File Number: 37367

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

WING WHA WONG

Appellant (on appeal)
(Appellant)

- and -

HER MAJESTY THE QUEEN

Respondent
(Respondent)

- and -

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Interveners

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RULES 37 AND 42 OF THE *RULES OF THE SUPREME COURT OF CANADA*

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FACTUM OF THE INTERVENER

PART I – OVERVIEW AND FACTS

Overview

1. The decision of an accused to plead guilty is a fundamental step in the criminal process and involves the waiver of evidential, procedural and constitutional rights. The resulting guilty plea relieves the Crown of the burden to prove guilt beyond a reasonable doubt: divesting the accused of the presumption of innocence, the right to silence, and the right to make full answer and defence.

2. For a guilty plea to be valid it must be voluntarily, with an unequivocal admission of the facts necessary to establish the charge, and with an appreciation of both the direct and legally relevant collateral consequences that follow from the plea.

3. In assessing a request by an accused to withdraw a guilty plea, the only legally relevant collateral consequences are non-criminal adverse consequences imposed by the state which arise as a direct result of the conviction or sentence. Typical examples include automatic immigration deportation orders that issue without right of hearing or appeal, and unanticipated motor vehicle licence suspensions. The criminal law cannot rationally insist upon an accused being made aware of every conceivable non-state imposed collateral consequence.

4. An appellate court, upon being satisfied that it is reasonably probable an accused would not have entered a guilty plea had the state imposed consequences been known, should permit the withdrawal of a guilty plea as a miscarriage of justice under s.686(1)(a)(iii) of the *Criminal Code*. The test is subjective to the accused, but appellate courts should look at the objective evidence contemporaneous to the guilty plea to determine if the objective evidence is supportive of the accused's assertion that he would have not pleaded guilty had the collateral consequence been known.

5. An appellant seeking to withdraw a guilty plea on appeal need not demonstrate an articulable defence to the criminal charges. Prejudice and the corresponding miscarriage of justice occurs in the very act of pleading guilty while uninformed as to legally relevant collateral consequences. Nothing more is required.

Facts

6. Alberta takes no position on the facts as set forth by the parties in their facta.

PART II – ISSUES

7. 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 – ARGUMENT

The fundamental legal nature of a plea of guilty

The guilty plea at common law

8. Long before the entrenchment of the *Canadian Charter of Rights and Freedoms* (the *Charter*), Canadian courts have uniformly recognized that the decision of the accused to plead guilty or not guilty is of profound individual importance.

9. At both common law and post *Charter*, the decision by an accused to plead guilty or not guilty is of such fundamental importance that it is one of the few decisions that must be made personally by an accused. As this Court has noted:

> While it is not the case that defence lawyers must always obtain express approval for each and every decision made by them in relation to the conduct of the defence, there are decisions such as whether or not to plead guilty, or whether or not to testify that defence counsel are ethically bound to discuss with their client and regarding which they must obtain instructions.[1]

10. The decision to plead guilty has final legal impact upon an accused as the plea relieves the Crown of the burden to prove its case beyond a reasonable doubt. The consequences of the plea may be direct or indirect. The direct consequences of a plea include the sentence imposed and any ancillary or secondary orders. The indirect consequences of a plea, or collateral consequences, are innumerable and varied.

11. In recognition of the legal enormity of an accused's decision to surrender his innocence, this Court has long imposed significant evidential and procedural duties on a trial judge to make inquiries of an accused should it appear that the nature of the charge or the effect of the plea is

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[1] ***R v GDB,*** [2000] 1 SCR 520 at para 34; See also, ***R v Stark,*** 2017 ONCA 148 at para 17

not fully appreciated.[2] This duty remains even in circumstances where an accused is represented by counsel.[3] In *Adgey*, this Court confirmed that a guilty plea cannot be maintained if an accused did not intend to admit a fact constituting an essential element of the offence; misapprehended the effect of a guilty plea; or, never intended to plead guilty at all.[4] These grounds were expressly said not to be exhaustive.[5]

12. To be valid, a guilty plea must be a voluntary and unequivocal acknowledgment of the factual foundation(s) for the legal elements of the offence(s) charged. The plea must be informed in the sense that 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" [citing *R v Lyons*, [1987] 2 SCR 309 at p. 371].[6] An informed accused must understand that convictions will follow the guilty plea, and "an appreciation of the nature of the potential penalty [he] faced".[7] The consequences of a plea are limited to those that are "legally relevant".[8]

A guilty plea necessarily involves the waiver of constitutionally protected rights

13. Some of the protections afforded to an accused at common law have been imbued with added constitutional significance since the entrenchment of the *Charter*;[9] notably in the right to make full answer and defence under ss.7 and 11(d); the presumption of innocence under s.11(d); the right to silence under s.7; and, the right to avoid self-incrimination under s.13.

14. This appeal asks this Court to determine the test to be applied when an appellant seeks to overturn a guilty plea because he or she was uninformed about a collateral consequence. The legal test will necessarily be informed by significant evidential, procedural and constitutional safeguards. An accused wishing to plead guilty must admit the facts constituting the offence charged (evidential safeguard); he must do so voluntarily; and, with full knowledge of the effect

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[2] These duties have been codified under s 606(1.1) of the *Criminal Code*, although under s 606(1.2) consistent with common law, the failure of a trial judge to make inquiries does not in and of itself invalidate a guilty plea.

[3] ***R v Brosseau,*** [1969] SCR 181; ***Adgey v R,*** [1975] 2 SCR 426
[4] ***Adgey v R,*** [1975] 2 SCR 426 at p 430
[5] ***Adgey v R,*** [1975] 2 SCR 426 at p 431
[6] ***R v T(R),*** 1992 CanLII 2834 (ONCA)
[7] ***R v T(R),*** 1992 CanLII 2834 (ONCA); ***R v Taillefer; R v Duguay,*** **[**2003] 3 SCR 307 at para 85
[8] ***R v Quick,*** 2016 ONCA 95 at para 27; citing ***R v T(R),*** 1992 CanLII 2834 (ONCA)
[9] ***R v T(R),*** 1992 CanLII 2834 (ONCA)

and consequences of his plea (procedural safeguards).[10] The attendant waiver of constitutional rights by reason of an accused's guilty plea should inform the Court's consideration and the balancing of fairness to an accused with the greater integrity of the administration of justice.

Collateral Consequences of a Guilty Plea

There is great disparity in the provincial appellate decisions

15. The Alberta Court of Appeal has held that an accused's unawareness of a collateral consequence on its own can never invalidate a guilty plea,[11] at least without an assertion of a valid defence, or a failure to admit the facts comprising the offence.[12] The appellate courts of British Columbia and Quebec have similarly required an appellant to articulate a defence as a perquisite to withdrawing a guilty plea as a miscarriage of justice under s.686(1)(a)(iii) of the *Criminal Code*.[13] In Nova Scotia, the "requirement" to demonstrate a "valid defence" is only a factor.[14] In Saskatchewan, the Court of Appeal has similarly referred to the lack of a viable defence, although it did not say whether it was a requirement or merely a consideration.[15]

16. The Ontario Court of Appeal has not required an appellant to demonstrate an articulable defence.[16] Recently, in the context of an unanticipated and indefinite provincial suspension of the Appellant's drivers licence, the Court applied a subjective test holding a plea is uninformed if it is realistically likely that an accused, informed of an unforeseen consequence, would have pleaded not guilty and gone to trial.[17] The Ontario Court found the Appellant was prejudiced in the very act of his guilty plea. The resulting miscarriage permitted the guilty plea to be withdrawn.

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[10] ***R v Hoang,*** 2003 ABCA 251 at paras 17-27; ***R v Alec,*** 2016 BCCA 282 at para 78

[11] See, for example, ***R v Slobodan,*** 1993 ABCA 33 at para 4 – "an unexpected penalty…after a voluntary and well informed plea of guilty does not…justify a change of plea."; ***R v Hoang,*** 2003 ABCA 251 at para 36; ***R v Lennon,*** 2012 ABCA 53

[12] ***R v Hunt,*** 2004 ABCA 88

[13] ***R v Nersysyan,*** 2005 QCCA 606; ***R c Raymond,*** 2009 QCCA 808; ***R v Wong,*** 2016 BCCA 416 at paras 25-26

[14] ***R v Riley,*** 2011 NSCA 52; ***R v Nevin,*** 2006 NSCA 72

[15] ***R v Eide,*** 2011 SKCA 81 at para 12

[16] ***R v Rulli,*** 2011 ONCA 18; ***R v Quick,*** 2016 ONCA 95

[17] ***R v Quick,*** 2016 ONCA 95

Alberta acknowledges that some collateral circumstances have legal relevance

17. The Attorney General of Alberta recognizes the sundry adverse effects of too lightly overturning a guilty plea.[18] These administration of justice concerns must be tempered by the significant procedural and constitutional protections afforded to an accused. The Court's approach to collateral consequences must ensure uninformed accused persons do not give up the presumption of innocence and the right to make full answer and defence. An appellate court may permit the withdrawal of a guilty plea by reason of unawareness of a collateral consequence in very limited circumstances.[19]

Legally relevant collateral circumstances should be limited to those imposed by the state

18. Mindful of the delicate balance of competing interests, Alberta submits that "legally relevant" consequences should be limited to unforeseen adverse consequences, or non-criminal penalties imposed by the state, which arise as a direct and automatic result of the criminal conviction or sentence.[20] The collateral consequences of a guilty plea that are not imposed by the state are legally irrelevant to an informed plea; notwithstanding, it is possible that a sentencing judge may consider some non-state imposed collateral consequences to determine sentence.[21] This Court should reject the wide-ranging notion that "legal relevance" for the purpose of determining

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[18] Respondent's Factum at paras 50-52; ***R v Hoang,*** 2003 ABCA 251 at paras 25-26; ***R v Alec,*** 2016 BCCA 282 at para 78

[19] Direct consequences include the sentence imposed and a broad range of ancillary orders – see the definition of sentence, ss. 673 and 785 *Criminal Code.*

[20] In some circumstances the legally relevant collateral consequence may not be automatic and an accused might have the right to a further hearing or appeal.

[21] Some relevant examples: stigma – e.g., ***R v Adam,*** 2007 BCSC 764 at para 110; travel restrictions; disadvantages in family law or civil proceedings; loss of a job or career opportunities –e.g., ***R v Bunn,*** [2000] 1 SCR 183 at para 23; family repercussions – e.g. ***R v Folino,*** 2005 CanLII 40543 (ONCA) at paras 29-33; loss of license to practice regulated or professional activities; loss of security clearance; difficulty in obtaining credit; an increase in insurance premiums or a difficulty in obtaining insurance.

the informed nature of a guilty plea can be determined by asking simply whether the collateral consequence may be relevant to sentence.[22]

What should be the test for overturning an uninformed plea as a miscarriage of justice?

The onus to strike a guilty plea is on the appellant to establish beyond a reasonable probability that a miscarriage of justice has occurred

19. The approach of Canadian appellate courts to appeals based upon claims of ineffective legal representation provides guidance as to the appellant's onus to withdraw his guilty plea on appeal by reason of the unawareness of collateral consequences. An appellant must first establish on a balance of probabilities a factual unawareness, at the time of the guilty plea, of a legally relevant collateral consequence.[23] Practically speaking, this will most often require an application to adduce new (fresh) evidence under s.683(1)(d) of the *Criminal Code*, and waiver of solicitor-client privilege.

20. If the appellant has established the necessary factual foundation, the appellant must demonstrate to a reasonable probability that a miscarriage of justice occurred.[24] A reasonable probability lies somewhere between a mere possibility and a likelihood. An uninformed guilty plea creates procedural unfairness – an articulable defence need not be demonstrated.

21. A miscarriage of justice under s.686(1)(a)(iii) of the *Criminal Code* may take many forms. In some circumstances it is counsel's performance that compromises the reliability of the

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[22] The sentencing consequence is difficult to predict and must necessarily be individualized. For example, contrast, ***R v Adam,*** 2007 BCSC 764 at para 110 where stigma was considered on sentence, as opposed to ***R v Zentner,*** 2012 ABCA 332 at paras 46-49 where it was said there is a "grave danger that the suggestion publicity replaces punishment, will degenerate into lower sentences for the prominent, the successful, and those hold public office."

[23] ***R v Stark,*** 2017 ONCA 148 at para 12; ***R v Chica,*** 2016 ONCA 252 at para 7; ***R v Archer,*** 2005 CanLII 36444 (ONCA) at para 119; ***R v Rhodes,*** 2015 MBCA 100 at paras 14, 16; ***R v Le (TD),*** 2011 MBCA 83 at para 189; ***R v Joanisse,*** 1995 CanLII 3507 (ONCA) at para 71

[24] ***R v Rhodes,*** 2015 MBCA 100 at para 14; ***R v Trudel,*** 2015 ONCA 422 at paras 34-35; ***R v Dunbar,*** 2007 ONCA 840 at para 22; ***R v Archer,*** 2005 CanLII 36444 (ONCA) at para 12; ***R v GDB,*** [2000] 1 SCR 520 at para 29; ***R v Dunbar,*** 2003 BCCA 667 at para 25; ***R v Yellowhead,*** 2015 BCCA 389 at para 31; ***R v Cheng,*** 2014 BCCA 342 at para 17; ***R v Chica,*** 2016 ONCA 252 at para 8; ***R v Prebtani,*** 2008 ONCA 735 at para 4

trial's result. In other circumstances, counsel's performance may have resulted in procedural unfairness. [25] Rosenberg J.A. gives as an example of procedural unfairness, legal counsel who fail to obtain instructions before embarking on a course of defence in circumstances where counsel was bound to obtain instructions.[26]

22. The surrender by an accused of the right to full answer and defence, without meaningful awareness of legally relevant collateral consequences, operates by itself to create procedural unfairness. "…The prejudice lies in the fact that in pleading guilty, the appellant gave up his right to a trial."[27]

23. The provincial appellate courts who **require** an appellant to demonstrate an articulable defence as a prerequisite to establishing prejudice, conflate concerns with the reliability of the verdict with procedural concerns. The availability of a defence is a relevant concern only in situations where a miscarriage is claimed by reason of ineffective legal representation resulting in an unreliable verdict. An appellant seeking to withdraw an uninformed guilty plea is not claiming the verdict is unreliable, but that it was not fair – an articulable defence is not a relevant consideration. The valid defence requirement has been also been rejected by the United States Supreme Court in *Lee.*[28] Its legitimacy is also questioned by Fitch J.A. and Harris J.A. in the court below.[29]

24. In some situations, the legally relevant collateral consequence will not be automatic in the sense that the appellant will have a right to a further hearing or an appeal. Appellate courts in such circumstances should have the flexibility to determine on a case by case basis if sufficient prejudice arises to support the withdrawal of a guilty plea. Further, mindful of the reduced prejudice, an appellant in these circumstances must demonstrate an articulable defence.

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[25] ***R v GDB,*** 2000 SCC 22 at para 28; ***R v Stark,*** 2017 ONCA 148 at para 14; ***R v Cheng,*** 2014 BCCA 342 at para 17; ***R v Prebtani,*** 2008 ONCA 735 at para 4; ***R v Chica,*** 2016 ONCA 252 at para 7; ***R v Rhodes,*** 2015 MBCA 100 at para 16; ***R v Trudel,*** 2015 ONCA 422 at para 34; ***R v Dunbar,*** 2007 ONCA 840 at para 23; ***R v Joanisse,*** 1995 CanLII 3507 (ONCA) at para 76; ***R v Archer,*** 2005 CanLII 36444 (ONCA) at para 120; ***R v Dunbar,*** 2003 BCCA 667 at para 20

[26] ***R v Prebtani,*** 2008 ONCA 735 at para 4

[27] ***R v Rulli,*** 2011 ONCA 18 at para 2; followed by ***R v Quick,*** 2016 ONCA 95 at para 38

[28] ***Lee v United States,*** 582 US_(2017) at pp 8-10

[29] ***R v Wong,*** 2016 BCCA 416 at paras 71-78, 82

Competence of Counsel

25. It is unnecessary to consider counsel's performance. An uninformed plea remains prejudicial even if it can be said that a hypothetically reasonable lawyer would not have warned about the collateral consequence.[30]

The probability-based test should be subjective and not objective

26. Alberta accepts that the probability-based test should be subjective, not objective, because the decision to plead guilty is inherently personal to the accused.[31] The question asks simply whether this particular appellant would have pleaded guilty had the collateral information been known.

27. In assessing the reasonableness of the appellant's subjective claim, however, an appellate court should look at the contemporaneous evidence to determine the appellant's veracity. As cautioned by the U.S. Supreme Court in *Lee,* "courts should not upset a plea solely because of *post hoc* assertions…. [but] should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences."[32]

28. A useful measure of the contemporaneous evidence is to ask whether it is probable an accused informed of the collateral consequence of a plea would have gone to trial.[33] The focus is on the peculiar circumstances of the accused and not a hypothetical reasonable accused. As noted by the United Supreme Court in *Lee*, an individual who had 30 years of financial and family connections to the United States has more to consider than his likely success at trial. It was not unreasonable that Mr. Lee would have chosen to go to trial knowing that a plea agreement would certainly lead to deportation and going to trial almost certainly.[34] The presumption of innocence

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[30] ***R v Sangs,*** 2017 ONCA 683

[31] The benefits can be substantial as part of a joint submission, ***R v Anthony-Cook,*** [2016] 2 SCR 204 or otherwise; Appellant's factum at paras 50-51

[32] ***Lee v United States,*** 582 US_(2017) at p 10

[33] ***R v Quick,*** 2016 ONCA 95 at para 33 (the Ontario Court of appeal uses reasonable likelihood as the standard); ***R v Taillefer; R v Duguay,*** **[**2003] 3 SCR 307 at para 90 (this Court uses reasonable possibility as the standard); ***Lee v United States,*** 582 US_(2017) at p 13, citing ***Hill,*** 474 US 59 (1985)

[34] ***Lee v United States,*** 582 US_(2017) at p 12

includes the "right to roll the dice" and to hope for a "Hail Mary".

29. In the context of the contemporaneous examination of the appellant's *post hoc* assertions, an appellate court may legitimately consider the availability of an articulable defence - not as a prerequisite to the withdrawal of a guilty plea - but in consideration of the believability of those assertions. Logically, the availability of an articulable defence renders it more likely that an appellant would have chosen to plead not guilty had the collateral consequences been known. This does not discount the possibility that an appellant would choose to "roll the dice" with little hope of an effective defence. This is particularly so when the individual stakes are higher by reason of the collateral consequences than the trial itself.

An appellate court should not overturn a guilty plea where the accused had some level of awareness of the collateral consequences, or was engaging in wishful thinking

30. An appellant who has some level of awareness of the possible nature of the collateral consequences, but not necessarily an appreciation of the precise outcome, is sufficiently informed and cannot demonstrate the necessary prejudice supporting a miscarriage of justice.[35] Mere dissatisfaction with the outcome is insufficient.[36] Nor, can a guilty plea be successfully withdrawn merely upon the appellant's hopeful assumptions.[37]

PART IV – COSTS

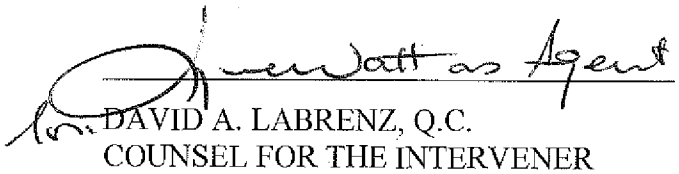
31. The Intervener makes no submissions regarding costs.

PART V – REQUEST TO PRESENT ORAL ARGUMENT

32. The Intervener requests permission to present oral argument at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Calgary, Alberta, this 6th day of September, 2017.



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[35] ***R v Kitawine,*** 2016 BCCA 161; ***R v Tyler,*** 2007 BCCA 142; ***R v Shiwprashad,*** 2015 ONCA 577
[36] ***R v Lyons,*** [1987] 2 SCR 309 at para 107 (SCC)
[37] ***R v Saddlemire,*** 2007 ONCA 36

PART VI – TABLE OF AUTHORITIES AND LEGISLATION

Authorities	**Cited at Paragraph No.**
Adgey v R, [1975] 2 SCR 426, 1973 CarswellOnt 39 at pp 430, 431	11
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