File Number: 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)

and

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INTERVENERS

FACTUM OF THE RESPONDENT,
HER MAJESTY THE QUEEN
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I: STATEMENT OF FACTS

A. **Overview**

1. After a preliminary inquiry and with the assistance of legal counsel, the appellant pleaded guilty to trafficking cocaine and received a nine month sentence. He was unware that his conviction made him inadmissible to Canada by virtue of the *Immigration and Refugee Protection Act* and that his sentence foreclosed an appeal of this status. Had he received a sentence less than six months, his ability to appeal the deportation order would have remained. The appellant does not assert that had he known of the immigration consequence he would not have pleaded guilty and neither does he suggest that there is a way to defend the case should a new trial be ordered. Nevertheless, the appellant argues that his guilty plea was not an informed one, his counsel should have provided him with immigration advice and as a result, allowing his conviction to stand amounts to a miscarriage of justice.

2. A waiver of the right to trial is not invalidated simply because an accused was not warned by legal counsel about collateral consequences flowing from a conviction and sentence. Knowledge of such matters is not part of the essential informational requirements of a valid waiver of the right to trial as defined by s. 606(1.1)(*b*) of the *Criminal Code* which is concerned with ensuring that an accused understands the implications of a guilty plea on the criminal proceedings themselves.

3. In the alternative, if collateral consequences are relevant to striking a guilty plea entered with the assistance of counsel, the situation should not be treated any differently than an allegation that a trial was unfair by reason of ineffective assistance of counsel. An appellate court may only intervene on the ground that the resulting conviction is a product of a miscarriage of justice. That standard cannot be met unless the applicant accused demonstrates that: a) counsel's performance in informing the accused about the "nature and consequences" of entering a guilty plea in that case was legally ineffective, b) had the omitted information been known, the accused would have chosen to go to trial rather than to plead guilty; and c) that there was an articulable basis on which to defend the case at trial.

4. There was no miscarriage of justice in this case: the guilty plea is valid and the conviction should not be vacated. The unforeseen collateral immigration consequences were not part of the informational requirements of an informed waiver of the right to trial. In fact, they mainly arise

from the sentence imposed. The collateral impacts remain avoidable without ordering a new trial and would be as likely to attach in the event of a new trial. Additionally, the guilty plea was entered with the assistance of legal counsel and the appellant has not met the conditions for overcoming the presumption of a valid waiver.

5. This Court should not impose an obligation on defence counsel to provide legal advice about collateral matters arising from the consequences of a conviction and sentence outside of the criminal law as part of obtaining a client's instructions to plead guilty. Such an obligation would add undue complexity to the role of criminal defence counsel and goes beyond the requirements of an informed guilty plea. Neither should trial judges be required to provide warnings about potential collateral consequences or inquire about an accused's knowledge of such consequences which may flow from a guilty plea. Providing these warnings or making these inquiries is not an effective way to prevent collateral consequences and trial judges are not well-positioned to appreciate or advise of the consequences arising from other legislation.

B. **The charges and guilty plea**

6. The appellant was charged in the Provincial Court of British Columbia, at Kelowna, with trafficking cocaine. The charge related to a dial-a-dope transaction in which the appellant sold 0.7 grams of cocaine to an undercover police officer on February 29, 2012.[1]

7. The appellant's first court appearance was on July 30, 2012. After a number of appearances he elected to be tried by a superior court judge without a jury and he requested a preliminary inquiry.[2] The preliminary inquiry was held on August 12, 2013. The Crown called five witnesses, and tendered three exhibits, following which the appellant was ordered to stand trial.[3]

8. The appellant's two-day trial in Supreme Court was set during the week of January 6, 2014. On December 10, 2013, the appellant's counsel advised the court that the appellant intended to plead guilty and that Crown counsel had consented to a re-election to allow the appellant to plead guilty and be sentenced in Provincial Court.[4]

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[1] Appellant's Record, Tab 1, p 1, Information; Appellant's Record, Tab 11, Transcript, p 53, l.28-p 54, l.20.
[2] Appellant's Record, Tab 2, p 2-4, Record of Proceedings.
[3] Respondent's Record, Tab 3, Index to Transcript of Proceedings at Preliminary Inquiry; Appellant's Record, Tab 2, p 2-4, Record of Proceedings.
[4] Appellant's Record, Tab 14, pp 157-161, Exhibit 'M' to the Affidavit of Christin Kyle.

9. On January 6, 2014, the appellant re-elected and entered his guilty plea in Provincial Court. On February 21, 2014 it appears that the re-election and the plea of guilty entered on January 6, 2014 was formalized before the sentencing judge, Hogan P.C.J.[5]

10. Prior to taking the guilty plea on February 21, 2014 a Cantonese interpreter was affirmed. Trial counsel then told the court that the appellant would be pleading guilty. The judge then asked the appellant if he was pleading guilty to unlawfully trafficking cocaine on February 29, 2012 in Kelowna. Through the interpreter the appellant said "guilty plea."[6]

C. **The sentencing hearing**

11. The sentencing hearing proceeded immediately after the guilty plea. The proceedings unfolded in the following way:

(a) Crown counsel set out the circumstances of the offence as follows:

(i) An undercover operator called the number believed to be associated with the appellant. When a male answered, the officer asked him if she could get powder. The male replied that she had the wrong number; she said she had the right number and asked if she was speaking to Wang.[7] The male then confirmed that the undercover officer did have the right number and he agreed to meet her.[8]

(ii) A few minutes after this conversation, the appellant met the undercover operator and leaned into the undercover operator's car while holding a medium-sized jewelry style Ziploc bag which contained several flaps. He asked her if she wanted two and she said she had $40. He handed over one flap and she asked if she could get two for $40. He laughed but said for another $20, he would give her two. The undercover operator gave the appellant another $20 and he gave her a second flap from the bag.[9]

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[5] Appellant's Record, Tab 2, pp 2-4, Record of Proceedings; Appellant's Record, Tab 11, Transcript, p 52, l.44-p 53 l.12.
[6] Appellant's Record, Tab 11, Transcript, p 53, l.7-12.
[7] An informer had provided information that cocaine could be purchased by calling the phone number and that the person associated with that phone number was Wang Wong.
[8] Appellant's Record, Tab 11, Transcript, p 53, l.28-43.
[9] Appellant's Record, Tab 11, Transcript, p 53, l.44-p 54, l.11.

(iii) The appellant drove away, was followed by other police officers and stopped a short distance away. The appellant was photographed by the police officers.[10]

(b) Crown counsel filed the appellant's criminal record which was admitted by trial counsel. The appellant had a 1994 conviction for possession of stolen property for which he received a jail sentence of two years less one day.[11]

(c) Crown counsel submitted that the appellant should be sentenced to 12 months in jail, that the Court should impose the mandatory ten-year firearms prohibition, and a DNA collection order.[12]

(d) The appellant's trial counsel, Mr. Kennedy then made his submissions. Counsel outlined the appellant's personal background and employment history. Counsel provided the Court with documentation confirming the appellant's employment and personal background.[13] In particular, Mr. Kennedy submitted:

(i) The appellant moved to Canada from China in 1989 and has "remained a permanent resident here since".[14]

(ii) The appellant was the sole financial support for his family.[15]

(iii) The drug trafficking to which the appellant pleaded guilty was low-level.[16]

(iv) The appellant had not dragged the matter out and elected to have a preliminary inquiry based on advice from counsel.[17]

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[10] Appellant's Record, Tab 11, Transcript, p 54, l.11-16.
[11] Appellant's Record, Tab 11, Transcript, p 54, l.28-40; Appellant's Record, Tab 16, p 222, Appellant's Criminal Record.
[12] Appellant's Record, Tab 11, Transcript, p 54, l.40-47; p 55, l.17-22.
[13] Appellant's Record, Tab 11, Transcript, p 57, l.8-p 59, l.18; Appellant's Record, Tabs 17-19, p 223-225, Record of Employment, Letter of Employment, Birth Certificate of Ann Wong.
[14] Appellant's Record, Tab 11, Transcript, p 58, l. 2-13.
[15] Appellant's Record, Tab 11, Transcript, p 59, l.6-7.
[16] Appellant's Record, Tab 11, Transcript, p 59, l.19-27.
[17] Appellant's Record, Tab 11, Transcript, p 60, l.2-16.

(v) In support of his submission that a conditional sentence order was appropriate, counsel referred the Court to two recent B.C. Supreme Court cases where conditional sentences had been imposed on offenders convicted of serious drug offences.[18]

(e) When asked by the Court whether he had anything to say, the appellant through the interpreter stated: "I am remorseful".[19]

12. In oral reasons for sentence on the same day, the sentencing judge accepted that the appellant was a street-level trafficker and not the financial supporter behind the operation; he was a low-level player in the trafficking of cocaine.[20] Although a conditional sentence order was available, street level dial-a-dope offences usually attract jail sentences. The appellant was not a youthful offender, he was a mature adult who had a criminal record—he should have known better.[21]

13. Taking into account the guilty plea, the appellant's steady employment and the need to impose a sentence which adequately addressed general deterrence, the judge imposed a nine month jail term, a firearms prohibition, and a DNA collection order.[22]

D. **The appeal**

14. On January 8, 2015, over nine months after the time period to appeal had expired, the appellant filed a notice of appeal from conviction. The principal ground of appeal was "that trial counsel was ineffective in that he failed to fully advise the appellant of all material aspects of a guilty plea."[23]

15. The allegation of ineffective assistance of counsel advanced in the appellant's factum before the Court of Appeal was multi-faceted. The appellant alleged: (a) his trial counsel had failed to provide him with advice about potential immigration consequences arising from his guilty plea and sentence; (b) his trial counsel had failed to advise him of the defence of entrapment;[24] (c) when he entered his guilty plea he did not understand what he was doing; and (d) his guilty plea was

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[18] Appellant's Record, Tab 11, Transcript, p 60, l.31-p 63, l.28.
[19] Appellant's Record, Tab 11, Transcript, p 64, l.21-24.
[20] Appellant's Record, Tab 3, pp 5-10, Reasons for Sentence, para 5.
[21] Appellant's Record, Tab 3, pp 5-10, Reasons for Sentence, paras 6-8.
[22] Appellant's Record, Tab 3, pp 5-10, Reasons for Sentence, paras 9, 12-14.
[23] Respondent's Record, Tab 1, Notice of Appeal.
[24] Appellant's Record, Tab 7, pp 14-40, Court of Appeal Reasons, para 2.

entered contrary to his instructions to string-out the proceedings to create a delay argument. The latter two allegations were not advanced at the hearing of the appeal.[25]

16. On July 31, 2015, the appellant filed an affidavit sworn on May 11, 2015. In this affidavit the appellant deposed that:

(a) The letters he received from his trial counsel Mr. Kennedy were not translated.[26]

(b) Mr. Kennedy never explained the choices of having a trial in Provincial Court, Supreme Court or in front of a jury.[27]

(c) Mr. Kennedy never explained the consequences of pleading guilty or not guilty.[28]

(d) The appellant did not think to tell Mr. Kennedy about his status in Canada because he did not know that it would matter. The appellant never thought to tell him because he relied on Mr. Kennedy completely. Mr. Kennedy never asked the appellant about his status in Canada.[29]

(e) Mr. Kennedy never spoke to him about entrapment. Based on what Mr. Guild (the appellant's first appellate lawyer) explained, the appellant believes Mr. Kennedy should have discussed it with him.[30]

(f) Before the preliminary inquiry the appellant asked Mr. Kennedy what would happen if he pleaded guilty and Mr. Kennedy did explain that he could go to jail.[31]

(g) The appellant did not know what the preliminary inquiry was and did not know why the witnesses were there. He did not recognize any of the witnesses.[32]

(h) The first conversation the appellant had with Mr. Kennedy about pleading guilty was without an interpreter, he did not understand entirely what Mr. Kennedy meant or what he

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[25] Appellant's Record, Tab 7, pp 14-40, Court of Appeal Reasons, para 7.
[26] Appellant's Record, Tab 12, pp 66-70, Affidavit of Appellant, para 5.
[27] Appellant's Record, Tab 12, pp 66-70, Affidavit of Appellant, para 5.
[28] Appellant's Record, Tab 12, pp 66-70, Affidavit of Appellant, para 6.
[29] Appellant's Record, Tab 12, pp 66-70, Affidavit of Appellant, para 6.
[30] Appellant's Record, Tab 12, pp 66-70, Affidavit of Appellant, para 7.
[31] Appellant's Record, Tab 12, pp 66-70, Affidavit of Appellant, para 8.
[32] Appellant's Record, Tab 12, pp 66-70, Affidavit of Appellant, para 9.

might plead guilty to. The appellant knows that Mr. Kennedy never talked to him about going to jail.[33]

(i) When the appellant was in court in January of 2014, there was an interpreter, but he did not know Mr. Kennedy was going to plead guilty for him. Mr. Kennedy told him to plead guilty. The interpreter asked if he was pleading guilty, he told her it was up to the lawyer. He understood that if he pleaded guilty he would get a fine, because that is what happened for another charge. That is what he understood Mr. Kennedy was telling him would happen.[34]

(j) Mr. Kennedy never talked to the appellant about immigration consequences for pleading guilty and the appellant claimed that he did not fully understand what it meant to plead guilty.[35]

(k) At the next court appearance the appellant understood that his lawyer said he was pleading guilty. The judge asked him if he was pleading guilty and he said he was because he thought that his lawyer had already done that at the last court appearance so he had to say he was guilty.[36]

(l) On the day the appellant went to jail, he did not have any conversation with Mr. Kennedy about pleading guilty or the sentence. The appellant did not think that he would go to jail because he had a wife and a child to support.[37]

(m) The first time the appellant knew there were immigration consequences was when he was in jail and talked to someone from the Canadian Border Service Agency.[38]

17. The appellant did not assert that he was not guilty of the offence, that he had a defence to the charge, that he instructed his trial counsel to delay the case, or that had he known of a potential immigration consequence he would not have pleaded guilty.

18. Mr. Kennedy, the appellant's trial counsel, swore an affidavit on June 4, 2015 in which he deposed that:

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[33] Appellant's Record, Tab 12, pp 66-70, Affidavit of Appellant, para 11.
[34] Appellant's Record, Tab 12, pp 66-70, Affidavit of Appellant, para 12.
[35] Appellant's Record, Tab 12, pp 66-70, Affidavit of Appellant, para 12.
[36] Appellant's Record, Tab 12, pp 66-70, Affidavit of Appellant, para 13.
[37] Appellant's Record, Tab 12, pp 66-70, Affidavit of Appellant, para 14.
[38] Appellant's Record, Tab 12, pp 66-70, Affidavit of Appellant, para 15.

(a) He first met the appellant on July 24, 2012, with Clem who acted as an interpreter for the meeting. During the meeting Mr. Kennedy received some background information about the appellant.[39]

(b) The appellant was charged with offences on two separate informations. One alleged possession of cocaine and obstruction of a peace officer on June 1, 2012, and the other alleged trafficking cocaine on February 29, 2012.[40]

(c) The appellant's first court appearance was on July 30, 2012 and prior to the court appearance, Mr. Kennedy had meetings with the appellant. On July 30, 2012 Mr. Kennedy appeared in court with the appellant and a court appointed interpreter.[41]

(d) At the appellant's next court appearance on August 13, 2012, Mr. Kennedy reviewed the police reports with the appellant with the assistance of his interpreter. He later prepared and forwarded correspondence to the appellant summarizing the meeting, the information obtained, and instructions received.[42]

(e) Based on instructions received from the appellant during the August 13, 2012 meeting, a trial date in Provincial Court was set for the possession of cocaine and obstruction charges. On the trafficking cocaine charge, the appellant elected to be tried in Supreme Court and he requested a preliminary hearing which was scheduled.[43]

(f) Mr. Kennedy explained the options for trial to the appellant and provided his opinion that the best course of action was to have a Supreme Court judge alone trial and to have a preliminary hearing which would allow him to test the evidence and determine the strength of the Crown's case. It is Mr. Kennedy's habit and practice to explain the options to his client, take their instructions and act on them.[44]

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[39] Appellant's Record, Tab 13, pp 71-82, Affidavit of Michael Kennedy, paras 2-3.
[40] Appellant's Record, Tab 13, pp 71-82, Affidavit of Michael Kennedy, para 6.
[41] Appellant's Record, Tab 13, pp 71-82, Affidavit of Michael Kennedy, paras 7-8.
[42] Appellant's Record, Tab 13, pp 71-82, Affidavit of Michael Kennedy, paras 9, 10, 12.
[43] Appellant's Record, Tab 13, pp 71-82, Affidavit of Michael Kennedy, paras 13-15, 20.
[44] Appellant's Record, Tab 13, pp 71-82, Affidavit of Michael Kennedy, paras 16-19, 53, pp 73-74, 77.

(g) The appellant was very concerned about going to jail and his instructions were to do whatever could be done to avoid going to jail. Mr. Kennedy took all steps to avoid jail.[45]

(h) On January 10, 2013, Mr. Kennedy had a lengthy meeting with the appellant.[46]

(i) On March 20, 2013, the appellant pleaded guilty to the simple possession charge and the Crown stayed the obstruction charge. Prior to entering the guilty plea, Mr. Kennedy met with the appellant and took instructions from him. The appellant received a $400 fine for the possession offence.[47]

(j) On August 12, 2013, the preliminary inquiry with respect to the trafficking cocaine charge took place. Two undercover officers testified. Throughout the proceedings Mr. Kennedy had several discussions with the appellant regarding the evidence and how the evidence affected the appellant's goal of avoiding jail. Following the preliminary inquiry, the appellant was ordered to stand trial.[48]

(k) During a lengthy in-person meeting with the assistance of the appellant's interpreter, instructions were received to enter a guilty plea in Provincial Court. Mr. Kennedy took very careful instructions from the appellant and he understood that the appellant wanted to take the necessary steps to avoid jail. Mr. Kennedy explained to the appellant that a guilty plea could result in a jail sentence.[49]

(l) Mr. Kennedy perceived that the case against the appellant was strong, and he provided the appellant with his options, costs and potential ramifications of continuing with the matter and then not being able to show the mitigating factor of a guilty plea.[50]

(m) Mr. Kennedy obtained a great deal of background from the appellant about his personal circumstances. Mr. Kennedy presented a great deal of positive information to the Court regarding the appellant's employment, life circumstance, and his willingness to work at paid legal

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[45] Appellant's Record, Tab 13, pp 71-82, Affidavit of Michael Kennedy, paras 21, 22.
[46] Appellant's Record, Tab 13, pp 71-82, Affidavit of Michael Kennedy, para 26.
[47] Appellant's Record, Tab 13, pp 71-82, Affidavit of Michael Kennedy, paras 28-33.
[48] Appellant's Record, Tab 13, pp 71-82, Affidavit of Michael Kennedy, paras 34-37.
[49] Appellant's Record, Tab 13, pp 71-82, Affidavit of Michael Kennedy, paras 38, 42.
[50] Appellant's Record, Tab 13, pp 71-82, Affidavit of Michael Kennedy, para 43.

employment. Mr. Kennedy was also able to relay to the Court the appellant's responsibility to care for his wife and child.[51]

(n) Mr. Kennedy did not discuss immigration consequences with the appellant; he was not told and did not ask about the appellant's immigration status.[52]

(o) Mr. Kennedy did not view entrapment as a reasonable argument, having thoroughly reviewed the disclosure and explored the issue at the preliminary inquiry. Therefore, it was not discussed with the appellant.[53]

E. **The sentence appeal**

19. The appellant did not file his application for leave to appeal his sentence until October 30, 2015, 19 months after the expiration of the limitation period. The appellant's sentence appeal has not been heard, pending the final outcome of his conviction appeal.[54]

F. **The Court of Appeal's decision**

20. The Court of Appeal dismissed the conviction appeal and granted leave to the appellant to appeal sentence.[55] The granting of leave to appeal sentence in that manner was highly unusual and unanticipated. In keeping with the practice of the Court, the issue had not been argued before the conviction appeal panel and would ordinarily have been argued before and decided by a separate panel considering the merits of the sentence appeal.

21. It is noteworthy that the allegation of ineffective assistance of counsel based on counsel's failure to discuss a defence of entrapment with the accused, an issue not advanced in this Court, was summarily dismissed by the Court of Appeal. Only two of the three justices explicitly addressed the matter in their separate reasons for dismissing the appeal. Saunders J.A. dismissed this complaint on the basis that the defence had "no air of reality in this case" and there was no basis for disputing the wisdom of trial counsel's assessment of the matter.[56] Fitch J.A. did not mention

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[51] Appellant's Record, Tab 13, pp 71-82, Affidavit of Michael Kennedy, paras 44, 48, 49.
[52] Appellant's Record, Tab 13, pp 71-82, Affidavit of Michael Kennedy, paras 54-56.
[53] Appellant's Record, Tab 13, pp 71-82, Affidavit of Michael Kennedy, paras 61-62.
[54] Respondent's Record, Tab 2, Application for Leave to Appeal and Notice of Sentence Appeal.
[55] Appellant's Record, Tab 7, pp 14-40, Court of Appeal Reasons, paras 48, 51, 71, 79, 80, 83, pp 30, 31, 36, 39, 40.
[56] Appellant's Record, Tab 7, p 25, Court of Appeal Reasons, paras 27, 28.

the issue but concurred in the disposition of the case.[57] Harris J.A. agreed with Saunders J.A. that there was no merit in the complaint that the appellant had not been "informed of the possibility of advancing an entrapment argument."[58]

22. The Court was unanimous that the appeal should be dismissed. While each member of the Court wrote separate reasons for dismissing the appeal, they all agreed that allowing the conviction to stand did not amount to a miscarriage of justice because the appellant failed to establish that he would not have pleaded guilty had he known the immigration consequences of his plea.[59] As noted by Fitch J.A., the affidavit filed by the appellant on the appeal was very detailed. Conspicuously absent from the affidavit was any assertion that he would not have pleaded guilty had he been aware of the immigration consequence of doing so.[60]

23. Saunders J.A. held that in addition to the appellant's failure to show that advice about immigration consequences would have made a difference to his decision to plead guilty, the appellant had failed to advance an "articulable route to an acquittal". Saunders J.A. relied on jurisprudence in British Columbia requiring an appellant to establish a "valid defence" on an application to strike a guilty plea to conclude that an appellant must do more than demonstrate that a guilty plea was invalid to establish a miscarriage of justice.[61] Based on the Court's decision in *R v Duong*, and the purpose of s. 686(1)(*a*)(iii), Saunders J.A. interpreted the "valid defence" requirement as one that requires an appellant to establish an articulable route to an acquittal; the hope of a favourable verdict must be based on more than the chance that evidence needed for conviction will become unavailable.[62]

24. Saunders J.A. considered that there were two approaches to assessing the validity of a guilty plea on appeal: (a) an objective test which was described by Justice LeBel in *R v Taillefer; R v Duguay*, 2003 SCC 70, [2003] 3 SCR 307. This test requires the appellant to demonstrate that there

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[57] Appellant's Record, Tab 7, p 32, Court of Appeal Reasons, para 52.
[58] Appellant's Record, Tab 7, p 40, Court of Appeal Reasons, para 81.
[59] Appellant's Record, Tab 7, pp 14-40, Court of Appeal Reasons, paras 42, 44, 56, 80.
[60] Appellant's Record, Tab 7, pp 14-40, Court of Appeal Reasons, para 68.
[61] Appellant's Record, Tab 7, pp 14-40, Court of Appeal Reasons, paras 24-26; *R v Singh*, 2014 BCCA 373, 316 CCC (3d) 490; *R v Duong*, 2006 BCCA 325, 142 CRR (2d) 261; *R v Carter*, 2003 BCCA 632, 61 WCB (2d) 431; *R v Read* (1994), 47 BCAC 28, 24 WCB (2d) 240 (CA).
[62] Appellant's Record, Tab 7, pp 14-40, Court of Appeal Reasons, para 26; *R v Duong*, 2006 BCCA 325, 142 CRR (2d) 261.

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 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 taken the risk of standing trial if he or she was aware of the new information;[63] and (b) a subjective test, set out by Laskin J.A. in *R v Quick,* where the question is whether the unknown consequences of the plea would have mattered to him, without having to show that a viable defence is available before the plea will be set aside.[64]

25. Saunders J.A. concluded that the appellant's conviction appeal could not succeed for two reasons: (a) the appellant did not establish that the lack of information in respect of the immigration consequences would have made a difference to his decision to plead guilty; and (b) the appellant had not advanced an articulable route to a conclusion other than a guilty verdict. She noted that unlike Mr. Quick who only had to wait out six months to avoid the collateral consequences, the appellant needed to avoid conviction altogether to avoid the immigration consequences. The appellant did not articulate any basis to avoid conviction or show that he had any prospect of success in respect of the verdict.[65]

26. Saunders J.A. left open the question as to whether, in a different case, an appellant would need to show a viable defence in order to have a guilty plea set aside.[66]

27. Saunders J.A. reached the same conclusion analyzing the issue from the perspective of the law relating to ineffective assistance of counsel. She concluded that the appellant had not established prejudice flowing from his lack of knowledge of the immigration consequences, because there was no evidence he would have gone to trial and because he had not shown "any basis on which to think the verdict after a trial would have been different." [67]

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[63] Appellant's Record, Tab 7, pp 14-40, Court of Appeal Reasons, paras 37, 38.
[64] Appellant's Record, Tab 7, pp 14-40, Court of Appeal Reasons, para 41, *R v Quick,* 2016 ONCA 95, 129 OR (3d) 334.
[65] Appellant's Record, Tab 7, pp 14-40, Court of Appeal Reasons, paras 42, 43.
[66] Appellant's Record, Tab 7, pp 14-40, Court of Appeal Reasons, para 42. She called this a "*Quick*-like result".
[67] Appellant's Record, Tab 7, pp 14-40, Court of Appeal Reasons, para 45.

28. While ultimately arriving at the same result, Fitch J.A., approached the issue differently. He took no issue with Saunders J.A.'s analysis of the competence of counsel claim; however, he did not believe it was necessary or helpful for the appellant to have framed his ground of appeal as a competence of counsel case. The reason the guilty plea was uninformed did not matter and added unnecessary complexity to the analysis. Analyzing it through the lens of competence of counsel could not possibly lead to a different result.[68]

29. Fitch J.A. found the analytical formula employed by Laskin J.A. in *Quick* helpful and concluded that because the appellant did not understand the immigration consequences of his guilty plea when it was entered, his guilty plea was not informed. However, because the appellant did not assert that he would have acted differently had he known the immigration consequences of pleading guilty, he failed to show that the conviction was the product of a miscarriage of justice.[69]

30. Fitch J.A. noted that there was no evidence before the Court upon which an inference could be drawn that the appellant would not have entered a guilty plea had he known of the immigration consequences of doing so. The Court could not speculate about whether the appellant would have privileged longer-term immigration goals over the shorter-term goal of avoiding custody. It was not implicit in his affidavit that he would not have entered a guilty plea had he been informed of the immigration consequences of doing so. To reach that conclusion would prejudice the Crown who chose not to cross-examine the appellant on his affidavit.[70]

31. Relying on *Quick,* Fitch J.A. concluded that an appellant who raises the validity of a guilty plea for the first time on appeal and argues that the plea was uninformed, must demonstrate a lack of awareness of a penalty that is legally relevant. While declining to determine the type of consequence that may be too indirect, remote or trivial to be properly classified as "legally relevant", he concluded that the immigration consequence at issue was not remote or indirect. The immigration consequence arose directly from the plea of guilty.[71]

32. Fitch J.A. questioned the correctness of the Court's own jurisprudence which requires an appellant seeking to set aside a guilty plea to demonstrate an articulable route to an acquittal or a

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[68] Appellant's Record, Tab 7, pp 14-40, Court of Appeal Reasons, para 54.
[69] Appellant's Record, Tab 7, pp 14-40, Court of Appeal Reasons, paras 55, 56.
[70] Appellant's Record, Tab 7, pp 14-40, Court of Appeal Reasons, para 69.
[71] Appellant's Record, Tab 7, pp 14-40, Court of Appeal Reasons, paras 63, 64.

valid defence to the charge. However, as the issue was neither argued by counsel nor required to be resolved to dispose of the appeal, he declined to decide the issue, preferring that it be addressed in a case where the issue squarely arises for determination.[72]

33. Harris J.A. agreed with both Saunders J.A. and Fitch J.A. that because the appellant failed to demonstrate his plea of guilty would not have been entered if he had known of the immigration consequences, the appeal must be dismissed. In relation to the ineffective assistance of counsel ground, he agreed with Saunders J.A. that it was appropriate to analyze the issue in this context and he agreed with her analysis in that regard.[73]

34. Harris J.A. considered that he was bound by the Court of Appeal's jurisprudence requiring an appellant to demonstrate an articulable route to an acquittal or a valid defence, but shared the concerns of principle regarding such a requirement expressed by Fitch J.A. Given the basis on which it was agreed that the appeal should be dismissed, he did not think that it was appropriate to resolve, reconsider or clarify the status of such a prerequisite.[74]

[72] Appellant's Record, Tab 7, pp 14-40, Court of Appeal Reasons, paras 72-77.
[73] Appellant's Record, Tab 7, pp 14-40, Court of Appeal Reasons, paras 80, 81.
[74] Appellant's Record, Tab 7, pp 14-40, Court of Appeal Reasons, para 82.

PART II: ISSUES

35. The appellant frames the issue in the following way:

> 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?

36. It is the position of the respondent that knowledge of collateral consequences does not bear upon the validity of a guilty plea. Warnings regarding such matters are not germane to the informational requirements codified in s. 606(1.1) of the *Criminal Code*. Should the Court accept this position, the appeal should be dismissed.

37. If this Court finds that knowledge of such collateral consequences is required for a guilty plea to be properly informed, then it is the position of the respondent that a conviction should not be vacated unless an accused demonstrates that there was a miscarriage of justice resulting from ineffective assistance of counsel. This requires the appellant to show that counsel's performance was incompetent, that the accused suffered prejudice, and that there is an articulable basis to defend the case should a new trial be ordered.

38. In the circumstances of this case, the appellant cannot meet those preconditions. The appeal should be dismissed.

PART III: ARGUMENT

A. Lack of knowledge of collateral consequences does not invalidate a guilty plea

1. *Section 606(1.1) does not contemplate knowledge of all consequences*

39. It is the positon of the respondent that the informational requirement that an accused understand "the nature and consequences" of pleading guilty does not include any requirement that the accused be specifically warned about consequences that might arise upon being convicted apart from a general understanding of exposure to penal measures applicable at sentencing. Accordingly, there is no reason to believe that the plea in this case was not sufficiently informed.

40. Section 606 of the *Criminal Code* was amended in 2002[75] to codify the informational requirements of a valid plea. In relevant part, it reads:

Conditions for accepting guilty plea	Acceptation du plaidoyer de culpabilité
606 (1.1) A court may accept a plea of guilty only if it is satisfied that the accused (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, and (iii) that the court is not bound by any agreement made between the accused and the prosecutor.	**606 (1.1)** Le tribunal ne peut accepter un plaidoyer de culpabilité que s'il est convaincu que les conditions suivantes sont remplies : a) le prévenu fait volontairement le plaidoyer; b) le prévenu : (i) comprend que, en le faisant, il admet les éléments essentiels de l'infraction en cause, (ii) comprend la nature et les conséquences de sa décision, (iii) sait que le tribunal n'est lié par aucun accord conclu entre lui et le poursuivant.

41. Knowledge of collateral consequences flowing from conviction are beyond the statutory preconditions for a valid guilty plea. The language of s. 606(1.1)(*b*)(ii) is significant because although the word "consequences" appears, it is not used in reference to the impacts of being convicted. Rather the focus is squarely placed upon the "nature and consequences of the plea" itself.

42. The French text is consistent with this interpretation. The phrase employed in the French text reads: "la nature et les conséquences de sa decision." To paraphrase in a way that is consistent with both official languages, the informational requirement might be expressed as an understanding

[75] S.C. 2002, c. 13, s. 49.

of the nature and consequences of the decision to plead guilty. Notably, neither text makes reference to the consequences of "a conviction" (or in French of "d'une déclaration de culpabilité").

43. Interpreting "consequences" as used in s. 606(1.1)(*b*)(ii) in this way is consistent with the common purpose that underlies the informational requirements of all three subparagraphs in s. 606(1.1)(*b*). Whereas, s. 606(1.1)(*a*) is concerned that the plea be the free choice of the accused, s. 606(1.1)(*b*) is meant to ensure that the accused understands what is being given up by pleading guilty.

44. The first subparagraph seeks to confirm an understanding that the plea involves an admission of the allegations made by the Crown at least so far as is necessary to make out the required elements of proving the offence.

45. The second subparagraph (the one germane to the issue in this case) is aimed at ensuring that the accused understands that pleading guilty means that there will not be a trial to determine whether the Crown can prove that he is guilty. This includes giving up procedural rights such as the ability to challenge the admissibility of evidence under the *Charter* or the ability to seek to stay the proceedings (for example on account of unreasonable delay). It also includes giving up the ability to raise a defence and the right to require the Crown to prove its case beyond a reasonable doubt. The accused must understand the end result: he or she will be found guilty and will face sentencing as well as the penal measures available under the criminal law.

46. Consistent with this focus, the third subparagraph acknowledges the modern reality of plea bargaining and aims to ensure that the accused understands that if there was an agreement with the Crown that resulted in the guilty plea, the Court is not bound by it. This clarifies that entering a guilty plea is something different than signing a contract; it must be understood as a foundation on which the judge must determine a just result, notwithstanding the agreement between the parties.

47. This interpretation of s. 606(1.1)(*b*) is also consistent with the common law respecting informational requirements of a valid plea prior to codification. The leading case interpreting the informational requirements of a valid guilty plea, which has been most frequently cited both prior to the passage of s. 606(1.1) and since, is the decision of the Ontario Court of Appeal in *R v T.R.*, where Doherty J.A. expressed the matter in the following terms:

> 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 [citations omitted].[76]

48. It is significant that Doherty J.A. supported his interpretation of the common law requirement upon what was said in *Lyons v The Queen*, where a majority of this Court rejected the suggestion that an accused had to be warned or given explicit notice prior to pleading guilty to a serious personal injury offence that the Crown was contemplating an application to have him declared a dangerous offender. In that case, this Court observed that the fact of the legislation itself provided notice that those provisions might be invoked upon conviction for that offence.[77]

49. It is difficult to appreciate why the mere fact that legislation, such as the *Immigration and Refugee Protection Act*, imposes analogous collateral impacts is not similarly sufficient warning. To the extent that the jurisprudence relied upon by the appellant imports a requirement of more explicit notice or warning about "legally relevant" collateral consequences imposed by other legislation as an informational precondition for a valid guilty plea, it is incompatible with this Court's decision in *Lyons.* It is also inconsistent with the prevailing precedents in several Canadian provinces, which collectively support the conclusion that knowledge of all consequences imposed by law upon conviction is not a requirement of an informed guilty plea.[78]

2. *Guilty pleas are advantageous for the accused and all justice system participants*

50. The issue of whether a guilty plea can be struck on appeal due to a lack of knowledge of a collateral consequence must be considered in light of the substantial benefits which accrue to the accused and the administration of justice as a whole when a criminal case is concluded by way of a guilty plea. Accordingly, the framework set by this Court for striking guilty pleas made with the assistance of counsel is important not only for each individual case affected but for the Canadian criminal justice system as a whole. In deciding upon that framework, this Court ought to consider

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[76] *R v T. (R.),* 1992 CanLII 2834 (ON CA), 10 OR (3d) 514 at para. 14 [*T. (R.)*].
[77] *Lyons v The Queen*, [1987] SCJ No 62, [1987] 2 SCR 309 at p 371. [*Lyons*]
[78] *R c Nersysyan*, 2005 QCCA 606, 66 WCB (2d) 148; *R c Raymond*, [2009] QJ No. 3984, 2009 QCCA 808; *R v Riley*, 2011 NSCA 52, 274 CCC (3d) 209 at para 26, *R v Slobodan*, 18 WCB (2d) 388 1993 ABCA 33 at para 4; *R v Hunt*, 346 AR 45, 2004 ABCA 88 at para 22; *R v Hoang*, 182 CCC (3d) 69, 2003 ABCA 251 [*Hoang*], *R v Chukwu*, 2016 SKCA 6, 128 WCB (2d) 306; *R v Kim*, 2011 SKCA 74, 272 CCC (3d) 15 [*Kim*], *R v Pitchford*, 2011 SKQB 400, 386 SaskR 5.

that each time a guilty plea is vacated, substantial benefits are lost and there will be serious negative impacts that strain the quality of justice.

51. As the appellant has demonstrated, the vast majority of criminal cases are ultimately disposed of by guilty pleas—certainly more than three quarters of all cases.[79] Most cases, like this one, are resolved in situations where an accused instructs legal counsel to plead guilty and resolve the matter summarily. Guilty plea resolutions have significant advantages compared to cases that are resolved at trial.[80] Such dispositions not only make efficient use of the limited resources of the criminal justice system, but they also have direct benefits for the accused and all other stake holders involved in a criminal case. Consider the following list of salutary results:

a) The admission of responsibility may foster some measure of reconciliation between the offender and the community including victims of the crime.

b) The accused benefits because the guilty plea generally reflects remorse such that a lesser sentence might be imposed.

c) The accused is credited for having waived procedural rights which is treated as an additional basis for reduction of sentence.

d) Accepting responsibility and feeling remorse may hasten the accused's rehabilitation and reintegration into society.

e) The accused may have received other consideration in recognition of a guilty plea such as the Crown accepting a guilty plea to a lesser charge, withdrawing associated charges or deciding not to pursue proof of contentious allegations that could aggravate the sentence to be imposed.

f) The avoidance of what might have been a lengthy trial frees up the resources of criminal justice including judges, courtrooms, court staff, translators, prosecutors and legal aid defenders, to absorb other cases or to accommodate other cases sooner.

g) Police officers who would have been required to spend hours or days waiting to testify are released to perform their primary protective function.

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[79] Factum of the Appellant, p 11, para 36 and the authorities cited at footnote 28.
[80] *R v Anthony-Cook,* 2016 SCC 43, [2016] 2 S.C.R. 204.

h) Witnesses, such as the victims of domestic violence or sexual assault, particularly children, are relieved of the traumatic experience of having to recount the circumstances of their victimization.

i) Other civilian witnesses are relieved of the disruption, including loss of income, that having to attend to testify at a trial imposes upon employees and business owners.

j) The number of persons required for jury duty at a given time in a given community is reduced.

k) The admission of guilt and acceptance of responsibility provides closure and certainty with respect to society's need to know the truth of the matter, particularly where there is a mystery about who was responsible or where the circumstances of the crime itself are inexplicable.

l) It may assist victims deal with their psychological damage.

m) A sense of justice is achieved.

3. *Quashing a guilty plea on appeal has profound negative impacts*

52. The other side of the coin, the consequences of undoing a guilty plea, are equally illustrative of why it is important that these dispositions be upset only when truly necessary. Setting aside a guilty plea has profound negative implications in every case where the above listed benefits and sense of finality and justice have already been realized and will be undone by the award of a new trial. Consider the following detrimental impacts of undoing a conviction based upon a guilty plea:

a) A trial will be required with all of the attendant strain upon the limited resources of justice.

b) The passage of time never makes it easier to prove what happened. In some cases, this will present the spectre for the administration of justice that an accused who previously admitted doing the crime will be acquitted because the prosecution can no longer prove the case beyond a reasonable doubt.

c) In some cases, for example sexual assaults and homicides, victims and surviving family members will be met afresh with all of the emotional and psychological strain of

reliving an exceedingly painful event; it will be the psychological equivalent of tearing open a wound that had just begun to heal.

d) In cases involving child victims for whom the original resolution by guilty plea was a saving grace, months of therapeutic progress will suddenly be disrupted by the prospect of having to recount the traumatic events by being forced to testify against an abuser, who has already admitted having perpetrated that abuse.

e) In a case where the application to strike the guilty plea does not occur until many months after the conviction, exhibits may have been returned to their owners or destroyed. This may have a negative impact on the Crown's ability to present its case at a new trial.

f) Each conviction carries with it a particular burden of attendant administrative work and effort. For example, DNA collection orders, weapons prohibitions and the record of conviction itself must be collected, catalogued, forwarded and entered on centralized computer data bases. This work may stand and potentially impact other investigations during the period while the validity of the first conviction is being considered. (In this case all ancillary orders have already stood for more than three and a half years.) If the conviction is set aside, all of those orders would be vacated and those central authorities would have to adjust their records accordingly. Then, if the accused were to be convicted at the new trial, all of that administrative work would have to be done again.

g) In some cases, witnesses who were available to testify when the guilty plea occurred may have died, moved away or simply moved on with their lives and the evidence of these witnesses may be unavailable in the event of a new trial.

h) The criminal conviction may have had ripple effects on related civil proceedings which may have settled based upon the fact that the accused accepted responsibility, for example, for having causing a death or having operated a motor vehicle in a criminally negligent manner. Family law proceedings like custody and access orders may have been altered or structured based upon admissions connected with a guilty plea that showed that the accused was a threat to the children involved or an inappropriate influence. Striking a guilty plea can throw all of that into turmoil causing expense, frustration and uncertainty for those litigants.

i) The final outcome in the case will inevitably be delayed; justice delayed is justice denied.

B. **Striking a guilty plea on appeal must be determined within the ineffective assistance of counsel framework**

53. If this Courts decides that collateral consequences are relevant to the determination of whether a guilty plea entered with the assistance of counsel should be struck, the application should take place within the ineffective assistance of counsel framework.

1. *An appellant must demonstrate miscarriage of justice*

54. The jurisdiction of an appeal court to strike a guilty plea for ineffective assistance of counsel and all other appeals impugning integrity of the trial process, is found in s. 686(1)(*a*)(iii) of the *Criminal Code* which provides that an appeal can be allowed where a miscarriage of justice has occurred.

55. In cases where a conviction follows a trial and is appealed on the basis that the trial was unfair by reason of ineffective assistance of counsel, this Court in *G.D.B.* has crystallized the applicable framework as follows:

> 26. The approach to an ineffectiveness claim is explained in *Strickland v. Washington*, 466 U.S. 668 (1984), *per* O'Connor J. The reasons contain a performance component and a prejudice component. For an appeal to succeed, it must be established, first, that counsel's acts or omissions constituted incompetence and second, that a miscarriage of justice resulted.
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> 27. Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.
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> 28. Miscarriages of justice may take many forms in this context. In some instances, counsel's performance may have resulted in procedural unfairness. In others, the reliability of the trial's result may have been compromised.
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> 29. In those cases where it is apparent that no prejudice has occurred, it will usually be undesirable for appellate courts to consider the performance component of the analysis. The object of an ineffectiveness claim is not to grade counsel's performance or profes-

> sional conduct. The latter is left to the profession's self-governing body. If it is appropriate to dispose of an ineffectiveness claim on the ground of no prejudice having occurred, that is the course to follow (*Strickland*, *supra*, at p. 697).[81]

2. *A guilty plea entered with the assistance of counsel is presumptively valid*

56. A judge receiving a guilty plea by an accused assisted by counsel should operate on the presumption that it is both voluntary and fully informed. The Canadian criminal justice system relies heavily upon the competency of criminal defence counsel to satisfy the informational requirements of a guilty plea rather than go to trial when they obtain instructions of their clients to plead guilty.

57. Almost 50 years ago, in *Brosseau*, this Court rejected the suggestion that a trial judge faced with an accused attempting to plead guilty with the assistance of counsel need make any inquiry about either the voluntariness or informed nature of a guilty plea, absent circumstances suggesting a contrary state of affairs.[82] In this connection, Cartwright C.J.C. stated the following on behalf of the majority:

> Failure to make due inquiry may well be a ground on which the Court of Appeal will exercise its jurisdiction to allow the plea of guilty to be withdrawn if it is made to appear that the accused did not fully appreciate the nature of the charge or the effect of his plea or if the matter is left in doubt; but in my opinion, it cannot be said that where, as in the case at bar, an accused is represented by counsel and tenders a plea of guilty to non-capital murder, the trial Judge before accepting it is bound, as a matter of law, to interrogate the accused.[83]

58. In more recent jurisprudence addressing other criminal law waivers, this Court has similarly affirmed the presumption of validity attaching to a waiver made by an accused assisted by legal counsel. In doing so, this Court has cited both *Brosseau* and *Adgey* to support the soundness of that presumption. For example:

> a) In *Korponay*, this Court held that a relevant factor in determining whether the waiver of a procedural right was valid (waiver of the right to a jury trial) was whether the accused was represented by counsel. The test for a valid waiver in this context was the same as the

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[81] *R v G.D.B.*, 2000 SCC 22, [2000] 1 SCR 520 at paras 26 to 29.
[82] *R v Brosseau*, [1969] SCR 181, 1968 CanLII 59 (SCC) [*Brosseau*]; see also: *Adgey v The Queen*, 1973 CanLII 37 (SCC), [1975] 2 SCR 426 (1973) [*Adgey*].
[83] *Adgey*, at p 190.

test to determine whether the accused's guilty plea - the waiver of right to a trial, was valid.[84]

b) In *Mills*, this Court considered that the assessment of the validity of counsel's waiver of time periods for the purpose of determining whether an accused's s. 11(*b*) *Charter* right had been violated was the same as considering the validity of an accused's waiver of a right to a trial, when a guilty plea is entered, with the assistance of counsel.[85]

59. While the language of s. 606(1.1) of the *Criminal Code* may be said to encourage trial judges to make inquiries about the voluntariness and informed nature of guilty pleas, Parliament was careful not to mandate such inquiries. In this connection, s. 606(1.2) provides, as follows:

Validity of plea	Validité du plaidoyer
606(1.2) The failure of the court to fully inquire whether the conditions set out in subsection (1.1) are met does not affect the validity of the plea.	**606(1.2)** L'omission du tribunal de procéder à un examen approfondi pour vérifier la réalisation des conditions visées au paragraphe (1.1) ne porte pas atteinte à la validité du plaidoyer.

60. The day to day practice surrounding offer and acceptance of guilty pleas in trial courts in cases where the accused is assisted by legal counsel has altered very little since 1968, even after the passage of the 2002 amendments to s. 606. As in this case, in some courts, the provisions of s. 606(1.1) are simply not mentioned. In other courts, where they are explicitly mentioned, defence counsel typically confirms that the requirements of s. 606 (1.1) have been fully canvassed with the client, sometimes on request, often without such a request. In other courts, judges will seek a formal confirmation on the record that those requirements have been met. More detailed interrogatories about the sufficiency of information conveyed to the accused are virtually unknown in the absence of cause for concern that the accused does not appreciate what he or she is doing. This should surprise no one. What Smith J.A. of the British Columbia Court of Appeal said in *Milina*, approved by this Court in *Brosseau*, remains apposite today:

> …it is desirable to state now quite plainly that in my opinion when an accused person pleads guilty it is not the law that the magistrate must go into the facts in order to satisfy himself

[84] *Korponay v Attorney General of Canada*, [1982] 1 SCR 41, 1982 CanLII 12 (SCC) at pp 48-50. See also: *Park v The Queen*, 1981 CanLII 56 (SCC), [1981] 2 SCR 64 at pp 73-74
[85] *Mills v The Queen*, [1986] 1 SCR 863, 1986 CanLII 17 (SCC), at para 169.

> that the accused is in fact guilty. If that were so there would be an end at once to any efficacy in a plea of guilty.[86]

61. Appellate courts have routinely cited *Brosseau* both before and after the 2002 amendment in the context of applications to strike guilty pleas on appeal to support the principle that a guilty plea is presumed to be both voluntary and informed when made with the assistance of counsel. This implies that the onus of overcoming that presumption is weighty.[87]

3. *Alleged counsel error must impact on accused's waiver of a right to trial*

62. To reach the level of miscarriage of justice, a counsel error related to taking instructions to plead guilty must have subjectively been important to the accused and objectively had a bearing on whether the case might have been defended. The accused must show that prejudice flowed from the counsel error. In practical terms, that means that the information will usually be germane to the choice not to defend the case; it must be about the prospects of a defence, the strength of the Crown's case, the potential to have the case stopped for delay, and other matters of that nature.

63. Erroneous information about consequences of conviction like the applicable range of sentence or what the Crown is seeking on sentence will operate as sufficient prejudice only where the accused can articulate an arguable defence to the case, whether procedural or factual; for example, it must be more tangible than the hope that all the witnesses will leave the jurisdiction and be unavailable. Awarding a new trial without requiring the appellant to articulate an arguable defence, presents the spectre that a trial is being awarded after a guilty plea when there is no reason to believe that the result will be any different.

64. A miscarriage of justice does not automatically flow from a failure to inform the accused about collateral legal consideration subjectively important to the decision to plead guilty. This is so because properly instructed waivers embrace a lot of far more essential information including: an assessment of the Crown's proof of guilt, an assessment of substantive defenses, an assessment of the accused as a potential witness, the prospects of multiple and various *Charter*-based attacks on admissibility of the evidence, an assessment of any delay, the sufficiency of disclosure, allegations of entrapment and many other considerations.

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[86] *Brosseau,* at p 189, citing *R v Milina,* [1946] BCJ No 39, 86 CCC 374 (CA) at p 592.
[87] *T. (R.),* at p 15; *R v Hoang*; *R v Newman*, 1993 CanLII 8592 (ON CA), 79 CCC (3d) 394, *R v Clermont*, 31 WCB (2d) 2, 1996 CanLII 10244 (NS CA) at paras 33 to 36; *R c Bergeron*, 2000 CanLII 7459 (QC CA) at para 29.

65. In seeking a client's instructions to plead, there is a potential for something relevant either to not be communicated or to be misunderstood. In acting on the presumption that represented accused are making voluntary and informed guilty pleas, there has never been an expectation of perfect understanding, let alone perfect lawyering. Within the accepted range of professional assistance and having regard to personal styles and the prior history of the lawyer-client relationship, there is going to be a great deal of variation about how critical information is communicated and even about what gets discussed because its importance will vary according to the circumstances of each case. It is on account of these realities that characterization of an informational lacunae as a miscarriage of justice justifying the striking of a guilty plea must be limited to only those cases that involve both incompetent legal advice and demonstrated prejudice.

4. *There was no miscarriage of justice in this case*

66. There was no miscarriage of justice in this case: the conviction should not be vacated. Warnings regarding unforeseen immigration consequences were not germane to an informed waiver of the appellant's right to trial. In fact, they were primarily a function of the sentence imposed and avoidable by his appeal from sentence. There is no reason to believe that a new trial the appellant would not be convicted, resulting in the same inadmissibility consequence, irrespective of the sentence imposed following that trial since the appellant has not put forward any basis on which to challenge the reliability of the verdict or any arguable basis on which to defend the case. He has not shown that his guilty plea proceeding was unfair or produced an unreliable outcome by reason of incompetent legal representation.

67. As argued above, the collateral immigration consequences of a conviction are irrelevant to the informational requirements of a valid guilty plea. The appellant made allegations that his guilty plea was otherwise uninformed but these allegations were either abandoned by him before the Court of Appeal or rejected by the Court of Appeal and not advanced in this Court; there is no basis for impugning the validity of his guilty plea.

68. Even if this Court were to accept the appellant's thesis – that warnings about the collateral immigration consequences were essential and that lack of that information before deciding to plead guilty was sufficient prejudice – to justify an order of a trial, this Court should refuse to order a new trial in the circumstances here.

69. The appellant's principal concern is not about inadmissibility based upon conviction for a serious crime but rather about diminished ability to resist deportation resulting from receiving a sentence of six months or more—loss of a right of appeal to the Immigration Appeal Division where equitable relief would be available to him. The Court of Appeal has already taken the extraordinary step of granting the appellant an extension of the time to file a notice of sentence appeal and granted him leave to appeal, despite that issue not being before the Court at the hearing of the conviction appeal. The appellant plainly has a basis on which to appeal his sentence because immigration consequences were relevant to the individualization of his sentence and were not considered.[88] Further, the respondent concedes that the appellant has a meritorious sentence appeal in that a sentence of six month less a day would be within the range of sentence imposed for this offence in British Columbia, albeit at the low end, having regard to the gravity of the offence and the circumstances of the offender.

70. If this Court finds that the information about collateral immigration consequences was legally relevant to the decision to plead guilty but accepts the respondent's suggested framework for determining whether a guilty plea must be struck by reason of ineffective assistance of counsel, the appellant cannot establish a miscarriage of justice on that basis.

71. The appellant has not met the burden of establishing that his counsel's performance was incompetent. No Canadian court has yet held that that counsel assisting an accused pleading guilty must warn the accused regarding collateral impacts of being convicted of a crime, as part of ensuring that their client's decision to plead guilty involves an informed choice. While some courts have expressed the view that informing criminal clients about such matters would be beneficial, those same courts have been reluctant to impose any specific obligation upon defence counsel in that regard. As some courts have observed, there is a lack of information respecting the prevailing standard of care. In this connection, it is noteworthy that in *Pham*, despite concluding that collateral consequences like those imposed under immigration legislation are relevant to the individualization of sentencing, this Court made no comment about the standard of care with respect to investigating and advancing the issue at sentencing, let alone in the course of taking instructions whether to plead guilty when as here, the client has not sought advice about the matter.

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[88] *R v Pham*, 2013 SCC 15, [2013] 1 SCR 739 [*Pham*].

72. As the Court of Appeal unanimously decided, despite a detailed affidavit in support of his claim of ineffective assistance of counsel, the appellant did not present evidence that he would have gone to trial had he been informed about the collateral immigration consequences.[89]

73. The appellant has not articulated any basis to suggest that the result would be different, had he chosen to go to trial. The required prejudice has not been established. There was no miscarriage of justice.

C. The appellant's framework for quashing guilty pleas solely for lack of information about collateral consequences should be rejected

74. Relying upon both what Fitch J.A. said in the court below and the decision of the Ontario Court of Appeal in *Quick*, the appellant proposes that the allegation of legal error in taking instructions to plead guilty be considered without the rigours of the ineffective assistance of counsel framework. He argues that the ineffective assistance of counsel framework is an unnecessary complication and relying upon *Quick*, he submits that the prejudice lies in making the imperfectly informed choice to plead guilty.

1. *The appellant's approach is unprincipled*

75. This Court should reject the suggestion that an error by counsel in the course of seeking instructions to plead guilty should be reviewed differently than errors made in the course of conducting a defence at trial. Where an accused seeks to appeal a conviction based upon a guilty plea entered with the assistance of counsel, the appeal ought to proceed on the same basis as appeals from conviction after a trial said to be tainted by counsel error. There is no cogent reason to treat these allegations differently for the following reasons:

a) The stakes in both cases are equally grave. It is imperative that society be entitled to rely upon the presumption of effective legal assistance as supporting the finality of the conviction as a just and fair outcome. The societal interest in order and finality demands that the result not be overturned without a showing of prejudice.
b) In both cases, the appeal is advanced on the basis of the same provision: s. 675 of the *Criminal Code*.

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[89] Appellant's Record Tab 7, Court of Appeal Reasons, para 68.

c) All cases where the basis for the appeal is an error made by counsel representing the accused, the appeal requires fresh evidence admitted on the basis that it is necessary where the integrity of the trial process is in issue.
d) In both cases, the appeal seeks to overcome the presumption that counsel's performance fell within the wide range of professional assistance.

76. This last point is particularly true of cases where the alleged counsel error relates to the matter of inadequate information about the "nature and consequences" of pleading guilty. A claim that counsel erred by omitting significant information in seeking instructions to plead guilty involves a similar kind of problem as when trial counsel is said to have been incompetent about choosing not to advance a *Charter* complaint, not calling particular evidence or not having the accused testify. The fairness of what occurred at the guilty plea proceeding can only be properly assessed by considering the significance of the omitted information in the context of the surrounding dialogue between lawyer and client and the wide range of professional competence regarding the handling of the omitted matter.

77. While striking a guilty plea does not involve repeating the same trial, a substantial list of benefits for the accused and all concerned are lost.[90] Having a matter once resolved by guilty plea go to trial is every bit as undesirable as ordering a retrial. It carries a long list of negative consequences.[91]

78. The perception of the administration of justice in the eyes of the reasonable and informed person is more harmed when a guilty plea is vacated for counsel's error than when a case must be retried on that account. There are a few reasons for this. First, new trials are often required for many different reasons and an error by a key participant is easier to understand. Second, counsel error will usually be demonstrated by a review of the record of the trial. Third, the posture of the accused is consistent throughout: the charges are contested at trial and on appeal. Fourth, an appeal aimed at striking a guilty plea simply because the lawyer neglected to inform the client about something is a much harder pill to swallow for the reasonable informed person. The posture of the accused is a contradiction. At trial, he admitted guilt. On appeal, he says that this is wrong; it is hard

[90] See paragraph 51 above.
[91] See paragraph 52 above.

not to think that he is merely unhappy with the result. Also, there is nothing tangible and independent to confirm the fact of the alleged error; the appellate court must assess the allegation upon the word of the accused and the person who was hired to champion his interests.

79. The appellant's approach inspired by the decision in *Quick* undermines the proper administration of justice, notably because it ignores the societal interest in order and finality. The Ontario Court of Appeal found a miscarriage of justice because counsel's error denied Mr. Quick the opportunity to delay his guilty plea for a period of six months in order to ensure that one of his prior driving convictions would be statute-barred in order to avoid an indeterminate suspension of his driving privileges. The implication is that had he known better, he could have pleaded not guilty, booked a trial date more than six months hence, and then either pleaded guilty at a more strategic date or on the trial date itself. In the absence of some reason to believe that an accused who pleaded guilty has some basis on which to defend the case at trial, either factual or procedural, the idea that justice miscarries because that accused is denied the option of arbitrarily *delaying* the imposition of a conviction and thereby subverting collateral statutory consequences is simply offensive. It is certainly not in the best interests of the administration of justice.

80. The procedural approach in *R v Quick* is puzzling. There is no mention in the decision as why the case was not subjected to the ineffective assistance of counsel framework which has been applied by the same Ontario Court of Appeal in other cases involving allegations of counsel error related to the decision to plead guilty.[92] The rigours of the ineffective assistance of counsel approach has been applied to counsel error in relation to guilty pleas in British Columbia, as discussed below. And that approach has been followed by other appellate courts across Canada.[93]

2. *The appellant's approach is unworkable*

81. The appellant's approach entails that every accused person considering pleading guilty to any criminal offence should first be warned either by that person's legal counsel or by the presiding judge who receives the guilty plea of all potential consequences imposed by any other law that may be connected with conviction for that offence. A requirement for such warnings is both unworkable and unnecessary.

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[92] See for example: *Baylis*
[93] *Kim*; *McCarthy*; *R v Laffin*, 2009 NSCA 19, 185 CRR (2d) 87.

82. This approach promises to add to the burden of an already over-burdened system and complicate the work of defence counsel in obtaining instructions about whether to plead guilty or go to trial. Many more guilty pleas will be vulnerable to being vacated on appeal. It will mean an additional burden of new trials added to a system already struggling to meet the s. 11(*b*) requirements as recently articulated by this Court.[94] Increasing the informational requirements of a valid guilty plea may oblige judges to make more inquiries into the validity of the plea in a greater number of cases. When one considers the fact that many guilty pleas occur in docket courts, this will undoubtedly increase the necessary intake period and generally bog down the work of those courts.

D. **No informational duty about collateral consequences should be imposed**

1. *Defence counsel should not be required to provide advice about collateral consequences*

83. Courts mainly operate on the presumption that counsel has ensured that the plea is both voluntary and sufficiently informed. Adding collateral consequences arising from other areas of law to the mandatory informational mix will directly impact upon the standard of care related to seeking instructions whether to plead guilty or go to trial. This Court should thus consider whether imposing a further informational obligation upon defence counsel about matters that lie outside their specialized area of practice is warranted.

84. As the appellant notes, when *Brosseau* and *Adgey* were decided the question of informed waiver was almost exclusively concerned with the evidential aspect of pleading guilty—the question of factual guilt or innocence.[95] Today, the informational requirements of ensuring that an accused makes an informed waiver of the right to trial are far more extensive. In addition to whether the known evidence will establish guilt and whether any substantive defence might be raised, defence counsel has to consider and advise upon the prospects of a broad range of potential *Charter*-based attacks on the Crown's case that must be factored into the decision whether to plead guilty.

85. It is not surprising in the current procedure-focused environment of criminal practice that guilty pleas entered with the assistance of counsel have been challenged on appeal on the basis of alleged errors by counsel in obtaining instructions to plead guilty. Consider the following examples:

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[94] *R v Jordan*, 2016 SCC 27, [2016] 1 SCR 631; *R v Cody*, 2017 SCC 31.
[95] Factum of the Appellant at paras 38-45.

a) In *Fegan*, a guilty plea was found invalid because counsel mistakenly counselled the guilty plea as a means of shortening the trial after an unsuccessful *Charter* application as a means of moving on to the appeal. The Ontario Court of Appeal declined to vacate the conviction; because the *Charter* ruling was correct, there was no miscarriage of justice.[96]

b) A conviction was vacated in *Claveau* where counsel made a similar error by advising the accused that he could preserve an appeal against a *Charter* ruling despite pleading guilty.[97]

c) In *Henry*, an appeal from conviction following a guilty plea was allowed where it turned out that counsel's advice to abandon a *Charter* application was wrong because counsel missed cogent evidence from a police surveillance tape that made out that procedural defence.[98]

86. Adding collateral impacts to the matrix of considerations that must inform defence counsel's task in seeking instructions about how to plead will add undue complication. In the majority of cases, the main goal of defence counsel is to obtain the result for their client that involves the least imposition upon their liberty in the circumstances of the charges facing that client. In doing so, they are routinely obliged to perform the challenging task of trying to assist a legally unsophisticated client to make an informed choice amid a host of contingencies. These include: whether guilt can be proven; whether the case can be stopped; and what facts will likely be found in order to decide whether to go to trial or accept a plea resolution. The plea agreement may involve a reduction of charges and a reduction of sentence. Expecting legal counsel to factor in collateral consequences particularly those that may arise under immigration legislation will mainly serve to overcomplicate an already arduous task.

87. The case of immigration consequences is particularly acute in this respect. It is trite that immigration law is a specialization all its own. It is simple to say after the fact what legal course should have been taken with the criminal case in light of immigration consequences that have already blossomed into fruition. However, it is another matter when one is faced with what to do amidst the dynamic of conducting a criminal defence. The appellant's own description of how he would have been better served by knowing about immigration consequences before pleading is

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[96] *R v Fegan*, 1993 CanLII 8607 (ONCA), 80 CCC (3d) 356.
[97] *Claveau v R*, 2003 NBCA 52, 58 WCB (2d) 512.
[98] *R v Henry*, 2011 ONCA 289, 277 CCC (3d) 293.

sufficient to illustrate the difficulty of trying to run a criminal defence in a way that will minimize or avoid immigration consequences.

88. For example, the appellant says that his trial counsel should have accepted the Crown's plea resolution offer in August 2012 because the threshold for loss of the right of appeal to the Immigration Appeal Division was the subject of proposed legislation by the time the appellant was charged.[99] That proposition seems obvious with the benefit of perfect hindsight, but in practical terms it was not so simple. In addition to keeping track of legislative developments on the immigration front, defence counsel would have had to assess the strength of the Crown's case without hearing the Crown's witnesses at the preliminary inquiry which occurred several months after that bill was passed into law.[100]

89. The other example offered by the appellant also illustrates the uncertain impact of immigration consequences. The appellant suggests that trial counsel's pursuit of a conditional sentence order was ill-advised given the state of immigration precedents at the time of sentencing, holding that a conditional sentence is a term of imprisonment for the purpose of considering s. 64 of the *Immigration and Refugee Protection Act* (which occasions the loss of appeal rights, the nub of his present predicament). But that second opinion must be qualified by his footnote that indicates that the state of this fine point of immigration law is uncertain to this day, at least a debatable matter, because the leading case in which a Federal Court judge made a contrary holding is on reserve in this Court.[101]

90. Beyond these considerations, the collateral immigration consequences are not as straightforward, automatic, or unavoidable as the appellant suggests. Before a case such as the appellant's goes to an inadmissibility hearing a report must be made pursuant to s. 44(1) of the *Immigration and Refugee Protection Act*. A person subject to removal is typically afforded an opportunity to say why they should not be found inadmissible and to indicate any personal or mitigating circumstances before that report is made. In turn, the immigration official exercises some limited discretion about whether to advance a case to an inadmissibility hearing.[102] Persons found inadmissible

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[99] Factum of the Appellant, at para 72.
[100] See paragraph 7 *infra*, the preliminary inquiry was held on 12 August 2013. The bill became law in June of 2013
[101] Factum of the Appellant, at para 73.
[102] *Sharma v. Minister of Public Safety and Emergency Preparedness*, 2016 FCA 319.

may not be deported without an assessment of the risks they might face in their country of origin.[103] There is also an appeal on humanitarian and compassionate grounds, although the appellant would have to do this from outside the country.[104] Finally, a person facing deportation retains the right to seek leave and judicial review of the removal order and other decisions leading to it.[105]

91. The imprudence of expecting criminal law specialists to factor uncertain and complicated immigration consequences into their advice concerning whether to resolve a matter by guilty plea is also borne out by jurisprudence involving this perceived informational gap. In the Canadian context, where the standard of care for criminal lawyers in this connection is uncertain, leading cases have involved an instance where the criminal lawyer waded into immigration law and gave the wrong advice[106] and another where sending the client to an immigration specialist did not assist because the client failed to act upon that advice and pleaded guilty without it.[107]

92. The United States Supreme Court's case upon which the appellant relies, *Padilla v Kentucky*, and the more recent decision in *Lee v United States*,[108] are equally discouraging about the effectiveness of this prescription. In the context of American legal practice where consideration of immigration consequences has been part of the accepted standard of care of criminal lawyers for many years according to the evidence accepted by the US Supreme Court, it is ironic that the two leading cases both involved the situation of criminal lawyers giving fundamentally incorrect advice about whether the accused faced deportation as a consequence of conviction.

93. Defence counsel's efforts to obtain the most favorable criminal law resolution for their client is consistent with an attempt to minimize the impact of collateral consequences. Legislative provisions that impose collateral consequences are invariably organized on the principle that those consequences are lighter or more avoidable when the criminal conduct is less serious or when the

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[103] *IRPA*, ss. 112(1), 113(d), 97, 114(1); See *Medovarski v Canada (Minister of Citizenship and Immigration); Esteban v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 SCR 539, paragraph 43; *Sharma v. Canada (Minister of Citizenship and Immigration)*, [2007] FCJ No 1491, 161 ACWS (3d) 957, paragraph 25 *IRPA*, ss. 112(1), 113(d), 97 and 114(1)(b).
[104] *IRPA*, s. 25(1).
[105] *IRPA*, s. 72.
[106] *R v Shiwprashad*, 2015 ONCA 577, 328 CCC (3d) 191 [*Shiwprashad*].
[107] *R v Kitawine*, 2016 BCCA 161 [*Kitawine*].
[108] *Padilla v Kentucky*, 130 S Ct 1473, 559 US 356 [*Padilla*]; *Lee v United States 582 U.S. (2017)*.

individual has been convicted less often. More significant collateral impacts apply to those convicted of more serious crimes or to worse (more-frequent) offenders. It would be perverse if it were otherwise. Consequently, the effect of defence counsel's efforts to minimize the direct impact of criminal prosecution naturally and incidentally seeks to avoid, reduce the risk of, or minimize the impact of any collateral consequences.

2. *Requiring courts to provide warnings about collateral consequences is unworkable*

94. Imposing an obligation on trial judges to routinely make inquiries or provide warnings would be equally problematic. In addition to being beyond the scope of s. 606(1.1), it is difficult to imagine how a trial judge could make detailed inquiries about the accused's understanding of what is being given up by pleading guilty without requiring the accused to divulge much about his or her litigation priorities and private concerns as well as the advice received from counsel. The proof of this is evident each time a court of appeal is asked to vacate a guilty plea made with the assistance of counsel; revelation of much that is privileged is unavoidable.[109]

95. Most judges are also similarly ill-equipped to appreciate the nuances of collateral impacts that may arise from legislation such as the *Immigration and Refugee Protection Act*. Even a simple requirement that they pose the question will be a recipe for turmoil and will not effectively avoid the collateral consequence.

96. One can only imagine the confusion of the accused person confronted with this additional complication. Consider the situation of an accused who is ready to plead guilty having just finished digesting complicated legal advice about why his or her chances of excluding essential evidence, staying the case for unreasonable delay or advancing a disclosure argument are not sufficiently cogent to reject the plea offer presented by the Crown by which some charges will be dropped and a substantial reduction in sentence can be achieved. Assume that accused is also told, that going to trial will likely mean being convicted and receiving a significantly sterner sentence.

97. The most immediate and likely impact of being warned about immigration consequences at that juncture by the presiding judge will be to delay the resolution and send the criminal defence

[109] British Columbia Court of Appeal Practice Directive: Ineffective Assistance of Trial Counsel (Criminal Practice Directive, 12 November 2013); Practice Direction Concerning Criminal Appeals at the Court of Appeal for Ontario: Allegations of Ineffective Assistance of Counsel, p 41.

lawyer back to the drawing board to confirm the instructions of the client. Occasionally, highlighting the matter in that fashion may result in that accused impulsively choosing to run a trial at which he will most likely be convicted and face more substantial penal consequences, making deportation even more likely. It is difficult to appreciate how an approach that is calculated to foster such outcomes would advance the best interests of the accused or the administration of criminal justice.

98. Moreover, in considering the need for warnings, as this Court noted in *Lyons*, the legislation itself provides notice about those consequences. While it is true that the maxim, "ignorance of the law is no excuse" does not mean that everyone knows every law, it is equally true that fairness does not demand that we place a premium on remaining ignorant about law that some persons just need to know about irrespective of their immediate contemplation of a guilty plea. Indeed, the passage from the American case of *Padilla v. Kentucky* quoted by the appellant acknowledges that "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."[110] It should not be surprising to any non-citizen that their ability to remain in their chosen country of residence is likely to be impacted by committing serious criminal offences.

99. There is little reason to believe that information about immigration consequences has any real impact upon the decision whether to plead guilty, as opposed to sentencing considerations. Some of the jurisprudence involving applications to strike guilty pleas for inadequate advice about immigration consequences involved situations where the accused had a significant level of specific personal awareness that criminal conviction risked serious immigration consequences but chose to plead guilty anyway.[111]

100. It is difficult to see why a lack of information about immigration consequences alone presents concern about miscarriage of justice. Explicit warnings about collateral consequences are not objectively necessary for an effective understanding of what it means to plead guilty or to make an intelligent choice about whether to do so. Warnings about those consequences are likely to encourage a greater number of unsophisticated accused persons to make an imprudent choice to proceed to a trial in circumstances where a conviction is inevitable, resulting in a longer sentence and the same immigration consequences.

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[110] *Padilla*, passage quoted at p 24 of the Factum of the Appellant.
[111] *R v Kitawine*; *R v Shiwprashad*.

PART IV: COSTS

104. In accordance with the usual practice in criminal matters, no costs should be ordered.

PART V: NATURE OF ORDER SOUGHT

105. The respondent requests that the appeal be dismissed, without costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at the City of Ottawa, in the Province of Ontario, this 18th day of August, 2017.

Ronald C. Reimer Counsel for the respondent	John Walker Counsel for the respondent

PART VI: TABLE OF AUTHORITIES

AUTHORITIES	PARAGRAPHS
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