S.C.C. File No. 37367

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

WING WHA WONG

APPELLANT
(Appellant)

- and -

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

APPELLANT'S FACTUM

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

Peter Edelmann, Erica Olmstead
Edelmann & Company Law Corporation
905 – 207 West Hastings Street
Vancouver, BC V6B 1H7

Phone: 604-646-4684
Fax: 604-648-8043
Email: office@edelmann.ca

Counsel for the Appellant

Michael Sobkin
331 Somerset St. W.
Ottawa, Ontario K2P 0J8

Phone: 613-282-1712
Fax: 613-288-2896
Email: msobkin@sympatico.ca

Ottawa Agent for the Appellant

John Walker
Public Prosecution Service of Canada
900 – 840 Howe St.
Vancouver, BC V6Z 2S9

Telephone: 604-666-0704
Fax: 604-666-1599
Email: john.walker@ppsc.gc.ca

Counsel for the Respondent

Per: François Lacasse
George Dolhai
Acting Director of Public Prosecutions
160 Elgin Street, 12th Floor
Ottawa ON, K1A 0H8

Phone: 613-957-4770
Fax: 613- 941-7865
Email: flacasse@ppsc-sppc.gc.ca
Ottawa Agent for the Respondent

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This is an appeal of the decision of the British Columbia Court of Appeal dismissing the appeal of the Appellant's conviction for trafficking in a controlled substance. The Appellant, with the assistance of previous counsel, entered a plea of guilty to one count of trafficking in cocaine and was sentenced to 9 months' incarceration. He did not learn until afterwards that because he was a permanent resident of Canada, the plea rendered him inadmissible under s.36(1)(a) of the *Immigration and Refugee Protection Act* and he therefore faces deportation. As a result of the sentence he will have no right of appeal to seek equitable relief at the Immigration Appeal Division of the Immigration and Refugee Board. He therefore sought to have his guilty plea struck on the basis that he had not been fully informed of its consequences.

2. The decision to enter a plea of guilty when facing criminal charges is among the most significant and life-altering choices an accused person may ever be called upon to make. A plea of guilty constitutes a waiver of several of the most fundamental rights set out in the *Canadian Charter of Rights and Freedoms* ("*Charter"*), invariably subjecting the accused to a number of serious consequences both within and outside the criminal law. Our courts have been unequivocal about the requirements for a valid plea. To constitute a valid guilty plea, the plea must be voluntary and unequivocal. The plea must also be informed, that is the accused must be aware of the nature of the allegations made against him, the effect of his plea, and the consequence of his plea. Because courts largely defer to counsel, the responsibility of ensuring that pleas entered with their assistance are voluntary, unequivocal, informed, and thus constitutionally valid often relies on the involvement of counsel competent to properly inform their clients of relevant consequences.

3. While there is a broad consensus that a plea must be informed, there is some divergence on the approach to be taken to define the scope of knowledge required, and on the framework to be applied in deciding whether to strike a plea when an accused has entered a plea without being informed of relevant consequences. Since this Court's decision in *R. v. Pham*, 2013 SCC 15, it is clear that collateral consequences such as loss of permanent residence and

deportation are relevant factors in the criminal sentencing process. It is common ground that the Appellant was not informed of the immigration consequences of his plea and in order for his plea to have been informed, he ought to have been informed of these consequences.

4. The more substantial disagreement among the appellate courts is about the framework to be applied in deciding whether an uninformed plea constitutes a miscarriage of justice. The crux of the divergence is assessing the prejudice to the accused of entering an uninformed plea. The most coherent approach to this question is the one taken by the Ontario Court of Appeal in *R. v. Quick*, 2016 ONCA, which recognizes that an uninformed plea is inherently prejudicial because the accused has given up a number of rights in waiving his right to a trial. This approach remains doctrinally coherent in the face of both the traditional context of the guilty plea and the contemporary reality in which the vast majority of criminal cases resolve through plea resolutions.

5. The alternate approaches place an onus on the accused to prove that he subjectively would have entered a different plea had he been informed of the relevant consequences, or even that he articulate a viable path to acquittal. These approaches are more difficult to reconcile with a principled approach to guilty pleas, in particular in the context of the range of *Charter* rights that are engaged in the decision to waive the right to trial. While demonstrating that one would have entered a different plea if informed or that one actually does have a viable path to acquittal are both good illustrations of the types of prejudice inherent in giving up one's rights in an uninformed way, neither should be a prerequisite in every case. An accused has a fundamental right to enter a plea of not guilty and require the state to prove its case beyond a reasonable doubt, without the need to explain his decision or demonstrate a viable path to acquittal. It is difficult to understand why such requirements would be imposed when an accused has given up his rights without being properly informed of the consequences of doing so.

6. Even if this Court were to accept the proposition that an uninformed plea is not inherently prejudicial, there are compelling grounds to conclude that the Appellant would have entered a different plea had he been made aware of the immigration consequences. The Appellant's actions after becoming aware of the immigration consequences speak very strongly to such

an inference. The Appellant deposed that he became aware of the immigration consequences after he had completed a substantial portion of his jail sentence. He sought to withdraw his guilty plea after completing his sentence, placing the immigration consequences front and center in terms of both the reasons for seeking an extension of time to appeal, and of the allegations of incompetence of counsel in not informing him of the risk that he would lose his permanent residence and face removal from a country he and his family have called home for over 25 years.

B. Statements of Facts

7. The Appellant, Wing Wha WONG, is a 52-year-old citizen of China who came to Canada in 1990. He continues to be a permanent resident of Canada. His wife, Yuan Qing Chen, and Canadian child, Ann Wong, reside with him in Kamloops, British Columbia.[1]

8. On April 3, 2012, the Appellant was charged with one count of trafficking in cocaine under s.5(1) of the *Controlled Drugs and Substances Act*, arising from an incident in Kelowna on February 29, 2012. An undercover officer, acting on a tip from a confidential informant, called him and asked to purchase "powder". They later met and he allegedly sold her two flaps of cocaine for $60.00.[2]

9. On January 6, 2014, the Appellant entered a plea of guilty with the assistance of former counsel.[3]

10. The Appellant was not informed of the immigration consequences of his plea. This was confirmed by former counsel who deposed that he did not advise the Appellant of the consequences of a guilty plea as they pertained to his immigration status.[4]

11. On February 21, 2014, the Appellant was sentenced to 9 months jail before Hogan J. of the Provincial Court of British Columbia. Although the Appellant's status as a permanent

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[1] Appellant's Record ("AR"), Tab 11 - Transcript, pp. 58-59.
[2] AR, Tab 11 - Transcript, p. 54.
[3] AR, Tab 3- Reasons for Sentence, p. 5.
[4] AR, Tab 13 - Affidavit of M. Kennedy, paras. 55-56, p.78.

resident was mentioned in submissions, there were no submissions made on the immigration consequences of the plea or sentence and no inquiry on the issue by the sentencing judge. [5]

12. The Appellant learned about a potential immigration consequence arising from his plea when he was in jail and the Canadian Border Services Agency ("CBSA") spoke to him. [6] On January 8, 2015, the Appellant then promptly filed an appeal of his conviction in the British Columbia Court of Appeal with an application for an extension of time.

13. In a letter dated April 13, 2015, the Appellant was given notice to appear at an admissibility hearing where a deportation order would be sought under s. 36(1)(a) of *IRPA*.[7] This hearing was adjourned pending the Appellant's conviction appeal.

1) Immigration Consequences

14. The effect of deportation can be devastating for individuals and their families. In this case, the deportation of the Appellant would result in separation from his wife and Canadian child, or the dislocation of the entire family from their established lives and communities, and the loss of the Appellant's employment.

15. The importance of permanent residence status is crucial to understanding the significant consequences of the plea entered by the Appellant. While not quite as secure as citizenship, permanent residence is a status that attracts much greater stability, longevity and associated rights than that of a foreign national. Permanent residence is not simply temporary residence that does not expire, it is a fundamentally different form of status. The status of permanent residence brings with it a number of important legal rights, including the right to enter and remain in Canada, and essentially the same rights as a citizen to work in Canada, and to receive social benefits, including health care, employment insurance and old age security pension.[8]

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[5] AR, Tab 11 - Transcript, p. 59.

[6] AR, Tab 12 - Affidavit of Appellant, para. 15, p. 69.

[7] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 36(1) ["*IRPA*"]; AR, Tab 10 - Notice to Appeal for Admissibility Hearing, p.172.

[8] *Toussaint v. Canada (Citizenship and Immigration)*, 2011 FCA 146 at para 5.

16. Permanent residence grants constitutional rights under s. 6(2) of the *Charter* to move and gain a livelihood anywhere in Canada:

> (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
> (*a*) to move to and take up residence in any province; and
> (*b*) to pursue the gaining of a livelihood in any province. [9]

The Appellant faces the loss of his rights under s. 6(2) upon loss of his status as a permanent resident.

17. Numerous other statutes confer greater protection to permanent residence as a status than that of a temporary resident. In the *Criminal Code*, the definition of "Canadian" includes citizens and permanent residents:

> "Canadian" means a Canadian citizen, a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act* or a body corporate incorporated and continued under the laws of Canada or a province.[10]

The same definition is found at s. 273.61 of the *National Defence Act*.[11]

18. Further examples of the preferred status of permanent residents are included in the definitions in s. 79 of the *Copyright Act*,[12] s. 21(2.1) of the *Old Age Security Regulations*,[13] s. 2 of the *Foreign Ownership of Land Regulations*[14] and s. 152.02(1) of the *Employment Insurance Act*,[15] all of which provide rights to permanent residents alongside Canadian citizens.

19. Under the *IRPA*, there are a number of protections afforded to permanent residents that do not apply to temporary residents. This includes higher thresholds for inadmissibility and

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[9] *Canadian Charter of Rights and Freedoms*, s. 6, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 ["*Charter*"].

[10] *Criminal Code of Canada*, R.S.C., 1985, c. C-46, s.83.01.

[11] *National Defence Act*, R.S.C., 1985, c. N-5, s. 273.61.

[12] *Copyright Act.* R.S.C., 1985, c. C-42, s. 79.

[13] *Old Age Security Regulations*, C.R.C., c. 1246, s. 21(2.1).

[14] *Foreign Ownership of Land Regulations*, SOR/79-416, s. 2.

[15] *Employment Insurance Act*, S.C. 1996, c. 23, s. 152.02(1).

detention, greater rights to appeal removal orders, the ability to sponsor family members and act as a guarantor, and the right to benefits and protections under international agreements in the Canadian labour market.[16] These are all further indications of the importance of permanent resident status.

20. A permanent resident or foreign national becomes inadmissible under s. 36(1)(a) of *IRPA* for "serious criminality" for:

> (a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

21. In the Appellant's case, an offence under s. 5(1) of the *Controlled Drugs and Substances Act* with respect to a substance listed in Schedule 1 was punishable by a maximum term of imprisonment for life under s. 5(3) of that Act. A discharge under s.730 of the *Criminal Code* is not available for offences punishable by imprisonment for life, so a conviction was the inevitable result of entering a guilty plea in the circumstances, thus rendering the Appellant inadmissible and placing him at risk of deportation.

22. Since June 2013, a sentence of at least six months like that imposed on the Appellant renders a permanent resident ineligible to seek relief from deportation at the Immigration Appeal Division. The Immigration Appeal Division has the power to stay or quash a removal order on humanitarian and compassionate grounds, which is generally the only recourse allowing a permanent resident found inadmissible under s. 36(1)(a) to avoid loss of status.

23. In exercising its equitable jurisdiction to stay removal orders on humanitarian and compassionate grounds, the Board will be guided by the following factors from *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4, endorsed by this Court in *Chieu v. Canada (Minister of Citizenship and Immigration)*:[17]

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[16] *IRPA*, *supra* note 7, ss. 36(2), 55(3.1), 56(2), 63(3); *Immigration and Refugee Protection Regulations* (SOR/2002-227), s. 203.

[17] *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 84.

- seriousness of the offence or offences leading to the deportation
- possibility of rehabilitation
- length of time spent in Canada and the degree to which the appellant is established
- family in Canada and the dislocation to that family that deportation of the appellant would cause
- support available for the appellant not only within the family but also within the community
- degree of hardship that would be caused to the appellant by his return to his country of nationality

24. The passage of the *Faster Removal of Foreign Criminals Act* in 2013 fundamentally changed access to the Immigration Appeal Division for criminality appeals. The threshold for the loss of appeal rights for persons with in-Canada convictions was lowered from 2 years of imprisonment to 6 months imprisonment.[18]

25. As a result of his conviction and sentence in the case at bar, the Appellant was rendered inadmissible under s. 36(1)(a) of *IRPA*, and as a result of the 9 month sentence he received, he does not have a right of appeal to the Immigration Appeal Division under s. 64(2) of *IRPA*. He has been referred for removal proceedings and faces nearly automatic loss of his permanent resident status and issuance of a deportation order against him.[19]

2) British Columbia Court of Appeal Decision

26. On October 26, 2016, the British Columbia Court of Appeal dismissed the Appellant's conviction appeal. Each member of the panel wrote separate reasons concurring in the result but diverging on the nature of the legal test to be applied for striking a guilty plea.[20]

27. Accepting that the Appellant had not been informed of the significant immigration

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[18] Bill C-43, *An Act to amend the Immigration and Refugee Protection Act*, 1st Sess., 41st Parl., 2013 (as introduced by the House of Commons 20 June, 2012 and assented to on 19 June, 2013).

[19] AR, Tab 14 - Affidavit of Christine Kyle, pp. 171-173.

[20] *R. v. Wong*, 2016 BCCA 416 ["*Wong* BCCA"]; AR, Tab 7 at p. 17.

consequences of his guilty plea, Saunders J.A. set out two additional requirements for striking a plea which she found had not been met:

> First, Mr. Wong has not established that the lack of information in respect to the immigration consequences of conviction would have made a difference to his decision to plead guilty. [...]
>
> Second, Mr. Wong has not advanced an articulable route to a conclusion different from a guilty verdict. [...] Mr. Wong needs to avoid conviction altogether to avoid the consequences of s. 36 of the *Immigration and Refugee Protection Act*. He has not articulated any basis to avoid conviction or to consider he has any prospect of success in respect to the verdict.[21]

28. In concurring reasons, Fitch J.A. framed the issues in the following terms:

> 1. Did Mr. Wong understand the immigration consequences of his guilty plea when it was entered?
>
> 2. If the answer to the first question is "No", did Mr. Wong have to understand those immigration consequences for his guilty plea to be informed?
>
> 3. If the answer to the second question is "Yes", is the conviction entered following the guilty plea the product of a miscarriage of justice? [22]

29. Justice Fitch accepted that the Appellant did not understand the immigration consequences of the plea, and that the plea was therefore not informed:

> [66] I am satisfied that for Mr. Wong's plea of guilty to be informed, he had to understand the immediate immigration consequence to him – criminal inadmissibility under s. 36(1)(a) of the Act. In my view, Mr. Wong has met his onus of showing on a balance of probabilities that his plea of guilty was not informed with respect to a legally relevant consequence.

30. On the third question, however, Fitch J.A. found that an uninformed plea is not presumptively a miscarriage of justice but that the appellant "bears the onus of demonstrating that the plea would not have been entered had the legally relevant consequences of doing so been known."[23] He concluded that the Appellant had not met that burden and therefore

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[21] *Ibid*. at paras. 42-43.

[22] *Ibid*. at para. 55.

[23] *Ibid.* at para. 64.

dismissed the appeal.[24]

31. The separate concurring reasons of Harris J.A. come to a similar conclusion that the Appellant had "not established that he would not have pleaded guilty if he had been properly informed of the immigration consequences of his plea."[25]

32. Both Fitch J.A. and Harris J.A. went on to express concerns about the requirement set out by Saunders J.A. that an appellant articulate a defence or route to acquittal as a prerequisite for withdrawal of a plea. Harris J.A. summarized the issue as follows:

> [82] I agree that the jurisprudence in this court appears to have embedded, as a prerequisite of withdrawing a guilty plea on the ground that otherwise would result in a miscarriage of justice, the need to demonstrate something akin to "an articulable route to an acquittal" or a valid defence. Accordingly, I consider myself bound by authority in respect of that issue. Nonetheless, I share the concerns of principle regarding such a requirement articulated by Mr. Justice Fitch.

33. Justice Fitch engaged in a somewhat more detailed discussion of the jurisprudence on this issue, ultimately coming to the conclusion that because the case was being disposed of on other grounds the matter did not need to be decided in this case.[26]

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[24] *Ibid.* at paras. 68-70.

[25] *Ibid.* at para. 80.

[26] *Ibid*. at paras. 71-78.

PART II – QUESTION IN ISSUE

1) What is the framework to be applied by an appellate court in deciding whether to strike a guilty plea by an individual who was not informed of significant collateral consequences of their plea?

PART III – STATEMENT OF ARGUMENT

A. Introduction

34. The guilty plea plays a fundamental role in the contemporary criminal justice system in Canada. There is a clear consensus that a guilty plea must be voluntary, unequivocal and informed given the importance of the constitutional rights being waived by an accused person entering a guilty plea. The following sections will begin by exploring some of the doctrinal underpinnings of the guilty plea and some of the practical considerations, including in particular the role of courts and competent counsel. The second segment of the argument will focus more specifically on the informed nature of the plea, and in particular on the framework for courts to assess the relevant scope of consequences about which an accused must be informed. The final portion of the argument will address the test to be applied in assessing the prejudice of an uninformed plea.

B. Guilty Pleas

1) Theoretical framework

35. The decision to enter a plea of guilty when facing criminal charges is among the most significant and life-altering choices an accused person may ever be called upon to make. Laskin J. discussed the nature of guilty pleas in *Adgey v. R.* in the following terms:

> A plea of guilty carries an admission that the accused so pleading has committed the crime charged and a consent to a conviction being entered without any trial. The accused by such a plea relieves the Crown of the burden to prove guilt beyond a reasonable doubt, abandons his non-compellability as a witness and his right to remain silent and surrenders his right to offer full answer and defence to a charge. It is important, therefore, that the plea be made voluntarily and upon a full

> understanding of the nature of the charge and its consequences and that it be unequivocal.[27]

36. Although there is a consensus among researchers that a substantial majority of convictions in Canada result from guilty pleas,[28] there has been limited engagement with both the practical realities of guilty pleas and the theoretical underpinnings of the practice. As was pointed out by Joseph DiLuca in his 2005 Criminal Law Quarterly journal article:

> In the years that have followed the [Martin Committee] Report, plea bargaining has become a recognized staple of the criminal justice system with approximately 80% of cases in the Ontario Court of Justice being resolved by way of a guilty plea. We now operate in a system of guilty plea justice. Notwithstanding this fact, there is a paucity of Canadian research on the issue.[29]

37. In her detailed monograph on the guilty plea in the Canadian criminal justice system,[30] Professor Oonagh Fitzgerald attempted to provide some theoretical foundations upon which to structure an understanding of the role of guilty pleas in the common law criminal system. Her study begins with a history of both the common law and civil law systems of criminal justice leading up to the current era where guilty pleas have become the *de facto* mechanism for resolving most criminal cases. Fitzgerald outlines the function of the guilty plea in the following terms:

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[27] *Adgey v. R.*, [1975] 2 SCR 426 at p. 440.

[28] Oonagh E. Fitzgerald, *The Guilty Plea and Summary Justice: A Guide for Practitioners* (Toronto: Carswell, 1990) at p.1 ["Fitzgerald, 1990"] (Professor Fitzgerald estimates that between 70-95% of cases are resolved by way of guilty pleas); See also: Joseph DiLuca, "Expedient McJustice or Principled Alternative Dispute Resolution? A Review of Plea Bargaining in Canada", (2005) 50 Crim L.Q. at p 15 ("The Committee [*Report of the Criminal Justice Review Committee* (February 1999), Co-chairs Justice Hugh Locke, Senior Judge John D. Evans, and Murray Segal, Assistant Deputy Attorney General, Criminal Law Division, Ontario Ministry of the Attorney General] referred to statistics reported from the Ministry of the Attorney General that suggest that 88% of cases were resolved by pleas of guilty.")

[29] Joseph DiLuca, "Expedient McJustice or Principled Alternative Dispute Resolution? A Review of Plea Bargaining in Canada", (2005) 50 Crim L.Q. at p 15.

[30] Fitzgerald, 1990, *supra* note 28.

> The trend towards a summary process dependent on guilty pleas has quietly shifted the entire focus of criminal procedure from its traditional foundation in trial process. An accused who, upon arraignment, chooses to plead guilty thereby waives the traditional protections of the criminal trial: the rights to a jury trial, to the presumption of innocence, to confront one's accusers, to present witnesses in defence and to remain silent. At the same time, the guilty plea serves as an admission of all the essential elements of the offence, thereby relieving the Crown of the burden of proving guilt beyond a reasonable doubt. Although the criminal trial process is still regarded as the ideal, the day-to-day functioning of the present criminal justice system, with its heavy dependence on guilty pleas, has become an overwhelmingly pragmatic affair, lacking in ideological foundation.[31]

38. In seeking to develop a more coherent framework for understanding the nature of the guilty plea, Professor Fitzgerald makes a fundamental distinction between the evidentiary and procedural aspects of the plea, succinctly summarized as follows:

> In the preceding discussion of the notion of the acceptability of the guilty plea, it appeared that, in focusing on the accused's understanding of the effects of the guilty plea and on the voluntariness of the plea, the courts were treating it mainly as a procedural device resulting in the waiver of the accused's trial rights. Only when the courts turned their attention to the existence of a factual basis for the plea, did the courts consider the evidentiary role of the guilty plea, whereby it substituted for proof beyond a reasonable doubt. The juridical nature of the guilty plea cannot be fully understood without recognizing its dual nature as a procedural and evidentiary device.[32]

39. The importance of the dual aspect of the guilty plea will become apparent in the following sections, although the evidentiary aspect of the guilty plea is not directly at issue in the present appeal. It does, however, assist in bringing coherence to the jurisprudence in this area because much of the engagement by this and other courts with guilty pleas has been in relation to the evidentiary aspect. As will be seen below, the jurisprudence dealing with the evidentiary aspect of the plea has led to incoherence and unfairness when imported into reasoning about the procedural aspects of guilty pleas.

40. In the most explicit engagement with the evidentiary aspect of guilty pleas, this Court has been clear that a criminal court in Canada ought not to accept a guilty plea where it is evident

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[31] *Ibid* at p. 1.

[32] Fitzgerald, 1990, *supra* note 28 at p. 103.

that the accused does not admit to facts supporting a conviction in relation to the offence in question.[33] This can be contrasted with the situation in the United States, where the Supreme Court in *North Carolina v. Alford* (1970), 400 U.S. 25 (U.S.S.C.) endorsed the practice of allowing a plea of guilty to be entered without the accused admitting to underlying facts on each element of the offence.

41. The procedural aspect of the guilty plea is at the center of the present appeal.

42. The Martin Committee Report, commissioned in 1991 by the Attorney General of Ontario to study charge screening, disclosure, and resolution or plea discussions, frames the guilty plea in the context of the waiver of fundamental constitutional rights:

> Every accused person has the constitutional rights to be presumed innocent, and to have a fair and public trial. But, like many such rights, they may be waived by an accused person by pleading guilty. The right of waiver is subject to the power of the court to control the integrity of its process, and the waiver itself must, of course, be clear and unequivocal, with full knowledge of the rights a trial will protect, and full knowledge of the effect of such a waiver: *Korponey v. A.G. Canada* (1982), 65 C.C.C. (2d) 65 at 73-74 (S.C.C.). It is the duty of defence counsel to ensure that a client contemplating such waiver is aware of the consequences.[34]

43. Professor Fitzgerald outlined a number of the specific rights which were constitutionalized with the advent of the *Charter*, and went on to comment on the importance of reconsidering the guilty plea in the context of the waiver of *Charter* rights:

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[33] *Brosseau v. The Queen*, [1969] SCR 181 p. 188-90; *Adgey v. R.*, [1975] 2 SCR 426 at p. 444.

[34] G. Arthur Martin, "Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions", (Toronto: Queen's Printer, 1993) at p. 284 ["The Martin Committee Report"]; *R. v. Anthony-Cook*, [2016] 2 S.C.R. 204 ("The Committee was commissioned in 1991 by the Hon. Howard Hampton, Attorney General of Ontario, to study the early stages of the criminal process, namely, charge screening, disclosure, and resolution or plea discussions. The Committee comprised leading members of the criminal bar, including both Crown and defence counsel, senior police officers, and other members of the community. Notably, it was chaired by the Hon. G. Arthur Martin, one of the foremost criminal law jurists in this country's history" at note 2).

> Despite the apparent relevance of these *Charter* provisions to the guilty plea process, no case to date has considered how these constitutional rights may impact upon the legitimacy of the guilty plea process. Nor have the courts considered whether the notion of "conviction by consent" can withstand constitutional scrutiny or whether a more stringent test of waiver is required with respect to constitutional rights than has hitherto been applied to the waiver of pre-*Charter* procedural rights.[35]

44. There is little disagreement among appellate courts about the fundamental requirements for the validity of a guilty plea. In a passage cited with approval by this Court in *R. v. Taillefer*, 2003 SCC 70, Doherty J.A. succinctly summarized the basic principles from *R. v. R.T.* (1992), 10 O.R. (3d) 514 (C.A.):

> To constitute a valid guilty plea, the plea must be voluntary and unequivocal. The plea must also be informed, that is the accused must be aware of the nature of the allegations made against him, the effect of his plea, and the consequence of his plea [...] [36]

45. The case at bar deals with one procedural aspect of the guilty plea: the scope of understanding of the consequences of a plea required for a plea to be properly informed and thus valid.

2) Plea Resolutions

46. The context of the guilty plea in Canada cannot be understood without engaging with the realities of the plea resolution process. The practice of engaging in plea resolutions has elicited some controversy in Canadian legal literature over the past half century.[37] While there may not be a consensus on the scope within which plea resolutions are desirable, there is substantial authority endorsing the practice. The Martin Committee Report made the following comments in 1993:

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[35] G. Arthur Martin, *ibid*. at pp.172-173.

[36] *R. v. Taillefer*, 2003 SCC 70 at para. 85.

[37] See: Milica Potrebic Piccinato, “Plea Bargaining: Criticisms of the practice”, Canada’s System of Justice, Department of Justice Reports and Publications, 3 July 2016; Law Reform Commission of Canada, *Plea Discussions and Agreements* (Working Paper 60), Ottawa, 1989, p. 5-6; Ken Chasse, “Plea Bargaining is Sentencing” (2009) 14 Can. Crim. L. Rev. 55; Ken Chasse, “The Triumph of Plea Bargaining” (2011) 85 CR-ART 29; Arthur D. Klein, “Plea Bargaining” (1971-1972) 14 Crim. L.Q. 289.

> In addition to being generally in favour of properly conducted resolution discussions, the Committee takes a broad view of what that term entails. Resolution discussions, as contemplated by the Committee, include much more than simply plea discussions, which may themselves be quite broad. Resolution discussions include any discussions between counsel aimed at resolving any issues that a criminal prosecution raises.[38]

47. This Court explicitly endorsed the fundamental role of plea agreements in the criminal justice system in *R. v. Nixon*, [2011] 2 SCR 566 in the context of assessing the propriety of Crown counsel withdrawing from such an agreement:

> However, the vital importance of upholding such agreements means that, in those instances where there is disagreement, the Crown may simply have to live with the initial decision that has been made. To hold otherwise would mean that defence lawyers would no longer have confidence in the finality of negotiated agreements reached with front-line Crown counsel, with whom they work on a daily basis. Further, if agreements arrived at over the course of resolution discussions cannot be relied upon by the accused, the benefits that resolutions produce for both the accused and the administration of justice cannot be achieved.[39]

48. More recently, this Court discussed plea resolutions in the context of joint submissions in *R. v. Anthony-Cook,* [2016] 2 S.C.R. 204, citing the Martin Committee Report with approval:

> Guilty pleas in exchange for joint submissions on sentence are a "proper and necessary part of the administration of criminal justice" (Martin Committee Report, at p. 290). When plea resolutions are "properly conducted [they] benefit not only the accused, but also victims, witnesses, counsel, and the administration of justice generally" (*ibid.*, at p. 281 (emphasis deleted)).[40]

49. There has otherwise been limited engagement by this Court with the process and mechanisms through which plea resolutions are undertaken. Given the substantial deference to be afforded by sentencing judges to joint submissions resulting from plea resolutions, there is significant interest in ensuring that the accused are aware of the consequences of waiving their constitutionally protected rights.[41] This includes ensuring that an accused is aware that one of

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[38] Martin Committee Report, *supra* note 34 at p. 282.

[39] *R. v. Nixon*, [2011] 2 SCR 566 at para. 48.

[40] *R. v. Anthony-Cook*, [2016] 2 S.C.R. 204 at para. 35.

[41] *Ibid.*

the benefits that may be available in the context of plea negotiations is to avoid or mitigate collateral consequences.

50. In the case at bar, the context of plea resolution discussions was considered and dismissed by Saunders J.A. in the following terms:

> Mr. Wong suggests that counsel's failure to understand his immigration jeopardy and to communicate that jeopardy to him may have coloured communications with the Crown and deprived Mr. Wong of the opportunity to plead to a less serious offence on a new information. I do not accept this suggestion. It is the actual charge that Mr. Wong faced, not a hypothetical one that might have been substituted, that frames this appeal, and here there is no indication in the record that trial counsel stinted in his efforts to minimize the sentence for the offence that was charged.[42]

51. This reasoning is evidence of a problematic approach to assessing the prejudice of an uninformed plea. Studies of the plea resolution process invariably highlight a plea to a lesser offence as among the possible benefits to an accused willing to waive his constitutional rights.[43] In Ferguson and Roberts' detailed review of the literature, it is cited first in a list of benefits of plea resolutions for an accused:

> The range of benefits discussed in the legal literature are: (1) a reduction in the charge to a lesser or included offence; (2) a withdrawal of other charges or a promise not to proceed on other possible charges; (3) a recommendation or a promise as to the type of sentence that can be expected (fine, probation, imprisonment, and so on); and (4) a recommendation or a promise as to the severity of the sentence (amount of fine or length of imprisonment). [...][44]

52. The plea resolution that was at issue in *Nixon* was precisely of this nature, and this Court was unequivocal that such a resolution fell squarely within the ambit of prosecutorial discretion:

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[42] *Wong* BCCA, *supra* note 20 at para. 45.

[43] G.A. Ferguson and D.W. Roberts, "Plea Bargaining: Directions for Canadian Reform" (1974), 52 Can. Bar Rev. 497 at s550; See also: S.A. Cohen and A.N. Doob, "Public Attitudes to Plea Bargaining" (1989-90), 32 Crim. L.Q. 85 at 86-87; Joseph DiLuca, "Expedient McJustice or Principled Alternative Dispute Resolution? A Review of Plea Bargaining in Canada", (2005) 50 Crim. L.Q. at p. 16.

[44] G.A. Ferguson and D.W. Roberts, *Ibid*, at p. 550.

> [29] None of the participants in this appeal disputes that Crown counsel's decision to resolve the proceedings by accepting a plea to a lesser offence falls within the scope of prosecutorial discretion as defined in *Krieger*. To the extent that the application judge's analysis suggests that anything occurring after the charges are laid falls outside the scope of prosecutorial discretion, it cannot be sustained.[45]

53. The courts cannot accept the propriety of criminal convictions resulting from plea resolutions while at the same time claiming that there is no prejudice in the loss of the opportunity to engage in resolution discussions in a fully informed manner.

3) Role of the Court

54. Given the significant consequences for an accused of waiving the constitutional rights associated with a trial, often as a result of a plea resolution discussion, it is crucial to understand the role of the court in accepting the plea. There is no question that a court is under no obligation to accept a guilty plea tendered by an accused if there are reasons to question the validity or propriety of the plea. There has been greater debate with respect to the role of the court in ensuring that the plea is in fact informed.

55. If a court has doubts about whether a plea is informed, it is clear that an inquiry may be undertaken to satisfy any concerns. The more controversial question is the extent to which a court ought to inquire into pleas as a matter of course. This issue was squarely before this Court in *Brosseau v. The Queen*[46] and *Adgey v. R.*,[47] and in both cases the majority of the Court was of the view that such inquiries by the trial judge were not required, in particular when an accused was represented by counsel. It should be noted that both were cases decided prior to the *Charter*, and as will be discussed below there may be compelling grounds to revisit the principles of guilty pleas in the *Charter* context.

56. The opposing view was expressed in the dissenting opinion of Laskin J. in *Adgey*, in which he had called for a requirement that a court inquire into the validity of guilty plea:

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[45] *R. v. Nixon*, [2011] 2 SCR 566 at para. 29.

[46] *Brosseau v. The Queen*, [1969] SCR 181 at p. 190.

[47] *Adgey v. R.*, [1975] 2 SCR 426 at p. 429.

> The overriding concern is, however, the failure of the trial judge to make any inquiry at all of the accused or his counsel as to whether he understood the charges, whether he appreciated the consequences of a plea of guilty to them and whether he was unequivocal in admitting guilt. On the footing that he was represented by retained counsel, the inquiry could be short. I see no denigration of the reputation of counsel if such an inquiry is made. The trial judge should have no difficulty in making the inquiry in a manner that does not give the impression that counsel is either being bypassed or that his qualification is challenged. The matter is one of the trial judge, who is called upon to enter a conviction without a trial, being certain that the accused is fully aware of what is involved in, and is content to stand by, his plea of guilty.[48]

57. This view was taken up as one of the recommendations in the Martin Committee Report:

> The Committee recommends that the Attorney General seek an amendment to the *Criminal Code* requiring a sentencing judge to question the accused as set out above, whether the accused is represented by counsel or not. It is, in the Committee's view, central to the integrity of a resolution of a criminal prosecution agreed upon by the Crown and the defence that it be fully understood and agreed to by the accused person. No one is more directly affected by the outcome of a criminal prosecution than the accused, and, therefore, no one has a more compelling interest in understanding and agreeing to that outcome where it is reached through discussions, rather than through the conduct of a trial.[49]

58. In 2002, Parliament partially implemented the recommendation of the Martin Committee Report with the addition of s. 606 (1.1) to the *Criminal Code*, setting out the conditions required for a court to accept a guilty plea in the following terms:

> (1.1) A court may accept a plea of guilty only if it is satisfied that the accused
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> (a) is making the plea voluntarily; and
>
> (b) understands
>
> (i) that the plea is an admission of the essential elements of the offence,
>
> (ii) the nature and consequences of the plea, [...][50]

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[48] *Ibid* at pp. 445-446.

[49] Martin Committee Report, *supra* note 34 at p. 318; A similar recommendation is made in Fitzgerald, 1990, *supra* note 28 at p.51.

[50] *Criminal Code of Canada*, R.S.C., 1985, c. C-46, 2002, c. 13, s. 49.

59. Parliament did not, however, create the obligation recommended in the Martin Committee Report for the judge accepting a plea to always make an inquiry into the informed nature of the plea. In fact, s. 606 (1.2) specifically states that a plea will be valid even if such an inquiry is not made.

C. Competence of Counsel

60. The competence of counsel plays a fundamental role in the adversarial process that is at the foundation of Canadian criminal law. Both the propriety of the practice of plea resolution and the reasoning that a court need not inquire into the validity of a plea when someone is represented by counsel, as discussed above, rest on the foundation of counsel competent to advise an accused of the consequences of the plea and to ensure its validity.

61. The Martin Committee Report explicitly addresses this issue in the following terms:

> The Committee does note, however, that the discretionary latitude accorded the parties in our adversarial system can only be fairly exercised on both sides if an accused has unqualified access to competent counsel. Such access permits the Crown and the defence to engage in resolution discussions on an equal professional footing.[51]

62. This Court discussed the constitutional requirement for counsel to be involved in the plea resolution process in *R. v. Burlingham*, [1995] 2 SCR 206:

> Furthermore, I conclude that s. 10(b) mandates the Crown or police, whenever offering a plea bargain, to tender that offer either to accused's counsel or to the accused while in the presence of his or her counsel, unless the accused has expressly waived the right to counsel. It is consequently a constitutional infringement to place such an offer directly to an accused [...][52]

63. The Martin Committee Report underlined that exploring the situation of the accused is an important part of defence counsel's professional responsibilities:

> It is, in the Committee's view, an important part of both Crown and defence counsel's professional responsibilities to explore the situation of accused persons,

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[51] Martin Committee Report, *supra* at p. 286.

[52] *R. v. Burlingham*, [1995] 2 SCR 206 at para 21.

> victims and witnesses, so that these persons' circumstances may be appropriately brought to bear in determining how the proceedings should be conducted.[53]

64. The crucial role of defence counsel was described in the following terms by the Nova Scotia Court of Appeal in *R. v. Riley*, 2011 NSCA 52:

> The educational role of counsel is paramount in ensuring that an accused knows what it is he or she is giving up by pleading guilty. This includes not only the obvious consequences of the plea in terms of being a formal admission of the essential elements of the offence and waiving a variety rights, including the right to a trial and to be presumed innocent. It also encompasses ensuring the accused is aware of the likely ramifications in terms of the type of penalties and other orders the court may impose.[54]

65. In the context of the present case, there is no question defence counsel ought to have informed the Appellant of the potentially devastating immigration consequences of his plea. The plea was entered almost a year after this Court's decision in *R. v. Pham*, 2013 SCC 15, which confirmed a long line of cases in British Columbia and in other provinces which emphasized the importance of considering immigration consequences in the criminal context.[55]

66. Several years before this Court's decision in *Pham*, the British Columbia Court of Appeal in *R. v. Martinez-Marte*, 2008 BCCA 136, had even urged Crown counsel to raise the issue of immigration consequences upon the failure of defence counsel to do so:

> A number of recent cases in this Court have raised this issue. It is to be hoped that in future, the record will demonstrate adequate consideration of the immigration consequences of any sentence to be imposed. It is perhaps not too much to ask the Crown to address these matters before the sentencing judge in the event that defence counsel fails to do so.[56]

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[53] Martin Committee Report, *supra* at p. 289.

[54] *R. v. Riley*, 2011 NSCA 52 at para. 32.

[55] See: *R. v. Lacroix (2003*), 57 W.C.B. (2d) 606 (Ont. C.A.); *R. v. Hamilton (2004),* 186 C.C.C. (3d) 129 (Ont.C.A.); *R. v. Kanthasamy*, (2005) 195 C.C.C. (3d) 182 (B.C.C.A.); *R. v Mai*, [2005] B.C.C.A. 615; *R. v. Almajidi*, 2008 SKCA 56; *R v. Leila*, 2008 BCCA 8; *R. v. Sinio,* [2009] B.C.J. No. 308 (BCCA); *R. v. B.C*., 2010 ONCA 561; *R. v. Arganda*, 2011 MBCA 24.

[56] *R. v. Martinez-Marte*, 2008 BCCA 136 para 27. See also: *R. v. Kanthasamy*, 2005 BCCA 135, *R. v. Leila*, 2008 BCCA 8, *R. v. Moretto*, 2009 BCCA 139, *R. v. Nasabi*, 2010 BCCA 209, *R. v. Doradea*, 2010 BCCA 423.

67. The Supreme Court of the United States in *Padilla v. Kentucky* framed the issue of informing an accused of significant immigration consequences in terms of the professional responsibilities of counsel:

> The severity of deportation—"the equivalent of banishment or exile," [...] only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation. It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the "mercies of incompetent counsel." [...] To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation.[57]

68. Advising an accused of the potential immigration consequences of a criminal sentence is a basic step required of competent defense counsel. This is affirmed by the inclusion of immigration consequences of sentences and convictions in Canadian law society criminal practice manuals and checklists existing at the time the Appellant entered his guilty plea.[58] Of particular pertinence in the case at bar, the Law Society of British Columbia's practice checklist since at least 2010 has included a specific directive to consider immigration consequences:

> Interview Client: 1. Citizenship; place and date of birth. Where appropriate, review *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, to determine impact of conviction on client. If unable to do so, refer client to counsel with expertise in immigration law.[59]

69. A review of similar materials was undertaken by the Supreme Court of the United States in

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[57] *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) at p. 7.

[58] See: Law Society of British Columbia, "Sentencing Procedure", Practice Checklists Manual, March 1, 2010 at p. 7; Law Society of British Columbia, "Criminal Procedure", *Professional Legal Training Course Practice Material*, 2011 at p 123; Barreau du Québec "Détermination De La Peine"; Comité de l'inspection professionnelle, 2 Mars 2003 at p. 3-8; Paul Calarco, "Appeal Court Review - R. v. Pham: Immigration Consequences in Sentencing", *Ontario Bar Association*, June 2013; Samuel D. Hyman, "Lemme In... – Don't Kick Me Out": Immigration Law and Criminal Proceedings", Civil Law For Criminal Lawyers, *CLE BC*, February 2012 at 6.1.8; Gregory P. DelBigio, "Sentencing (2007)", *CLE BC*, May 2007 at 1.1.7; Peter Edelmann, "Immigration Consequences at Sentencing", (Paper presented at the Trial Lawyers Association BC), *CLE*, September 2013; Angus Grant, "Table: Immigration Law Consequences of Criminal Sentencing" *Legal Aid Ontario*, 9 May 2011.

[59] Law Society of British Columbia, "Sentencing Procedure", Practice Checklists Manual, March 1, 2010 at p. 7.

Padilla, leading to the conclusion that the standard of professional conduct required informing non-citizen accused of immigration consequences:

> The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation. (…) "[A]uthorities of every stripe—including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications—universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients.[60]

70. It is difficult to understand how competent counsel engaging in a sentencing-related practice could fail to be aware of the immigration consequences that would flow from the Appellant's plea and of a long-standing sentencing principle in British Columbia that had been recently confirmed in this Court in *Pham*.

71. In the specific context of the Appellant's case, the fact that counsel approached the case without any knowledge or regard for immigration consequences was particularly detrimental.

72. The Appellant's charges were laid April 3, 2012 and he retained his trial counsel in July, 2012. At that time, the term of imprisonment barring a right of appeal to the Immigration Appeal Division was 2 years or more under s. 64(2) of *IRPA.* This changed on June 19, 2013, when s. 64(2) was amended to reduce this period to 6 months or more imprisonment by a Government bill that had been before Parliament since June, 2012, before counsel had first met with the Appellant.[61] Had Mr. Wong been promptly advised of the collateral immigration consequences that would flow from a conviction, given the Crown's initial sentencing position of 9 months imprisonment,[62] he could have pleaded guilty to the offence before the change in the law occurred and he would have retained access to appeal rights before the Immigration Appeal Division.

73. Counsel stated that his intention at the time was to seek a conditional sentence order for the

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[60] *Padilla v. Kentucky*, *supra* note 57 at pp. 9-10.

[61] *Faster Removal of Foreign Criminals Act*, S.C. 2013, c. 16; Bill C-43, *An Act to amend the Immigration and Refugee Protection Act*, 1st Sess., 41st Parl., 2013 (as introduced by the House of Commons 20 June, 2012 and assented to on 19 June, 2013).

[62] AR, Tab 15 - Crown Disclosure dated August 20, 2012, p. 174; AR, Tab 11 - Transcript, p. 56.

Appellant given that he had stated he was concerned about going to jail.[63] However, a conditional sentence order would not have avoided the collateral immigration consequences. The Minister of Public Safety and Emergency Preparedness, the Canada Border Services Agency, and the Immigration Appeal Division all interpreted conditional sentence orders as being terms of imprisonment under *IRPA* at the time that the Appellant was charged and pleaded guilty.[64] By the time the Appellant pleaded guilty on February 21, 2014 a conditional sentence order of at least six months was interpreted as a term of imprisonment that resulted in inadmissibility and barred his appeal to the Immigration Appeal Division.[65]

74. The failure to inform the Appellant of the immigration consequences fundamentally undermined his ability to engage in plea resolution discussions in an informed manner, thus undermining the entire process leading to the guilty plea.

D. Requirement to be Informed of Collateral Consequences

75. There is general agreement that an informed plea requires the accused to understand the nature of the charges, the allegations, and the general scope of *Criminal Code* consequences that may result from entering a guilty plea. However, there has been less agreement among appellate courts when it comes to consequences collateral to the criminal sentencing

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[63] AR, Tab 13 - Affidavit of Michael Kennedy, dated June 4, 2015, p. 74.

[64] *Mokelu v. Canada* (Minister of Citizenship and Immigration), 2002 FCT 757; *Meerza v. Canada (Citizenship and Immigration)*, 2003 CanLII 54270 (I.R.B.).

[65] This interpretation of whether a conditional sentence order ought to be interpreted as being a term of imprisonment under *IRPA* briefly changed in November 4, 2014, after the Appellant was convicted. Justice O'Reilly of the Federal Court found it to be unreasonable to interpret the law this way in *Tran v. Canada (MPSEP)*, 2014 FC 1040. This decision however was overturned by the Federal Court of Appeal on October 30, 2015, *Canada (MPSEP) v. Tran*, 2015 FCA 237 and the Minister has continued to argue that the Federal Court of Appeal's interpretation should be upheld as recently as January, 2017 before this Court (*Tran v. Canada (MPSEP)*, SCC Court File No. 36784 – decision under reserve).

regime.[66] Writing for this Court, Wagner J. addressed the question of collateral immigration consequences in sentencing in *Pham* in the following terms:

> [T]he collateral consequences of a sentence are any consequences for the impact of the sentence on the particular offender. They may be taken into account in sentencing as personal circumstances of the offender. However, they are not, strictly speaking, aggravating or mitigating factors, since such factors are by definition related only to the gravity of the offence or to the degree of responsibility of the offender (s. 718.2(a) of the Criminal Code). Their relevance flows from the application of the principles of individualization and parity.[67]

76. *Pham* dealt specifically with immigration consequences, and it is helpful to remember the potential gravity of such consequences. In *Padilla v. Kentucky*, the Supreme Court of the United States accepted that "deportation is an integral part - indeed, sometimes the most important part - of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[68] The Court went on to elaborate:

> We have long recognized that deportation is a particularly severe "penalty," Fong Yue Ting v. United States, 149 U. S. 698, 740 (1893); but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, see INS v. Lopez-Mendoza, 468 U. S. 1032, 1038 (1984), deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century, see Part I, supra, at 2–7. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it "most difficult" to divorce the penalty from the conviction in the deportation context. United States v. Russell, 686 F. 2d 35, 38 (CADC 1982). Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult. See St. Cyr, 533 U. S., at 322 ("There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions").

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[66] See: *R. v. Hunt*, 2004 ABCA 88; *R. v. K.R.F.*, 2011 NLCA 2; *Raymond c. R.*, 2009 QCCA 808; *Nersysyan c. R.*, 2005 QCCA 606; *R. v. Slobodan*, 1993 ABCA 33; *R. v Lennon*, 2012 ABCA 53.

[67] *R. v. Pham*, 2013 SCC 15 at para. 11; This Court has also pointed out in *B010 v. Canada (Citizenship and Immigration)* 2015 SCC 58 at para. 53 that "Obstructed or delayed access to the refugee process is a 'penalty' within the meaning of art. 31(1) of the Refugee Convention", see also para. 63. Inadmissibility under s. 36(1)(a) has a similar impact for refugee claimants.

[68] *Padilla v. Kentucky. supra* note 57 at p. 6.

77. In *Pham*, this Court cited with approval the reasons of Doyon J.A. in *R. v. Guzman*, 2011 QCCA 136, which stated that "the status of the appellants and the impact of the prison sentences on their right to appeal to the Immigration Appeal Division are relevant circumstances and must be taken into consideration."[69]

78. The Court went on to address the scope within which appellate courts could intervene when collateral consequences had not been considered at sentencing:

> An appellate court has the authority to intervene if the sentencing judge was not aware of the collateral immigration consequences of the sentence for the offender, or if counsel had failed to advise the judge on this issue. In such circumstances, the court's intervention is justified because the sentencing judge decided on the fitness of the sentence without considering a relevant factor: M. (C.A.), at para. 90. [70]

79. In the case at bar, the issue of whether the Appellant was informed of the immigration consequences was not contested; there was consensus that the Appellant had not been informed at all of the immigration consequences of his plea.

80. Fitch J.A. accepted that the collateral immigration consequences are "legally relevant" and that the plea was therefore uninformed:

> I am satisfied that for Mr. Wong's plea of guilty to be informed, he had to understand the immediate immigration consequence to him – criminal inadmissibility under s. 36(1)(a) of the Act. In my view, Mr. Wong has met his onus of showing on a balance of probabilities that his plea of guilty was not informed with respect to a legally relevant consequence.[71]

81. The Court in *Pham* did not address the question of the impact a lack of knowledge of collateral consequences would have on the validity of a plea. There are two issues that arise in the context of assessing the knowledge of collateral consequences required for an informed plea: the requisite level of knowledge and the scope of relevant consequences. The level of knowledge will be briefly discussed before turning in more detail to the relevant scope of consequences.

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[69] *R. v Pham* 2013 SCC 15 at para 21.

[70] *Ibid*. at para. 24.

[71] *Wong* BCCA, *supra* note 20 at para. 66.

1) Level of Awareness

82. The level of awareness of collateral consequences required in order for a plea to be informed was recently discussed by the British Columbia Court of Appeal in *R. v. Kitawine*, 2016 BCCA 161 in the following terms:

> *Quick* was a case of absence of knowledge. More difficult are those cases where the accused had a general awareness of the nature of the collateral consequences, but not necessarily an appreciation of the precise outcome. The general trend in such cases, beginning with *R. v. Lyons*, 1987 CanLII 25 (SCC), [1987] 2 S.C.R. 309; *R. v. Tyler*, 2007 BCCA 142 , in this jurisdiction; and *R. v. Shiwprashad*, 2015 ONCA 577 in Ontario, is to uphold the plea as sufficiently informed.[72]

83. In the case at bar, the level of knowledge was not at issue, the Appellant was not informed of any of the immigration consequences that would result from his plea.

2) Scope of Relevant Consequences

84. Prior to this Court's decision in *Pham*, some appellate courts were of the view that an accused did not need to be informed about collateral consequences at all. The Alberta Court of Appeal in *R. v. Slobodan*, 1993 ABCA 33 took the view that knowledge of such consequences is irrelevant to whether a plea was "informed". This approach was confirmed in *R. v. Hunt*, 2004 ABCA 88, a case like the one at bar dealing with immigration consequences:

> We decide, that where there has been an unequivocal free and voluntary admission of the facts constituting the offence, not disputed on appeal, that an unexpected legal consequence such has occurred here is not such as to allow the withdrawal of the plea of guilty. In *R. v. Hoang* (2003), ABCA 251, this Court stated at paragraph 36 that:
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> "The requirement that the accused understand the nature and consequences of a guilty plea is not a requirement to canvass every conceivable consequence which may result or may be forgone. Such a requirement be a practical impossibility."[73]

85. The approach in *Hunt* has also been followed outside Alberta. The Québec Court of Appeal,

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[72] *R. v. Kitawine*, 2016 BCCA 161 at para 20.

[73] *R. v. Hunt*, 2004 ABCA 88 at para. 9.

for example, adopted the above passage in *Nersysyan c. R.*[74] and *Raymond c. R.*[75] As noted, this line of cases predates *Pham* (SCC). It originated in the Alberta Court of Appeal which had also taken the view in its decision in *R. v. Pham*, 2012 ABCA 203, that collateral consequences were not a relevant factor at sentencing, a position overturned by this Court. It is therefore likely that this line of cases will no longer be followed in those jurisdictions.

86. Other appellate courts rejected the approach in *Hunt* and *Slobodan*, including the British Columbia Court of Appeal in the case at bar. While there was disagreement on the test to be applied, all three judges in the Court below agreed that the collateral immigration consequences were legally relevant and that the Appellant's plea was therefore uninformed.

87. At this point, there should be little disagreement that, if collateral consequences may be relevant factors at sentencing, then the accused being informed of such consequences is also pertinent to the validity of a plea. The more fundamental question is the scope of the collateral consequences that are "legally relevant" in this context. In *R. v. Quick*, 2016 ONCA 95 Laskin J.A. outlined a test based on the circumstances of the accused and importance of the consequence in question:

> What is called for is a fact-specific inquiry in each case to determine the legal relevance and the significance of the collateral consequence to the accused. A simple way to measure the significance to an accused of a collateral consequence of pleading guilty is to ask: is there a realistic likelihood that an accused, informed of the collateral consequence of a plea, would not have pleaded guilty and gone to trial? In short, would the information have mattered to the accused? If the answer is yes, the information is significant. I draw support for this approach from the reasons of LeBel J. in *R. v. Taillefer; R. v. Duguay*, 2003 SCC 70; [2003] 3 S.C.R. 307 and the reasons of Watt J.A. in *R. v. Henry*, 2011 ONCA 289.[76]

88. While the British Columbia Court of Appeal purports to follow *Quick* in the case at bar, the Court strays from the *Quick* approach in two fundamental ways.

89. First and foremost, the British Columbia Court of Appeal makes proof that an alternate plea

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[74] *Nersysyan c. R.*, 2005 QCCA 606 at para. 9.

[75] *Raymond c. R.*, 2009 QCCA 808 at para. 114.

[76] *R. v. Quick*, 2016 ONCA 95 at para. 33 ["*Quick*"].

would have been entered a condition precedent of striking the plea. It is not clear this was Laskin J.A.'s intention, as the language is not framed in the form of a requirement, but as one way to measure the significance of the information to an accused person ("A simple way..."). [77] The language leaves open the possibility that there are other ways to measure the scope of relevant information.

90. In fact, Laskin J.A. recognized that this Court in *Taillefer* took an alternative (objective) approach to the question. It may well be that both approaches are appropriate in different cases. One can imagine, for example, that if the Appellant would have entered a different plea because he was misinformed of the relevant astrological context, the Crown would be arguing for some form of objective assessment regardless of whether or not the Appellant would subjectively have entered a different plea.

91. Applying the test in *Taillefer* to the case at bar, there is at the very least a "realistic possibility" that a reasonable person in the Appellant's circumstances would have entered a different plea had he been made aware of the serious immigration consequences. This is consistent with the conclusion of Fitch J.A. in paras. 60-66 that the immigration consequences were legally relevant to an informed plea in the circumstances.

92. Secondly, Laskin J.A. separates the question of legal relevance and the "informed" nature of the plea from the subsequent question of whether there has been a miscarriage of justice allowing the withdrawal of the plea. As will be seen below, the two issues are easily conflated as the jurisprudence from the Ontario Court of Appeal considers an uninformed plea by its very nature to be a miscarriage of justice and therefore spends little time on the second question.

3) Application by the BCCA

93. The test in *Quick* is only partially applied in the case at bar, and at a different stage of the analysis. Saunders J.A. appears to incorporate the framework set out in *Quick* for assessing legal relevance directly into the miscarriage of justice analysis. This approach is particularly confusing because, as will be seen below, Saunders J.A. explicitly rejects the approach to

[77] *Ibid.* at para. 33.

miscarriage of justice in *Quick* by requiring an articulable path to acquittal.

94. The approach taken by Fitch J.A. appears on its face to follow *Quick* more closely, although the failure to clearly articulate the framework renders the reasoning more difficult to follow. The problem is that Fitch J.A. clearly comes to the objective conclusion that the collateral immigration consequences are "legally relevant" and that the plea was therefore uninformed in an analysis starting at paragraph 60 and concluding at paragraph 66:

> I am satisfied that for Mr. Wong's plea of guilty to be informed, he had to understand the immediate immigration consequence to him – criminal inadmissibility under s. 36(1)(a) of the Act. In my view, Mr. Wong has met his onus of showing on a balance of probabilities that his plea of guilty was not informed with respect to a legally relevant consequence.[78]

95. However, as will be seen below, after acknowledging the plea to be uninformed Fitch J.A. goes on to engage with the question of whether the Appellant would have entered a different plea if informed. Implicit in this approach is either a rejection or a misunderstanding of the framework employed by Laskin J.A. in *Quick* on two levels.

96. If the view of Fitch J.A. is that a plea can be uninformed as to a legally relevant consequence and yet not constitute a miscarriage of justice, then his position is a direct rejection of the Ontario Court of Appeal's view in both *R. v. Rulli*, 2011 ONCA 18 and *Quick*, as will be seen below.

97. If, on the other hand, Fitch J.A. is suggesting that despite the objective relevance of the immigration consequences in the Appellant's case, that the Court in *Quick* would still have required explicit proof of subjective intent of an alternate plea for it to have been a legally relevant consequence, then there is a misunderstanding of the approach in *Quick*, which clearly foresees more than one method to assess the legal relevance of the consequences of a plea.

E. Test for striking an Uninformed Plea

98. There appears to be some consensus about the basis upon which a plea might be struck, as a

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[78] *Wong* BCCA, *supra* note 20 at para. 66.

remedy under s. 686(1)(a)(iii) of the *Criminal Code* requires a finding of a "miscarriage of justice". As Fitch J.A. pointed out in the case at bar, "Inherent in the miscarriage of justice test as it applies in this context is a requirement that an appellant demonstrate prejudice." There are, however, at least three remarkably different approaches to assessing prejudice resulting from an uninformed plea.

99. The first approach, applied by the Ontario Court of Appeal, finds that giving up one's right to a trial is inherently prejudicial and therefore an uninformed plea is presumptively a miscarriage of justice.

100. The second approach requires that the appellant demonstrate that the plea would have been different if informed. Within this second approach, there is some confusion about the test both in terms of the evidence required and the evidentiary threshold to be met. First, there is disagreement about whether the issue is to be assessed subjectively as it was in the case at bar or objectively as suggested by this Court in *Taillefer*. Secondly, there is divergence on whether the standard that must be met is to show a "reasonable possibility" that a different plea would have been entered had the accused been properly informed or whether a "reasonable probability/likelihood" is required.

101. The third and most onerous approach is that taken by Saunders J.A. in the case at bar and applied in the Alberta and Québec appellate courts, requiring a threefold test be met by an appellant to strike a plea. The appellant must demonstrate not only that the plea was uninformed and that there would have been a different plea had the appellant been informed, but also that there is an articulable route to an acquittal should a plea of not guilty be entered.

102. It will be helpful to examine each of these approaches in more detail.

1) Uninformed Plea as Miscarriage of Justice

103. The Ontario Court of Appeal explicitly rejected the requirement that an appellant seeking to strike an uninformed plea need show anything more. The decision of Moldaver J.A. (as he then was), Feldman J.A. and MacFarland J.A. in *Rulli*, is unequivocal about the prejudice inherent in an uninformed plea:

> With respect, the summary conviction appeal judge applied the wrong legal test in assessing whether the plea should have been struck. In the circumstances, he should have focused on whether the plea was informed. If it was not, the prejudice lies in the fact that in pleading guilty, the appellant gave up his right to a trial. Whether he had a viable defence was not a relevant factor in the circumstances.[79]

104. The Court in *Quick* explicitly endorsed the statement above from *Rulli*,[80] finding prejudice inherent in the uninformed plea and therefore allowing it to be struck.

2) Onus to Demonstrate Alternate Plea

105. In the case at bar, Fitch J.A. accepted that the plea was uninformed but went on to consider whether the uninformed plea resulted in a miscarriage of justice:

> Inherent in the miscarriage of justice test as it applies in this context is a requirement that an appellant demonstrate prejudice. Prejudice is established when the appellant satisfies the court that he or she would not have entered the guilty plea had the legally relevant consequences of doing so been known.[81]

Standard of Proof

106. The statement of the law above does not address the standard of proof required, but simply states that the onus is on the appellant to demonstrate that a different plea would have been entered.

107. Saunders J.A. discusses the burden of proof, albeit in the context of ineffective assistance of counsel, citing the following paragraph from the decision in *R. v. Aulakh*, 2012 BCCA 340:[82]

> A miscarriage of justice will occur where there is a reasonable probability or reasonable possibility (the terms are used interchangeably in the jurisprudence) that "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to

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[79] *R. v. Rulli*, 2011 ONCA 18 at para. 2; the principle is also cited with approval by Pardu J.A. in *R. v. Aujla*, 2015 ONCA 325.

[80] *Quick*, *supra* note 74 at para. 38.

[81] *Wong* BCCA, *surpa* note 20 at para. 67.

[82] *Wong* BCCA, *supra* note 20 at para. 22.

> undermine confidence in the outcome": *Strickland v. Washington*, 466 U.S. 668 (1984) per O'Connor J. at 2068, cited in *Joanisse* at 64. The standard of reasonable probability/possibility falls somewhere between a mere possibility and a likelihood: *Joanisse* at 64.[83]

108. It should be underlined that the decision in *Joanisse* was made prior to the decision from this Court in *Taillefer*. In dealing with a failure to disclose evidence, this Court in *Taillefer* was clear that the standard of proof was a "reasonable possibility":

> […] The accused must demonstrate that there is a reasonable possibility that the fresh evidence would have influenced his or her decision to plead guilty, if it had been available before the guilty plea was entered. However, the test is still objective in nature. The question is not whether the accused would actually have declined to plead guilty, but rather whether a reasonable and properly informed person, put in the same situation, would have run the risk of standing trial if he or she had had timely knowledge of the undisclosed evidence, when it is assessed together with all of the evidence already known. Thus the impact of the unknown evidence on the accused's decision to admit guilt must be assessed. If that analysis can lead to the conclusion that there was a realistic possibility that the accused would have run the risk of a trial, if he or she had been in possession of that information or those new avenues of investigation, leave must be given to withdraw the plea.[84]

109. This Court made no mention in *Taillefer* of "reasonable probability" as a standard. The Ontario Court of Appeal in *Quick* does specifically address the standard, referring to the decision of Watt J.A. in *R. v. Henry* 2011 ONCA 289:

> In *Henry*, Watt J.A. also applied a subjective test when he set aside a guilty plea because the accused was misinformed about the viability of a constitutional challenge. And the standard he used was "realistic likelihood", not "reasonable possibility".[85]

110. With respect, it is not clear from *Henry* that Watt J.A. had turned his mind to the distinction in the thresholds to be applied, as he was concluding that there was a "realistic likelihood" the appellant in *Henry* would have acted differently and therefore the plea was struck.

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[83] *R. v. Aulakh*, 2012 BCCA 340 at para. 42.

[84] *R. v. Taillefer*, 2003 SCC 70 at para. 90.

[85] *Quick*, *supra* note 74 at para. 36.

111. The limited discussion of the evidentiary burden in the jurisprudence also does not address the nature of the evidence that presumably would need to be adduced. The primary reproach of the Court of Appeal against the Appellant was the failure to declare in an affidavit that he would have entered a different plea had he been informed of the immigration consequences. While such a declaration appears necessary on the test applied by both Saunders and Fitch JJ.A., it is not clear if such a declaration would be sufficient. If the Court were to believe the Appellant's subjective assertion but find the basis for it objectively unreasonable it is unclear whether some form of modified test would be applied.

112. In fact, the approach taken by Fitch J.A. at paragraphs 60-66 establishes the objectively important nature and gravity of the immigration consequences which flow almost automatically from the conviction.

Subjective vs. Objective Standard

113. This brings us to the second issue of contention, which is whether the requirement to demonstrate an alternate plea is subjective or objective. This Court made it clear in *Taillefer* that an objective test applied in the context of striking the guilty plea in that case:

> However, the test is still objective in nature. The question is not whether the accused would actually have declined to plead guilty, but rather whether a reasonable and properly informed person, put in the same situation, would have run the risk of standing trial if he or she had had timely knowledge of the undisclosed evidence, when it is assessed together with all of the evidence already known.

114. In the case at bar, Saunders J.A. specifically considered and rejected the objective test set out in *Taillefer* in favour of what she interpreted to be the subjective test set out in *Quick*:

> The objective test described by Justice LeBel, which falls short of requiring the appellant to establish the information not known would have made a difference to the plea, is one measure that may be applied to the task of the appellant seeking to set aside his conviction because of unexpected collateral consequences. The *Taillefer* approach is not the only approach that may be taken, however.[86]

115. All three members of the panel appear to apply the subjective test set out by Saunders

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[86] *Wong* BCCA, *supra* note 20 at para. 38.

J.A., focusing on the lack of direct evidence from the Appellant that he would personally have made a different decision.

116. Even if one were to accept the requirement for a retrospective finding of subjective intent, there are compelling grounds to conclude that the Appellant would have entered a different plea had he been made aware of the immigration consequences. The Appellant's actions after becoming aware of the immigration consequences speak very strongly to such an inference. The Appellant deposed that he became aware of the immigration consequences after he had completed a significant portion of his jail sentence. He sought to withdraw his guilty plea after his release from jail, placing the immigration consequences front and center in terms of both the reasons for seeking an extension of time to appeal, and of the allegations of incompetence of counsel.

117. Saunders J.A. was unwilling to make the above inferences because "one cannot assume [the Appellant] would have chosen a full trial rather than using the guilty plea in aid of a submission on sentence".[87] There are two problems with this reasoning.

118. First, it is inconsistent with the Appellant seeking to go back before the provincial Court if he is presumably just going to plead guilty once again.

119. Secondly, if one were to accept the implicit inference that the reason for the appeal is that the Appellant is unhappy with his jail sentence, then it is difficult to understand why he would appeal only after having served the jail sentence in question. The very reason the appeal was filed late was because the Appellant only learned of the immigration consequences after a significant portion of his sentence was completed, a reason accepted by Saunders J.A. in allowing the extension of time.[88]

120. Therefore, even if this Court were to find that the Appellant needed to demonstrate a subjective intention to enter an alternate plea, there is ample evidence on the file allowing that inference to be drawn. The focus on the failure to include a specific statement to that

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[87] *Ibid.* at para. 44.

[88] *Ibid*. at paras. 3-5.

effect in the affidavit would be a triumph of form over substance, particularly in the context of the currently confused state of the law.

3) Articulable Path to Acquittal

121. The most controversial aspect of the test being applied for withdrawal of guilty pleas in several appellate courts is the requirement for a credible assertion of factual innocence or an articulable path to acquittal. In the case at bar, Saunders J.A. reviewed the state of the law in British Columbia in the following terms:

> I would interpret the requirement as one of establishing an articulable route to an acquittal, allowing that the hope of a favourable verdict must be from more than the chance that evidence needed for conviction will have become unavailable.[89]

122. This formulation is similar to that of the Québec Court of Appeal in *Nersysyan c. R.*, 2005 QCCA 606:

> Le facteur primordial à considérer est le déni de justice. Dans ce contexte, il incombe à l'appelant d'établir qu'il avait des moyens de défense valables et non futiles à présenter. Il ne suffit pas de spéculer sur l'issue du procès qui a été évité. Or, dans le présent cas, l'appelant se contente d'une dénégation générale des actes qu'on lui reproche;[90]

123. The Alberta Court of Appeal sets out a similar criterion in *R. v. Hunt*, 2004 ABCA 88. The approach in the Nova Scotia Court of Appeal, traced in some detail in *R. v. K.R.F.*, 2011 NLCA 2, alludes to a valid defence, but as a "factor to be considered", which is remarkably different from the "requirement" it has apparently become in Québec, Alberta and British Columbia.

124. While other appellate courts have to some degree integrated a requirement for an articulable path to acquittal, the source of the reasoning can be traced back to the very line of British Columbia cases that caused concern for Fitch and Harris JJ.A. in the case at bar, although they declined to rule on the issue as the case was being decided on other grounds. In

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[89] *Ibid.* at para. 26.

[90] *Nersysyan c. R.*, 2005 QCCA 606 at para. 6.

an analysis endorsed by Harris J.A.,[91] Fitch J.A. engaged in a detailed discussion of the origin of the requirement in British Columbia and the reasons he is reluctant to endorse it:

> The origin of the additional "valid defence" prerequisite to appellate intervention appears to be *R. v. Read* (1994), 1994 CanLII 946 (BC CA), 47 B.C.A.C. 28 (C.A.). In *Read*, the guilty plea was not shown to be invalid. Thus, the statement in *Read* that "the court must be satisfied on the evidence before it that the appellant has a defence which, if proven, could constitute a valid defence" appears to be *obiter* (para. 43).
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> Further, it is apparent that in *Read*, this court relied on *R. v. Adgey*, 1973 CanLII 37 (SCC), [1975] 2 S.C.R. 426, to support the notion that an appellant who establishes that their plea of guilty is invalid must also demonstrate a valid defence. It does not appear to me that either the majority or minority judgments in *Adgey* address this point, let alone require the demonstration of a valid defence as a condition precedent to setting aside an invalid guilty plea on appeal. Accordingly, there is reason to doubt whether *Adgey* actually supports the proposition expressed by this court in *Read*.[92]

125. It is helpful to return to fundamental principles in assessing the development of the case law as described by Fitch J.A. The confusion in applying *Adgey* and the resulting doctrinal incoherence can both be explained by the conflation of the procedural and evidentiary aspects of the guilty plea. *Adgey* was a case that was clearly focused on the evidentiary aspect of the plea – there was no issue raised about the procedural element of the plea aside from the role of the court in considering the evidentiary foundation of the plea.

126. The underlying problem is well articulated by Professor Fitzgerald in addressing the very problem that troubled Fitch and Harris JJ.A.:

> Some of these cases suggest that once an accused person has pleaded guilty, the presumption of innocence disappears and a presumption of guilt replaces it. The accused then is in the position of having to rebut this presumption by showing that the plea was the result of error or improper pressure and that in fact there was a good defence on the merits of the case. This additional requirement, whether explicitly or implicitly demanded that the accused have a good defence, means that an accused who has plead guilty through error or improper inducement is thereby denied the right to insist that the Crown prove guilt beyond a reasonable doubt.

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[91] *Wong* BCCA, *supra* note 20 at para. 82.

[92] *Wong* BCCA, *supra* note 20 at paras. 73-74.

> This additional requirement also demonstrates judicial confusion about the evidentiary and procedural role of the guilty plea. An accused who asks to withdraw a guilty plea on grounds of misunderstanding or duress is complaining about the procedural aspects of the plea, that is, that it did not in the circumstances of the case, constitute a valid waiver of the accused's trial rights. The court, on the other hand, in focusing on the factual basis of the plea, ignores its procedural function, thereby treating it simply as an evidentiary device, substituting for proof beyond a reasonable doubt. Given that the guilty plea serves both a procedural and evidentiary role, it would seem that a better approach when an accused seeks to withdraw a guilty plea might be to allow a change of plea if the guilty plea was defective for either procedural *or* evidentiary reasons.[93]

127. In effect, the certainty of a conviction is precisely one of the advantages which accrues to the Crown in the context of plea resolution, as noted by the Martin Committee Report:

> Likewise, from the perspective of Crown counsel, the certainty of conviction often makes resolution discussions desirable, for the corresponding advantages of saving expense and, perhaps, trauma for prosecution witnesses.[94]

128. More fundamentally, there is inherent prejudice in an accused waiving his constitutional rights without having been informed of the consequences of doing so. This is very clearly articulated by the Ontario Court of Appeal in *Quick*:

> In now asking that his plea be set aside Quick need not show a viable defence to the charge of dangerous driving. Whether he has a defence is irrelevant: "the prejudice lies in the fact that in pleading guilty, the appellant gave up his right to a trial." *R. v. Rulli*, 2011 ONCA 18 (CanLII) at para. 2.[95]

129. It would indeed be untenable if an accused, who does not need to be able to articulate a route to acquittal in order to plead not guilty and have a trial, could lose that right after having been misled into tendering a plea against his interests.

F. Conclusion

130. In the contemporary context where the vast majority of criminal cases are concluded by way of plea resolution, this Court should ensure the fundamental fairness of the process. This means establishing a coherent, objective framework for the scope of relevant information to

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[93] Fitzgerald, 1990, *supra* note 28 at p. 80.

[94] Martin Committee Report, *supra* note 34 at p. 285.

[95] *Quick*, *supra* note 74 at para 38.

be imparted to an accused and a recognition that entering a guilty plea without being informed of relevant consequences cannot be condoned given the importance of the rights being waived. It is common ground that the Appellant entered a guilty plea with the assistance of counsel who did not advise him of the devastating immigration consequences of his conviction and sentence. Waiving one's fundamental rights in the criminal justice system without understanding such devastating consequences directly imposed by state actors as a result of the conviction is inherently prejudicial, unfair and is clearly a miscarriage of justice.

PART IV – SUBMISSIONS CONCERNING COSTS

131. The Appellant does not seek costs and asks that no costs be awarded against him.

PART V – ORDER SOUGHT

132. Pursuant to s. 686(1)(a)(iii) of the *Criminal Code*, the Appellant seeks an order allowing the appeal, quashing the conviction, and remitting the matter for a new trial.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Vancouver, British Columbia this 23rd day of June, 2017.

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Peter Edelmann
Erica Olmstead
Shirin Kiamanesh

Counsel for the Appellant

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