Defendants who plead guilty receive a reduced sentence. But is this always the case, and should it be? This case comment is largely restricted to analyzing whether the Ontario Court of Appeal was correct in refusing to consider the Appellant’s guilty plea as a mitigating factor (paras. 21–24). It is argued that this aspect of the decision is inconsistent with long-standing authority from the same Court of Appeal. In discussing the issue of plea-based sentence reductions we also explore other aspects of this controversial element of common law sentencing.

We begin by drawing on the experience in England and Wales, the first (and so far only) jurisdiction to structure judicial discretion regarding the use of plea-based sentencing reductions by means of a formal sentencing guideline. The experience in that jurisdiction may carry lessons for Canada. A brief summary of arrangements in that jurisdiction may be useful to the Canadian reader.

Structuring Sentencing Discretion in England and Wales: Sentence Reductions for a Guilty plea

The Sentencing Council of England and Wales is a statutory body which issues guidance for the courts in the form of sentencing guidelines. There are two kinds of guidelines, some are offence-specific while others

---

* Ontario Court of Justice.

** Oxford University and Worcester College.

1 In this article we follow the English convention of using the term “reduction” rather than “discount”. The latter term implies an unprincipled departure from an appropriate tariff, whereas we argue, again consistent with the English guilty plea guideline, that plea-based reductions follow a principle, albeit one which is not retributive in nature.

2 The guidelines apply only to courts in England and Wales. Scotland and Northern Ireland have yet to develop sentencing guidelines.
are of general application across all cases. In sentencing an offender, every court must “follow any sentencing guidelines . . . unless the court is satisfied that it would be contrary to the interests of justice to do so.”

One such “generic” guideline regulates the use of plea-based sentence reductions.

The statutory foundation for the practice in England and Wales is found in s. 144 (1) of the Criminal Justice Act 2003:

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

This provision offers no guidance as to the magnitude of reductions appropriate to pleas entered at different stages of the criminal process, nor the circumstances which might justify high or modest reductions. For guidance on these (and related) issues, courts turn to the definitive guideline on sentence reductions. The first guilty plea guideline was issued in 2004, and it has been twice revised (in 2007 and 2017). The current guideline endorses and prioritizes the utilitarian justifications for plea-based sentence reductions, namely that of saving court time and resources, and sparing victims and witnesses from having to testify. It also specifies that reductions are unrelated to the question of remorse; offenders deemed to be genuinely remorseful may benefit from some mitigation but this is not part of the calculus determining the appropriate reduction to reflect a guilty plea. Decoupling remorse from the benefits to the State clarifies the justification for plea-based reductions. It prevents a

---


4 Coroners and Justice Act, 2009 s. 125(1).


6 “Factors such as admissions at interview, co-operation with the investigation and demonstrations of remorse should not be taken into account in determining the level of reduction. Rather, they should be considered separately and prior to any guilty plea reduction, as potential mitigating factors.” See Sentencing Council, ibid, at 4.
court from having to determine whether the plea reflected genuine acceptance of responsibility and moral transformation.

In terms of the magnitude of reduction appropriate to defendants who enter a plea, if a guilty plea is entered at the first stage of criminal proceedings, the maximum sentence length\(^7\) reduction is one-third. The size of the sentence reduction then diminishes the later the guilty plea is entered, and the defendant who changes his plea to guilty on the day the trial commences should receive a maximum reduction of only 10%. The guideline thus creates a sliding scale of discounts to reflect the timing of the plea, which itself reflects the benefits to the state and victims and witnesses. The variable of time is therefore critical to determining the level of reduction awarded, and this arrangement is consistent with other common law jurisdictions.

Courts retain a degree of discretion in determining the level of reduction awarded. First, the statutory foundation notes that timing of the plea is not the only determinant of the reduction accorded. Section 144(1) of the Criminal Justice Act 2003 identifies two elements, and not simply the timing: there is also a reference to the “circumstances” in which the plea is entered. Second, Court of Appeal decisions have emphasised the importance of individualising the level of reduction, albeit within a principled framework. In a pre-guideline decision (Buffey) the Lord Chief Justice wrote that “it would be quite wrong for us to suggest that there was any absolute rule as to what the discount should be. Each case must be assessed by the trial judge in its own facts and there will be considerable variance as between one case and another.”\(^8\) This view has been endorsed in the latest and most comprehensive guideline judgment on plea-based reductions, where the Court of Appeal used the phrase “residual flexibility” to recognize the discretion of a court to individualise the reduction awarded.\(^9\) The guideline was designed to reduce but not eliminate all such variation. Finally, the Council’s guideline itself is flexible.

---

\(^7\) A guilty plea may affect the nature as well as the quantum of punishment. Thus an offender convicted of a crime the seriousness of which justifies imposition of a term of custody may receive a noncustodial sentence in return for an early guilty plea.

\(^8\) (1993), 14 Cr. App. R. (S) 511.

\(^9\) Caley and Ors, [2012] EWCA Crim 2821.
to the degree that it enumerates circumstances which may justify a reduction in excess of the guideline recommendation.\textsuperscript{10}

The guideline’s recommendations are broadly followed by English and Welsh courts with the greatest reductions accruing to offenders who entered a prompt plea (“Early” pleas). Thus, in a recent year (2014) 89\% of offenders in this category received exactly the guideline recommendation of a one-third reduction.\textsuperscript{11} The reductions awarded to early plea cases cluster more tightly around the guideline’s recommendation but there is greater dispersal of the later plea cases, particularly the latest category. This more scattered distribution of reductions reflects the complexities of cases where the guilty plea is classified as having been entered late.\textsuperscript{12} It would be unrealistic to expect all cases sentenced by the courts to fall exactly into the three levels of reductions specified by the guideline, for the simple reason that too many variables relating to the appropriate reduction are in play. The guideline acknowledges this complex legal environment and allows courts flexibility in determining the exact level of reduction awarded.

A guideline containing specific reductions appropriate to the stage at which the plea was entered gives legal counsel and their clients a clear idea of what reduction to expect. In addition, a defendant may request a more specific indication of the likely reduction from the court. This is known as a “Goodyear”\textsuperscript{13} indication. At this hearing a defendant may request some indication of the likely impact of a guilty plea on the sentence which will be imposed in his case.\textsuperscript{14} To summarise, defendants in

\begin{itemize}
\item \textsuperscript{10} For example, a late plea may result in the greatest level of reduction “Where the sentencing court is satisfied that there were particular circumstances which significantly reduced the defendant’s ability to understand what was alleged or otherwise made it unreasonable to expect the defendant to indicate a guilty plea sooner than was done” p. 7, supra note 5.
\item \textsuperscript{11} See https://www.sentencingcouncil.org.uk/wp-content/uploads/CCSS-An-
\item \textsuperscript{13} R. v. Goodyear, [2005] EWCA Crim 888.
\end{itemize}
England and Wales — and indeed all parties with a stake or interest in sentencing — are better placed than their counterparts in Canada. Parties to the sentencing process in Canada are further disadvantaged by the absence of any court statistics revealing the empirical pattern of sentence reductions.\textsuperscript{15}

Analysis of F.H.L.

While the Court is entirely correct in indicating that “[a] plea of guilty does not entitle an offender to a set standard of mitigation” (para. 21)\textsuperscript{16}, the Court goes on to hold that where (a) “a guilty plea is simply a recognition of the inevitable” (para. 22), and (b) an offender insists on a Gardner hearing, meaning that he “[does] not conserve judicial resources or provide a degree of finality to the complainant” (para. 23), the offender is not entitled to any mitigation of sentence. Let us examine each of these rationales in turn.

1. — The guilty plea “is simply a recognition of the inevitable”

As noted by Ruby et al.\textsuperscript{17} one by now common basis for providing a reduction of sentence to an Ontario offender who pleads guilty was first articulated by the Court of Appeal in the marijuana importing case of \textit{R. v. Johnston & Tremayne}, [1970] 4 C.C.C. 64, where the Court expressly accepted and adopted “the purely practical rationale” for sentence reduction following a guilty plea\textsuperscript{18} expressed by the English Court of Criminal Appeal in \textit{R. v. deHaan} (1967), 52 Cr. App. R. 25. In the English case

\textsuperscript{15} The principal database for sentencing in adult courts (the Adult Criminal Court Survey, administered by Statistics Canada) does not capture the plea entered. The consequence is that there is no data in that jurisdiction which permits comparison of the average sentences imposed for guilty plea and contested trial cases. This prevents us from determining the actual reductions awarded to defendants who plead guilty.

\textsuperscript{16} In his concurring judgment Brown J.A. expressly agrees with the majority judgment “that no error was committed by the sentencing judge in his treatment of the appellant’s guilty plea” (para. 54). For this reason we shall refer to “the Court” throughout this comment.

\textsuperscript{17} Ruby, Chan, Hasan & Enenajor \textit{Sentencing} (9th ed., 2017)

\textsuperscript{18} In fact, as noted by Ruby et al. deHaan’s guilty plea was not one entered early in the process: “the plea was changed from not guilty to guilty during the course
there was no question of remorse; despite the fact that the offender was “inevitably caught” the court nevertheless considered it entirely appropriate to give a discount “as clearly in the public interest”. In allowing substantial reductions in the sentences imposed at trial, Gale C.J.O. wrote for the Ontario court: “It is obvious that little, if any, consideration was given by the trial Judge [who had “jumped” a joint submission by counsel] to the fact that these two men pleaded guilty and thus saved the community a good deal of expense” (at 67).

Approximately one year earlier the British Columbia Court of Appeal had considered the ruling in deHaan in R. v. Spiller, [1969] 4 C.C.C. 211, a Crown appeal against sentence imposed on a senior bank teller who had defrauded her bank employer of almost $500,000 over the course of several years. While acknowledging the English position Robertson J.A. wrote for the court: “I do not think that that is a principle of universal application, though it may well be appropriate to apply it in some cases, and I do not think that any significant weight should be given to the plea of guilty here: the respondent knew that she was inescapably caught” (para. 16).

In the 1975 case of R. v. Wisniewski (1975), 29 C.R.N.S. 342, a very aggravated case of criminally negligent driving where a fatality occurred, Graburn J., a very experienced trial judge, noted the differing views of the two courts of appeal in regard to an offender who was “inescapably caught”. Despite holding that in the case under consideration the offender was “analogous” to that of Spiller, in that the offender had not expressed much remorse for his actions, Graburn J. carefully noted that “a plea of guilty saves the community a great deal of expense and that factor ought to be considered by a trial judge” (at 349). Thus, in balancing the various factors considered in the sentence he ultimately imposed Graburn J. indicated: “I have considered your plea of guilty” (at 352).19

of the trial but prior to the time that the offender had an opportunity to testify” (at 316).

19 In R. v. Rosenberg, [1993] O.J. No. 3260, a fraud case estimated to take two to six years had it proceeded to trial, Watt J. commented on the credit to be given to a “late” guilty plea: “Later pleas of guilty are often but acquiescence to the inevitable, a realization that guilt is or will be plainly established. Nonetheless, even a late guilty plea saves the community expense and inconvenience. . . . What is lost by the passage of time before the plea is more than offset by
This notion of giving some credit for a guilty plea despite an overwhelming case against the accused has been adopted in several other Ontario Court of Appeal decisions:

- In *R. v. Santos*, [1993] O.J. No. 2539, the offender pleaded guilty to two robberies and related offences. The trial judge had dismissed this “significant mitigating factor” because his pleas of guilty were “inevitable because of the overwhelming evidence against him” (para. 2). Though the appeal court was divided as to the sentence it should impose, the Court of Appeal was clear that the trial judge had clearly erred: “We do not subscribe to the proposition that there should be less weight to a plea of guilty from a person who has been inescapably caught” (ibid).

- In *R. v. Faulds et al.*, [1994] O.J. No. 2145 the four accused committed an armed robbery and murder of a Brinks truck driver. The victim was shot three times by the accused J., but it was an agreed fact that these wounds would not have caused his death. The accused S. fired a shotgun blast into the back of the victim, which was the cause of death. Upon his plea of guilty to a charge of second degree murder the trial judge imposed a mandatory life sentence but increased S.’s parole ineligibility period to 19 years. The Crown appealed, arguing that the considerations outlined in [then] s.744 of the *Code* dictated the imposition of a 25-year period of parole ineligibility. While the Court of Appeal allowed the Crown appeal to the extent of increasing the parole ineligibility period to 23 years, the court explained that: “In [some] cases, a guilty plea is simply a recognition of the inevitable. That is this case. Even where the plea is not a manifestation of genuine remorse, it may still save valuable judicial resources and provide a degree of finality from the perspective of the victims which would not exist without the plea. Those features are present in this case and should be taken into account in assessing the appropriate sentence.” (para. 14; emphasis added).

\[\text{\footnotesize 20} \]

In relation to the accused F., the court similarly did not allow the Crown’s appeal to the extent the Crown sought, holding that, like S., F. “deserves some credit for his guilty plea” (para. 26).

\[\text{\footnotesize 20} \]
In *R. v. Sarao*, [1995] O.J. No. 1027, the accused entered pleas of guilty to three counts of second degree murder, a case where he executed his wife and in-laws following his wife’s disclosure that she had been sexually assaulted when she was a young girl. He pleaded guilty and the sentencing judge imposed sentences of life imprisonment with the maximum parole ineligibility period of 25 years. In reducing the parole ineligibility period to 22 years the Court of Appeal held, *inter alia*, that: “it must also be taken into consideration that he pleaded guilty to the charges (albeit in the face of overwhelming evidence) and thereby saved the victim’s family the trauma of a trial and he saved the state the time and expenses of a lengthy trial” (para. 4; emphasis added).

In *R. v. Klair* (2004), 186 C.C.C. (3d) 285, an angry drunken grandfather deliberately set his residence on fire, knowing full well that his young grandson was inside. The child suffered dreadful life-threatening and very significant physical and emotional injuries. Watt J., as he then was, imposed a life sentence following the offender’s plea of guilty to a charge of arson causing bodily harm. On appeal Sharpe J.A. (McCombs J. concurring) reduced the sentence to 10 years. Among the factors that the majority considered significant were “[the offender’s] plea of guilty and . . . acceptance of responsibility for the harm he has caused” (para. 37). In dissent Feldman J.A. would have upheld the sentence imposed at trial. Though neither of the decisions expressly refers to the offender having been “inescapably caught”, it is clear from the reports that both trial and appellate judges treated the case as such.

In *R. v. Daya*, [2007] O.J. No. 3865, the Crown appealed “a sentence of ten months imprisonment (which included a twenty-four month reduction for time spent in pre-trial custody) . . . [for] trafficking in cocaine . . . and ecstasy and possession of a loaded .38 calibre handgun.” (para. 1). The trial judge had considered that a global sentence of 60 months would have been appropriate, but then made three deductions. The Crown did not dispute deductions to reflect pre-trial custody and for certain limited assistance the accused had given to the police subsequent to his arrest. However, the trial judge then considered that the offender was “entitled to a [third] reduction . . . of a substantial amount, perhaps 25%, perhaps 33 1/3%” for his guilty plea. He thus reduced the sentence by a further 20 months — one-third of sentence (para. 11). Had it...
not been for this last 20 month credit, the court specified that it would not have interfered with the sentence imposed at trial (para. 13 & 24). However, “[t]he circumstances of this case were that the [respondent] was caught red-handed, he had no defence to the charges and a trial would simply have postponed the inevitable. By pleading guilty, the respondent spared the administration of justice some time and expense, and for that, according to R. v. Faulds, he was entitled to some credit. In our view, however, a twenty month discount for the guilty plea was excessive.” (para. 15; emphasis added).

Thus, contrary to the decision in F.H.L. there is a consistent body of authority from the Ontario Court of Appeal that even an offender who is “inescapably caught” is entitled to some reduction in sentence following a guilty plea.21

The English approach to overwhelming evidence cases

When the case against the defendant is overwhelming, there may be some reluctance to award any reduction on the ground that he or she had no option but to plead guilty. The case of the defendant “caught red-handed” has been more thoroughly considered in England. By noting that plea-based reductions are independent of more nebulous claims in mitigation such as remorse, the English guideline clarifies the appropriate response in cases where the evidence is overwhelming. The original guideline issued in 2004 recommended a lower reduction in cases where the prosecution’s case was overwhelming. The propriety of this was reviewed by the Sentencing Council, and after an extensive public and professional consultation Council concluded that if the rationale for reductions was purely to recognise the cost savings to the criminal justice system and the benefits to victims and witnesses, it is inappropriate to withhold or reduce the reduction in red-handed cases. The current guide-

21 For purposes of completeness, we should note that in the terrorism sentencing case of R. v. Gaya, [2010] O.J. No. 185 the sentencing judge commented that: “even where the plea is not a manifestation of genuine remorse, it may still save valuable judicial resources and is worthy of some mitigation.” (para. 53). On appeal the Court of Appeal ruled that, given the “unique nature of terrorism offences”, the trial judge had “overemphasized the mitigating factors of Gaya’s guilty plea”. [2010] O.J. No. 5476 at para. 20.
line makes this position explicit. Pleading guilty may reflect “recognition of the inevitable”\(^{22}\), but the defendant may still put the prosecution to the test, with consequences for precious resources and for the welfare of victims and witnesses.\(^{23}\) A reasonable compromise for Canada may be to adopt the approach recommended in the previous version of the English guideline, namely to award a lower reduction when the prosecution’s evidence was overwhelming. This approach would preserve some incentive for such defendants to plead guilty yet recognise that the plea reflects the reality of the case as disclosed.

2. — The guilty plea “does not conserve judicial resources or provide a degree of finality to the complainant”

What appears to have particularly troubled the F.H.L. court were (a) clear evidence of intentional delay caused by the offender by fleeing Ontario for many months in flagrant breach of his bail recognizance, and (b) the accused’s insistence on a Gardiner hearing at which the young complainant was required to testify. But even in these types of circumstances there have been several cases in which the Ontario Court of Appeal has clearly held that an offender who either intentionally delays the process, or who insists that witnesses be called (at a preliminary inquiry, or at trial, or during a Gardiner hearing) is nevertheless still entitled to some deduction to credit his guilty plea:

- In *R. v. Gouvieia; R. v. Correiro*, [1984] O.J. No. 34, the Crown appealed against sentences imposed following a plea of guilty in Superior Court following a lengthy preliminary inquiry in which the rape victim was called by the Crown to testify, whereupon she was exposed to “extensive and difficult cross-examination” (para. 2). Speaking for the court Brooke J.A. held: “I do not share the view of the learned trial judge that the plea of guilty was of significant consequences so far as sentence was concerned in this case. It is really not correct to say that she was spared the humiliation of

---

\(^{22}\) Tying the reduction to the anticipated benefits for the State as well as victims and witnesses, obviates the need for a court to determine whether the case was indeed overwhelming, which is not always straightforward.

\(^{23}\) The guideline notes that “The benefits apply regardless of the strength of the evidence against an offender. The strength of the evidence should not be taken into account when determining the level of reduction”, *supra* note 5 at 4.
recounting what occurred. The record from the preliminary inquiry dispels any notion that this was so.” (para. 6)24. We find it noteworthy that even in a sexual assault case as “vicious” as this, the Court declined to say that no weight should have been given to the guilty plea.

• In *R. v. Pitkeathly*, [1994] O.J. No. 546, the offender eventually entered a plea of guilty to a charge of aggravated assault on his common law partner, but the plea was not entered until “after a preliminary hearing had been held and after a voir dire extending over four days had been concluded, during which counsel for the appellant unsuccessfully sought to exclude a confession made by the appellant to the police and also sought a stay of proceedings by reason of the alleged unreasonable delay in bringing the trial on at an earlier date.” (para. 9). The Court of Appeal dismissed the offender’s appeal, agreeing with the trial judge “that a plea of guilty under the circumstances which existed here is not to be considered as a particularly significant mitigating factor.” (para. 10). However, we note that, unlike *R. v. F.H.L.*, the court was prepared to concede that some deduction should be made even after the complainant had been called to testify at the preliminary inquiry (and presumably would have been available to testify upon the resumption of the trial following the voir dire).

• This decision seems consistent with the court’s subsequent holding in *R. v. Bates*, [2000] O.J. No. 2558, the leading Ontario case on sentencing for serious and repetitive criminal harassment of and assaults on an estranged partner. At the outset of the trial the accused indicated that he was prepared to plead guilty to some of the charges, and did so, but he insisted on his right to trial on others. Those trials proceeded first, during which the victim and some of her family members were required to testify. The accused was acquitted of some charges and found guilty of others, in addition to those charges to which he had already pleaded guilty. Despite his insistence on trials on some of the charges, the court held: “The guilty pleas are a fact which stands in his favour on

---

sentencing, even though the victims were required to testify at trial.” (para. 43). However, in its lengthy reasons the court does not deal further with the issue of what level of deduction should have been made in these circumstances.

- In R. v. Carreira, [2015] O.J. No. 4867, the offender had entered an early guilty plea to a charge of criminal negligence causing death but had then required the Crown to embark on a four-day, 11 witness Gardiner hearing, apparently because he refused to concede that his consumption of alcohol was voluntary. On appeal by the offender, the panel of the court hearing the appeal held that the sentencing judge “gave the appellant credit for his early guilty plea but balanced it against the Crown’s strong case and the significant amount of litigation around the issue of voluntary consumption of alcohol” (para. 8). In response to an argument raised by the appellant to the effect that his right to insist on a Gardiner hearing “should not adversely impact his entitlement to full credit for admitting the essential elements of the offence” (para. 13), the court quoted paragraph 14 of the judgment in R. v. Faulds, supra, and concluded that the trial judge’s consideration of “the impact of the guilty plea on the proceedings” was appropriate (para. 16).

Given that two of the judges on the appellate panel in R. v. Carreira coincidentally were members of the panel that decided R. v. F.H.L. it seems clear that what most troubled the court about the Gardiner hearing in the latter case were three factors: (a) that the offender’s claim for mitigation based on his plea of guilty “was further reduced by the appellant’s refusal to accept responsibility for all but one of the sexual assaults that

25 Unfortunately, the report is not entirely clear as to the charges on which the offender was acquitted. Quaere whether the court would have had the same view had the accused been found guilty of all charges.

26 At the end of the paragraph in the judgment where the extract from Faulds is quoted, the court references the decision of the Newfoundland Court of Appeal in R. v. Basha, [1979] N.J. No. 51 as support for the proposition that each case turns on its facts. However, that was a case in which the Newfoundland court refused to place any significance on the guilty plea, despite the saving of time at the trial level. With respect, as discussed supra, this is not the position in Ontario.

27 Both judgments were authored by Epstein J.A.
the trial judge found he had committed” (para. 23); (b) that he attempted “to minimize his responsibility for the one admitted incident by testifying that E.B. had effectively ‘come on to him’” (ibid); and (c) that “[u]nlike the accused in Faulds, the appellant chose to test the Crown’s evidence relating to the more aggravating aspects of his case. As a result E.B. was made to relive the assaults in her testimony and to undergo cross-examination designed to impugn her credibility” (ibid).

We submit that there are two problems with this refusal to allow any deduction for the offender’s plea of guilty. First, as outlined above, this view seems inconsistent with Ontario Court of Appeal case law cited above. Second, at least where the offence(s) charged are sexual assaults, does this holding mean that any time an accused declines to admit every item in the Crown’s statement of facts, his insistence that aggravating factors be proven beyond a reasonable doubt means that he loses his right to claim at least some mitigation of sentence? Surely this flies in the face of both the Ontario Court of Appeal and Supreme Court of Canada decisions in R. v. Gardiner. With respect, this sends an inappropriate message to future defendants (in sexual assault cases) and creates ambiguity for advocates.

In sum, we agree with the Queensland Court of Criminal Appeal, where Byrne J., writing for the court, commented on the concept that a guilty plea discount should be greater when the prosecution case is weak:

I remain to be convinced that this reluctance to make any allowance for guilty pleas in indefensible cases is justified. If administrative expediency resulting from a guilty plea is a sufficient basis for moderation in sentencing, it ought not to be decisive against a lesser sentence that conviction seems certain in the event of a trial. Unless there is an incentive for an offender to admit guilt, there is always the

---

28 Ruby et al. point out that “the Alberta Court of Appeal is more prone to deny reductions for guilty pleas than any other court” (9th ed., p.316), but the authors cite recent Alberta appellate authority for the proposition that “while a sentencing judge has the right to weigh the effect of mitigating factors, the sentencing judge erred here by saying the appellant’s guilty plea was not mitigating at all. He should have placed it on the scale and weighed it” R. v. Burback, [2012] A.J. No. 147 at para. 21

29 The Gardiner hearing in R. v. Carriera seems to have been restricted to establishing whether the accused’s consumption of alcohol was voluntary, a subject matter obviously less emotive than hearing from a sexual assault victim.
prospect the trial will proceed to a verdict, if only because the ac-
cused perceives that there is nothing to lose by risking the contest . . .
Another intended benefit of a submission to conviction, one fre-
quently mentioned in sexual assault cases, is sparing the witnesses
the ordeal of a trial. That advantage is no less valuable in seemingly
irresistible cases

Summary
This case highlights some deficiencies in the Canadian approach to
awarding plea-based sentence reductions. The practice remains contro-
versial, but if a sentencing regime elects to offer such rewards, several
conditions need to be fulfilled.
First, the rationale for reducing sentence should be clarified. Is it to re-
ward the offender for saving the State the time and expense of a prosecu-

tion or to recognise the moral transformation which is associated with the
expression of remorse? Clarification of the underlying justification
would also resolve several troubling questions. If saving victims and wit-
tnesses from having to attend trial and offer evidence, then courts should
recognise this by awarding greater reductions where the testifying is
likely to be particularly traumatic. If cost savings and victim benefit are
the justifications, timing becomes all important and this implies a sliding
scale, with reductions diminishing as the trial date looms.
Second, greater clarity is needed with respect to impact of plea on the
nature and quantum of sentence imposed. Advocates cannot advise their
clients unless there is a degree of predictability in the levels of reductions
awarded. It is not simply a question of quantum; as noted above, the En-
glish guideline recognises that one consequence of a guilty plea may be a
change in the nature of the sanction imposed, and not simply a reduction
in the length of imprisonment or onerousness of a noncustodial alterna-
tive. Defendants are unlikely to plead, or less likely to plead early, if the
benefits of pleading guilty are inscrutable or unpredictable. In R. v. F.H.L the Court notes that “a plea of guilt does not entitle an offender to

30 Bulger (1990), 48 A Crim R 239. See also Fearon, [1996] 2 Cr App R (S) 25.
31 Victims also have an interest in knowing why a sentence reduction may be
offered, and what level of reduction is conventionally awarded.
a set standard of mitigation. The amount of credit a guilty plea attracts will vary in each case,” (para. 22). With this we agree. Yet it is submitted that a wholly individualised approach is unsatisfactory. The amount of credit should be justified by a clear rationale, and the specific reductions follow clear and transparent guidance. This can only be achieved if appellate courts issue guidance on these matters, or if Parliament decides to create a Sentencing Commission for Canada with the power to issue guidelines.