

## THE LOST ART OF THE PLEA INQUIRY: LEARNING FROM THE PAST TO PREVENT WRONGFUL CONVICTIONS IN THE FUTURE

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*A guilty plea wrongful conviction occurs when an innocent person pleads guilty to a crime that they did not commit. Canada's main procedural protection against guilty plea wrongful convictions is an inquiry, codified in sections 606(1.1) and (1.2) of the Criminal Code, that courts must conduct before accepting a plea from the accused. This plea inquiry requires that a court be satisfied of three conditions before accepting a guilty plea from an accused: (1) that the plea is voluntary, (2) that the plea is informed, and (3) that the facts support the charge.*

*The goal of this article is to show that sections 606(1.1) and (1.2) offer insufficient protection against false guilty pleas and can be improved by learning from the early common law courts' approach to plea inquiries. This article argues that when sections 606(1.1) and (1.2) were enacted in 2002, guilty plea wrongful convictions were poorly understood and, as a result, Parliament crystalized a plea inquiry that systematically fails to account for many recently recognized causes of false guilty pleas. However, this article suggests that sections 606(1.1) and (1.2) can be improved by looking to the early common law, when courts were skeptical of guilty pleas and the risk of wrongful conviction. In particular, this article recommends three ways that sections 606(1.1) and (1.2) can be improved: (1) to conduct a full plea inquiry in every case, (2) to individualize the inquiry to the accused by considering their circumstances and motive for pleading guilty, and (3) to foster a skeptical attitude towards guilty pleas amongst the judiciary. This article further argues that these lessons can, at least in part, be implemented by challenging the constitutionality of sections 606(1.1) and (1.2) under section 7 of the Charter.*

### TABLE OF CONTENTS

I.	INTRODUCTION . . . . .	1018
II.	THE HISTORY: THE ORIGINS OF THE PLEA INQUIRY . . . . .	1020
	A. EARLY COMMON LAW—1892: A DISTASTE FOR GUILTY PLEAS AND THE EARLY PLEA INQUIRY . . . . .	1020
	B. 1892—1960: THE BIRTH OF GUILTY PLEAS IN CANADA AND THE ADVENT OF PLEA BARGAINING . . . . .	1023
	C. 1960—1975: A SHIFT AWAY FROM THE EARLY COMMON LAW APPROACH . . . . .	1025
	D. 1975—2002: FIRST CALL FOR CHANGE AND THE ENACTMENT OF SECTIONS 606(1.1) AND (1.2) . . . . .	1028

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Editor's note: Please note that there are some instances within this article that refer to opinions and quotes from legal scholars in the years 1609–1771. In order to preserve the accuracy of the original authors' works in quotations, the original text has been quoted as it appears in the original works. For clarity, please note the following spelling discrepancies to assist with pronunciation while reading this article: "f" and "F" are what is known as a "long s," and are a unique letter from the letter "s"; both are pronounced as one would pronounce the letter "s." There are instances where the letter "u" is replaced with the letter "v"; in these instances, the "v" should be pronounced as one would pronounce the letter "u."

E.	2002–2019: AWAKENING TO GUILTY PLEA WRONGFUL CONVICTIONS AND BILL C-75 . . . . .	1029
III.	THE PROBLEM: THE LIMITED SCOPE OF SECTIONS 606(1.1) AND (1.2) . . . . .	1033
A.	SECTIONS 606(1.1) AND (1.2): A WALKTHROUGH . . . . .	1033
B.	THE INABILITY OF SECTIONS 606(1.1) AND (1.2) TO PREVENT CAUSES INTERNAL TO THE ACCUSED . . . . .	1035
C.	THE INABILITY OF SECTIONS 606(1.1) AND (1.2) TO PREVENT CAUSES EXTERNAL TO THE ACCUSED . . . . .	1036
D.	THE INABILITY OF SECTIONS 606(1.1) AND (1.2) TO PREVENT CAUSES RELATED TO THE IDENTITY OF THE ACCUSED . . . . .	1037
E.	WHY SECTIONS 606(1.1) AND (1.2) ARE THE PROBLEM, NOT COURT PRACTICES . . . . .	1038
IV.	SOME SOLUTIONS: LEARNING LESSONS FROM THE PAST . . . . .	1038
A.	LESSON #1: CONDUCT A PLEA INQUIRY WITH THE ACCUSED IN EVERY CASE . . . . .	1039
B.	LESSON #2: INDIVIDUALIZE THE PLEA INQUIRY TO THE ACCUSED . . . . .	1039
C.	LESSON #3: FOSTER A SKEPTICAL ATTITUDE TOWARDS GUILTY PLEAS . . . . .	1040
V.	A PATH FORWARD: SECTIONS 606(1.1) AND (1.2) ARE RIPE FOR <i>CHARTER</i> REVIEW . . . . .	1041
A.	SECTION 7 . . . . .	1041
B.	SECTION 1 AND REMEDY . . . . .	1045
VI.	CONCLUSION . . . . .	1047

The importance of preventing wrongful convictions cannot be overstated. As this Court held in *United States v. Burns*, . . . “the avoidance of conviction and punishment of the innocent has long been in the forefront of ‘the basic tenets of our legal system’” . . . Robust procedural protections against wrongful convictions are crucial.<sup>1</sup>

## I. INTRODUCTION

Canada’s main procedural protection against guilty plea wrongful convictions — the phenomenon where an innocent person falsely pleads guilty to a criminal offence — is an inquiry that courts may conduct before accepting a plea from the accused. This inquiry, codified in sections 606(1.1) and (1.2) of the *Criminal Code*, asks three questions: (1) whether the plea is voluntary, (2) whether the plea is informed, and (3) whether the facts support the charge.<sup>2</sup> Sections 606(1.1) and (1.2) read, in full:

### Conditions for accepting guilty plea

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

<sup>1</sup> *R v CP*, 2021 SCC 19 at para 61 [citations omitted].

<sup>2</sup> RSC 1985, c C-46, ss 606(1.1)–(1.2).

- (a) the accused is making the plea voluntarily;
- (b) the accused understands
  - (i) that the plea is an admission of the essential elements of the offence,
  - (ii) the nature and consequences of the plea, and
  - (iii) that the court is not bound by any agreement made between the accused and the prosecutor; and
- (c) the facts support the charge.

### Validity of Plea

- (1.2) The failure of the court to fully inquire whether the conditions set out in subsection (1.1) are met does not affect the validity of the plea.<sup>3</sup>

Since sections 606(1.1) and (1.2) were enacted in 2002, legal scholars have increasingly investigated wrongful convictions, and false guilty pleas have become their *hot topic*.<sup>4</sup> Many have realized that false guilty pleas are likely the most common cause of wrongful convictions; hundreds or thousands are estimated to occur annually.<sup>5</sup> It is well-established that, although sections 606(1.1) and (1.2) provide important oversight over the guilty plea process, many accused continue to plead guilty when innocent.

Oddly, however, plea inquiries were not always inadequate in preventing false guilty pleas. Few recognize that our early common law traditions were well acquainted with the risks of guilty plea wrongful convictions. Indeed, judges in that era conducted extensive plea inquiries and attempted to discourage guilty pleas. This history begs the question of why our approach to plea inquiries changed and what went wrong.

In this article, I strive to answer these questions. In particular, I argue that sections 606(1.1) and (1.2) offer insufficient protection against false guilty pleas and can be improved by learning from the early common law courts' approach to plea inquiries. I develop this argument in four parts. I begin, in Part II, by canvassing the history of pleas inquiries. I show that, historically, the robustness of plea inquiries has been dependent on a trade-off: as the legal system increasingly valued efficiency and leniency towards the accused's right to choose how to plead, the protections provided by courts against false guilty pleas have

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<sup>3</sup> *Ibid.*

<sup>4</sup> See e.g. Christopher Sherrin, "Guilty Pleas From the Innocent" (2011) 30 Windsor Rev Legal Soc Issues 1; Joan Brockman, "An Offer You Can't Refuse: Pleading Guilty When Innocent" (2010) 56:1/2 Crim LQ 116; Amanda Carling, "A Way to Reduce Indigenous Overrepresentation: Prevent False Guilty Plea Wrongful Convictions" (2017) 64:3/4 Crim LQ 415; Federal/Provincial/Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions, *Innocence at Stake: The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada* (Ottawa: Public Prosecution Service of Canada, 2018) at ch 8 [*FPT Report*]; Kent Roach, "You Say You Want a Revolution? Understanding Guilty Plea Wrongful Convictions" (30 June 2021), online: <ssrn.com/abstract=3869888>.

<sup>5</sup> Sherrin, *ibid* at 6.

declined. I propose that, when sections 606(1.1) and (1.2) were enacted in 2002, efficiency and leniency were prized, but guilty plea wrongful convictions were poorly understood. In Part III, I demonstrate how this history sheds light on the modern limitations of the plea inquiry. I walk through sections 606(1.1) and (1.2), step-by-step, to demonstrate that they are incapable of preventing many recently established causes of false guilty pleas. In Part IV, I propose that sections 606(1.1) and (1.2) can be improved by adopting three lessons from the past. These lessons include (1) to conduct a full plea inquiry in *every* case, (2) to individualize the inquiry to the accused by considering their circumstances and motive for pleading guilty, and (3) to foster a skeptical attitude towards guilty pleas amongst the judiciary. In Part V, I argue that these lessons can, at least in part, be implemented by challenging the constitutionality of sections 606(1.1) and (1.2) under section 7 of the *Canadian Charter of Rights and Freedoms*.<sup>6</sup>

## II. THE HISTORY: THE ORIGINS OF THE PLEA INQUIRY

### A. EARLY COMMON LAW—1892: A DISTASTE FOR GUILTY PLEAS AND THE EARLY PLEA INQUIRY

The early years of the common law were characterized by a discouragement of guilty pleas.<sup>7</sup> As explained by Ferdinando Pvlton — one of the earliest writers on criminal law — the plea of not guilty was “the moft common and ufual plea [and] . . . it receveith great favour in Law.”<sup>8</sup> When an accused tried to enter a guilty plea, courts would actively try to convince them to withdraw it.<sup>9</sup> In 1769, William Blackstone explained that courts were “very backward in receiving and recording [a guilty plea], out of tendernefs to the life of the fubject; and will generally advife the prifoner to retract it, and plead to the indictment.”<sup>10</sup>

In assessing guilty pleas, judges seem to have engaged in a form of “plea inquiry” where they would engage directly with the accused, consider their circumstances, and ensure they were fit to plead guilty. The English Justice Sir Michael Foster, for instance, explained that for a court to accept a guilty plea, the plea must be made “when the party may be prefumed to be properly upon his guard, and apprized of the danger he ftandeth in.”<sup>11</sup> In these “inquiries,” courts would consider whether a guilty plea was in the accused’s interests; if the

<sup>6</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

<sup>7</sup> Albert W Alschuler, “Plea Bargaining and Its History” (1979) 13:2 Law & Soc’y Rev 211 at 214–15.

<sup>8</sup> Ferdinando Pvlton, *De Pace Regis et Regni. viz.: A Treatise Declaring Which Be the Great and Generall Offences of the Realme, and the Chiefe Impediments of the Peace of the King and the Kingdome, as Menaces, Affaults, Batteries, Treafons, Homicides, and Felonies, Ryots, Routs, Vnlawfull Affemblyes, Forcible Entries, Forgeries, Perjuries, Maintenance, Deceit, Extortion, Oppreffion: And How Many and What Forts of Them There Be, and by Whome, and What Means the Fayd Offences, and the Offenders Therein Are to Bee Refrained, Repreffed, or Punifhed. Which Being Reformed or Duly Checked, Florebit Pax Regis & Regni [The Peace of the King and the Kingdom Will Flourish]* (London: The Companie of Stationers, 1609) at 192.

<sup>9</sup> See e.g. Sir Matthew Hale, *Hiftoria Placitorum Coronae: The History of the Pleas of the Crown* (London: publisher unknown, 1778) vol 2 at 225 (Honourable Chief Justice Hale explains, “it is ufual for the court . . . to advife the party to plead [not guilty] and put himfelf upon his trial, and not prefently to record his confeffion, but to admit him to plead [not guilty]”).

<sup>10</sup> *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1769) vol 4 at 324 [footnotes omitted].

<sup>11</sup> Sir Michael Foster, *A Report of Some Proceedings on the Commission for the Trial of the Rebels in the Year 1746, in the County of Surry; And of Other Crown Cases: To Which Are Added Discourses Upon a Few Branches of the Crown Law*, 3rd ed (London: publisher unknown, 1792) at 243.

plea would clearly harm the accused, then the court would refuse to accept it. For example, as reported by Joseph Chitty, when the punishment was capital, “courts [were] very reluctant to receive and record such confessions.... And where [the accused] freely in court discloses the facts of his case, and demands the opinion of the judges ... they will refuse to record the disclosure, and admit him to the full advantage of a trial upon the evidence of the witnesses.”<sup>12</sup>

Notwithstanding these practices, some argued that the accused deserved even *more* procedural protection. In 1827, for instance, Jeremy Bentham famously criticized the then-current approach to guilty pleas. He recognized that “[i]n practice, it is grown into a sort of fashion, when a prisoner has [entered a plea of guilty], for the judge to endeavour to persuade him to withdraw it, and substitute the opposite plea, the plea of not guilty.”<sup>13</sup> However, Bentham “urged abolition of the guilty plea and the substitution of a more careful and rigorous examination of the defendant, an examination designed ‘to guard him against undue conviction, brought on upon him by his own imbecility and imprudence.’”<sup>14</sup> Although Bentham’s proposal never came to fruition, it represents the sense of skepticism that was widespread in that era.<sup>15</sup>

There are at least three reasons why the early common law courts were reluctant to accept guilty pleas. First, unlike today, the justice system was highly efficient and guilty pleas were not needed to clear overflowing court dockets.<sup>16</sup> During these years, trials were extremely expedient because jury trials were non-adversarial summary proceedings, the accused was forbidden counsel, there were virtually no laws of evidence, juries were informally selected, and securing an appeal of a criminal case was near impossible.<sup>17</sup> Trials were so fast that criminal courts typically tried between 12 and 20 felony cases per day.<sup>18</sup> With this level of efficiency, there was no need for guilty pleas to usher the administration of justice.<sup>19</sup>

Second, a guilty plea carried steeper consequences and fewer benefits compared to today; as a result, courts were less inclined to be lenient towards an accused’s choice to plead guilty. For instance, in the early common law world, all felony convictions carried the death penalty and would result in the disinheritance of the accused’s family.<sup>20</sup> Moreover, there was seemingly no equivalent to the modern-day guilty plea sentence discount. Thus, by accepting

<sup>12</sup> J Chitty, *A Practical Treatise on the Criminal Law; Comprising the Practice, Pleadings, and Evidence Which Occur in the Course of Criminal Prosecutions, Whether by Indictment or Information: With a Copious Collection of Precedents of Indictments, Informations, Presentments, and Every Description of Practical Forms, With Comprehensive Notes as to Each Particular Offence, the Process, Indictment, Plea, Defence, Evidence, Trial, Verdict, Judgement, and Punishment*, 2nd ed (London: AJ Valpy, 1816) vol 1 at 429.

<sup>13</sup> Jeremy Bentham, *Rationale of Judicial Evidence, Specially Applied to English Practice* (London: Hunt and Clarke, 1827) vol 2, book 3 at 316.

<sup>14</sup> Alschuler, *supra* note 7 at 214–15, citing Bentham, *ibid*, vol 3, book 5 at 127 [emphasis added].

<sup>15</sup> Alschuler, *ibid* at 214.

<sup>16</sup> *Ibid* at 215.

<sup>17</sup> John H Langbein, “Understanding the Short History of Plea Bargaining” (1979) 13:2 Law & Soc’y Rev 261 at 261–64.

<sup>18</sup> John H Langbein, “The Criminal Trial Before the Lawyers” (1978) 45:2 U Chicago L Rev 263 at 277.  
<sup>19</sup> JM Beattie, *Crime and the Courts in England: 1660–1800* (Princeton: Princeton University Press, 1986) at 336–37 [Beattie, *Crime and the Courts*].

<sup>20</sup> Oonagh E Fitzgerald, *The Guilty Plea and Summary Justice: A Guide for Practitioners* (Toronto: Carswell, 1990) at 12.

a guilty plea, a court was knowingly condoning devastating consequences for the accused and their family.

Third, courts were aware of the possibility that the accused might plead guilty when they were truly innocent.<sup>21</sup> Baron William Eden Auckland framed the problem of false guilty pleas as such:

[W]e have known instances of murders avowed, which never were committed; of things confessed to have been stolen, which never had quitted the possession of the owner.

It is both ungenerous therefore, and unjust, to suffer the diffractions of fear, or the misdirected hopes of mercy to preclude that negative evidence of disproof ... *we should never admit, when it may be avoided, even the possibility of driving the innocent to destraction.*<sup>22</sup>

Several factors likely contributed to the prevalence of false guilty pleas during this era. For instance, until the nineteenth century, the accused was not entitled to counsel and may have falsely pled guilty simply because they did not understand the law.<sup>23</sup> Moreover, until the late eighteenth century, an accused who refused to plead, either guilty or not guilty, was tortured by “*peine forte et dure*.”<sup>24</sup> *Peine forte et dure* was a punishment where the accused would have progressively heavier stones placed on their chest until they pled, or were crushed to death.<sup>25</sup> Although the accused could plead not guilty to escape the torture, one can plausibly assume that some might have been pressured by the state to confess to the crime. Furthermore, false guilty pleas might have been common because, upon conviction for some offences, first-time offenders could claim “benefit of clergy” to receive a reduced sentence.<sup>26</sup> The benefit of clergy was a special plea with religious origins where first-time offenders would be spared the death penalty and, instead, receive a significantly lesser sentence, such as a branding on the thumb.<sup>27</sup> Benefit of clergy could be claimed by those who pled guilty or those who were convicted at trial. However, with the possibility of receiving benefit of

<sup>21</sup> Alschuler, *supra* note 7 at 216.

<sup>22</sup> William Eden Auckland, *Principles of Penal Law*, 2nd ed (London: publisher unknown, 1771) at 167 [emphasis in original].

<sup>23</sup> *Trial of John Twyn*, 6 Howell’s State Trials 513 at 516 (where Hyde LCJ of the Old Bailey Court noted the following concern to a treason defendant: “I will tell you, we are bound to be of counsel with you ... the court ... are to see that you suffer nothing for your want of knowledge in matter of law”).

<sup>24</sup> In this era, the common law had a limited view of the jurisdiction of criminal justice system. Courts could only claim jurisdiction over an accused if they pled guilty or not guilty. Thus, *peine forte et dure* developed as a practice to incentivize pleas. See e.g. Charles H Randall Jr, “Sir Edward Coke and the Privilege Against Self-Incrimination” (1956) 8:4 South Carolina LQ 417 at 429.

<sup>25</sup> Randall Jr, *ibid* at 429. For a description of this practice, see e.g. Guy Miede, *The Present State of Great-Britain and Ireland. In Three Parts.: Containing An Accurate and Impartial Account of these great and famous Islands: Of their several Counties, and their Inhabitants; the Advantages and Disadvantages of Both, in respect to Foreign Countries; and their Curiosities both of Nature and Art. Of the vast, populous, and opulent City of London, the Metropolis of Great-Britain; and of the Famous Universities of the Land. Of the Britains Original, Language, Temper, Genius, Religion, Morals, Trade, &c. Their Nobility, Gentry, Clergy, and Commonalty. Their Laws and Government; With a succinct History of all the English Monarchs to this time. The present Princes and Princeesses of the Blood Royal, and the Settlement of the Succession in the Protestant Line. With the LISTS of the Present Officers in Church and State, Of Both Houses of Parliament, and of the Convocation. To which are added, The MAPS of the Three Kingdoms*, 2nd ed (London: JH, A Bell, R Smith, and J Round, 1711) at 322.

<sup>26</sup> John H Langbein, “Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources” (1983) 50:1 U Chicago L Rev 1 at 37 [Langbein, “Ryder Sources”]. See also Beattie, *Crime and the Courts*, *supra* note 19 at 336; JM Beattie, *Policing and Punishment in London, 1660–1750: Urban Crime and the Limits of Terror* (Oxford: Oxford University Press, 2001) at 23–24.

<sup>27</sup> Langbein, “Ryder Sources,” *ibid* at 37–39.

clergy, the accused may have regularly rendered false guilty pleas to resolve the matter as quickly as possible.

To summarize the above history, the criminal justice system was efficient, the stakes of a guilty plea were high, and the courts knew that accused persons might falsely plead guilty. Courts seem to have been skeptical towards guilty pleas because, in almost all circumstances, an accused would be better off by submitting themselves to a trial. This skepticism sets the stage for the development of guilty pleas in Canada.

## B. 1892–1960: THE BIRTH OF GUILTY PLEAS IN CANADA AND THE ADVENT OF PLEA BARGAINING

The ability of an accused to plead guilty was codified in section 657(1) of Canada's first *Criminal Code* in 1892.<sup>28</sup> Section 657(1), in almost identical language as section 606(1) of the modern *Criminal Code*, read, “[w]hen the accused is called upon to plead he may plead either guilty or not guilty, or such special plea as is hereinbefore provided for.”<sup>29</sup> Between 1892 and 1960, there was scarcely any judicial or scholarly consideration of section 657(1) or, more broadly, the Canadian guilty plea process. Rather, almost all attention and research were focused on trial procedure and substantive criminal law.<sup>30</sup> A likely explanation for this phenomenon is that Canada's plea process was inherited from a common law culture that tried to avoid guilty pleas; thus, when section 657(1) was enacted, guilty pleas were still largely disfavoured by courts and did not receive much attention.

The criminal law, however, was in a transitional period that would ultimately change the justice system's approach to guilty pleas. For instance, the accused was given a right to counsel and to a trial; section 659 of the *The Criminal Code, 1892* stated that “[e]very person tried for any indictable offence shall be admitted, after the close of the case for the prosecution, to make full answer and defence thereto by counsel learned in the law.”<sup>31</sup> Moreover, the laws of evidence were becoming increasingly complex and required judicial scrutiny to determine whether particular pieces of evidence would be admitted into court; the first version of the *Canada Evidence Act* was passed in 1893 and formalized evidentiary proceedings.<sup>32</sup> Further, intricate jury selection procedures were being implemented and allowed the accused to challenge jury panels,<sup>33</sup> challenge jury arrays,<sup>34</sup> stand aside prospective jurors,<sup>35</sup> etc.<sup>36</sup> Each of these developments in the law would continue to grow in the common law in the ensuing years.

<sup>28</sup> *The Criminal Code, 1892*, SC 1892 (55–56 Vict), c 29, s 657(1) [*Criminal Code, 1892*].

<sup>29</sup> *Ibid.*

<sup>30</sup> Gerard A Ferguson & Darrell W Roberts, “Plea Bargaining: Directions for Canadian Reform” (1974) 52:4 Can Bar Rev 497.

<sup>31</sup> *Criminal Code, 1892*, *supra* note 28, s 659.

<sup>32</sup> James Crankshaw, *The Criminal Code of Canada and the Canada Evidence Act, 1893: With an Extra Appendix Containing the Extradition Act, the Extradition Convention with the United States, the Fugitive Offenders' Act, and the House of Commons Debates on the Code and an Analytical Index* (Montreal: Whiteford & Theoret, 1894).

<sup>33</sup> *Criminal Code, 1892*, *supra* note 28, s 667.

<sup>34</sup> *Ibid.*, s 666.

<sup>35</sup> *Ibid.*, s 669.

<sup>36</sup> *Ibid.* at Part LI for additional jury selection procedures implemented during this period.

These changes seemingly had two cumulative effects. First, as will be further explored in the coming sections of the article, they slowed down the trial process,<sup>37</sup> and “laid the seeds for its dependence on conviction by guilty plea and plea bargaining as a means of cutting the trial process short, clearing overburdened dockets and keeping the criminal process functioning.”<sup>38</sup> Second, they provided greater procedural fairness to the accused and lowered the stakes of a guilty plea. Now that accused persons had a right to counsel, and the death penalty was not a constant possibility for every offence, courts would seem to eventually grow more comfortable and lenient toward guilty pleas.

These two effects, however, did not seem to materialize immediately; it would take years for the dockets to build up and for courts to change their attitudes towards guilty pleas.<sup>39</sup> Instead, courts remained steadfast in their reluctance to accept guilty pleas. Consider, by way of example, two cases which illustrate the courts’ perspectives towards guilty pleas during this interim period.

First, in *R. v. McNeil*, the accused agreed with the prosecutor to plead guilty to a lesser offence under the *Motor Vehicle Act*<sup>40</sup> instead of proceeding to trial for a more serious crime.<sup>41</sup> Despite this agreement, the Nova Scotia Supreme Court rejected the plea because the prosecutor’s “threat to prefer another charge against the defendant” rendered it involuntary and “there [was] no evidence which establishes the offence charged *beyond a reasonable doubt*.”<sup>42</sup> This case is notable because the Court applied an incredibly high standard when considering the plea: the mere pressure of the proposed plea bargain, combined with absence of proof beyond of reasonable doubt, was sufficient to invalidate the plea.

Second, in *R. v. Stone*, the accused pled guilty to smuggling alcohol after she was promised by the prosecution the minimum fine of \$50 in exchange for a plea.<sup>43</sup> However, when she pleaded, she was fined the maximum amount of \$200.<sup>44</sup> On appeal, the Court set aside the guilty plea because “[i]n such circumstances *natural justice demanded* that she be given a chance to present any defence which she had, and carried the case outside the general rule that a plea of guilt is such conclusive proof of guilt that it admits of no contradiction and so bars appeal.”<sup>45</sup> Here, the Court went further than merely relying on the Crown’s coercion; principles of “natural justice demanded” that it invalidate the pleas.<sup>46</sup> These two cases reflect the fact that at least up until this point, there was no need for any codified plea inquiry in the *Criminal Code* because courts protected the accused from the dangers of the guilty plea process on their own accord. However, as I will soon demonstrate, the current interpretation

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<sup>37</sup> Fitzgerald, *supra* note 20 at 19.

<sup>38</sup> *Ibid.*

<sup>39</sup> For the few early guilty plea decisions, see e.g. *R v Richmond* (1917), 12 Alta LR 133 (SC (AD)); *R v Ah Tom* (1928), 60 NSR 1 (SC (TD)); *R v Stone* (1932), [1931] NSJ No 3 (SC (TD)) [*Stone*]; *R v McNeil* (1932), [1933] 1 DLR 349 (NS SC (TD)) [*McNeil*]; *R v McGrath*, [1944] 3 DLR 669 (NS SC (TD)); *Dorion v R*, 1958 CarswellNB 10 (SC (AD)).

<sup>40</sup> RSNS 1989, c 293 as it appeared on 24 December 1932.

<sup>41</sup> *McNeil*, *supra* note 39.

<sup>42</sup> *Ibid* at 350 [emphasis added].

<sup>43</sup> *Supra* note 39 at para 26.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid* at para 27 [emphasis added].

<sup>46</sup> *Ibid.*

of sections 606(1.1) and (1.2) would almost undoubtedly lead a court to accept the pleas in both *McNeil* and *Stone*.

### C. 1960–1975: A SHIFT AWAY FROM THE EARLY COMMON LAW APPROACH

Beginning in the 1960s, however, there was a shift away from the early common law approach to the guilty plea process. Due to a sharp rise in the volume of criminal cases, both guilty pleas and plea bargaining became a practical necessity to expedite the administration of justice.<sup>47</sup> As a result, courts were unable to maintain the level of discouragement towards guilty pleas that was seen in earlier centuries.

This shift was largely facilitated by two judgments from the Supreme Court: *R. v. Brosseau*<sup>48</sup> and *R. v. Adgey*.<sup>49</sup> In *Brosseau*, the Supreme Court held that a trial judge is not required to inquire into whether an accused understood the nature of the charge and effect of their plea unless “there is any reason to doubt that the accused understands what he is doing.”<sup>50</sup> *Brosseau* involved a 22-year-old Cree man with a grade two education who was charged with capital murder.<sup>51</sup> Mr. Brosseau initially accepted the Crown’s offer to plead guilty to non-capital murder,<sup>52</sup> but later sought to withdraw his plea and maintained his innocence. He explained that he pleaded guilty because he “was scared of being hanged, that when he pleaded guilty he did not understand that the Judge had no choice but to impose a life sentence.”<sup>53</sup> Under the early common law approach to guilty pleas, this case would have been easy; out of the interests for Mr. Brosseau and due to the concerns about the possibility of a false guilty plea, the Court would have invalidated his plea. However, the Supreme Court changed the course of the guilty plea jurisprudence by holding that the trial judge was right to accept it without question.<sup>54</sup>

Six years later, in *Adgey*, the Supreme Court reaffirmed *Brosseau* and indicated that a court is under no obligation to conduct a plea inquiry.<sup>55</sup> Mr. Adgey was a 21-year-old man with no criminal record.<sup>56</sup> Represented by duty counsel, Adgey pled guilty to “several charges of false pretences, a charge of fraud, and a charge of break, enter and theft.”<sup>57</sup> After the pleas were entered, a police officer described the facts underlying each charge and Adgey was given an opportunity to explain himself.<sup>58</sup> Adgey cast doubt on the validity of some of the charges, claiming, for instance, “I don’t know about one of [those charges]” and “[t]here’s an explanation for that.... Can I say what happened?”<sup>59</sup> After being sentenced, Adgey appealed his conviction to the Ontario Court of Appeal and the Supreme Court of

<sup>47</sup> See e.g. Arthur D Klein, “Plea Bargaining” (1972) 14:3 Crim LQ 289 at 290; Ferguson & Roberts, *supra* note 30 at 501.

<sup>48</sup> (1968), [1969] SCR 181 [*Brosseau*].

<sup>49</sup> (1973), [1975] 2 SCR 426 [*Adgey*].

<sup>50</sup> *Brosseau*, *supra* note 48 at 188.

<sup>51</sup> *Ibid* at 186.

<sup>52</sup> *Ibid*.

<sup>53</sup> *Ibid*.

<sup>54</sup> *Ibid* at 190.

<sup>55</sup> *Adgey*, *supra* note 49 at 429.

<sup>56</sup> *Ibid* at 434.

<sup>57</sup> *Ibid* at 428.

<sup>58</sup> *Ibid*.

<sup>59</sup> *Ibid* at 435.

Canada, requesting that they strike his plea.<sup>60</sup> However, in a very brief decision, the majority of the Supreme Court swiftly rejected Adgey's arguments by relying on *Brosseau*. Notably, in dissent, Justice Laskin proposed a rule that would, effectively, become sections 606(1.1) and (1.2) of the *Criminal Code*; he argued that guilty pleas must be voluntary, informed, and unequivocal, and that the facts must be able to support a conviction.<sup>61</sup>

The majorities in *Brosseau* and *Adgey* did not provide a rationale for changing the approach to guilty pleas. However, a review of the relevant scholarship during these years raises two possible explanations.

First, the Supreme Court may have been reacting to the then-consensus that courts were overburdened and that guilty pleas were a practical necessity to expedite the administration of justice. For instance, during this period, scholars described the judicial system as needing to adapt to "meet the needs of the overburdened court systems in high-crime, urban centres"<sup>62</sup> and "prevent case-load backlogs."<sup>63</sup> In fact, Justice Laskin, dissenting in *Adgey*, suggested that the majorities consciously decided to prioritize the efficiency of the criminal justice system in formulating their opinion. Rejecting the *Brosseau* rule, Justice Laskin explained "having confirmation of the voluntariness, understanding and appreciation of consequences where guilty pleas are offered *stand above any need of statistical support that such pleas are the means by which most charges of indictable offences are disposed of*."<sup>64</sup> Interestingly, however, there is virtually no data, to my knowledge, to substantiate the claim that there was a spike in criminal cases or burden facing the courts in the 1960s. Rather, the sudden attention towards backlog in the criminal justice system coincides with the period when Statistics Canada began collecting data on criminal cases.<sup>65</sup> Thus, it seems to me that the legal community only became alive to the issue in the 1960s because that was when they could first grasp its magnitude. And, indeed, some doubted the veracity of the claim that courts were suddenly overburdened. Martin Friedland, for example, questioned whether "the increased burden on the courts [was] as great as might be suspected."<sup>66</sup>

Second, the Supreme Court might have been adopting the then-current perspective that some leniency towards guilty pleas was necessary to permit effective plea bargaining. At that time, the benefits of plea bargaining were well-known. These well-known benefits include: cost and time efficiency, a possibility for the accused to take responsibility for their actions and obtain a lesser sentence, reduced trauma for the victim who might have to otherwise testify at trial, and a sense of finality for all parties.<sup>67</sup> Few were aware, by contrast, of the harms of plea bargaining. Rather, it was famously labelled Canada's "dirty little secret"<sup>68</sup> for

<sup>60</sup> *Ibid* at 428.

<sup>61</sup> *Ibid* at 440.

<sup>62</sup> Brian A Grosman, *The Prosecutor: An Inquiry Into the Exercise of Discretion* (Toronto: University of Toronto Press, 1969) at 41.

<sup>63</sup> Ferguson & Roberts, *supra* note 30 at 533.

<sup>64</sup> *Adgey*, *supra* note 49 at 447 [emphasis added].

<sup>65</sup> See e.g. "Canada's Crime Rate: Two Decades of Decline," online: <[www150.statcan.gc.ca/n1/pub/11-630-x/11-630-x2015001-eng.htm](http://www150.statcan.gc.ca/n1/pub/11-630-x/11-630-x2015001-eng.htm)>.

<sup>66</sup> Martin L. Friedland, *Detention Before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates' Courts* (Toronto: University of Toronto Press, 1965) at 61.

<sup>67</sup> *Ibid* at 49–50; see also Ferguson & Roberts, *supra* note 30 at 526–42; TH Hartnagel, "Plea Negotiation in Canada" (1975) 17:1 *Can J Crim & Corr* 45 at 45.

<sup>68</sup> Ferguson & Roberts, *ibid* at 500 [footnotes omitted]. See also Gerard A Ferguson, "The Role of the Judge in Plea Bargaining" (1972) 15:1 *Crim LQ* 26 at 30.

the prejudice it placed on the accused.<sup>69</sup> Or, slightly more comically, Gerard Ferguson explained that “plea bargaining in Canada could be likened to a mysterious ghost freely strolling the halls of our criminal courts, no one knowing exactly what it is or what force it carries, and no one daring to ask for fear the answer might reveal that which we would rather leave unknown.”<sup>70</sup> The few critics of plea bargaining recognized that police were laying multiple charges to incentivize the accused to plead guilty, that prosecutors might repudiate the bargain they offered to the accused by asking the Court for a harsher sentence, and that defence counsel were likely in a position to persuade an accused to accept a plea bargain due to a difference in power or knowledge.<sup>71</sup> In effect, some were realizing that plea bargaining might cause the accused to plead guilty when they were actually innocent.

The shift away from the early common law approach was likely compounded by the fact that the legal community was largely ignorant of a dominant factor driving guilty plea wrongful convictions during this period: the inaccessibility of bail. Martin Friedland’s seminal 1965 book, *Detention Before Trial: A Study of Criminal Cases Tried in the Toronto Magistrate’s Courts*, offered one of the first comprehensive studies of the bail system in Canada. Friedland found that bail was particularly hard to obtain, for instance, because magistrates “generally set bail at standardized amounts according to the offence charged rather than according to the likelihood that the accused will appear for his trial.”<sup>72</sup> As a result, over 50 percent of all accused persons could not raise the funds in order to pay bail and were sent to harsh pre-trial detention facilities.<sup>73</sup> The corresponding effect of this wholesale denial of bail was an increased “likelihood that the accused [would] plead guilty”<sup>74</sup>; 40 percent of those held in pre-trial detention pled guilty at their first court appearance, compared to 30 percent of those who summoned or bailed before their first appearance.<sup>75</sup> Friedland proposed several explanations for the increased probability of guilty pleas, including:

[T]he possibility in fact and in the mind of the accused that if he pleads guilty he will not have to spend a further period of time in custody; the desire to be released from a distasteful experience; the effect of suggestions by the police and fellow accused that it is better to plead guilty; and the use of highly developed police interrogation methods, both proper and improper.<sup>76</sup>

Unfortunately, these arguments made by Friedland were entirely novel at the time and would not become commonplace for many decades. If courts and judges were more aware of this problem, however, then perhaps they would have been more reticent to limit the scope of plea inquiries.

<sup>69</sup> Ferguson & Roberts, *ibid* at 542–50.

<sup>70</sup> Ferguson, *supra* note 68 at 30.

<sup>71</sup> Fitzgerald, *supra* note 20 at 144–49.

<sup>72</sup> Friedland, *supra* note 66 at 149.

<sup>73</sup> *Ibid* at 150.

<sup>74</sup> *Ibid* at 60.

<sup>75</sup> *Ibid* at 61.

<sup>76</sup> *Ibid* at 60–61 [footnotes omitted].

#### D. 1975–2002: FIRST CALL FOR CHANGE AND THE ENACTMENT OF SECTIONS 606(1.1) AND (1.2)

By 1975, many were outraged at *Brousseau* and *Adgey*, calling them “a veritable invitation for Crown and defence to disguise the most egregious bargains under a thin veneer of acceptability.”<sup>77</sup> As a result, this period began with, effectively, a revolt against plea bargaining. In 1975, for instance, the Law Reform Commission of Canada took the strong position that plea-bargaining cannot be justified and should be abolished.<sup>78</sup> The Law Reform Commission of Ontario and the Canadian Bar Association held opinions to the same effect.<sup>79</sup>

Over the years, however, opinions tempered, and the legal community recognized that plea bargaining could be justifiable, if conducted with adequate safeguards. In 1989, the Law Reform Commission of Canada relaxed its earlier position and called for reform, as opposed to abolition, of the plea-bargaining process.<sup>80</sup> They explained that the advent of the *Charter*, the expansion of legal aid and the development of pre-trial conference procedures created protections for accused who seek to plead guilty.<sup>81</sup>

The most influential call for change came in 1993, when the Advisory Committee to the Attorney General of Ontario on Charge Screening, Disclosure, and Resolution Discussions published a report proposing recommendations for improvement of the province’s criminal justice system.<sup>82</sup> The Martin Report was commissioned to address court delay in Ontario,<sup>83</sup> in the aftermath of the Supreme Court’s decision in *R. v. Askov*,<sup>84</sup> and reviewed the debate surrounding plea bargaining. The Committee recognized that plea resolution discussions carried benefits, including that a guilty plea saves the expense, inconvenience, and trauma of a full trial while offering the accused an opportunity to get a sentence discount.<sup>85</sup> Yet, they also found that the process did not contain adequate procedural protections for the accused.<sup>86</sup> So, the Committee recommended an amendment to the *Criminal Code* that would balance the risk of false guilty pleas with the need for plea bargaining. The Committee recommended a mandatory plea comprehension inquiry where judges would be required to question an accused to ensure: “(a) that they appreciate the nature and consequence of a plea of guilty; (b) that the plea is voluntarily made; and (c) that they understand that an agreement between the Crown prosecutor and defence counsel does not bind the court.”<sup>87</sup> In 2002, these

<sup>77</sup> Fitzgerald, *supra* note 20 at 169.

<sup>78</sup> Honourable E Patrick Hartt et al, “Criminal Procedure: Control of the Process” (1975) Law Reform Commission of Canada Working Paper No 15 at 48.

<sup>79</sup> Ontario Law Reform Commission, *Report on Administration of Ontario Courts*, Part II (Toronto: Ministry of the Attorney General, 1973) at 119; The Canadian Bar Association, *Code of Professional Conduct*, (Ottawa: CBA, 1974) at 30–31 (chapter VIII, commentary 10).

<sup>80</sup> Justice Allen M Linden et al, “Plea Discussions and Agreements” (1989) Law Reform Commission of Canada Working Paper No 60 at 12.

<sup>81</sup> *Ibid* at 4–5.

<sup>82</sup> *Report of the Attorney General’s Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Ontario Ministry of the Attorney General, 1993) (The Honourable G Arthur Martin) [*Martin Report*].

<sup>83</sup> Zina Lu Burke Scott, “An Inconvenient Bargain: The Ethical Implications of Plea Bargaining in Canada” (2018) 81:1 Sask L Rev 53 at 60–61.

<sup>84</sup> [1990] 2 SCR 1199.

<sup>85</sup> *Martin Report*, *supra* note 82 at 282–90.

<sup>86</sup> *Ibid* at 15.

<sup>87</sup> *Ibid* at 317–18 [emphasis omitted].

recommendations were added, nearly word-for-word, into sections 606(1.1) and (1.2) of the *Criminal Code*.<sup>88</sup>

## E. 2002–2019: AWAKENING TO GUILTY PLEA WRONGFUL CONVICTIONS AND BILL C-75

Despite the enactment of sections 606(1.1) and (1.2) in 2002, accused persons continued to falsely plead guilty. After several high-profile guilty plea wrongful conviction cases, such as *R. c. Marshall*,<sup>89</sup> *R. v. Hanemaayer*,<sup>90</sup> *R. v. Kumar*,<sup>91</sup> *R. v. Catcheway*,<sup>92</sup> and many others,<sup>93</sup> the academic community sought to better understand guilty plea wrongful convictions. Now, twenty years later, many interacting factors are known to cause false guilty pleas. However, these causes go largely unaccounted for by sections 606(1.1) and (1.2). These causes can be compartmentalized into three groups: (1) causes internal to the accused; (2) causes external to the accused; and (3) causes related to the identity of the accused. Each group will be briefly addressed in turn.

### 1. CAUSES INTERNAL TO THE ACCUSED

“Causes internal to the accused” include the pressures that might consciously motivate a person to falsely plead guilty. In a 2018 review of wrongful convictions in Canada, the Federal/Provincial/Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions compiled a list of several causes of false guilty pleas.<sup>94</sup> A modified version of this list includes the following six causes internal to the accused that can induce a false guilty plea.

First, and perhaps the most well-known cause of guilty plea wrongful convictions, is the belief that pleading guilty will result in a sentence discount.<sup>95</sup> A guilty plea is often treated as a mitigating factor at sentencing<sup>96</sup> or might be rendered in response to a plea bargain from the Crown. Thus, if an accused person believes that there is a strong possibility of conviction at trial, then they may be incentivized to falsely plead guilty. *Kumar* is a well-known example of this cause of guilty plea wrongful convictions. Consider the description of Mr. Kumar’s situation, as set out by the Ontario Court of Appeal, that led him to falsely plead guilty: “Like in *Hanemaayer*, the appellant faced a terrible dilemma. The justice system now held out a powerful inducement: a reduced charge, a much-reduced sentence (90 days instead of a minimum of ten years), all but the elimination of the possibility of deportation, and

<sup>88</sup> *Criminal Law Amendment Act, 2001*, SC 2002, c 13, s 49(1), amending RSC 1985, c C-46. As will be explained below, section (1.1)(c) — the requirement that the facts support the charge — was not added until 2019 (*An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, SC 2019, c 25, s 268(2), amending RSC 1985, c C-46 [Bill C-75]).

<sup>89</sup> 2005 QCCA 852.

<sup>90</sup> 2008 ONCA 580 [*Hanemaayer*].

<sup>91</sup> 2011 ONCA 120 [*Kumar*].

<sup>92</sup> 2018 MBCA 54.

<sup>93</sup> See e.g. *R v CM*, 2010 ONCA 690; *R v Shepherd*, 2016 ONCA 188; *R v Brant*, 2011 ONCA 362; *R v CF*, 2010 ONCA 691; *R v Sherret-Robinson*, 2009 ONCA 886.

<sup>94</sup> *FPT Report*, *supra* note 4.

<sup>95</sup> Sherrin, *supra* note 4 at 7–8.

<sup>96</sup> See e.g. *R v Lacasse*, 2015 SCC 64 (where the Supreme Court describes how a guilty plea is treated as a mitigating factor at sentencing).

access to his surviving child.”<sup>97</sup> It would be challenging for anyone in such a situation to turn down the opportunity to plead guilty.

Second, and relatedly, an accused may falsely plead guilty due to the belief that one’s situation is hopeless because the Crown case appears strong. If an individual truly believes that a trial would be futile, then they might plead guilty in order to bring the matter to an expedient end and to reap the benefits of a possible sentence discount. This is precisely what occurred in *Hanemaayer*, a case involving a man who was wrongfully convicted after a homeowner provided erroneous eye-witness testimony claiming Mr. Hanemaayer was the man who broke into her house and attacked her teenage daughter.<sup>98</sup> As explained by the Court of Appeal for Ontario,

[i]n an affidavit filed with this court, the appellant explained why he changed his plea. In short, he lost his nerve. He found the homeowner to be a very convincing witness and he could tell that his lawyer was not making any headway in convincing the judge otherwise. Further, since his wife had left him and wanted nothing more to do with him, he had no one to support his story that he was home at the time of the offence. He says that his lawyer told him he would almost certainly be convicted and would be sentenced to six years imprisonment or more.<sup>99</sup>

Third, an individual may falsely plead guilty to protect others that might be affected by a not guilty plea. The accused might plead guilty if they have reason to prevent blame from falling on the real perpetrator of the offence;<sup>100</sup> one can plausibly imagine, for instance, a situation whereby an individual seeks to protect a more senior member of a gang or organized crime group. Moreover, an accused might plead guilty to prevent stress or shame imposed on family and friends.<sup>101</sup>

Fourth, an accused might enter a false guilty plea to relieve psychological stress.<sup>102</sup> A criminal charge is, self-evidently, a deeply stress-inducing situation that faces an individual. Any reasonable individual will want the process to end as quickly as possible. Thus, “some defendants may choose to plead guilty in order to maximize certainty of outcome, even if a not guilty plea is objectively more rational.”<sup>103</sup>

Fifth, a person may falsely plead guilty in order to escape harsh pretrial detention conditions after being denied bail.<sup>104</sup> Jails where accused persons are held when denied bail are notorious for their poor and violent conditions.<sup>105</sup> For instance, between January 2012 and July 2017, 174 people died in provincial jails while awaiting trial, compared to 80 persons

<sup>97</sup> *Kumar*, *supra* note 91 at para 34.

<sup>98</sup> *Hanemaayer*, *supra* note 90 at para 3.

<sup>99</sup> *Ibid* at para 11.

<sup>100</sup> See e.g. Richard V Ericson & Patricia M Baranek, *The Ordering of Justice: A Study of Accused Persons as Dependents in the Criminal Process* (Toronto: University of Toronto Press, 1982) at 74; Sherrin, *supra* note 4 at 12.

<sup>101</sup> Sherrin, *ibid* at 12.

<sup>102</sup> *FPT Report*, *supra* note 4 at 176. See also Sherrin, *ibid* at 13.

<sup>103</sup> Sherrin, *ibid*, n 60 citing Belinda R McCarthy & Charles A Lindquist, “Certainty of Punishment and Sentence Mitigation in Plea Behavior” (1985) 2:3 Justice Q 363 at 380–81.

<sup>104</sup> Roach, *supra* note 4 at 19–23.

<sup>105</sup> *Ibid* at 20.

that died in jails while serving sentences.<sup>106</sup> Faced with these conditions, an accused may falsely plead guilty to be transferred to a safer and more secure facility.

Sixth, an individual may not be able to afford the financial costs of proceeding to trial.<sup>107</sup> Successfully defending oneself at trial with effective counsel requires significant financial investment. Moreover, one may have to take time off work, pay for childcare, transportation, and so on, in order to fight their criminal case.<sup>108</sup> If one does not have the means to support their defence, then they may accordingly plead guilty irrespective of their innocence.

## 2. CAUSES EXTERNAL TO THE ACCUSED

“Causes external to the accused” include the influences imposed by parties other than the accused that can indirectly induce a false guilty plea. Both defence counsel and prosecutors might have incentives to influence an accused in this sense.

Defence counsel might have at least two reasons to try to have their clients plead guilty regardless of their innocence. First, defence counsel might genuinely believe it is in their client’s best interest to plead guilty and frame the case in a way that makes the accused think they have no chance of acquittal at trial. Although such legal advice may seem reprehensible, it is unclear whether lawyers’ ethical codes prevent them from doing so. As explained by Kent Roach, “[e]thical codes in Canada speak of clients being required to voluntarily ... admit guilt, but this seems to beg the question of whether the clients were actually guilty.”<sup>109</sup> Compounding this problem is the fact that, as will be explored below, lawyers often speak on behalf of the accused throughout a section 606 inquiry. Thus, although a lawyer’s mere passive compliance with sections 606(1.1) and (1.2) ought never be accepted by a judge, there is little stopping counsel from simply confirming guilt. Second, defence lawyers might also try to have their clients plead guilty due to financial incentives. Christopher Sherrin has shown, for instance, that some criminal defence lawyers in Ontario can make more money from guilty pleas than taking cases to trial.<sup>110</sup> Thus, defence counsel might have reason to get their clients to plead guilty as quickly as possible.

Prosecutors, on the other hand, are seemingly driven by institutional incentives. Given that prosecutors are operating in an overburdened criminal justice system where guilty pleas are prized for their efficiency, they might employ tactics that intimidate the accused into pleading guilty. For instance, prosecutors may be incentivized to exaggerate charges, tell the accused that they will receive an unconscionable sentence at trial, or offer a plea deal that no rational person could refuse. Prosecutors, of course, have ethical guidelines which prevent them from accepting guilty pleas if the accused is not prepared to admit guilt or if the prosecutor believes they are innocent.<sup>111</sup> However, as explained by Joan Brockman, “[a]ny system that allows prosecutors to force bargains because they have weak cases or no time

<sup>106</sup> Anna Mehler Paperny, “Canada’s Jailhouse Secret: Legally Innocent Inmates are Dying in Prison,” *Global News* (3 August 2017), online: <[globalnews.ca/news/3644735/canada-jail-prisoners-dying/](http://globalnews.ca/news/3644735/canada-jail-prisoners-dying/)>.

<sup>107</sup> See e.g. Sherrin, *supra* note 4 at 2.

<sup>108</sup> *Ibid* at 8. See also Brockman, *supra* note 4 at 127.

<sup>109</sup> Roach, *supra* note 4 at 25 [footnotes omitted].

<sup>110</sup> Sherrin, *supra* note 4 at 20–22.

<sup>111</sup> Roach, *supra* note 4 at 26.

to develop them will result in the innocent pleading guilty and perhaps even unfairness to the guilty who plead guilty.”<sup>112</sup>

### 3. CAUSES RELATED TO THE IDENTITY OF THE ACCUSED

“Causes related to the identity of the accused” include the systemic factors that can disproportionately cause members of certain identity groups to falsely plead guilty. Indigenous people and those with mental health issues or intellectual disabilities are at a particularly heightened risk. The inequities facing these groups will be briefly described, in turn.

Indigenous people are more likely to render false guilty pleas due to at least four factors.<sup>113</sup> First, Indigenous people are more likely to be denied bail and overrepresented in remand.<sup>114</sup> Second, due to the impact of colonialism, many Indigenous people are distrustful of the Canadian justice system; they might falsely plead guilty because they believe they will not receive a fair trial due to racist attitudes in the courtroom.<sup>115</sup> Third, courts lack adequate translation services for many Indigenous dialects which can lead to misunderstandings of the law and false guilty pleas.<sup>116</sup> Fourth, there are intercultural communication barriers which prevent Indigenous people from understanding their rights to remain silent and against self-incrimination.<sup>117</sup> For example, according to the Royal Commission on Aboriginal People, the “Aboriginal world view” involves recognizing another person’s view of events, regardless of whether they are true,<sup>118</sup> this belief is thought to lead some Indigenous people to falsely plead guilty and accept responsibility for things that they have not done.

People with intellectual disabilities or mental health issues are likewise more likely to enter false guilty pleas for several reasons.<sup>119</sup> For instance, they are less likely to be granted bail.<sup>120</sup> Moreover, they may struggle to develop defences to their charges or fail to appreciate the consequences of a plea because their lawyers might doubt their innocence.<sup>121</sup> Further, they might plead guilty to access alternative justice processes, such as mental health or drug treatment courts.<sup>122</sup>

<sup>112</sup> Brockman, *supra* note 4 at 128–29.

<sup>113</sup> For a comprehensive review of the factors that might lead an Indigenous accused to falsely plead guilty, see e.g. Carling, *supra* note 4; Department of Justice, *Guilty Pleas Among Indigenous People in Canada*, by Angela Bressan & Kyle Coady (Ottawa: Department of Justice Canada, 2017).

<sup>114</sup> “Trends in the Use of Remand in Canada, 2004/2005 to 2014/2015,” online: <[www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/14691-eng.htm](http://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/14691-eng.htm)>.

<sup>115</sup> Carling, *supra* note 4; Roach, *supra* note 4 at 34–36; Aboriginal Justice Implementation Commission, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol 1 (Winnipeg: AJIC, 2001) ch 6–7, online: <[www.ajic.mb.ca/reports/final\\_toc.html](http://www.ajic.mb.ca/reports/final_toc.html)>; *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by the Honourable Frank Iacobucci* (Toronto: Ontario Ministry of the Attorney General, 2013) at para 215 [*Iacobucci Report*].

<sup>116</sup> *Iacobucci Report*, *ibid* at para 216. See also Carling, *ibid* at 430–33.

<sup>117</sup> Carling, *ibid* at 438–41.

<sup>118</sup> Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Minister of Supply and Services Canada, 1996) at 61 [footnotes omitted], quoting Murray Sinclair, “Aboriginal Peoples, Justice and the Law” in Richard Gosse, James Youngblood Henderson & Roger Carter, eds, *Continuing Poundmaker and Riel’s Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich, 1994) 173 at 176.

<sup>119</sup> Bressan & Coady, *supra* note 113 at 6.

<sup>120</sup> Roach, *supra* note 4 at 33.

<sup>121</sup> *Ibid*.

<sup>122</sup> Bressan & Coady, *supra* note 113 at 6.

## 4. BILL C-75

In 2019, Parliament responded to the above-described recognition of guilty plea wrongful convictions in their omnibus Bill C-75<sup>123</sup> reforms. Bill C-75 added paragraph 606(1.1)(c) to the plea inquiry, which requires that the court be satisfied that “the facts support the charge” before they may accept a guilty plea.<sup>124</sup> Parliament recognized the diverse causes of false guilty pleas and claimed, “[i]t is not known how often false guilty pleas occur, but concerns have been raised about the potential prevalence of this issue, particularly with respect to Indigenous accused and accused from vulnerable populations.”<sup>125</sup> The apparent purpose of the amendment was to provide “an additional safeguard against false guilty pleas, while continuing to encourage early case resolution, enhancing the integrity of the administration of justice, and striving for efficiencies.”<sup>126</sup> This amendment is also notable in that it reflects a growing awareness in Parliament of the problem of false guilty pleas. However, awareness may still be limited and in need of development; no Member of Parliament nor Senator mentioned the name of any single case of a guilty plea wrongful conviction in the Parliamentary debates surrounding the bill.

### III. THE PROBLEM: THE LIMITED SCOPE OF SECTIONS 606(1.1) AND (1.2)

In this section of the article, I demonstrate that sections 606(1.1) and (1.2) are limited in scope, even after the 2019 amendments. I begin by walking through the plea inquiry. Then, I return to the three categories of causes of false guilty pleas identified above — factors internal to the accused, external to the accused, and related to the identity of the accused — and propose that sections 606(1.1) and (1.2) are systematically unable to take them into account. I finish this section by arguing that sections 606(1.1) and (1.2) in particular, and not court practices, are the source of the flaws of the plea inquiry.

#### A. SECTIONS 606(1.1) AND (1.2): A WALKTHROUGH

*606 (1.1) A court may accept a plea of guilty only if it is satisfied that*<sup>127</sup>

The plea inquiry begins by setting out that a court can only accept a guilty plea if it is satisfied that the conditions in paragraphs (a)–(c) are met.

*(a) the accused is making the plea voluntarily;*<sup>128</sup>

First, the plea must be made voluntarily. A voluntary plea is one which reflects the “conscious volitional decision of the accused to plead guilty for reasons which he or she

<sup>123</sup> Linden et al, *supra* note 80.

<sup>124</sup> Bill C-75, *supra* note 88, s 268.

<sup>125</sup> “Legislative Background: An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, as enacted (Bill C-75 in the 42nd Parliament),” online: <justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/c75/p3.html>.

<sup>126</sup> *Ibid.*

<sup>127</sup> *Criminal Code, supra* note 2, s 606(1.1).

<sup>128</sup> *Ibid.*, s 606(1.1)(a).

regards as appropriate.”<sup>129</sup> All that matters is that the plea is an expression of the accused’s own free will; the pressures inherent in the nature of the plea process are not sufficient to vitiate consent.<sup>130</sup> Courts are not required to inquire into one’s reasons for pleading guilty because “[pleas] entered in open court [are] presumed to be voluntary.”<sup>131</sup>

This voluntariness inquiry is fundamentally about whether the accused intended to plead guilty. Although this approach to guilty pleas may seem antiquated, it makes good sense reflecting on the context in which sections 606(1.1) and (1.2) were enacted. Recall that by passing sections 606(1.1) and (1.2) in 2002, Parliament was striking a balance between the pros and cons of plea bargaining. This balance required providing the accused with the agency to enter a bargain at their own discretion; their subjective reasons for doing so would be immaterial.

*(b) the accused understands: (i) that the plea is an admission of the essential elements of the offence, (ii) the nature and consequences of the plea, and (iii) that the court is not bound by any agreement made between the accused and the prosecutor; and*<sup>132</sup>

Second, the plea must be informed, meaning that the accused must be aware of the criminal consequences and “legally relevant collateral consequences” of the plea.<sup>133</sup> A legally relevant collateral consequence is one which is state-imposed, flows from conviction or sentence, and impacts the accused’s serious interests.<sup>134</sup> In order to be properly informed, the accused must have sufficient information about the charges that they face and receive proper disclosure from the Crown.<sup>135</sup>

This step in the inquiry is concerned with whether the accused knows what they are getting themselves into by pleading guilty. As with the voluntariness inquiry, this section’s roots seem to stem from the plea-bargaining era; it provides the accused with a degree of latitude to enter into an agreement with the Crown, no matter the consequences, if the accused understands what they are agreeing to.

*(c) the facts support the charge.*<sup>136</sup>

Third, the facts must support the charge to which the accused is pleading. This component of the plea inquiry was enacted in 2019 and, as a result, has very little judicial treatment. Although this requirement is undoubtedly important, I believe that it will do little to stop false guilty pleas. As will be shown below, the plea inquiry is structurally inadequate; its structure permits courts to avoid inquiring into many of the causes of guilty plea wrongful convictions. As a result, properly revising sections 606(1.1) and (1.2) requires structural change, as opposed to merely adding to the existing scheme.

<sup>129</sup> *R v T(R)* (1992), 10 OR (3d) 514 at 520.

<sup>130</sup> *R v Carty*, 2010 ONCA 237 at para 37.

<sup>131</sup> *R v Eizenga*, 2011 ONCA 113 at para 45.

<sup>132</sup> *Criminal Code*, *supra* note 2, s 606(1.1)(b).

<sup>133</sup> *R v Wong*, 2018 SCC 25 at para 4.

<sup>134</sup> *Ibid* at para 9.

<sup>135</sup> *R v Henry*, 2011 ONCA 289 at paras 25–26.

<sup>136</sup> *Criminal Code*, *supra* note 2, s 606(1.1)(c).

(1.2) The failure of the court to fully inquire whether the conditions set out in subsection (1.1) are met does not affect the validity of the plea.<sup>137</sup>

Although the plea inquiry has been described as mandatory,<sup>138</sup> section 606(1.2) ensures that the failure of the court to assess any of the conditions set out in sections 1.1(a–c) does not invalidate the plea. As a result, if a court does a lackluster plea inquiry, or even refuses to do an inquiry altogether, they have not committed a reversible legal error that would enable an appellate court to strike the plea.<sup>139</sup> Instead, to challenge a guilty plea on the grounds that a court failed to discharge its obligation to conduct a plea inquiry, one must show that allowing the plea to stand would amount to a miscarriage of justice under section 686(1)(a)(iii) of the *Criminal Code*.<sup>140</sup> But, to succeed under section 686(1)(a)(iii), one must show that the failure of the judge to conduct a thorough plea inquiry is prejudicial to the accused.<sup>141</sup> Thus, in effect, if a judge fails their duty to conduct a thorough plea inquiry, then the burden switches onto the accused to prove prejudice, even though prejudice plays no part in the inquiry.

The exact purpose of section 606(1.2) is unknown. However, given the historical context, one can see that section 606(1.2), once again, likely emanates from the emphasis on efficiency and leniency in the plea bargaining era. By allowing the judge to exercise their discretion to pass over the plea inquiry, Parliament largely left the resolution of the charge up to the defence and prosecution; the accused is entitled to plead guilty if they so choose, and they must handle the consequences — it is not for the judge to intervene.

## B. THE INABILITY OF SECTIONS 606(1.1) AND (1.2) TO PREVENT CAUSES INTERNAL TO THE ACCUSED

Sections 606(1.1) and (1.2) are incapable of preventing guilty plea wrongful convictions caused by factors “internal to the accused” — that is, the pressures that might consciously motivate an accused to falsely plead guilty. The plea inquiry fails to prevent these causes because, as shown above, sections 606(1.1) and (1.2) do not require a court to make any inquiry into the accused’s motivations for pleading guilty.

Instead, a court merely needs to hear a “yes” to the conditions laid out in section 606(1.1) to convict the accused. This reality has been recognized by the courts. For example, consider the discouraged words of Justice Healy in *Khanfoussi c. R.*:

There is a paradox with respect to guilty pleas. The Code, extensive case law and common sense require the court to investigate the quality of a plea ... But, there is nothing in our law that requires proof, even on a balance of probabilities, of the substantive quality of a guilty plea. Certainly, a judge can - and must - refuse it if he is not satisfied that a guilty plea is not free, voluntary and advised in full knowledge of the facts. But the Code, case law and daily practice only require the appearance of a free, voluntary and informed guilty

<sup>137</sup> *Ibid*, s 606(1.2).

<sup>138</sup> *R v G (DM)*, 2011 ONCA 343 at para 42.

<sup>139</sup> *R v CK*, 2021 ONCA 826 at para 93 [CK].

<sup>140</sup> *Ibid* at paras 93–94. See also *R v Gates*, 2010 BCCA 378 at para 2 (“[a]n accused seeking to appeal a conviction based on a guilty plea can only succeed under section 686(1)(a)(iii) of the *Criminal Code*”); *R v Beecher*, 2017 ABCA 86 at para 2.

<sup>141</sup> *CK*, *ibid* at paras 93–94.

plea. The law does not oblige the parties or the judge to question the accused on the motive or the reasons which could explain a plea.

...

In this sense and to this extent, form trumps substance ... Despite imprecise and unfortunate wording, the legislator explicitly provides that a minimum of form would suffice instead of an ideal on the merits of a guilty plea.<sup>142</sup>

As Justice Healy explains, sections 606(1.1) and (1.2) do not actually require the accused to provide a valid plea; they just require the *appearance* of validity. Without an investigation of the motive underlying a plea, it is functionally impossible for a court to ensure its *substantive quality* because the court cannot know if an accused is pleading earnestly, or for some ulterior purpose.

### C. THE INABILITY OF SECTIONS 606(1.1) AND (1.2) TO PREVENT CAUSES EXTERNAL TO THE ACCUSED

Sections 606(1.1) and (1.2) similarly fail to prevent the operation of causes of guilty plea wrongful convictions that are “external to the accused” — that is, the influences imposed by parties other than the accused that can indirectly induce a false guilty plea. The plea inquiry fails to catch these factors because it does not require the court to receive any information directly from the accused; defence counsel can, and often do, make all submissions on their behalf.<sup>143</sup> Thus, the accused is not required to confirm that they committed the offence, that their plea is voluntary, or that they understand anything about the process.

As a result, the plea inquiry often becomes a conversation between the defence, the Crown and the court. Without any involvement from the accused, the incentives of defence counsel and the Crown to secure a guilty plea are free to run roughshod. If the court was required to hear directly from the accused, however, then the court might be able to parse the accused’s feelings, from those of the lawyers in the room.

Consider these concerns in action in *R. v. Peers*.<sup>144</sup> This case involved a man who sought to withdraw his guilty plea after his counsel negotiated a plea agreement with the Crown.<sup>145</sup> When the pleas were entered, the Court engaged in the following limited exchange to satisfy section 606(1.1):

MR. PROCEE [defence counsel]: . . . I have canvassed section 606(1.1) with Mr. Peers prior to this, and all answers were in the affirmative.

THE COURT: Okay. Mr. Peers, and all of those counts were reviewed with you previously; is that correct, sir?

THE ACCUSED: Yes, it is, yeah.

<sup>142</sup> 2010 QCCQ 8687 at paras 10–11 [translated by author].

<sup>143</sup> Brockman, *supra* note 4 at 132.

<sup>144</sup> 2022 ABCA 3.

<sup>145</sup> *Ibid* at paras 1–2.

THE COURT: And you understand what you are pleading guilty to?

THE ACCUSED: I do, Ma'am.<sup>146</sup>

This exchange is the *only* involvement that Mr. Peers had in the process before the judge accepted the pleas; *just* “[y]es, it is, yeah.”<sup>147</sup> Some months later, Mr. Peers retained new counsel and maintained his innocence.<sup>148</sup> He claimed that he was unduly influenced by his counsel in pleading guilty and requested the Court to strike his plea.<sup>149</sup> The apparent motivations of the defence counsel remain unknown. However, the crux of the problem is that these concerns did not arise until Mr. Peers appealed his case. With the current plea inquiry, the court has no way of detecting these issues.

#### D. THE INABILITY OF SECTIONS 606(1.1) AND (1.2) TO PREVENT CAUSES RELATED TO THE IDENTITY OF THE ACCUSED

Sections 606(1.1) and (1.2) are likewise unable to prevent false guilty pleas stemming from causes related to the identity of the accused. The plea inquiry is limited, in this sense, because it does not ask questions whose answers vary based on identity. Whether one is capable of voluntarily pleading guilty, whether one understands the consequences of their plea, or whether the facts support the charge are questions that are largely independent of gender, race, or disability status.<sup>150</sup> This limitation of the plea inquiry was acknowledged by the Ontario Court of Appeal in *R. v. C.K.*:

[T]he hard truth is that Indigenous experiences are not commonly going to be relevant during an application to withdraw a guilty plea, given the state of the law. Even accepting the proposition that an Indigenous person’s experiences can engender feelings of hopelessness and resignation, such feelings are not apt to be material to ... the ability of the individual to make active or conscious choices.<sup>151</sup>

*R. v. C.K.* was a case where, if the plea inquiry was structured in a way to assess identity, the accused’s plea likely would have been struck. This case involved an Indigenous person, Mr. K, who sought to withdraw his plea of guilty to charges of violent assault.<sup>152</sup> According to his *Gladius* report, Mr. K was impacted by intergenerational trauma related to his Indigenous identity; his life “abounded with abuse: physical, mental, sexual, fuelled with drugs and alcohol, poverty, [and] housing insecurity.”<sup>153</sup> Mr. K pled guilty after spending 22 months segregated in protective custody where he was confined to his cell for nearly 23 hours per day.<sup>154</sup> Mr. K argued that his time in segregation, compounded by his experiences as an Indigenous man, affected his decision-making capabilities and led him to give a false guilty plea.<sup>155</sup> However, Justice Paciocco, writing for the majority explained that Indigeneity is not

<sup>146</sup> *Ibid* at para 3.

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid* at para 6.

<sup>149</sup> *Ibid* at para 6.

<sup>150</sup> *R v MAW*, 2008 ONCA 555 at para 33 (if a person has an intellectual disability or mental health condition that renders them unable to make active and conscious choices, then they are subjected to a different standard).

<sup>151</sup> *CK*, *supra* note 139 at para 83.

<sup>152</sup> *Ibid* at paras 6, 28

<sup>153</sup> *Ibid* at para 22.

<sup>154</sup> *Ibid* at para 16.

<sup>155</sup> *Ibid* at para 23.

relevant to his guilty plea because one's experiences as an Indigenous person have no effect on one's capacity to choose to plead guilty or to understand the consequences of that choice.<sup>156</sup>

### E. WHY SECTIONS 606(1.1) AND (1.2) ARE THE PROBLEM, NOT COURT PRACTICES

Before moving into considering how sections 606(1.1) and (1.2) can be improved, I should address why sections 606(1.1) and (1.2) in particular, as opposed to court practices, are the source of the problem. Reading the above, one could fairly point out that sections 606(1.1) and (1.2) do not prevent a court from conducting a meaningful inquiry. Thus, one could argue, this is an issue of judicial discretion, not legislation, because courts are simply making a choice not to ask about the factors that might cause a false guilty plea.

To this counter-argument, I would respond that sections 606(1.1) and (1.2) grant discretion where discretion ought not exist. There is, in my view, no circumstance where a court could justifiably refuse to conduct a proper plea inquiry because a court can never know whether an accused will provide a false guilty plea. Since the discretion afforded by sections 606(1.1) and (1.2) is unwarranted, procedural protections ought to be implemented to restrain the exercise of that discretion; courts ought to be directed on when and how to conduct plea inquiries.

This argument, albeit in a different context, was recently used by the Supreme Court in *R. v. Bissonnette*.<sup>157</sup> In *Bissonnette*, the Supreme Court struck down section 745.51 of the *Criminal Code*, which provided courts with the discretion to impose consecutive 25-year parole ineligibility periods in cases involving multiple first-degree murders.<sup>158</sup> The Crown argued that section 745.51, itself, was not problematic; rather, it was the use of judicial discretion authorized by section 745.51 that deserved to be scrutinized.<sup>159</sup> However, the Supreme Court rejected this argument and stated that the legislation itself was the source of the problem because it authorized discretion where discretion was not warranted.<sup>160</sup> To me, the Supreme Court's reasoning in *Bissonnette* is directly applicable to the plea inquiry. Sections 606(1.1) and (1.2) deserve to be scrutinized because they authorize courts to be complacent towards false guilty pleas when complacency is unwarranted.

### IV. SOME SOLUTIONS: LEARNING LESSONS FROM THE PAST

As I hope to have shown above, sections 606(1.1) and (1.2) are insufficient. However, lessons can be learned from times past. Today, courts treat guilty pleas informally and passively. However, in earlier times, judges viewed guilty pleas with the seriousness that they deserved. The history described above provides three related lessons that could be used to improve the modern plea inquiry: (1) courts should conduct a plea inquiry in every case;

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<sup>156</sup> *Ibid* at para 83.

<sup>157</sup> 2022 SCC 23 [*Bissonnette*].

<sup>158</sup> *Ibid*.

<sup>159</sup> *Ibid* at para 109.

<sup>160</sup> *Ibid* at paras 3, 110–11.

not only where they believe it to be necessary; (2) judges should consider the accused's circumstances and motive for pleading guilty; and (3) the judiciary should, once again, become skeptical of guilty pleas. I recognize that there are counter-arguments to these recommendations; namely, that they might limit efficiency and reduce the degree of leniency that has been traditionally afforded to the accused to plead guilty and obtain sentence discounts. To avoid redundancy, I will address these counter-arguments in Part IV when conducting the analysis of section 1 of the *Charter*.

**A. LESSON #1: CONDUCT A PLEA INQUIRY  
WITH THE ACCUSED IN EVERY CASE**

As shown above, sections 606(1.1) and (1.2) do not require courts to question the accused; the judge can choose to speak with counsel or skip the inquiry altogether. This approach is completely opposed to the one taken by the early common law courts. Recall that in the early common law years, it was a basic norm for courts to engage with each accused that tried to enter a guilty plea. By speaking with the accused directly, the courts were able to obtain the necessary information to assess the validity of the plea. Courts ought to learn from this historical approach to guilty pleas. Judges should be required to conduct a full inquiry with the accused — not merely with their counsel — in every case and ensure that each condition in section 606(1.1) is satisfied.

This recommendation is not novel. Several scholars, at this point, have suggested that the *Criminal Code* ought to mandate a complete inquiry with the accused.<sup>161</sup> However, it merits reiteration because, in my view, it is fundamental to the success of any meaningful plea inquiry. By requiring the court to engage specifically with the accused, the judge would necessarily learn more about them and their circumstances; as a result, they would be better able to detect if a plea is false. Moreover, by speaking directly with the accused, the judge would minimize any undue influence that counsel might have over a false guilty plea. Further, questioning the accused could uncover causes of a false guilty plea that the accused did not even share with their lawyer. These causes could be exposed through a proper plea inquiry in court. If an accused was questioned directly by a judge, then the accused could only falsely plead guilty if they lied in court (that is, they would have to confess to committing an offence that they never committed). As Christopher Sherrin has explained, the psychological literature suggests that such lies “can be difficult to utter ... because they contravene social norms and can provoke emotional unease through feelings of guilt and fear of being caught.”<sup>162</sup> Put differently, the accused may be less likely to lie to the judge if engaged directly in a discussion with them.

**B. LESSON #2: INDIVIDUALIZE THE  
PLEA INQUIRY TO THE ACCUSED**

If a judge chooses to conduct a plea inquiry, then sections 606(1.1) and (1.2) only direct them to ask a series of yes or no questions which are not reflective of many of the well-known causes of false guilty pleas. This setup is antithetical to the process employed by our

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<sup>161</sup> See e.g. Sherrin, *supra* note 4 at 25; *Martin Report*, *supra* note 82 at 318.  
<sup>162</sup> Sherrin, *ibid* at 26.

early common law traditions. Recall that the early common law courts would take account of the accused's situation and possible punishment, and they would engage in dialogue with the accused. These courts did not simply apply a set of pre-determined questions. Rather, they seem to have dealt with each guilty plea individually.

Courts ought to re-adopt this individualistic approach to plea inquiries. In light of the literature on the causes of false guilty pleas, this end would be best served by inquiring into an accused's personal circumstances and motive for pleading guilty. By embracing such an individualistic approach, the court would necessarily consider whether the accused has any reason to render a false guilty plea or any identity characteristics that would render them more susceptible of a guilty plea wrongful conviction. Moreover, questions surrounding the circumstances and motive of the accused could not be answered by a simple yes or no. Instead, they would necessarily involve a substantive discussion between the judge and the accused to ensure the validity of the plea.

### C. LESSON #3: FOSTER A SKEPTICAL ATTITUDE TOWARDS GUILTY PLEAS

Today, courts carry a relaxed attitude towards guilty pleas. This disposition starkly contrasts with the vigilance exhibited by the earlier common law courts. Recall that courts used to be deeply skeptical towards guilty pleas; this level of concern for the accused led courts to engage in robust plea inquiries. Courts ought to regain this sense of skepticism towards guilty pleas. If courts became more critical of guilty pleas, then hopefully they would be more alert when conducting the plea inquiry and better prevent wrongful convictions.

Presumably, courts today are not skeptical of guilty pleas because they are oblivious to the problem. Guilty plea wrongful convictions are rare and unlikely to be a judge's primary concern when conducting a plea inquiry. Moreover, guilty plea wrongful convictions remain poorly understood. Until recently, false guilty pleas were scarcely discussed in the literature. This point is evidenced, for instance, by the fact that the Federal/Provincial/Territorial Heads of Prosecutions Committee have published three reports on wrongful convictions in 2004,<sup>163</sup> 2011,<sup>164</sup> and 2018,<sup>165</sup> yet the 2018 report was the first of these reports to give a thorough discussion of false guilty pleas.<sup>166</sup>

I see three avenues that can be used to help promote judicial awareness of guilty plea wrongful convictions and skepticism towards guilty pleas. First, the National Judicial Institute could launch educational initiatives for judges geared towards understanding guilty plea wrongful convictions. To my knowledge, none of the existing educational programs on wrongful convictions touch on false guilty pleas.<sup>167</sup> Second, Parliament could introduce

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<sup>163</sup> Canada, FPT Heads of Prosecutions Committee Working Group, *Report on the Prevention of Miscarriages of Justice* (Ottawa: Department of Justice, 2004) (Chairs: DA Bellmore & Rob Finlayson).

<sup>164</sup> Federal/Provincial/Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions, *The Path to Justice: Preventing Wrongful Convictions* (Ottawa: Public Prosecution Service of Canada, 2011) (Chairs: Stephen Bindman & Mary Nethery).

<sup>165</sup> *FPT Report*, *supra* note 4.

<sup>166</sup> *Ibid* at 169.

<sup>167</sup> *Ibid* at 149–50.

amendments to sections 606(1.1) and (1.2) that recognize the risks of false guilty pleas or require more engagement with the vulnerabilities of the accused. Third, someone could challenge the inadequacies of sections 606(1.1) and (1.2) under the *Charter*. If the plea inquiry was declared unconstitutional, then the legal community would necessarily become aware of the reality of guilty plea wrongful convictions and the shortcomings of sections 606(1.1) and (1.2) could be addressed with appropriate constitutional remedies.

## V. A PATH FORWARD: SECTIONS 606(1.1) AND (1.2) ARE RIPE FOR *CHARTER* REVIEW

In this final section, I propose challenging sections 606(1.1) and (1.2) under section 7 of the *Charter*<sup>168</sup> as a viable method of implementing the above three lessons.<sup>169</sup> I recommend a constitutional challenge for two reasons. First, Parliament amended sections 606(1.1) and (1.2) in 2019 and, as a practical matter, one can assume that they will not update the plea inquiry again for several years. Second, sections 606(1.1) and (1.2) fail to adequately protect innocent persons from the deprivation of their liberty; thus, sections 606(1.1) and (1.2) are ripe for *Charter* review.

I begin this section by setting out various constitutional arguments as to how sections 606(1.1) and (1.2) might infringe section 7. Then, I discuss how sections 606(1.1) and (1.2) might be considered under section 1 and how appropriate constitutional remedies can be applied to improve the plea inquiry.

### A. SECTION 7

Sections 606(1.1) and (1.2) plausibly engage the liberty interest protected by section 7. The Supreme Court in *R. v. Seaboyer*; *R. v. Gayme* explained that the liberty interest is engaged where the impugned law “[has] the capacity to deprive a person of his or her liberty.”<sup>170</sup> The capacity that sections 606(1.1) and (1.2) have to deprive a person of their liberty is self-evident; these provisions enable a person to plead guilty and subject themselves to sentencing and imprisonment.

Sections 606(1.1) and (1.2) merit scrutiny under three principles of fundamental justice: (1) the principle that the innocent must not be convicted, (2) the principle that Parliament cannot create an illusory defence, and (3) the principle that the effects of a law cannot be grossly disproportionate to its purpose. Each will be considered in turn.

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<sup>168</sup> *Supra* note 6, s 7.

<sup>169</sup> I recognize that sections 606(1.1) and (1.2) could also be plausibly challenged under section 15 of the *Charter* given that certain identity groups disproportionately falsely plead guilty. However, the plausibility of a successful equality argument has, in my view, diminished because of recent changes made to the section 15 framework in *R v Sharma*, 2022 SCC 39. For this reason, I will save the section 15 analysis for another day.

<sup>170</sup> [1991] 2 SCR 577 at 602 [*Seaboyer*].

## 1. THE INNOCENT MUST NOT BE CONVICTED

The Supreme Court has consistently reaffirmed the principle of fundamental justice that the innocent must not be convicted.<sup>171</sup> The purpose of this principle was described in *Seaboyer*:

The precept that the innocent must not be convicted is basic to our concept of justice. One has only to think of the public revulsion felt at the improper conviction of Donald Marshall in this country or the Birmingham Six in the United Kingdom to appreciate how deeply held is this tenet of justice.

...

The interest is both individual, in that it affects the accused, and societal, for no just society can tolerate the conviction and punishment of the innocent.<sup>172</sup>

I suggest that, as a matter of logic, this principle of fundamental justice necessarily requires courts to interpret an accused's motive for pleading guilty. I arrive at this conclusion in two simple steps. First, it is a corollary to the principle that the innocent must not be convicted that, likewise, the innocent must not plead guilty. Second, without interpreting an accused's motive for pleading guilty, it is impossible to ensure that the innocent do not plead guilty. In other words, if a court accepts a plea without interpreting motive, then they could never know if the accused was truly guilty or if they have just convicted an innocent person who has entered a plea for unknown reasons. Thus, I propose that the *Charter* requires courts to assess the motive underpinning guilty pleas, akin to how the *Charter* requires a minimum mental element for the commission of a criminal offence. Since sections 606(1.1) and (1.2) allow courts to accept a guilty plea without any interpretation of motive, they run afoul of section 7.

## 2. A DEFENCE MUST NOT BE ILLUSORY

In *R. v. Morgentaler*, the Supreme Court recognized the principle of fundamental justice that “when Parliament creates a defence to a criminal charge, the defence should not be illusory or so difficult to attain as to be practically illusory.”<sup>173</sup> In *Morgentaler*, this principle was used to strike down the provisions of the *Criminal Code* that prohibited most abortions. The provisions at issue in *Morgentaler* did not explicitly create a defence. Rather, the law stated that the offences of procuring an abortion “do not apply” under certain circumstances. These circumstances were explained by Justices Dickson and Lamer, as follows:

A pregnant woman who desires to have an abortion must apply to the ‘therapeutic abortion committee’ of an ‘accredited or approved hospital’. Such a committee is empowered to issue a certificate in writing stating that in the opinion of a majority of the committee, the continuation of the pregnancy would be likely to endanger the pregnant woman’s life or health. Once a copy of the certificate is given to a qualified medical practitioner

<sup>171</sup> *Ibid* at 606–608. See also *R v Stinchcombe*, [1991] 3 SCR 326 at 336–38; *R v Leipert*, [1997] 1 SCR 281 at para 24; *R v O’Connor*, [1995] 4 SCR 411 at paras 15–18; *Reference Re Motor Vehicle Act (British Columbia)*, [1985] 2 SCR 486 at 513.

<sup>172</sup> *Seaboyer*, *ibid* at 606–607.

<sup>173</sup> [1988] 1 SCR 30 at 70 [*Morgentaler*].

who is not a member of the therapeutic abortion committee, he or she is permitted to perform an abortion on the pregnant woman.<sup>174</sup>

This defence was held to be illusory for three main reasons. First, the Supreme Court found that accessibility to the defence unduly depended on the discretion of a state actor, since hospitals could only become “approved” for abortion procedures at the designation of a provincial minister.<sup>175</sup> Second, they held that the defence was practically unattainable. They found that the requirements to form a “therapeutic abortion committee” could not be met in several hospitals across the country.<sup>176</sup> Moreover, the requirements to become an “accredited hospital” were stringent and further limited access to abortion.<sup>177</sup> Third, the requirements used to assess whether one qualified for an abortion were unclear. In particular, obtaining the defence required that the pregnancy endanger the woman’s life or health; however, “health” was undefined in the legislation.<sup>178</sup>

The arguments set out by the Supreme Court in *Morgentaler* are directly applicable to the guilty plea process. Sections 606(1.1) and (1.2) create an illusory defence against false guilty pleas. Just like the legislation at issue in *Morgentaler*, sections 606(1.1) and (1.2) do not explicitly create a defence. Rather, they create circumstances under which guilty pleas “do not apply.” A judge can only accept a guilty plea if they are satisfied that it is voluntary, informed, and supported by the facts. Sections 606(1.1) and (1.2), therefore, require that a court reject a plea, or that an accused be entitled to withdraw a plea, if it is *involuntary, uninformed, or unsupported by the facts*. However, in practice, this protection is completely illusory for the same three reasons that the abortion restrictions were struck down in *Morgentaler*.

First, the decision to conduct a plea inquiry unduly depends on the discretion of a judge. As explored above, due to section 606(1.2), which states that “the failure of the court to fully inquire whether the conditions set out in subsection (1.1) are met does not affect the validity of the plea,”<sup>179</sup> the decision on how to conduct a plea inquiry, or to conduct one at all, rests with the court. Thus, in effect, section 606(1.2) takes away the protections promised by section 606(1.1).

Second, even if an accused can prove that the preconditions for a valid guilty plea in section 606(1.1) were not satisfied, the defence remains practically unavailable. After a guilty plea is entered, it can only be withdrawn on appeal by filing an application under section 686(1)(iii) of the *Criminal Code*.<sup>180</sup> As discussed above, to succeed under section 686(1)(iii), the accused must prove that there has been a miscarriage of justice and that they were prejudiced by the failure of the judge to conduct a plea inquiry.<sup>181</sup> Therefore, even if the accused can show that a plea inquiry was conducted inadequately, sections 606(1.1) and (1.2), alone, cannot come to their defence.

<sup>174</sup> *Ibid* at 64.

<sup>175</sup> *Ibid* at 67.

<sup>176</sup> *Ibid*.

<sup>177</sup> *Ibid*.

<sup>178</sup> *Ibid* at 68.

<sup>179</sup> *Criminal Code*, *supra* note 2, s 606(1.2).

<sup>180</sup> *CK*, *supra* note 139 at paras 93–94.

<sup>181</sup> *Ibid*.

Third, similar to the word “health” in the provisions at issue in *Morgentaler*, the term “voluntarily” — a prerequisite for a valid guilty plea as set out in paragraph 606(1.1)(a) — is undefined and unclear. The lack of legislative guidance on how to interpret “voluntarily” ensures that its interpretation is left to the discretion of the court. As a result, there is no degree of certainty that two judges view voluntariness in a similar manner. Moreover, since courts are not required to provide written reasons to justify their application of the plea inquiry, it is impossible to understand how voluntariness is being understood in practice.

### 3. A LAW’S EFFECTS MUST NOT BE GROSSLY DISPROPORTIONATE TO ITS PURPOSE

Section 606(1.2) — the section of the plea inquiry which enables a court *not* to conduct a plea inquiry — warrants consideration under the gross disproportionality jurisprudence.<sup>182</sup> The gross disproportionality doctrine, according to the Supreme Court, targets laws whose “effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported.”<sup>183</sup> Assessing gross disproportionality is a two-step inquiry.<sup>184</sup>

The first step is to identify the purpose of the impugned law.<sup>185</sup> While the purpose of section 606(1.2) has never been identified, it was quite clearly enacted to promote some utilitarian-oriented objective within the criminal justice system. One could imagine, for instance, a court characterizing the purpose of section 606(1.2) as “efficiency” or “leniency” because it allows courts to work through section 606(1.1) without having to “fully inquire” into its conditions. However, as I explain momentarily, the precise purpose of section 606(1.2) is not crucial to the analysis.

The second step of the analysis is to consider “if the impact of the restriction on the individual’s life, liberty or security of the person is grossly disproportionate to the object of the measure.”<sup>186</sup> This balancing step, in the context of section 606(1.2), requires weighing the benefit being afforded to society by enabling courts to skip over some or all of the plea inquiry against the diminished protection afforded to an accused and the heightened risk of a wrongful conviction. Although the benefits afforded by section 606(1.2) are important, one can imagine many hypotheticals or real-life examples where this balancing exercise becomes absurd. For instance, consider the facts of *Brosseau*, where an uneducated Indigenous man, who pleaded guilty out of fear, received a life sentence because the Supreme Court of Canada refused to impose a duty on the trial judge to conduct a plea inquiry.<sup>187</sup> *Brosseau*, being decided in 1968, may or not may have been justifiable at the time. However, times have changed; it is now known that members of society’s most vulnerable groups regularly plead guilty when innocent. The fact that a court today is under no more duty to investigate those pleas than in 1968, for the purpose of, say, judicial efficiency, cannot be rationally supported.

<sup>182</sup> I am solely considering section 606(1.2) under the gross disproportionality test, not the entirety of sections 606(1.1) and (1.2).

<sup>183</sup> *Canada (AG) v Bedford*, 2013 SCC 72 at para 120.

<sup>184</sup> *Carter v Canada (Attorney General)*, 2015 SCC 5 at paras 73–90.

<sup>185</sup> *Ibid* at para 73.

<sup>186</sup> *Ibid* at para 89.

<sup>187</sup> *Brosseau*, *supra* note 48.

## B. SECTION 1 AND REMEDY

Predicting how a court might conduct a section 1 analysis is impractical and futile. For this reason, I will not work through each step of the *R. v. Oakes* test.<sup>188</sup> Rather, I will address what appear to be the two strongest arguments that the Crown could make in favour of justifying sections 606(1.1) and (1.2) under section 1. These two arguments include that sections 606(1.1) and (1.2) are necessary to (1) maintain efficient courts and (2) provide sufficient leniency to the accused to plead guilty.

### 1. SECTIONS 606(1.1) AND (1.2) CANNOT BE JUSTIFIED BY AN “EFFICIENCY” ARGUMENT

First, the Crown could argue that sections 606(1.1) and (1.2), as written, are necessary to maintain an efficient criminal justice system. A more intensive plea inquiry, they may claim, would slow down the administration of justice and burden the courts. Although this argument seems plausible, there is simply no evidence that a more robust plea inquiry would harm the efficiency of the criminal justice system. In fact, several common law countries have enhanced plea inquiries relative to Canada, and continue to have high-functioning criminal justice systems. In England for instance, the common law requires the court to receive a guilty plea personally from the accused and to ask them if they admit to the offence or had any explanation for their actions.<sup>189</sup> Similarly, Rule 11 of the Federal Rules of Criminal Procedure in the United States requires a court, before accepting a guilty plea, to personally address the defendant and work through a series of 15 questions with them.<sup>190</sup> Although these British and American procedures may not be exactly what is advocated for in this article, they show that more extensive plea inquiries can sit comfortably in the guilty plea process.

Moreover, counterintuitively, revising sections 606(1.1) and (1.2) might improve judicial efficiency in a limited capacity. A simple search of Westlaw using search terms “guilty plea” and “strike” reveals thousands of cases where an accused sought to withdraw a guilty plea. If addressed with a proper plea inquiry, each of these cases could have been dealt with in a handful of minutes. Instead, these issues were heard at first instance on appeal, which necessarily takes up months to resolve and incurs thousands of dollars in costs.

### 2. SECTIONS 606(1.1) AND (1.2) CANNOT BE JUSTIFIED BY A “LENIENCY” ARGUMENT

Second, the Crown could claim that sections 606(1.1) and (1.2) are necessary to afford courts a degree of leniency to allow the accused to choose how to plead and to access sentence discounts. However, one must remember that false guilty pleas are exceptional; even with the most extensive plea inquiry, an issue as to the validity of a plea will seldom arise. Thus, a more robust plea inquiry would not prohibit the majority of accused persons from benefiting from a guilty plea discount or from pleading guilty for whatever reason they deem appropriate. Instead, a more robust plea inquiry would *only* limit the leniency afforded

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<sup>188</sup> [1986] 1 SCR 103.

<sup>189</sup> See e.g. *R v Ellis* (1973), 57 Criminal Appeal Reports 571 (CA UK); *R v Walker*, [2001] EWCA Crim 1346.

<sup>190</sup> Fed R Crim P 11 (US).

by courts to plead guilty in the rare cases where there is a risk of a wrongful conviction. In such cases, the court ought to have a duty to inquire into the validity of the plea and commit the accused to trial.

Some might object to this proposition and claim that, even if someone is innocent, they should be entitled to plead guilty because, otherwise, they risk being wrongfully convicted at trial and receiving a longer sentence. After all, this is precisely why the accused pled guilty in *Hanemaayer, Kumar*, and other guilty plea wrongful convictions cases.<sup>191</sup> However, this counter-argument is not a reason, in and of itself, to allow sections 606(1.1) and (1.2) to stand; rather, it is a reason to develop ways to prevent wrongful convictions at trial. As Christopher Sherrin explains, “[t]he problem of false guilty pleas is intimately connected to the problem of false guilty verdicts” because “[t]rial will never be as appealing as it should be to innocent accused until we minimize the frequency of wrongful conviction resulting from it.”<sup>192</sup> Moreover, at a constitutional level, the inadequacies of sections 606(1.1) and (1.2) cannot be justified solely on the basis of the fact that the justice system has not prevented the possibility of false guilty verdicts. Otherwise, the constitutionality of sections 606(1.1) and (1.2) would be dependent on whether Parliament has chosen to enact additional policies. Such an approach to *Charter* rights, to quote Justice Cromwell dissenting in *R. v. Kokopenace*, “does not reflect the nature of the state’s obligation: compliance with constitutional rights is not optional.”<sup>193</sup>

### 3. REMEDY

For these reasons, in my view, sections 606(1.1) and (1.2) cannot be justified under section 1. Section 606(1.2) should be deemed of no force or effect and struck in its entirety. Section 606(1.1), alternatively, is a prime candidate for a suspended declaration of invalidity to ensure that Parliament can amend the plea inquiry, without stripping all accused of its benefits in the interim. One of the limited situations where a court may grant a suspended declaration of invalidity is where the law is “deemed unconstitutional because of under-inclusiveness rather than overbreadth, and therefore striking down the legislation would result in the deprivation of benefits from deserving persons without thereby benefitting the individual whose rights have been violated.”<sup>194</sup> In these circumstances, a suspended declaration of invalidity is warranted because “the legislature is in a better position to decide whether to extend underinclusive benefits.”<sup>195</sup> Sections 606(1.1) and (1.2), despite being an important protection that prevents some false guilty pleas, is underinclusive in that it does not adequately address the causes of false guilty pleas. If deemed unconstitutional, then Parliament could be encouraged to revise these inadequacies.

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<sup>191</sup> *Hanemaayer*, *supra* note 90; *Kumar*, *supra* note 91.

<sup>192</sup> Sherrin, *supra* note 4 at 35.

<sup>193</sup> 2015 SCC 28 at para 256.

<sup>194</sup> *Schachter v Canada*, [1992] 2 SCR 679.

<sup>195</sup> Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Toronto: Thomson Reuters, 2021), ch 14:42.

## VI. CONCLUSION

Sections 606(1.1) and (1.2) of the *Criminal Code* are now 20 years old and seemingly offer little procedural protection against false guilty pleas. Although guilty pleas are now known to be a main cause of wrongful convictions, sections 606(1.1) and (1.2) of the *Criminal Code* permit complacency towards the guilty plea process, allow the validity of a plea to be assumed, and entitle courts to conduct plea inquiries lackadaisically. In this article, I have strived to show that it has not always been, and it does not need to be, this way. More robust plea inquiries have comfortably and functionally existed in our common law traditions. The recent outburst of scholarship on guilty plea wrongful convictions should make us yearn for this past, to ensure we prevent false guilty pleas in the future.

There is nothing currently stopping judges from implementing the recommendations of this article. Any judge, if they so desire, could conduct all plea inquiries directly with the accused, individualize it to the defendant in front of them, and approach sections 606(1.1) and (1.2) with an attitude of skepticism. However, the simple truth is that judges do not abide by these lessons from the past. Instead, the plea inquiry has become a lost art.

The costs of losing this “art form” are substantial. Indeed, these costs have names: Sherry Sherret-Robinson; Maria Shepherd; Brenda Waudby; Richard Brant; Dinesh Kumar; O’Neil Blackett; C.F.; C.M.; Simon Marshall; Anthony Hanemaayer; Gerald Barton; Chris Bates; Clayton Boucher; Richard Catcheway; and Wendy Scott.<sup>196</sup> These 15 individuals — the reported known incidents of guilty plea wrongful convictions among the thousands of estimated cases — had their lives upended after rendering a false guilty plea. Any measures that can be taken to prevent these most serious deprivations of Canadians’ liberty ought to be seriously considered.

Fixing the plea inquiry will not, of course, prevent all guilty plea wrongful convictions. The causes of false guilty pleas are multi-factorial and cannot all possibly be detected by a judge in a courtroom. Rather, preventing guilty pleas will necessarily require multiple policies and buy-in from many actors in the justice system. It is the fundamental aspiration of this article to show that a robust plea inquiry can be, and ought to be, a step in the right direction.

The upside is that Parliament is clearly alive to the problem of guilty plea wrongful convictions. The legislative debates surrounding the Bill C-75 reforms to the plea inquiry provide some measure of hope insofar as the government knows that sections 606(1.1) and (1.2) can serve as a means to prevent guilty plea wrongful convictions. However, the Bill C-75 reforms, themselves, are lacklustre. Introducing a requirement that the “facts support the charge”<sup>197</sup> is a welcome change to the plea inquiry; but, it is simply insufficient. Sections 606(1.1) and (1.2) must be amended to affect the way in which courts conduct plea inquiries, not merely adding steps into a flawed framework.

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<sup>196</sup> Kent Roach, “Canada Has a Guilty Plea Wrongful Conviction Problem: The First Report from The Canadian Registry of Wrongful Convictions” (February 2023), online: *Canadian Registry of Wrongful Convictions* <datocms-assets.com/75199/1676311113-report-on-the-guilty-plea-wrongful-convictions-in-the-canadian-registry-of-wrongful-convictions-feb-13.pdf>.

<sup>197</sup> *Criminal Code*, *supra* note 2, s 606(1.1)(c).

If Parliament fails to act, there are pressing constitutional questions that should be litigated. Few things ought to engage the liberty interest as deeply as a law which fails to prevent wrongful convictions. Sections 606(1.1) and (1.2) are ripe for *Charter* review. And, the *Charter* may be the most promising way of recovering the lost art of the plea inquiry.