THINKING ABOUT DELAY: COMPARATIVE APPROACHES TO SENTENCE ADJUSTMENT WHERE GUILTY PLEA RESOLUTION

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ABSTRACT

Where an offender pleads guilty, no trial is held and victims and witnesses are not required to testify. The sooner after arrest that a guilty plea is entered, the greater the efficiencies for the system thereby contributing to less congestion in the courts.

Almost universally, sentencing courts acknowledge a reduction in sentence where a guilty plea evidences remorse on an offender's part and/or in recognition of various pragmatic interests served relating to a trial not being held.

In Canada, criminal legislation is silent on the subject of sentence reduction on account of a guilty plea. While our sentencing jurisprudence recognizes the reductionist principle to lessen a sentence's severity in circumstances of a guilty plea, the weight to be afforded such a plea has not been quantified in terms relating to *when* such a plea is entered – to the extent that a sentence is adjusted to recognize a guilty plea, it tends to be part of a synthesis of factors resulting in a single appropriate sentence.

In other jurisdictions, legislation has been enacted to provide not only clarity and consistency to the principle of sentence reduction in circumstances of the timing of a guilty plea but also to act as an incentivization scheme to encourage earlier guilty pleas.

INTRODUCTION

[1] Section 606(1) of the *Criminal Code* authorizes a person accused of a crime to plead guilty.[1] A guilty plea amounts to an admission of the essential elements of the offence(s) with which he or she is charged.[2]

[2] A guilty plea is legally valid only if it is informed, voluntary and unequivocal.[3]

[3] The overwhelming number of charges coming before the criminal courts, which are not stayed or withdrawn, are disposed of by pleas of guilt as opposed to guilty verdicts following contested trials.[4]

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[1] Section 606(1) "An accused who is called on to plead may plead guilty or not guilty …".

[2] *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions (the Martin Committee Report)*, Ontario Ministry of Attorney General (1993), at p. 294; *R. v. Cairns*, [2013] EWCA Crim 467, at para. 4.

[3] *R. v. Shepherd*, 2016 ONCA 188, at para. 13; *R. v. T.L.*, 2016 SKCA 160, at para. 14; *R. v. White*, 2016 NSCA 20, at para. 25; *R. v. M.A.W.*, 2008 ONCA 555, at paras. 23-25.That said, the reality is that an accused's decision whether to plead guilty or not is frequently a decision made under pressure: *R. v. Meadus*, 2014 ONCA 445, at paras. 16-17; *R. v. Tryon*, [1994] O.J. No. 332 (C.A.), at para. 1.

[4] Precise Canadian statistics appear hard to determine. The recent Statistics Canada publication "Adult criminal court statistics in Canada" (release date, Feb. 21, 2017), reports that in 2014/15 63% of all cases in adult criminal court concluded with a finding of guilt – however, this figure includes both guilty plea cases *and* findings of guilt after a contested trial. The September 2016, Macdonald Laurier Institute report, "Report Card on the Criminal Justice System: Evaluating Canada's Justice Deficit", at p. 19, noted that in Ontario, leaving aside criminal cases where charges were withdrawn or stayed, only 55.3% of cases resulted in a guilty verdict – a "significant outlier" provincial statistic. In England, approximately 94% of defendants in the magistrate courts plead guilty ("Mass production of guilty pleas" Law Teacher) and 90% plead guilty in Crown Court criminal cases ("Reduction in Sentence for a Guilty Plea Guideline – Consultation", UK Sentencing Council, Feb. 2016, at p. 10). In Australia, nearly 80% of criminal defendants plead guilty (Elizabeth Wren and Lorana Bartels, "'Guilty, Your Honour': Recent Legislative Developments on the Guilty Plea Discount and an Australian Capital Territory Case Study on its Operation" (2014), 35 Adelaide Law Review 361, at p. 361). In his article, "Why Innocent People Plead Guilty" (The New York Review of Books – Nov. 20, 2014), US Dristrict Court Judge Jed Rakoff documented, respecting federal criminal charges, that 8% are dismissed for mistake or withdrawal and that 97% of the remainder result in guilty pleas.

PART I

Is a Guilty Plea Relevant to Sentence?

[4] For decades, in Canada and elsewhere, the courts have recognized that a plea of guilt by an offender is generally considered a factor capable of reducing the harshness of a punishment to be imposed by a sentencing court.[5]

[5] The effect of recognizing the role of a guilty plea in sentencing means, with respect to the accused who is convicted after pleading *not* guilty, that the leniency which might otherwise be available to such an accused is unavailable – this is not however an aggravating factor or a penalty for not pleading guilty – every criminal defendant clothed with the presumption of innocence has the right to plead not guilty and to require the Crown/prosecution to prove his or her guilt beyond a reasonable doubt.[6]

[6] Turning first to the Canadian experience, in the view of the courts, the factor of an offender's guilty plea may be relevant to sentencing in two ways:

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[5] In *R. v. Caley & Others (guilty pleas)*, [2012] EWCA Crim 2821, at para. 1, the court described this as "the long established practice in sentencing which recognizes that a distinction should ordinarily be drawn between a defendant who admits guilt and one who does not".

[6] *R. v. Proulx*, [2000] 1 S.C.R. 61, at para. 113 (in determining appropriateness of less punitive sentencing options, a court may take into account "whether the offender has acknowledged his or her wrongdoing"); *R. v. Araya*, 2015 ONCA 854, at para. 31 (revd on a different basis, 2015 SCC 11) (because accused maintained his innocence, he "cannot rely on remorse or an acknowledgement of harm to the victim to reduce his sentence"); *R. v. Spencer* (2004), 72 O.R. (3d) 47 (C.A.), at para. 48 (leave to appeal refused [2005] S.C.C.A. No. 4) ("Although Ms. Spencer is not to be penalized for her not guilty plea, she is also not entitled to the substantial mitigation flowing from a guilty plea"); *R. v. Roks*, 2011 ONCA 618, at para. 16 ("Others plead not guilty and have a trial. They don't get the discount"); *R. v. A.(K.)* (1999), 137 C.C.C. (3d) 554 (Ont. C.A.), at p. 570 ("…an increased sentence is not justified because the accused has pleaded not guilty"); *R. v. Jamieson*, [1997] O.J. No. 1111 (C.A.), at para. 2("a plea of not guilty [is] not [an] aggravating facto[r].")

(1) personal mitigation relating to the offender

(2) achievement of pragmatic or utilitarian objectives.

[7] The *personal mitigation* prong focuses upon the motivation and state of mind of an offender in tendering a guilty plea. Is it simply part of a resolution agreement (for example to have charges withdrawn against a co-accused relative or friend), to save the expense of a trial, to use up significant accumulated pre-trial custody, etc., or does the plea truly represent a reflective and contrite state of mind? If the latter, remorse, acceptance of responsibility, amenability to change, victim empathy, and prospects of rehabilitation are worthy of recognition.[7]

[8] It may be that there is no presumptive implication merely arising from an offender's decision to plead guilty that he or she is in fact genuinely remorseful. Indeed, there may be only a weak correlation between a plea of guilty and genuine remorse for committing a criminal offence with recognition of the deleterious effects upon the victim of an offender's crime. Regret at being caught or conditional or feigned remorse can easily pose for real contrition.

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[7] See: *R. v. Faulds* (1995), 20 O.R. (3d) 13 (C.A.), at p. 17 ("In some cases, a guilty plea is a demonstration of remorse and a positive first step toward rehabilitation"); *R. v. Doucette*, 2015 PECA 5, at para. 20 ("a guilty plea is an expression of remorse and an acceptance of responsibility"); *R. v. Finnis* (1978), 3 C.R. (3d) S. 54 (Ont. C.A.) ("It is in his favour that he pleaded guilty, and acknowledged what he did").

[9] Review of the circumstances, and perhaps evidence, may be necessary before a sentencing court can, on balance, conclude that an offender's plea is in part driven by contrition. A sentencing court may consider comments in the presentence report, confession to police, agreement between counsel, a written apology, the offender's allocution statement under s. 726 of the *Code*, evidence of the offender or others, etc.

[10] The second prong of relevance for a plea of guilt, that of *pragmatic or utilitarian concerns*, focuses upon, not offender-based, but systemic, factors relating to administration of criminal justice issues such as delay, treatment of victims and witnesses, and the expenditure of resources.[8]

[11] Reduction of the sentence to be imposed upon an offender, taking into account his or her guilty plea, does not require that the sentencing judge conclude that both genuine remorse *and* utilitarian features have been served by the plea.[9]

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[8] See: *R. v. P.M.*, 2012 ONCA 162, at para. 42 (leave to appeal refused [2012] S.C.C.A. No. 242) ("By the plea, the respondent spared the complainant having to testify at a preliminary inquiry or trial"); *R. v. Doucette*, footnote 7 above, at para. 20 (a guilty plea "saves the justice system the time and expense of a trial") and para. 28 (the early guilty plea "saved an enormous amount of time and money in terms of police and court resources in bringing this matter to trial"); *Caley*, footnote 5 above, at paras. 4, 17 (saving "considerable cost", "saves victims and witnesses from concern about having to give evidence"; "saving in preparation of trial-ready evidence by the Crown"; "in practice, great saving in the assembly and service of evidence"); *R. v. Beier*, [1995] O.J. No. 2552 (C.A.), at para. 2 (the guilty pleas "saved the state a tremendous expenditure of resources"); *R. v. Johnson and Tremayne*, [1970] 4 C.C.C. 64 (Ont. C.A.), at p. 67 (accused "pleaded guilty and thus saved the community a great deal of expense").

[9] *R. v. Faulds*, footnote 7 above, at p. 17: "Even where the plea is not a manifestation of genuine remorse, it may still save valuable judicial resources and provide a degree of finality from the perspective of

Utilitarian Benefits of Guilty Pleas in Relation to Timing of the Plea

[12] Quite logically, the systemic benefits to be derived from a guilty plea are integrally related to the stage at which the plea is entered – a reality recognized by the Supreme Court of Canada[10] and other courts.[11]

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victims which would not exist without the plea". To similar effect is this passage from *R. v. Caley*, footnote 5 above, at para. 7:

> … a plea of guilty may of course be an indication of remorse for the offence, but it may not be and the two things are not the same. A defendant may indeed regret his offence, and, beyond that, it may be clear that he wishes to avoid doing it again. Equally, however, he may plead guilty not because he regrets committing the crime but simply because he does not see a way of avoiding the consequences. The benefits which we have described which come from a defendant who is guilty admitting that he is so remain present if it is a case of the latter type. Moreover, it accords with elementary instincts of justice to recognise the difference between two defendants, one of whom is defiant and requires the public to prove every dot and comma of the case against him and the other of whom accepts his guilt.

[10] *R. v. Lacasse*, 2015 SCC 64, at para. 81 ("A plea entered at the last minute before the trial is not deserving of as much consideration as one that was entered promptly").

[11] See: *R. v. Filian-Jimenez*, 2014 ONCA 601, at para. 2 ("relatively lenient sentence" justified in part on accused entering "an early guilty plea"); *R. v. Mann*, 2010 ONCA 342, at para. 21 ("A guilty plea, especially an early one, is entitled to a substantial credit in the sentencing process"); *R. v. McKinnon*, 2010 ONCA 828, at para. 6 (sentencing disparity between co-accused justifiable where M's accomplice "pleaded guilty at the earliest opportunity"); *R. v. Al-Diasty*, [2006] O.J. No. 3711 (C.A.), at para. 1 ("the absence of the important mitigating factor of the early guilty plea"); *R. v. Valle-Quintero* (2002), 169 C.C.C. (3d) 140 (Ont. C.A.), at p. 164 (sentencing judge "was alive to the mitigation relevance of the appellant's early guilty pleas"); *R. v. Patterson*, [1998] O.J. No. 937 (C.A.), at para. 1 (offender "indicated his intention to plead guilty at the earliest opportunity"); *R. v. T.(R.)* (1992), 17 C.R. (4th) 247 (Ont. C.A.), at p. 263 ("the appellant is entitled to considerable credit for pleading guilty at the first opportunity"). See also *R. v. Pitkeathly* (1994), 29 C.R. (4th) 182 (Ont. C.A.), at pp. 184-5, where the court observed:

> Counsel for the appellant submitted that the trial judge failed to give sufficient weight to the mitigating factor of the plea of guilty. However, it is to be noted that the plea of guilty was not entered into until after a preliminary hearing had been held and after a *voir dire* extending over four days had been concluded, during which counsel for the appellant unsuccessfully sought to exclude a confession made by the appellant to the police and also sought a stay of proceedings by reason of the alleged unreasonable delay in bringing the trial on at an earlier date.
>
> Although the fact that the appellant had not pleaded guilty at an earlier time is not an aggravating circumstance, we agree with the trial judge that the plea of guilty under the circumstances which existed here is not to be considered as a particularly significant mitigating factor.

[13] This is not to say that the entry of a guilty plea late in the process is not deserving of some recognition.[12]

What Reduction in Sentence is Appropriate Where a Guilty Plea is Entered?

[14] Turning first to general principles relating to the sentencing function, sentencing courts are guided by the accumulated experience of the common law espoused in appellate court precedents and the provisions of Part XXIII of the *Criminal Code*. The *Criminal Code* defines the maximum punishments for crimes and, in some instances, mandatory minimum sentences.

[15] Within the boundaries of these statutorily prescribed maximum and minimum punishments, the courts exercise broad discretion[13] to impose a fit sentence "proportionate to the gravity of the offence and the degree of responsibility of the offender".[14]

[16] A "sentence should be … reduced to account for any relevant … mitigating circumstances".[15]

[17] A sentencer will identify the general guideline range set by appellate courts for similarly committed offences.[16] Then, "[o]nce the range is identified, the

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[12] *Martin Committee Report*, footnote 2 above, at pp. 310-311; *Caley*, footnote 5 above, at para. 28; *R. v. Gladue*, 2012 ABCA 118, at para. 12; *R. v. Garofoli et al.* (1988), 41 C.C.C. (3d) 97 (Ont. C.A.), at p. 153 (affd [1990] 2 S.C.R. 1421); *R. v. Hallak*, [2014] NSWCCA 48, at para. 23.

[13] Section 718.3(2) of the *Code* expressly recognizes this judicial discretion: "the punishment to be imposed is … in the discretion of the court".

[14] Section 718.1 of the *Code*; *R. v. Nur*, [2015] 1 S.C.R. 773, at para. 42; *R. v. Anderson*, [2014] 2 S.C.R. 167, at para. 22.

[15] *Criminal Code*, s. 718.2(a).

[16] *R. v. Nasogaluak*, [2010] 1 S.C.R. 206, at para. 44; *R. v. Lacasse*, footnote 10 above, at para. 60.

sentencing judge must consider specific … mitigating factors"[17] and "[t]he relative importance of any mitigating … factors will then push the sentence…down the scale of appropriate sentences for similar offences".[18]

[18] While the *Criminal Code* supplements sentencing jurisprudence in describing various relevant sentencing principles,[19] no express reference is made to consideration of a guilty plea as a relevant circumstance.[20]

[19] While sentencing is a discretionary exercise tailored to the individual circumstances of a particular offender and the crime(s) committed,[21] a difficult question for sentencing judges is how to quantify the discount or reduction of sentence to take into account the value of a guilty plea.

[20] In Ontario, a guilty plea's value has been variously described, in somewhat amorphous terms, including "the substantial mitigation flowing from a guilty

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[17] *R. v. Hamilton and Mason* (2004), 186 C.C.C. (3d) 129 (Ont. C.A.), at para. 111.
[18] *R. v. Nasogaluak*, footnote 16 above, at para. 43.
[19] For example, *Criminal Code*, ss. 718, 718.01, 718.2, 718.21.
[20] Arguably, an indirect reference may be drawn from s. 718(f) of the *Code*:

> 718. PURPOSE – The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> …
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[21] *R. v. Nasogaluak*, footnote 16 above, at paras. 43-6.

plea"[22] and as a "significant mitigating factor"[23] and as worthy of "considerable credit".[24]

[21] Articulation by sentencing courts of a quantified reduction for a guilty plea has generally not attracted favourable comment by appellate courts.[25]

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[22] *R. v. Spencer*, footnote 6 above, at para. 48.
[23] *R. v. Santos*, [1993] O.J. No. 2539 (C.A.), at para. 2.
[24] *R. v. T.(R.)*, footnote 11 above, at p. 263.
[25] For example, in *R. v. Kosik*, [2005] O.J. No. 1172 (C.A.), where the trial judge stated that a one (1) year discount would be given for the plea, the appeal court observed at para. 7, "It would also have been preferable if he had not defined a specific credit for a guilty plea". In *R. v. Daya* (2007), 227 C.C.C. (3d) 367 (Ont. C.A.), where the trial judge stated that the offender's guilty plea would entitle him to a sentence reduction of "perhaps 25 percent, perhaps 33 and a third percent", the appeal court stated at para. 33:

> First, the credit to be given for a guilty plea cannot be reduced to any formula, but "will vary with the circumstances of each case"; see *R. v. Faulds* (1994) 20 O.R. (3d) 13 (C.A.) at para. 14.

In *Faulds*, footnote 7 above, at p. 17, the court stated that: "[t]he effect of a guilty plea in setting the appropriate sentence will vary with the circumstances of each case". While recognizing at para. 21 in *Doucette*, footnote 7 above, that "[s]ome courts have held that a guilty plea can justify a discount of up to 25 to 33 %", the PEICA went on in the same paragraph to note that "[t]he amount of credit engendered by a guilty plea … depends on the circumstances of the case". At para. 22, the court observed that the reduction in sentence "is not simply a mathematical calculation". In *R. v. Nguyen*, 2013 ONCA 51, the court heard an appeal against sentence in which the trial judge said: "I … believe that anybody entering an early guilty plea should receive a reduction of 20 to 30 percent". Without adverse comment on this approach, the appeal court stated at paras. 9-10:

> In the next sentence, the trial judge continued: "The prosecution has asked for 15 months, and that is a number I cannot argue with." He then used 15 months as the foundation for the sentence he imposed. However, deductions of both 20 per cent and 30 per cent from 18 months would reduce the sentence below 15 months, to 14.4 and 12.6 months respectively. The mid-point of the trial judge's reduction for a guilty plea, 25 per cent, would generate a starting point of 13.5 months.
>
> In these circumstances, we regard an appropriate sentence as 10 months imprisonment, less credit of two months for pre-trial custody. The appeal is allowed accordingly.

Because the panel in *Nguyen* made no reference to prior Ontario Court of Appeal authority commenting unfavourably on use of a specific figure to describe the allowable reduction on account of a guilty plea, this may be a *per curiam* or outlier authority.

[22] In some jurisdictions, notably Scotland and some of the Australian states, appellate courts have articulated guidance as to the potential sentence reduction which might be permissibly assigned to the value of a plea of guilt.[26]

[23] Are there advantages/disadvantages to a sentencing regime depending upon whether or not it features specification guidelines quantifying sentence reduction in relation to the timing of a guilty plea? That subject will be discussed below in Part II in the context of other jurisdictions which have elected to address the matter by way of legislation.

A Word About Process

[24] While an accused person's decision to plead guilty may occur as soon as his or her first court appearance, the first reasonable opportunity is more likely after counsel has been retained and initial disclosure received from the prosecution. The decision to plead may also be the result of informal resolution discussions between defence counsel and a prosecutor or as a result of judicial input within the context of a judicial pretrial conference.[27]

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[26] In Scotland, s. 196(1) of the *Criminal Procedure (Scotland) Act 1995* requires a sentencing court to consider the stage at which a guilty plea has been entered without specifying any recommended reduction. In *Spence v. Her Majesty's Advocate*, [2007] HCJAC 64 (Scot), at para. 14, the court expressed the view that, in the instance of an early guilty plea, a reduction up to one third would not be inappropriate. For an overview of the Australian experience, see Elizabeth Wren and Lorana Bartels, "'Guilty, Your Honour': Recent Legislative Development on the Guilty Plea Discount and an Australian Capital Territory Case Study on its Operation", footnote 4 above; and "Guilty Plea/Commonwealth Sentencing Database", Aug. 19, 2015 (online-https://njca.com.au/sentencing/principles-practice/general_sentencing_principles/s16a_specific_relevant_factors/guilty-plea/).

[27] Pre-hearing conferences with a judge as authorized by s. 625.1 of the *Criminal Code*.

[25] Resolution discussions between counsel are routine in the processing of criminal cases:

> It is an accepted and entirely desirable practice for Crown and defence counsel to agree to a joint submission on sentence in exchange for a plea of guilty. Agreements of this nature are commonplace and vitally important to the well-being of our criminal justice system, as well as our justice system at large. Generally, such agreements are unexceptional and they are readily approved by trial judges without any difficulty.[28]

[26] Where Crown/defence resolution discussions result in counsel presenting a "joint submission" to a sentencing court recommending the fit sentence to be imposed, based in part on the accused's agreement to plead guilty, the judge should accept the submission unless it would bring the administration of justice into disrepute to do so.[29] Effectively then, the precise role of the accused's guilty plea (and its quantification) in the recommended sentence, occurs without the transparency of seeing its precise contribution to the result.

[27] It is an obligation of defence counsel before going to trial to inform his or her client respecting the sentence likely to be faced both after a contested trial and where a plea of guilty is to be tendered.[30] Rules of professional conduct for lawyers support this approach.[31]

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[28] *R. v. Anthony-Cook*, 2016 SCC 43, at para. 25.

[29] *Ibid.*, at paras. 29, 31-34, 47-48.

[30] In *R. v. Jones* (1994), 89 C.C.C. (3d) 353 (S.C.C.), Justice Gonthier of the Supreme Court of Canada observed at pp. 399-400, "It is the duty of counsel to make an accused aware of the possible sentence he will be facing as a result of being found guilty of particular crime".

[31] For example, in Ontario, the Law Society of Upper Canada Rules of Professional Conduct Ch. 5 'Relationship to The Administration of Justice Section 5.1 'The Lawyer as Advocate', ss. 5.1-7 and 5.1-8 "Agreement on Guilty Plea" provide that:

[28] It is fully anticipated that, in a judicial pretrial conference, the subject of the likely sentence upon a plea of guilt which might legitimately be expected will be discussed.[32]

> 5.1-7 Before a charge is laid or at any time after a charge is laid, a lawyer for an accused or potential accused may discuss with the prosecutor the possible disposition of the case, unless the client instructs otherwise.
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> 5.1-8 A lawyer for an accused or potential accused may enter into an agreement with the prosecutor about a guilty plea if, following investigation,
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> (a) the lawyer advises the client about the prospects for an acquittal or finding of guilt;
> (b) the lawyer advises the client of the implications and possible consequences of a guilty plea and particularly of the sentencing authority and discretion of the court, including the fact that the court is not bound by any agreement about a guilty plea;
> (c) the client voluntarily is prepared to admit the necessary factual and mental elements of the offence charged; and
> (d) the client voluntarily instructs the lawyer to enter into an agreement as to a guilty plea.

[32] See, for example, Rule 28(11) (12) of the *Rules Respecting Criminal Proceedings in the Superior Court of Justice (Ontario)*, governing the appropriate subject matter for criminal pretrials, with a judge and counsel participating, which provides:

> (11) The pre-trial conference judge shall inquiry about and discuss:
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> (a) the prosecutor's position on sentence before trial and after trial in the event of conviction, including the counts upon which pleas of guilty would be sought, the credit to be given for pre-sentence custody or release on stringent terms, any corollary orders sought upon conviction, and whether further proceedings would be taken upon conviction of any "serious personal injury offence" as defined in s. 752 of the Criminal Code; and
> (b) the position of counsel for each accused on sentence, both before and after trial, on the basis that the accused were to instruct counsel that she or he wished to plead guilty, and where guilt was proven after trial.
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> (12) The pretrial conference judge may express his or her opinion about the appropriateness of any proposed sentencing disposition based upon the circumstances disclosed at the pre-trial conference.

PART II

Examples of Legislative Schemes

[29] In England, sentencing courts are mandated by the *Criminal Justice Act 2003* to consider the fact of a guilty plea and *when* the offender indicated his or her preparedness to plead guilty:

> In determining what sentence to pass on an offender who has pleaded guilty to an offence in proceedings before that or another court, a court must take into account:
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> (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and
> (b) the circumstances in which this indication was given.[33]

[30] The Sentencing Council (formerly the Sentencing Guidelines Council) has in turn been authorized by statute to produce sentencing guidelines relating to a court's consideration of the value of a guilty plea to the sentencing process.[34]

[31] In England, the Sentencing Guidelines Council first issued its *Reduction in Sentence for a Guilty Plea Definitive Guideline* in 2004, with a revised reissue in

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[33] Section 144(1) of the *Act*.

[34] Section 120(3)(a) of the *Coroners and Justice Act 2009 (CJA)* states:

> (3) The Council must prepare-
> (a) sentencing guidelines about the discharge of a court's duty under section 144 of the *Criminal Justice Act 2003* (reduction in sentences for guilty pleas).

The Council's guidance is published in the form of "definitive guidelines". Section 125(1) of the *CJA* provides that:

> Sentencing guidelines: duty of court
> (1) Every court-
> (a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and
> (b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function,
> unless the court is satisfied that it would be contrary to the interests of justice to do so.

2007. The SGC Guideline, adopted by the appeal courts, has become a presumptive working guideline for sentencing courts.

[32] The Guideline's recommended approach is:

> (1) with reference to established sentence ranges for the crime, the court decides the sentence for the offence(s) taking into account aggravating and mitigating factors (including whether remorse is present)
>
> (2) the court selects the amount of the reduction on account of the guilty plea by reference to the sliding scale
>
> (3) the court applies the reduction
>
> (4) when pronouncing sentence the court should usually state what the sentence would have been if there had been no reduction as a result of the guilty plea.[35]

[33] The existing Guideline, one maintaining residual flexibility for a sentencer's exercise of discretion, sets out a sliding or progressively diminishing scale of recommended reduction in sentence depending on when the guilty plea was indicated:

> (1) up to ⅓ for a plea at the first reasonable opportunity,
>
> (2) up to ¼ after this point and prior to trial, and
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> (3) up to $^{1}/_{10}$ at the door of the trial court.

[35] SGC *Reduction in Sentence for a Guilty Plea – Definitive Guideline* (Rev. 2007), at pp. 4-5.

[34] In 2016, the Sentencing Council circulated consultation documents[36] with new draft guidelines seeking input on modification of the sentence reductions to $^{1}/_{3}$, $^{1}/_{5}$ and $^{1}/_{10}$ respectively. No guideline revision has been issued.

[35] The states of Western Australia[37] and South Australia[38] both have legislation directly speaking to the quantification of reduction in recognition of the timing of a guilty plea.

[36] Jamaica, in enacting the *Criminal Justice (Administration)(Amendment) Act, 2015,* proclaimed Nov. 30, 2015, has established a progressive scale of permissible sentence reduction for guilty pleas as part of a broader justice reform effort to reduce criminal case backlog:

> (1) up to 50% for an indication of a guilty plea on the first relevant date
>
> (2) up to 35% for a guilty plea after that date but before the trial commences
>
> (3) up to 15% after the trial has commenced but prior to verdict

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[36] *Reduction in Sentence for a Guilty Plea Guideline Consultation*, published February 11, 2016.

[37] In 2012, Western Australia enacted the *Sentencing Amendment Act 2012* (amending the *Sentencing Act 1995*) described as an effort to codify and encourage fast-track pleas of guilty (Explanatory Memorandum, Sentencing amendment Bill 2012 (WA)). Section 9AA states that a sentencing court may reduce a sentence in the circumstance of a guilty plea "to recognize the benefits to the State, any to any victim of or witness to the offence, resulting from the plea" with greater reduction (up to 25%) to occur "[t]he earlier in the proceedings the plea is made". Prior to 2012, sentence reductions for a guilty plea in Western Australia cases had, by caselaw precedents, ranged from 20 to 35% (*R. v. Cameron*, [2002] HCA 6, at paras. 6, 27, 43).

[38] The *South Australia, Criminal Law (Sentencing) Act 1988*, section 10B provides a sliding scale of recommended sentence reductions:

> (1) not more than 4 weeks after accused first appears before the court – reduction up to 40%
> (2) from the point of 4 weeks after the accused's first appearance before the court to a point not less than 4 weeks before trial – reduction up to 30%

(4) with respect to crimes for which a mandatory minimum sentence exists – a discount, as defined in s. 42D(3) of the *Act*, is available "without regard to the prescribed minimum penalty".

[37] Uniquely, the Jamaican legislation also delineates a list of factors relevant to how the reduction guidelines should be applied in individual cases.[39]

[38] Those jurisdictions which have opted for statutory guidance to sentencing courts, respecting sentence adjustment relating to the timing of a guilty plea, premise their regimes on a number of foundational supports including:

(1) the legislated guidelines are sufficiently prescriptive to influence sentencing practice while maintaining enough flexibility to permit discretion in individual cases

(2) the clarity provided by presumptive reductions for guilty pleas, depending on when such pleas are entered, not only encourages guilty pleas by the factually guilty but also manipulates offender behaviour to have the plea entered sooner rather than later

(3) the sliding-scale approach disentangles utilitarian factors relating to a guilty plea from mitigation of sentence based upon a finding of genuine remorse

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[39] *The Criminal Justice (Administration) (Amendment Act), 2015*, s. 42H:

> 42H. Pursuant to the provisions of this Part, in determining the percentage by which a sentence for an offence is to be reduced in respect of a guilty plea made by a defendant within a particular period referred to in 42D(2) and 42E(2), the Court shall have regard to the following facts namely –
>
> (a) whether the reduction of the sentence of the defendant would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of the defendant, that it would shock the public conscience;
> (b) the circumstances of the offence, including its impact on the victims;
> (c) any factors that are relevant to the defendant;
> (d) the circumstances surrounding the plea;
> (e) where the defendant has been charged with more than one offence, whether the defendant pleaded guilty to all of the offences;
> (f) whether the defendant has any previous convictions;
> (g) any other factors or principles the Court considers relevant.

(4) the statutory approach to describing available reductions for guilty pleas is seen to have real advantages including:

(a) delay and case backlog reduction

(b) benefits for victims and witnesses

(c) clarity, consistency, transparency and accessibility insofar as the credit to be given to offenders who plead guilty

(d) financial savings and efficient use of resources.

[39] There is a common understanding that a guilty plea incentivization scheme relates to *delay reduction* in the systemic processing of criminal cases.[40] The early removal of cases resolved by way of guilty pleas positively impacts on the ability to dispose of the rest of a court's inventory in a timely fashion.

[40] Consistent with the *Canadian Victims Bill of Rights*,[41] and well-recognized sensitivity to the role of victims in the criminal process, guilty pleas and early disposition by such pleas, contributes to timely closure for victims and generally *enhances respect for those victimized by crime*.[42]

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[40] *R. v. Cameron*, footnote 37 above, at para. 39 ("under the pressure of delayed hearings and ever increasing lists, Australian courts have indicated that they will regard a plea of guilty as a mitigating factor even when no remorse or contention is present"), at para. 47 ("helps clear the lists"), at para. 67 ("helps ease the congestion in the courts that delay the hearing of such trials as must be held"); *R. v. Caley*, footnote 5 above, at para. 4 (enables "other cases to be disposed of more expeditiously"); "Sentencing Indication and Specified Sentence Discounts: Final Report Summary & Recommendations", Victoria Sentencing Advisory Council (2007), at p. 1("removes the need for a trial and frees up the resources of the justice system for other matters").

[41] S.C. 2015, c. 13, s. 2.

[42] *R. v. Caley*, footnote 5 above, at para. 5 (in terms of stress for victims, the guilty plea process "normally reduces that impact substantially and thus brings significant benefit to the victim"); *Martin Committee Report*, footnote 2 above, at pp. 288-9 ("a victim of crime may be quite content with a

[41] Any guilty plea incentivization regime must however respect the presumption of innocence. No factually innocent person should be encouraged to plead guilty and give up his or her fundamental right to have the Crown prove guilt beyond a reasonable doubt. Accordingly, sentencing credit for guilty pleas must not become extortionate but rather be careful not to over-incentivize the occurrence of such pleas.[43]

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guilty plea by an accused that saves him or her the difficulty of testifying in an unfamiliar and public forum about an event that may have been quite traumatic"), at p. 309 ("The process of testifying at trial may be … inconvenient or distressing for the necessary witnesses"); *R. v. Cameron*, footnote 37 above, at para. 67 ("may also help the victims of crime to put their experience behind them; to receive vindication and support from their families and friends and possibly assistance from the community for injuries they have suffered"; "may spare the victim or the victim's family and friends the ordeal of having to give evidence"); "Swift and Sure Justice: The Government's Plans for Reform of the Criminal Justice System", UK Ministry of Justice White Paper (July 2012), at p. 12 ("Delay is also bad for the experience of witnesses, for whom the prospect of giving evidence causes inevitable anxiety"), at p. 31 ("an early guilty plea saves victims and witnesses from the experience of giving evidence and ensures they see justice done more swiftly"); "Reduction in Sentence for a Guilty Plea Guideline", footnote 4 above, at p. 9 (the sliding scale encouraging early guilty pleas designed "to encourage pleas as early in the process as possible to maximize the relief to victims and witnesses" and will "spare victims and witnesses from giving evidence and provide victims with the satisfaction of knowing that the offender has admitted guilt"), at p. 13 ("The benefits arising from a guilty plea are considerable, particularly in cases where there are vulnerable victims and witnesses. Indeed, most witnesses or potential witnesses find the whole process difficult"); "Sentence Indication and Specified Sentence Discounts …", footnote 40 above, at p. 339 ("a guilty plea spares complainants, witnesses and others with a personal stake in the case from emotional stress"; "Sparing witnesses the "ordeal" of giving evidence in a criminal case" including "the stress that may be caused to those" having the case "hanging over them"), at p. 341 ("reduce emotional stress for those with a stake in the case"), at p. 344 (speedier resolution minimizes "emotional stress caused to those who would have to endure a longer wait for cases to be resolved").

[43] "Reduction in Sentence for a Guilty Plea Guideline, footnote 4 above, at p. 13 (sliding scale of sentence reduction based on timing of guilty plea "does not undermine the presumption of innocence"); "Attitudes to guilty plea sentence reductions", UK Sentencing Council (May 2011), at p. 25 (greater than $^1/_3$ maximum reduction seen as "unacceptably excessive" with a danger of over incentivizing discounts"); *R. v. Cameron*, footnote 37 above, at para. 65 (known guilty plea reductions which "restrict excessive discounts for a plea of guilt that could indeed undermine the accusatorial feature of our criminal justice system"); Fiona Leverick, "Sentencing discounting for guilty pleas: an argument for certainty over discretion", [2014] Crim. L. Rev. 338, at pp. 340-346 ("the role of the sentence discount in inducing guilty pleas from innocent defendants is – at its present magnitude – not significant enough to outweigh the very real benefits that guilty pleas bring"). As discussed at footnote 31 above, defence counsel are ethically obliged not to participate in permitting a factually innocent client to plead guilty. Section 606(1.1) of the *Criminal Code* provides:

[42] In addition, over-quantification of the sentencing credit for guilty pleas, particularly early guilty pleas, risks public erosion of public confidence in the administration of criminal justice.[44]

[43] Statutory schemes for sentence reduction on a progressive basis linked to the timing of guilty pleas, though only presumptive in character with residual discretion in the sentencing court to do justice in individual cases, nevertheless provide *a measure of certainty or predictability* relating to the sentencing function.[45] With target reductions, not *ad hoc* discounts, resolution discussions become more meaningful as defence counsel takes instructions from his or her client, prosecutor-defence counsel consultations are advantaged, and judicial pre-trial conferences more focused in terms of plea discussions. Society secures

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(1.1) 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.

[44] Fiona Leverick, in her article, "Sentence discounting for guilty pleas: an argument for certainty over discretion", footnote 43 above, at pp. 340-346 makes the point that the credibility of the justice system could suffer if sentences passed do not adequately reflect the seriousness of the offences for which sentences are imposed – "if sizeable discounts are awarded too readily to those seen as undeserving, public confidence in the criminal justice system may decline").

[45] Leverick, "Sentence discounting …", footnote 43 above, at p. 346 ("It might also be said that a formal sentence discounting scheme is vastly preferable to informal plea bargaining. Sentence discounting is, at least, judicially sanctioned, relatively open and transparent and is applied as a matter of general principle, rather than being dependent on the negotiating skills of the defendant's legal representative"), at p. 343 ("If defendants cannot predict with confidence that a discount will be awarded or suspect that it will only be minimal, they may simply choose to take their chances at trial"),; "Swift and Sure Justice …, footnote 42 above, at pp. 31-2 ("An earlier guilty plea may also benefit the defendant as he or she will receive maximum credit available for it, will have greater certainty about his or her sentence, and may therefore be able to engage in activities aimed at reducing the chances of reoffending at an earlier stage"); "Reduction in sentence for a Guilty Plea Guideline…", footnote 4 above, at p. 6 (sentence reduction guidelines "improve clarity and consistency in the application of guilty plea reductions").

the certainty of a conviction where delay might otherwise make cases unprovable.[46] Offenders in relatively similar circumstances can expect to receive similar benefit from the reduction principle relating to the timing of a guilty plea. In addition, appellate review of the fitness of sentences imposed by trial courts may be improved by such statutory provisions.[47]

[44] The greater the number of cases resolved by guilty pleas, and the earlier in the process that such pleas are entered, the more significant are the benefits to the system in terms of financial savings and efficiencies in resource allocation, etc.[48]

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[46] See, for example: Wren and Bartels, "'Guilty, Your Honour'", footnote 4 above, at p. 363 (providing greater certainty in sentencing regimes contributes to securing "a conviction in cases where the complainant might otherwise withdraw and the case be abandoned").

[47] *R. v. Cameron*, footnote 37 above, at para. 70 ("Unless it [the amount of adjustment for a guilty plea] is known it may not be possible for an appeal court to compare the sentence imposed with other sentences for like offences or check disputed questions of parity").

[48] The earlier in the process guilty pleas are entered by accused persons in custody (who have not been admitted to bail), the bigger the reduction in the remand population of pre-trial holding facilities. See also: *Martin Committee Report*, footnote 2 above, at p. 288 (avoids "needless expense for the ... administration of justice, and thus the public"), at p. 309 ("Criminal prosecutions may require of the community considerable expense and inconvenience"): *R. v. Caley*, footnote 5 above, at para. 6 ("The expenditure in public time and money on trials and on preparation for trials is considerable "including further investigation and the assembly of lay and expert evidence" – "Such steps are necessary, but expensive"; "The public's limited resources can be concentrated on those cases where a trial will really be necessary, and such cases will not be delayed, often with accused persons in custody"); *R. v. Cameron*, footnote 37 above, at para. 66 (saving in costs "otherwise expended upon the provision of judicial and court facilities; prosecutorial operations; the supply of legal aid to accused persons; witness fees; and the fees paid, and inconvenience caused, to any jurors summoned to perform jury service"); Leverick, "Sentence discounting for guilty pleas…", footnote 43 above, at pp. 340-341 (guilty pleas tendered at early stages save money for the prosecution and the defence and "in Legal Aid expenditure" as well as "costs incurred by the witnesses (and their employers) if they have to attend trial"); Wren and Bartels, "'Guilty, Your Honour': Recent …", footnote 4 above, at p. 363 ("resources can be allocated more efficiently"); "Reduction in Sentence for a Guilty Plea Guideline", footnote 4 above, at p. 5 ("the police and the Crown prosecution service can apply their resources to the investigation and prosecution of other cases"); "Swift and Sure Justice …", footnote 42 above, at p. 31 ("The identification and earlier conclusion of guilty plea cases also saves work and money for the criminal justice system"), at p. 6 (with less delay, "those innocent of the crimes of which they are

CONCLUSION

[45] Delay reduction in the criminal courts, an incredibly complex subject, presents different challenges in different parts of Canada.

[46] Attitudinal and collaborative changes on the part of justice system participants, best practices and rules of court to reduce undue delay, resource enhancements, and the structural reform of legislation to support the dispensation of timely justice are all necessary to combat trial court delay.

[47] To the extent that global initiatives exist to reduce unreasonable-delay-to-trial, such as statutory guilty plea sentence reduction strategies, our national discussion can usefully study such initiatives.

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accused have to wait longer to clear their names"); Sean Doran and John D. Jackson, *The Judicial Role in Criminal Proceedings* (Portland, Oregon: Hart Publishing, 2000), at p. 86 ("… those who defer the decision until the last moment "waste" scarce resources which would otherwise be spent on "deserving" cases").