



NOVA SCOTIA
BARRISTERS' SOCIETY

GUILTY PLEA

STANDARD

Defence counsel must ensure that an accused's guilty plea is voluntary, unequivocal and informed, and that the admitted facts support the charge.¹

To be informed, an accused must understand:

- 1) that the plea is an admission of the essential elements of the offence;
- 2) the effect of the plea having regard to the waiver of the right to a trial;
- 3) the criminal consequences of the plea;
- 4) the legally relevant collateral consequences of the plea²; and
- 5) that the court is not bound by any agreement between the accused and the prosecutor.

NOTES

1 *R. v. Wong*, 2018 SCC 25 at para. 3; *Criminal Code of Canada*, s. 606 (1.1); *Youth Criminal Justice Act* s. 36; Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012: rule 5.1-8.

2 *Wong, Ibid*, at paras. 3 – 4.

COMMENTARY

D) A VOLUNTARY PLEA

As summarized by Hill, J. in *R. v. Moser*, [2002] O.J. No. 552 (S.C.J.) at para. 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...

...Ordinarily a plea of guilty involves certain inherent and external pressures... Plea negotiations in which the prosecution pursues a plea of guilty in exchange for forgoing legal avenues open to it, or agrees not to pursue certain charges, do not render the subsequent plea involuntary...

...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...

...There is, of course, no closed list of circumstances calling into question the voluntariness of a guilty plea: pressure from the court...; pressure from defence counsel...; incompetence of defence counsel...; cognitive impairment or emotional disintegration of the accused...; effect of illicit drugs or prescribed medications... (citations omitted)

A unanimous Ontario Court of Appeal in *R. v. Cherrington*, [2018], O.J. No. 4012 also clarifies at para. 21 that:

...To enter a voluntary plea of guilty, an accused need only be able to understand the process leading to the plea, communicate with counsel, and make an active or conscious choice. Whether the choice to plead guilty is wise, rational or in the accused's best interest is not part of the inquiry... (citations omitted)

Defence counsel should be alert to circumstances where an accused may be subject to coercion by a third party to enter a plea of guilty. For example, where two or more individuals are charged with an offence there may be pressure for a client to 'take the fall' for a co-accused.

Defence counsel must ensure that the ultimate choice to plead guilty is that of the accused. As the majority of the Supreme Court of Canada states in *Wong, supra*, at para. 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. G.D.B.*, [2000 SCC 22](#), [\[2000\] 1 S.C.R. 520](#), at para. 34).

II) AN UNEQUIVOCAL PLEA

The accused's intention to enter a plea of guilty must be clear. There is no room for doubt, misunderstanding or confusion.

As Hill, J. states in *R. v. Moser*, [2002] O.J. No. 552 (S.C.J.) at para. 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...

III) AN INFORMED PLEA

Understanding that the Plea is an Admission of the Essential Elements of the Offence

Defence counsel must review the essential elements of the offence with the accused, drawing attention to the requisite conduct and the associated mental element.

Model jury instructions may be of assistance.

Defence counsel must review the prosecution's case with the accused, having regard to the anticipated evidence outlined in the disclosure materials. Defence counsel must be alert to any weaknesses in the prosecution's case, taking into account any *Charter* issues and potential defences. Defence counsel must also consider any information provided by the accused when making this assessment.

Defence counsel must provide the accused with an opportunity to personally review the disclosure materials prior to plea.

An accused may want to enter a guilty plea before Defence counsel has had an opportunity to obtain full disclosure. There is nothing preventing Defence counsel from assisting a client in such a situation. Indeed, it may be in a client's best interests to resolve the matter before the prosecution has had an opportunity to provide all relevant material.

If an accused wants to enter a guilty plea in the absence of full disclosure, Defence counsel should explain that their assessment of the case is qualified to the extent that

disclosure is incomplete. As Justice Di Luca states in *R. v. Cherry*, [2018] O.J. No. 4928 (S.C.J.) at para. 24:

...In many routine cases, initial disclosure provided for the purpose of a bail hearing can be a sufficient basis upon which counsel can form a tentative opinion about a case sufficient to advise a client on the plea -- subject of course to a caveat that full disclosure could change counsel's views. In cases where a client wishes to proceed and is prepared to admit the essential facts in support of the plea, counsel can assist in negotiating and entering a plea.

Cases to consider:

R. v. C.S., 2010 ONCJ 497 – Defence counsel did not meaningfully review the case with the accused and did not provide him with an opportunity to review the two complainants' statements. The guilty pleas were uninformed and involuntary.

R. v. Henry, 2011 ONCA 289 – Defence counsel erroneously advised the accused that a recording of police radio conversations meant that there was no viable *Charter* motion, when in fact the recordings supported a *Charter* motion. The Court of Appeal allowed the accused to withdraw his guilty plea. The Court stated that a “plea may not be informed if it was entered without timely knowledge of information that is relevant to the decision of whether to plead guilty or run the risk of a trial...” (para. 36).

Understanding the Effect of the Plea Having Regard to the Waiver of the Right to a Trial

Defence counsel must inform an accused that by pleading guilty he or she is giving up his or her constitutional right to a fair trial before an independent and impartial tribunal, including a trial before a Supreme Court judge sitting with a jury if the accused has an election available with respect to the mode of trial.

Defence counsel should also review the fundamental procedural safeguards that govern the conduct of a criminal trial, including: i) The presumption of innocence; ii) The burden on the Crown to prove the allegation; iii) The high standard of proof beyond a reasonable doubt; iv) The right to make full answer and defence; v) The right to silence; and vi) The right against self-incrimination.

Understanding the Criminal Consequences of the Plea

Defence counsel must review the criminal consequences of the plea with the accused, including:

- The imposition of a punishment by the Judge;
- The sentencing options available to the Judge;

- Counsel should be alert to sentencing options that are not available (see *R. v. Armstrong*, [1997] O.J. No. 45 (C.A.) – The Court set aside the accused’s guilty plea on the basis that Defence counsel erroneously advised the accused that a discharge was an available sentencing option).
- Any applicable ancillary orders that the Judge may/shall impose, such as:
 - A DNA order;
 - A restitution order;
 - A forfeiture order;
 - A weapons prohibition order;
 - A SOIRA order (*Sex Offender Information Registration Act*);
 - An order prohibiting or limiting contact with young persons;
 - A driving prohibition order; and
 - A victim fine surcharge.
- Eligibility for earned remission or statutory release (where appropriate);
- Eligibility for parole (where appropriate);
- The possibility of a long-term and/or dangerous offender application (where appropriate);
- Criminal record keeping:
 - If the accused is a youth, how long will the record be accessible?
 - If the accused is an adult with a prior youth record, what impact will the proceeding have with respect to the accessibility of the prior youth record?

- If the accused is an adult and receives a discharge, how long will the record of the discharge be accessible? (*R. v. Fells*, [2003] O.J. No. 1392 (S.C.J.) - The Court accepted that had the accused known that a conditional discharge involved a form of criminal record accessible in a criminal record check she would not have pleaded guilty. The Court set aside the accused's guilty plea.)
- If the accused is an adult and receives a criminal record of conviction (or the Judge decides to impose an adult sentence on a youth), is the accused eligible for a record suspension, and if so, when?

Understanding the Legally Relevant Collateral Consequences of the Plea

The Supreme Court of Canada affirmed in *Wong, supra*, that Defence counsel must ensure that the accused is aware of the legally relevant collateral consequences of the plea outside of the confines of the criminal justice system.

While the Court declined to define the full scope of legally relevant collateral consequences or the necessary prerequisites of such consequences, the Court provided counsel with the following guidance:

- “A legally relevant consequence is one which bears on sufficiently serious legal interests of the accused.” (para. 4);
- “...a legally relevant collateral consequence will typically be state-imposed, flow from conviction or sentence, and impact serious interests of the accused.” (para. 9); and
- “Immigration consequences bear on sufficiently serious legal interests to constitute legally relevant consequences” (para. 4).

Defence counsel must obtain sufficient information about the client's personal circumstances in order to properly assess the legally relevant collateral consequences of a guilty plea.

Legally relevant collateral consequences must be assessed on a case-by-case basis and may include:

- Employment and occupational licensing;
- Eligibility for educational programs;
- Eligibility for participation in volunteer organizations;

- Driver licensing (provincial legislation);
 - o *R. v. Quick*, 2016 ONCA 95 – Before entering a plea of guilty to a driving offence under the *Criminal Code* counsel must advise a client of the nature and length of any potential license suspensions under both the *Criminal Code* and the provincial legislation regulating the operation of motor vehicles. The Court of Appeal vacated the guilty plea as the accused was not aware of a personally significant collateral consequence (i.e. an indefinite license suspension for a truck driver) and there was a realistic likelihood that he would have set the matter down for trial had he known about it.
- Sex offender registration (provincial legislation – Ontario);
- Civil liability;
- Repercussions in a family court proceeding; and
- Repercussions for international travel.

Defence counsel must be alert to any limitations in their expertise with respect to legally relevant collateral consequences outside of the criminal justice system.

Understanding the Court is Not Bound by Any Agreement Made Between the Accused and the Prosecutor

Defence counsel must inform an accused that it is the Judge who makes the final decision with respect to the appropriate punishment and that the Judge is not bound by any agreement made between the accused and the prosecutor.

Cases to consider:

R. v. Anthony-Cook, 2016 SCC 43 – The leading case on joint submissions in Canada.

IV) THE ADMITTED FACTS SUPPORT THE ESSENTIAL ELEMENTS OF THE CHARGE

Counsel must ensure that the accused admits sufficient factual circumstances to support the essential elements of the charge.

Counsel must not assist an accused in tendering a guilty plea if the accused proclaims innocence.

If the accused subsequently makes an application for parole, the National Parole Board will consider the admitted factual circumstances in deciding whether early release is appropriate.

The admitted factual circumstances may also be important with respect to related family, civil or immigration proceedings.

The scope of the factual admissions is often a subject of negotiation between Defence counsel and the prosecution.

When the accused is tendering a plea of guilty it is a matter of good practice for Defence counsel to alert the prosecution as to whether there are any factual circumstances that the accused is not prepared to admit. For example, the accused may be prepared to admit facts that support the essential elements of the charge but deny other information that may be embarrassing or aggravating in nature. The prosecution will then be in a position to decide whether to call evidence to prove a contested fact and to ensure that sufficient time is set aside for the sentencing hearing.

Cases to consider:

R. v. Gardiner, [1982] S.C.J. No. 71 – The Crown must prove any disputed aggravating facts beyond a reasonable doubt at a sentencing hearing.

BEST PRACTICES

Prior to Court

It is useful for Defence counsel to utilize a direction that includes the admitted factual circumstances when the accused wants to enter a plea of guilty.

A direction helps to avoid any misunderstanding between Defence counsel and the accused.

A direction also adds a degree of solemnity to the process and serves to emphasize the serious nature of the course of action that the accused is contemplating.

Sample Direction

A sample direction is attached for Defence counsel to draw upon when tailoring a direction specific to the accused's case.

In Court

When the accused tenders a plea of guilty, the Judge may ask counsel: "Have you reviewed section 606(1.1) with your client?"

For ease of reference, section 606(1.1) states:

A court may accept a plea of guilty only if it is satisfied that the accused

(a) is making the plea voluntarily; and

(b) 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.

It is a matter of good practice for Defence counsel to request that the Judge confirm a guilty plea directly with the accused. As the Honourable Justice Richard A. Saull states:

...it is unwise for a plea to be made by counsel on behalf of the accused instead of by the accused himself. This simply invites the question that may arise during the course of the sentencing itself or at a later appeal of whether the accused actually intended to plead guilty. ...At this crucial stage of the criminal proceedings, with so much at stake, why would a judge allow counsel to conduct the inquiry in open court or to simply advise the court that the inquiry had already been made with their client? A few simple questions put to the accused by the court can go a long way to preventing a later suggestion that the accused's plea was not properly taken. (*Striking a Guilty Plea*, National Criminal Law Program, Quebec City, Quebec, July, 2011, at page 3)

As Hill, J. states in *R. v. Moser*, [2002] O.J. No. 552 (S.C.J.) at para. 32:

...The accused's personal entry of the plea is a factor tending to demonstrate the unequivocal character of the plea...

ADDITIONAL RESOURCES

Nova Scotia Public Prosecution Service – DPP Directive – “Resolution Discussions and Agreements”

(https://novascotia.ca/pps/publications/ca_manual/ProsecutionPolicies/ResolutionDiscussionsandAgreements.pdf)

Sample Direction (this will be an embedded link)

I understand that it is alleged that I have committed the following criminal offence:

(Offence) - (Date of Offence) - (Jurisdiction of Offence)

I have had an opportunity to review the disclosure materials.

[I understand that I have the right to obtain all relevant disclosure prior to entering my plea. I want to enter my plea of guilty even though disclosure is not complete.]

I have had sufficient time to consider all of my options.

I understand that I have the right to a trial to contest the allegation.

I understand that at a trial the prosecution bears the burden of proving the charge against me beyond a reasonable doubt.

I understand that by entering a plea of guilty I am giving up my right to a trial.

I want to enter a plea of guilty.

I accept responsibility for committing the offence.

I admit the factual circumstances in the attached Agreement Statement of Facts.

I am making this decision to enter a plea of guilty voluntarily. No one is pressuring me or forcing me to plead guilty. I am entering a plea of guilty of my own free will.

I understand that by entering a plea of guilty I will have a criminal record of conviction in relation to this charge.

I understand that I will be eligible for a record suspension (formerly known as a pardon) ___ years after I complete my sentence.

[or]

I understand that I will not be eligible for a record suspension (formerly known as a pardon) in relation to this conviction.

I understand that if the Judge grants a conditional discharge the criminal record of the discharge will remain accessible in a criminal record check for a period of three years from the date that the Judge grants the discharge.

I understand that if the Judge grants an absolute discharge the criminal record of the discharge will remain accessible in a criminal record check for a period of one year from the date that the Judge grants the discharge.

I understand that by pleading guilty I will receive a punishment to be determined by the Judge.

I understand that it is the Judge, not my lawyer and not the Crown Attorney, who determines the appropriate punishment. Stated differently, I understand that the Judge makes the final decision as to the appropriate punishment in my case.

I understand that the Judge *will* also impose the following (ancillary) orders at the time of sentencing: 1)...; 2); and 3)....

I understand that the Judge *may* impose the following (ancillary) orders at the time of sentencing: 1)...; 2); and 3)....

I understand that the Registry of Motor Vehicles will revoke my driver's license upon notification of my criminal conviction. I understand that I will not be eligible to apply to restore my driver's license for at least _____ months/years.