File No. 37367

IN THE SUPREME COURT OF CANADA
(On Appeal from the British Columbia Court of Appeal)

B E T W E E N:

WING WHA WONG

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

-and-

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF ALBERTA, CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO, CANADIAN ASSOCIATION OF REFUGEE LAWYERS, DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS, ASSOCIATION DES AVOCATS DE LA DÉFENSE DE MONTRÉAL, CHINESE AND SOUTHEAST ASIAN LEGAL CLINIC, SOUTH ASIAN LEGAL CLINIC OF ONTARIO, CANADIAN COUNCIL FOR REFUGEES, CANADIAN CIVIL LIBERTIES ASSOCIATION, and AFRICAN CANADIAN LEGAL CLINIC

Interveners

FACTUM OF THE INTERVENER, THE CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO

Pursuant to Rule 37 and 42(1) of the Rules of the Supreme Court of Canada

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PART I - OVERVIEW AND FACTS:

Overview:

1. A conviction that is the product of a miscarriage of justice cannot stand. This fundamental rule applies whether the conviction followed after a contested trial or upon a plea of guilt by the accused. A miscarriage of justice occurs where the result is unreliable ***or*** where the process or procedure that lead to that result was fundamentally unfair. Where an accused asks a court to strike his guilty plea on the basis it was uninformed, the proper inquiry is to examine the process that gave rise to the plea. It is a mistake to try to measure that process against some imagined or "what if?" scenario to try to divine what the accused would or would not have done if he had possessed a true understanding of his plea. It is equally unhelpful to have the inquiry turn on the competence of counsel. The dispositive question has to be whether the accused understood the legal consequences of waiving his right to require the Crown to prove his guilt beyond reasonable doubt. Where an appellant has established that his waiver was not informed with respect to legally relevant consequences[1] no additional showing of prejudice is required.

2. This approach is doctrinally sound and makes practical sense in the modern justice system. Guilty pleas are almost always a product of resolution discussions. Resolution negotiations are a crucial and significant part of the administration of criminal justice. It is important that resolution negotiations be informed and fair. Resolution discussions require disclosure of the evidence against the accused and that counsel must conduct a reasonable investigation of the file before advising on the client's prospects. Fairness also requires that resolution discussions be informed as to the personal circumstances of the accused. This information not only impacts the "quantum" of sentence, but dictates how defence counsel must approach the case, informs the exercise of Crown discretion, and may impact judicial pre-trial views of the matter. A rule requiring an accused to show that he would have elected to have a trial, and then at that trial had a path to acquittal, ignores the reality of the resolution process.

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[1] According to *R. v. Quick*, 2016 ONCA 95 the relevant consequences include at least those imposed by the state. (at para. 28)

3. The body of law governing ineffective assistance of counsel is equally inappropriate when assessing whether an uninformed guilty plea results in a miscarriage of justice. The inquiry into the competence of counsel does not directly address the central issue. Public interest weighs heavily in favour of preserving the solicitor client relationship and preventing erosion of solicitor client privilege. Practical considerations weigh heavily against drawing these cases into the various protocols and procedures required to advance an ineffective assistance claim. More importantly, that approach misses the real point: there will be cases where counsel are clearly competent, yet the plea is uninformed and a miscarriage of justice nevertheless can be said to have occurred.

4. The Respondent argues that criminal lawyers cannot be held responsible for advising accused about immigration consequences. The CLA is particularly well placed to assist this Court regarding the evolving expectations of defence counsel. In the modern environment, it is not unreasonable to expect criminal lawyers to be alive to possible immigration issues. In many circumstances, a failure to do so falls below the standard of reasonable professional assistance.

PART II - ISSUES

5. When is an uninformed guilty plea a miscarriage of justice? 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 the plea?

PART III - ARGUMENT

Procedural Unfairness is a Miscarriage of Justice

6. To be valid, a guilty plea, like any waiver of important rights, must be voluntary, unequivocal and informed.[2] Being informed means more than being aware that there will be a finding of guilt and a sentence imposed.[3] A plea of guilt is a waiver of all the rights associated with the criminal trial process.[4] A guilty plea is not informed where an accused person is unaware of material state-imposed consequences flowing from the admission of

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[2] *R. v. Taillefer; R. v. Duguay*, [2003] 3 S.C.R. 307 at para. 85
[3] *R. v. T.(R.),* 1992 CanLII 2834 (ON CA), O.J. No. 1914 (C.A.); *R. v. Quick*, *supra*
[4] *Korponey v. A.G. Canada*, [1982] 1 S.C.R. 41

guilt, the conviction or the sentence. This approach is consistent with the approach of the Ontario Court of Appeal in *R. v. Quick*[5] and in *R. v. Sangs*[6]. Giving up one's right to a trial is inherently prejudicial (in the sense of contrary to the accused's interests) and therefore an uninformed guilty plea is presumptively a miscarriage of justice.[7] The additional requirement that an appellant also prove that in some 'what if' scenario the outcome of the case would have been different misses the point and undermines procedural fairness, the fundamental importance of the right to a trial, and the presumption of innocence. It is also contrary to established principles.

7. In *R. v. G.D.B.*, this Court recognized that in ineffective assistance cases, miscarriages of justice are occasioned not only where the verdict is rendered factually unreliable, but also where procedural unfairness resulted. The Court articulated the approach to the issue 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.
>
> 27 Incompetence is determined by a reasonableness standard. …
>
> 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.*** [Emphasis added]

This approach is bedrock law when it comes to assessing ineffective assistance claims.[8] In Ontario, the Court of Appeal has made clear that where the actions of the trial lawyer result in procedural unfairness, a miscarriage of justice is occasioned without an additional showing of prejudice.[9]

Importance of Informed Resolution Discussions:

8. The vast majority of criminal cases in Canada (and virtually all guilty pleas) are subject to resolution discussions. Resolution discussions are an essential part of the

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[5] *R. v. Quick*, *supra*
[6] *R. v. Sangs* 2017 ONCA 683
[7] *R. v. Quick*, *supra* at paras. 4, 16, 17, 25 and 26
[8] *R. v. Prebtani*, 2008 ONCA 735 per Rosenberg J.A. at para. 4
[9] *R. v. Stark*, 2017 ONCA 148 per Lauwers J.A. at paras. 18-20

criminal justice system. Done properly, they benefit all participants in that system - victims, witnesses, the accused, counsel, police, and the administration of justice generally.[10] As noted by the Martin Committee:

> As one commentator has stated, "the trend towards a summary process dependent upon guilty pleas has quietly shifted the entire focus of criminal procedure from its traditional foundation in the trial process." Consequently, it is not inaccurate to say that if the early stages of the criminal trial process are not functioning properly, the administration of criminal justice itself is not functioning properly.[11]

9. Most participants only see the early stages of the criminal justice process. Put simply, the fairness of resolution discussions is central to the process: "dispositions meted out early in the criminal process [must] be fundamentally fair, and represent an acceptable reconciliation of the interests of the accused and the community"[12]

10. Informed resolution discussions require a close consideration of all the circumstances of the case. In this regard, the Martin Committee adopted the recommendation of the United States *Principles of Federal Prosecution*, that all the considerations relevant to the desirability of any particular resolution agreement include the probable sentence or other consequences if the defendant is convicted.[13] Resolution discussions conducted without regard for legally relevant collateral consequences may not result in fair resolutions, and are contrary to the public interest.

11. No one would dispute that fairness requires that adequate disclosure is made before the resolution discussions take place. Otherwise, an accused person may be put at a disadvantage in negotiations with the Crown because he or she does not appreciate significant weaknesses in the Crown's case or does not fully appreciate the cost to him in accepting the resolution proffered by the Crown. In both cases, the accused comes to the bargaining table without knowing what is at stake and what exactly he stands to lose or gain

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[10] Ontario Ministry of the Attorney General, *Crown Policy Manual*: Resolution Discussions (Toronto: Ministry of the Attorney General, 2005) at p.1

[11] The Honourable G. Arthur Martin, O.C., O.ONT., Q.C., LL.D. Chair: *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* ["Martin Committee Report"] (Toronto: Queen's Printer, 1993) at 281; *R. v. Anthony-Cook*, [2016] 2 S.C.R. 204 at para. 2, 25

[12] Martin Committee Report, *supra* at 17-18

[13] *Ibid.* at 303-304

by pleading guilty.[14] By analogy, an accused person unaware of collateral consequences such as immigration consequences is equally at an unfair disadvantage.

12. Resolution discussions are not concerned merely with quantum of sentence. The process is often used to fine-tune the facts the accused is prepared to admit and the Crown is prepared to accept, the charges to which an accused might plead and those the Crown might withdraw, the timing of the plea, and whether the Crown would proceed summarily or by indictment. [15] All of these decisions are potentially impacted by immigration consequences. As with other personal circumstances of the accused, it is the obligation of defence counsel to inquire about and adduce these factors where relevant or helpful at this early stage of the criminal process. The Crown's exercise of discretion is often tied to it. Awareness of immigration consequences by both parties at this stage can alter the entire direction of the discussions.

13. In *Padilla v. Kentucky*, the U.S. Supreme Court recognized that an appreciation of immigration discussions at the resolution discussion stage is essential to the proper function of this process:

> By bringing deportation consequences into this process, the defence and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offence may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offence that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defence with a powerful incentive to plead guilty to an offence that does not mandate that penalty in exchange for a dismissal of a charge that does.[16]

A requirement that in order to withdraw an uninformed guilty plea an appellant show that he would not have admitted guilt if informed of the immigration consequences, or that he had a route to acquittal, ignores the reality that *all* the participants (including the prosecutor) may have acted differently had they known of the immigration consequences.

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[14] *Ibid.* at 285-288

[15] Mario D. Bellissimo, *Canadian Citizenship and Immigration Inadmissibility Law* (Toronto: Carswell, 2017) at 10-1, 10-9, 10-49; Joseph DiLuca, "*Expedient McJustice or Principles Alternative Dispute Resolution? A review of Plea Bargaining in Canada*", 2005 50 C.L.Q. 14

[16] *Padilla v. Kentucky*, *supra* at p. 21

Inappropriateness of the Ineffective Assistance of Counsel Framework

16. If a plea is uninformed, the focus of the inquiry ought to be on the validity of the plea, and not the question of *why* the plea was uninformed. As Justice Fitch wrote, "the competence of counsel claim … adds unnecessary complexity to the analysis"[17] The test for ineffective assistance of counsel is neither principally nor practically the appropriate framework for analyzing whether or not the plea is informed.

17. Miscarriage of justice cases are concerned with the integrity of the underlying conviction. Where there has been a guilty plea, the integrity of that conviction rests entirely on the validity of the plea as a waiver of all the accused's rights. An inquiry into the competence of counsel may be one line of inquiry but hardly the only one. Where an accused is unrepresented, the question of competence of counsel is irrelevant. Where an accused is personally unaware of his or her immigration status[18], the question of competence of counsel is irrelevant. Where the law changes,[19] an inquiry into the competence of counsel is irrelevant. An inquiry into the competence of counsel should be the last resort, not the starting point of the analysis.

18. Society does not benefit from the proliferation of ineffective assistance of counsel claims. Provincial appellate courts have adopted practice directions or procedural protocols to attempt to manage claims of ineffective assistance of counsel.[20] This is because these appeals are inherently complex, time consuming and demand significant court resources. An appellant alleging infective assistance of counsel is required to waive solicitor client privilege. A complex factual inquiry almost always follows. The appellant and his former

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[17] Court of Appeal Reasons, para. 54
[18] *R. v. Ismail*, 2017 ONCA 597
[19] *R. v. Freckleton*, 2016 ONCA 130
[20] *Practice Direction Concerning Criminal Appeals at the Court of Appeal for Ontario*, Court of Appeal for Ontario (March 1, 2017), "Allegations of Ineffective Assistance of Counsel"; *Practice Directive (Criminal) Title: Ineffective Assistance of Trial Counsel*, British Columbia Court of Appeal (November 12, 2013); *Directive Regarding Appeal Proceedings Involving Allegations of Ineffective Counsel in First Instance*, Manitoba Court of Appeal (January 15, 2016); *Protocol for Appeal Proceedings Involving Allegations of Ineffective Counsel in First Instance*, Court of Appeal of New Brunswick (February 19, 2014); *Protocol for Appeal Proceedings Involving Allegations of Ineffective Trial Counsel*, Nova Scotia Court of Appeal (Accessed on September 23, 2017); *Rules of the Court of Appeal of Quebec in Criminal Matters*, Quebec Reg. SI/2006-42, s. 26; *Directive 6: Ineffective Assistance of Trial Counsel*, Yukon Court of Appeal (Accessed on September 23, 2017)

lawyer are put in an adversarial position. Where the issue on appeal is whether the plea is *informed*, the question in most cases can be addressed on a fresh evidence application without resorting to this process.

19. A rule requiring unnecessary ineffective assistance claims would undermine the public interest in fostering the solicitor-client relationship.[21] The U.S. Supreme Court in *Strickland v. Washington* cautioned against encouraging ineffective assistance of counsel claims:

> The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defence. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptance assistance could dampen the ardor and impair the independence of defence counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.[22] **[emphasis added]**

20. Allegations of ineffective assistance of counsel also erode solicitor client privilege, which is fundamental to the Canadian legal system and integral to its proper function.[23] In *R. v. McClure*, this Court observed that free and candid communication between the lawyer and client were essential to protect the legal rights of the citizen.[24] In *MacDonald Estate v. Martin*[25], this Court observed that the loss of confidence in solicitor-client privilege would deliver "a serious blow to the integrity of the profession and to the public's confidence in the administration of justice.[26] Without confidence in the privilege between solicitor and client - a relationship described by the Ontario Court of Appeal as one of "faith and confidence" - defence counsel simply cannot fulfill their duties as the guardian of the presumption of innocence.[27]

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[21] *R. v. Delchev*, 2015 ONCA 381 at paras. 57-58
[22] 466 U.S. 668 (1984) at p.29
[23] *R. v. McClure*, [2001] 1 S.C.R. 445 at para. 17
[24] *Ibid.* at paras. 33-35
[25] *MacDonald Estate v. Martin* [1990] 3 S.C.R. 1235
[26] *Ibid.* at para. 15
[27] *R. v. Delchev*, *supra* at para. 62

Standard of Care of Reasonable Criminal Defence Counsel

21. The inquiry into whether advice provided by criminal defence counsel meets the standard of "reasonable" is a factual one. The role of defence counsel with respect to a guilty plea is advisory, and involves advocacy in the negotiations with Crown counsel.[28] Defence counsel must advise their client of the Crown's 'offer' and whether it is prudent to accept that offer and all the attendant consequences.[29] If an accused cannot count on his criminal defence lawyer to advise him as to the potential collateral consequences of a plea, whom can he look to? No one else is better suited to provide this advice to a criminally charged individual. Some courts query whether the failure of a criminal defence lawyer to advise about potential immigration consequences falls below the standard of competence reasonably to be expected of a criminal lawyer.[30] The loss of status in Canada, near automatic deportation, resulting loss of property and community, and often alienation from family may be more significant than the temporary loss of liberty. No reasonable person would regard the failure of one's advocate to advise of these potential consequences as reasonable professional assistance.

22. The standard of care is evolving. Awareness of immigration issues in modern Canadian society is increasingly important. The authors of the text *Sentencing: The Practitioner's Guide* cite several reasons for this: "the increasing number of new Canadians; the increasing number of self-represented or under-represented accused; the increasing number of sentences with minimum prison terms; immigration legislation removing appeal rights of permanent residents from a removal order where they are sentenced to a certain period of imprisonment; and legislation making it more difficult, and slower, for certain offenders to get record suspensions."[31] They note that "[w]hile Canadian courts and Law Societies have so far not set an explicit obligation on criminal defence counsel to make sure that their clients are informed about the immigration

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[28] Steven Skurka and James Stribopoulos, Professional Responsibility in Criminal Practice - Bar Admission Course (Toronto: Law Society of Upper Canada, 2005) at 2.6
[29] Law Society of Upper Canada, *Rules of Professional Conduct*, r.4.01
[30] *R. v. Shiwprashad*, 2015 ONCA 577 at 65; *R. v. Lee*, 2016 ONSC 3425 at para. 26; *R. v. Martinez-Marte*, 2008 BCCA 136 at para. 19; *R. v. Ali*, 2015 MBCA 64 at para. 12
[31] Gary R. Clewley, Paul G. McDermott, Rachel E. Young, *Sentencing: The Practitioner's Guide* (Toronto: Thomson Reuters, 2017) at para. 1.330.

consequences, the evolving perception is that this is a best practice."[32] The growing line of appellate cases varying sentences in such situations make it less and less defensible for counsel to fail to inquire into the immigration consequences for an accused.[33]

23. As in all sentencing matters, it is the obligation of defence counsel to put forward information about the client that is relevant and may mitigate a sentence. Continuing education in criminal practice demonstrates that the standard of care has evolved. Criminal lawyers are regularly advised to (a) inquire as to the immigration status of their clients and (b) advise that there could be serious immigration consequences as a result of a plea, conviction or sentence. This is part of providing competent service.[34]

24. This is consistent with the U.S. approach: counsel must advise the client regarding the risk of deportation where this risk is clear. Recognizing that deportation is intimately connected to the criminal process, and sometimes the most important part of the penalty imposed on non-citizens for criminal conviction, the Supreme Court in *Padilla v. Kentucky* observed that accurate legal advice for noncitizens accused of crimes has never been more

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[32] *Ibid.* at para. 1.330.

[33] See also *R. v. Carlisle*, 2016 ONCA 950; *R. v. Tmenov*, 2017 ONCA 454; *R. v. Le*, 2013 ABCA 232; *R. v. Ismail*, *supra*; *R. v. Nassri*, 2015 ONCA 316; *R. v. Niazi*, 2015 QCCA 1863; *R. v. Frater*, 2016 ONCA 386; *R. v. Srbinovsky*, 2016 ONCA 729; *R. v. Edwards*, 2015 ONCA 537; *R. v. Freckleton*, *supra*; *R. v. McKenzie*, 2017 ONCA 128; *R. v. Basov*, 2015 MBCA 22.

[34] Peter Edelmann, "Immigration Consequences at Sentencing", paper presented at the Trial Lawyers Association of BC — Continuing Legal Education, Vancouver, 2013 and posted on the BC Legal Services Society's website under "Practice Resources"; Mario D. Bellissimo, *supra* at 10-1, 10-9, 10-49; Clewley & McDermott, *supra* at para. 1.330; Nora Rock and Katie James, "Can a criminal conviction make your client inadmissible for residency/citizenship?" (2014); Paul Calarco, "*R. v. Pham: Immigration Consequences in Sentencing"* Ontario Bar Association Criminal Justice Section, June 2013; Legal Aid Ontario, "Impact of criminal processes on immigration status and mobility" (October 1, 2013); Law Society of Upper Canada, "How to Prepare and Conduct a Sentencing Hearing" (December, 2016); Dale E. Ives, "Pleading your client guilty: key considerations for counsel" (2010) For the Defence Vol. 32:2; Marshall Drukarsh, "A brief primer on some immigration consequences arising from criminal convictions" (2012) For the Defence Vol. 33:5; Constance Baran-Gerez, "How Criminal Law Affects Immigration Matters: The Short Answer? It Depends" (April 12, 2014), presented at Law Society of Upper Canada program "The Six-Minute Criminal Defence Lawyer 2014"; John Norris, "Danger Ahead: The Immigration Consequences of Criminal Proceedings", presented at the 2015 CLA Spring Conference; Ayesha Kumararatne, "An immigration primer for criminal defence lawyers: basics, updates and practice", presented by the County of Carleton Law Association & the Defence Counsel of Ottawa on October 17-18, 2015; Legal Aid Ontario, *Plea Comprehension Inquiry Form.*

important. The Court concluded that the "weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation".[35]

25. These standards are not unreasonable.[36] An accused's waiver of constitutional, evidentiary and procedural rights must be informed, clear and unequivocal, with full knowledge of the rights a trial will protect, and full knowledge of the effect of such a waiver.[37] It is the duty of defence counsel to ensure that a client contemplating such a waiver is ware of the consequences.[38]A guilty plea is procedurally unfair where an accused demonstrates that his plea was not informed as to legally relevant consequences. No further showing of prejudice ought to be required.

PART IV – COSTS

26. The CLA makes no submissions regarding costs.

PART V - REQUEST TO PRESENT ORAL ARGUMENT

27. The CLA requests permission to present oral argument at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.
DATED at Toronto, Ontario this 25th day of September, 2017.

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Erika Chozik
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Cate Martell
Barrister, LSUC #65620C

Counsel for the Intervenor, Criminal Lawyers' Association

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[35] *Padilla v. Kentucky*, *supra* at p. 14-18

[36] American Bar Association, *Criminal Justice Standards for the Defence Function*, Standard 4-5.4; 4-5.5. The professional standards established by the American Bar Association mandate defence counsel consider collateral consequences and direct defence counsel to identify, investigate under applicable laws, seek assistance from specialists where it is needed and advise the client of collateral consequences that may arise from charge, plea or conviction, with special attention to immigration consequences. This duty arises sufficiently in advance so that collateral consequences "may be fairly considered in a decision to pursue trial, plea and other dispositions".

[37] *Korponey v. A.G. Canada*, *supra*

[38] Martin Committee Report, *supra* at 284

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