Guilty Plea Revocation, Constitutional Waiver, and the Charter: "A Guilty Plea Is Not A Trap"

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The entry of a guilty plea has significant constitutional ramifications. It relieves the Crown of its obligation to prove the elements of an offence beyond a reasonable doubt and constitutes a waiver by the accused of various rights including the right to put the Crown's case to the test of a trial, the right to confront Crown witnesses through cross-examination and the right to remain silent in relation to the determination of legal guilt. In light of these constitutional dimensions, the article considers an issue which has received little academic attention: the revocation of a guilty plea. The author assesses the existing Canadian common law revocation rule, which he finds to be incompatible with the values expressed in the Canadian Charter of Rights and Freedoms owing to its narrow scope, uncertainty, and discretionary nature. He also considers the rule developed within the American federal court system as a possible alternative to the Canadian approach. The author proposes a revised revocation rule which provides for the withdrawal of a guilty plea where the accused can prove on a balance of probabilities that the guilty plea was either uninformed or involuntary, and which further allows for revocation at any time prior to sentencing unless the Crown can demonstrate that significant prejudice would result from revocation. The author counters the view that the decision to deny the revocation of a guilty plea should be subject to deference on appeal.

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fédérales américaines en tant qu’alternative possible à l’approche canadienne actuelle. L’auteur propose une nouvelle règle qui autoriserait le retrait d’un plaidoyer de culpabilité dans les cas où l’accusé est en mesure d’établir, selon une balance de probabilité que sa décision de plaider coupable a été prise involontairement ou n’a pas été prise d’une façon éclairée. Un tel retrait serait possible à tout moment avant la condamnation à moins que la Couronne démontre qu’un préjudice important en résulterait. L’auteur rejette l’opinion que la décision de refuser le retrait d’un plaidoyer de culpabilité en première instance fasse l’objet de déférence judiciaire en appel.

Introduction

The presumption of innocence, which is perhaps the most fundamental of legal rights, places the burden on the Crown to prove all elements of a criminal offence beyond a reasonable doubt. Hence, s. 11(d) of the Canadian Charter of Rights and Freedoms guarantees to an accused “the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.” The corollary of the presumption of innocence is the accused’s right to remain silent at both the pre-trial and trial stages of a criminal prosecution. This right has been recognized as a principle of fundamental justice under s. 7 of the Charter, and one aspect of it, the right of non-compellability at trial, has been specifically protected by s. 11(c). Taken together, the presumption of innocence and the right to remain silent form the foundation of a criminal justice system in which, by constitutional dictate, the Crown is obliged to construct a convincing case against the accused, while the accused is under no obligation to assist the Crown. The accused is then entitled to sit back, secure in his or her silence, and put the Crown to its proof.

A plea of guilty is a formal acknowledgement by the accused of the validity of the charges faced, and constitutes an admission of the facts necessary to support a conviction. A guilty plea also has considerable constitutional significance, since it relieves the prosecution of the obligation underlying s. 11(d) of the Charter to prove the elements of the offence beyond a reasonable doubt. In effect, by pleading guilty, an accused is waiving the right to put the Crown’s case to the test of a trial,

and the right to remain silent in relation to the determination of guilt.\(^4\) For this reason, a guilty plea has been described, in the constitutional context, as “perhaps the most devastating waiver possible.”\(^5\) Despite the repercussions to the accused of a guilty plea, the great majority of convictions in the Canadian criminal justice system arise from guilty pleas.\(^6\) It is reasonable to infer that the system would become hopelessly overburdened if every accused pleaded not guilty and demanded a trial. Clearly, the constitutional waiver of legal rights through guilty pleas has social utility, if for no other reason than because such pleas reduce the costs of the justice system and minimize trial delays.\(^7\)

This article considers an important issue of pleading which, to date, has received little academic consideration in Canada: the revocation of a guilty plea. As will be demonstrated below, a Canadian common law rule was developed prior to the entrenchment of the Charter which, though allowing the revocation of a guilty plea, places the matter squarely within the discretion of the trial judge (or, more accurately, the judge hearing the motion to withdraw a guilty plea). Keeping in mind that “the Charter has fundamentally changed our legal landscape”, and that “[a] legal rule relevant to a fundamental right may be too narrow to be reconciled with the philosophy and approach of the Charter”,\(^8\) this article will analyze the common law guilty plea revocation rule in light of modern Charter values. The analysis will also draw on guilty plea revocation jurisprudence from the United States. The American federal experience not only demonstrates some of the inadequacies of the extant Canadian common law position, but also has its own deficiencies which Canadian law should strive to avoid. In conclusion, the article advances several proposals for the reformulation of rules for guilty plea revocation.

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6. “It is well to recall in any discussion of sentencing procedures that the vast majority of offenders plead guilty. Canadian figures are not readily available but American statistics suggest about 85 percent of the criminal defendants plead guilty or nolo contendere. . . . Sentencing is, in respect of most offenders, the only significant decision the criminal justice system is called upon to make.” R. v. Gardiner, [1982] 2 S.C.R. 368 at 414, 140 D.L.R. (3d) 612.


8. Hebert, supra note 2 at 164, per McLachlin J.
I. Pleading and the Rationale Underlying Revocation

The severe consequences of a guilty plea are at the root of the rule that such a plea is valid only if it is informed and is entered freely and unequivocally. In some cases, the deficiencies of a guilty plea will be obvious. For example, a plea of “guilty . . . at least that’s what my lawyer told me to say” or “guilty . . . I guess” are clearly unacceptable because they lack the requisite degree of certainty and voluntariness required by the law. In other cases, uncertainty, involuntariness, or lack of information may underlie an explicit plea of guilt. Although Canadian judges are under no compulsory duty to inquire into the validity of a guilty plea according to the “voluntary”, “unequivocal”, and “informed” criteria (as are their American counterparts), they are well-advised, particularly where an accused is unrepresented by counsel, to engage in a searching inquiry to ensure that an accused understands the charges and the ramifications of a guilty plea, and intends freely to enter the plea. One could conclude that where such an inquiry has occurred and an accused nevertheless maintains the guilty plea, then the plea should be binding. However, the reality of the pleading process demonstrates why guilty pleas should be approached with caution.

It is a well-known fact that individuals who intentionally commit criminal acts (i.e. the “morally guilty”) often plead not guilty. This is their

9. In the case of R. v. Lamothe (1908), 15 C.C.C. 61 at 66-7 (Ont. C.A.) [hereinafter Lamothe], the accused was charged with being a “frequenter of a house of ill-fame”. He was the landlord of the house in question, and claimed that he was merely on the premises to collect rent. When asked to plead, he responded sarcastically, “I am guilty, if you call going to collect rent guilty.” The Court of Appeal concluded that the trial judge erred in accepting such a plea.


11. United States, Federal Rules of Criminal Procedure (1975), r. 11, requires trial judges to address the defendant “personally”, and to ascertain that a plea of guilty has been made “voluntarily with understanding of the nature of the charge and the consequences of the plea.” See infra notes 88-89 and accompanying text, and P.E. Gartner, Jr., “Withdrawal of Guilty Pleas in the Federal Courts Prior to Sentencing” (1975) 27 Baylor L. Rev. 793 at 795.

12. R. v. Brosseau, [1969] S.C.R. 181 at 190, 2 D.L.R. (3d) 139 [hereinafter Brosseau cited to S.C.R.], per Cartwright C.J.: “it cannot be said that where . . . an accused is represented by counsel and tenders a plea of guilty to non-capital murder, the trial Judge before accepting it is bound, as a matter of law, to interrogate the accused.” Compare to Spence J., dissenting, at 190: “I am of the opinion that it is the duty of the trial tribunal . . . to satisfy himself that the appellant understands the nature of the charge and the effect of the plea before he is entitled to accept a plea of guilty.” Moreover, in Adgey, supra note 5 at 442-43, Laskin J. (dissenting) found certain aspects of the Brosseau decision to be unacceptable, with the implication that he preferred the approach of Spence J. The Supreme Court of Canada has not revisited this issue in the Charter era, but the Brosseau majority has been followed by provincial appellate courts. See R. v. Newman (1993), 12 O.R. (3d) 481 at 488, 79 C.C.C. (3d) 394 (C.A.); R. v. Clermont (1996), 150 N.S.R. (2d) 264 at 270, 436 A.P.R. 264 (C.A.).
right, of course, as our Constitution presumes their innocence, the burden of proof rests with the Crown to prove otherwise, and there is no legal requirement that they should facilitate or expedite their prosecution. A distinction between “moral guilt” and “legal guilt” is simple to state: those who are morally guilty have committed a crime (and only they know for certain of their moral guilt), whereas those who are legally guilty have been proven to be guilty by the Crown in a criminal trial. Hence, while one may be morally guilty of an offence, one becomes legally guilty only when one is successfully prosecuted for the offence. While our criminal justice system seeks to deter every potential criminal, the morally and legally guilty alike, it only punishes the legally guilty. This is an inevitable result of the fact that even the morally guilty are presumed innocent unless and until a guilty verdict is reached, and sentence may be imposed only upon those found guilty by a court of law.

Once one appreciates the moral guilt/legal guilt distinction, one can see how a guilty plea effectively converts moral guilt into legal guilt. At the time of pleading, the Crown has yet to present its case. A plea of not guilty triggers the trial process, where the Crown may or may not prove its case. If the Crown’s evidence establishes guilt beyond a reasonable doubt, a morally guilty accused becomes legally guilty.\(^3\) A plea of guilty relieves the Crown of its burden. The trial is unnecessary and legal guilt results out of the actions of the accused. It is thus hardly surprising that an accused might have second thoughts subsequent to the making of the guilty plea. An accused might reassess the advice received from his or her lawyer, family, or friends to plead guilty, and decide that the advice was flawed; subsequent events might bolster the accused’s confidence of prevailing in a trial; or the accused might simply regret being the author of his or her own doom. In all these cases, such an accused might wish to be returned to his or her pre-pleading status, in order to exercise the right to test the Crown’s case in a trial.

One could, in denying revocation, take some solace in binding accused persons to guilty pleas where they are morally guilty anyway. However, this is simplistic reasoning because the morally guilty may prove to be either legally guilty or legally not guilty,\(^4\) depending on the strength of

\(^{13}\) Leaving aside those cases where innocent (i.e. morally blameless) persons are found guilty.

\(^{14}\) I use the term “legally not guilty” to include the “morally blameless”, who did nothing wrong (and therefore should not be found legally guilty in a criminal trial), and those who, despite their moral guilt, would nevertheless be able to secure an acquittal at trial. The latter group would include those who are able to benefit from a reasonable doubt at trial, and those who achieve a “jury nullification” (i.e. a jury acquittal on sympathetic grounds, or for another reason unrelated to whether or not they committed the crime in question).
the Crown's case against them. It is their legal status which matters under our criminal justice system. Moreover, just as the morally guilty may plead not guilty, it is conceivable that the morally blameless\textsuperscript{15} may plead guilty.\textsuperscript{16} Consider the systemic pressures within the criminal justice system which promote guilty pleas. First, given the difficulties of predicting the outcome of a criminal trial, an accused may prefer to enter into a plea bargain with the Crown rather than risk a guilty verdict.\textsuperscript{17} As a quid pro quo for relieving it of having to proceed to trial,\textsuperscript{18} the Crown will generally be willing to offer some benefit to an accused, for example, by allowing him or her to plead guilty to a lesser offence, or by recommending a lighter sentence to the trial judge, or both. Such considerations may not be available if the accused insists on a trial. Thus, a plea of not guilty presents an accused with a risk-laden situation, while a guilty plea may at least allow the accused to minimize the sentence.\textsuperscript{19} Secondly, there have been recent suggestions that the police, the prosecution, and defence lawyers operate under assumptions of guilt and actively promote pleas of guilt.\textsuperscript{20} The police "charge up" to the highest category of offence and include the greatest number of counts possible, "in order

\textsuperscript{15} My use of the term "morally blameless" is explained \textit{ibid.}

\textsuperscript{16} A recent British Royal Commission study indicates that criminal defence barristers are concerned that "innocent" accuseds may be pleading guilty. Over the course of a two-week study period, fifty-three defence barristers stated that they had clients who pleaded guilty despite being innocent: U.K., Royal Commission on Criminal Justice, \textit{The Crown Court Study} (Research Study No. 19) by M. Zander \& P. Henderson (London: H.M.S.O., 1993); M. Zander, "Tom Sergeant Memorial Lecture: The Royal Commission's Crown Court Survey" (11 December 1992) New L.J. 1730; M. Zander, "Royal Commission's Crown Court Study: The 'Innocent' (?) Who Plead Guilty" (January 22, 1993) New L.J. 85.

\textsuperscript{17} A. Ashworth, \textit{Sentencing and Penal Policy} (London: Weidenfeld \& Nicolson, 1983) at 312: "The injustice of plea bargaining arises when the pressure is so great . . . as to induce a defendant to change his plea even though he believes that he is innocent, or that he has an arguable point of law or question of degree."

\textsuperscript{18} From the Crown's perspective, it makes sense to accord some concession to an accused who pleads guilty because, among other reasons, costs and delays are reduced or because witnesses (including complainants) are saved from the trauma of having to testify.

\textsuperscript{19} In \textit{North Carolina v. Alford}, 91 S.Ct. 160 at 167 (1970), the United States Supreme Court (per White J.) accepted that accuseds "may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if [they are] unwilling or unable to admit . . . participation in the acts constituting the crime." An accused may have "nothing to gain by a trial and much to gain by pleading [guilty]." See also, Note, "Plea Bargaining and the Transformation of the Criminal Process" (1977) 90 Harvard L. Rev. 564 at 573 [hereinafter "Plea Bargaining"]: "The practice of exchanging sentencing concessions for guilty pleas creates an incentive for defendants to plead guilty whenever there is a significant risk of conviction at trial", and at 574: "While plea bargaining thus reduces the inaccuracies and costs of the traditional model, it also presents a danger that innocent defendants will be tempted to plead guilty."

\textsuperscript{20} R.V. Ericson, "The Decline of Innocence" (1994) 28 U.B.C. L. Rev. 367 at 368.
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...to create a position in which charge reductions and charge withdrawals can be offered in exchange for guilty pleas." 21 Defence and prosecution lawyers are usually under tremendous work pressures, and may prefer to negotiate a plea bargain than engage in a lengthy or complex trial. 22 Prosecutors may be tempted to press for a plea bargain in order to secure a conviction in cases where, for technical, constitutional or other reasons, they doubt their ability to prove legal guilt. 23 These factors conspire to create a climate in which pressure may be exerted on an accused to plead guilty. Third, criminal trials can be lengthy and expensive affairs in which an accused can be subject to intense public scrutiny. An accused might choose to avoid all of this by entering a plea of guilty ab initio, and thereby escaping the ordeal of a trial. 24

Imagine a situation in which an accused, inexperienced with the criminal justice system and having been charged with the most serious crime possible in the circumstances, is faced with the prospects of a costly trial, adverse publicity and a lengthy prison sentence if convicted. It is hardly surprising that even a morally blameless accused might choose to accept a plea bargain, particularly where defence counsel (for whatever reason) is urging the merits of a guilty plea, such as a lighter sentence. In short, facts irrelevant to guilt (either in the moral or legal sense) may influence an accused to plead guilty despite being legally not guilty of the crime to which the plea is directed.

While such considerations could justify a liberal approach to guilty plea revocation prior to sentencing, and perhaps a similarly generous approach even after sentencing, the common law in both Canada and the United States appears to have adopted a more restrictive position. Indeed, while the law in both countries is supposedly generous in relation to pre-sentencing guilty plea revocation, the application of that law lies within the discretion of the judge hearing the revocation application. Judges have demonstrated considerable reluctance to grant guilty plea revocation motions, and appellate courts have resisted interfering with the exercise of judicial discretion. As will be argued below, the extant Canadian legal position on the issue of guilty plea revocation cannot be reconciled with the values enshrined in the Charter, which favour a

21. Ibid. at 369-70.
22. Ibid. at 370.
cautious approach to guilty pleas, a generous approach to revocation, and a more rigorous standard of appellate review. First, however, it is necessary to consider the law as it has developed in both Canada and the United States.

II. The Canadian Common Law Rule Governing Guilty Plea Revocation

The origins of the Canadian common law rule governing guilty plea revocation lie in the early English law on the issue. Two English cases are of particular note. In *R. v. Sell*, the accused was charged with theft, entered a plea of guilty, and was sentenced. He then moved to withdraw his plea. The Court concluded, after considerable consultation, that the motion could not be granted since a sentence had already been pronounced. However, the Court noted that if sentencing had not yet occurred, the accused would have been allowed to retract his plea because "there is never any difficulty" in granting such a motion prior to sentencing. This liberal approach to pre-sentencing revocation was followed in the next reported case on the issue, *R. v. Clouter*. There, the accused Clouter pleaded guilty to charges of uttering a forged document. He later sought withdrawal of the plea on the basis that he had misunderstood the nature of the charge and had not known that the document in question was forged. Bramwell J. allowed the withdrawal because the accused had sworn that the plea was entered by mistake. A King's Bench decision of 1902, *R. v. Plummer*, thus summed-up the English position as it stood at the turn of the century: a court has the power to allow withdrawal of a guilty plea "at any time before, though not after, judgment."

The early English cases leave one with the impression that guilty plea withdrawal, where requested prior to sentencing, was permitted routinely. This same impression arises from the early Canadian case law. In *R. v. Guay*, the Court cited the English case law, and then observed: "[i]n the District of Montreal, it is customary to allow the accused to change a plea of guilty to a plea of not guilty at any time before he is sentenced." However, the same Court then held that the decision

29. [1902] 2 K.B. 339 at 347.
31. (1914), 23 C.C.C. 243 at 245 (Que. S.C.).
whether or not to allow guilty plea revocation rested exclusively within the discretion of the trial judge. The Court went so far as to state that, "the exercise of such discretion cannot be reviewed on a case reserved." This position was then adopted, with striking results, in *R. v. Nelson*, where the accused sought to change his guilty plea on the basis that he was being framed by two other prisoners, and pleaded guilty because he thought his conviction was inevitable. The trial judge denied revocation. On appeal, Walsh J.A. held that the decision to deny revocation was within the discretion of the trial judge, and "[a]s long as he exercised a sound legal discretion, I do not think that I can, or that I should, interfere with his exercise of it." Walsh J.A. then added a comment which demonstrates the tension between a liberal revocation rule, and the placing of decisions made according to that rule within the discretion of trial judges. He wrote:

I feel quite at liberty to say that if I had been in the magistrate’s place I would have allowed this plea to be changed even if I had had no doubt of the guilt of the accused. I think that [this] is what I would do in any case in which the application was made in proper time and no prejudice had resulted to the Crown from the original plea, such, for instance, as the dispersal of its witnesses, no matter how satisfied I might be of the guilt of the accused. . . . To say that because I would have done otherwise therefore the magistrate did wrong, would be to substitute my discretion for his, and that I cannot do.

By taking this position, Walsh J.A. was effectively endorsing the application by trial judges of potentially divergent approaches to guilty plea revocation. Hence, an accused in exactly the same position as Nelson would have been allowed to revoke his plea if the trial judge had shared Walsh J.A.'s view, as opposed to that of Nelson's trial judge.

The position asserted by Walsh J.A. in *Nelson* remains consistent with the law in Canada even today: guilty plea revocation is permissible, but is a matter within the discretion of the trial judge. There is still little guidance as to the factors which should inform the exercise of this discretion. The Supreme Court of Canada has had three occasions in the past forty years to consider guilty plea revocation, but has failed in each case to articulate a clear rule or set of factors governing such revocation. Thus, in *R. v. Thibodeau*, the Court confirmed that, "the decision

34. *Ibid.* at 77.
36. This is also the common law position in both England and Australia. See *S. (an infant) v. Manchester City Recorder and Others*, [1969] 3 All E.R. 1230 (H.L.); Shimon Amuzig Sagiv (1986), 22 A. Crim. R. 73 (N.S.W.C.A.).
whether or not permission to withdraw a plea of guilty should be given rests in the discretion of the Judge to whom the application for such permission is made and that this discretion, if exercised judicially, will not be lightly interfered with"; and further held that a revoked guilty plea could not be used as evidence against the accused at trial. Five years later, in *R. v. Bamsey*, the Court (per Ritchie J.) relied on *Thibodeau* in concluding that it was only permissible for an accused to change his guilty plea, "if he can satisfy [the Court] that there are valid grounds for his being permitted to do so."

Finally, in *Adgey*, the appellant had pleaded guilty to charges of false pretences, fraud, and break, enter and theft. After his pleas were entered, he offered an explanation which gave rise to the possibility that he could have mounted a defence to at least the break, enter and theft charge. The question considered by the Supreme Court was whether the trial judge erred in accepting the guilty plea. For the majority, Dickson J. (as he then was) noted that because the appellant had been represented by counsel, there was no obligation on the trial judge to inquire into the guilty pleas prior to accepting them (i.e. the Brosseau rule). Where, however, a trial judge makes such an inquiry, then, "the judge may, in his discretion, direct that a plea of not guilty be entered or permit the accused to withdraw his original plea or enter a new one." Dickson J. then repeated the test from *Bamsey*, observing that a guilty plea may be changed if the accused has raised a "valid ground" for doing so. He resisted the opportunity to elaborate upon the revocation rule, stating that, "[i]t would be unwise to attempt to define all that which might be embraced within the phrase

38. Ibid. at 654.
39. Ibid. at 655.
41. *Bamsey*, ibid. at 298. Note that *Bamsey* had been convicted at trial on the basis of his own guilty plea, but had successfully appealed the conviction to the County Court, which then ordered a new trial at which Bamsey entered a plea of not guilty. Ritchie J., at 301, concluded that the County Court erred in permitting Bamsey "to plead 'not guilty' without any reason being given to support his change of plea." By appealing his conviction, as opposed to moving to revoke his guilty plea, Bamsey was able to change his plea without having to meet the requirements of the common law revocation rule. This constituted, "playing fast and loose with the administration of justice", at 300.
42. Supra note 5.
43. Ibid. at 429.
44. Ibid. at 430. Dickson J. added that, "[t]he discretion exercised by the trial judge is one which 'if exercised judicially, will not be lightly interfered with.' per Cartwright J. (as he then was) in *Thibodeau v. The Queen*. . . ."
‘valid grounds’.”

However, his resolution of the case provides some clues as to the grounds which he had in mind as being “valid”. In the case of the false pretences and fraud charges, Dickson J. found that the accused provided no explanation which could have afforded a defence at trial.

In the case of the break, enter and theft charge, the accused advanced an explanation consistent with “colour of right”. However, in pleading guilty the accused “admits having done that with which he is charged” and therefore “admitted he broke and entered” the premises in question. After examining the available evidence, Dickson J. concluded that, “it is difficult to discern any foundation upon which a claim to colour of right could properly rest.”

In dissent, Laskin J. (as he then was, for himself and Spence J.) found that there was sufficient doubt in relation to the mens rea element of the break, enter and theft charge to justify changing the plea from guilty to not guilty.

Laskin J. did not comment specifically on the revocation rule, because his judgment was centred on the failure of the trial judge to make adequate inquiries prior to accepting the accused’s plea (a position which required him to seek the overturning of Brosseau). In fact, he opined that resort to guilty plea revocation would occur less frequently if trial judges made appropriate inquiries in advance of pleading.

He nevertheless gave some indications that in the absence of inquiry, guilty plea revocation should be allowed liberally. First, his reasons were based on the premise that a guilty plea is a serious waiver of legal rights, including the right of non-compellability, the right to remain silent, and the right to offer full answer and defence. For this reason, “[i]t is important . . . that the plea be made voluntarily and upon a full understanding of the nature of the charge and its consequences and that it be unequivocal.”

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45. Ibid. at 431. See, however, the list of grounds offered by Cullen D.C.J. in R. v. Barr (1967), 64 W.W.R. 57 at 58 (Alta. Dist. Ct.), aff’d 64 W.W.R. 384n (C.A.). See also, Law Reform Commission of Canada, Double Jeopardy, Pleas, and Verdicts (Working Paper 63) (Ottawa: The Commission, 1991) Recommendation 24 at 85. The Commission offers four grounds justifying guilty plea revocation: (a) the accused had no prior notice of the prosecutor’s intention to make a dangerous offender application; (b) the plea was entered as a result of an improper inducement or without a proper understanding that the accused could choose to plead not guilty to the charge; (c) the accused did not properly understand the nature of the charge or the effects of pleading guilty to it; or (d) the accused did not know the mandatory sentence, if any, for the crime charged.
46. Adgey, supra note 5 at 431-32.
47. Ibid. at 433.
48. Ibid.
49. Ibid. at 445.
50. Ibid. at 444.
51. Ibid. at 440.
52. Ibid.
ondly, in what could be seen as a veiled criticism of Dickson J.’s consideration of the merits of the “colour of right” defence, Laskin J. stated that the issue is whether the existence of conflicts between the Crown’s allegations and the accused’s explanation leads one to doubt “the propriety of the plea of guilty in terms of the accused’s understanding and appreciation of it and its unequivocal character.”

Presumably, judges should not hold a trial to determine the merits of an accused’s explanation, in order to decide whether a guilty plea should stand.

Indeed, the fact that Adgey could have mounted a “colour of right” defence, but for some reason was unaware of it at the time of pleading, seems sufficient to justify the revocation of his guilty plea. Dickson J. would have rejected the plea withdrawal not because Adgey’s plea was informed, voluntary and unequivocal, but instead because, in his view, the potential defence lacked merit. Dickson J. effectively tried and convicted Adgey on the break, enter and theft charge in order to reject his appeal.

In light of the Supreme Court of Canada jurisprudence on the issue of guilty plea revocation, the following principles can be identified:

1) Revocation of a guilty plea prior to sentencing is permissible (Thibodeau, Bamsey, Adgey);

2) A revoked guilty plea may not be used as evidence against the accused in the subsequent trial (Thibodeau);

3) The decision whether or not permission should be given to revoke a plea of guilty rests within the discretion of the judge to whom the application for such permission is made, and this discretion, if exercised judicially, will not be lightly interfered with on appeal (Thibodeau, Bamsey, Adgey);

4) Accuseds have no right to withdraw guilty pleas. An accused must advance a “valid ground” to justify a guilty plea revocation. A simple request to revoke a guilty plea and proceed to trial is insufficient to justify revocation (Bamsey);

5) It would be unwise to list exhaustively the valid grounds which would justify guilty plea revocation, as this would fetter the discretion of the judge to whom a revocation application is made (Adgey);

6) Valid grounds for guilty plea revocation include: the accused never intended to admit to a fact which is an essential ingredient of the offence or has admitted facts which do not amount to an offence; the accused misapprehended the effect of the guilty plea; the accused never intended to plead guilty (Adgey);

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53. Ibid. at 444.
54. Ibid.
7) The existence of a defence on the merits may also be a valid ground for sentencing. However, the mere assertion by the accused of the existence of a defence is probably insufficient to warrant revocation (Adgey).

Although there have been some refinements to the revocation rule since Nelson, the basic proposition that revocation may be allowed at the discretion of the trial judge remains the law in Canada. The open-ended nature of the rule has resulted in inconsistencies and controversy in the jurisprudence. A discussion of two cases with similar facts but different results will illustrate this point.

It is generally accepted that where an accused has been pressured by counsel to plead guilty, then this may be a valid ground to justify withdrawal of the plea if it leads to the conclusion that the plea was not sufficiently voluntary. In R. v. Lamoureux, the accused pleaded guilty to a charge of theft. Six weeks later, at the commencement of the sentencing hearing, Lamoureux's counsel moved to vacate the plea. Counsel told the trial judge that he had pressured Lamoureux to plead guilty, despite Lamoureux's protestations of innocence, because the evidence supported a conviction and a guilty plea was likely to lead to a lighter sentence. The trial judge, in exercising his discretion, nevertheless concluded that the plea was voluntary, rejected the motion, and sentenced Lamoureux. In the Court of Appeal, Rothman J.A. found that the trial judge had erred. Though noting that "this Court should not lightly interfere with the decision of the trial judge", Rothman J.A. was troubled by the fact that the evidence of both Lamoureux and his counsel "indicate[d] that the plea of guilty was induced by pressure from counsel and that the accused did not wish to plead guilty." Rothman J.A.

55. The Law Reform Commission of Canada, supra note 45 at 85, took the view that legal reform of the revocation rule was required in order "to provide a more structured series of rules . . . and thus to promote the uniformity and fairness of this area of the law." R. v. Hansen (1977), 37 C.C.C. (2d) 371 (Man. C.A.) [hereinafter Hansen] demonstrates the need for such reform. There, the Manitoba Court of Appeal split 3-2 on the issue of whether an accused should be entitled to revoke a guilty plea where the Crown misled him about the potential for the laying of a more serious charge in the absence of a guilty plea. The majority, per Matas J.A. at 374-75, emphasized the unfairness of holding the accused to his plea in such circumstances, particularly because a guilty plea has "serious connotations." The dissent, per Guy J.A. at 373, would have bound the accused to his plea due to the need for "finality in legal proceedings". As the analysis below will demonstrate, the dissenting position in Hansen is untenable in the Charter era because an accused's constitutional rights are of greater weight than the value of "finality". Even prior to the entrenchment of the Charter, the dissenting position could have been criticized for its harsh results.

57. Ibid. at 373.
58. Ibid.
emphasized the importance to an accused of effective counsel and the right to counsel protected by s. 10(b) of the Charter, and stated the following as the controlling proposition:

Now, counsel has, not only a right, but a duty to advise an accused as to the weaknesses of his case, as to the probable outcome of the trial and as to the nature and consequences of a plea. Sometimes that advice must be firmly given. But counsel certainly has no right to pressure an accused into anything, least of all into pleading guilty. A plea of guilty must always be a free and voluntary act by the accused himself, untainted by any threats or promises to induce the accused to admit that he committed the offence when he does not wish or intend to do so.

Rothman J.A. then considered the fact that the evidence available supported the accused’s guilt. However, in contrast to Dickson J.’s approach in Adgey, this was deemed irrelevant: “the issue, at this stage, is whether or not he voluntarily offered the plea of guilty. If he did not, then it cannot stand, however guilty he may ultimately be proved to be at his trial.”

Lamoureux contrasts sharply with Leo, a case in which the pressure exerted by counsel was at least as egregious as that which occurred in Lamoureux. There, Leo pleaded guilty to charges of “unlawfully obtaining or attempting to obtain, for consideration, the sexual services of a person under the age of 18 years old.” He then retained new counsel, and at the start of the sentencing hearing moved to vacate the guilty plea. The lawyer who had represented Leo at the time of his plea testified at the motion. His evidence indicated that Leo had been reluctant to plead guilty from the time of their first meeting, that he had gone over the Crown allegations with Leo only briefly, and that he had never reviewed the police report and the Crown’s alleged facts and particulars with Leo. Nevertheless, he pressed Leo to plead guilty because he “felt very strongly” that this was advisable. Leo finally agreed just prior to entering the courtroom, and the lawyer then entered the guilty plea on his behalf. However, after the Crown prosecutor read out the alleged facts and particulars, Leo refused to admit them because of significant errors.

59. Ibid. at 374.
60. Ibid. at 373.
61. Ibid. at 374-75.
62. Supra note 24 (144 A.R., Prov. Ct.).
63. Ibid. at 100. Leo’s counsel testified that, “Leo had somewhat ‘sat on the fence’ throughout the time that the file was open as to what he was going to do.”
64. Ibid. at 100.
65. Ibid. at 101. It appears that his reasons included concerns about the adverse publicity Leo would face from a trial.
A "heated" discussion ensued outside the courtroom, in which the lawyer advised Leo "in very strong terms" that a failure to maintain his guilty plea could have serious ramifications, in particular that new allegations and charges might be made against him. The lawyer also advised Leo that if he planned to plead not guilty, then he should obtain new counsel. Leo testified that he felt under great pressure from the lawyer to plead guilty both before and during the pleading proceedings, and claimed that his uncertainty frustrated and angered the lawyer, leading to incidents of yelling. Because of his lawyer's forcefulness and anger, Leo felt he "had no choice" and "had reached the point of no return." It was for this reason that he agreed to stick with his guilty plea. However, within days of making the plea, he acquired new counsel for the purposes of seeking revocation.

The testimony at the revocation motion leaves one with the distinct impression that Leo's lawyer was operating under a "presumption of guilt" (as discussed in Part II above). Leo was inexperienced with the criminal justice system, which made him particularly susceptible to pressure from his counsel. In any event, the evidence is clear that he was very reluctant to plead guilty both at the time of initial pleading, and at the time when he was called upon to admit the Crown's facts and particulars. Given this, and in light of Lamoureux, one would have thought that revocation of Leo's guilty plea would have been permitted. However, the trial judge, Fradsham P.C.J., exercised his discretion to deny the motion, even relying on Lamoureux to support the proposition that it is appropriate for lawyers to provide firm advice to clients to plead guilty. The learned judge concluded that Leo's lawyer had given "strong" advice, but had not pressured him, and that the lawyer had represented him compe-

66. Ibid. at 100.
67. Ibid. at 101. Leo's counsel testified that, "I said to him at one point that I thought he should have a trial and he should have a trial with somebody else as his lawyer."
68. Ibid. at 104.
69. Ibid.
70. The Leo case could well be a "textbook example" of the phenomenon discussed by Ericson in his article "The Decline of Innocence", supra note 20. According to Leo's testimony at the revocation motion, his lawyer advised him to plead guilty to take advantage of conditions which could limit his sentence: "today we got all the favourable elements. We got a very, very reasonable judge, we got a soft Crown prosecutor, and we got a good psychiatric report and let's go for it": Leo, supra note 24 at 103.
71. Leo testified that, upon learning of the Crown's alleged facts and particulars, he told the lawyer, "there's something very wrong here. I mean, Christ, how can I - I plead to something I - I may not even have done. Those things are totally untrue": ibid. at 104.
72. Ibid. at 106.
tently. With respect, these findings are difficult to reconcile with the evidence.

Leo appealed unsuccessfully to the Court of Appeal, which concluded that the revocation decision was within the discretion of Fradsham P.C.J., and thus refused to overturn his decision. An application for leave to appeal to the Supreme Court of Canada was also unsuccessful.

\textit{Lamoureux} and \textit{Leo} are substantially similar cases, for the following reasons: (1) in each case, the accused was reluctant to plead guilty and did so at the insistence of his lawyer; (2) both accuseds then sought to revoke the plea at the first possible opportunity, in order to have a trial and put the Crown to its proof; (3) in each case, the evidence suggested that the accused would probably be found guilty at trial; and (4) the trial judges in both cases exercised their discretion to deny revocation, concluding that the pleas were entered voluntarily. The real difference between the two cases lies in the approaches of the appellate courts. In \textit{Lamoureux}, the Québec Court of Appeal concluded that the trial judge erred in exercising his discretion, because the facts did not support the voluntariness of the plea; in \textit{Leo} the Alberta Court of Appeal deferred to the trial judge’s discretionary decision. If one subscribes to the view that the decision whether or not to permit revocation should not be overturned easily by an appellate court, then \textit{Leo}, and not \textit{Lamoureux}, may have been decided correctly. If, however, one prefers a more stringent standard of appellate review, in order to reflect the significance of a guilty plea and the constitutional rights at stake, then the result in \textit{Lamoureux} is preferable.

Leaving aside the issue of the standard of appellate review, the two cases also raise the issue of what the test should be for guilty plea revocation. In cases where an accused reluctantly pleads guilty (perhaps because of pressure to do so from counsel), yet acts quickly and with sincerity to revoke the plea, and there is no evidence that the Crown’s case has been prejudiced by the guilty plea, one must ask what values or objectives are served by refusing the motion to revoke the guilty plea? Should the guilty plea be enforced in order to avoid a costly trial (i.e. an efficiency objective), or to ensure finality to legal proceedings? Should

\begin{itemize}
  \item \textit{Ibid.} at 107.
  \item The Court of Appeal held as follows:
    
    When the appellant sought to withdraw his plea, he urged Fradsham, P.C.J., to consider his evidence as well as that of his former Lawyer, Mr. Lord. The Judge did so. After hearing that evidence, Fradsham, P.C.J., then concluded the appellant’s plea of guilty was not forced by any improper pressure by his conclusion.
    
    In the result, we can find no error by Fradsham P.C.J.
    
  \item Hansen, \textit{supra} note 55, per Guy J.A.
\end{itemize}
it be enforced as a warning to future defendants to take their pleading more seriously (i.e., a deterrence objective)? Or, should the morally guilty (as one might conclude of Leo and Lamoureux) be bound to their guilty pleas regardless of their legal guilt? Neither of the trial judges in Leo and Lamoureux explicitly considered such questions. Moreover, neither of the judges recognized (or expressed concern about) the fact that a guilty plea is a significant waiver of constitutional rights, with serious ramifications for the liberty of an accused. This factor could surely support a liberal approach to revocation, in order to promote fairness and preserve the integrity of the Constitution. The trial results in both Leo and Lamoureux were to deny guilty plea revocation when no criminal justice value was identified to support the denial, and no consideration was given to the constitutional values which were threatened by the denial. Surely, any test for guilty plea revocation should be sensitive to such values.

The American jurisprudence on the issue of guilty plea revocation has focused to a much greater extent on the values, constitutional and otherwise, which are at stake. It is therefore helpful to turn now to that experience.

III. The American Federal Experience with Guilty Plea Revocation

There is a vast amount of state and federal case law in the United States on the issue of guilty plea revocation, and it is certainly beyond the scope of this article to canvass it all. Thus, federal as opposed to state law will be considered.

76. One inevitably wonders whether the trial judges in the two cases were motivated primarily by the apparent factual guilt of the accuseds, as opposed to the validity of their guilty pleas. See Note, “Presentence Withdrawal of Guilty Pleas in Federal Courts” (1965) 40 N.Y.U.L. Rev. 759 at 759 [hereinafter “Presentence Withdrawal”]: “some courts are undoubtedly affected in their exercise of discretion when the defendant seems to have committed the acts charged.”

77. A good overview of state and federal law can be found in D.L. Grundmeyer et al., “Withdrawal of Pleas” (1981) 21 Am. Jur. 2d 829 (§§ 500-511). State law evinces a variety of approaches to the issue of guilty plea revocation: (1) revocation allowed for “good cause”: California Penal Code, § 1018; Florida R. Crim. P. 3.170(f); (2) revocation allowed if “fair and just”: Delaware Super. Ct. Crim. R. 32(d); Hawaii R. Penal P. 32(d); (3) revocation allowed if “fair and just” unless substantial state prejudice: Indiana Code Ann. § 35-35-1-4(b) (West 1997); (4) revocation allowed in the “interests of justice”: Maryland R. Cr. 4-242(f); (5) revocation allowed to remedy “manifest injustice”: Alaska R. Crim. P. 14.4(e); Minnesota 49 Minn. Stat. Ann. R. Crim. P. 15.05(1) (West 1979). In Connecticut, guilty plea withdrawal is permitted as of right prior to the plea’s “acceptance” by the court, Connecticut R. Super. Ct. Cr. § 720, but after acceptance, the plea may only be revoked if the accused can demonstrate that it was involuntary or uninformed, § 721. Under Georgia’s Official Code, O.C.G.A. § 17-7-93(b), an accused has an unqualified and unlimited right to withdraw a guilty plea prior to sentencing, which may be exercised regardless of whether the withdrawal is motivated by
An appropriate starting point for consideration of the American federal experience with guilty plea revocation is the decision of the United States Supreme Court in *Kercheval v. United States.* There, the accused had been allowed to withdraw his guilty plea, and the question before the Court was whether the plea could be used against him at trial. This was the very same issue raised in *Thibodeau,* and like Canada’s Supreme Court, the American Court concluded that the evidence of the revoked plea is inadmissible. In reaching this conclusion, the Court made the following statement about guilty plea revocation:

Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences. When one so pleads he may be held bound. . . . But on timely application, the court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence. Such an application does not involve any question of guilt or innocence. The court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just.  

The revocation rule applied by federal courts has been codified in r. 32(e) of the Federal Rules of Criminal Procedure, which creates a distinction between pre-sentencing and post-sentencing revocation:

A motion to withdraw a plea of guilty or *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.  

This rule has been interpreted as imposing a lighter burden on the defendant when seeking to vacate a guilty plea prior to, as opposed to after, sentencing. Leaving aside, for the moment, the distinction between pre- and post-sentencing, it is notable that the rule provides little guidance for determining the permissibility of revocation. Hence, in the pre-sentencing context, the rule has been interpreted as incorporating the “fair and just” standard from *Kercheval.* This standard, like the “valid
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grounds” concept from Bamsey and Adgey, is rather open-ended. In fact, at least one American court has complained that the standard applicable to a pre-sentencing motion for withdrawal of a guilty plea, “is not easily defined.”83 However, one aspect of the rule which is well-established is that, as in Canada, the decision to allow or refuse revocation rests within the discretion of the judge hearing the application, and can only be overturned on appeal if it can be shown that the judge abused his or her discretion. As a standard of review, abuse of discretion is very lax.84 Its Canadian equivalent would be “patent unreasonableness”.

Whereas the open-ended, discretionary nature of the Canadian revocation rule has led to some incoherence and inconsistency, it is possible to discern two lines of case law flowing from the similarly general American federal rule. This bifurcation of the authorities was identified by Paul E. Gartner, who observed that some courts have emphasized the discretionary nature of the revocation rule, and the fact that revocation is a privilege as opposed to an absolute right, in adopting a strict test for revocation. Other courts have adopted a “more lenient rule” based on the principle that pre-sentencing revocation should be “freely allowed.”85 Gartner added, however, that the trend in the United States as of 1975 was toward a stricter approach to revocation. He attributed this to the existence of r. 11 of the Federal Rules of Criminal Procedure, which imposes a mandatory duty on a trial judge to explain the nature and sentencing ramifications of the charge(s) to the accused prior to pleading86 and to inform the accused that a guilty plea results in the waiving of the right to trial,87 and further requires the trial judge to ensure after pleading, by addressing the accused personally, “that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement.”88 If the requirements of r. 11 have been met then, according to Gartner,

85. Gartner, supra note 11 at 794-95. Gartner identifies cases such as Pool v. United States, 250 F.2d 396 (D.C. Cir. 1957) and Kadwell v. United States, 315 F.2d 667 (9th Cir. 1963) as examples of a more lenient approach. In contrast, cases such as United States v. Swaggerty, 218 F.2d 875 (7th Cir. 1955) and Everett v. United States, 336 F.2d 979 (D.C. Cir. 1964) [hereinafter Everett] represent a stricter approach. See also H.J. Alperin, Annotation, “Withdrawal of Plea of Guilty or Nolo Contendere. Before Sentence, Under Rule 32(d) of Federal Rules of Criminal Procedure” (1971) 6 A.L.R. Fed. 665 at 670 & 675-77 and Supplement (October 1995). He also identifies two lines of cases based on the “no absolute right” and “freely allowed” principles.
86. United States, Federal Rules of Criminal Procedure, r. 11(c)(1).
88. United States, Federal Rules of Criminal Procedure, r. 11(d).
The Courts seem to indicate that since they are bending over backwards to make sure that a defendant is aware of what he is doing when he enters a guilty plea, they will not allow that defendant to make a mockery of the system by allowing him to withdraw his plea simply because he changes his mind and now wants a jury trial.\footnote{Supra note 11 at 799. Note, however, that compliance with r. 11 is not necessarily a bar to a motion under r. 32(d) to withdraw a guilty plea. In United States v. Roberts, 570 F.2d 999 at 1007 (D.C. Cir. 1977) [hereinafter Roberts], the Court made this point in holding that “[t]he defendant’s personal responses to Rule 11 inquiries are understandably likely to be inaccurate and somewhat confused” and that “[d]efendants’ responses to judicial questioning at the Rule 11 hearing are notoriously unreliable”. \xspace}

The United States Supreme Court revisited the issue of pre-sentencing guilty plea revocation in 1972 in \textit{Dukes v. Warden, Connecticut State Prison}.\footnote{Supra note **.} In this case, Dukes pleaded guilty to charges of narcotics possession and larceny of goods on the basis of a plea bargain, and on the advice of his lawyer. Prior to the guilty plea, however, Dukes had repeatedly expressed his misgivings. A month after entering the plea, and prior to sentencing, Dukes applied to withdraw his plea and proceed to trial. The basis for the withdrawal was that his lawyer was in a position of conflict of interest, he had received inadequate counsel as a result, and his guilty plea (which was entered on his lawyer’s advice) was therefore involuntary and uninformed.\footnote{Dukes’ lawyer also represented two girls who were involved in the larceny charges, had pleaded guilty, and were sentenced before the same judge who was to sentence Dukes a few weeks later. During the girls’ sentencing hearing, the lawyer requested leniency for them, telling the Court that they had come “under the influence of Dukes”, but should be credited for agreeing “to testify against him that capitulated him into taking a plea on which he will shortly be removed from society . . .”, ibid. at 256. This formed the basis of Dukes’ conflict of interest claim. He further claimed that his plea was tainted because he had just been released from hospital and did not appreciate the nature of the charges or the ramifications of pleading guilty. \xspace}

The trial judge, in rejecting Dukes’ revocation motion, stated that nothing in the record indicated that the alleged conflict resulted in ineffective counsel or made Dukes’ plea involuntary or unintelligent. On appeal, the Connecticut Supreme Court preferred to defer to the trial judge’s exercise of discretion. This view also prevailed in the United States Supreme Court.\footnote{Brennan J., in brief reasons, agreed with the lower courts that there was no merit to Dukes’ claim that the alleged conflict of interest affected his plea. \xspace} However, in a strong dissent, Justice Marshall\footnote{Marshall J. was joined by Douglas J. Stewart J. agreed with Marshall J. on the law, but decided that the case was actually one of post-sentencing revocation, and thereby reached a different result, supra note ** at 258.} sought to re-cast the revocation rule. In reliance on an earlier decision concerning plea revocation following the prosecution’s repudiation of a
plea bargain, Santobello v. New York,94 he emphasized that there is a constitutional right not to plead guilty, and that, “[a] defendant may waive his constitutional rights through a guilty plea, but such waivers are not quickly presumed, and, in fact, are viewed with the ‘utmost solicitude’.”95 For this reason, he preferred to frame the revocation rule such that a defendant is required to present “a reason for vacating his plea”, and withdrawal is only to be denied if the government has been prejudiced by relying on the guilty plea.96 Thus, where the government is able to show “specific and substantial harm” due to its reliance on a guilty plea, then the accused may be held to the earlier plea.97 However, Justice Marshall thought that “ordinarily”, the government can claim only disappointed expectations. In such a case, the balance of interests must favour vindication of the individual’s “most basic constitutional rights.”98 He elaborated on the justification for his liberal approach as follows:

I would not view a guilty plea as an irrevocable waiver of a defendant’s federal constitutional right to a full trial, even where the plea is, strictly speaking, “voluntarily” entered. . . .

. . . We view guilty pleas with the “utmost solicitude” because they involve the simultaneous waiver of so many constitutional rights; our system of law favors the assertion of constitutional rights, not their waiver. It is inconsistent with that basic viewpoint for guilty pleas to be irrevocable even before sentencing. Usually, because of new information or new insights, defendants may have “sober second thoughts” about their pleas. Where the sentencing itself is postponed beyond the day of pleading, the door should not be slammed shut to formal reconsideration of the decision to plead guilty. A guilty plea is not a trap. Ordinarily, a defendant who changes his mind for sufficient reason and in timely fashion should not be deemed to have waived his right to a full trial. In short, absent the government’s showing specific and substantial harm, I would generally permit withdrawal of the plea before sentencing.99

Thus, Justice Marshall placed the issue of guilty plea revocation squarely within the realm of constitutional law.

One problem with Justice Marshall’s test relates to the fact that he did not elaborate in any detail on what could constitute a “sufficient” or “good”100 reason justifying revocation. On the facts in Dukes, however, he pointed to the conflict of interest of Dukes’ lawyer as sufficient to

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95. Dukes, supra note ** at 265.
96. Ibid. at 266.
97. Ibid.
98. Ibid.
99. Ibid. at 265-66.
100. Ibid. at 270.
support guilty plea revocation, because this conflict made it "plausible" that the plea was unsound by reason of inadequate legal counsel. 101 "Plausibility" as the standard to judge an accused's ground for seeking revocation is certainly a low threshold. Nevertheless, it may well be consistent with the importance of the constitutional rights at stake, and the need for a cautious approach to constitutional waiver. If indeed the Constitution favours the assertion—as opposed to the waiver—of rights, then a plausible reason should be sufficient to permit an accused to escape from an earlier constitutional waiver.

Since Justice Marshall's position failed to command a majority in Dukes, the American federal revocation rule remains discretionary, and bifurcated between the "no absolute right" and the "freely allowed" camps. Justice Marshall's opinion has had some influence insofar as it emphasized a balancing between the accused's reasons for seeking revocation, and the prejudice advanced by the prosecution in opposition. Hence, the recent American case law has seen a focus on the issue of state prejudice. 102 An example of this modern approach is United States v. Roberts. 103 There, the accused moved to revoke his guilty plea because the prosecution had failed to disclose to him a material element of the plea agreement. The trial judge had denied the motion, but the Court of Appeals, District of Columbia Circuit, reversed. The Court held not only that the inadequate disclosure was a sufficient reason to justify revocation, but also admonished the prosecution for opposing the revocation motion when withdrawal of the accused's guilty plea would have entailed no prejudice to the government's interests (other than the delay and expense inherent to a trial). 104

It is interesting to observe that the issue of prejudice to the government had been mentioned in the Canadian case of Nelson 105 in 1919, thus

101. Ibid. at 268-69. Justice Marshall concluded his reasons, at 271, by stating, "Where the defendant has presented a plausible reason for withdrawing his plea, [the disappointed expectations of the state] cannot bar him from regaining his constitutional rights before sentencing."


103. Roberts, supra note 89.

104. Ibid. at 1011-13.

105. Supra note 33.
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predating Justice Marshall’s decision in Dukes by some 53 years. However, while prejudice has increasingly become the focus of the American jurisprudence, it is rarely mentioned in the recent Canadian decisions. In fact, neither the trial judges nor the appellate courts in Lamoureux and Leo considered the question of government prejudice.

IV. Developing a Revocation Rule Consistent with Charter Values

Canada’s guilty plea revocation rule should be reconsidered in order to frame it in a manner consistent with modern Charter values. As will be argued below, a constitutional update is overdue.

As the analysis above has demonstrated, the current revocation rule requires an accused to assert a “valid ground” for revocation. This test raises two distinct legal problems and several subsidiary questions. First, what kinds of grounds may justify revocation? Is it sufficient for the accused to assert a sincere change of heart based on “sober second thought”? May the accused succeed by demonstrating a change of circumstances since the plea? Or, must the accused advance some rationale for concluding that the guilty plea was, at the time of its making, involuntary or misinformed? Secondly, what is the standard of proof which must be met by an accused on a revocation motion? Does the accused have to substantiate, on a balance of probabilities, the ground asserted for revocation? Or, must there merely be an air of reality to the ground? It is remarkable that, on an issue as important as guilty plea revocation, these basic issues remain unresolved in Canadian law. Certainly, one can imagine both liberal and restrictive revocation tests. For example, the most narrow of revocation rules might be framed as follows: on a revocation application, an accused must prove, on a balance of probabilities, that the plea was either made involuntarily or without sufficient awareness at the time of its making. In fact, this would seem to be the approach applied by the trial judges in both Lamoureux and Leo.

An issue distinct from the revocation test to be applied by trial judges is the standard of review to be adopted in appeals. The present Canadian rule places the revocation decision within the discretion of the judge hearing the motion to withdraw the guilty plea, with the result that a standard of review similar to “patent unreasonableness” is applied by appellate courts. Should the highly discretionary nature of the revocation rule survive in the Charter era?

Reference to the Charter values implicated by guilty plea revocation, and the principles flowing from these values, will assist in resolving the issues of “valid grounds”, standard of proof and the rules for appellate review.
A. The Charter Values at Stake

The Canadian Charter of Rights and Freedoms places a premium on legal rights such as the right to silence and the right to put the Crown’s case to the test of a trial. Prior to the entrenchment of the Charter, a guilty plea was characterized as a serious waiver of legal rights; after 1982, a guilty plea must be recognized as a significant waiver of constitutional rights. As such, it must be approached with caution and scepticism.

This is because, to paraphrase Justice Marshall in Dukes, Canada’s legal and constitutional order is premised on the value to individuals, and to society generally, of the assertion of constitutional rights, as opposed to their waiver.

The overriding values embodied by the Charter, and which should be advanced by an updated revocation rule, are the promotion of fairness within, and the preservation of the integrity of, the criminal justice system. In the case of guilty plea revocation, the primary rationale of which is to ensure that the criminal justice system does not punish those who are legally not guilty and morally blameless (see Part II above), these values would be best served by a liberal rule, in order to ensure that accuseds who sincerely wish to assert their constitutional rights are permitted to do so. However, in some circumstances, fairness and justice system integrity would dictate denial of a revocation motion. This would include cases where the initial guilty plea was a strategic ploy, or where it has substantially prejudiced the Crown’s ability to prosecute the case to trial. Such circumstances will be elaborated below.

It is argued that the following general principles flow from the relevant Charter values:

(1) The guilty plea revocation rule should favour the vindication and assertion of constitutional rights, to the extent that this promotes fairness and preserves the integrity of the justice system;

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106. Adgey, supra note 5 at 440 (per Laskin J.).
107. Supreme Court of Canada jurisprudence on the issue of criminal law waiver has emphasized that the validity of a waiver depends on it “being clear and unequivocal that the person is waiving the procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process”, Korponay, supra note 4 at 49. See also: R. v. Clarkson, [1986] 1 S.C.R. 383 at 394-95, 26 D.L.R. (4th) 493; R. v. Prosper, [1994] 3 S.C.R. 236 at 274-75, 118 D.L.R. (4th) 154 (hereinafter Prosper cited to S.C.R.) (concerning waiver of the s. 10(b) right to counsel); R. v. Askov, [1990] 2 S.C.R. 1199 at 1228-29, 74 D.L.R. (4th) 355; R. v. Morin, [1992] 1 S.C.R. 771 at 790-91, 71 C.C.C. (3d) 1 (concerning waiver of the s. 11(b) right to a trial within a reasonable time). The Court has clearly adopted a cautious approach to constitutional waiver. For example, “the standard required for an effective waiver of the right to counsel is very high”, Prosper, ibid. at 275.
(2) Following from (1), the rule should provide for revocation in two separate contexts: (i) where an accused’s waiver of constitutional rights through a guilty plea was not legitimate at the time of its making, because it was involuntary or uninformed (i.e. invalid constitutional waiver), and (ii) where the accused wishes to revoke her guilty plea and re-assert her constitutional rights without questioning the validity of the plea (i.e. reassertion of constitutional rights);

(3) Following from (1) and (2), the issues addressed by the revocation rule should be limited to the validity of a constitutional waiver, and the permissibility of re-asserting constitutional rights despite a valid waiver. The accused’s moral guilt, and the likelihood of the accused being found legally guilty, should be irrelevant to guilty plea revocation.

B. Proposals for an Updated Revocation Rule

In light of the values and principles outlined above, it is proposed to frame the revocation rule in two separate parts, the first dealing with the situation where constitutional waiver through a guilty plea is attacked as being invalid, and the second concerning the re-assertion of constitutional rights despite a legitimate waiver. Each part will be stated and then a commentary will be provided:

1. Invalid Constitutional Waiver

Where the accused demonstrates, on a balance of probabilities, that his or her guilty plea was not valid, in the sense that it was involuntary or uninformed, then a not guilty plea will be substituted for the guilty plea. This aspect of the proposed rule resembles the rule which, it would seem, is presently applied by some Canadian courts. It requires the accused to assert a ground justifying revocation, and to prove the validity of that ground on a balance of probabilities. In other words, the accused must satisfy the judge hearing the revocation motion that the plea would probably have been different in light of the ground asserted. Although Canadian case law is helpful, there is also considerable jurisprudence from the American courts which provides guidance as to the grounds which are relevant to the validity of a constitutional waiver through a guilty plea. These can be divided roughly into three categories. First, there may have been circumstances at the time of pleading which prevented the accused from fully appreciating the ramifications of a guilty plea, such as incompetent or inadequate counsel, or the accused’s

108. R. v. Fraser, [1972] 2 W.W.R. 248, 5 C.C.C. (2d) 439 (B.C.C.A.) (unrepresented accuseds pleaded guilty, but later statements indicated that they could have mounted a defence); R. v. Lavoie (1986), 73 A.R. 72 (C.A.) [hereinafter Lavoie] (guilty plea revoked
own mental or other infirmities. Such factors go to the requirement that a valid guilty plea must be informed. Second, information may come to light subsequent to the guilty plea which, if it had been known by the accused at the time of the plea, would have made the guilty plea unlikely. Again, this would be relevant to the informed nature of the plea. For example, the revelation that a key prosecution witness had lied could justify guilty plea revocation, since the accused may not have entered a guilty plea if she had known of the perjury. Third, the accused’s plea may have been induced by pressure, threats, or inducements. Threats from third parties, pressure from legal counsel, or promises of a reduced sentence from the trial judge or Crown could bring into question the voluntariness of a guilty plea.

because it was entered in the absence of counsel, and the accused was only 18 years old); United States v. Loughery, 908 F.2d 1014 (D.C. Cir. 1990) (counsel’s failure to apprise the accused of a key decision of the United States Supreme Court, which rendered the counts against the accused invalid, justified withdrawal of guilty plea).
110. United States v. Morgan, 567 F.2d 479 (D.C. Cir. 1977) (a psychiatric report, filed after the accused pleaded guilty, supported his insanity defence, so his plea was vacated). See also People v. Harvey, 198 Cal. Rptr. 58 (5th Dist. 1984); R. v. Catcheway, [1980] 5 W.W.R. 744, 8 Man. R. (2d) 122 (Man. Cty. Ct.) [hereinafter Catcheway cited to W.W.R.] (accused entered guilty plea on the advice of counsel, but the plea was allowed to be withdrawn after it became known that counsel had been misinformed as to material facts by the Crown).
111. United States v. Schubert, 728 F.2d 1364 (11th Cir. 1984) (the accused pleaded guilty, but then learned that a witness had lied in denying a role as a government informant; the fact that the witness was an informant provided the basis for an entrapment defence, so the accused’s plea was revoked).
112. United States v. Cunnisano, 599 F.2d 851 (8th Cir. 1979) (family coercion coupled with pressure from the trial judge led to the conclusion that guilty plea unsafe).
113. Lamoureux, supra note 56; United States v. Truglio, 493 F.2d 574 (4th Cir. 1974) (guilty plea vacated because lawyer may have pressured accused to plead guilty in order to secure a favourable plea bargain for co-accuseds).
114. Ex parte Otinger, 493 So.2d 1362 (Ala. 1986) (the accused was permitted to withdraw his guilty plea, which was induced by the trial judge’s indication of a lighter sentence, after it became apparent that the sentence was unavailable in the circumstances); State v. Reid, 526 A.2d 528 (Conn. 1987) (the accused should have been allowed to withdraw his guilty plea, since the trial judge told him that he would be entitled to do so if the judge refused to accept the terms of a plea bargain).
115. Culbreath v. Rundle, 466 F.2d 730 (3rd Cir. 1972) (where the accused was induced to plead guilty on the basis of a plea bargain, but the trial judge was unable to accept the sentencing promises made by the prosecution, then the accused was permitted to withdraw his plea). There is a considerable body of American jurisprudence concerning guilty plea revocation where the prosecution’s promises are not fulfilled. See Annotation, “Right to withdraw guilty pleas in state criminal proceedings where court refuses to grant concessions contemplated by plea bargain” (1975) 66 A.L.R. 3d 902, and Supplement (August 1996).
In attacking the asserted ground, the Crown may take issue with the accused’s sincerity, perhaps by alleging that the accused is engaging in mischief or delay. The Crown may also attack the alleged ground itself. For example, if the accused claims to have misunderstood the ramifications of a guilty plea, the Crown might lead evidence of the accused’s prior experience with the justice system to show a level of sophistication inconsistent with the accused’s claim. Moreover, if, at the time of the guilty plea, the trial judge inquired of the accused to be satisfied that the plea was voluntary and aware, then this might also be relevant to the determination of whether the accused has met the burden of proof.

It is surely irrelevant, however, to the validity of a constitutional waiver through a guilty plea that the accused may be considered to be morally guilty, has failed to assert his or her innocence to the charges, or is likely to be found guilty at trial. At the pleading stage, the law is unconcerned with such matters; hence, there is no requirement that an accused assert moral innocence as a pre-condition to a plea of not guilty. Nor should the law be concerned with such matters in the context of revocation. The issue is whether the plea was valid (i.e. voluntary and informed), and not whether the plea reflects the moral, or ultimate legal, status of the accused. This point is particularly important where the accused asserts, as a ground for vacating a guilty plea, that there exists a defence of which he was not aware at the time of pleading (perhaps because of incompetent counsel, or because of new information). It would be inappropriate for a court to determine the validity of the defence as part of the revocation motion. Whether or not the defence is likely to succeed at trial is a separate question from the issue to be considered.

116. See for example, United States v. Trott, 604 F. Supp. 1045 at 1049-50 (Dist. Ct. 1985), aff’d 779 F.2d 912 (3rd Cir. 1986), where the accuses sought to negotiate an agreement for favourable treatment, following his guilty plea, but failed: “These facts and circumstances cast considerable doubt on the sincerity of the defendant’s claim that he is innocent.”

117. In the American jurisprudence, the fact that a trial judge has fulfilled the compulsory requirements of r. 11 of the Federal Rules of Criminal Procedure has been significant to revocation decisions, supra note 89. Canada has no such compulsory inquiry requirement, supra note 12, but where an inquiry has occurred, the accused’s answers may be significant to the question of whether the guilty plea was voluntary and informed.

118. Some American cases have held that a failure by an accused to make a positive assertion of innocence is a bar to guilty plea revocation, Everett, supra note 85; United States v. Stayton, 285 F. Supp. 428 (Pa. Dist. Ct. 1968). Interestingly, the American Uniform Rules of Criminal Procedure, r. 444(e), would permit a defendant to move for withdrawal of his guilty plea without alleging that he is innocent of the charge to which the plea was entered. Indeed, the question of the accused’s guilt or innocence should be kept separate from the issue of the voluntariness and intelligibility of a guilty plea.

119. As seems to have occurred in Dickson J.’s reasons in Adgey, supra note 5.
in a revocation motion, which is whether the accused would have entered a guilty plea if fully apprised of the defence at the time of pleading.\textsuperscript{120}

Moreover, it should be irrelevant to the question of whether a guilty plea was valid that the Crown could (or even would) suffer prejudice from the withdrawal of the plea. If a judge concludes, on a balance of probabilities, that in the absence of the asserted ground the accused would not have entered a guilty plea, then the plea is not valid and the accused must be allowed to plead not guilty. It would be contrary to the values enshrined in the \textit{Charter} to hold an accused to an invalid guilty plea because of Crown prejudice since this would result in the punishing of an accused whose legal guilt has never been determined. For this same reason, it would be inappropriate to deny revocation in reliance on the value of finality in the criminal justice system. Of course, the Crown should be at liberty to lead evidence that the accused's guilty plea revocation efforts are insincere or are part of a strategy to undermine the Crown's prosecution efforts (\textit{i.e.} mischief). Potential or actual prejudice by itself should be irrelevant.

2. \textit{Re-assertion of Constitutional Rights}

Where the accused asserts a sincere change of heart, and the Crown is unable to advance a valid justification for holding the accused to his plea, then a not guilty plea will be substituted for the guilty plea.

This second aspect of the proposed revocation rule would be new to Canadian law, as it would permit accuseds to revoke their constitutional waiver of rights through a guilty plea without having to prove the invalidity of the plea. Thus, where an accused sincerely desires to re-assert the right to a trial, he or she should be allowed to do so except in the case where there is a "valid justification" for holding the accused to the guilty plea. This follows from the scepticism and caution to be applied to a constitutional waiver, and the value placed in our legal system on the assertion of constitutional rights. It is notable that the Supreme Court of Canada has yet to consider a case where an accused has sought to withdraw a constitutional waiver and to re-assert the right in question. To

\textsuperscript{120} After all, the pleading decision involves the weighing of risks, \textit{supra} notes 17 & 19. Thus, even if a defence seems far-fetched, the decision to plead guilty may involve the weighing of a variety of factors, such as the merits of other possible defences and possible sentences. An accused could convincingly state that, in light of the factors he or she was considering at the time of pleading, there was a reason to plead not guilty in the hopes of a lighter sentence. However, if the accused had known of another possible defence, the risk of a heavier sentence would have been outweighed by the chance of acquittal, and a not guilty plea would have been more logical.
date, the Court’s jurisprudence is limited to the requirements for a valid waiver under ss. 10(b) and 11(b) of the Charter. Arguably, the uniquely damaging effects of a constitutional waiver through a guilty plea would justify a special rule allowing the waiver to be revoked. However, it could be argued that any waiver of a constitutional legal right is so significant that if it is possible to permit the accused to re-assert the waived right without substantial prejudice to the Crown, then the waiver should generally be nullified.

This new aspect of the revocation rule would run counter to the pre-Charter common law position that a plea should be binding unless the accused is able to advance (and prove) a valid reason for its withdrawal. However, surely Charter values now support the adoption of the opposite position. Hence, the constitutional waiver of rights through a guilty plea has such severe ramifications that it should not be binding unless there is some good reason for holding an accused to the plea (even if the validity of the plea is not disputed by the accused). There are, it is submitted, two valid justifications for denying revocation on the basis of a sincere change of heart: (1) revocation would result in significant prejudice to the Crown; and (2) sentencing has already occurred. Each will be discussed in turn.

1. Crown prejudice as a bar to revocation – As with Part (a) of the proposed revocation rule described above, the Crown could counter a revocation motion by demonstrating that the accused’s revocation efforts are insincere, for example, to cause delay or to wear down witnesses. However, under this second aspect of the revocation rule, the Crown would generally be required to show significant prejudice resulting from the accused’s original guilty plea, which would make it unjust to grant the revocation. This is effectively the position adopted by Justice Marshall in Dukes, when he argued that a revocation motion based on “sober second thought” and made “in a timely fashion” should only be denied where the prosecution can show “specific and substantial harm.” Interestingly, the adoption of this new aspect of the revocation rule into the Canadian common law would reinstate the prevailing approach from the nineteenth and early twentieth centuries, which treated revocation much more liberally. It would also give effect to Walsh J.A.’s preferred position, asserted in 1919, that revocation should be permitted “in any case in which the application was made in proper time and no prejudice resulted to the Crown from the original plea. . . .” How ironic that these courts

121. Adgey, supra note 5.
122. Supra note **.
123. Supra notes 25-29 and accompanying text.
were more sensitive to the values subsequently embodied in the *Charter* than their counterparts in the post-*Charter* era.

What, then, would constitute prejudice sufficient to deny a sincere revocation motion? As Justice Marshall stated, a timely application to revoke a guilty plea will only rarely be defeated by a finding of substantial prejudice to the government. Hence, as the delay between the plea and the revocation motion increases, so too does the likelihood of the state meeting its burden of showing significant prejudice. Over time, witnesses may leave the jurisdiction, memories may fade or evidence may become stale. American case law on the issue of prejudice is now sufficiently advanced that it can provide important guidance to Canadian courts.

2. **Sentencing as a bar to revocation** - Rule 32(d) of the Federal Rules of Criminal Procedure draws a sharp distinction between pre- and post-sentencing guilty plea revocation. Thus, post-sentencing revocation is only allowed "to correct manifest injustice", whereas according to the *Kercheval* test incorporated into r. 32(d), pre-sentencing revocation is permissible if it is "fair and just." The early English case law seems to have closed the door to post-sentencing revocation, but the pre-/post-sentencing distinction has not played a prominent role in Canadian jurisprudence. Certainly, there is no hard and fast rule barring revocation after sentencing, nor is there any judicial pronouncement similar to r. 32(d) that post-sentencing revocation applications should be approached with particular scepticism. In fact, many Canadian courts have considered post-sentencing revocation applications without mentioning as a consideration the fact that sentencing had already taken place. This is

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125. Dukes, supra note **.
126. Supra note 102. Some examples of prejudice which has defeated a revocation motion include: *United States v. Barker*, 514 F.2d 208 (D.C. Cir. 1975) (in a case where the revocation motion was brought eight months after the guilty plea was entered, and co-accuseds had already been tried and convicted, the Court held that the prosecution would be prejudiced if the guilty plea were vacated because of the difficulties of re-assembling witnesses, and because the publicity from the co-accuseds' trial would make jury selection at a new trial difficult); *United States v. Tammaro*, 93 F.R.D. 826 (Ga. N.D. 1982) (the accused's revocation motion was defeated because the government had placed important witnesses under the witness protection program, and bringing them back for a new trial might jeopardize their new identities); *Acevedo-Ramos*, supra note 102 (after the accused's guilty plea, the government dismantled its case, witnesses were sent back to jail, and other witnesses had disappeared; therefore, the prejudice to the government of allowing a new trial outweighed the grounds advanced by the accused for revoking his guilty plea).
127. Supra notes 80-82 and accompanying text.
128. Supra notes 25-29 and accompanying text.
129. In *Thibodeau*, supra note 37 at 653 the Court considered revocation "any time before sentencing" but did not discuss revocation after sentencing.
not surprising, given that sentencing may occur immediately after pleading, or may be delayed days or weeks. Where an accused is able to assert and substantiate a ground which brings into question the validity of the guilty plea itself, the moment of sentencing would be a somewhat arbitrary cut-off point for determining whether or not a motion for revocation should be entertained. Nevertheless, the issue of sentencing has some force in the context of Part (b) of the updated revocation rule, and it is therefore necessary to consider the rationales advanced for imposing a higher test on accuseds seeking revocation after sentencing.

The first rationale supporting a separate, higher test for post-sentencing revocation is the discouragement of “sentence-testing”, a strategy used by accuseds to gauge the sentence which they might expect to receive following a trial verdict of guilty. Given the difficulties of predicting sentences and the sentencing benefits of an early guilty plea, an accused might plead guilty to determine the extent of his or her “sentencing risk”. If the sentence following a guilty plea is harsher than expected, then an accused might decide that the sentencing risk of an unsuccessful trial is not so great, and might therefore seek a revocation of the guilty plea. By making post-sentencing revocation more difficult, the American revocation rule discourages such strategic pleading, and limits the resulting delays and costs associated with it.

It is difficult to imagine that sufficient numbers of accuseds would deliberately engage in the strategy of sentence-testing to justify a higher test for post-sentencing revocation. However, a higher test would also address those accuseds who seek revocation out of disappointment at the ultimate sentence received. In some cases, for example, accuseds will expect lighter sentences based on assurances from counsel, or representations from prosecutors. A more severe sentence might come as a surprise, thus prompting second thoughts about the guilty plea. There is strong support in Canadian law for the view that mere sentencing disappointment is not a valid ground on which to base a revocation motion. In R. v. Lyons, the Supreme Court of Canada considered the case of a sixteen-year-old accused who pleaded guilty to several charges involving violence and the use of firearms. A sentencing hearing was scheduled, but prior to the hearing, the Crown applied to have the accused declared a “dangerous offender” pursuant to Part XXIV of the Criminal Code. Such an application, if successful, would have subjected the

131. Alperin, supra note 81 at 670.
accused to an indeterminate sentence of imprisonment. The hearing proceeded and the Crown succeeded in proving beyond a reasonable doubt that the accused qualified as a "dangerous offender". The accused appealed, one of his grounds being that the failure of the Crown to notify him prior to his guilty plea of its intention to make a dangerous offender application infringed his rights under s. 7 of the Charter, and rendered his guilty plea invalid.

La Forest J., for the majority, gave the s. 7 argument short shrift, commenting that,

"[s]ubsequent 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."134

Wilson J., in dissent, took the view that the principles of fundamental justice guaranteed by s. 7 dictate that, "an accused know the full extent of his jeopardy before he pleads guilty to a criminal offence for which a term of imprisonment may be imposed."135 For Wilson J., the issue was whether the accused's guilty plea was sufficiently informed on the issue of sentencing. She concluded that it was not because, if the accused had been aware at the time of pleading of the Crown's intention to apply for a dangerous offender designation, he probably would not have pleaded guilty.136

Although the Court has closed the door to guilty plea revocation on the basis of mere sentencing dissatisfaction, it appears that where an accused is under a misapprehension concerning the severity of penalty, revocation may be permissible. In Lyons, La Forest J. concluded that the accused should have been aware of the risks of a dangerous offender application,137 whereas Wilson J. cited the accused's youth and the rarity of such applications, to support her view that he did not appreciate the risk of an indeterminate period of incarceration at the time of pleading, and that his plea was therefore uninformed. Thus, if the Crown promised the accused

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134. Lyons, supra note 132 at 372. La Forest J. cited the decision of the Québec Court of Appeal in Antoine v. R. (1984), 40 C.R. (3d) 375 for support.
135. Lyons, ibid. at 379-80.
136. Ibid.
137. Ibid. at 370-71. La Forest J.'s reasons could be criticized for imposing an objective, reasonableness standard in determining the informed nature of a plea. The issue, in the criminal context, surely must be whether the accused himself was aware of the ramifications of his plea (i.e. a subjective test). The Law Reform Commission of Canada, supra note 45 at 85, has dealt with this exact issue. The Commission thought that withdrawal of a guilty plea should be allowed where the accused had no prior notice of the prosecutor's intention to make a dangerous offender application.
that, in exchange for a guilty plea, it would not bring a dangerous offender application, then the guilty plea would be unsafe if the Crown went back on the promise. A rule allowing revocation where the accused proves on a balance of probabilities that he did not appreciate, or misapprehended, the sentencing ramifications at the time of pleading (i.e. Part (a) of the updated revocation rule, “Invalid Constitutional Waiver”, as described above) is sensible in light of the influence played by sentencing expectations in the decision to plead guilty.

However, Part (b) of the proposed revocation rule presents some problems in the context of post-sentencing guilty plea revocation. If, indeed, mere sentencing dissatisfaction can never be a ground justifying guilty plea revocation, then a rule allowing revocation after sentencing unless the Crown can show substantial prejudice would seem to invite the very revocation motions based on sentencing disappointment that were rejected by Lyons. Moreover, if Part (b) were to apply in the case of post-sentencing revocation, then it could promote “sentence-testing”. These considerations argue against the availability of Part (b) of the proposed rule in the case of post-sentencing motions.

In fact, limiting Part (b), but not Part (a), to the pre-sentencing context is justifiable. Where, as in Part (a), an accused is able to prove on a balance of probabilities that his guilty plea was invalid, then his legal guilt was established through an illegitimate waiver of constitutional rights. The law only punishes those who are legally guilty; therefore any sentence imposed on an accused who has not legitimately been found guilty is, itself, illegitimate. An illegitimate sentence can hardly stand in the way of vindicating an accused’s basic legal rights. However, under Part (b), an accused is not questioning the validity of a constitutional waiver, but is asking for the waiver to be set aside because of a sincere change of heart. This change of heart, where it occurs after sentencing has taken place, cannot alter the fact that the accused was legitimately legally guilty at the time of sentencing, and that the sentence imposed was legitimate too. For an accused to request the overturning of a legitimate constitutional waiver and a legitimate sentence based on that waiver is asking too much, and jeopardizes the integrity of the criminal justice system. At this stage, the value of finality in the criminal justice system can be invoked to deny the possibility of revocation.

C. The Appellate Standard of Review

The highly deferential standard applied by both American and Canadian appellate courts when reviewing revocation decisions is difficult to reconcile with the sensitive constitutional nature of the rights waiver
inherent to a guilty plea. Typically, an appellate court will defer to factual findings made at trial if the trial judge was in a better position to assess the credibility of witnesses and to determine the weight to be accorded to the evidence. Legal issues, and issues of mixed fact and law (for example, the determination of whether a particular set of facts meets a particular legal standard) are generally reviewed on a higher standard of correctness.

The decision whether or not to allow the withdrawal of a guilty plea involves a range of factual, legal, and mixed fact/law issues. Under the traditional Canadian revocation rule, a judge hearing a revocation motion must decide two distinct questions: (1) does the evidence support the existence of the "ground" asserted by the accused in seeking revocation?; and (2) is the ground a "valid" basis justifying revocation? While the first question may be purely factual in nature, the second has a clear legal and policy component. The second is also a constitutional issue which could be re-stated as whether the ground asserted renders the waiver of constitutional rights through a guilty plea invalid. Thus, in Leo, there was little to support the Court of Appeal's deferential standard of review on the second question, since the validity of Leo's guilty plea raised both legal and constitutional considerations.

Generally, a trial judge will have discretion to make decisions on administrative and procedural matters, for example change of venue applications and continuance motions. A lower standard of appellate review may be justifiable for efficiency reasons since it discourages appeals by the parties on the many procedural decisions taken over the course of a trial, and thereby reduces the costs and delays associated with such appeals. However, the efficiency rationale should only have force where the issue at stake raises few public policy concerns, and has little

138. Grundmeyer, supra note 77 at 833.
139. Where the evidence is contained in affidavits, or when there is no issue of credibility arising from the testimony, then appellate courts may intervene in factual conclusions of the trial judge, reasoning that they are in as good a position as the trial judge to make factual findings.
140. Mewett, supra note 3 at 206, observes that distinguishing between issues of law and issue of mixed fact and law can be difficult.
141. In R. v. Dunnett (1990), 111 N.B.R. (2d) 67 at 80-81, 62 C.C.C. (3d) 14 (C.A.), Hoyt J.A. canvassed the law on the issue of appeals implicating the interpretation of Charter rights. He observed that it would be wrong to "restrict the ability of appellate courts to fulfil their role of ensuring the proper interpretation of these fundamental rights—a direction that, by and large, has been rejected. It is because these rights have been constitutionally enshrined that appellate courts should be free to consider their application."
142. Kelso, supra note 84 at 475, observes that, "[a] trial judge's discretion is concentrated in procedural and administrative matters", and, "little useful purpose would be served by carefully scrutinizing the sort of decisions subject to the abuse of discretion standard."
impact on the correctness of the ultimate judgment.\textsuperscript{143} Guilty plea revocation, as a constitutional waiver with grave consequences, raises significant public policy concerns, and is directly linked to the ultimate result of a criminal prosecution. Guilty plea revocation is thus qualitatively different from change of venue and other procedural issues. The failure of appellate courts to recognize this and to apply a stricter standard of appellate review is a deficiency which should be remedied under an updated revocation rule.\textsuperscript{144}

Because the rule proposed here will clarify the requirements for guilty plea revocation, and will simplify it greatly in the case of pre-sentencing revocation,\textsuperscript{145} the nature and scope of the rule will necessarily be more certain. This alone will lessen the dangers of leaving the revocation decision within the discretion of the judge hearing the revocation motion. Nevertheless, the proposed rule calls for important determinations of a legal nature. Under Part (a), there is a legal issue as to whether an asserted ground is the sort which may render the accused’s plea uninformed or involuntary. Under Part (b), a key legal issue will be whether the prejudice advanced by the Crown is sufficient to justify denying revocation. The existence of such legal issues and the constitutional nature of guilty plea revocation generally, warrant the conclusion that revocation decisions made at trial are not entitled to undue appellate deference. Instead, they should be scrutinized carefully and sceptically.

Conclusion

The common law rule governing guilty plea revocation should be reformed in order to recognize that a guilty plea is a serious waiver of constitutional rights and that \textit{Charter} values demand a rule which favours the assertion, as opposed to the waiver, of such rights. To this end, this article has proposed an updated revocation rule which, among other suggestions, provides for the withdrawal of a guilty plea where the accused can prove on a balance of probabilities that the guilty plea was either uninformed or involuntary, and further allows for revocation at any

\textsuperscript{143} \textit{Ibid.}

\textsuperscript{144} As a guilty plea is a waiver of constitutional rights, the revocation of the plea should be approached on appeal in the same manner as other constitutional waivers. There is no indication in the jurisprudence that a trial judge’s finding concerning waiver of the s. 10(b) right to counsel, or of the s. 11(b) right to a trial within a reasonable time is entitled to appellate deference.

\textsuperscript{145} The updated revocation rule would allow for pre-sentencing revocation as of right unless the Crown is able to establish substantial prejudice. This approach was recommended in 1965 in “Presentence Withdrawal”, \textit{supra} note 76 at 764, in order to avoid the inconsistencies, incoherence, and “unequal justice” of the American discretionary rule. See also \textit{ibid.} at 769.
time prior to sentencing unless the Crown can demonstrate significant prejudice which would result from revocation.

The American jurisprudence on the issue of guilty plea revocation, which has been considered in some detail in this article, has been more sensitive to the constitutional issues at stake, and can provide guidance to Canadian courts, particularly on the issue of Crown prejudice. However, the failure of American appellate courts to adopt a strict standard of review for revocation denials should not be replicated in Canada. Charter values demand that appellate courts monitor carefully trial decisions which have such a vital impact upon the constitutional rights of accuseds.

One result of the adoption of the revocation rule proposed herein will no doubt be an increase in the number and in the success rate of guilty plea revocation motions. The cost of these motions and of the resulting criminal trials where the accused succeeds will probably impose a further financial burden on the state. Yet before these costs are accepted as an argument against reform, one should recall that the financial strains within the justice system (i.e. lengthy delays, costly trials, inadequate legal aid, a possible systemic bias in favour of plea bargaining over trials) are in part responsible for the pleading pressures which can lead to unsound guilty pleas. Hence, financial tension within the justice system can be both an argument for, and against, relaxation of the rule governing guilty plea withdrawal.

In a perfect world, the machinery of justice would advance efficiently and rapidly, all accuseds would have access to the highest standards of legal representation regardless of their personal financial means, and defence and Crown counsel would have unlimited resources to pursue their cases (yet would strive always to minimize delays). Suffice it to say that we do not operate in this “legal nirvana” nor are we likely to in the foreseeable future. Although the economics of the justice system is itself a significant matter extending far beyond the issues raised in this article, we can at least take note of the fact that the legal rights guaranteed by the Charter of Rights and Freedoms transcend purely economic considerations. Hence, although we might appreciate the savings in time and money resulting from a judge’s decision to deny a revocation motion (particularly where the accused is apparently guilty), that same decision may well offend our constitutional sensibilities where it is based on a pre-Charter common law rule which lacks the coherence and sensitivity to rights demanded by the modern constitutional order. Given the paramount importance of Charter rights and values, the interests of justice are best served by the legal reform of the guilty plea revocation rule.