CHAPTER THIRTEEN

Resolutions

I. Introduction 393
II. Withdrawals and Stays 393
III. Alternative Measures 394
IV. Peace Bonds 395
V. Guilty Pleas 398
A. Procedure 399
B. Elements of a Valid Guilty Plea 399
C. Collateral Consequences 402
D. Pleas to Lesser or Different Offences 410
E. Rejecting, Striking, or Withdrawing a Plea 410
F. Crown Repudiation 411
G. No Contest 412
Problems 421

I. INTRODUCTION

Most criminal charges are resolved short of trial. For 2008-2009, Statistics Canada reported that over 90 percent of cases in adult criminal court were completed without proceeding to trial: Statistics Canada, "Adult Criminal Court Statistics, 2008/2009" by Jennifer Thomas, in Juristat 30:2, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2010) at 13. Most charges end in a guilty plea, but about one-third of charges are either withdrawn or stayed by the prosecution: Statistics Canada, "Adult Criminal Court Statistics in Canada, 2014/2015" by Ashley Maxwell, in Juristat 37:1, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2017) at 6-7. The outcomes are often related, as cases involving multiple charges are frequently resolved by the accused pleading guilty to some and, in exchange, the Crown declining to prosecute the others. This chapter considers the various ways in which criminal cases can be resolved without trial.

II. WITHDRAWALS AND STAYS

Withdrawals and stays of proceedings are both ways in which the prosecution can terminate the proceedings against an accused, either permanently or temporarily. The effect of both is to remove the information or indictment from the jurisdiction of the court and to vacate any related orders for judicial interim release or detention.

There are many reasons why the Crown may decide to withdraw or stay charges. For example, the Crown may conclude that it does not have enough evidence to secure a conviction or that it needs more time to investigate the allegations. The Crown may conclude that continuation of the prosecution is not in the public interest, such as when the victim of

This excerpt is for review purposes only and may not be shared, reproduced, or distributed to any person or entity without the written permission of the publisher. © 2020 Emond Montgomery Publications. All Rights Reserved.

a minor property offence has been fully compensated and does not wish to pursue the charge. (See, generally, Ontario Ministry of the Attorney General, *Report of the Attorney-General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Queen's Printer, 1993) (Chair: Martin G. Arthur) at 74-113.) Alternatively, the Crown may conclude that different, possibly more serious, charges should be brought against the accused. Most commonly, the Crown is simply abandoning the prosecution of one or some of several charges as part of a plea bargain with the accused.

The prosecutor has the common law authority to withdraw criminal charges as early as the moment when process is issued. The authority to do so is unfettered and largely unreviewable prior to the time the accused enters a plea. After the accused enters a plea, leave of the trial judge is required. See *McHale v Ontario (Attorney General)*, 2010 ONCA 361, leave refused [2010] SCCA No 290. In most cases, a judge would only refuse leave if the accused would be prejudiced, such as where the Crown had already started to call its case and sought to withdraw with a view toward starting the trial anew, possibly with better evidence.

Section 579(1) of the *Criminal Code* (the Code) grants the Crown the right, at any time after an information is laid and before judgment, to stay proceedings against an accused. Leave of the court is not required.

As a practical matter, both a withdrawal and a stay will often permanently terminate the prosecution of the accused for the specific offences charged. But neither will necessarily have that effect. (Keep in mind that a prosecutorial stay is different from a judicial stay of proceedings, which, absent successful appeal, does permanently end the prosecution.) Absent prejudice to the accused or an abuse of process, the Crown can re-lay a charge after withdrawal: *R v Selhi*, [1990] 1 SCR 277; *R v Maramba* (1995), 104 CCC (3d) 85 (Ont CA); *R v Lamoureux*, [1986] OJ No 2780 (QL) (Prov Ct). Section 579(2) of the Code explicitly grants the Crown the authority to recommence stayed proceedings either within one year or, in the rare case when a limitation period applies, before the expiration of that period. This authority can be exercised for any legitimate or proper purpose: *R v Scott*, [1990] 3 SCR 979 at paras 23-28; *R v Anderson*, 2014 SCC 41 at paras 36-51. See Chapter 17 for a discussion of limitation periods.

III. ALTERNATIVE MEASURES

In some cases, the Crown is of the view that a simple withdrawal or stay of proceedings is inappropriate, but that the public interest can be served by something less than full judicial proceedings. This often occurs in connection with minor offences where the Crown concludes that it has the necessary evidence to prosecute, but that the circumstances of the offence or the offender are such that sentencing objectives like deterrence, rehabilitation, and restoration can be achieved without resort to the formal sentencing powers of the court and without saddling the accused with a criminal record. An otherwise law-abiding individual, for example, may have committed a relatively trivial shoplifting offence in circumstances where the individual was suffering emotional trauma from the recent loss of a loved one. The offence may be attributable to transitory circumstances rather than bad character and may be adequately addressed by the accused voluntarily undertaking counselling and making restitution to the victim.

Section 717 of the Code authorizes the use of alternative measures, defined in s 716 as "measures other than judicial proceedings under this Act used to deal with a person who is

This excerpt is for review purposes only and may not be shared, reproduced,
or distributed to any person or entity without the written permission of the publisher.
© 2020 Emond Montgomery Publications. All Rights Reserved.

eighteen years of age or over and alleged to have committed an offence." Alternative measures programs are established by the province or federal government and can require the accused to do any of a number of things, such as community service hours or a donation to a charity. If the accused fulfills the requirements of the program, the Crown will usually withdraw the charges. If, for some reason, the Crown pursues the prosecution, s 717(4) stipulates that a court shall dismiss the charges if it is satisfied on a balance of probabilities that the accused has totally complied with the terms and conditions of the alternative measures. The court can also dismiss the charges even though the accused has only partially complied if it concludes that prosecution of the charges would be unfair.

The Crown can only agree to alternative measures if it is satisfied that it has enough evidence to proceed with the prosecution, prosecution is not barred by law, and the use of alternative measures is appropriate "having regard to the needs of the person alleged to have committed the offence and the interests of society and of the victim": s 717(1)(b). The accused must agree to participate and must "[accept] responsibility for the act or omission that forms the basis of the offence that the person is alleged to have committed": s 717(1)(e). Section 717(2)(a) stipulates that alternative measures shall not be used if the accused "denies participation or involvement in the commission of the offence." The requirement to accept responsibility can be problematic for an accused who denies culpability for the offence but who sees alternative measures as a useful way to avoid prosecution. Section 717(3) states that no statement accepting responsibility "is admissible in evidence against that person in any civil or criminal proceedings," but counsel should never encourage a client to pretend to accept responsibility because his or her statement would be inadmissible.

Alternative measures are sometimes colloquially known as diversion. Diversion, however, sometimes refers to informal alternative measures. The Crown, in the exercise of its discretion, can agree to withdraw or stay charges in exchange for the accused performing acts outside of an official alternative measures program. The Crown may agree to do so, for example, where an appropriate alternative measures program is not in place or where the accused has already done much to make amends by the time the Crown concludes that full prosecution is not necessary in the public interest.

IV. PEACE BONDS

In some cases, the Crown will discontinue the prosecution in exchange for the accused entering into a peace bond. A peace bond is a court order requiring the accused, for a certain period of time, to keep the peace and be of good behaviour and to comply with other conditions designed to secure his or her good conduct. Resolution by way of peace bond may be resorted to when, for example, the accused gets into a minor physical altercation and the Crown concludes that the interests of justice will be served simply by requiring the accused to abstain from communicating or associating with the complainant.

There are two kinds of peace bonds: statutory peace bonds and common law peace bonds. Statutory peace bonds are authorized by ss 810-810.2 of the Code, although in this context s 810 is probably most commonly used. Common law peace bonds are, as the name suggests, authorized by common law.

The following case explains the nature of each kind of peace bond, some of the differences between the two, and some procedural and evidentiary issues relevant to both.

This excerpt is for review purposes only and may not be shared, reproduced,
or distributed to any person or entity without the written permission of the publisher.
© 2020 Emond Montgomery Publications. All Rights Reserved.

R v Musoni

(2009), 243 CCC (3d) 17 (Ont Sup Ct J), aff'd 2009 ONCA 829

[Musoni was charged with criminal harassment. On his trial date, he entered a common law peace bond and the criminal harassment charge was withdrawn. He later appealed to the Superior Court, seeking to quash the bond.]

DURNO J: …

[20] A peace bond can be obtained through an information sworn pursuant to s. 810 of the *Criminal Code* or relying on the common law to require a person to enter a common law peace bond without reference to s. 810 of the *Criminal Code*. *Re: Regina v. Shaben et al.* (1972), 8 C.C.C. (2d) 422 (Ont. H.C.J.). The onus is on the applicant on the balance of probabilities. *Mackenzie v. Martin*, [1954] S.C.R. 361 at 368, 108 C.C.C. (3d) 305.

[21] The differences in the applications are that a s. 810 peace bond is based on a sworn information while a common law peace bond generally is not; a s. 810 bond can be for a period not to exceed 12 months while there is no maximum period for a common law bond; a s. 810 bond is based on a more limited basis, that the complainant's fears on reasonable grounds that another person will cause personal injury to him or her or to his or her spouse or common law partner or child or will damage his or her property. [Editor's note: After *Musoni* was decided, s 810 was supplemented to authorize a peace bond when a person fears on reasonable grounds that someone will commit the offence of publishing an intimate image without consent. It was also expanded to cover reasonable fear of personal injury to a complainant's dating partner or former spouse.] A common law peace bond has a wider scope, a reasonably apprehended breach of the peace; and a s. 810 peace bond has a specific provision for breach allegations pursuant to s. 811 which creates a hybrid offence of breaching a peace bond ordered under various *Criminal Code* sections. … Where a common law peace bond is alleged to have been breached the prosecution is pursuant to s. 127 of the *Criminal Code*, for disobeying a court order which has the same penalty provisions as s. 811.

[22] A peace bond is not a finding of guilt or a criminal conviction. A peace bond is preventative justice in order to keep the peace in general and, in most instances, specifically in regards to one or more named persons. An order that a common law peace bond be entered reflects a finding by the court that there was a basis for apprehending that the appellant would commit a breach of the peace. *R. v. White*, [1969] 1 C.C.C. 19 (B.C.S.C.), cited with approval in *Beardsley v. Ontario Provincial Police*, [2001] O.J. No. 4574, 52 W.C.B. (2d) 45 (C.A.).

[23] What is required are facts to the judge's satisfaction which justify his or her apprehension that there may be a breach of the peace. This common law prerogative cannot be exercised on speculation or conjecture that a person had done something which will justify apprehension that there may in the future be a breach of the peace. It therefore follows that there must be proof, by way of evidence, determined as fact in order to exercise this jurisdiction. *Shaben*, at para. 18.

[24] Peace bonds are used routinely in many jurisdictions to resolve criminal charges without a trial. The accused is not required to enter a plea of guilty or make any admission of criminal conduct. It is an application based on apprehended conduct. Once the application is made the accused can either seek to show cause why he or she should not enter

This excerpt is for review purposes only and may not be shared, reproduced,
or distributed to any person or entity without the written permission of the publisher.
© 2020 Emond Montgomery Publications. All Rights Reserved.

the bond, enter the bond as proposed or not show cause but contest one or more of the suggested terms.

[25] Peace bonds save court time and give a measure or protection whether through s. 810 or at common law. Often as a result of concerns including those for the strength of the Crown's case, the availability of witnesses, the views of the complainant, the best interest of the administration of justice and/or overcrowded court dockets, peace bonds are a sensible resolution to criminal charges.

• • •

[33] … Where a peace bond is entered there are no elements of the offence to be admitted and no admissions are made by the accused. If there are grounds to believe there might be a breach of the peace including but not limited to the complainant reasonably fearing for his or her safety or privacy, the accused does not have to admit that he or she did anything to contribute to those concerns or that the concerns are reasonable. …

• • •

[43] There can be no dispute that the better course of conduct is for the prosecutor to give the presiding judge some background to support the issuance of a peace bond unless the accused shows cause why the order should not be entered. The question is whether or not a judge ordering an accused to enter a common law peace bond must be given some factual basis upon which to make an independent determination that a bond should be entered or can counsel simply tell the judge they have agreed on a common law peace bond, that the accused does not wish to show cause, and provide the suggested terms without a factual foundation.

• • •

[48] No doubt the prudent course here would have been for the judge to hear an overview or summary of the circumstances. What the trial judge had before him was the information alleging criminal harassment although it was never read in court, counsel's agreement of the resolution, that the appellant did not wish to show cause and the agreed upon terms. Was that enough?

[The court ultimately decided that it was a sufficient basis upon which the judge could make an independent determination that the bond should issue, adding the following comments.]

[49] … [I]t is not necessary to call oral testimony in every peace bond application regardless of the type of bond, whether it was a statutory or common law bond. … [T]he evidence may be given by counsel to provide the background to support a finding that a bond should be ordered.

• • •

[51] In reaching this conclusion, the distinction between the objective of common law peace bonds and statutory bonds is important. This was not an application at which the judge would have to determine: if a complainant feared on reasonable grounds that another person will cause personal injury to him or her or to his or her spouse or common law partner or child or would damage his or her property (s. 810); if a complainant feared on reasonable grounds that another person will intimidate a justice system participant, commit a criminal organization offence or a terrorism offence (s. 810.01); if a complainant feared on reasonable grounds that another person will commit an enumerated sexual

This excerpt is for review purposes only and may not be shared, reproduced, or distributed to any person or entity without the written permission of the publisher.
© 2020 Emond Montgomery Publications. All Rights Reserved.

offence against one or more persons who are under the age of fourteen years (s. 810.1); or if a complainant feared on reasonable grounds that another person will commit a serious personal injury offence (s. 810.2). The determination in a common law peace bond application is whether there are grounds to conclude that the accused may breach the peace in general or in relation to a specific person.

An additional difference between statutory and common law peace bonds not mentioned in *Musoni* relates to the conditions that can be ordered. Both types of bonds authorize a variety of conditions, such as refraining from communicating with specified individuals and remaining a certain distance away from specified locations. It is doubtful, however, that some of the newest orders permitted by statute are authorized at common law, such as an order requiring the accused to provide on demand or at regular intervals samples of a bodily substance for the purpose of monitoring his or her use of intoxicants (ss 810-810.2), to participate in a treatment program (ss 810.01-810.2), or to wear an electronic monitoring device (ss 810.01-810.2). See *R v Parks*, [1992] 2 SCR 871; *R v Shoker*, 2006 SCC 44.

Musoni states that breach of a common law peace bond can be prosecuted as disobedience of a court order, contrary to s 127 of the Code. That particular assertion is actually controversial. See, for example, *R v Mousseau*, 2011 ONCJ 222, holding that s 127 cannot be used to penalize non-compliance with a common law peace bond, and suggesting that the only remedy is forfeiture of the amount of the recognizance. Partly because of this controversy, common law peace bonds tend to be used only in minor cases when there is no real concern about compliance.

Common law peace bonds are most often used as part of case resolutions, but a judge can also impose one after trial, even though the trial results in an acquittal (and maybe even when the accused is discharged following a preliminary inquiry). The power is not commonly exercised and its use is somewhat controversial, but authority to date indicates that the power exists. The courts have recognized, however, that anyone who may be subject to the bond has the right to basic procedural fairness, including the rights to receive notice, make submissions, and, in at least some situations, call evidence: *R v Wells*, 2012 ABQB 77; *R v Petre*, 2013 ONSC 3048; *R v Riad*, 2014 ONSC 3407 at para 10; *R v Marshall*, [2003] OJ No 5501 (QL) (Ct J); *R v Lall*, 2015 ONSC 2709.

V. GUILTY PLEAS

A guilty plea is a formal admission of guilt to the crime charged. It signifies consent to a guilty verdict being entered without any trial. It constitutes a waiver of both the accused's right to require the Crown to prove its case beyond a reasonable doubt and the related procedural safeguards, some of which are constitutionally protected: *R v T (R)* (1992), 10 OR (3d) 514 (CA); *R v Adgey*, [1975] 2 SCR 426.

The large majority of accused persons plead guilty. Often they do so as part of a plea bargain with the Crown, in which the latter withdraws other charges, agrees to a proposed sentence, and/or agrees to a scaled-down version of the alleged facts. The simple reality of criminal practice is that trials are *relatively* uncommon and that a great deal of time is spent on cases in which the accused will, to one extent or another, admit culpability. Even if only

This excerpt is for review purposes only and may not be shared, reproduced,
or distributed to any person or entity without the written permission of the publisher.
© 2020 Emond Montgomery Publications. All Rights Reserved.

for that reason, it is imperative to have a good understanding of the prerequisites to a valid guilty plea and the circumstances in which a guilty plea can be withdrawn.

A. Procedure

The procedure typically employed for a guilty plea is straightforward. If an election is available, the accused must elect to be tried by the court before which he or she intends to plead. The charges are then read out to the accused and the accused is asked whether he or she pleads guilty or not guilty to each. Counsel is entitled to respond on behalf of the accused, but it is better practice to let the accused respond: *R v MacDonald*, [2009] OJ No 5750 (QL) (CA); *R v Sommerfeldt* (1984), 14 CCC (3d) 445 (BCCA). Once guilty pleas are entered, the Crown generally reads into the record the facts underlying the charges, although it occasionally calls witnesses to testify to those facts. The accused is then asked whether he or she agrees with the alleged facts. Again, counsel is entitled to respond on behalf of the accused, but it is usually wise to confirm with the accused any response made in open court. If the facts are not disputed (in any significant way), and they support the charge(s), they form the evidentiary foundation for the finding(s) of guilt. Any alleged fact that is not admitted is not evidence and must be proven in the traditional way: *R v C (WB)* (2000), 142 CCC (3d) 490 (Ont CA). Once culpability is determined, the proceedings move to the sentencing stage.

In many cases, defence counsel would be wise to obtain written instructions from the accused prior to any guilty plea. Accused persons can later regret the decision to plead guilty and try to resile from it by claiming, sometimes unfairly, that they were misled, coerced, or ill-advised by defence counsel. Written instructions help clarify precisely what an accused was told and understood. Counsel should also keep in mind the rules of professional conduct regulating guilty pleas, such as the ones found in s 5.1-8 of the Federation of Law Societies of Canada's *Model Code of Professional Conduct*.

B. Elements of a Valid Guilty Plea

R v Moser

(2002), 163 CCC (3d) 286 (Ont Sup Ct J)

HILL J: …

[29] An accused's plea of guilt is a fundamentally significant step in the criminal trial process. The plea relieves the Crown of the burden to prove guilt beyond a reasonable doubt—the presumption of innocence, the right to silence, and the right to make full answer and defence to the charge are at an end: *Adgey v. The Queen* (1973), 13 C.C.C. (2d) 177 at 183 per Laskin J. (as he then was) (in dissent in the result); *Regina v. T.(R.)* (1992), 17 C.R. (4th) 247 (Ont. C.A.) at 252 per Doherty J.A.; *Regina v. Ross*, [1997] O.J. No. 1034 (C.A.) at para. 6 *per curiam* … .

. . .

[31] A guilty plea, to be considered valid, must have minimally sufficient characteristics in order to provide an assurance that the forfeiture of a trial is fair.

This excerpt is for review purposes only and may not be shared, reproduced, or distributed to any person or entity without the written permission of the publisher.
© 2020 Emond Montgomery Publications. All Rights Reserved.

[32] To be valid, the plea must be *unequivocal*—the circumstances should not be such that the plea was unintended or confusing, qualified, modified, or uncertain in terms of the accused's acknowledgement of the essential legal elements of the crime charged: *Regina v. T.(R.)*, *supra* at 252-4; *Regina v. C.(N.)*, [2001] O.J. No. 4484 (C.A.) at para. 6 *per curiam*. The accused's personal entry of the plea is a factor tending to demonstrate the unequivocal character of the plea: *Regina v. Eastmond*, [2001] O.J. No. 4353 (C.A.) at para. 6 *per curiam* … .

[33] A plea of guilty must be *voluntary* in the sense that the plea is a conscious volitional decision of the accused to plead guilty for those reasons which he or she regards as appropriate: *Regina v. T.(R.)*, *supra* at 253; *Regina v. Acorn*, [1996] O.J. No. 3423 (C.A.) at para. 3 *per curiam*. Ordinarily a plea of guilty involves certain inherent and external pressures: *Regina v. Tryon*, [1994] O.J. No. 332 (C.A.) at para. 1 *per curiam*. Plea negotiations in which the prosecution pursues a plea of guilt in exchange for forgoing legal avenues open to it, or agrees not to pursue certain charges, do not render the subsequent plea involuntary: *Regina v. Hector* (2000), 146 C.C.C. (3d) 81 (Ont. C.A.) at 84, 88-9; *Regina v. Lewis*, [1997] O.J. No. 2656 (C.A.) at para. 1-2 *per curiam*. What is unacceptable is coercive or oppressive conduct of others or any circumstance personal to the individual which unfairly deprives the accused of free choice in the decision not to go to trial: *Regina v. T.(R.)*, *supra* at 253; *Laperrière v. The Queen* (1996), 109 C.C.C. (3d) 347 (S.C.C.) at 347-8 per La Forest J. (adopting the dissent of Bisson J.A. at (1995), 101 C.C.C. (3d) 462 (Que. C.A.) at 470-1); *Regina v. Rajaeefard* (1996), 27 O.R. (3d) 323 (C.A.) at 331-4 *per* Morden A.C.J.O. (as he then was). There is, of course, no closed list of circumstances calling into question the voluntariness of a guilty plea: pressure from the court (*Regina v. Djekic* (2000), 147 C.C.C. (3d) 572 (Ont. C.A.) at 575-6 *per curiam*; *Regina v. Rajaeefard*, *supra* at 131-4); pressure from defence counsel (*Laperrière v. The Queen*, *supra*; *Regina v. Tiido*, [1996] O.J. No. 3798 (C.A.) at para. 1 *per curiam*); incompetence of defence counsel (*Regina v. Armstrong*, [1997] O.J. No. 45 (C.A.) at paras. 2-4 *per curiam* … ; cognitive impairment or emotional disintegration of the accused (*Regina v. Djekic*, *supra*; *Regina v. Thissen*, [1998] O.J. No. 1982 (C.A.) at paras. 5, 7 *per curiam* … ; effect of illicit drugs or prescribed medications (*Regina v. Ross*, *supra*; *Regina v. Hann*, [1997] O.J. No. 5157 (C.A.) at paras. 2-3 *per curiam* … .

[34] Finally, a guilty plea's validity depends on the plea being informed: *Regina v. T.(R.)*, *supra* at 254-7. It is essential that the accused understand the nature of the charges faced, the legal effect of a guilty plea, and the consequences of such a plea. Where an accused understands the factual basis for the allegations, counsel is able to give advice and take instructions respecting existence of the essential ingredients of the crimes charged. As stated, the legal effect of a guilty plea is to surrender the presumption of innocence and alleviate the prosecution's burden of establishing guilt beyond a reasonable doubt. The accused must generally know the jeopardy faced by way of possible punishment. Often the seriousness of the offences is self-evident and therefore so too is the exposure to a stiff custodial disposition. However, incorrect legal advice as to sentencing options may call into question whether the plea was truly informed: *Regina v. Armstrong*, *supra* at paras. 2-4.

[35] The prior experience of the accused in the criminal justice system is one factor weighing toward the validity of the accused's plea as he or she has had the opportunity to participate in the process: *Regina v. T.(R.) supra* at 256, 260; *Regina v. Eastmond*, *supra*

This excerpt is for review purposes only and may not be shared, reproduced,
or distributed to any person or entity without the written permission of the publisher.
© 2020 Emond Montgomery Publications. All Rights Reserved.

at para. 4 *per curiam*; *Regina v. Hector*, *supra* at 85; *Regina v. Sode* (1974), 22 C.C.C. (2d) 329 (N.S.S.C.-A.D.) at 334 per Coffin J.A.

[36] A statement by counsel on behalf of his client and in his presence amounts to an admission by the accused: *Regina v. C.(W.B.)* (2000), 142 C.C.C. (3d) 490 (Ont. C.A.) at 508-9 per Weiler J.A. (affirmed [2001] 1 S.C.R. 530 at 530 per Iacobucci J.). …

[37] The presence of legal representation stands as a significant quality control mechanism to ensure a guilty plea is valid. Where a plea is entered in open court, particularly by an accused represented by counsel, it is presumed to be a valid plea: *Regina v. Eastmond*, *supra* at para. 6; *Regina v. Djekic*, *supra* at 575; *Regina v. T.(R.)*, *supra* at 253. …

[38] In the absence of any circumstances in the record, or a challenge to the competence and professionalism of trial counsel, a trial judge is justified in drawing the inference that counsel took the necessary steps to ensure the client understood the nature and consequences of a guilty plea: *Regina v. Eastmond*, *supra* at para. 7. Where counsel is experienced in defending criminal cases, it can be safely assumed there exists a professional discharge of counsel responsibilities: *Regina v. Dallaire*, [2001] O.J. No. 1722 (C.A.) at para. 2 *per curiam* … ; *Regina v. Hector*, *supra* at 85; *Regina v. Eastmond*, *supra* at para. 6. This is particularly so where the accused seeks out counsel who has previously acted on his or her behalf: *Regina v. Hector*, *supra* at 85.

[39] In *Regina v. C.(S.)*, [2000] O.J. No. 803 (S.C.J.) at para. 11 … , Durno J. observed: "It is the client's decision how to plead provided he or she has provided instructions on the facts which would support admissions of the *actus* and *mens rea*." I take this correct statement of the law to mean that counsel, after a factual investigation of the allegations through Crown disclosure or otherwise, will explain the essential legal elements of the offences charged, provide legal advice relating to defence of the allegations, and only take instructions to participate in a guilty plea proceeding where guilt is clearly acknowledged by the client: *Rules of Professional Conduct*, Law Society of Upper Canada: Rule 2.01 Competence, Rule 2.09 (b)(d) Mandatory Withdrawal, Rule 4.01(1) Advocacy Commentary—Duty as Defence Counsel, Rule 4.01(8)(9) Agreement on Guilty Plea; *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* (1993), [Queen's Printer for Ontario] (chaired by the Honourable G.A. Martin) (The *Martin Committee Report*) at pages 278, 291-295; Law Society of Upper Canada, Special Lectures, *Defending a Criminal Case* (1969), at pages 318-319; *Regina v. Rajaeefard*, *supra* at 333.

The elements of a valid guilty plea have now been codified in the Code.

606(1.1) A court may accept a plea of guilty only if it is satisfied that

(a) the accused is making the plea voluntarily; and

(b) the accused understands

(i) that the plea is an admission of the essential elements of the offence,

(ii) the nature and consequences of the plea, and

(iii) that the court is not bound by any agreement made between the accused and the prosecutor, and

(c) the facts support the charge.

This excerpt is for review purposes only and may not be shared, reproduced,
or distributed to any person or entity without the written permission of the publisher.
© 2020 Emond Montgomery Publications. All Rights Reserved.

This section does not mandate any particular procedure. In fact, s 606(1.2) states that the "failure of the court to fully inquire whether the conditions set out in subsection (1.1) are met does not affect the validity of the plea." The Ontario Court of Appeal has taken the position that s 606 of the Code requires *some* inquiry, even if not a full inquiry: *R v G (DM)*, 2011 ONCA 343 at para 42. Other courts have suggested that s 606(1.2) can forgive the absence of any inquiry, at least where the accused is represented by counsel: *R v Gates*, 2010 BCCA 378; *R v Leviska*, 2011 BCCA 145, leave refused [2011] SCCA No 263. Failure to comply with s 606(1.1) can make it easier for the accused to later show that the plea was not voluntary, unequivocal, and informed. At the same time, the mere fact that an inquiry was made does not *necessarily* prove that the plea was voluntary, unequivocal, and informed.

C. Collateral Consequences

As *Moser* demonstrates, courts have traditionally held that a guilty plea is informed if the accused understands the nature of the charges, realizes that she or he is giving up the right to trial and that a conviction will be entered, and appreciates (in general terms) the nature of the potential penalty. More recently, however, courts have considered whether the accused must also be aware of the potential collateral consequences of a conviction. Many different collateral consequences may follow, in relation to immigration, employment, civil and family law proceedings, and so forth. Courts were initially uncertain whether and to what extent an accused must have knowledge, especially detailed knowledge, of such consequences: for example, *R v Hunt*, 2004 ABCA 88; *Nersysyan c R*, 2005 QCCA 606; *R v Quick*, 2016 ONCA 95; *R v Kitawine*, 2016 BCCA 161 at para 19. The following case from the Supreme Court of Canada provided some direction. The case also introduces the idea of withdrawing a guilty plea after it has been entered, a topic that will addressed further in section V.E., below.

R v Wong
2018 SCC 25

[Wong pleaded guilty to trafficking in cocaine. When he entered his plea, he was not aware that his being convicted and sentenced for that offence could result in the loss of his permanent resident status and a removal order from Canada without any right of appeal. He subsequently applied to withdraw his plea on the basis that it was uninformed. The majority of the Supreme Court ultimately rejected his application. Because the majority judgment partly endorsed and was written largely as a response to the minority judgment, we start with an excerpt from the latter.]

WAGNER J, DISSENTING:

41 An essential criterion of a valid guilty plea is that the accused be informed of the consequences of entering the plea. The criminal consequences of such a plea include conviction and the imposition of a sentence. However, a guilty plea can also trigger serious consequences collateral to the criminal process that may significantly affect the fundamental interests of the accused. This appeal requires us to consider whether an accused person must be aware of such collateral consequences for a guilty plea to be sufficiently informed.

This excerpt is for review purposes only and may not be shared, reproduced,
or distributed to any person or entity without the written permission of the publisher.
© 2020 Emond Montgomery Publications. All Rights Reserved.

. . .

44 In my view, a guilty plea may be withdrawn if the accused shows (1) that he or she was not aware of a legally relevant collateral consequence and (2) that there is a reasonable possibility he or she would have proceeded differently if properly informed of that consequence. … This [second] question is to be assessed on a modified objective standard. …

. . .

B. When Does an Uninformed Guilty Plea Result in a Miscarriage of Justice?

(1) The Accused Was Not Aware of a Legally Relevant Consequence

67 It is well established that for a plea to be informed, the accused must be aware of its consequences: *Taillefer* [2003 SCC 70] at para. 85. At a minimum, this entails awareness of the criminal consequences of a plea, and thus awareness that conviction and a penalty may follow: *T. (R.)* [(1992), 10 O.R. (3d) 514 (Ont CA)] at p. 523. At issue is whether collateral consequences must also be known to the accused in order for his or her plea to be informed.

68 Collateral consequences are consequences that are secondary or collateral to the criminal process and that have an impact on the offender: see *R. v. Pham*, 2013 SCC 15, [2013] 1 S.C.R. 739 (S.C.C.), at para. 11. This Court has already held that collateral immigration consequences may be relevant in the sentencing context: *Pham*, at para. 13. … However, the simple fact that a collateral consequence is relevant at the sentencing stage does not mean that it necessarily bears on the validity of a guilty plea. In determining whether a sentence is fit, a court must consider all relevant factors, which may include collateral consequences of the sentence. The validity of a sufficiently informed guilty plea engages different considerations. In the latter context, the ultimate issue is whether the accused forfeited his or her rights, by pleading guilty, in a process that was fundamentally fair.

69 Provincial appellate courts have been divided on whether, in order for a guilty plea to be informed, the accused must be aware of its collateral consequences. Courts in Alberta and Quebec have taken a narrow approach, holding that an awareness of collateral consequences is not relevant and does not affect the validity of an otherwise informed plea. …

70 In other provinces, a broader approach has been taken to the relevance of collateral consequences in the assessment of whether a guilty plea was sufficiently informed. Courts in British Columbia and Ontario have accepted that a guilty plea may be set aside on the basis that the accused was not aware of its collateral consequences … .

71 I would not endorse the narrow approach according to which collateral consequences are irrelevant to the assessment of whether a guilty plea is sufficiently informed. The requirement that a guilty plea be informed is intended to ensure that an accused who gives up his or her procedural rights does so in a manner that preserves the integrity and fairness of the criminal process. The narrow approach focuses solely on whether the accused was aware of the consequences of a guilty plea for the criminal proceedings and excludes the consideration of collateral consequences which might affect his or her fundamental interests. To endorse the narrow approach would be to compromise the ability of the accused to make an informed decision. Such an approach would be

This excerpt is for review purposes only and may not be shared, reproduced, or distributed to any person or entity without the written permission of the publisher.
© 2020 Emond Montgomery Publications. All Rights Reserved.

incongruous with the principled rationale underlying the requirement of an informed plea to ensure procedural fairness.

72 Collateral consequences that affect the accused person's fundamental interests could have a more significant impact on the accused than the criminal sanction itself. As a result, it may be essential for an accused to be aware of such consequences in order to enter an informed guilty plea. This is particularly true in the immigration context, in which an accused may be exposed to a collateral consequence as serious as deportation. People who are to be deported may experience any number of serious life-changing consequences. They may be forced to leave a country they have called home for decades. They may return to a country where they no longer have any personal connections, or even speak the language, if they emigrated as children. If they have family in Canada, they and their family members face dislocation or permanent separation.

• • •

74 In my view, the procedural fairness concerns that the informed plea requirement was originally intended to address may mean that for a guilty plea to be informed, awareness of serious collateral consequences such as these is required. I would therefore endorse a broader approach to the effect that whether a guilty plea was sufficiently informed may depend on whether the accused was aware of such collateral consequences and whether the accused, in entering a guilty plea, thus forfeited his or her rights in a process that was fundamentally fair.

75 Courts that have adopted a broader approach have used the expression "legally relevant" to describe a collateral consequence which must be known to the accused in order for his or her plea to be informed: see *T. (R.)*, at p. 524; *Quick* [2016 ONCA 95] at paras. 28-30. I find that this expression is appropriate to describe the types of consequences that are sufficiently serious to bear on the validity of a guilty plea. For a collateral consequence to be legally relevant and capable of supporting a determination that a guilty plea is sufficiently informed, it will typically be state-imposed and flow fairly directly from the conviction or sentence, and it must have an impact on serious interests of the accused.

76 A guilty plea will therefore be uninformed if the accused establishes on a balance of probabilities that he or she was unaware of a collateral consequence that is legally relevant. Legally relevant collateral consequences are not limited to the immigration context. Possible collateral consequences are so varied that what is legally relevant defies simple classification. The characteristics enumerated above are not meant to be prerequisites for legal relevance, but are simply factors a court should consider when an accused seeks to set aside a guilty plea on the basis of a claim that he or she was unaware of a collateral consequence.

77 I would also emphasize that for a plea to be informed, the accused need not be informed of every conceivable consequence of the plea. While a guilty plea can trigger myriad collateral consequences which arise in a variety of circumstances, only those that are legally relevant are germane to this inquiry. Some consequences may be too remote or trivial to constitute information which must be known to the accused in order for his or her guilty plea to be informed. In my view, it would be neither necessary nor wise in this appeal to exhaustively define the scope of legally relevant consequences. The content of this concept must evolve incrementally as new cases are considered.

78 I note that an assessment of legal relevance does not require a fact-specific inquiry into the significance of a collateral consequence to the accused before a court. Rather, at

This excerpt is for review purposes only and may not be shared, reproduced,
or distributed to any person or entity without the written permission of the publisher.
© 2020 Emond Montgomery Publications. All Rights Reserved.

this step of the inquiry, the only concern is whether the consequence is sufficiently serious that it would constitute a legally relevant consequence. I am satisfied that a state-imposed consequence such as the risk of deportation without any right of appeal, which flows directly from a criminal conviction and sentence, bears on serious interests and constitutes a legally relevant collateral consequence.

(2) There Is a Reasonable Possibility That the Accused Would Have Proceeded Differently Had He or She Been Aware of the Collateral Consequence

79 Even if it is shown that a guilty plea was uninformed because the accused was unaware of a legally relevant collateral consequence, that alone does not establish a miscarriage of justice. An uninformed guilty plea may raise the possibility of a breach of procedural fairness, but the court must go on to consider the effect of the lack of awareness. An uninformed guilty plea may only be set aside on the basis of a miscarriage of justice if it has resulted in prejudice to the accused.

80 Therefore, at the second stage of the inquiry, a court must be satisfied of a reasonable possibility that the accused would have proceeded differently had he or she been aware of the collateral consequence, either by declining to admit guilt and entering a plea of not guilty, or by pleading guilty but with different conditions. This must be determined by applying an objective standard, modified such that a court can take the situation and characteristics of the accused before it into account. Thus, the inquiry is not concerned with whether the accused before the court would actually have declined to plead guilty. Reviewing courts must *objectively* assess the impact of the missing information in the particular circumstances of the accused. The question, therefore, is whether there is a reasonable possibility that a similarly situated reasonable person would have proceeded differently if properly informed.

81 The applicable standard of proof is a reasonable possibility, which falls between a mere possibility and a likelihood: *Strickland v. Washington*, 466 U.S. 668 (U.S. Fla. S.C. 1984), at pp. 693-94, per O'Connor J., cited in *R. v. Joanisse* (1995), 102 C.C.C. (3d) 35 (Ont. C.A.), at p. 64. Thus, a court need be satisfied only of a reasonable possibility that a reasonable person in the same situation as the accused would have proceeded differently had he or she been aware of the collateral consequence. It need not be satisfied of a likelihood that a similarly situated accused would in fact have chosen to plead not guilty: see e.g. *Taillefer*, at para. 111. At its heart, the inquiry is concerned with the effect of the unknown collateral consequence on the ability of the accused to make an informed decision. In other words, it is concerned with preventing the prejudice that results where information, if known, would have sufficiently *influenced* a decision whether to plead guilty, to the extent that there is a reasonable possibility that a similarly situated accused would have proceeded differently; it is not concerned with determining whether such an accused would *actually have declined* to plead guilty.

. . .

86 The modified objective approach strikes a proper balance between the competing interests when an accused seeks to withdraw a guilty plea on the ground that he or she was not aware of a legally relevant consequence. This test allows a court to take the situation and characteristics of the accused into account in order to properly assess whether the uninformed plea had a prejudicial effect in his or her circumstances. At the same time,

This excerpt is for review purposes only and may not be shared, reproduced,
or distributed to any person or entity without the written permission of the publisher.
© 2020 Emond Montgomery Publications. All Rights Reserved.

the objective nature of the test reflects society's interest in the finality of guilty pleas and militates against an accused seeking to strike a plea for capricious or trivial reasons which may in fact be unrelated to his or her being unaware of a particular consequence. It also ensures that an accused cannot seek to strike a plea on the ground that he or she was deprived of information that would have been unlikely to have an impact on the decision in the circumstances.

• • •

MOLDAVER, GASCON and BROWN JJ: …

I. Overview

• • •

4 We agree with our colleague Wagner J. that for a plea to be informed, an accused must be aware of the criminal consequences of the plea as well as the legally relevant collateral consequences. A legally relevant collateral consequence is one which bears on sufficiently serious legal interests of the accused. Here, Mr. Wong was not aware of the immigration consequences of his conviction and sentence. Immigration consequences bear on sufficiently serious legal interests to constitute legally relevant consequences. His guilty plea was therefore uninformed.

5 We respectfully disagree with our colleague, however, as to the prejudice that must be shown to establish a miscarriage of justice and vacate a guilty plea. Our colleague proposes that whether an accused has shown prejudice should be determined by way of a "modified objective" analysis. … As we discuss below, this approach does not account for the fundamentally subjective and deeply personal nature of the decision to plead guilty. Further, it will likely be difficult for courts to apply.

6 In our view, the accused should be required to establish subjective prejudice. Meaning, accused persons who seek to withdraw their guilty plea on the basis that they were unaware of legally relevant consequences at the time of the plea must file an affidavit establishing a reasonable possibility that they would have either (1) opted for a trial and pleaded not guilty; or (2) pleaded guilty, but with different conditions. …

II. Analysis

A. Modified Objective Framework

• • •

9 We agree that the accused must first show that he or she was unaware of a legally relevant collateral consequence at the time of pleading guilty, and endorse a broad approach to evaluating the relevance of a collateral consequence in the assessment of whether a guilty plea was sufficiently informed. We also agree that a legally relevant collateral consequence will typically be state-imposed, flow from conviction or sentence, and impact serious interests of the accused. And, like our colleague, we do not see it as necessary to define the full scope of legally relevant collateral consequences nor the characteristics of such consequences for the purposes of this appeal. We see two problems, however, with the second step as our colleague states it.

10 First, a modified objective framework fails to account for the fundamentally subjective nature of the guilty plea. …

This excerpt is for review purposes only and may not be shared, reproduced,
or distributed to any person or entity without the written permission of the publisher.
© 2020 Emond Montgomery Publications. All Rights Reserved.

11 … The decision to plead guilty reflects deeply personal considerations, including subjective levels of risk tolerance, priorities, family and employment circumstances, and individual idiosyncrasies. For this reason, it is one of the few steps in the criminal process where defence counsel are ethically required to seek their client's direct instruction (*R. v. B. (G.D.)*, 2000 SCC 22, [2000] 1 S.C.R. 520 (S.C.C.), at para. 34).

12 Simply put, pleading guilty is the decision of *the* accused, not a *reasonable* accused, or someone *like* the accused. To permit reviewing courts to substitute their own view of what someone in the accused's circumstances would have done is to run a serious risk of doing injustice to that accused. An example from United States case law suffices to make the point. In *Lee v. United States*, 825 F.3d 311 (U.S. C.A. 6th Cir. 2016), the accused sought, as Mr. Wong seeks, to withdraw his plea on the basis that he was unaware of its consequences for his immigration status. The Sixth Circuit Court of Appeals denied the accused's motion. Even taking into account the accused's particular circumstances, the Sixth Circuit wrote:

> … no rational defendant charged with a deportable offense and facing "overwhelming evidence" of guilt would proceed to trial rather than take a plea deal with a shorter prison sentence. [para. 2]

13 The accused in *Lee* had deposed that he would have proceeded to trial, with the effect of *near certain* deportation, rather than taking a plea deal with *certain* deportation, even if conviction at trial meant a longer prison sentence. Despite what the Sixth Circuit saw as the only rational course of action, the accused's right to remain in the United States was more important to him than any jail sentence, no matter its length. The Sixth Circuit's decision was ultimately overturned by the Supreme Court of the United States in *Lee v. United States*, 137 S.Ct. 1958 (U.S. Sup. Ct. 2017), in which the objective approach for assessing prejudice was rejected.

• • •

16 The second problem we see in the modified objective framework is that it will likely be difficult for lower courts to apply. Our colleague refers to what "a similarly situated reasonable person" would have done (para. 80). But this is qualified by his statement that such a reasonable person need not be presumed to "have taken the 'best' or single most rational course of action" (para. 82). Given the highly contextual and even idiosyncratic nature of factors that influence important decisions (such as choosing whether or not to plead guilty), adopting a standard based on what a hypothetical reasonable person (who might not always act in the most rational way) would have done effectively confers upon reviewing courts unbounded discretion to reach whatever conclusion they see fit. It also runs squarely into the injustice that led to the United States Supreme Court's intervention in *Lee*.

• • •

18 In sum, our colleague's modified objective approach risks, in our view, resulting in vacated guilty pleas even where there is no evidence that the accused personally would have done something differently. Even further, an accused who admits under cross-examination that he would have proceeded identically would *still* be entitled to withdraw his plea if a reasonable accused in his circumstances would withdraw his plea. This would impose unnecessary and substantial demands on a criminal justice system that is already overburdened, to the detriment of other participants in the system, including accused

This excerpt is for review purposes only and may not be shared, reproduced,
or distributed to any person or entity without the written permission of the publisher.
© 2020 Emond Montgomery Publications. All Rights Reserved.

persons, victims, and the public at large who seek efficient and just resolution of criminal complaints.

B. Subjective Prejudice Framework

(1) Forms of Prejudice

19 In our view, an accused seeking to withdraw a guilty plea must demonstrate prejudice by filing an affidavit establishing a reasonable possibility that he or she would have either (1) pleaded differently, or (2) pleaded guilty, but with different conditions. This approach strikes what we see as the proper balance between the finality of guilty pleas and fairness to the accused.

20 With respect to the first form of prejudice—where the accused would have opted for a trial and pleaded not guilty—there will of course be instances in which the accused may have little to no chance of success at trial, and the choice to proceed to trial may simply be throwing a "Hail Mary." But a remote chance of success at trial does not necessarily mean that the accused is not sincere in his or her claim that the plea would have been different. For certain accused, such as the accused in *Lee*, the certain but previously unknown consequences of a conviction made even a remote chance of success at trial a chance worth taking. In such circumstances, and where the court accepts the veracity of his or her statement, the accused has demonstrated prejudice and should be entitled to withdraw his or her plea.

21 There remains the second form of prejudice—where an accused would have pleaded guilty, but only on different conditions. A guilty plea on different conditions will suffice to establish prejudice where a court finds that the accused would have insisted on those conditions to enter a guilty plea and where those conditions would have alleviated, in whole or in part, the adverse effects of the legally relevant consequence. We do not presume here to list every condition which, if raised by the accused, could give rise to prejudice. At minimum, however, these additional conditions may include accepting a reduced charge to a lesser included offence, a withdrawal of other charges, a promise from the Crown not to proceed on other charges, or a joint submission on sentencing.

22 The mere possibility of different conditions on its own is not, we stress, automatically sufficient. A plea may be withdrawn only where an accused credibly asserts that he or she would have, during the plea negotiation phase, insisted on additional conditions, but for which he or she would not have pleaded guilty. In short, the accused must articulate a meaningfully different course of action to justify vacating a plea, and satisfy a court that there is a reasonable possibility he or she would have taken that course.

23 Parenthetically, we observe that the accused need not show a viable defence to the charge in order to withdraw a plea on procedural grounds. "[T]he prejudice lies in the fact that in pleading guilty, the appellant gave up his right to a trial" (*R. v. Rulli*, 2011 ONCA 18 (Ont. C.A.), at para. 2 (CanLII)). Requiring the accused to articulate a route to acquittal is antithetical to the presumption of innocence and to the subjective nature of choosing to plead guilty. An accused is perfectly entitled to remain silent, advance *no* defence, and put the Crown to its burden to prove guilt beyond a reasonable doubt. It does not make sense to let an accused proceed to trial at first instance without any defence whatsoever, but to insist on such a defence to proceed to trial when withdrawing an uninformed plea. Though the decision to go to trial may be unwise or even reckless, we

This excerpt is for review purposes only and may not be shared, reproduced,
or distributed to any person or entity without the written permission of the publisher.
© 2020 Emond Montgomery Publications. All Rights Reserved.

are not seeking to protect an accused from himself or herself. Rather, we seek to protect an accused's right to make an informed plea.

• • •

26 That the analysis focusses on the accused's subjective choice does not mean that a court must automatically accept an accused's claim. Like all credibility determinations, the accused's claim about what his or her subjective and fully informed choice would have been is measured against objective circumstances. Courts should therefore carefully scrutinize the accused's assertion, looking to objective, circumstantial evidence to test its veracity against a standard of reasonable possibility. Such factors may include the strength of the Crown's case, any concessions or statements from the Crown regarding its case (including a willingness to pursue a joint submission or reduce the charge to a lesser included offence) and any relevant defence the accused may have. The court may also assess the strength of connection between the guilty plea and the collateral consequence, that is, whether the trigger for the collateral consequence is the finding of guilt as distinct from a particular length of sentence. More particularly, where the collateral consequence depends on the length of the sentence—keeping in mind that a guilty plea typically mitigates a sentence—the court may have reason to doubt the veracity of the accused's claim.

• • •

28 Of course, the basis for judicial scrutiny of the accused's claim is not limited to objective circumstances contemporaneous with the original plea, since the accused's idiosyncratic preferences may not always be reflected in those circumstances. A reviewing court must therefore also test the veracity of the accused's assertions in their own right. A court may properly find an accused's expressed preferences to be credible, and to establish a reasonable possibility of prejudice, based solely on the contents of the accused's affidavit and on his or her withstanding of cross-examination.

• • •

C. Application of the Framework

36 We agree with our colleague that Mr. Wong's plea was uninformed … . To establish prejudice, however, the accused seeking to withdraw a guilty plea must show a reasonable possibility that, having been informed of the legally relevant consequence, he or she would have either pleaded differently, or pleaded guilty with different conditions. Mr. Wong has not met this burden.

37 Though he filed an affidavit before the Court of Appeal, he did not depose to what he would have done differently in the plea process had he been informed of the immigration consequences of his guilty plea. … We therefore see no basis to permit him to withdraw his plea.

The disagreement in *Wong* concerned the proper test to be applied by a court considering an application by the accused to withdraw a guilty plea that has already been entered. The court was unanimous on the point that a guilty plea cannot be valid unless the accused is aware of "legally relevant" collateral consequences. The immigration consequences to Mr Wong were considered legally relevant. Can you think of any other collateral consequences that might also qualify? Can you think of any that should not? What should happen if the

This excerpt is for review purposes only and may not be shared, reproduced,
or distributed to any person or entity without the written permission of the publisher.
© 2020 Emond Montgomery Publications. All Rights Reserved.

accused is aware of the general nature of a legally relevant collateral consequence but not its details? What should happen if the collateral consequence is possible but unlikely?

D. Pleas to Lesser or Different Offences

An accused can plead guilty to offence(s) with which he or she is charged. But, with consent of the prosecutor, the Code also allows for a guilty plea to any other offence(s) arising out of the same transaction.

> 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 that plea of guilty and, if the 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.

This section is often employed as part of a plea bargain where an accused pleads guilty to a lesser offence included within the charged offence, but it is not restricted to that situation. An accused can plead guilty to any offence "arising out of the same transaction." See Chapter 15 on preliminary inquiries for a discussion of the meaning of that term. Section 606(4), of course, does not prevent an accused, with the consent of the Crown, from pleading guilty to an offence not arising out of the same transaction. To effectuate that arrangement, however, the Crown would have to withdraw the charge against the accused and lay a new information charging the offence to which the accused will plead guilty. When it is applicable, s 606(4) relieves the Crown of the burden of having to lay a new information.

Section 606(4) is permissive. It states that the court "may" accept the guilty plea to the other offence. Where acknowledged or proven facts demonstrate that the full offence charged is made out, the presiding judge can refuse to accept a plea to a lesser or different offence. Refusal, however, is relatively rare. "[T]rial judges in most cases do, and should, give great weight to the decision of counsel for the prosecution, as a representative of the public interest with heavy responsibilities, to accept a plea of guilty to an included or lesser offence": *R v Naraindeen* (1990), 75 OR (2d) 120 at para 30 (CA). Counsel would be well advised, however, to provide the court with some brief explanation of the reasons for the proposed resolution so that the judge can understand why it is reasonable. Defence counsel should also advise the accused of the possibility of the judge refusing to accept the plea.

If the prosecutor refuses to consent to a guilty plea to another offence arising out of the same transaction, any such plea by the accused is a nullity: *R v Conway*, [1989] 1 SCR 1659 at para 13. In at least some provinces, however, the attempted plea can be considered an admission usable by the Crown at trial: *R v Parris*, 2013 ONCA 515 at para 123; *Miller v R*, 2005 NBCA 50 at para 5.

E. Rejecting, Striking, or Withdrawing a Plea

Occasionally, something occurs during plea proceedings that calls into question the validity of a guilty plea. When the factual allegations are read out in court, for instance, the accused may prove unwilling to admit a fact that is an essential ingredient of the charged offence. The court would then reject the plea and enter a plea of not guilty instead. Alternatively, evidence may come before the court later on indicating that the plea may be invalid. The

This excerpt is for review purposes only and may not be shared, reproduced, or distributed to any person or entity without the written permission of the publisher. © 2020 Emond Montgomery Publications. All Rights Reserved.

accused could, for example, maintain innocence to the probation officer preparing a pre-sentence report. The court could then strike the plea. On other occasions, an accused may just have a change of mind and decide that he or she wants to have a trial. The accused could then ask the court for permission to withdraw the plea.

A guilty plea entered in open court, particularly by an accused represented by counsel, is presumed to be valid, but a court has the discretion to conduct an inquiry into whether the plea should be struck. There is no right to have a guilty plea struck. The burden is on the accused to show that it should be. Several courts have stated that a guilty plea should only be set aside in exceptional circumstances: *R v White*, 2016 NSCA 20 at para 24 (in chambers); *R v Staples*, 2007 BCCA 616 at para 39; *R v Hoang*, 2003 ABCA 251 at para 25.

Usually, a plea will be struck because it was not voluntary, unequivocal, and/or informed. But the grounds for setting aside a plea are not limited to those technical elements. Any "valid reason" suffices, of which there is no closed list: *R v T (R)* (1992), 10 OR (3d) 514 at paras 10, 44 (CA). For example, a breach of the duty to disclose will invalidate a plea if the accused can demonstrate that "a reasonable and properly informed person, put in the same situation, would have run the risk of standing trial if he or she had had timely knowledge of the undisclosed evidence, when it is assessed together with all of the evidence already known": *R v Taillefer; R v Duguay*, [2003] 3 SCR 307 at para 90. "The essential question … is whether the withdrawal is justified in the interests of justice": *R v Brown*, 2006 PESCAD 17 at para 45. The accused need not necessarily show that he or she has a defence to the charges: *R v Rulli*, 2011 ONCA 18 at paras 1-2; *R v Nevin*, 2006 NSCA 72; *R c Lamoureux* (1984), 13 CCC (3d) 101 (Qc CA). That would help, but it has also been suggested that evidence of a viable defence ("a defence that might conceivably have succeeded had the matter gone to verdict") is not a stand-alone justification for setting aside a plea, especially when the accused was represented by counsel, was aware of the defence but chose not to pursue it, and derived a benefit from the plea: *R v Alec*, 2016 BCCA 282 at paras 83-84. Courts are concerned "that an experienced criminal not be allowed to abandon a position when matters 'did not play out as expected' … . In other words, a valid guilty plea must not be disturbed by a calculated scheme designed to manipulate the system": *R v Moser* (2002), 163 CCC (3d) 286 at para 42 (Ont Sup Ct J). Courts are particularly skeptical of claims of invalidity after an accused receives a sentence that is harsher than expected: *R v Lyons*, [1987] 2 SCR 309 at para 107.

Note that it is sometimes suggested that the criteria for withdrawal of a guilty plea are more stringent on appeal than at trial, possibly requiring proof of "articulable route to an acquittal" or an explanation for why withdrawal was not sought before sentencing: *R v Wong*, 2016 BCCA 416 at paras 26, 82; *R v Gates*, 2010 BCCA 378 at para 2; *R v Nevin*, 2006 NSCA 72 at para 21. The Supreme Court in *R v Wong*, 2018 SCC 25 at paras 23 and 95, rejected the notion that an accused must show a viable defence in order to withdraw a plea on the basis that it was uninformed. It *might* be necessary when the accused claims the plea was equivocal, on the basis that it speaks to whether the accused suffered any prejudice when he or she ambiguously or only partly acknowledged guilt. The law, however, is not clear.

F. Crown Repudiation

Many guilty pleas result from plea bargaining. Indeed, the Crown routinely makes plea offers to accused persons, often right at the start of the prosecution. Commonly, the offer is to seek a specified sentence if the accused pleads guilty to specified charges. Prior to entering a

This excerpt is for review purposes only and may not be shared, reproduced,
or distributed to any person or entity without the written permission of the publisher.
© 2020 Emond Montgomery Publications. All Rights Reserved.

plea, the accused has complete freedom to reject any such offer and proceed to trial after a not guilty plea. We have seen that an accused can sometimes withdraw from a guilty plea even after it has been entered. The Crown, however, operates under greater restraints. Once a plea offer is accepted, the Crown will be expected to honour the agreement—and it does so in the overwhelming majority of cases.

Every once in a while, however, the Crown seeks to resile from an agreement. In *R v Nixon*, 2011 SCC 34, the Supreme Court of Canada held that the Crown is entitled to do so, since both the act of entering into an agreement and the act of repudiating it fall within the core of prosecutorial discretion. Repudiation is only subject to judicial review for abuse of process (i.e., for whether repudiation prejudices the accused's fair trial interests or is so unfair or oppressive, or so tainted by bad faith or improper motive, that it would tarnish the integrity of the judicial system). In *Nixon*, the Supreme Court noted, however, that repudiation is to be most exceptional:

> [47] … [T]he *binding effect* of plea agreements is a matter of utmost importance to the administration of justice. It goes without saying that plea resolutions help to resolve the vast majority of criminal cases in Canada and, in doing so, contribute to a fair and efficient criminal justice system.
>
> [48] Of course, there may be instances where different Crown counsel will invariably disagree about the appropriate plea agreement in a particular case. Given the number of complex factors that must be weighed over the course of plea resolution discussions, this reality is unsurprising. However, the vital importance of upholding such agreements means that, in those instances where there is disagreement, the Crown may simply have to live with the initial decision that has been made. To hold otherwise would mean that defence lawyers would no longer have confidence in the finality of negotiated agreements reached with front-line Crown counsel, with whom they work on a daily basis. Further, if agreements arrived at over the course of resolution discussions cannot be relied upon by the accused, the benefits that resolutions produce for *both* the accused and the administration of justice cannot be achieved. As a result, I reiterate that the situations in which the Crown can properly repudiate a resolution agreement are, and must remain, very rare.

The court added the following comments regarding burdens that apply when the Crown repudiates an agreement:

> [63] … In my view, evidence that a plea agreement was entered into with the Crown, and subsequently reneged by the Crown, provides the requisite evidentiary threshold to embark on a review of the decision for abuse of process. Further, to the extent that the Crown is the only party who is privy to the information, the evidentiary burden shifts to the Crown to enlighten the court on the circumstances and reasons behind its decision to resile from the agreement. That is, the Crown must explain why and how it made the decision not to honour the plea agreement. The ultimate burden of proving abuse of process remains on the applicant and … the test is a stringent one. However, if the Crown provides little or no explanation to the court, this factor should weigh heavily in favour of the applicant in successfully making out an abuse of process claim.

G. No Contest

A variant of the guilty plea has recently received recognition in the Canadian legal system. It is a plea of not guilty that is accompanied by a decision not to contest the Crown's evidence, and possibly even a decision to invite the trial judge to enter a finding of guilt. This sort of

This excerpt is for review purposes only and may not be shared, reproduced,
or distributed to any person or entity without the written permission of the publisher.
© 2020 Emond Montgomery Publications. All Rights Reserved.

"no contest" plea can be used in the difficult situation where the accused does not wish to, or maybe even cannot, acknowledge guilt in open court—or maybe anywhere else.

Accused persons who protest innocence, to one extent or another, sometimes still want to enter a guilty plea. There may be clear practical benefits to doing so. For example, an accused may receive a significantly lower sentence on a guilty plea than upon conviction (which may appear likely) after trial: *R v Hanemaayer*, 2008 ONCA 580. Courts have traditionally frowned upon guilty pleas from those who claim to be not guilty. They allow for some equivocation as to guilt, or even a failure to explicitly admit guilt to defence counsel, as long as it is ultimately accompanied by a formal acknowledgement of guilt in open court: *R v Hector* (2000), 146 CCC (3d) 81 (Ont CA). But a guilty plea is considered invalid when the record shows that the accused overtly maintains innocence: *R v K (S)* (1995), 99 CCC (3d) 376 (Ont CA); *R v M (GO)* (1989), 51 CCC (3d) 171 (Sask CA). In the words of the Ontario Court of Appeal, "[t]he court should not be in the position of convicting and sentencing individuals who fall short of admitting the facts to support the conviction unless that guilt is proved beyond a reasonable doubt. Nor should sentencing proceed on the false assumption of contrition. … Plea bargaining is an accepted and integral part of our criminal justice system but must be conducted with sensitivity to its vulnerabilities. A court that is misled, or allows itself to be misled, cannot serve the interests of justice": *R v K (S)* (1995), 99 CCC (3d) 376 at para 15 (Ont CA).

At common law, a plea of *nolo contendere* was available. The plea was the assertion that the accused did not wish to contest the case for the Crown and that he or she sought the mercy of the court. This plea is available in many American jurisdictions (sometimes along with the stronger version called an *Alford* plea, based on *North Carolina v Alford*, 400 US 25 (1970), in which a court can accept a guilty plea from an accused who openly professes innocence). *Nolo contendere* is not an available plea in Canada. However, as the following case explains, a functional equivalent is available.

R v RP

2013 ONCA 53

[RP faced multiple charges alleging that he sexually abused four relatives. He entered a not guilty plea and proceeded to trial before a jury.]

WATT JA: …

[11] The appellant was represented at trial by experienced counsel whom he had retained two years earlier shortly after his arrest. Counsel had appeared on the appellant's behalf at the preliminary inquiry, held 14 months before the trial, and there cross-examined each of the four complainants who testified as Crown witnesses. The appellant elected trial by judge and jury.

[12] On the first day of the appellant's trial, the first complainant, the eldest of the four, testified before the jury. At the end of the day, counsel for the appellant at trial thought that the complainant "did well" in the witness box. The remaining complainants were scheduled to testify the next and subsequent days.

[13] Trial counsel for the appellant was concerned about the appellant's ability to "make it through" the trial proceedings. Counsel had already alerted the trial judge to the prospect that frequent adjournments might be required because of the appellant's

This excerpt is for review purposes only and may not be shared, reproduced,
or distributed to any person or entity without the written permission of the publisher.
© 2020 Emond Montgomery Publications. All Rights Reserved.

compromised condition. During and at the end of the first day of trial, the appellant had poor colour and was ill-composed.

The Second Day of Trial

[14] Before the trial resumed the following day, counsel and the appellant met at the court house. The appellant had better colour and seemed better composed than he had been on the previous day. Trial counsel asked the appellant how he was holding up.

[15] During their discussions, counsel gave the appellant some legal advice. The appellant gave counsel some instructions. As a result, counsel approached the Crown with a proposal. A plea of guilty was not part of the proposal nor had the appellant's instructions been reduced to writing prior to discussions between Crown counsel and the appellant's trial counsel.

[16] Counsel advised the trial judge in a general way about their discussions and asked that the jury be excused until the afternoon. The trial judge excused the jury and arranged for a "mid-trial" before another judge.

The Written Instructions

[17] Trial counsel obtained written instructions from the appellant about the procedure to be followed at trial. Counsel reviewed the instructions with the appellant and had a second lawyer from the local Bar repeat the procedure. The appellant signed the instructions which the other lawyer witnessed.

[18] The instructions signed by the appellant indicated that he would re-elect trial by judge alone and not contest the counts upon which the Crown would be proceeding. Attached to or accompanying the instructions was a list of the relevant counts and a detailed statement of facts concerning the allegations of each complainant, except the first complainant who had already testified before the jury and for whom the facts were to be as disclosed in his evidence. The appellant acknowledged that the Crown had a strong case and that neither he nor his wife, for different reasons, would be able to offer much of a response.

[19] The instructions also noted that none of the offences on which the Crown was proceeding required the imposition of a minimum sentence of imprisonment. Trial counsel for the appellant would seek a conditional sentence, but Crown counsel would not be joining in that submission. The appellant further acknowledged that the final result would be in the judge's discretion after a sentencing hearing.

The Procedure Followed

[20] In the absence of the jury, counsel advised the trial judge of the procedure they proposed to follow. The appellant re-elected trial by judge alone with Crown counsel's consent and, after the trial judge had discharged the jury and declared a mistrial, pleaded not guilty to each count in the indictment.

[21] During the discussions with the trial judge in the absence of the jury, trial counsel for the appellant said:

> We have agreed on a statement of facts that we anticipate will be followed through.

Trial counsel made it clear that the appellant would not be entering guilty pleas but that both counsel would be inviting the trial judge to make findings of guilt and to enter

This excerpt is for review purposes only and may not be shared, reproduced,
or distributed to any person or entity without the written permission of the publisher.
© 2020 Emond Montgomery Publications. All Rights Reserved.

convictions on specified counts, and to record conditional stays in connection with the remaining counts.

[22] In accordance with the written instructions of the appellant, counsel agreed to have the evidence given by the first complainant before the jury apply to the proceedings before the trial judge. Crown counsel then read the statement of facts appended to the appellant's instructions in connection with the remaining complainants. Trial counsel indicated that those facts were not contested. The trial judge entered findings of guilt on all counts and recorded convictions in conformity with the agreement of counsel. Conditional stays were entered on the remaining counts.

The Sentencing Proceedings

[23] Over six months later, the trial judge heard sentencing submissions. Counsel filed a pre-sentence report in which the appellant challenged the complainants' allegations as a "fantasized and dramatized story" and told the pre-sentence reporter that he couldn't "fathom why" the complainants had made their allegations.

[24] During sentencing submissions by Crown counsel, the trial judge queried the effect of the appellant's comments in the pre-sentence report challenging the complainants' allegations. Neither counsel suggested that the proceedings were procedurally flawed as a result of the appellant's subsequent rejection of the complainants' accounts.

[25] Trial counsel for the appellant sought a conditional sentence. Crown counsel submitted that a fit sentence was a term of imprisonment in a federal penitentiary of four to five years, coupled with several ancillary orders to which the appellant took no objection.

THE GROUNDS OF APPEAL

[26] The appellant … submits … that the procedure followed, the functional equivalent of a plea of *nolo contendere*, was illegal, and thus the convictions should be set aside … .

• • •

[28] An assessment of this allegation of error requires some further background information including information gathered from materials filed on appeal that were not before the trial judge.

The Additional Background

[29] When he appeared before the trial judge, the appellant was 70 years old. English was his first language. His education included college programs. He had worked in a provincial training school and had been a member of the military. He reported several health concerns. He maintained his innocence in his discussions with trial counsel, but did not want to require the remaining three complainants to testify before the jury.

[30] In his affidavit, the appellant swears that he did not know that he "would necessarily be found guilty" as a result of the proposed procedure. He did know that the formal process in which the complainants were to testify, and in which he could testify,

> … would end the formal contest whether or not I was guilty, but in my ignorance of criminal procedure I thought that I would still be able to dispute the charges in a less formal way.

He experienced "shock" that he had no opportunity to dispute the allegations.

This excerpt is for review purposes only and may not be shared, reproduced,
or distributed to any person or entity without the written permission of the publisher.
© 2020 Emond Montgomery Publications. All Rights Reserved.

[31] In cross-examination on his affidavit [filed in support of the appeal], the appellant repeatedly acknowledged the following:

i. that he did not want to continue with the trial and the testimony of the complainants;
ii. that he did not want to testify;
iii. that he knew he would be found guilty as a result of the procedure followed; and
iv. that he did not want to be sentenced to a term of imprisonment.

[32] Trial counsel for the appellant gave evidence that it did not occur to him that the *nolo contendere*-like procedure followed here was unavailable as a matter of law. The appellant expressed no concerns to counsel about being found guilty in the proceedings. Trial counsel knew that the prospects of a conditional sentence were very, very remote. Counsel expected that the appellant would dispute the allegations when asked by the pre-sentence reporter because the appellant had maintained his innocence with counsel.

The Arguments on Appeal

[33] For the appellant, Mr. Doucette says that a formal plea of *nolo contendere* is foreclosed by s. 606(1) of the *Criminal Code*. He submits that what occurred here was the functional equivalent of a plea of *nolo contendere*. Although he acknowledges that authority does permit the conduct of proceedings in such a way as to amount to the functional equivalent of a plea of *nolo contendere*, Mr. Doucette reminds us that two critical safeguards were lacking here:

i. a plea inquiry to ensure that the appellant's participation was voluntary, unequivocal, and reflected an understanding of the nature and consequences of the procedure; and
ii. a formal admission of the facts that underpinned the findings of guilt.

[34] In the end, Mr. Doucette urges, the procedure was fatally flawed and amounted to a miscarriage of justice. The proceedings were unfair and resulted in a verdict that is unreliable. The only appropriate disposition, he submits, is to set aside the convictions and order a new trial.

[35] For the respondent, Ms. Choi says that the procedure followed here did not cause a miscarriage of justice. The proceedings were fair and transparent, the verdict reliable. Ms. Choi points out that recent authority does not create a bright-line rule that prohibits all *nolo contendere*-like procedures. The overarching concern is whether what was done caused a miscarriage of justice. That, she submits, did not happen here.

[36] Ms. Choi contends that the appellant's participation in the procedure followed here was voluntary, unequivocal, and informed. The appellant knew the effect of his re-election and discharge of the jury, and that his failure to contest the facts alleged by the Crown would mean that no witnesses would testify and that he would be found guilty of the offences specified in the written instructions. He was fully aware of the specific facts alleged because he reviewed them twice and initialled each page.

[37] Ms. Choi submits that the appellant's claim that he thought his counsel would dispute the facts alleged is simply not credible, belied by his conduct throughout. He well knew that findings of guilt would follow and he hoped to leverage his decision to not require the remaining complainants to testify at trial into a non-custodial sentence.

This excerpt is for review purposes only and may not be shared, reproduced,
or distributed to any person or entity without the written permission of the publisher.
© 2020 Emond Montgomery Publications. All Rights Reserved.

The Governing Principles

[38] Section 606(1) describes the pleas available to an accused who is called upon to plead. The section makes it clear that, apart from the general pleas of guilty and not guilty and the special pleas authorized by Part XX, no other pleas are available. Thus, a formal plea of *nolo contendere*, literally "I am unwilling to contest," is not available under our procedural law.

[39] A plea of guilty is a formal admission of guilt and constitutes a waiver, not only of an accused's right to require the Crown to prove its case by admissible evidence beyond a reasonable doubt, but also of various related procedural safeguards, including those constitutionally protected: *R. v. T. (R.)* (1992), 10 O.R. (3d) 514 (C.A.), at p. 519; *Korponay v. Canada (Attorney General)*, [1982] 1 S.C.R. 41, at p. 49.

• • •

[41] On the other hand, an accused who pleads not guilty puts the Crown on notice that she or he requires the Crown to prove every essential element of the offence charged, by evidence that is relevant, material, and admissible, to the exclusion of reasonable doubt, and in accordance with applicable procedural safeguards: *R. v. G. (D.M.)*, 2011 ONCA 343, 275 C.C.C. (3d) 295, at para. 52. …

[42] Among the methods of proof available to the Crown are admissions of fact governed by s. 655 of the *Criminal Code*. Under that provision, it is for the Crown, not the defence, to state the fact or facts that it alleges against the accused and of which it seeks admission. The accused may choose to admit the facts, or decline to do so. Admissions require action by two parties, one who makes the allegation and the other who admits it. Once the admission is made, no other proof of the facts admitted need be offered: *Castellani v. The Queen*, [1970] S.C.R. 310, at pp. 315-317.

[43] Sometimes, formal admissions of fact under s. 655 may constitute the entirety of the Crown's case. For example, in *R. v. Cooper*, [1978] 1 S.C.R. 860, the Crown's case-in-chief consisted of an agreed statement of facts. The Supreme Court of Canada described the procedure as unusual, but did not suggest that it was legally impermissible or procedurally flawed. A similar procedure is followed by some courts in one-stage trials on the issue of criminal responsibility.

[44] A procedure similar to what happened here came under scrutiny in *G. (D.M.)*. There, as here, the accused pleaded not guilty to a sexual offence. Crown counsel read out a synopsis of the allegations against the accused. The trial judge made no inquiry of the accused to ensure that he understood the nature and effect of the procedure that was being followed. Neither Crown nor defence counsel made any submissions. The trial judge convicted the accused and remanded him in custody for sentencing.

[45] In *G. (D.M.)* a combination of two errors caused a miscarriage of justice and warranted a new trial. The first had to do with the manner in which Crown counsel discharged her burden of proof after the accused had pleaded not guilty. And the second was the failure of the trial judge to conduct any inquiry into the voluntariness of the appellant's participation and his understanding of the nature and effect of the procedure: *G. (D.M.)*, at para. 61.

[46] In *G. (D.M.)*, Crown counsel read a synopsis of the allegations on which the Crown relied. Defence counsel said nothing about whether he agreed with or did not dispute the allegations. Nothing said or done by counsel could be construed as bringing the case within the reach of s. 655 of the *Criminal Code*.

This excerpt is for review purposes only and may not be shared, reproduced,
or distributed to any person or entity without the written permission of the publisher.
© 2020 Emond Montgomery Publications. All Rights Reserved.

[47] In *G. (D.M.)*, the trial judge did not conduct any inquiry of the accused, similar to the inquiry mandated by s. 606(1.1) for pleas of guilty, to ensure that the accused was a voluntary participant in the procedure and understood the nature and effect of the procedure being followed. The fresh evidence in that case did not establish the scope of any advice counsel may have provided to the accused, more specifically, whether counsel told the appellant about the procedure that would be followed when proceedings resumed.

[48] In *G. (D.M.)*, as in this case, the appellant, in discussions with counsel, denied having committed the offences with which he was charged and on which he was being tried.

. . .

[50] To determine whether the procedure followed in cases like this caused a miscarriage of justice requires a case-specific examination of all relevant circumstances, including those revealed by the fresh evidence: *G. (D.M.)*, at para. 62.

The Principles Applied

[51] Despite several similarities between what occurred here and what happened in *G. (D.M.)*, I am satisfied that the principles stated there yield a different result in this case. I would not give effect to this ground of appeal.

[52] To take first, the common ground between this case and *G. (D.M.)*.

[53] Each appellant pleaded not guilty. Each maintained their innocence in discussions with counsel. Neither expressed his denial in open court. In both proceedings, Crown counsel adduced no *viva voce* evidence, rather read the factual allegations made by the complainants against the appellants (in addition in this case, the evidence given by the eldest complainant was incorporated by reference). These allegations were not filed as an exhibit, nor were they expressly characterized as a factual admission under s. 655 of the *Criminal Code*. Defence counsel did not expressly acknowledge the accuracy or admit the truth of the allegations, nor was either appellant asked to do so.

[54] In both cases the appellant recounted some health problems. Each appellant wished to avoid having the complainants testify although, in this case, the first and eldest complainant did testify before the jury. Both appellants had no previous convictions. Neither trial judge conducted any inquiry to determine whether the appellant understood the consequences of the procedure followed and voluntarily participated in it.

[55] But important differences distinguish this case from *G. (D.M.)*.

[56] First, in this case, experienced defence counsel obtained detailed written instructions from the appellant in advance of the appellant's re-election and the subsequent proceedings. He had represented the appellant for over two years between arrest and trial and had conducted the preliminary inquiry where all four complainants had testified and been cross-examined.

[57] Defence counsel reviewed the circumstances of the case and the instructions with the appellant. Another local lawyer reviewed the instructions with the appellant and witnessed the appellant's signature. The instructions included:

i. an agreement to re-elect trial by a judge sitting alone;
ii. an agreement *not* to contest the counts listed in the instructions;
iii. an acknowledgement that participation in the procedure was free and voluntary, without any threats or inducements from anyone including trial counsel;

This excerpt is for review purposes only and may not be shared, reproduced,
or distributed to any person or entity without the written permission of the publisher.
© 2020 Emond Montgomery Publications. All Rights Reserved.

iv. an acknowledgement of the strength of the Crown's case and of the likely impact of his "health difficulties" on his ability to give evidence and those of his wife who "would not be a particularly effective witness";
v. an appreciation of the positions that counsel would advance on sentence and an acknowledgement that "*the final result will be in the Judge's discretion after a sentencing hearing*" (emphasis in original); and
vi. an understanding that a pre-sentence report would be ordered and would include information about the appellant's medical condition, lack of criminal record, work record, and community involvement, along with his wife's medical condition.

[58] Together with the written instructions was a second document, drafted by the Crown Attorney, that listed the counts that would not be contested and set out the circumstances relied upon in respect of each complainant. Apart from the first complainant whose evidence at trial was incorporated by reference, the document contained the specific circumstances to be relied upon for each of the other complainants. Trial counsel reviewed this document with the appellant twice. The appellant initialled each page and signed the last page. The second review took place in the presence of the same local lawyer who had witnessed the appellant's written instructions. This lawyer initialled each page of the factual allegations and signed the last page.

[59] Before the Crown had read the allegations contained in the document initialled and signed by the appellant, trial counsel for the appellant said:

> We have *agreed on a statement of facts* that we anticipate will be followed through. Then obviously after that we will be talking about a sentencing hearing some time in the future, sir. So that's kind of the outline of what we have. (Emphasis added)

The trial judge confirmed with the appellant his understanding of the procedure of re-election.

[60] Immediately before the appellant re-entered pleas of not guilty to each count in the indictment, trial counsel expressed his understanding of what would follow:

> [DEFENCE COUNSEL]: There's not to be a plea. Basically the counts that are going to be dealt with here, sir, are basically not to be contested, and we're content that the facts be read in and ultimately there be a finding on that basis.
>
> THE COURT: So he's going to plead not guilty. There will be facts alleged, which will be the evidence of [the first complainant] …
>
> [DEFENCE COUNSEL]: Yes
>
> THE COURT: … and then statements for the other three complainants, and the defence will not be contesting and inviting me to make a finding of guilty.
>
> [DEFENCE COUNSEL]: That's correct, sir.

[61] The subsequent discussions between the trial judge and counsel contain repeated references to findings of guilt and the absence of any contest about the facts read into the record by the Crown. The trial judge made findings of guilt, recorded convictions, and entered stays in accordance with the agreement of counsel.

This excerpt is for review purposes only and may not be shared, reproduced,
or distributed to any person or entity without the written permission of the publisher.
© 2020 Emond Montgomery Publications. All Rights Reserved.

[62] Third, despite procedural similarities to *G. (D.M.)*, this case involves substantive differences from *G. (D.M.)*. The factual matrix put before the trial judge in this case consisted of the referential incorporation of the trial evidence of the complainant (thus making it *evidence* in the proceedings), and allegations based on the preliminary inquiry testimony of the remaining complainants that trial counsel for the appellant on at least one occasion characterized as an "agreed statement of facts." Unlike in *G. (D.M.)*, this appellant had reviewed with counsel and initialled the precise factual assertions read by Crown counsel in the proceedings under review.

[63] Fourth, unlike *G. (D.M.)* where trial counsel made no submissions, counsel for the appellant expressly indicated that the factual allegations read by the Crown were not contested and that counsel was content with the procedure being followed. It was also clear that counsel *invited* the trial judge to make findings of guilt based on the factual allegations with which he took no issue.

[64] Further, it is abundantly clear that this appellant well knew the inevitability of findings of guilt for specific offences. The written instructions contain several references to "sentence" and a "sentencing hearing." The appellant acknowledged the strength of the Crown's case and the problematic nature of any response by the defence. In his cross-examination on the affidavit filed on the fresh evidence application, the appellant repeatedly acknowledged that he knew he would be found guilty, but hoped he would not be sent to prison. In the harsh light of day, his periodic rejoinder that he thought trial counsel would "look into it and speak on my behalf" rings rather hollow. As the court said in *Lyons*, at p. 372:

> Subsequent dissatisfaction with the "way things turned out" or with the sentence received is not, in my view, a sufficient reason to move this Court to inquire into the reasons behind the election or plea of an offender, particularly where there is nothing to suggest that these were anything other than informed and voluntary acts.

[65] Finally, we are left with an appellant who voluntarily participated in a procedure without statutory warrant (or prohibition, except against entry of a formal plea of *nolo contendere*), well aware of the consequences (a finding of guilt and conviction), in the hope of gaining a desired sentencing disposition without having to utter an express admission of guilt of sexual offences. That he asserted innocence and did not admit guilt to his counsel does not invalidate these proceedings any more than it would vitiate a plea of guilty. Unlike the appellant in *G. (D.M.)*, this appellant does not say he wanted to testify to deny the allegations, but the procedure followed denied him that opportunity.

[66] As *G. (D.M.)* points out, at para. 51, there is no statutory provision or common law principle that prohibits the procedure at issue in that case and in this case after an accused has entered a plea of not guilty. The flaw in *G. (D.M.)* was in the execution. The execution in this case was materially different. I am satisfied that in the circumstances of this case, the procedure followed did not cause a miscarriage of justice. The procedure here did not compromise the fairness of the hearing or contribute to an unreliable verdict. I would not give effect to this ground of appeal.

The courts are drawing some fine lines between valid guilty and no contest pleas. If RP had pleaded guilty and then denied guilt in a pre-sentence report, his pleas would likely have

This excerpt is for review purposes only and may not be shared, reproduced,
or distributed to any person or entity without the written permission of the publisher.
© 2020 Emond Montgomery Publications. All Rights Reserved.

been struck. Do you agree that a different result is justified just because an accused pleads not guilty and declines to dispute the Crown's case? Do you think the procedure endorsed in *RP* would allow for the situation where the accused explicitly declines to contest the Crown's evidence but also explicitly protests innocence in open court?

PROBLEMS

1. B is charged with production of a controlled substance, contrary to s 7(2)(a) of the *Controlled Drugs and Substances Act*, SC 1996, c 19. Shortly before the preliminary inquiry, the Crown enters a stay of proceedings under s 579 of the Code in order to continue the police investigation. Two years later, after the investigation has been completed, the Crown lays a new information, charging B with the same offence.

Is the new charge valid?

2. AD pleads guilty to several counts of fraud. He is sentenced to six months in jail followed by a 12-month conditional sentence. AD appeals, asking that his pleas be struck. He explains that he always maintained his innocence but decided to plead guilty because his personal circumstances made it imperative to avoid jail. He had been advised by his counsel that he would not receive a jail sentence on a guilty plea. His counsel explains that he gave AD that advice because the pre-trial judge had indicated that he would not sentence AD to jail, only to a conditional sentence. When AD entered his pleas in court, the judge stated that, although there had been pre-trial discussions with counsel, he (the judge) could sentence AD as he saw fit. AD assumed that the judge was simply going through the necessary ritual.

Should the pleas be struck?

3. K is charged with sexual assault and sexual interference. On the day scheduled for trial, his counsel presents him with a proposed plea bargain in which the Crown would withdraw the sexual assault charge in exchange for a guilty plea to sexual interference. K had not instructed his lawyer to enter plea negotiations and the plea bargain is sprung on him shortly before the trial is to commence. K is told that pleading guilty is his best and possibly only chance of avoiding jail, and that a significant jail term is likely on conviction after trial. K is fearful of suffering physical abuse in jail so he agrees to the plea bargain. He confirms to the trial judge that his plea is voluntary. Shortly before sentencing, however, he seeks to withdraw his plea on the basis that it was involuntary. The trial judge refuses to let him do so.

Did the trial judge err?

4. L is charged with theft. He is 25 years old and represented by counsel. He enters a guilty plea and the case is adjourned for preparation of a pre-sentence report. On the return date, L seeks to withdraw his plea. He complains that he was pressured to plead guilty by his lawyer, who told him that he would be sentenced to a term of imprisonment upon conviction after trial, whereas he could expect a suspended sentence after a guilty plea. Defence counsel supports the request, acknowledging that he did indeed put pressure on L to plead guilty. The judge refuses to strike the plea.

Did the judge err?

5. Q drives a truck for a living. He is charged with dangerous driving. He pleads guilty. He knows that, as part of his sentence, he will be prohibited from driving for a year. He does not know, because he was never told, that because he has two prior convictions for impaired driving, his driver's license will be automatically suspended for life pursuant to the provincial *Highway Traffic Act*. He appeals, claiming that he would not have pleaded guilty had he

This excerpt is for review purposes only and may not be shared, reproduced,
or distributed to any person or entity without the written permission of the publisher.
© 2020 Emond Montgomery Publications. All Rights Reserved.

known of the lifetime suspension. The *Highway Traffic Act* only counts as a prior conviction one that was entered within the previous ten years. Q was last convicted of drinking and driving nine-and-a-half years prior to the date of his guilty plea to dangerous driving. If he had pleaded guilty six months later, he would not have received a lifetime suspension.

Should Q's plea be struck?

6. W pleads guilty to sexual assault and sexual interference. He is not represented and declines the opportunity to find a lawyer. While not suffering from a psychotic form of depression, he is deeply depressed and in poor physical health. He has spent time living on the street. He has repeatedly threatened suicide and refused medical and legal help. Three months earlier, he walked into a Revenue Canada office and demanded that $991,000 be reported as tax payable on his tax return because he and his family had received that amount from federal and provincial social programs. He suffers from a personality disorder. On the other hand, he did volunteer work for the preceding three years and also edited a monthly newspaper. He has not experienced any delusions or hallucinations. During the plea proceedings, he confirms to the trial judge that his plea is voluntary and that he understands the consequences of the plea could be very severe. At the sentencing proceedings several weeks later, he again refuses representation and asks for the maximum sentence on each count, consecutive, without parole.

Was his guilty plea voluntary?

7. C, a permanent resident of Canada, is charged with possession of the proceeds of crime. He agrees to plead guilty on the basis of a joint submission for a two-year prison sentence. Before finalizing the plea agreement, C asks his counsel if the Crown would agree to oppose any "sort of removal process" following the guilty plea, because of his "Canadian status." Counsel offers to make inquiries of the Crown and to refer C to an immigration lawyer. C ultimately declines both offers, fearful that discussions with the Crown will alert immigration officials to his situation. C pleads guilty and serves his sentence. He is then contacted by the Canadian Border Services Agency and informed that they are considering his deportation on the ground of serious criminality (more specifically, that he was convicted of an offence punishable by a maximum of ten years). He further learns that he would not have the right to appeal any deportation order because he was sentenced to more than six months' incarceration. C appeals the criminal conviction, seeking to withdraw his guilty plea on the ground that it was uninformed. In an affidavit, he deposes: "If I had known that I would be facing deportation without a right of appeal, I would never have entered a guilty plea to this charge."

Should C be permitted to withdraw his guilty plea?

This excerpt is for review purposes only and may not be shared, reproduced,
or distributed to any person or entity without the written permission of the publisher.
© 2020 Emond Montgomery Publications. All Rights Reserved.