the trial process altogether by guilty plea."[10] Today, an overly complex trial with intricate evidentiary issues may be circumvented with a plea of guilt, and theoretically, the individual should receive mitigation for their decision to save court time.

This format, played out over several hundred years in England, has repeated itself again in Canada, from the 1950s through to today. Historically, a trial judge's discretion to accept a plea was restricted by the common law. While juries always had the ability to return a verdict of a lesser and included offence, it was impossible for a trial judge to accept a plea on such.[11] This led to an absurd procedure in circumstances where the Crown was prepared to accept a plea to a lesser and included offence, wherein a jury had to be empanelled and directed to return a lesser verdict, so the trial judge could sentence the accused on the charge the Crown was prepared to accept a plea on.[12]

The *Criminal Code* was amended in the 1960s to allow for judges to hear pleas on lesser and included offences.[13] The catch "and included" was an important and, to modern eyes, overlooked aspect of the requirement at the time. While judges could accept pleas to included offences, they could not accept a plea to a lesser offence that was *not* otherwise included. Put another way, if a jury could not return a verdict on it, a judge could not accept a plea on it. This hiccup in the law was overcome with yet another variation to section 606.[14] Section 606(4) now allows a judge to accept a plea *on any charge arising out of the same facts.*

When the criminal justice system found itself subject to greater scrutiny and reflection in the 1970s, the phrase "plea bargain" was treated as a composition of dirty words. Much ink was spilled over the perceived abdication of justice such a quid pro quo entailed, and comparisons were made to Hercules' cleaning of the Augean

9 John H Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2003) at 19.

10 Oonagh E Fitzgerald, *The Guilty Plea and Summary Justice* (Toronto: Carswell, 1990) at 25.

11 *R v Hazeltine*, 51 Cr App Rep 351 at 354-55, [1967] 2 QB 857 (CA).

12 *R v Naraindeen (CA)*, 1990 CanLII 6731 (ONCA); *Regina v Dietrich*, 1968 CanLII 293 (ONCA).

13 *Criminal Law Amendment Act*, *1968-69*, SC 1968-69, c 38, s 46.

14 *Criminal Law Amendment Act*, *1985*, SC 1985, c 19.

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Stables.[15] "In 1973, the Ontario Law Reform Commission perceived only a very limited scope for the practice, and suggested strict guidelines to control it."[16] Today, the reality is that the justice system is a plea bargain and guilty plea system. Across Canada today, roughly 96 percent of charges resolve without a trial.

The Law Reform Commission of Canada took the position, in its 1975 paper, that the drawbacks of plea bargaining were "overwhelming." In the Commission's view, plea bargaining detracted from the "pursuit of the legitimate goals of the criminal justice system" and destroyed "the appearance and reality" of justice.[17]

In 1976, the attorney general of Ontario updated its direction to all Crowns, directing them not to accept pleas for expediency or in an effort to reduce workload.[18] To the modern prosecutor, this sounds quite foreign, and in a justice system still struggling to overcome delays caused by the COVID-19 pandemic, counterproductive.

The advantages of plea bargaining to the maintenance of a functioning justice system were too alluring to be refused on principle, and by the 1980s, the practice was not only practically entrenched within the justice system but viewed as more favourable as well. After a lengthy review by an advisory committee made up of police, Crown counsel, and defence counsel (most of whom went on to have careers as noted and respected jurists), Ontario's justice system came to formally condone the practice, within the confines of established ethical guardrails.[19]

III. Motivation for Pleas

As will be discussed in Chapter 4, The Plea Inquiry and Ethical Issues, section 606 of the *Criminal Code* is a statute that is much more nuanced than just covering the process of arraignment. There are many contextual reasons within criminal law, society, and procedure why people plead guilty. In 2018, the Federal/Provincial/Territorial Heads of Prosecution Subcommittee on the Prevention of Wrongful Convictions reported that

> [a]s counterintuitive as it may appear, innocent persons sometimes plead guilty to crimes they did not commit, and for a variety of reasons. Chief among these reasons, experts suggest, is that an early guilty plea allows an accused to avoid the uncertainty of a trial

15 SN Verdun-Jones & FD Cousineau, "Cleansing the Augean Stables: A Critical Analysis of Recent Trends in the Plea Bargaining Debate in Canada" (1979) 17 Osgoode Hall LJ 227 at 237.

16 Ontario Law Reform Commission, *Report on the Administration of Ontario Courts Part II* (Toronto: Ministry of the Attorney General, 1973) at 119-28.

17 Law Reform Commission of Canada, "Criminal Procedure: Control the Process" (1975) Working Paper No 15 at 45, online: <https://archive.org/details/criminalproccontrol00lawr/page/n3/mode/2up>.

18 Ontario, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* (Toronto: Queen's Printer for Ontario, 1993) at 276 (G Arthur Martin, Chair).

19 Ontario, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* (Toronto: Queen's Printer for Ontario, 1993) (G Arthur Martin, Chair).

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outcome, and receive the more lenient sentence that generally accompanies an early guilty plea, whether factually guilty or not. (An early guilty plea has long been recognized in the common law as a mitigating factor at sentencing).

However, factually innocent persons may plead guilty to crimes they did not commit for other reasons as well, both rational and irrational, including the following factors or combination of factors:

- their youth;
- mental illness;
- intellectual deficits;
- the belief that an admission of guilt will allow them to go home;
- the need to relieve psychological stress;
- the desire to get out of custody sometimes because being granted bail is perceived to be unlikely, often due to the accused's criminal record;
- because they are charged with a minor offence and believe that the penalty flowing from an early guilty plea will be less than the sanction that would result from a conviction following trial;
- wanting or needing to avoid the emotional, financial and other costs of fighting a criminal case and proceeding to trial;
- the belief that admitting to the crime or to at least some role in it may result in less severe punishment;
- perceiving the situation as hopeless since the police and other state actors appear to be convinced of their guilt, and/or conviction appears likely because the Crown case appears strong despite their factual innocence;
- protecting the real perpetrator;
- lack of an alibi;
- desire to resolve the matter quickly;
- perceived pressure from defence counsel or Crown;
- offender is facing multiple offences and is guilty of some of them thus does not care about being convicted of all of them if it does not affect the overall sentence;
- to receive a more lenient sentence and thus avoid the negative collateral consequences that could result from a longer sentence imposed following trial, such as being deported; and
- in some cases, because the accused, during the interrogation process, comes to believe he or she committed the crime.

These factors, which can overlap in some cases, are all deserving of greater examination regarding their relationship to false guilty pleas.[20]

20 Public Prosecution Service of Canada, "Chapter 8—False Guilty Pleas" in *Innocence at Stake: The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada* (Ottawa: PPSC, last modified 25 April 2019), s IV, online: <https://www.ppsc-sppc.gc.ca/eng/pub/is-ip/ch8.html>.

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Defence counsel should probe their client's motivation for pleading guilty to ensure that the plea is actually voluntary and fully informed by the client, a concept that will be explored later on in Chapter 4, The Plea Inquiry and Ethical Issues. A client may be forthright at the beginning of the solicitor–client relationship and instruct their counsel to help them mitigate the outcome as best as possible in exchange for a guilty plea. Even if this is the case, counsel should be careful to review the underlying reasons why the person has immediately chosen this course of action. The first step is to review the disclosure to ensure that the Crown's burden of proof has been met. The Crown has the heavy onus of ensuring that the charge to which it is seeking pleas can be made out, and the defence has the obligation of ensuring that they have reviewed the evidence, have assessed possible defences, and have reviewed the disclosure with their client.

Defence counsel may struggle with how much disclosure is appropriate to be satisfied that an accused should plead guilty. Accused persons who request to plead on the same day as their arrest may request that their counsel rely solely on the bail brief and short synopsis of charges. Counsel should tread carefully in these circumstances, especially if their client is only doing so to be released from custody or to receive some other favourable sentence. Other accused persons may wish to review every item of disclosure, no matter how immaterial to the prosecution.

A. Genuine Remorse

An accused person may genuinely feel remorse and a sense of responsibility for their actions, advising their counsel from the outset that they wish to plead guilty and spare any further harm to victims or expense to themselves or the justice system. Individuals might plead guilty to acknowledge their wrongdoing and show genuine remorse, which can sometimes lead to a more lenient sentence.

It is important to note, however, that a guilty plea alone is not *always* considered a gesture of remorse by the court. As aptly summarized in the oft-cited *R v Duong*, the British Columbia Court of Appeal noted that a guilty plea is an admission of responsibility, though the degree of remorse expressed depends on the circumstances—especially because a guilty plea may have come out of bargaining for a lesser sentence.[21]

Truly *genuine* remorse is often determined by the court with consideration to actions surrounding the plea. Consider the Nunavut case of *R v CA*: the accused, charged with sexual assault, admitted to and cooperated with the police from the outset of the investigation; struggled with trauma after the fact and attempted to seek help; and spoke to the fact that "he has not only let himself down, but has severely damaged his familial relationship."[22] All of these contributed to the Court's finding that he had truly genuine remorse in his actions.[23]

21 *R v Duong*, 2006 BCCA 325 at para 11.

22 *R v CA*, 2015 NUCJ 31 at para 32.

23 *R v CA*, 2015 NUCJ 31.

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An indication of genuine remorse, while being a mitigating factor in and of itself, can also contribute to a general finding of potential rehabilitation. In the *CA* case, the Court did indeed find that the actions surrounding the guilty plea, arising from his remorse, demonstrated considerable capacity for rehabilitation, thus mitigating his sentence by several years.[24]

Remorse can be difficult in cases where an accused does not recall an incident, often due to intoxication. For instance, in the case of *Pellham v Canada*, the defendant had previously pleaded guilty to rape but conceded he did not have any memory of the night in question because he had been drinking heavily.[25] The Court here noted that alleging he did not remember meant that he evidently did not have any remorse for the incident or its severity, which weighed against him in his appeal.[26]

This is not true for all cases, however: where an accused genuinely does not recall an incident but still expresses remorse for the consequences, this can serve as a mitigating factor. In the case of *R v Wessel*, the defendant was charged with breaking and entering, as well as assault. The defendant was very intoxicated on the night of the assault and did not recall the incident. Notwithstanding this lack of memory, the defendant still expressed remorse, including writing an apology letter to the family for the harm that was committed, even if he did not recall it being him.[27] On appeal, the Court noted that this still constituted a form of remorse and thus was a mitigating factor (especially because it was expressed early on), though it was ascribed *less weight* than had he remembered the event and expressed remorse for it in full, including his responsibility.[28]

If entering a guilty plea only after alternative and adversarial legal options have been exhausted, remorse is less likely to be found genuine—remorse should be expressed early and consistently. The case of *R v Kueviakoe*,[29] for instance, involved an accused pleading guilty and expressing remorse only after witnesses had testified and his Charter[30] challenges were rejected. In this context, the Court found the remorse as being disingenuous and not to be given much weight as a mitigating factor, even if present all the same.[31]

24 *R v CA*, 2015 NUCJ 31 at paras 39-41.

25 *Pellham v Canada (Minister of Citizenship and Immigration)*, [1995] IADD No 164 at paras 10-14.

26 *Pellham v Canada (Minister of Citizenship and Immigration)*, [1995] IADD No 164 at para 14.

27 *R v Wessel*, 2023 ABCA 331 at para 5.

28 *R v Wessel*, 2024 ABCA 76 at paras 5-6.

29 2015 ONCJ 681.

30 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

31 *R v Kueviakoe*, 2015 ONCJ 681 at para 92. See also e.g. *R v Fraser*, 2009 BCCA 179 at paras 5-6.

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Finally, it is worth noting that it is generally established that lack of remorse is *not* an aggravating factor as regards sentencing but rather a neutral one.[32] As justified by the Court of Appeal in *Nash v R*, not expressing remorse is encapsulated within the right to remain silent—a right that is not extinguished simply because an accused has been found guilty.[33] This is not to say that lack of remorse cannot be used in considering other factors that weigh into sentencing. For instance, in the case of *R v Shah*, the Court of Appeal agreed that while the trial judge was within his rights to determine the accused had a lack of remorse, that by itself was not an aggravating factor. Instead, it can be used to determine the possibility of rehabilitation and specific deterrence and potentially to speak to the potential for future dangerousness of the defendant.[34]

There may be a time later on in the sentencing process when the offender will be offered an opportunity to speak, pursuant to section 726 of the *Criminal Code*, also known as allocution. While the plea of guilt implicitly signals remorse, allocution is an additional opportunity for the offender to express their remorse to the court by speaking directly to the judge.

B. Plea Bargaining

Counsel and accused persons may agree to a guilty plea in exchange for a lesser charge or a reduced sentence. The plea-bargaining process may also involve adopting facts that inculpate themselves or other co-accused, in a statement taken under oath.[35] This process can provide a more predictable outcome compared to going to trial, which could risk a harsher sentence and findings of guilt on more serious charges if the accused is found guilty. Plea bargaining involves flexibility by Crown counsel, a desire to engage in negotiations by all parties, and instructions from the client on how to proceed.

The influx of mandatory minimum sentences emphasized the utility of plea bargaining.[36] In the face of a lengthy mandatory minimum sentence, Crown counsel was able to leverage their positioning by offering a non-mandatory-minimum-eligible offence as a means of advancing the negotiation. As criminal law and the rules of evidence become more nuanced and complex, plea bargaining presents relief and predictability.

Courts give great deference to the process and outcome of plea bargaining. In *R v Nahanee*,[37] Moldaver J, writing for the majority of the Supreme Court of Canada,

32 See e.g. *R v Valentini*, [1999] OJ No 251 (QL) at paras 90-91, 132 CCC (3d) 262 (CA); *R v Fraser*, 2009 BCCA 179 at para 18; *R v Muhammad*, 2004 BCCA 396 at paras 8-10; *R v Ambrose*, 2000 ABCA 264; *Clarke v R*, 2001 NFCA 35.

33 *Nash v R*, 2009 NBCA 7 at para 2.

34 *R v Shah*, 2017 ONCA 872 at paras 7-8.

35 This will be explored more in Chapter 5, The Facts.

36 Faizal R Mirza, "Mandatory Minimum Prison Sentencing and Systemic Racism" (2001) 39:2 Osgoode Hall LJ 491, online: <https://doi.org/10.60082/2817-5069.1471>.

37 2022 SCC 37.

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explained the rationale for the test outlined in *R v Anthony-Cook*. This test sets a very high bar by design. It is meant to encourage agreement between the parties, which saves court time at sentencing. The test also incentivizes guilty pleas, sparing victims and the justice system the need for costly, time-consuming trials.[38]

Accused persons benefit because they have a very high degree of certainty that the sentence jointly proposed will be the sentence they receive, and the Crown benefits because it is assured of a guilty plea on terms it is prepared to accept.[39] Both parties also benefit by not having to prepare for a trial or a contested sentencing hearing.[40]

It should only be on rare occasions that a judge will reject a plea bargain,[41] given the work that is committed to the negotiation process by the Crown and the defence. The knowledge that a judge will most likely abide by the negotiated resolution serves to encourage the guilty plea. Justice system participants share an understanding that resolutions and plea bargaining are part of an efficient legal system.

C. Avoiding Uncertainty

Trials can be lengthy, costly, and stressful without a guarantee of what the outcome will be. Uncertainty is a necessary part of the adversarial process. Many factors contribute to uncertainty, including the passage of time, frailty of evidence, and witnesses.[42]

In the absence of a guilty plea, the Crown bears the heavy onus of proving its case beyond a reasonable doubt. A plea of guilt precludes the Crown from having to meet this onus and instead becomes an exercise in managing the facts for sentencing. Pleading guilty can provide a sense of closure to the witnesses, the accused, and all counsel involved. Overall, a plea of guilt helps avoid the uncertainties of a trial,[43] including the risk of a more severe penalty if found guilty.

D. Legal Advice

Defence lawyers may advise their clients to plead guilty if the evidence against them is strong. An early guilty plea might be in the client's best interest to mitigate potential penalties and avoid the risk of a longer sentence if the case goes to trial. If the evidence against a defendant is overwhelming, they might plead guilty to avoid the higher likelihood of a conviction at trial and to take advantage of any sentencing credit that may be afforded from the early plea.

An adept lawyer will be familiar with the elements of each of the offences the accused is charged with and will be able to work with the disclosure to discern how

38 *R v Anthony-Cook*, 2016 SCC 43 at paras 35, 40.

39 *R v Anthony-Cook*, 2016 SCC 43 at paras 36-39.

40 *R v Anthony-Cook*, 2016 SCC 43 at para 26.

41 *R v Anthony-Cook*, 2016 SCC 43.

42 *R v Anthony-Cook*, 2016 SCC 43; *R v McBride*, 2018 BCSC 865.

43 *R v Silverthorne*, 2024 ONCJ 450 at para 11.

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each element could be proven by the Crown. The lawyer must have a complete understanding of the impact of entering a plea, the subsequent admissions of facts, and the range of consequences that their clients will face in order to advise them effectively.

E. Mitigating Circumstances

There may be mitigating circumstances that can be presented by the defence to the prosecution, and subsequently shared with the court, that have an overall effect on plea positions and sentencing ranges. These mitigating circumstances could include factors like acting in self-defence or defence of others, the impacts of addiction in drug trafficking offences, or poverty as a motivation for theft.

The prosecution may not agree to the mitigating circumstances as presented. As part of the plea process, the Crown must prove the facts of the case beyond a reasonable doubt. In these circumstances, defence counsel may wish to argue the mitigating facts in a hearing based on the principles in *R v Gardiner*[44]—known as a *Gardiner* hearing. A guilty plea followed by a contested hearing of the facts allows the prosecution to prove facts the defence is not willing to admit and the accused to present evidence of the mitigating factors. They are useful where the accused is factually guilty and wishes to take advantage of the credit offered by a guilty plea but where the defence and Crown cannot agree on facts that each view as key to achieving a just and appropriate sentence. The *Gardiner* hearing and its procedures will be explored in further depth in Chapter 3, Plea Negotiations, and is discussed in the book *Sentencing and Penal Policy in Canada*.[45]

F. Personal Factors

Some accused persons might choose to plead guilty due to personal circumstances, such as the desire to move on quickly from the legal process to avoid the emotional and psychological strain of a trial on themselves. Some may consider the financial impact of a trial or the toll on their families. Accused persons can wait 18 months or 30 months, depending on the Crown's election, for the completion of their trial. This waiting period can be agonizing, especially if the accused is subject to onerous bail conditions or is detained in custody.

The phrase "pleading just to get it over with" should be unacceptable to all justice system participants. In these situations, care must be taken by counsel to ensure that the facts supporting the plea are unequivocally accepted. Each case is unique, and the decision to plead guilty involves careful consideration of various factors, including legal advice, the strength of the prosecution's case, and personal circumstances.

44 [1982] 2 SCR 368, 1982 CanLII 30.

45 Allan S Manson et al, *Sentencing and Penal Policy in Canada: Cases, Materials and Commentary*, 4th ed (Toronto: Emond, 2023).

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IV. The "Benefit" of a Guilty Plea

The credit given to a guilty plea is not a scientific measure and is not reduced to any specific formula. It is left to the judge's discretion.[46] Counsel should advise their client that the court will likely give the client some credit for an early expression of remorse, implicit in the plea of guilt. What is tacit in that credit is an understanding of the great benefit that a plea has on relieving justice system pressures, on sparing victims from testifying, and on the other personal and financial expenses associated with trials. Some offences, such as murder, simply do not allow for sentencing credit to be incurred by a plea; however, an early plea may assist in parole opportunities.

V. Criticisms of Guilty Pleas in Canada

The guilty plea system in Canada, while practical and often necessary for managing the court system efficiently, comes under public and appellate criticisms. One of the greatest concerns of Parliament, of courts receiving pleas, and of appellate courts is the prevalence of wrongful convictions that emerge as a result of false guilty pleas. While the statute articulates specific mechanisms meant to serve as protections within the subsections of section 606 to protect against wrongful convictions, there are many sociological, personal, and systemic reasons why accused persons will enter a plea of guilt despite their innocence.

A. Pressure and Coercion

If the judge is conducting a plea inquiry, they may ask about pressure: "Has anyone pressured you to plead guilty today?" This question will be asked in open court, with onlookers, and will be left broadly for the accused to answer. The accused typically shakes their head and says "no." But the question is much more nuanced than this simple question-and-answer script that plays out in courtrooms daily. All court actors should be mindful of how the personal circumstances of the accused person create different pressures, internal and external to the individual, and systemic pressures that the justice system perpetuates.

The most obvious type of pressure is exerted from a third party like a friend or family member. An individual co-accused with others may feel pressure to "take the charges" because of their status in the group. A youth accused in an event with other adults may be pressured to plead guilty and accept all responsibility for the acts in question because of the differential of impact in youth sentences and record entries.

Financial pressures also create false incentives to plead. An accused may feel pressure to plead guilty because they cannot afford the cost of a trial. An individual may plead guilty because they are the breadwinner of the family and bail conditions restricting them from going home will be lifted.

46 *R v Shah*, 2017 ONCA 872 at para 13; *R v Daya*, 2007 ONCA 693 at para 15.

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Defendants may feel pressured to plead guilty, even if they are innocent, due to the threat of a harsher sentence if they are found guilty at trial. This pressure can lead to wrongful convictions where individuals plead guilty to avoid the risk of a longer sentence. Other forms of pressure and coercion include time spent in incarceration, to avoid a mandatory minimum sentence, to mitigate the impact on another accused person, or wanting to be free from overly restrictive bail conditions. For example, in the case of *R v T(T)*, the defendant, who acknowledged guilt in some respects and maintained innocence in others, still pleaded guilty: in the short period of deciding whether to plead before the trial began, he felt pressured to plead guilty to avoid incarceration and to spare his wife the burden of testifying.[47]

The case law reveals recognition by courts of different types of pressure that accused persons face that may coerce them into guilty pleas. A defendant's personal circumstances can be a source of pressure. In *R v Naslund*, the Alberta Court of Appeal equated the circumstances of Helene Naslund's plea to a joint position to manslaughter, rather than murder, in exchange for a reduced sentence for her son as a "coercive bargain."[48]

Pressures that accused persons may face include internal pressures like the fear of losing access to health care or financial security, external environmental pressures like a loved one who needs their care or a workplace that needs their return, peer pressure from cellmates or family members, and of course pressure from counsel and court actors.[49] Justice system participants are tasked with guarding against overly exerting these types of pressures.

Defence counsel may also unknowingly be a source of pressure. Though counsel may have an opinion on the strength of a defendant's case—which is of course relevant to any discussions of a guilty plea—it is important to maintain a balance between presenting the situation with all options laid out and not going so far as to apply undue pressure on a client. In the decision of *R v Hardy*, where the Court was considering admissibility of affidavits from defence counsel, the testimony laid out suggested the counsel's actions could amount to misinforming.[50] In this case, the counsel advised his client that he would likely be found guilty of sexual assault and that the Crown may pursue a dangerous offender application (something that seemingly was not likely).[51] Though this ruling merely handled admissibility, it is clear to see how laying out the situation for the accused in such grave terms (without necessarily being justified in doing so) could improperly coerce a guilty plea.

47 *R v T(T)*, 2014 NUCJ 20 at paras 24-26.

48 *R v Naslund*, 2022 ABCA 6 at para 124.

49 *R v Rayworth*, 2001 CanLII 32774 (ONCA).

50 *R v Hardy*, 2015 ONSC 6665 at para 24.

51 *R v Hardy*, 2015 ONSC 6665 at paras 22, 25.

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For defence counsel, aligning advice with client needs and desired outcomes is both an art and a science. Understanding a client's motivations from the outside of the retainer assists in plea bargaining, negotiations, and client management. Skilled practitioners will know how to pitch a resolution to a client based on counsel's assessment of the evidence and advise their clients of the potential consequences of taking their matter to trial.

Counsel's role is to advise clients and provide advice, not to coerce clients. For example, a defence lawyer who refuses to take a matter to trial and will only plead a client guilty may place their client in the unenviable position of having to decide whether it is worth losing their counsel by foregoing the guilty plea.

B. Inequality of Bargaining Power

There can be an imbalance in bargaining power between the prosecution and the defence. The state, equipped with the investigatory and arrest powers of the police, prosecutorial resources, and public support for crime and punishment, may be better situated to achieve convictions. Defendants with fewer resources or less legal expertise may be more likely to accept a plea deal, even if it might not be in their best interest.

Lack of access to legal aid[52] or adequate representation in courts may inappropriately influence the accused person's decision to plead guilty. While the presumption of innocence is meant to be paramount, accused persons face tremendous imbalances.

C. Innocent Defendants

Innocent individuals might plead guilty to crimes they did not commit, particularly if they believe that a trial would result in a harsher sentence or if they do not have access to adequate legal representation. There is great concern for wrongful convictions that arise from plea bargaining or systemic pressures of the criminal justice system.

A well-documented analysis of this exact problem is provided by Kyle Scherr and colleagues. The authors open with a case of a man wrongly convicted of murdering his wife's newborn child in 1999—a child who was later discovered to have never existed because his wife was not capable of conception. The basis for his conviction was his plea of guilt.[53] Even though he was fully innocent of the crime (the crime did not even exist!), the authors note that the *risk* of facing the death penalty or life without parole at trial in Alabama was enough for him to enter pleas of guilt.[54] It is hard

52 Christopher Sherrin, "Guilty Pleas from the Innocent" (2011) 30 Windsor Rev Legal Soc Issues 1.

53 Kyle Scherr et al, "Cumulative Disadvantage: A Psychological Framework for Understanding How Innocence Can Lead to Confession, Wrongful Conviction, and Beyond" (2020) 15:2 Pers Psychol Sci 353 at 353.

54 Kyle Scherr et al, "Cumulative Disadvantage: A Psychological Framework for Understanding How Innocence Can Lead to Confession, Wrongful Conviction, and Beyond" (2020) 15:2 Pers Psychol Sci 353 at 353.

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to imagine accepting responsibility for something that did not happen or that you did not do. However, it is a reality faced by many accused persons. Factors like inadequate bail services, the prospect of a severe sentence, or insufficient access to legal aid are factors that contribute to false guilty pleas.[55]

D. Impact on Sentencing Consistency

The plea-bargaining system can lead to inconsistencies in sentencing. Similar offences might result in widely varying sentences depending on the plea agreements reached, which can undermine the principle of sentence parity. While sentencing is largely given great deference to local judges who understand the issues that are plaguing their communities,[56] sentencing judges are also instructed by the Supreme Court in *Anthony-Cook* to give joint positions great deference.[57] The overreliance on plea bargaining and joint positions can lead to a lack of well-reasoned and articulated decisions that can be relied on by other counsel. It can also result in one offender receiving a sentence of no incarceration for the same offence that an offender, similarly situated, in the next town over, receives a lengthy period of incarceration for committing.

The justice system's reliance on plea deals can sometimes overshadow the pursuit of justice. The prioritization of efficiency over due process could have the unintended consequence of legal issues not being properly litigated. Every case should be thoroughly examined and justice served for both victims and defendants, but the practicality of a system where every single case is reviewed to its minutia is untenable when resources are scarce. The absence of a reported sentencing decision could result in a lack of sentencing parity for similar offences.

E. Lack of Transparency

Plea deals are often negotiated behind the veil of settlement privilege, which can contribute to a lack of transparency about how justice is administered. This secrecy can contribute to public perceptions of unfairness in the criminal justice system. This could create the potential for reduced accountability.

When defendants plead guilty, there is less public scrutiny of the evidence and the case itself. Plea bargaining can also lead to certain facts being glossed over, left out, or even overemphasized in the hopes of arriving at a resolution. This can ultimately result in less accountability for the prosecution and a reduced opportunity to fully explore the facts of the case.

55 Christopher Sherrin, "Guilty Pleas from the Innocent" (2011) 30 Windsor Rev Legal Soc Issues 1.

56 *R v M (CA)*, [1996] 1 SCR 500, 105 CCC (3d) 327; *R v Lacasse*, 2015 SCC 64.

57 *R v Anthony-Cook*, 2016 SCC 43 at paras 40-42.

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F. Impact on Victims

Victims in Canada's justice system do not have a formal role to play in plea negotiations. While most prosecutors can and do take their views into consideration, whether to enter into plea negotiations and what bargain to strike are the decisions of the prosecutor alone.

In situations where the victims disagree with the exercise of their judgment, they are left without recourse. Without standing in the criminal justice process, there is no means by which they can intervene and change the course of the agreement. Further, the facts or charges settled on by the prosecution and defence may not fully account for everything the accused stands accused of, subject to the victim.

With Canada's proximity to the United States, and with similar but simultaneously very different criminal justice systems, victims are often surprised by the lower sentencing tariffs Canadian courts impose on offenders. Learning that the accused received a plea deal may only deepen victims' disillusionment with a system they may perceive as soft on crime.

In Canada, the Crown represents the public interest, not the victims of an offence. The victim's and the prosecutor's priorities for the resolution discussions may not align. Frequently, the prosecutor will approach the plea negotiations from a bigger picture, but not always. Sometimes, it's the inverse, and the victims may feel that the bargain struck ignores a larger systemic or societal problem.

These criticisms highlight the complexities and challenges inherent in the plea-bargaining system and underscore the need for ongoing reforms and improvements to ensure fairness and justice in the guilty plea process.

G. Guilty Pleas and Indigenous Persons

Indigenous persons are disproportionately represented as defendants in the criminal justice system, and conversely but relatedly, Indigenous women and children are amongst the group of people most likely to fall victim to serious violent crimes—they are an especially vulnerable group.[58] This reality for Indigenous victims and offenders underpins sections 718.04 and 718.2(e), respectively, the latter of which is the focus of the landmark *R v Gladue* case.[59]

Though *Gladue* focused heavily on the concern of sentencing, the principles enumerated in the case for taking special care with Indigenous offenders have been expanded far beyond that limited scope in its wake. In *R v Whitebear* and *R v Robinson*,

58 Statistics Canada, *Victimization of Aboriginal People in Canada, 2014*, by J Boyce, Catalogue No 85-002-X (Ottawa: Statistics Canada, June 2016), online: <https://www150.statcan.gc.ca/n1/pub/85-002-x/2016001/article/14631-eng.htm>.

59 *Criminal Code*, RSC 1985, c C-46, ss 718.04, 718.2(e). *R v Gladue*, [1999] 1 SCR 688, 1999 CanLII 679.

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for instance, the Gladue principles were extended to bail proceedings;[60] in *United States v Leonard*, they were extended to be applicable in extradition hearings;[61] and in *Twins v Canada*, they were extended to parole hearings.[62] These examples, though far from exhaustive, demonstrate that Gladue factors ought to be considered throughout the trial process, not merely at sentencing. It should be unsurprising, then, that courts have begun to adopt them for the sake of considering the validity of guilty pleas.[63]

Why is this relevant? The criticisms of guilty pleas in the context of Indigenous offenders go even farther than the considerations for all offenders, even other vulnerable groups. For instance, Jonathan Rudin made the observation that many Indigenous cultures place a heavy focus on taking responsibility for actions—though the distinction between personal responsibility and legal guilt is lost in this cultural translation to the criminal justice system.[64] Some Indigenous languages, Rudin observes, do not even have comparable words or concepts to encapsulate "guilt" and "innocence" in the legal tradition. Given this "loss in translation," an Indigenous offender may feel a cultural pressure to plead guilty, without fully appreciating what that means.[65] Counsel and the court should take into consideration these sorts of unique barriers when considering whether a guilty plea is fully informed—and such considerations should be included, if applicable, in any motions to withdraw a plea.

The overrepresentation of Indigenous peoples in the criminal justice system also creates a rigorous cyclical effect. Where an Indigenous offender has already had an interaction with the criminal justice system in the past, they may feel at a stark disadvantage or hopeless to stand in its wake when faced with it again: these sorts of mentalities fuel the "just get it over with" attitude observed by Kyle Coady and Angela Bressan.[66] This circumstance is worsened where defence counsel do not take proper diligence to consider the unique background of an Indigenous accused and may themselves have various language or cultural barriers in speaking with their clients.[67]

It is important to also recognize the pivotal role of the community in many Indigenous cultures and societies. The Anishinaabe clan system, for instance, highlights the

60 *R v Whitebear*, 2019 ABQB 269 at paras 53-57; *R v Robinson*, 2009 ONCA 205 at paras 13-15.

61 *United States v Leonard*, 2012 ONCA 622 at para 53.

62 *Twins v Canada (Attorney General)*, 2016 FC 537 at paras 58-59.

63 See e.g. *R v Ceballo*, 2019 ONCJ 612 at para 12.

64 Jonathan Rudin, *Aboriginal Peoples and the Criminal Justice System* (Toronto: Ipperwash Inquiry, 2005) at 22.

65 Jonathan Rudin, *Aboriginal Peoples and the Criminal Justice System* (Toronto: Ipperwash Inquiry, 2005) at 22.

66 Kyle Coady & Angela Bressan, *Guilty Pleas Among Indigenous People in Canada* (Ottawa: Department of Justice Canada, 2017) at 9-10, 15.

67 Kyle Coady & Angela Bressan, *Guilty Pleas Among Indigenous People in Canada* (Ottawa: Department of Justice Canada, 2017) at 11.

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interdependent role that various members of the community have and how each must rely on each other. This dependency and closeness with the community can have particular consequences in the context of plea bargaining: a defendant may not wish to go to trial if it will involve burdening members of the community to testify, if they risk being taken away from their communities, or if it may be seen as a lack of "taking responsibility" (as aforementioned), subjecting them to social pressure.[68] These unique social considerations of an Indigenous accused *must* be acknowledged by their defence counsel for effective plea bargaining and to ensure that the most important needs of their client are fulfilled in any agreement.

Finally, it is important to also recognize the prevalence of substance abuse, especially alcohol, in Indigenous communities. This reality means that a disproportionate number of Indigenous defendants may suffer from some degree of fetal alcohol spectrum disorder (FASD), a disease that is more prevalent in Indigenous communities than elsewhere—and for which few supports exist to accommodate within the legal system.[69] FASD, along with other mental health concerns discussed below in Section VI.A, "Vulnerable Individuals," adds additional complications to the existing barriers an accused faces by merely being Indigenous. Defence counsel should be aware of the risk of these considerations and, where appropriate, obtain assessments and seek bail conditions that will best accommodate these vulnerabilities.[70]

VI. Ethical Issues

The subject of some academic debate about the legality of assisting an accused person to plead guilty, if they are not in fact guilty, informs rules of professional conduct. Law societies across Canada frown upon the practice, and the Federation of Law Societies of Canada's *Model Code of Professional Conduct*, upon which most provincial ethical rules track, explicitly forbids the practice.[71] The corollary is true for prosecutors—attempting to coerce a guilty plea out of an accused where the facts do not bear out a conviction could be the subject of Law Society discipline or a malicious prosecution lawsuit.[72]

68 Kyle Coady & Angela Bressan, *Guilty Pleas Among Indigenous People in Canada* (Ottawa: Department of Justice Canada, 2017) at 11-13.

69 Kyle Coady & Angela Bressan, *Guilty Pleas Among Indigenous People in Canada* (Ottawa: Department of Justice Canada, 2017) at 16.

70 Kyle Coady & Angela Bressan, *Guilty Pleas Among Indigenous People in Canada* (Ottawa: Department of Justice Canada, 2017) at 16.

71 Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Ottawa: FLSC, as amended April 2024), ss 5.1-7 to 5.1-8, online (pdf): <https://flsc.ca/wp-content/uploads/2024/05/2024-Model-Code-of-Professional-Conduct.pdf>.

72 *Nelles v Ontario*, [1989] 2 SCR 170, 69 OR (2d) 448; *Miazga v Kvello Estate*, 2009 SCC 51.

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A. Vulnerable Individuals

Here are some factors that increase vulnerability:

- mental health,
- addiction,
- health/(dis)ability,
- having a native language other than English or French,
- age,
- lack of family support,
- gender,
- new immigrant status,
- race,
- Indigenous status, and
- other socio-economic disadvantages (e.g., precarious housing, low income, etc.).

Where a defendant falls into a vulnerable group of some sort—especially those with language barriers, health complications, socio-economic disadvantages, a history of discrimination due to status as a minority, or any and all of these in some combination—they are particularly susceptible to providing false guilty pleas. Consequently, defence counsel, Crown counsel (especially where the defendant is self-represented), and the court itself should take precautions to identify and be mindful of any indications of vulnerability when discussing a plea or assessing its merits.

An example of this concern is seen in *R v Peequaquat*, where the defendant was deaf and mute and suffered from FASD. He pleaded guilty, and this plea was accepted by the trial judge as fulfilling the necessary requirements of being voluntary, informed, and unequivocal.[73] This plea was then sought to be withdrawn and appealed, and while the Court of Appeal ultimately upheld the guilty plea as valid, this case reveals the numerous steps involved by the Court in addressing the capacity of the defendant. The Court ordered a psychological assessment; noted the importance of having an American Sign Language and deaf interpreter to ensure messages were properly conveyed (with context); and noted that, despite barriers to communication, both the defendant and his counsel were properly understanding the advice and direction of each other.[74] The scrutiny offered of the advice given by the defendant's counsel, the means by which they communicated, and any psychological evidence that may have impaired the ability to be properly informed of the effects of a guilty plea speak to the importance that courts have placed on handling guilty pleas from vulnerable parties.

73 *R v Peequaquat*, 2019 ABCA 236 at paras 1-2, 5-9.

74 *R v Peequaquat*, 2019 ABCA 236 at paras 9, 39-40, 44-48, 50-56.

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B. Incentivized Pleas

Incentivized pleas are plea bargains that may play on one of the vulnerabilities of the accused or on systemic issues that may create pressure for a client to plead to something they are otherwise innocent of. Sometimes these pleas are time limited with an expiration date from the Crown or they have built-in limitations (e.g., the position will only remain in place until a trial date is set). The incentive is built into the sentence the Crown will seek or to the specific charges the Crown will seek that the accused will plead to. In the absence of a viable plan for bail, the accused may prioritize avoiding a criminal record or being released from detention as soon as possible to return to employment or family obligations. Whether ethical or not, the criminal justice system incentivizes the swift management of criminal cases through sweetheart deals.

These pleas are fraught with frailties, and the concern is that even an innocent person could be persuaded to plead guilty. As experts point out, the fact is that

> an accused can sometimes get released earlier from custody by pleading guilty than by going to trial. In a 1971 *Life Magazine* article about a New York City lawyer, the defendant was quoted as saying: "You mean if I'm guilty I get out today … But if I'm innocent, I got to stay in?"[75] As one American academic put it: A guilty plea thus means immediate freedom, whereas fighting to vindicate one's innocence necessarily means a longer wait for a trial and potential freedom. Even an innocent defendant may find such a deal, and the prospect of immediate release, irresistible.[76]
>
> In fact, some Canadian experts point out that the incentive for a factually innocent person to enter an early guilty plea may be stronger in minor matters where an accused with a lengthy record believes there is zero chance of getting bail and recognizes that the delay before trial will exceed the sentence that would be imposed for an early plea.[77]

VII. Informed Clients

The decision to enter a plea should be a client-driven process. A client is informed when they have properly reviewed the disclosure, understand the case against them, understand how the elements of the offences they are pleading to are made out, and understand the consequences (both ancillary and the potential sentences) they are facing.

The Saskatchewan Court of Appeal in *R v Leonard* summarized the law as follows:

> It is well settled that, in order to be valid, a guilty plea must be voluntary, unequivocal and informed. Voluntariness turns on the idea of a conscious volitional decision to plead guilty for reasons the accused regards as appropriate. A guilty plea is unequivocal if it

75 Christopher Sherrin, "Excessive Pre-Trial Incarceration" (2012) 75:1 Saskatchewan L Rev 55 at para 21.

76 Stephanos Bibas, "Plea Bargaining's Role in Wrongful Convictions" in Allison D Redlich et al, eds, *Examining Wrongful Convictions* (Durham, NC: Carolina Academic Press, 2014) 161.

77 Public Prosecution Service of Canada, Innocence at Stake: *The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada* (Ottawa: PPSC, 2018) at 179-90, online (pdf): <https://www.ppsc-sppc.gc.ca/eng/pub/is-ip/is-ip-eng.pdf>.

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> is unqualified and certain with respect to the acknowledgement of the essential facts of the crime charged. It is informed if the accused understands the nature of the charges, the legal effect of the plea and the consequences of the plea.[78]

A plea of guilt that is proven to be inadequately informed is susceptible to a claim of ineffective assistance of counsel and/or to the plea being struck from the record. This will be discussed further in Chapter 13, Common Appeals from Guilty Pleas. Written instructions as well as the section 606 inquiry are the best tools for a practitioner and the court to safeguard against the plea being lost and collateral attacks on counsel. These important safeguards will be discussed in depth in subsequent chapters.

A. Written Instructions

Written instructions prepared by counsel, and reviewed, dated, and signed by clients for guilty pleas, remain the best safeguard for counsel to protect themselves from claims of ineffective assistance of counsel or negligence in the plea process.[79] The section 606 inquiry forms the basis of the written instructions, and the instructions reflect the lawyer's advice to the client, which will include understandings of ancillary consequences. Ancillary consequences could include the following:

- impact on child custody or family law proceedings;
- immigration consequences and the potential for deportation;
- impact on an outstanding immigration application;
- ancillary proceedings that may be triggered by a conviction, such as the revocation of a previous discharge[80] or the prosecution's decision to commence a dangerous or long-term offender application;[81]
- the ability to cross the border, to enter other countries, or to return to Canada;
- employment consequences;
- driving suspensions arising from driving convictions;
- the impact and extent of *Sex Offender Information Registration Act*,[82] section 161 orders[83] in sexual offences;
- DNA sample requirements[84] and relevant retention periods;
- weapons prohibitions and their length;

78 *R v Leonard*, 2007 SKCA 128 at para 17. See also *R v T (R)*, [1992] OJ No 1914 (QL), 1992 CanLII 2834 (CA); *Adgey v R*, 1973 CanLII 37 (SCC); *R v Moser*, [2002] OTC 119, 163 CCC (3d) 286 (SC).

79 Christine Mainville, "Professionally Serving and Managing Clients: Defence Counsel's Role in the Solicitor Client Relationship," *For the Defence* 39:3 (13 February 2019).

80 *Criminal Code*, RSC 1985, c C-46, ss 2.3(2)(f), 730(4).

81 *R v Waldorf*, 2023 ONCJ 209.

82 SC 2004, c 10; *Criminal Code*, RSC 1985, c C-46, ss 490.012-490.02911.

83 *Criminal Code*, RSC 1985, c C-46, s 161.

84 *Criminal Code*, RSC 1985, c C-46, ss 487.04-487.053, 487.055-487.091.

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- records retention for discharges, convictions, and ancillary orders; and
- the impact of an adult conviction on the retention period for a *Youth Criminal Justice Act* entry.[85]

Additional steps to ascertain legal opinions from practitioners in other areas of law, such as immigration, family, or employment, help bolster the validity of the plea. An accused person who receives a written opinion from an immigration lawyer that a plea of guilt will surely result in deportation, but who decides to enter the plea despite the opinion, would struggle to argue later on that they were not informed of their immigration consequences.[86] That written opinion can form part of the record or be appended to defence counsel's written instructions kept on file. Providing proof of immigration consequences to the court may have the benefit of being acknowledged by the court as a consideration on sentencing.

DEFENCE COUNSEL OUT-OF-COURT STEPS TO COMPLETE FOR PLEA

- Meet client and explain all available options to them—plea, trial, and presumption of innocence.
- Review disclosure with client; ensure disclosure is complete.
- Review law and have an understanding of the sentencing ranges, the lesser included pleas, the Crown policy manual, and the local tariffs on sentence.
- Review possible defences in the law with client.
- Obtain client's instructions and review their version of events.
- Understand the client's vulnerabilities, such as their mental health, their immigration status, their employment issues, and their familial needs.
- Be satisfied that the conviction is made out based on the disclosure, the case law and statute, and the client's version of events.
- Obtain client's instructions for any resolution and/or resolution discussions.
- Meet Crown and have discussions regarding resolution (see Chapter 3, Plea Negotiations).
- Review notes from meeting with the Crown and advise client.
- Draft written instructions and review instructions with client for signature.

VIII. The Ethical Lawyer and the Guilty Plea Process

In a lawyer's career, both Crown and defence, they will be presented time and time again with individuals who may be balancing many competing personal factors

85 See *Youth Criminal Justice Act*, SC 2002, c 1, s 119.

86 *R v Girn*, 2019 ONCA 202; *R v Wong*, 2018 SCC 25.

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that create pressures for them to resolve their matters quickly and plead guilty. For example, in a case of impaired driving, incentives like the interlock program that promise to get drivers back on the road expediently with the installation of an interlock machine in their vehicle in exchange for an early guilty plea may unduly influence someone to plead guilty to an offence that they otherwise are not guilty of. That individual may be thinking about their employment obligations or their childcare responsibilities. Thoughts of horrific jail conditions and the promise of being released from custody, in the absence of a bail plan, may pressure an accused to accept a guilty plea to charges that they could have beat at trial. Consider this proposition: plead today and you will be released or wait in jail and don't qualify for bail.

This type of coerciveness was often seen in cases involving mandatory minimum sentences. When faced with the potential of a crushing sentence that many charges in the *Criminal Code* mandated, accused persons would often jump at the opportunity to plead guilty.

Lawyers are often presented with what could otherwise be characterized as a "deal of a lifetime" from Crown counsel—it may be time limited, and it may just be too good to be true. While these types of deals may stir interest and increase the pace of work, it is important for the lawyer to maintain all of the same safeguards that would be in place for any other resolution. A careful consideration of the facts, all of the accused's circumstances, and their acceptance of the facts that support the charges must still be assessed by counsel, no matter how minor the offences or how alluring the plea deal may be.

Across Canada, provincial regulators require lawyers to take all settlement offers to their client as a fundamental ethical obligation. A lawyer's role is meant to be that of a professional—explaining the implications of the offer, helping the client understand how it compares to other possible outcomes, and explaining the strengths and weaknesses of any route the client wishes to take.

When faced with an ethical bind, the lawyer's starting point will be obtaining written instructions.[87] If counsel is concerned about the veracity or acquiescence of their client to the plea or the facts that will be tendered, counsel should have their client sign a copy of the facts that will be tendered as part of the resolution. Finally, having a witness in the room (such as a student-at-law or a staff member or associate) who is taking notes of the interaction is advisable.

The subsequent safeguard of section 606(1.1) creates an opportunity for the defence to request that the judge accepting the plea conduct their own plea inquiries. While most judges trust defence counsel to conduct their own inquiries out of court and off the record, the request may signal to the court that this particular plea requires careful handling. While section 606(1.2) indicates that it is not mandatory for a judge to conduct a plea inquiry, counsel can communicate their concerns to

87 *R v Hector*, [2000] OJ No 1597 (QL), 146 CCC (3d) 81 (CA).

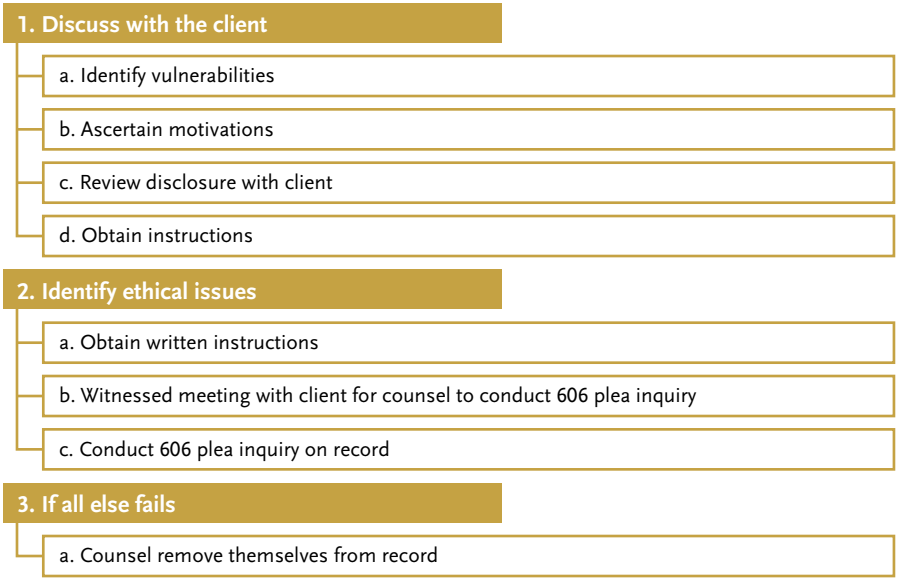
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the court. For example, counsel can state, "I am unable to conduct a plea inquiry in this case and ask the court to do so" or "I have not been able to obtain complete section 606 instructions and would request the court's assistance." By placing these comments on the record and inviting the court to conduct a section 606(1.1) inquiry, counsel is inviting the judge to assist in the process of ensuring that the plea is voluntary, informed, and unequivocal.[88] If the judge's inquiries with the client satisfy the court, and adequate information is placed on the record, another safeguard has emerged to assist trial counsel.

It is ultimately the client's choice whether they choose to accept or reject the plea offer. A lawyer must always act on their client's instructions and must not prioritize their own views on how a case should be completed. Obtaining clear and thorough written instructions remains the first and best safeguard for lawyers assisting clients with guilty pleas. Participating in the section 606 plea inquiry on the record, with the client answering the questions for the transcript to capture, bolsters this safeguard for all court actors. The lawyer and court are not immune from section 606 of the *Criminal Code*, and as officers of the court, they may not participate in any actions that would bring the administration of justice into disrepute. Participating in guilty pleas of the innocent should be avoided at all costs.

See Figure 1.1, which illustrates the navigation of ethical issues.

FIGURE 1.1 Navigating Ethical Issues



88 See *R v DMG*, 2011 ONCA 343 at paras 48, 54.

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