ALL CONVICTIONS ARE NOT THE SAME: RETHINKING CUPE’S ABUSE OF PROCESS DOCTRINE IN CASES INVOLVING PLEA BARGAINS

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ABSTRACT

Historically, when a criminal conviction was introduced as evidence of guilt in a subsequent civil action, the convicted party was permitted to introduce rebuttal evidence to negate or mitigate the effect of the prior conviction. However, the Supreme Court of Canada’s 2003 decision in Toronto (City) v Canadian Union of Public Employees (CUPE) Local 79 has resulted in an unprecedented restriction on the ability to rebut a prior conviction. As a result of the CUPE decision, the doctrine of abuse of process now precludes rebuttal evidence in most cases.

CUPE’s expanded abuse of process doctrine is troubling because, to date, courts have applied it to all prior convictions—even convictions arising out of plea bargains. However, Canada’s system of plea bargaining exerts significant coercive pressure on the accused, which may render such convictions less trustworthy. This paper argues that it is time that our civil courts recognize that all convictions are not the same: those based on plea bargains raise unique fairness concerns that warrant relaxing CUPE’s rigid bar on rebuttal evidence. Judges in our civil courts ought to be permitted to examine the circumstances surrounding guilty pleas to determine if the plea bargain appears to be coercive. If so, they ought to permit the convicted party to adduce rebuttal evidence. Such an approach remains true to the main principle underlying the CUPE decision—the integrity of the justice system—while at the same time preventing the unfairness of coercive plea bargains from spilling over into our civil courts.

Citation: (2014) 23 Dal J Leg Stud 22.

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I. INTRODUCTION

Criminal convictions often play a role in subsequent civil proceedings arising out of the same facts. Victims are unable to obtain damage awards through criminal trials and are therefore forced to bring civil actions to obtain recompense. Strategically, plaintiffs often commence these civil actions after the criminal trial has concluded so that they can introduce evidence of the defendant’s criminal conviction. Historically, the convicted party could generally adduce evidence to rebut the prior conviction. However, the Supreme Court of Canada’s 2003 decision in Toronto (City) v Canadian Union of Public Employees (CUPE) Local 79 has resulted in an unprecedented restriction on the ability to rebut a prior conviction: the abuse of process doctrine now precludes such evidence in most cases.

Although CUPE involved a prior conviction arising out of a trial on the merits, courts have applied the decision more broadly. In the decade since CUPE was decided, courts have applied the abuse of process doctrine to preclude litigants from introducing evidence to contradict any prior conviction—even when the conviction was the result of a guilty plea. To date, there has been no discussion about the wisdom of treating convictions following trial and convictions resulting from guilty pleas the same way.

Yet there are important reasons why these convictions should not be treated the same way. Most significantly, convictions following trials indicate that a criminal court has conducted a full factual analysis and is satisfied of the defendant’s guilt beyond a reasonable doubt. In contrast, there is only slight exploration of evidence in cases involving guilty pleas. Although one might assume that the defendant’s guilty plea is conclusive evidence of guilt, such an assumption overlooks the fact that defendants may plead guilty for a variety of reasons, even if they did not commit the acts alleged against them.

Importantly, many guilty pleas arise in the context of plea bargains. The contemporary realities of plea bargaining provide strong incentives for criminal defendants to plead guilty, even when they may be innocent. Given this fact, many commentators and practitioners have criticized plea bargaining and its effect on our criminal justice system. However, there has been little examination of how plea bargaining affects our civil courts and their ability to provide justice to litigants. The reality is that criminal convictions, including those arising out of plea bargains, often play an important role in civil actions that arise out of the same events. By applying the abuse of process doctrine to preclude litigants from rebutting a conviction based on a guilty plea, civil courts may unwittingly be working an injustice against defendants who have pleaded guilty.

Given this reality, is it justifiable to continue to apply the same abuse of process framework to convictions following trial and convictions arising out of guilty pleas? In this paper, I argue that it is time for courts to recognize that all convictions are not the same: convictions based on plea bargains raise unique fairness concerns that merit relaxing CUPE’s bar on rebuttal evidence. To explore this argument, I first examine the evolution of judicial treatment of prior convictions in the pre-CUPE era and then turn to the ways in which CUPE changed this approach. Then, after discussing some of the

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1 See section II, below.

2 Toronto (City) v Canadian Union of Public Employees (CUPE) Local 79, 2003 SCC 63, [2003] 3 SCR 77 [CUPE].

3 See section III, below.
dangers inherent in our system of plea bargaining, I examine the ways in which these dangers have manifested themselves in civil cases in which courts have prohibited the relitigation of prior convictions that arose out of plea bargains. Finally, I suggest that courts ought to be more willing to allow relitigation in such circumstances and, to this end, I propose a framework for courts to use in assessing whether a particular plea bargain raises fairness concerns that warrant relitigation. In developing these arguments, I focus on the problems that plea bargains have created for our civil justice system; however, the very existence of these problems in our civil courts also raises serious questions about the integrity of our criminal justice system and the role that plea bargaining has come to play in it.

II. THE PRE-CUPE ERA:
THE EVOLUTION OF JUDICIAL ATTITUDES TO PRIOR CONVICTIONS

Despite significant changes in the treatment of criminal convictions during the pre-CUPE era, the common law rules rendered it unnecessary for civil courts to consider whether criminal convictions based on guilty pleas were less trustworthy than convictions following trial. Civil courts could almost always hear evidence about the circumstances surrounding a guilty plea and any inducements that were offered, meaning that untrustworthy convictions were less likely to result in civil liability.

The CUPE decision in 2003 marked a significant change to this approach and rendered it extremely difficult for a convicted party to introduce evidence to rebut a prior conviction. In order to understand why the Supreme Court found it necessary to change the way in which civil courts deal with prior criminal convictions, it is necessary to examine the evolution of judicial approaches to this question prior to CUPE.

A. Prior Convictions as Inadmissible Opinion: The Rule in Hollington v Hewthorn

Traditionally, evidence that a party had previously been convicted of an offence arising out of the same facts was inadmissible in civil proceedings. Evidentiary weight was not an issue: the trier of fact was not permitted to hear evidence of the conviction at all. This approach originated in the 1943 English judgment Hollington v F Hewthorn & Co Ltd, which held that a prior conviction is inadmissible opinion evidence of the criminal court.4 The court adopted a rigid rule that was highly favourable to the convicted party but often created unjust results. As one Canadian commentator noted shortly after the Hollington decision:

[T]he law particularly requires that in most cases a jury of twelve men should be convinced beyond reasonable doubt of the facts in issue. To state that a civilized community is willing to see a man hanged on such a finding of fact but to treat such finding as a mere [inadmissible] opinion in a subsequent

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4 Hollington v F Hewthorn & Co Ltd, [1943] KB 587 at 595 CA (Eng) [Hollington].
case involving a matter of dollars and cents, is a reflection on the administration of justice, as well as an offence to common sense.⁵

Although *Hollington* established a strict prohibition on the introduction of prior convictions, it made an important distinction between convictions and guilty pleas.⁶ While the result of a trial could not be admitted, evidence of a guilty plea was a party admission that was admissible as an exception to the hearsay rule,⁷ just like any other statement made by the accused. This rationale for admitting guilty pleas meant that a person who had pleaded guilty was always permitted to rebut or contradict the prior plea. In this way, *Hollington* created a rule that made it very difficult to establish civil liability on the basis of criminal guilt.

After some initial uncertainty about whether *Hollington* had been imported into Canada, most courts and law reform bodies accepted that *Hollington* was the law of Canada and proceeded under the assumption that evidence of prior convictions was inadmissible.⁸ *Hollington’s* distinction between convictions and guilty pleas was also adopted in Canada, most notably in the Court of Appeal for Ontario’s decision in *Re Charlton*.⁹ As in *Hollington*, Canadian courts treated guilty pleas as “evidence of very great weight,” but permitted the party who had pleaded guilty to adduce rebuttal evidence.¹⁰

The rule in *Hollington* was problematic because it made it possible for a convicted party to avoid civil liability for his or her actions. The distinction between guilty pleas and convictions meant that unless a party had pleaded guilty, no direct evidence of criminal guilt could be introduced. This often resulted in the relitigation of the same issues at the subsequent civil trial. It was not long before courts began to challenge the rule in *Hollington* and to suggest that the treatment of prior convictions should be based on a more principled balance among the goals of fairness, finality, and efficiency.

### B. Moving Beyond *Hollington v Hewthorn*: the Admissibility of Prior Convictions

The rule in *Hollington* soon attracted academic and judicial criticism owing to the absurdity occasioned by a rule that rendered convictions inadmissible. In England, the court's rationales for excluding prior convictions were described as relying on “indefen-

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⁵ CA Wright, “Case and Comment” (1943) 21 Can Bar Rev 653 at 658.
⁶ *Hollington*, supra note 4 at 599-600.
⁷ Note, however, that some argue party admissions are not hearsay at all. See e.g. *R v Evans*, [1993] 3 SCR 653, 85 CCC (3d) 97, cited in *R v WBC* (2000), 142 CCC (3d) 490 at para 57, 130 OAC 1 (Ont CA) [WBC].
⁸ See e.g. *Clarke (Next friend of) v Holdsworth* (1967), 62 WWR 1, [1967] BCJ No 2 (QL) (BCSC) [Clarke]; Ontario Law Reform Commission, *Report on the Law of Evidence* (Toronto: Ministry of the Attorney General, 1976) at 95 (stating that “[i]n Ontario, it is now generally accepted law that evidence of a criminal conviction is inadmissible in subsequent civil proceedings to prove the facts upon which the conviction was based”). See also Law Reform Commission of British Columbia, *The Report on Hollington v Hewthorn* (Vancouver: Department of Attorney-General, 1977) at 6-7.
⁹ *Re Charlton*, [1969] 1 OR 706, 3 DLR (3d) 623 (CA) [Charlton cited to OR]. The admissibility of a criminal conviction was not before the court in *Re Charlton*, so its references to *Hollington’s* distinction between guilty pleas and convictions were obiter. However, the treatment of guilty pleas outlined in *Re Charlton* was generally followed across Canada. See e.g. Law Reform Commission of British Columbia, *ibid* at 12.
¹⁰ *Charlton*, supra note 9 at 709; Law Reform Commission of British Columbia, *ibid* at 12.
sible technicalities and similarly in Canada, the rule was the subject of criticism by various law reform bodies. As a result, from the late 1960s until the mid-1980s, there were contradictory judgments from Canadian courts. Some felt they were bound by Hollington’s bar on the admission of convictions, but others strived to find a way to avoid applying this rigid rule.

Canadian legislatures soon took note of the widespread dissatisfaction with Hollington. As a result, in the mid-1970s, Alberta and British Columbia amended their Evidence Acts to render convictions admissible. As amended, both statutes stated that convictions were prima facie evidence of the commission of the offence and provided that the question of weight was a matter for the trier of fact. At least one case held that it was reversible error if a judge failed to direct the jurors that they must not treat the conviction as conclusive proof, but rather determine its weight for themselves.

These statutory amendments reflected a principled balancing of the competing interests at stake when a party seeks to introduce a prior conviction in a civil action. Instead of the rigid focus on the technical evidentiary rules that was evident in Hollington, these changes reflected an attempt to strike a balance among the goals of fairness, efficiency, and finality. This new treatment of previous convictions accorded substantial importance to finality and efficiency. At the same time, by treating convictions as prima facie proof instead of giving them conclusive weight, it allowed for fairness concerns to play a role. If the convicted party could adduce sufficient evidence to displace the great weight accorded to prior convictions, the prior conviction would not be determinative.

Despite these changes, the treatment of prior convictions remained uncertain outside British Columbia and Alberta. However, in the mid-1980s, appellate courts began to follow suit. The landmark decision was Demeter v British Pacific Life Insurance Co. In Demeter, the plaintiff had previously been tried and convicted of murdering his wife. He subsequently brought an action against the deceased’s insurance companies, seeking to recover on her life insurance plan. Mr. Demeter’s pleadings expressly claimed that he had not killed his wife and, in defence, the insurance companies sought to introduce evidence of his prior conviction.


See e.g. Clarke, supra note 8; Hellyer Farms Ltd v Biro, [1971] 2 OR 583, 18 DLR (3d) 527 (Co Ct). Clarke recognized that Hollington was the law of Canada; however, it stated that by virtue of British Columbia’s Evidence Act, convictions were admissible for the purposes of attacking credibility (although not for the purpose of establishing guilt). Hellyer Farms went even farther and stated that by virtue of Ontario’s Evidence Act, convictions were admissible—and not just for the limited purpose of attacking credibility.

In Alberta: The Alberta Evidence Act, RSA 1970, c 127, as amended by The Attorney General Statutes Amendment Act, 1976, SA 1976, c 57, s 1(2); in British Columbia: Evidence Act, RSBC 1960, c 134, as amended by Evidence Amendment Act 1977, SBC 1977, c 70, s 2. The modern version of these provisions are found in British Columbia Evidence Act, RSBC 1996, c 124, s 71; Alberta Evidence Act, RSA 2000, c A-18, s 26. There was one notable exception in both statutes: convictions for defamation were treated as conclusive proof of the offence. For an explanation of this differing treatment, see Uniform Law Conference of Canada, supra note 12 at 219.

Tally v Klatt (1979), 17 AR 237, 106 DLR (3d) 33 (Alta CA).

Demeter v British Pacific Life Insurance Co (1983), [1984] 43 OR (2d) 33, 150 DLR (3d) 249 (H Ct J) [Demeter H Ct J cited to OR], aff’d (1984), 48 OR (2d) 266, 13 DLR (4th) 318 (CA) [Demeter CA].
The question as to the admissibility and weight of the prior conviction first came before Justice Osler in the Ontario High Court of Justice. After noting that Hollington had been vigorously criticized throughout the Commonwealth and was subsequently overturned in England, Justice Osler concluded that Hollington had not in fact been imported into Canada. Examining various cases that were commonly cited as importing Hollington into Canada, he stated that their approval of Hollington’s bar on the admissibility of prior convictions was only found in obiter comments. Therefore, Justice Osler felt that he was not bound by their approval of Hollington, and he admitted evidence of Mr. Demeter’s conviction.

Justice Osler went on to rule that Mr. Demeter was attempting to bring a collateral attack on his prior conviction but that he had not revealed any evidence that would cast doubt on its propriety. In these circumstances, he concluded that it would be an abuse of process to allow Mr. Demeter to challenge his conviction: it was conclusive proof of guilt. The Court of Appeal subsequently upheld this decision.

Although Justice Osler’s conclusion that Hollington was never the law of Canada may have been overstating matters, Demeter finally brought certainty to the treatment of prior convictions: they were admissible as prima facie evidence of guilt and could be rebutted unless it would be an abuse of process to do so. While Demeter did not set out a guiding framework for this abuse of process doctrine, the Court of Appeal for Ontario did so the following year, in Del Core v Ontario College of Pharmacists. In Del Core, the defendant pharmacist had previously been convicted of defrauding a pharmaceutical company and was subsequently brought before a professional disciplinary body, at which time he sought to contest this conviction. The court followed Demeter and concluded that evidence of the conviction was properly admitted.

The court went on to discuss the abuse of process doctrine; however, there was no majority opinion in this issue. Justice Finlayson held that relitigating the issue of guilt was an impermissible collateral attack on the conviction. As such, he would have limited the pharmacist to calling “evidence in mitigation or by way of excuse for the offence.” Justice Blair saw the issue differently. He held that it would be an abuse of process to relitigate precisely the same issues that had been decided at trial, as the pharmacist was attempting to do, and that in such cases, rebuttal evidence would be inadmissible. However, Justice Blair emphasized that when a party was not seeking to relitigate the exact issue that was determined in a prior proceeding, he or she should be permitted to challenge the conviction directly or to mitigate its effect by introducing evidence of the circumstances surrounding the conviction. He went on to advocate a flexible approach to abuse of process and the ability to rebut prior convictions:

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17 Specifically, Justice Osler examined both the Supreme Court’s decision in English v Richmond, [1956] SCR 383, 3 DLR (2d) 385 [Richmond], and the Court of Appeal for Ontario’s decision in Charlton, supra note 9—two cases that were often cited as importing Hollington into the law of Canada.
18 Demeter H Ct J, supra note 16 at 50-51.
19 Demeter CA, supra note 16.
20 See e.g. the sources cited supra note 8, all concluding that Hollington was the law of Canada.
21 Del Core v Ontario College of Pharmacists (1985), 51 OR (2d) 1, 19 DLR (4th) 68 (CA) [Del Core cited to OR].
22 Ibid at 9.
23 Ibid at 22.
24 Ibid at 21-22.
The law of Ontario is only now emerging from the long shadow cast over it by the decision in *Hollington v Hewthorn*…. It would be highly undesirable to replace this arbitrary rule by prescribing equally rigid rules to replace it. The law should remain flexible to permit its application to the varying circumstances of particular cases.  

Justice Houlden dissented in the result, but, like Justice Blair, he advocated a flexible approach to abuse of process. He concluded that abuse of process only applied when the convicted party had initiated civil proceedings with the ulterior motive of challenging the outcome of the criminal trial, which was not the case in *Del Core*:

> With respect, I cannot agree with Finlayson J.A. that by insisting in his defence on having the substance of his misconduct retried, the respondent is initiating a collateral attack on a final decision of a criminal court of competent jurisdiction. If that proposition is correct, the *Demeter* case has brought about an astounding amalgamation of criminal and civil law which has here-tofore been unknown in Canadian law.

Thus, both Justice Blair and Justice Houlden narrowly defined the circumstances in which abuse of process applied. They started from the proposition that criminal convictions were admissible as *prima facie* evidence and that the convicted party was permitted to adduce rebuttal evidence. A court would only preclude rebuttal evidence in narrow circumstances amounting to an abuse of process. Therefore, an individual whose prior conviction arose out of questionable circumstances would be able to present this evidence to the civil court, and the conviction would be less likely to serve as the basis for civil liability. In so holding, Justices Blair and Houlden set out a fairness-centred treatment of prior convictions that judges could adapt to the particular facts before them. Following the *Del Core* decision, several cases adopted this approach to the admissibility and weight to be afforded to prior convictions.

*Demeter* and *Del Core*’s confirmation that prior convictions were admissible was an important correction to the rigid rule in *Hollington*. Significantly, the flexible approach to abuse of process outlined in *Del Core* meant that it was unnecessary for the civil courts to consider whether certain types of convictions (namely, convictions based on guilty pleas) were generally less trustworthy. The wide scope for adducing rebuttal evidence meant that, in most cases, convictions could be relitigated. This built-in safeguard meant that civil liability would be less likely to result from an untrustworthy conviction, regardless of any reliability concerns.

While this flexible approach to abuse of process attempted to balance fairness against efficiency and finality, it nonetheless created problems. Because rebuttal evidence was generally admissible, a civil court or tribunal could conclude that individuals were not guilty, notwithstanding that a criminal court found them guilty beyond a reasonable doubt. These contradictory results were blatantly incompatible, and suggested

25 Ibid at 22.
26 Ibid at 19.
27 For other interpretations to this effect, see e.g. *Taylor v Baribeau* (1985), 51 OR (2d) 541 at 545, 548, 21 DLR (4th) 140 (H Ct J) [Baribeau]; *Canada Post Corp v Canadian Union of Postal Workers (Leavere)* (1998), 73 LAC (4th) 129 at 141-44, [1998] CLAD No 406 (QL) [Canada Post]; Tom Archibald, "*Toronto (City) v CUPE, Local 79: The End of Relitigation?*" (2005) 12 CLEJ 403 at 419.
28 See e.g. *Baribeau*, supra note 27 at 545-51; *Canada Post*, supra note 27 at 143-46.
that perhaps a more restrained approach was necessary. Ultimately, these tensions with respect to the definition of abuse of process came to a head in the late 1990s, resulting in the Supreme Court’s reformulation of the doctrine in Toronto (City) v Canadian Union of Public Employees (CUPE) Local 79.

III. THE SUPREME COURT’S DECISION IN CUPE & THE REFORMULATION OF THE ABUSE OF PROCESS DOCTRINE

A. CUPE: The Importance of Finality for the Integrity of the Justice System

The CUPE decision arose out of a trilogy of sexual assault cases between 1997 and 1999 involving Ontario public sector employees. In all three cases, employees were convicted of work-related sexual assault and were subsequently discharged. In each case, the convicted employee subsequently brought a grievance for wrongful dismissal. The issue facing the arbitrator in each case was whether the criminal conviction was conclusive, or whether it was merely prima facie evidence of guilt. The debate focused on section 22.1 of Ontario’s Evidence Act, which had been added to the statute in 1995. This section provides:

22.1 (1) Proof that a person has been convicted or discharged anywhere in Canada of a crime is proof, in the absence of evidence to the contrary, that the crime was committed by the person...

This provision is essentially a codification of the principle outlined in Del Core: it renders convictions admissible, but allows the convicted party to adduce “evidence to the contrary” to rebut it. The problem is that the statute is silent on the circumstances in which the convicted party is permitted to adduce rebuttal evidence. In the sexual assault trilogy that gave rise to the CUPE decision, all three arbitrators refused to accept the prior conviction as conclusive proof and allowed the employees to adduce “evidence to the contrary” under section 22.1. In two of the three cases, the arbitrators held that the grievor had successfully rebutted his conviction. As a result, the arbitrators upheld the grievances for wrongful dismissal.

These decisions put the employers in the awkward position of being forced to rehire convicted sex offenders. Unsurprisingly, the employers brought an application for judicial review to the Divisional Court. The Divisional Court quashed the arbitrators’

29 The three cases were Toronto (City) v Canadian Union of Public Employees (Local 79) (1 December 1998), unreported [CUPE arbitration]; Ontario (Minister of Community and Social Services) v Ontario Public Service Employees Union (White) (25 May 1999), unreported (Ont GSB) [White]; Ontario (Minister of Correctional Services) v Ontario Public Service Employees Union (Samaro) (15 September 1998), unreported (Ont GSB) [Samaro].
30 Ontario Evidence Act, RSO 1990, c E.23, s 22.1, as amended by SO 1995, c 6, s 6 [emphasis added].
31 CUPE, supra note 2 at para 20.
32 CUPE arbitration, supra note 29; White, supra note 29. The third case was Samaro, supra note 29. In Samaro, the arbitrator issued an interim ruling that the conviction was prima facie, not conclusive, proof. This ruling was brought before the Divisional Court on judicial review before a final decision in the arbitration was rendered.
33 Toronto (City) v Canadian Union of Public Employees (Local 79) (2000), 187 DLR (4th) 323, 134 OAC 48 (Div Ct).
decisions, and the Court of Appeal subsequently upheld this result.\textsuperscript{34} Although the two courts had slightly different reasons for reversing the arbitrators’ decisions,\textsuperscript{35} they both concluded that the convictions were final and binding.\textsuperscript{36} Despite the plain wording of section 22.1, they concluded that no “evidence to the contrary” could be adduced.

This issue made its way to the Supreme Court of Canada in 2003, and the Court seized the opportunity to reformulate the abuse of process doctrine. The Court agreed with the widely accepted practice that “evidence to the contrary” could only be adduced if it would not be an abuse of process to do so. On its face, this seemed to affirm the principles in \textit{Del Core} and \textit{Demeter}. However, the point of departure from these previous decisions was the Court’s restrictive approach to abuse of process.

In her majority judgment, Justice Arbour emphasized that abuse of process is primarily concerned with the integrity of the justice system and not with the motives of the parties.\textsuperscript{37} As such, the focus must always be on whether relitigation would harm the integrity of the adjudicative process.\textsuperscript{38} This emphasis on the integrity of the justice system was a response to the problems that arose out of \textit{Del Core}’s flexible approach to abuse of process and, to this end, Justice Arbour indicated that there should be consistent verdicts between criminal and civil courts.\textsuperscript{39} Particularly since criminal convictions are based on proof beyond a reasonable doubt, Justice Arbour stated that it would undermine the repute of the justice system if a civil court could hold that guilt was not even established on the balance of probabilities.

In correcting this inconsistency, Justice Arbour’s judgment focused heavily on the importance of finality. She cautioned that relitigation raises three major concerns for the integrity of the justice system:

First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for the witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the

\textsuperscript{34} \textit{Toronto (City) v Canadian Union of Public Employees (Local 79)} (2001), 55 OR (3d) 541, 205 DLR (4th) 280 (CA) [CUPE CA cited to OR]; \textit{Ontario (Ministry of Community and Social Services) v Ontario Crown Employees Grievance Settlement Board}, [2001] OJ No 3238 (QL) (CA). Note that at the Supreme Court level, the decisions in \textit{Samaroo} and \textit{White} were decided in a companion case to the main CUPE decision: see \textit{Ontario v Ontario Public Service Employees Union (OPSEU)}, 2003 SCC 64, [2003] 3 SCR 149.

\textsuperscript{35} The Divisional Court held that the employee was attempting to bring an impermissible collateral attack on his conviction and that both issue estoppel and abuse of process precluded him from relitigating this issue. In the Court of Appeal, the court concluded that issue estoppel did not apply but that abuse of process precluded relitigation of the conviction: “finality concerns must be given paramountcy over CUPE’s claim to an entitlement to relitigate [the employee’s] culpability.” CUPE CA, supra note 34 at paras 102-108.

\textsuperscript{36} Note that after the Court of Appeal heard this case but before it released its decision, the Ontario government amended the \textit{Public Service Act}, RSO 1990, c P-47. This amendment makes convictions conclusive proof of guilt in grievances before the Public Service Grievance Board, so long as the time for appeal has expired or the appeal has been dismissed. The \textit{Crown Employees Collective Bargaining Act}, SO 1993, c 38 was similarly amended with respect to arbitrations before the Grievance Settlement Board.

\textsuperscript{37} CUPE, supra note 2 at para 43.

\textsuperscript{38} Ibid at paras 45-49.

\textsuperscript{39} Ibid at para 54.
credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.\(^\text{40}\)

Given these problems with relitigation, Justice Arbour emphasized that a litigant should only be permitted to challenge a prior conviction if it would enhance the integrity of the adjudicative process. She went on to outline situations in which relitigation may be permissible: (i) if the first proceeding was tainted by fraud or dishonesty; (ii) if fresh, new evidence, previously unavailable, conclusively impeaches the original result; or (iii) if fairness dictates that the original result should not be binding in the new context.\(^\text{41}\) Although this list is non-exhaustive, it is a significant departure from the permissive, flexible approach to adducing rebuttal evidence set out in Del Core.

Justice Arbour clarified circumstances in which fairness may require that a defendant be allowed to call evidence to rebut his or her conviction:

If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision.\(^\text{42}\)

By articulating narrow exceptions under which relitigation is permissible, Justice Arbour’s judgment marked a significant change to the courts’ approach to abuse of process by reversing the starting point for the analysis. Under the approach articulated by Justices Blair and Houlden in Del Core, courts began from the assumption that relitigation was permissible. Parties who wished to rely on a prior conviction as conclusive proof of guilt had to convince the trier of fact that relitigation would be an abuse of process; otherwise, the convicted party would be permitted to rebut his or her prior conviction. In contrast, the CUPE decision begins from the presumption that relitigation is abusive. Justice Arbour emphasized that “from the system’s point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and effectiveness of the adjudicative process as a whole.”\(^\text{43}\) Therefore, under CUPE, the burden has shifted to the convicted party to prove that relitigation would enhance the administration of justice.\(^\text{44}\) Otherwise, the conviction will be admitted as conclusive proof of guilt. This change has serious implications for convicted parties and renders it much more difficult for them to contest a prior conviction.

\(^{40}\) Ibid at para 51.
\(^{41}\) Ibid at para 52.
\(^{42}\) Ibid at para 53.
\(^{43}\) Ibid at para 52.
\(^{44}\) Bank of Montreal v Woldegabriel, [2007] OJ No 1305 at para 47 (QL), 2007 CarswellOnt 8835 (WL Can) (Ont Sup Ct J); Archibald, supra note 27 at 419.
B. Judicial Interpretations of CUPE: Has the Corrective Gone Too Far?

Owing to CUPE’s directive that challenging a prior conviction is presumptively abusive, relitigation has now become the exception rather than the rule. Since CUPE, the abuse of process doctrine has been applied with “surprising frequency” to preclude the relitigation of prior convictions.\(^{45}\) In most cases, not only are litigants precluded from contesting a prior conviction, but when abuse of process applies, they are also precluded from challenging the facts on which the conviction is based.\(^ {46}\)

Despite CUPE’s strong caution against relitigation, one aspect of the decision seemed to leave room for courts to be slightly more generous in allowing relitigation: Justice Arbour’s statement that “fairness” may require relitigation in certain situations. This open-ended criterion suggested that there might be situations other than those discussed in CUPE in which relitigation is permissible. A few years after CUPE was decided, the Court of Appeal for Ontario considered this very question in Hanna v Ab-\(^{47}\)bott.\(^ {47}\) The court confirmed that the examples given by Justice Arbour were not an exhaustive list of situations in which relitigation might enhance the integrity of the justice system. It went on to conclude that “the doctrine of abuse of process ought to generally be a flexible doctrine whose aim is to protect litigants from abusive, vexatious or frivolous proceedings or otherwise prevent a miscarriage of justice. Its application will depend on the circumstances, facts and context of a given case.”\(^ {48}\) As examples, the court stated that if the issues in the two proceedings are different or if there was unfairness or a lack of effective representation in the prior proceedings, relitigation might be permissible.\(^ {49}\) On its face, this language seemed to confirm that courts still had a fair degree of discretion in deciding what situations fell within Justice Arbour’s “fairness” requirement. However, subsequent decisions have not typically approached abuse of process in a flexible manner.

Despite Hanna’s recognition that there may be justifications for relitigation apart from those explicitly discussed in CUPE, many cases have treated Justice Arbour’s three criteria as exhaustive. In several cases, the courts have held that because the convicted parties did not demonstrate that their case fell within one of the three exceptions set out in CUPE, abuse of process precluded them from adducing evidence to rebut their convictions.\(^ {50}\) This rigid approach to abuse of process is a clear indication that, in the wake of CUPE, finality has supplanted fairness as the most important concern in the minds of the courts.

Nowhere has this emphasis on finality been more evident than in courts’ treatment of convictions based on guilty pleas. Although Justice Arbour’s decision was rendered in the context of a conviction after a trial on the merits, courts and tribunals have since applied her abuse of process analysis to preclude relitigation of convictions based on


\(^ {46}\) Caci v MacArthur, 2008 ONCA 750, 93 OR (3d) 701 [Caci]; McGowan v Toronto (City), 2010 ONCA 362 at para 4, 70 MPLR (4th) 193.

\(^ {47}\) Hanna v Abbott (2006), 82 OR (3d) 215 at para 31, 272 DLR (4th) 621 (Ont CA) [Hanna].

\(^ {48}\) Ibid at para 31.

\(^ {49}\) Ibid at para 32.

\(^ {50}\) See e.g. Caci, supra note 46 at para 16; CEP Atlantic Communications Council v Bell Aliant Regional Communication LP (2010), 203 LAC (4th) 407 at para 3, [2010] CLAD No 419 (QL) (Can Arb Bd); Ontario Public Sector Employees Union v Ontario (Ministry of Community Safety & Correctional Services, 2008 CarswellOnt 6734 at para 91 (WL Can) (Crown Employees GSb) [OPSEU]; Calgary (City) v CPA (2007), 160 LAC (4th) 385 at 399, [2007] AGAA No 19 (QL) (Alta Arb Bd) [CP-A].
guilty pleas. As one administrative body explained, “[t]here is no indication in [CUPE] that the abuse of process doctrine applies only to convictions based on a full trial. The Court noted some exceptions to the applicability of that doctrine, but judicial determinations based on plea bargains was not one of them.”

This development is an unprecedented restriction on the ability of a party to explain or mitigate a prior guilty plea. When convictions were inadmissible under Hollington, a party to a civil action could only be exposed to the inference that he or she was guilty of a crime if evidence of a prior guilty plea was introduced. Crucially, these guilty pleas were always open to rebuttal. Even when Demeter and Del Core rendered convictions admissible, the presumption in favour of relitigation meant that a convicted party was typically able to introduce rebuttal evidence and explain the guilty plea underlying his or her conviction. However, now that CUPE has severely restricted the possibilities for relitigation, individuals who have pleaded guilty are far more likely to find themselves unable to explain the circumstances surrounding their guilty plea and to be found civilly liable as a result.

In CUPE, the Court was faced with a conviction following trial, and therefore did not consider whether convictions based on guilty pleas present unique concerns. However, the modern reality of plea bargaining provides a strong inducement for accused persons to plead guilty. Under Hollington and later, under Demeter and Del Core, there was little need for civil courts to consider whether the dangers of plea bargaining had resulted in an unreliable conviction: the ability to rebut guilty pleas and convictions provided built-in protection against these problems. It was therefore open to the convicted party to show that the inducement of the plea bargain was so strong that the veracity of the conviction was doubtful. Yet now that CUPE has removed this protection, there is reason to question whether it is justifiable to continue to treat convictions based on guilty pleas the same way as convictions following a trial.

IV. COERCIVE JUSTICE: PLEA BARGAINING

Convictions based on guilty pleas raise unique concerns that arise out of the practice of plea bargaining. Plea bargaining is “any agreement by the accused to plead guilty in return for the promise of some benefit.” This “bargain” may take many forms. To name but a few, it may involve a reduction in the charge, a withdrawal of certain charges, a promise not to proceed on certain charges, a promise to recommend a more lenient sentence, a promise to recommend a particular type of sentence (probation, fine, etc.), or a promise about the content of any submissions made to the sentencing judge (e.g. a promise not to mention aggravating facts). Plea bargaining has historically been criticized because it suggests that justice can be bartered; however, it is now an integral

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51 OPSEU, supra note 50 at para 91. On this point, see also CPA, ibid at 399.
part of Canada’s criminal justice system. Its pervasiveness is problematic because it represents an enormous coercive force on accused persons to plead guilty, regardless of their guilt or innocence. It is because of this potential for coercion that civil courts ought to consider whether there should be a wider scope for allowing rebuttal evidence in cases involving convictions based on guilty pleas.

A. Why does Plea Bargaining Occur?

Plea bargaining has existed for many years, and there are several justifications for its existence: it spares victims from testifying in court, it indicates remorse, and it provides quick and certain punishment. Yet these rationales are secondary to the main reason plea bargaining exists: as a practical matter, this practice is necessary for the proper functioning of the criminal justice system.

Criminal trials are lengthy and expensive and, in recent years, the costs have only increased. They require not only judicial resources and court time, but also countless hours of preparation by both the prosecution and the defence. Particularly in major metropolitan areas, a major part of a prosecutor’s job is efficient case management. The only way to handle the large number of cases passing through a prosecutor’s office is to resolve most of them before trial.

In 1990, the Supreme Court’s decision in R v Askov made it clear that prompt disposition of cases is not merely a goal to strive for; it is a constitutional imperative. In Askov, the accused parties applied for a stay of proceedings on the basis that their Charter right to be tried within a reasonable time had been violated. The delay in Askov did not occur because of any impropriety on the part of the Crown; rather, it resulted from insufficient institutional resources to bring the matter to trial sooner. The Court ruled that a lack of institutional resources was no excuse for inordinate delay, and held that the proceedings should be stayed. Based on Askov, a significant number of criminal defendants were subsequently released because of undue delay in bringing their cases to trial.

Askov sent a strong message that criminal cases must be moved through the system more quickly. The elimination of the backlog in the criminal courts hinges on the prosecutors’ ability to convince accused persons to plead guilty: there are simply not enough court resources to increase the number of trials. In this respect, plea bargaining is an invaluable tool in prosecutors’ arsenals because it allows them to present defendants

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55 Ferguson & Roberts, supra note 53 at 500. For the history of plea bargaining in the American context, see George Fisher, Plea Bargaining’s Triumph (Stanford, Stanford University Press, 2003).


57 Critics of plea bargaining dispute this rationale or argue that other changes could be made that would promote the efficient disposition of cases; however, necessity has long been the central justification for plea bargaining in Canada. See e.g. Ferguson & Roberts, supra note 53 at 533; Augustine Brannigan & JC Levy, “The Legal Framework of Plea Bargaining” (1983) 25 Can J Crim 399 at 402.

with significant inducements in exchange for foregoing their constitutional right to a trial. After Askov, this practice became an institutional strategy to relieve the strain on resources that had reached crisis levels. By the turn of the 21st century, only 8.7% of criminal cases in Ontario proceeded to trial—a trial rate that was three times lower than the one recorded less than twenty years earlier. In no small part, this was due to the newfound importance placed on plea bargaining. The pressing need for early case resolution results in strong pressure on defendants to plead guilty and creates a real risk that innocent people will do so.

B. The Dangers of Plea Bargaining

The plea bargaining system is inherently coercive. This coercion exists because of the institutional pressures that necessitate plea bargaining and because of the strong inducements offered to defendants to encourage them to plead guilty. When these forces come together against a defendant awaiting trial, they result in powerful institutional pressure—pressure that some defendants are unable to resist, regardless of their guilt or innocence. If civil courts use these convictions as the basis for liability without allowing the convicted party to explain why he or she decided to plead guilty, there is a risk of injustice occurring.

While there are many inducements that may be present in a plea bargain, the most common is the prospect of a significantly shorter sentence. Although this sentence “discount” varies according to the circumstances, a few Canadian cases have explicitly adopted the English rule that a guilty plea should attract a discount of one-quarter to one-third of the sentence. Importantly, the earlier the plea, the greater the discount typically is. This favourable treatment of early guilty pleas has led many commentators to argue that there is in fact a “trial penalty” (namely, a harsher sentence) that is levied against defendants who are “foolish or stubborn enough” to exercise their constitutional right to a trial and are subsequently found guilty.

These pressures mean that plea bargaining encourages the innocent and guilty alike to plead guilty. Why might innocent parties plead guilty? First, there may be some incriminating evidence that makes them fear that they may nonetheless be convicted at trial. Second, defendants may have a prior criminal record that they fear may undermine an attempt to lead a defence. As the authors of a leading Canadian study on plea bargaining conclude:

By themselves, these factors can pressure an accused into foregoing a trial. But they may become pressures that are impossible to withstand in a plea bargain system, particularly where the bargain offered is large; in short, as the

59 Lafontaine & Rondinelli, supra note 54 at 111.
61 Brannigan & Levy, supra note 57 at 400.
62 Ferguson & Roberts, supra note 53 at 543-44.
65 See e.g. Di Luca, supra note 56 at 38, 56-57; McCoy, supra note 56 at 81.
concession or inducement increases, so also does the risk of causing an innocent person to plead guilty.\textsuperscript{66}

This problem is compounded when one considers the situations in which prosecutors are more likely to offer generous plea bargains. Prosecutors bargain hardest and offer the greatest sentencing discounts when their case is weakest.\textsuperscript{67} As a result, a leading American study on plea bargaining concludes that “the greatest pressures to plead guilty are brought to bear on defendants who may be innocent.”\textsuperscript{68} For this reason, it is problematic if civil courts unquestioningly rely on convictions arising out of plea bargains as conclusive proof of guilt, because these convictions may be less reliable than one might assume.

There are many Canadian examples of innocent defendants who have accepted a plea bargain, only to be proven innocent many years later.\textsuperscript{69} For example, \textit{R v Hanemaayer}\textsuperscript{70} involved a defendant who was charged with breaking and entering and assault. After hearing the Crown’s witnesses on the first day of trial, he entered a guilty plea because he “lost his nerve” when his lawyer informed him that the witnesses were convincing and that he would almost certainly be convicted and sentenced to a minimum of six years in jail.\textsuperscript{71} He pleaded guilty and was sentenced to two years less a day: one-third of the penalty he would likely have received if he had been convicted at trial. Nearly twenty years after he pleaded guilty, it was determined that someone else had committed the crime. \textit{Hanemaayer} shows that even an innocent defendant may plead guilty if a cost-benefit analysis indicates that it is better to take the lighter punishment from pleading guilty instead of risking a conviction and the harsher sentence that will accompany it.

The temptation of receiving a lighter sentence is compounded when a defendant is in pre-trial custody. Studies show that the longer defendants are held in pre-trial custody, the greater the likelihood that they will plead guilty.\textsuperscript{72} A stark illustration of this phenomenon was presented in a \textit{Life} magazine article on plea bargaining in New York City:

One defendant, in jail for ten months, was approached by his lawyer with the suggestion that he enter a guilty plea; he could probably get a one-year sentence which, with credit for time served and good behaviour, would put him right out on the street. If he insisted on trial, on the other hand, he would have to spend a few more months in jail before he could get one, and would

\begin{footnotes}
\item[66] Ferguson & Roberts, \textit{supra} note 53 at 544.
\item[69] See e.g. \textit{R v Hanemaayer}, 2008 ONCA 580, 234 CCC (3d) 3 [\textit{Hanemaayer}]; \textit{R v Sherret-Robinson}, 2009 ONCA 886, 86 WCB (3d) 4. \textit{Sherret-Robinson} did not involve a traditional plea bargain in that the defendant did not actually plead guilty; rather, she agreed not to contest a set of facts if the Crown agreed to reduce the charge against her. Although the defendant pleaded not guilty to the reduced charge, the effect of her agreeing not to contest the statement of facts was akin to pleading guilty: the statement of facts contained an allegation that she strangled her child as well as a summary of a pathologist’s evidence concluding that the child was killed intentionally. By stipulating to this statement of facts, she therefore rendered her conviction inevitable. Several years after her conviction, the Court of Appeal for Ontario concluded that she had been wrongfully convicted.
\item[70] \textit{Hanemaayer}, \textit{supra} note 69.
\item[71] \textit{Ibid} at para 11.
\item[72] Ferguson & Roberts, \textit{supra} note 53 at 528-29.
\end{footnotes}
get a stiff sentence as well if he lost. The poor defendant could hardly believe it: “You mean if I’m guilty I get out, but if I’m innocent I stay in jail?” But that’s the way the system works.\textsuperscript{73}

Although an extreme example, this description shows why innocent defendants may choose to plead guilty. By offering powerful inducements to plead guilty and harsh punishments for refusing to do so, the system of plea bargaining makes it costly to insist on one’s innocence.

The problems resulting from the coercive nature of plea bargaining are compounded by the weakened protections for defendants who plead guilty. True, a guilty plea must be voluntary in the sense that the accused must understand the nature of the charge and the consequences of pleading guilty.\textsuperscript{74} However, the plea bargaining system abandons the more robust safeguards of the trial process, including the presumption of innocence, the Crown’s burden of proving guilt beyond a reasonable doubt, the right to cross-examine witnesses, and the privilege against self-incrimination.\textsuperscript{75} In this way, plea bargaining permits the condemnation of the accused without a full analysis of the facts.

Plea bargaining is central to the functioning of our criminal justice system because of its role in the efficient disposition of cases. However, the pressures involved in obtaining these guilty pleas and the relaxed safeguards surrounding them render these convictions inherently less trustworthy than convictions following trial. While these concerns raise obvious questions about the integrity of our criminal justice system, it must be recognized that they also have implications for our civil courts. By precluding defendants in subsequent civil actions from introducing evidence to explain their prior guilty pleas, our civil courts assume that the convictions resulting from these pleas are more reliable than they really are. In so doing, they may unknowingly be perpetuating the unfairness that can arise out of plea bargains.

\textbf{C. Subsequent Civil Cases Involving Convictions Based on Guilty Pleas}

Just as the plea bargaining system has gained prominence because of a need for efficiency, since \textit{CUPE}, the relitigation of prior convictions has similarly been viewed through the lens of efficiency and finality. This efficiency-centred approach to the relitigation of prior convictions is problematic when the conviction is based on a guilty plea because \textit{CUPE}’s definition of abuse of process provides little opportunity to consider or counterbalance the coercive forces that induce some defendants to accept plea bargains.

Although \textit{CUPE} recognized that fairness might require relitigation in some situations, courts have not acknowledged that convictions arising out of plea bargains ought to fall into this category. In cases in which courts have allowed the relitigation of convictions arising out of guilty pleas, it has been because there are other factors in the case that fall within the criteria set out by Justice Arbour in \textit{CUPE}.\textsuperscript{76} They have failed to

\textsuperscript{73} James Mills, “I Have Nothing to Do with Justice”, \textit{Life} (12 March 1971) at 57, 62, reproduced in Ferguson & Roberts, supra note 53 at 528-29.
\textsuperscript{74} See \textit{Criminal Code}, RSC 1985, c C-46, s 606(1.1).
\textsuperscript{75} Langbein, supra note 67 at 60. See also \textit{R v Adgey}, [1975] 2 SCR 426, 39 DLR (3d) 553.
\textsuperscript{76} For example, the higher stakes in the subsequent civil action were cited as a reason to allow relitigation in \textit{Duncan v Morton}, 2012 ONSC 3105, [2012] OJ No 2319 (QL). Higher stakes, lack of representation on the
recognize that plea bargains may give rise to unfairness in and of themselves, and may therefore merit relitigation in many cases. Granted, permitting relitigation in these cases may raise other concerns, which are explored below in section V. However, as illustrated by post-CUPE cases involving convictions based on plea bargains, a greater unfairness may result if civil courts do not have a mechanism for examining the circumstances surrounding these convictions.

The injustice that may result from courts’ failure to recognize the problems with plea bargaining was illustrated in *Andreadis v Pinto*. *Andreadis* arose out of a traffic accident between the plaintiff and the defendant’s ex-husband. The defendant, Ms. Pinto, was the owner of the vehicle and was charged with permitting a motor vehicle to be operated without insurance contrary to the *Highway Traffic Act*. She ultimately accepted a plea bargain: in exchange for pleading guilty, she received a $1,000 fine instead of the $5,000 fine that the Crown had originally sought. She was subsequently sued for damages arising out of the same motor vehicle accident.

Ms. Pinto argued that she should be allowed to relitigate her conviction because of fairness concerns. Among other arguments, she contended that the civil action had significantly higher stakes because it exposed her to a potential $30,000 judgment. However, the trial judge had little sympathy for this argument. Citing CUPE, he stated that lower stakes in the *Highway Traffic Act* prosecution were only relevant if they meant that Ms. Pinto had not been motivated to produce a “full and robust response.” At the time of the *Highway Traffic Act* charge, Ms. Pinto had indicated that she could not even afford to pay $1,000, let alone $5,000. Therefore, the trial judge concluded that she had been motivated to produce a full and robust response, and that the abuse of process doctrine precluded relitigation.

The analysis in *Andreadis* illustrates the problem with focusing on the stakes in the two proceedings instead of on the problems with plea bargaining itself. Given the financial strains Ms. Pinto was facing, a $1,000 fine likely seemed much less daunting than a $5,000 fine, even if she did not have the money available at the time. Given these facts, it is understandable why Ms. Pinto pleaded guilty: the plea bargain saved her a significant amount of money at a time when she had no money to spare. However, had she known that accepting the plea bargain would expose her to potential liability for $30,000, she might have decided to contest the charges and go to trial.

Ms. Pinto’s case is also troubling because of the way the court dealt with inconsistencies in her evidence. During a motion before the trial judge, Ms. Pinto testified that she had not given her ex-husband permission to use the vehicle at the time of the accident. This assertion was inconsistent with the statement of facts that supported her guilty plea. If the trial judge had been alive to the pressures that induced Ms. Pinto to plead guilty—namely, her strained financial resources and the plea bargain that offered her an 80% reduction in the fine—he may have concluded that this was a potentially innocent defendant who had succumbed to the pressure to plead guilty. Instead, the

Prior provincial offence charges and difficulty understanding English were all cited as fairness concerns that rendered relitigation permissible in *Shah v Becamon*, 2009 ONCA 113, 308 DLR (4th) 80. Neither case recognized the problems inherent in plea bargaining as a reason to allow relitigation.

77 *Andreadis v Pinto* (2009), 98 OR (3d) 701, 80 CPC (6th) 185 (Ont Sup Ct J) [cited to OR].

78 Ibid at para 35.

79 Ibid at paras 26, 37. The trial judge also highlighted other (seemingly unimportant) inconsistencies. (Ibid at para 26).
trial judge concluded that the inconsistencies in her testimony rendered her credibility suspect. While his conclusion was a reasonable one, there was an equally reasonable alternative that he failed to consider: he did not recognize that Ms. Pinto’s contradictory evidence may have been an indication that her conviction was unreliable and that she had been induced to plead guilty by the extremely favourable deal offered by the Crown. By analyzing the evidence from a perspective that privileged efficiency and finality, the trial judge failed to turn his mind to the coercive nature of plea bargaining and to recognize that it may be creating unfairness in the case before him.

_Andreadis v Pinto_ is not an isolated case illustrating the courts’ failure to recognize the problems with plea bargaining. _Calgary (City) v CPA_ also illustrates the potential unfairness that can result when courts focus on efficiency instead of examining the implications of plea bargaining. In _CPA_, a police officer was charged criminally after his service revolver was stolen from his personal vehicle. The officer, Detective Madison, was charged with careless use of a firearm and contravention of firearm storage regulations. These charges exposed him to the prospect of both a criminal conviction and a firearms prohibition, which would have ended his career as a police officer. Ultimately, he accepted a plea bargain: he pleaded guilty to one charge, the other charge was withdrawn, and he was granted an absolute discharge.

The charge to which Detective Madison pleaded guilty only applied to police officers who were off duty. When he subsequently sought indemnification for his legal defence, the City of Calgary refused: his collective agreement only provided indemnification if the legal action was related to an incident that occurred while he was engaged in his duties as a police officer. Detective Madison then brought a grievance against the City and, as part of that proceeding, sought to introduce evidence that would show he was engaged in his duties at the time of the incident. Because this evidence would contradict the basis for his guilty plea, the _CUPE_ abuse of process analysis was applicable to the case.

The arbitration board held that his guilty plea was “no less a judicial determination” than a conviction following trial and that he had failed to bring himself within any of the exceptions outlined in _CUPE_:

> We cannot find that the grievor’s reasons for pleading guilty fall within the exceptions expressed in paragraph 53 of _Toronto [CUPE]_. Indeed the reverse is true for one of the exceptions; rather than being inconsequential, the stakes were too serious to generate a full and robust response; that is, the grievor was not prepared to risk mounting a defence for fear of prejudicing his hope for a discharge.

Ironically, in this statement, the board alluded to the strong inducements offered by the plea bargain but failed to recognize that this “bargain” was coercive. The board confirmed that the benefits of pleading guilty were so strong that the only rational decision was to accept the plea bargain, yet it did not consider the implications of this conclu-

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80 Ibid at para 26.
81 _CPA_, supra note 50.
82 Ibid at 391.
83 Ibid at 388.
84 Ibid at 399.
85 Ibid [emphasis in original].
sion. Accepting the plea bargain was the only way Detective Madison could ensure that he would not lose his job. The veracity of his admission that he was off duty at the time of the incident is questionable when viewed in light of these circumstances.

The board concluded that CUPE clearly precluded relitigation of Detective Madison’s guilty plea if the definition of “engaged in his/her duties” was the same in the criminal offence and his collective agreement. Ultimately, relitigation was permitted because the board concluded that the definition in the indemnity clause was broader than the definition in the criminal offence. The facts underlying his conviction were therefore still consistent with an assertion that, as defined in the collective agreement, he was engaged in the scope of his duties at the time.

Nonetheless, this case illustrates the problem with applying CUPE’s abuse of process analysis to convictions based on guilty pleas. As in CPA, when a criminal defendant’s livelihood is at stake and he is offered a chance to avoid punishment and save his career, it is understandable why he may choose to plead guilty. Yet these inducements call into question whether he is truly guilty and whether the facts supporting the guilty plea are accurate. CPA suggests that, in such cases, it may better serve the truth-seeking function of trials to consider allowing the defendant to introduce rebuttal evidence. Unfortunately, under the current interpretation of CUPE, courts are unlikely to allow defendants to do so.

CUPE made it clear that the abuse of process analysis should always be conducted with the aim of enhancing the integrity of the justice system, yet courts have not paused to consider whether plea bargaining undermines this goal. A few cases have allowed relitigation of convictions involving guilty pleas because of higher stakes in the civil proceeding and, in so doing, have made passing reference to the presence of a plea bargain. Yet none of these cases have recognized that the plea bargain itself is a problem that engages fairness concerns. Both Andreadis and CPA illustrate that the dangers that arise from the coercive nature of plea bargaining are more than theoretical criticisms; they are borne out in reality. In order to enhance the integrity of the justice system, civil courts ought to recognize this danger and attempt to address it through their approach to abuse of process.

V. THE CASE FOR RELITIGATING CONVICTIONS BASED ON PLEA BARGAINS

A. Relitigating Convictions based on Plea Bargains and the Integrity of the Justice System

To be clear, any conviction—including a conviction based on a plea bargain—should be treated as evidence of great weight in subsequent proceedings. However, the differences between convictions based on plea bargains and convictions following trial suggest that courts ought to be more sensitive to the particular concerns raised by plea bargaining and that they should more readily permit relitigation of such convictions.

86 Ibid at 422.
87 Ibid at 422-23.
88 See e.g. the cases discussed above at note 76. See also Wattel v Lacaille, 167 ACWS (3d) 504, [2008] OJ No 1821 (QL) (Ont Sup Ct J).
Convictions based on plea bargains should be seen as a “fairness” concern (to adopt the words of *CUPE*)—one that requires civil judges to examine the surrounding circumstances when a convicted party wishes to introduce rebuttal evidence. As with other fairness concerns that may suggest relitigation is required, this case-by-case analysis permits courts to limit rebuttal evidence to situations in which there is truly a question about the veracity of the conviction. I discuss a potential framework for this examination below. While this inquiry would admittedly be a departure from the restrictive approach to abuse of process in *CUPE*, it is nonetheless consistent with the underlying principles enunciated by Justice Arbour.

Although Justice Arbour emphasized that efficiency and finality are central to the integrity of the justice system, her judgment should not be read as an indication that these values are permitted to compromise the accuracy of the results. Indeed, her statement that fairness may necessitate relitigation is recognition that efficiency should not trump truth-finding. As examples of fairness concerns that indicate the need for relitigation, she cited “an inadequate incentive to defend [the previous proceeding], the discovery of new evidence in appropriate circumstances, or a tainted original process.”

The common thread linking these examples is that they are all situations in which the verdict of the prior court is suspect, either because the process itself was compromised or because the previous court did not hear evidence that may shed a different light on the facts.

These are the same concerns that are raised by plea bargaining. In situations involving plea bargains, there is no independent adjudication of facts by the criminal court. There is not a comprehensive presentation of evidence, and the court never rules on the viability of potential defences to the charges. Moreover, the inducements involved in plea bargaining are so strong that in some cases, they rise to the level of coercion and cast doubt on the reliability of the confession and its underlying facts. Therefore, allowing rebuttal evidence to be adduced when a civil court determines that these dangers are present is in keeping with the principles underlying *CUPE*’s approach to abuse of process. While allowing rebuttal evidence in these cases may raise some concerns, as discussed later in this section, this approach is preferable to the unfairness that has resulted from *CUPE*’s near-total bar on relitigation.

Treating plea bargains as a fairness concern and permitting rebuttal evidence in appropriate cases is also consistent with Justice Arbour’s concerns about relitigation. In *CUPE*, Justice Arbour outlined three ways in which relitigation may undermine the integrity of the justice system: (i) there is no guarantee that relitigation will yield a more accurate result; (ii) if the same result is reached in the subsequent proceeding, it will have been a waste of judicial resources; and (iii) if a different result is reached in the subsequent proceeding, the inconsistent verdicts undermine the credibility of the judicial process. Yet in cases involving convictions based on plea bargains, these concerns are eliminated or significantly mitigated.

First, allowing a convicted party to introduce evidence to rebut a conviction resulting from a plea bargain in appropriate cases would yield a *more accurate* result. Unlike convictions following trial, there has not been a full examination of the evidence when a conviction arises out of a plea bargain. The lack of adjudication of the facts coupled with the pressures involved in plea bargains means that there is a risk of untrustworthy

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89 *CUPE*, supra note 2 at para 53.
90 Ibid at para 51.
convictions. By allowing judges to examine these circumstances and permit rebuttal evidence only in cases in which a plea bargain has led to a questionable result, it allows civil courts to reach more accurate results.

Second, if the same result is reached in the subsequent proceeding, there is not a significant waste of judicial resources. Granted, an inquiry into the circumstances of the plea bargain would introduce inefficiencies into the civil justice system. However, prior to CUPE, virtually all convictions were open to relitigation and the courts were capable of handling this extra burden. Permitting a brief inquiry into the circumstances surrounding convictions only when they arise out of guilty pleas therefore does not create an unprecedented delay in the civil courts; moreover, the number of cases in which relitigation would actually be permitted would be even smaller. Even if this process does not change the outcome, examining the plea bargain and permitting rebuttal evidence in appropriate circumstances provides some assurance that civil liability will not be based on a wrongful conviction—a result that can only enhance the integrity of the justice system.

Finally, any inconsistency between a criminal conviction based on a plea bargain and the decision of a civil court does not undermine the integrity of the justice system. As mentioned, unlike convictions following trial, a conviction based on a plea bargain does not involve a full adjudication of the facts; rather, the criminal defendant has released the Crown from its obligation to prove guilt beyond a reasonable doubt. If a civil court subsequently decides that a party who previously accepted a plea bargain is not guilty or that a fact underlying the conviction is inaccurate, it is therefore not contradicting the finding of a criminal court in the same way as if the prior court had conducted a trial, made findings of fact after hearing a full presentation of the evidence, and found the defendant guilty beyond a reasonable doubt.

B. A Framework for Permitting the Relitigation of Convictions based on Plea Bargains

As discussed above, treating plea bargains as a fairness concern is reconcilable with the CUPE judgment. Given this conclusion, how might a civil court judge determine if a particular plea bargain raises fairness concerns that merit relitigation? To make this determination, the judge ought to inquire into whether the dangers of plea bargaining potentially influenced the result. Factors relating to the nature of the plea bargain itself and to the convicted party’s personal circumstances may help the judge obtain a more accurate picture of why the plea bargain occurred. Factors that may be important to consider in this analysis are:

(i) The immediate effect of the plea bargain on the defendant’s liberty. For example, was the defendant being held in pre-trial custody and was he or she released as a result of a plea bargain? If so, this factor may indicate that there was a strong inducement to plead guilty.

(ii) Personal factors and surrounding circumstances that may create an added inducement for the defendant to plead guilty. For example, a lack of financial resources, as in Andreadis, or a risk to the defendant’s livelihood, as in CPA4, may explain why the defendant pleaded guilty. Similarly, if the defendant is the sole guardian or caretaker for his de-
pendants and accepting the plea bargain allowed him to retain custody and return home, this may have provided a stronger inducement to plead guilty.

(iii) The sentence the Crown originally sought as compared to the sentence offered as part of the plea bargain.

(iv) The charge(s) the defendant was originally facing and the charge(s) to which he or she ultimately pleaded guilty.

(v) If the convicted party seeks to argue that he or she is not guilty, or merely seeks to dispute certain facts underlying the guilty plea.

The judge should examine these factors in order to understand the circumstances surrounding the plea bargain and ascertain whether the resulting conviction is trustworthy. In this respect, factors (i) and (ii) are the most important because they shed light on the particular situation of the accused and are most likely to reveal whether the terms of the plea bargain were so enticing that it verged on coercion. Factors (iii) and (iv) on their own will not suggest whether the plea bargain was coercive, but viewed in the context of the first two factors, they allow the judge in the civil action to determine the strength of the inducement given the accused’s personal circumstances.

The fifth factor reflects the reality that a defendant may admit to a fact that is untrue if it seems unimportant. Generally, an innocent defendant will only plead guilty if there is an overwhelming reason to do so, but the same level of pressure is not necessary to produce untrue factual admissions. Indeed, criminal charges can require admissions of fact that are seemingly unimportant until one is before a civil court. For example, in CP4, Detective Madison was likely unaware of the importance of the off-duty provision in the offence to which he pleaded guilty, but it turned out to be determinative of whether he would obtain indemnification. Courts should more willingly permit convicted parties to contest a fact underlying their convictions simply because, as part of the plea negotiation process, a defendant may make seemingly unimportant factual concessions more readily.

As part of the inquiry into these five factors, the convicted party should be required to indicate the nature of the evidence he or she hopes to introduce to cast doubt on the prior conviction or its underlying facts. If a convicted party does not refer to any evidence casting doubt on the conviction, relitigation should not be permitted. However, if there is evidence to support the convicted party’s contention, the judge should consider this evidence generously and with regard to the potentially coercive nature of plea bargaining. The ultimate decision about whether to allow relitigation must be based on an assessment of all of the circumstances surrounding the plea bargain. If there is a question about the accuracy of the conviction or the underlying facts, rebuttal evidence should be permitted.

C. Potential Concerns about Relitigating Convictions based on Plea Bargains

This case-by-case analysis of the circumstances surrounding a plea bargain prevents unreliable convictions and factual concessions from tainting civil actions. That said, I acknowledge that this approach may raise concerns of its own, in that it slightly shifts the balance among the goals of finality, efficiency, and fairness. As the primary aim of this paper has been to examine how plea bargaining has come to affect our civil justice
system and to propose a potential solution, a detailed discussion of these concerns must be left for another day. That said, a few preliminary thoughts on some of the more obvious objections are in order.

First, it must be emphasized that convictions remain evidence of great weight: litigants should not have an open invitation to relitigation. By permitting relitigation only in cases in which a judge determines that a plea bargain resulted in an untrustworthy conviction, courts can address the fairness concerns that arise out of plea bargains while still preserving the goals of finality and efficiency.

This approach also minimizes the concern that someone who is truly guilty will be able to take advantage of the system in order to escape civil liability, as was the case under Hollington. Rather, he or she must first show that the circumstances surrounding the guilty plea were inherently concerning. There will undoubtedly be situations in which someone who is guilty succeeds in doing so; however, this fact should not be troubling. The guilty are no less entitled to fair treatment in our court system than are the innocent. If anyone—guilty or innocent—has been coerced into a plea bargain and has thereby abandoned the right to a trial, permitting the civil courts to rely on the untrustworthy conviction compounds this unfairness. It can only enhance the reputation of our justice system to permit civil courts to allow relitigation when such circumstances are present.

A potential objection to relaxing CUPE’s bar on rebuttal evidence is that permitting relitigation might induce more people to plead guilty, knowing that they can relitigate their conviction in a subsequent civil trial. However, even if plea bargains are viewed as a fairness concern that permits relitigation, the approach set out above requires the convicted party to clear certain hurdles before the civil court will permit rebuttal evidence. By requiring the judge to examine the circumstances surrounding the guilty plea and assess whether there is credible evidence that calls the result into question, relitigation is not a foregone conclusion. Moreover, even if relitigation is permitted, a conviction and a guilty plea should still be considered important evidence in coming to the final result.

It could also be argued that precluding relitigation in subsequent proceedings would enhance accuracy at the plea bargaining stage. Under this theory, a decision to plead guilty would also take into account potential civil liability; in so doing, it would therefore discourage innocent defendants from pleading guilty. The problem with this line of reasoning is that in many cases, civil actions are not commenced until after the criminal action is complete. It is unreasonable to expect defendants to consider the hypothetical possibility of a civil action when faced with an immediate threat to their liberty. There is no feasible way for them to weigh the benefits and costs of a plea bargain in this situation, and it is unrealistic to assume that they would do so.

Conversely, if a civil action has already been commenced at the time of the plea bargain, this should be one of the “surrounding circumstances” the civil court judge considers when assessing whether relitigation should be permitted. If a criminal defendant pleads guilty knowing that it may create civil liability in an existing proceeding, this is a factor that may suggest relitigation is not warranted (depending, of course, on other relevant surrounding circumstances).

One might also argue that introducing an inquiry into the circumstances of the plea bargain and widening the scope for relitigation creates inefficiencies in the civil courts. While this may be true, our current system of precluding relitigation arguably leads to
greater inefficiency in the court system as a whole. Assuming defence lawyers are correctly advising their clients that they will not likely be able to contest a conviction based on a plea bargain in a subsequent civil case, our current system lessens the incentive to plead guilty. In so doing, our current approach to abuse of process may in fact be encouraging more criminal trials, creating a demand for resources that our criminal courts do not have. Plea bargaining is necessary to our criminal justice system, but sometimes creates unreliable results. A small delay in a subsequent civil proceeding in order to ensure that these convictions are trustworthy is an important counterbalance to this danger, particularly if our criminal justice system is unwilling or unable to address this problem.

A related objection may be that these unreliable convictions could be avoided at the outset by simply requiring criminal courts to conduct a more robust plea inquiry. However, this solution would be unlikely to fix the problem. When a plea bargain is coercive, it is because the personal circumstances of defendants render the plea bargain impossible to resist, regardless of their guilt or innocence. If the inquiry included an examination of these inducements, defendants would likely downplay these incentives in order to convince the judge that the plea was voluntary and to obtain the benefit of the deal. As a result, a more detailed inquiry by the criminal courts into the inducements offered by a plea bargain would not likely correct the problem.

While permitting rebuttal evidence when a judge determines that a plea bargain is untrustworthy widens the scope for relitigation, it does so in a limited sense. This approach recognizes that plea bargaining raises fairness concerns similar to those discussed in CUPE. Although relitigation should not be permitted in all cases involving plea bargains, permitting judges to inquire into the surrounding circumstances allows civil courts to strike a balance between fairness and efficiency that cannot be achieved if CUPE’s strict approach to abuse of process continues to apply to convictions arising out of guilty pleas.

VI. CONCLUSION

Plea bargaining is central to our criminal justice system and, as such, this practice is unlikely to disappear. Despite its importance in promoting efficiency, the inducements it offers can be so great that it may result in inaccurate factual admissions or, worse, false admissions of guilt. CUPE’s unprecedented restriction on relitigating prior convictions means that, for the first time, individuals whose convictions arose in doubtful circumstances may find themselves unable to question the propriety of their guilty plea in a subsequent civil action.

Relaxing CUPE’s bar against rebuttal evidence in cases involving plea bargains is consistent with the situations Justice Arbour identified in which fairness may necessitate relitigation. Courts have not yet recognized that plea bargains on their own may create unfairness, perhaps because, historically, the presumption in favour of admitting rebuttal evidence rendered such a consideration unnecessary. Yet now that rebuttal evidence is generally precluded, it is time for our civil courts to recognize that convictions involving a plea bargain are not the same as convictions following trial. Convictions based on
plea bargains raise unique concerns that ought to be considered before civil courts rely
on them to decide the outcome of a subsequent civil case.

Recognizing the potential issues with plea bargaining and permitting rebuttal evidence in appropriate cases is an important safeguard in order to ensure that an unreliable conviction does not taint the civil justice system. While this approach mitigates the problem that these unreliable convictions pose in the civil justice system, it may also have important implications for our criminal justice system. If civil courts’ inquiries into these convictions indicate that many of them are unreliable, it may indicate that criminal defendants are paying too high a price for the efficient functioning of our criminal courts. Unless and until our criminal courts reform their approach to plea bargaining, a relaxation of CUPE’s bar on rebuttal evidence is an important—if marginal—corrective measure to prevent this unfairness from spilling over into our civil courts.