Preserving Appeal Rights When Your Client's Only Defence is a (Failed) Charter Motion

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1. Introduction

Defence lawyers are often faced with the following scenario: your client has no defence on the merits of a charge, but you have a solid Charter argument which could result in an acquittal. Typically, this occurs because the evidence of guilt is incontrovertible, but was obtained by an unreasonable search, contrary to s. 8 of the Charter, or, in spite of an overwhelming case, the Crown has taken too long to bring the accused to trial, setting the stage for an 11(b) challenge. Either way, the Charter motion will be dispositive. If you win the motion, the charges fall; if you lose, there is little point in holding a trial, since the Crown's case is undeniable.

Should you lose the pre-trial Charter motion, you are faced with a dilemma as far as appeals go. You cannot appeal the Charter ruling itself, since this would violate the rule against interlocutory appeals in criminal matters.[1] You also cannot plead "guilty subject to a Charter defence" or *nolo contendere*, since these are not permissible pleas under the *Criminal Code*.[2]

The combination of the rule against interlocutory appeals and the

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1. See *R. v. Mills*, (*sub nom.* Mills v. R.) [1986] 1 S.C.R. 863, 26 C.C.C. (3d) 481, 52 C.R. (3d) 1 (S.C.C.), which held that there is a general rule in criminal law prohibiting appeals of interlocutory decisions, and that this rule was not affected by the adoption of the Charter. However, the "rule against interlocutory appeals" in criminal matters is arguably nothing more than an illustration of the general common law position that all appeal routes must be created by statute (*R. v. Meltzer*, [1989] 1 S.C.R. 1764, 49 C.C.C. (3d) 453, 70 C.R. (3d) 383 (S.C.C.)), since the *Criminal Code* simply does not provide for appeals of interlocutory decisions in any of its appeal provisions (see e.g. *Criminal Code*, R.S.C. 1985, c. C-46, ss. 672.72, 674, 675, 676, 676.1, 759, 784, 813, 830, 839).
2. *Criminal Code*, *ibid.*, s. 606. See also discussion of this issue in *R. v. Fegan* (1993), 80 C.C.C. (3d) 356, 21 C.R. (4th) 65, 13 O.R. (3d) 88 (Ont. C.A.); *R.*

closed list of permissible pleas means that if your client wishes to avoid a pointless trial, there are only two options open to you: your client can plead guilty, or your client can maintain a not guilty plea, but admit all the facts alleged by the Crown and invite a conviction.

These two options might seem to be functionally equivalent, since in both cases your client is no longer contesting factual guilt. As a result, it might seem reasonable to believe that either option will produce the same legal effect on appeal. Unfortunately, nothing could be further from the truth. Choosing to plead guilty will effectively waive Charter arguments on appeal (along with all other defences for that matter), but admitting facts while maintaining a non-guilty plea will generally preserve Charter arguments. This article explores recent Canadian case law on these two strategies, and outlines how defence counsel should conduct their case in light of this jurisprudence.

2. Whatever You Do, Don't Plead Guilty

This section begins by outlining the severe prejudice to Charter appeal rights which follows a guilty plea (s. 1(a)). It then explains that guilty pleas made without awareness of this prejudice can be withdrawn in some situations (s. 1(b)), but this will be a difficult task for appellate counsel, since there are many substantive and procedural barriers to obtaining leave to withdraw a guilty plea made in such circumstances (s. 1(c)).

(a) A Guilty Plea is a Waiver of All Defences — Including Charter Defences

It is settled law that a guilty plea is not just an admission of facts underlying the offence charged, but also a waiver of all defences – including constitutional defences. This rule is stated most clearly in a line of British Columbia Court of Appeal cases,[3] but the same position has been adopted by appellate courts in Alberta,[4]

c. Coderre, 2013 CarswellQue 8401, EYB 2013-226101, 2013 QCCA 1434 (C.A. Que.) at para. 30.

3. *R. v. Carter* (2003), 311 W.A.C. 178, 190 B.C.A.C. 178, 2003 CarswellBC 2888 (B.C. C.A.) at paras. 5-12; *R. v. Duong* (2006), 376 W.A.C. 183, 228 B.C.A.C. 183, 142 C.R.R. (2d) 261 (B.C. C.A.) at paras. 4-18; *R. v. Webster* (2008), 238 C.C.C. (3d) 270, 441 W.A.C. 168, 262 B.C.A.C. 168 (B.C. C.A.) at paras. 19-22; *R. v. Chuhaniuk* (2010), 261 C.C.C. (3d) 486, 493 W.A.C. 89, 292 B.C.A.C. 89 (B.C. C.A.) at paras. 45-49.

4. *R. v. Hoang* (2003), 182 C.C.C. (3d) 69, [2004] 7 W.W.R. 663, 339 A.R. 291 (Alta. C.A.) at paras. 6-11, 33-35 and 42-43. See also *R. v. Garang*, 2016 CarswellAlta 1081, [2016] A.J. No. 598, 2016 ABCA 182 (Alta. C.A.) at

Manitoba,[5] New Brunswick,[6] Newfoundland and Labrador,[7] Nova Scotia,[8] Ontario,[9] and by the Court Martial Appeal Court.[10] Even in provinces where there is no appellate jurisprudence on this issue, trial decisions hold that a guilty plea waives all Charter defences.[11] The Supreme Court has not addressed this issue in the post-Charter era, but its pre-Charter jurisprudence held that a guilty plea waives all defences and procedural safeguards.[12] Post-Charter decisions by the Ontario Court of Appeal have held that treating guilty pleas as a waiver of constitutional defences does not violate section 7 of the Charter.[13]

As a result, if an accused pleads guilty after losing a Charter

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para. 6; *R. v. Yanke* (2014), 308 C.R.R. (2d) 1, 2014 CarswellAlta 602, [2014] A.J. No. 404 (Alta. Prov. Ct.) at para. 35 mitigating factor #1.

5. *R. v. Bicknell*, 2009 CarswellMan 95, [2009] M.J. No. 79, 2009 MBCA 34 (Man. C.A.) at para. 4.
6. *R. c. Claveau* (2003), (*sub nom.* R. v. Claveau) 684 A.P.R. 192, 260 N.B.R. (2d) 192, 2003 CarswellNB 340 (N.B. C.A.). See also *R. v. Parish* (1996), 454 A.P.R. 153, 178 N.B.R. (2d) 153, 1996 CarswellNB 669 (N.B. Q.B.) at para. 14.
7. *R. v. Crocker* (1994), 382 A.P.R. 251, 123 Nfld. & P.E.I.R. 251, 1994 CarswellNfld 134 (Nfld. C.A.). See also *R. v. Appleby* (2007), 286 A.P.R. 175, 271 Nfld. & P.E.I.R. 175, 164 C.R.R. (2d) 242 (N.L. T.D.) at paras. 24-28.
8. *R. v. Davidson* (1992), 299 A.P.R. 307, 110 N.S.R. (2d) 307, 1992 CarswellNS 310 (N.S. C.A.). Followed in *R. v. Spencer* (2006), 807 A.P.R. 391, 253 N.S.R. (2d) 391, 2006 CarswellNS 627 (N.S. S.C.).
9. *Fegan*, *supra*, footnote 3; *R. v. Roberts* (1998), 106 O.A.C. 308, 1998 CarswellOnt 392, [1998] O.J. No. 461 (Ont. C.A.). Two other decisions state the same rule, albeit in *obiter*: *R. v. T. (R.)* (1992), 17 C.R. (4th) 247, 10 O.R. (3d) 514, 58 O.A.C. 81 (Ont. C.A.); *R. v. P. (R.)* (2013), 295 C.C.C. (3d) 28, 302 O.A.C. 78, 2013 CarswellOnt 912 (Ont. C.A.) at para. 39, leave to appeal refused (2013), 325 O.A.C. 402 (note), 460 N.R. 400 (note), 2013 CarswellOnt 7979 (S.C.C.) (both reciting that a guilty plea waives even "constitutional" safeguards).
10. *R. v. Lachance*, 2002 CarswellNat 1133, 2002 CarswellNat 1134, [2002] C.M.A.J. No. 7 (Can. Ct. Martial App. Ct.) at paras. 17-18 and 22; *R. v. Bouchard*, 2002 CarswellNat 1520, 2002 CarswellNat 2335, 2002 CACM 9 (Can. Ct. Martial App. Ct.) at para. 2 (in both cases the court noted that, in contrast to the *Criminal Code*, military law may allow a plea of *nolo contendere* or "guilty subject to Charter defence" under r. 37(a) of the *Military Rules of Evidence*, C.R.C. c. 1049).
11. Namely, Québec: *R. c. Bordeleau*, 2002 CarswellQue 3972 (C.S. Que.), *R. c. Transfert Express inc.*, 2001 CarswellQue 3322, REJB 2001-30713, J.E. 2001-2225 (C.Q.). There does not seem to be any jurisprudence addressing this issue in Prince Edward Island, Saskatchewan, or the territories.
12. *Korponay v. Canada (Attorney General)*, [1982] 1 S.C.R. 41, 65 C.C.C. (2d) 65, 26 C.R. (3d) 343 (S.C.C.) at pp. 48-49 [S.C.R.].
13. *R. v. Ford* (2000), 145 C.C.C. (3d) 336, 33 C.R. (5th) 178, 179 O.A.C. 82 (Ont. C.A.), at paras. 33-37.

motion, it is not possible to raise the Charter issue as a ground of appeal. That defence was waived along with all other possible defences as a consequence of the accused's guilty plea.[14]

(b) A Guilty Plea Can be Withdrawn if the Accused Didn't Realize it Prejudices Appeal Rights

However, appellate courts will allow an accused to withdraw a guilty plea on appeal if the accused did not understand that by pleading guilty, he was waiving the right to appeal a pre-trial Charter ruling.

To reach this conclusion, appellate courts have adopted the following line of reasoning. In order to be valid, a guilty plea must be informed, voluntary, and unequivocal.[15] The requirement that a guilty plea be "informed" has two components: the accused must understand both the nature of the allegations made against him and the consequences of the guilty plea.[16] An accused who pleads guilty without realizing that the plea will prevent an appeal of pre-trial Charter rulings therefore does not make an informed plea, since he is operating under a misunderstanding about a critical consequence of the plea.[17] In all cases, the accused bears the burden of satisfying the appellate court that the plea was invalid.[18] The standard of proof is a balance of probabilities.[19]

While Canadian courts have generally agreed about the possibility of withdrawing guilty pleas on the basis of this kind of misunderstanding, courts have split over the *degree* of misunderstanding necessary to invalidate a guilty plea.

14. See sources cited at notes 4-12, *supra*. See especially *Duong*, *supra*, footnote 4, at paras. 4-8; *Davidson*, *supra*, footnote 9.
15. T. (R.), *supra*, footnote 10, adopted in *R v. Taillefer; R v. Duguay*, (*sub nom.* R. v. Taillefer) [2003] 3 S.C.R. 307, 179 C.C.C. (3d) 353, 17 C.R. (6th) 57 (S.C.C.). However, the requirement that a plea be informed, voluntary, and unequivocal is merely a minimum requirement, and even if it is satisfied, there may be other "valid grounds" to withdraw the plea (*Adgey v. R.* (1973), [1975] 2 S.C.R. 426, 13 C.C.C. (2d) 177, 23 C.R.N.S. 298 (S.C.C.); *R. v. Hanemaayer* (2008), 234 C.C.C. (3d) 3, 239 O.A.C. 241, 2008 CarswellOnt 4698 (Ont. C.A.) at paras. 16-20).
16. T. (R.), *supra*, footnote e 10.
17. *Fegan*, *supra*, footnote 3: "The element of validity lacking in this appeal is that the plea was not informed because the appellant was not aware that the consequence of his guilty plea was to foreclose an appeal challenging . . . the validity of an evidentiary ruling."
18. See e.g. T. (R.), *supra*, footnote 10, at para. 12; *Claveau*, *supra*, footnote 7, at para. 6; *Hoang*, *supra*, footnote 5, at paras. 14, 28.
19. *R. v. Alec* (2016), 337 C.C.C. (3d) 345, 671 W.A.C. 281, 389 B.C.A.C. 281 (B.C. C.A.), at para. 80.

Many provincial courts of appeal have allowed pleas to be withdrawn based solely on a statement by the accused that he did not know he was giving up his appeal rights by pleading guilty.[20] This could be called the "ignorance standard," since it involves the accused simply being unaware of the impact that pleading guilty would have on his right to appeal the pre-trial Charter motion, and nothing more.

In other cases, the accused has alleged more than mere ignorance, and has instead stated that he was expressly and erroneously advised by his lawyer that a guilty plea would *not* affect appeal rights.[21] This could be called the "misinformation standard," since it requires the accused to have received incorrect legal advice about the effects of a guilty plea, rather than having no knowledge one way or the other.

In virtually all of the above decisions, the Crown conceded the invalidity of the plea, so it is unclear whether any of these decisions can be considered authority about the degree of misunderstanding required to withdraw a guilty plea.[22] As a result, in most provinces it remains an open question whether the accused must meet the ignorance standard or the misinformation standard in order to withdraw a guilty plea due to its unintended effect on his appeal rights. With the exception of Alberta, discussed below, all that the existing case law demonstrates is a relatively permissive attitude towards withdrawing guilty pleas on appeal.

The exception to this uncertainty is Alberta, since the Alberta Court of Appeal seems to have adopted an enhanced version of the misinformation standard. Although *Hoang* is somewhat ambiguous on this point, it seems that in Alberta, the accused must demonstrate two facts to withdraw a plea due its unintended consequences on Charter issue appeal rights: first, that the accused had a contemporaneous intention to appeal the Charter motion at the time the motion decision was handed down; second, that the accused had been specifically misinformed about the consequences of a guilty plea.[23]

Regardless of whether they have adopted the ignorance standard or the misinformation standard, courts have sometimes suggested that even if the standard is met, permission to withdraw a guilty plea could be refused in certain circumstances. For example, courts have

20. *Webster*, *supra*, footnote 4, at para. 18; *Duong*, *supra*, footnote 4, at para. 7; *Chuhaniuk*, *supra*, footnote 4, at paras. 45-46. *Fegan*, *ibid.*, may fall into this category, although the judgment is not entirely clear on this point.
21. *Carter*, *supra*, footnote 4, at para. 6; *Roberts*, *supra*, footnote 10, at para. 9; *Claveau*, *supra*, footnote 7, at para. 3; *Spencer*, *supra*, footnote 9, at para. 7.
22. Of the cases cited at notes 22-23, *supra*, only *Spencer*, *ibid.* involved a contested plea withdrawal.
23. *Hoang*, *supra*, footnote 5, at paras. 34-38.

expressed reluctance to allow a guilty plea to be withdrawn where it is part of a plea bargain with the Crown, noting that in such cases the plea may have resulted in the dismissal of charges against third parties, the withdrawal of charges that cannot be re-laid for various reasons, or other irreversible benefits that will accrue to the accused notwithstanding withdrawal of the plea.[24] Courts have also considered whether the Crown was able to call additional evidence, but elected not to do so as a result of the plea.[25] Again though, the Crown conceded the invalidity of the plea in all of these cases, so these comments were arguably *obiter*. That said, in a contested plea withdrawal case, courts would likely consider all relevant surrounding circumstances, and would retain a residual discretion to prevent the withdrawal of a plea in some circumstances.

Finally, it is interesting to note that the case law on withdrawing guilty pleas due to misunderstandings about appeal rights has not involved Charter issues like ineffective assistance of counsel. The reason for this is probably practical: the standard for showing ineffective assistance of counsel is a higher threshold than the common-law requirements to withdraw a guilty plea.[26] As a result, appellate counsel will generally prefer to rely on common-law arguments, rather than constitutional ones.

(c) There Are Procedural Peculiarities to "Appealing" Guilty Pleas

While it is clear that appellate courts have jurisdiction to entertain appeals from convictions based on guilty pleas,[27] the mechanics of such appeals are unsettled. Procedure often varies between provinces, and the same appellate courts have sometimes adopted inconsistent approaches in decisions rendered only a few years apart. In a few cases, courts have created judge-made rules for appealing from guilty pleas which conflict with the court's own *Criminal Appeal Rules*.[28]

24. *Roberts*, *supra*, footnote 10, at para. 6 (withdrawal of charges); *Webster*, *supra*, footnote 4, at para. 22 (joint submission on sentence); *Hoang*, *supra*, footnote 5, at para. 39 (sentence mitigation); *Chuhaniuk*, *supra*, footnote 4, at para. 48 (stay of charges against third party).
25. *Crocker*, *supra*, footnote 8, at para. 17.
26. See *R. v. B. (G.D.)*, [2000] 1 S.C.R. 520, 143 C.C.C. (3d) 289, 32 C.R. (5th) 207 (S.C.C.) at paras. 26-29.
27. *Fegan*, *supra*, footnote 3.
28. See e.g. *R. v. Staples* (2007), 414 W.A.C. 213, 249 B.C.A.C. 213, 2007 CarswellBC 2981 (B.C. C.A. [In Chambers]) at para. 16 and *R. v. Tyler* (2007), 218 C.C.C. (3d) 400, 391 W.A.C. 312, 237 B.C.A.C. 312 (B.C. C.A.) at para. 2, where the British Columbia Court of Appeal held that the 30-day appeal period runs from the date of the guilty plea, despite r. 3(1) of the

This section sets out the five most important of these procedural peculiarities, in the hopes of providing guidance on the proper mechanics of brining such an appeal.

First, the notice of appeal should indicate that the plea at trial was "guilty," even though the appellant's position will be that the plea is invalid. Stating that the plea at trial was "not guilty" is inaccurate, and risks misleading the court.[29] The notice of appeal should also disclose that the appellant is seeking to withdraw his guilty plea.[30] In some provinces, the notice of appeal must also contain an application for leave to appeal (see point four, below).

Second, in addition to the standard appeal materials, counsel appealing from a guilty plea must file a motion in the court of appeal to withdraw the plea.[31] Among other things, this motion serves as the procedural vehicle to put the required affidavit evidence before the court (see point three below).

Third, counsel should file at least one affidavit (and ideally two) in support of the motion. These affidavits are automatically admissible, without the need to satisfy the *Palmer* test for fresh evidence on appeal.[32]

The first affidavit is essential, and will be sworn by the accused. This affidavit should depose to three facts: (1) the accused's contemporaneous dissatisfaction with the trial judge's ruling on the

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British Columbia Court of Appeal Criminal Appeal Rules, 1986, SI/86-137, B.C. Reg. 145/86, which states that time to appeal runs from the date of sentencing. In *Webster*, *supra*, footnote 4, at para. 17, the same court applied the "30 days from sentencing" rule instead of the judicially-created rules in *Staples* and *Tyler*.

29. Both *Webster*, *supra*, footnote 4, at para. 17 and *Lachance*, *supra*, footnote 11, at paras. 6-9 comment unfavourably on counsel's decision to indicate that the plea at trial was "not guilty."

30. *R. v. Chiasson*, 2008 CarswellNB 218, 2008 CarswellNB 219, [2008] N.B.J. No. 171 (N.B. C.A.) at para. 4; *R v. Roy*, 1992 CanLII 1082 (dismissal of motion for leave to amend the notice of appeal led to denial of leave to bring motion to withdraw plea). *Contra*: *R. v. Behr*, [1967] 3 C.C.C. 1, [1967] 1 O.R. 639, 1967 CarswellOnt 247 (Ont. Dist. Ct.), reversed (1967), [1968] 2 C.C.C. 151, [1967] 2 O.R. 622, 1967 CarswellOnt 151 (Ont. C.A.) (allowing withdrawal of plea even though not mentioned in notice of appeal).

31. *Webster*, *supra*, footnote 4, at para. 18; *Bowman*, *ibid.*, at para. 8; *R. v. Winmill* (2006), 782 A.P.R. 125, 300 N.B.R. (2d) 125, 2006 CarswellNB 431 (N.B. C.A.) at para. 8 (illustrative); *R. v. Williams* (2012), 551 W.A.C. 166, 324 B.C.A.C. 166, 2012 CarswellBC 2185 (B.C. C.A.) at para. 46 (although in *Williams* the court considered the application to withdraw the plea despite the absence of a formal motion).

32. T. (R.), *supra*, footnote 10, at para. 12; *R. v. Wiebe* (2012), 565 W.A.C. 208, 331 B.C.A.C. 208, 2012 CarswellBC 4008 (B.C. C.A.) at para. 22. See also *Alec*, *supra*, footnote 20, at paras. 81-82.

Charter motion; (2) the accused's continuous desire to challenge that ruling on appeal; (3) the fact that trial counsel informed the accused that a guilty plea would not prejudice appeal rights (or, alternatively, that trial counsel simply did not explain the impact of a guilty plea on appeal rights one way or another).[33] Failure to file an affidavit from the accused may mean that the plea cannot be withdrawn, even if there is an affidavit from trial counsel or other evidence available.[34]

The second affidavit is optional in most jurisdictions, but may be essential in Alberta following *Hoang*, and it will be sworn by trial counsel. Ideally, trial counsel will be able to confirm that the accused was told that a guilty plea would not prejudice appeal rights. If trial counsel files an affidavit, ethical rules normally preclude trial counsel from representing the accused on appeal. However, in at least one case, trial counsel gave evidence that the accused was misinformed about how a guilty plea would affect his appeal rights and also argued the appeal.[35]

If the accused does not file an affidavit from trial counsel, the Crown may obtain such an affidavit in order to contradict the accused's version of the facts.[36] To the extent that the accused's affidavit evidence raises questions of credibility, the Crown may cross-examine the affiant(s) prior to the appeal and tender the resulting transcripts into evidence, or there may be *viva voce* cross-examination before the appeal panel itself.[37]

Fourth, there is considerable confusion over what grounds of appeal are invoked by an accused who appeals from a guilty plea on

33. *Hoang*, *supra*, footnote 5, at para. 35; *Webster*, *supra*, footnote 4, at para. 18; *Chuhaniuk*, *supra*, footnote 4, at paras. 45-46; *Williams*, *supra*, footnote 32, at para. 51.

34. *Crocker*, *supra*, footnote 8, at paras. 8, 16 (only trial counsel's affidavit filed – permission to withdraw plea denied); *R. v. Miller* (2011), 965 A.P.R. 302, 374 N.B.R. (2d) 302, 2011 CarswellNB 283 (N.B. C.A.) (accused relied on trial transcripts and did not submit fresh evidence – permission to withdraw plea denied); *Chiasson*, *supra* note 31 at para 8 (no fresh evidence on appeal – permission to withdraw plea denied); *R. v. Gagnon*, 2012 CarswellQue 7950, EYB 2012-209583, 2012 QCCA 1346 (C.A. Que.) at para. 3 (appellants ordered to submit fresh evidence as condition for prosecuting appeal); *Williams*, *supra*, footnote 32, at paras. 51, 55 (appellant failed to file affidavit attesting to state of mind – permission to withdraw plea denied); *R. v. Meade*, 2007 CarswellNB 313, 2007 CarswellNB 314, [2007] N.B.J. No. 237 (N.B. C.A.) at para. 5 (failure to file fresh evidence leads to dismissal of appeal).

35. *Spencer*, *supra*, footnote 9, at para. 7.

36. *Wiebe*, *supra*, footnote 33, at para. 22.

37. *Wiebe*, *ibid.*, at paras. 22, 41; *R. v. Hirtle* (1991), 283 A.P.R. 56, 104 N.S.R. (2d) 56, 1991 CarswellNS 142 (N.S. C.A.), *R. v. Tyler* (2007), 218 C.C.C. (3d) 400, 391 W.A.C. 312, 237 B.C.A.C. 312 (B.C. C.A.) at paras. 16-17.

the basis that the plea was misinformed. This confusion creates both procedural and substantive difficulties for appellate counsel.

As is well-known, the accused can appeal a conviction for an indictable offence on three grounds: error of law; error of fact or mixed fact and law; and miscarriage of justice.[38] How do invalid guilty pleas fit into this tripartite scheme? A small number of appellate decisions treat invalid guilty pleas as errors of law.[39] A larger number treat invalid guilty pleas either as errors of mixed fact and law[40] or as miscarriages of justice.[41] Finally, many decisions allow the accused to challenge a guilty plea as an error of law, and also to argue that even if the plea is valid at law, it has nonetheless resulted in a miscarriage of justice.[42]

This causes procedural confusion, specifically over whether the accused is required to seek leave to appeal. If invalid guilty pleas are treated as errors of law, there is no leave requirement and an appeal lies as of right. If invalid guilty pleas are treated as errors of mixed fact and law, or as miscarriages of justice, then leave should be required. However, not all appeal courts take leave requirements seriously. For example, Quebec, New Brunswick, and Saskatchewan treat invalid guilty pleas as mixed errors of law and fact, and also enforce the consequential requirement of leave to appeal.[43] However, the other jurisdictions that characterize invalid guilty pleas as mixed errors of

38. *Criminal Code*, *supra*, footnote 2, s. 675(1)(a).
39. See e.g. *R. v. Behr*, [1967] 3 C.C.C. 1, [1967] 1 O.R. 639, 1967 CarswellOnt 247 (Ont. Dist. Ct.), reversed (1967), [1968] 2 C.C.C. 151, [1967] 2 O.R. 622, 1967 CarswellOnt 151 (Ont. C.A.). See also cases cited at footnote 43, *infra*.
40. See e.g. *R. c. Guignard* (2003), (*sub nom.* R. v. Guignard) 684 A.P.R. 396, 260 N.B.R. (2d) 396, 2003 CarswellNB 311 (N.B. C.A.); *Chiasson*, *supra*, footnote 31, at para. 5; *Miller*, *supra*, footnote 35, at paras. 6-9; *R. v. McLaughlin* (2013), 1045 A.P.R. 358, 403 N.B.R. (2d) 358, 2013 CarswellNB 194 (N.B. C.A.) at paras. 9 and 12.
41. See e.g. *Hoang*, *supra*, footnote 5, at paras. 27, 41-42, 51 *R. v. Riley* (2011), 274 C.C.C. (3d) 209, 957 A.P.R. 321, 303 N.S.R. (2d) 321 (N.S. C.A.) at para. 2; *R. v. Hunt* (2004), 346 A.R. 45, 320 W.A.C. 45, 2004 CarswellAlta 221 (Alta. C.A.) at paras. 5, 7 and 11; *R. v. Short* (2012), 399 Sask. R. 192, 2012 CarswellSask 616, [2012] S.J. No. 593 (Sask. C.A.) at para. 3; *Williams*, *supra*, footnote 32, at para. 47; *Carter*, *supra*, footnote 4, at para. 7; *R. c. Gosselin*, 2010 CarswellQue 9618, EYB 2010-179334, 2010 QCCA 1651 (C.A. Que.) at para. 8; *R. c. Hok*, 2013 CarswellQue 4379, 2013 QCCA 863, 110 W.C.B. (2d) 801 (C.A. Que.) at para. 1 (single judge), deferred to panel *R. c. Hok*, 2013 CarswellQue 5365, EYB 2013-222887, 2013 QCCA 1011 (C.A. Que.).
42. See e.g. *Roberts*, *supra*, footnote 10, at para. 4; *Fegan*, *supra*, footnote 3, at para. 6; *Hirtle*, *supra*, footnote 38.
43. See e.g. *Short*, *supra*, footnote 42, at para. 3; *Gosselin*, *supra*, footnote 42, at para. 8; *McLaughlin*, *supra*, footnote 41, at paras. 9, 12.

law and fact or miscarriages of justice do not seem to actually enforce the leave requirement which this approach should entail.[44]

There is also substantive confusion, namely whether the correctness of the underlying Charter motion decision is relevant to whether the plea can be withdrawn. In theory, it shouldn't be, since a guilty plea waives all defences regardless of their validity. Yet a number of appellate courts seem to have considered the correctness of the pre-trial Charter motion ruling when deciding whether there has been a miscarriage of justice.[45] This implies that even if a guilty plea is valid, it might nonetheless be considered a miscarriage of justice if the accused waived a meritorious Charter argument. Such an approach is problematic, since as the Alberta Court of Appeal observed in *Hoang* "[w]ere this Court to fully determine whether the trial judge erred in deciding there were no Charter breaches [this] effectively permits the appellant to appeal on the merits and renders any refusal to allow a withdrawal of a guilty plea meaningless."[46] Yet in spite of this observation, even the court in *Hoang* went on to consider the validity of the underlying Charter decision.[47]

Fifth and finally, it is not always clear which remedy will be granted by a court of appeal if it allows the accused to withdraw a guilty plea. In most cases, when appellate courts have allowed a guilty plea to be withdrawn, they have simply addressed the underlying Charter argument and either affirmed the conviction or substituted an acquittal accordingly.[48] However, the *Claveau* decision shows that this approach will not always be available.[49] In *Claveau* the accused pled guilty after an adverse Charter ruling, but there was no agreed statement of facts, nor did the trial judge make any findings of fact. The New Brunswick Court of Appeal allowed withdrawal of the plea, but held that without an agreed statement of facts, it could not resolve the accused's ultimate guilt or innocence, and thus a new trial was the only remedy available. Counsel should thus be aware that if they

44. See e.g. *Hoang*, *supra*, footnote 5; *Hunt*, *supra*, footnote 42 (both in Alberta); *Riley*, *supra*, footnote 42 (Nova Scotia); *Carter*, *supra*, footnote 4 (British Columbia) none of which discuss the leave requirement.
45. See e.g. *Carter*, *supra*, footnote 4, at paras. 9-12; *Roberts*, *supra*, footnote 10, at paras. 4, 6, 9; *Hoang*, *supra*, footnote 5, at para. 43, *Fegan supra*, footnote 3; *Alec*, *supra*, footnote 20, at para. 83.
46. *Hoang*, *ibid*., at para. 43.
47. *Ibid*., at paras. 44-51. To balance these concerns, the Court in *Hoang* may have adopted a stricter standard of review than is typical, since the judgement refers to "clear" errors of law in assessing the pre-trial decision (*ibid*., at para. 50). Normally of course, an error of law need not be "clear" before appellate intervention is justified.
48. See e.g. *Fegan*, *supra*, footnote 3; *Duong*, *supra*, footnote 4.
49. *Claveau*, *supra*, footnote 7, at paras. 10-11.

succeed in withdrawing the guilty plea, the existence and content of the agreed statement of facts could become central to the disposition of their appeal.

3. The Proper Course is to Admit Facts and Invite a Conviction

The previous section established that if your client loses a pre-trial Charter motion, he should under no circumstances plead guilty. Such a plea would waive the very Charter argument that you were hoping to raise on appeal. This section explores the proper method of avoiding an unnecessary trial while preserving appeal rights on Charter issues — namely, admitting the factual elements of guilt while maintaining a non-guilty plea. Appellate courts have clearly and consistently endorsed this method of expediting an appeal on Charter issues.

Rather than pleading guilty, defence counsel should plead *not* guilty, but admit all of the facts required to convict the accused on the charges laid by the Crown.[50] This approach has been repeatedly endorsed by provincial appellate courts, which have ruled that because there is no guilty plea, the accused remains free to seek an acquittal on appeal by relying on the Charter argument(s) rejected at trial.[51] Indeed, appellate courts have specifically recognized that even if the accused admits all of the facts required to sustain a conviction, he is not required to plead guilty, and can maintain the original plea of not guilty.[52]

Consequently, making admissions but maintaining a plea of not guilty allows your client to achieve the result sought — namely to skip the delay and expense of a trial whose result is a foregone conclusion — while simultaneously preserving Charter argument(s) on appeal.

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50. Some cases also report defence counsel inviting the court to convict or suggest that such an invitation should be made (see e.g. *Duong*, *supra*, footnote 4, at para. 8; *Webster supra*, footnote 4, at para. 21; *R. v. Desjardins* (1998), 178 W.A.C. 33, 110 B.C.A.C. 33, 1998 CarswellBC 1621 (B.C. C.A.) at paras. 10-11; *R. v. Peltier* (2013), 303 O.A.C. 87, 2013 CarswellOnt 2625, [2013] O.J. No. 1004 (Ont. C.A.) at para. 12). Since many cases do not record or require such an invitation, inviting a conviction does not seem to be legally-required to pursue this strategy, and could thus be omitted at defence counsel's option (for example, when representing an unsophisticated client who might take such an invitation the wrong way).
51. *Duong*, *ibid.*, at para. 8; *Webster*, *ibid.*, at paras. 21, 47; *Chuhaniuk*, *supra*, footnote 4, at paras. 45, 47; *Fegan*, *supra*, footnote 3, at paras. 9-10.
52. *R. v. MacDonald* (2008), 236 C.C.C. (3d) 269, 59 C.R. (6th) 339, 92 O.R. (3d) 180 (Ont. C.A.) at para. 30; *Desjardins*, *supra*, footnote 51, at paras. 17-18; *Coderre*, *supra*, footnote 3, at para. 30; P. (R.), *supra*, footnote 10, at paras. 32, 35, 43, 50-51, 65-66.

This strategy is relatively straightforward, but there are a few nuances which should be kept in mind when deciding exactly what your client is prepared to admit and how to frame those admissions.

The most common procedure to make the necessary admissions is to prepare an agreed statement of facts (ASF).[53] The ASF should admit the underlying facts themselves, rather than the Crown's ability to prove certain facts beyond a reasonable doubt, since the latter is not considered a true admission.[54] In many cases, the defence may prefer to make admissions which closely track the language of the *Criminal Code* offences charged against the accused. Doing so is legally permissible, and minimizes ambiguity about what exactly is being admitted by the accused.[55] Finally, the ASF should clearly specify the proceedings to which it applies, since failure to restrict the ASF to the current trial may make it admissible as evidence against the accused in a retrial (or any other subsequent proceedings for that matter).[56]

Regardless of whether the ASF will be admissible in subsequent proceedings, it will play an important role in both the sentencing and appeal stages of the proceeding in which it is made. To the extent possible, the ASF should be negotiated by defence counsel with sentencing in mind, because the facts contained in the ASF are admissible for sentencing purposes, and the accused may be entitled to sentencing credit for making admissions that expedite trial and spare witnesses the need to testify.[57] Similarly, the facts contained in

53. *Criminal Code*, *supra*, footnote 2, s. 655.

54. *Coderre*, *supra*, footnote 3, at para. 29.

55. *R. v. Miljevic* (2010), 254 C.C.C. (3d) 25, [2010] 9 W.W.R. 279, 482 A.R. 115 (Alta. C.A.) at para. 18, affirmed [2011] 1 S.C.R. 203, 264 C.C.C. (3d) 394, 82 C.R. (6th) 1 (S.C.C.).

56. A majority of the Supreme Court in *R. v. McGuigan*, [1982] 1 S.C.R. 284, 66 C.C.C. (2d) 97, 26 C.R. (3d) 289 (S.C.C.) held that absent the accused's consent, admissions made with respect to one count of an indictment could not be used at the trial of another count of the same indictment; *a fortiori*, this would prohibit using admissions made at one trial during a second trial. However, *McGuigan* has been confined to its facts by more recent jurisprudence, which effectively adopts the converse position, holding that unless the accused expressly restricts the scope of an admission, it is admissible in subsequent proceedings, albeit as an informal, rather than formal, admission (see *R. v. Baksh* (2005), 199 C.C.C. (3d) 201, 2005 CarswellOnt 3106, [2005] O.J. No. 2971 (Ont. S.C.J.) at paras. 100-113 and 118-120, affirmed on this point 2008 CarswellOnt 720, [2008] O.J. No. 538, 2008 ONCA 116 (Ont. C.A.) at paras. 1-3).

57. *Fegan*, *supra*, footnote 3, at para. 4; *R. v. Singh* (2012), 286 C.C.C. (3d) 204, 26 M.V.R. (6th) 63, (*sub nom.* R. v. Mohla) 254 C.R.R. (2d) 63 (Ont. S.C.J.) at para. 181; *R. v. Spencer*, 2003 CarswellBC 3363, 2003 BCSC 1989 (B.C. S.C.) at para. 15; *R. v. W. (J.)* (2004), (*sub nom.* R. v. Wubbolt) 189 O.A.C.

the ASF may determine whether a Charter remedy can be granted on appeal, or whether the case must be retried.[58] Thus, where possible, the ASF should lay the necessary groundwork for the Charter remedy which will be sought on appeal.

Finally, litigants (or their appellate counsel) sometimes come to regret the admissions made at trial. This raises the question of whether admissions in an ASF can be withdrawn on appeal, and if so, under what circumstances. Courts have varied widely in their willingness to allow an accused to repudiate an ASF. In 1982, the Ontario Court of Appeal permitted withdrawal of formal admissions merely because the accused was prepared to testify to the contrary.[59] More recently, the Québec Court of Appeal allowed an accused to back out of a series of admissions, seemingly on the sole basis that an accused may repudiate an ASF at any time before trial.[60] On the other hand, there are recent Ontario Court of Appeal cases which take a strict approach to withdrawing an ASF, and which apply a standard that resembles the test used to withdraw guilty pleas.[61] As a result, depending on the jurisdiction in which the appeal is heard, counsel should be aware that resiling from an ASF on appeal may be simple enough, or may be difficult or even impossible.

347, 2004 CarswellOnt 3585, [2004] O.J. No. 3591 (Ont. C.A.) at para. 33. See *contra Pelletier*, *supra*, footnote 51, at paras. 12-13 (refusing sentencing credit for admissions without a guilty plea since the *voir dire* was extensive and required 11 witnesses); *R. v. Stewart* (December 18, 2008), McCombs (Ont. S.C.J.) at paras. 32-33 (refusing credit because admissions went to issues on which the Crown's case was overwhelming), affirmed on verdict no sentence appeal (2014), 306 C.C.C. (3d) 269, 315 O.A.C. 35, 2014 CarswellOnt 753 (Ont. C.A.).

58. See footnote 50, *supra*, and surrounding text.

59. *R. v. Coburn* (1982), 66 C.C.C. (2d) 463, 27 C.R. (3d) 259, 1982 CarswellOnt 68 (Ont. C.A.) at para. 13. The court's willingness to allow repudiation of the ASF seems to have been influenced by the numerous and admitted errors it contained (*ibid* at paras 10-11). See also *R. v. Lewis* (2012), 95 C.R. (6th) 317, 552 W.A.C. 180, 399 Sask. R. 180 (Sask. C.A.) at para. 22.

60. *Coderre*, *supra*, footnote 3, at paras. 38-42. The Québec Court of Appeal had also held that the document in question was not a true ASF (see note 55, *supra*), so arguably its comments about the accused's ability to resile from a true ASF were *obiter*.

61. P. (R.), *supra*, footnote 53, at paras. 50, 66 (miscarriage of justice required to set aside ASF); *R. v. G. (D.M.)* (2011), 275 C.C.C. (3d) 295, 84 C.R. (6th) 420, 105 O.R. (3d) 481 (Ont. C.A.) at para. 38 (miscarriage of justice standard). See also *R. v. Fertal* (1993), 85 C.C.C. (3d) 411, 145 A.R. 225, 13 Alta. L.R. (3d) 297 (Alta. C.A.) at para. 9, leave to appeal refused (2003), 346 A.R. 137 (note), 363 A.R. 195 (note), 321 N.R. 196 (note) (S.C.C.).

4. Conclusion: Does Canada Need a Conditional Guilty Plea?

The case law reviewed above illustrates that preserving appeal rights for Charter arguments is a fairly straightforward proposition, as long as two points are kept in mind.

First point: whatever you do, do not allow your client to plead guilty. A guilty plea would waive the very Charter argument your client wishes to argue on appeal. If a guilty plea has already been made, it can be withdrawn, but withdrawing a guilty plea on appeal is a difficult prospect, fraught with procedural and substantive difficulties. One of these difficulties is the need for an affidavit from trial counsel, a requirement which normally precludes trial counsel from arguing the appeal.

Second point: in order to avoid a pointless trial while preserving Charter arguments for appeal, the proper approach is to submit an agreed statement of facts in which the accused admits factual guilt, but maintains a not guilty plea. This approach has been repeatedly endorsed by provincial appellate courts.

The above state of the law may appear overly complex and even formalistic. Yet as explained at the outset of this article, the difficulties involving appeals of pre-trial Charter motions ultimately trace back to the interplay of two legal rules: the closed list of pleas and the unavailability of interlocutory appeals under the *Criminal Code*. This raises the question of whether law reform is called for in this area. The prohibition on interlocutory appeals is unlikely to change, for a host of reasons. Thus, the most promising avenue of law reform would be an amendment to the list of available pleas under the *Criminal Code*, to add a conditional guilty plea.

Many Canadian cases equate an attempted plea of "guilty subject to Charter defence" with the American plea of *nolo contendere*, but this is not the correct analogy. A *nolo contendere* plea does not attempt to preserve arguments for appeal, whereas a conditional guilty plea (another American concept) does just that.[62] Allowing conditional guilty pleas would solve a number of the substantive and procedural issues raised by this article, and would also the address conceptual incoherence of using agreed statements of fact while seeking a 24(2) Charter remedy on appeal.[63]

While the US experience with conditional guilty pleas has been

62. *Federal Rules of Criminal Procedure* r. 11(2), 11(3); *Notes of Advisory Committee on Rule 11 – 1983 Amendment* (online: www.law.cornell.edu/rules/frcrmp/rule_11).

63. Since an agreed statement of facts dispenses with the need for evidence (*Criminal Code*, s. 655), then in theory, even if a 24(2) argument succeeded on appeal, the inadmissibility of the evidence would be irrelevant, since the

largely positive, any change to such a fundamental component of the criminal justice system would have far-reaching consequences. More study would therefore be needed before it is possible to take a definitive position on whether Canada needs a conditional guilty plea. And until the *Criminal Code* is amended to permit conditional guilty pleas, formal admissions will remain the only safe way to avoid an unnecessary trial while preserving appeal rights for Charter violations.

accused has admitted the facts which the evidence was originally intended to approve. Thus the conviction would theoretically remain valid.