S.C.C. File No. 37367

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

B E T W E E N:

WING WHA WONG

Appellant
(Appellant at BCCA)

-and-

HER MAJESTY THE QUEEN

Respondent
(Respondent at BCCA)

-and-

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

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PART I – OVERVIEW AND FACTS

1. The collateral immigration consequences of a guilty plea can be the most severe consequences that an accused person will face on account of their criminal conviction. These consequences can include the deportation of a long-term permanent resident, the loss of a refugee claimant's ability to claim protection before the Immigration and Refugee Board, and a recognized refugee being stripped of the protection of non-*refoulement*. In these submissions, the Canadian Association of Refugee Lawyers ("CARL") proposes a test to assist courts in determining when, and the degree to which, an accused person must be aware of collateral consequences in order to make an informed plea, taking into account the nature of the consequences and the circumstances of the accused.

2. CARL takes no position on the facts before the Court.

PART II – POINTS IN ISSUE

3. CARL agrees that the points in issue are the ones identified by the Appellant and Respondent.

PART III – ARGUMENT

A. Framework for determining relevant collateral consequences

4. There are a range of collateral consequences that could result from a criminal conviction, including a range of immigration consequences. An accused need not be informed of every collateral consequence of their conviction in order for their plea to be informed. To determine the non-*Criminal Code* consequences of which an accused needs to be informed, CARL proposes a modified version of the framework set out by Justice Laskin in *R v Quick*.[1] The scope of applicable consequences can be narrowed in two ways: first, by limiting the applicable consequences to those that are legally relevant, and second, by considering the significance/meaningfulness of the consequence to a person in the accused's circumstances.

[1] *R v Quick,* 2016 ONCA 95 [*Quick*].

i. Relevance of the consequence

5. The first part of the assessment should consider the nature of the consequence itself, devoid of a consideration of the personal circumstances of the accused: is the consequence legally relevant? At the Court of Appeal below, Justice Fitch is the sole justice who comments on this issue, finding that the legal relevance of a consequence is a fact-specific inquiry to be decided on a case-by-case basis.[2] While the case-by-case approach provides judges with flexibility to deal with the myriad of consequences and impacts, it leaves defense counsel, the Crown and judges with little guidance as to the types of consequences of which an accused has to be informed.

6. Setting out the classes of consequences that would certainly be legally relevant, without closing the door on others, would provide some guidance to the actors in the criminal justice system. In *Quick*, for example, Justice Laskin finds that legally relevant consequences would at least include consequences imposed by the state.[3]

7. CARL also takes the position that state-imposed collateral consequences are always legally relevant ones. Parliament has chosen a range of consequences to be imposed on the basis of a criminal conviction – both criminal and non-criminal consequences. The fact that some consequences appear in statutes other than the *Criminal Code* does not diminish their legal relevance. All collateral immigration consequences flowing from a criminal conviction are state-imposed consequences and in CARL's submission there should be no further inquiry required to establish that immigration consequences are legally relevant. Moreover, this Court's finding in *R v Pham* affirms that immigration consequences are the very sort of consequences that are legally relevant to the criminal justice process.[4] If collateral immigration consequences are consequences of which a judge must be aware when deciding on a fit sentence for a particular offence, it follows that these are consequences of which an accused must be aware in making an informed decision as to whether to plead guilty to that offence.

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[2] *R v Wong*, 2016 BCCA 416 [*Wong*].

[3] *Quick* at para 28.

[4] *R v Pham*, 2013 SCC 15[*Pham*].

ii. Significance of the consequence to a person in the accused's position

8. The second issue is whether the consequence is meaningful to a person in the accused's circumstances. Even if a consequence is a legally relevant one, it may not be a meaningful one for a person in the accused's position. It is at this stage that some level of factual inquiry is required.

9. First, does the accused belong to the class of people to whom this consequence would apply? And second, is there a realistic possibility a reasonable and properly informed person, put in the same situation, would have not pled guilty if they had known about the consequence.

10. The framing of this second question as an objective test is borrowed from this Court's decision in *R v Taillefer.*[5] The *Taillefer* case related to the invalidity of a plea where evidence was not disclosed to the accused prior to making a guilty plea. This Court was clear that the question is not "whether the accused would actually have declined to plead guilty." Rather, it was whether there was a realistic possibility that a reasonable and properly informed person would have declined to do so in the circumstances.[6] The same approach should prevail in this case.

11. The aim of this test is not to turn back the clock to find out if the accused would have pled guilty, had they had knowledge of the consequence. Rather, it is to gauge the significance of the consequence to someone in the accused's position. This is an exercise in determining whether the consequence is of such a level of seriousness that a person in the accused's circumstances should have been informed of it in order to make an informed decision to plead guilty.

12. In *Quick,* Justice Laskin draws on the language from the *Taillefer* decision, though he determines that the test is a subjective one rather than an objective one, concluding that the central issue is "would the information have mattered to the accused? If the answer is yes, the information is significant."[7]

13. The problem with the subjective approach is evident in the case at bar. In the Appellant's case, he would face the consequence of deportation from a country where he has lived as a

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[5] *R v Taillefer*, 2003 SCC 70 [*Taillefer*].

[6] *Taillefer* at para. 90

[7] *Quick* at para 33.

permanent resident for over 25 years, severing the relationship with his family, friends and his social network. The significance of this consequence is not discussed in any of three concurring reasons. The focus instead in all three reasons is the lack of information provided by Mr. Wong himself as to whether he would have declined to plead guilty had he known about the risk of deportation. While there is debate in the judgment below as to whether demonstration of an articulable path to acquittal is necessary, all three justices agree that there is no prejudice to Mr. Wong unless it is found that he *would not* have pled guilty if he had known the immigration consequence.

14. Justice Laskin in *Quick* conceives of the prejudice differently than the Court of Appeal in *Wong*, finding that prejudice is inherent in an accused giving up their right to a trial based on an uninformed plea.[8] Justice Laskin relies on a subjective test not to determine whether there is a prejudice to the accused, but rather as a means to determine the level of significance a particular collateral consequence has on the accused.[9] It is CARL's position that while determining the meaningfulness of the consequences is the right inquiry– the objective test as set out in *Taillefer* is preferable.

15. First, the requirement that an accused be informed as to the legally relevant consequences of a guilty plea should not vary according to a *post facto* assessment of the accused's state of mind and the choices that they might have made at the time the plea was entered. The proposed objective test avoids the extremely difficult task of trying to recreate the accused's thought process in choosing to make the guilty plea, and rather asks the court to consider whether knowledge of the collateral immigration consequences would have mattered to a person in the circumstances of the accused.

16. Second, the test developed for invalidating a plea necessarily has implications for the information that an accused is required to have at the time they decide how to plead. The quantity of information that an accused is required to have should not vary according to an accused's subjective state of mind, leaving it so that the actors in the criminal justice process are not provided with guidance as to the sorts of consequences of which an accused would need to be

[8] *Quick* at para 38.

[9] *Quick* at para 35.

informed prior to making a guilty plea. For example, if a collateral consequence is a serious one, we would not want defense counsel making the judgment call that the accused need not know it given that their chances of success at trial are low. We would want them to simply provide the information to the accused so the accused could make an *informed* choice. Another example is that of an accused person who is trapped in a situation of addiction, or who lives with depression or other mental illness, who might well not be able to establish that they would have made a different choice at the time of their plea. It cannot be that someone who pled guilty simply because they did not feel as though they could fight the charges due to their mental or emotional state should be entitled to a reduced amount of information about the consequences of their plea simply because it is speculated that they might not have chosen to go to trial. It is CARL's submission that an objective test is the best way to promote the desired outcome that accused persons be aware of the serious, legally relevant consequences of their guilty plea.

iii. Presumption for severe consequences

17. It is submitted that, on an objective test, there are some collateral immigration consequences that are so grave on their face that, if those consequences apply to the accused, the Court should recognize a presumption that an accused must be informed of them prior to pleading guilty. In CARL's submission, risk of deportation of a permanent resident and the ineligibility to make a refugee claim are two of these most serious consequences.

18. Criminal convictions can lead to the deportation of permanent residents. According to s. 36(1) of the *Immigration and Refugee Protection Act* ("*IRPA*")[10], a permanent resident who, *inter alia,* is convicted of an offence that carried a maximum punishment of at least 10 years imprisonment is criminally inadmissible to Canada. If the permanent resident is referred to an admissibility hearing on this basis, the Immigration Division must issue them a deportation order. And if the permanent resident actually received a sentence of six months or more imprisonment, they lose their right to appeal to the Immigration Appeal Division on equitable grounds.[11] Instead, they automatically cease being a permanent resident on the day the deportation order was

[10] *Immigration and Refugee Protection Act,* SC 2001, c 27, ("*IRPA*").

[11] *IRPA* at section 64

issued. Unless the individual can demonstrate risk in their country of removal, s. 48(2) of the *IRPA* requires that their deportation order be executed "as soon as possible."[12]

19. Deportation by the state is a uniquely serious collateral consequence of a guilty plea. Deportation is akin to banishment and exile, severing the connection between an individual and their adopted home and community. Deportation can be the most serious result from a finding of guilt – more serious even than incarceration.[13] With respect, Justice Fitch's comments in the Court of Appeal below do not appreciate the significance of the consequence of deportation. Justice Fitch finds: "We cannot speculate about whether Mr. Wong would have privileged longer-term immigration goals over shorter term goal of avoiding a custodial sentence."[14] In CARL's view, characterizing a long-term permanent resident's entitlement to remain in their home country as an "immigration goal" dramatically understates what is at stake. Where deportation is the collateral consequence, we are not discussing a person's "immigration goals", but rather the serious consequences that arise when an individual is severed from their adopted home, community, family ties, employment – the defining features of their life.

20. In addition to permanent residents, refugee claimants[15] also face direct and severe consequences as a result of criminal convictions. A refugee claimant who has been determined to be inadmissible, for having been convicted of an offence that carries with it a maximum term of imprisonment of at least 10 years cannot have their claim for refugee protection referred to the Refugee Protection Division.[16] Instead, these claimants are only eligible to submit a written Pre-Removal Risk Assessment ("PRRA") application, and some claimants will only have their have their risk assessed on a higher standard of a balance of probabilities.[17] Moreover, refugee protection may not be conferred on a PRRA applicant who is determined to be inadmissible due to having been convicted of an offence that could have been punished by a sentence of ten years or more. Even if successful in their PRRA application, applicants who are inadmissible for

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[12] *IRPA* at ss 46(1)(c), 48, 49(1)(a).

[13] *Padilla v Kentucky,* 559 US 356 (2010), cited in *R v Shiwprashad*, 2015 ONCA 577 at para.62 [*Shiwprashad*]. See also *Jae Lee v. United States,* 582 US (2017) at p.11,12.

[14] *Wong* at para 69.

[15] A person may have the status of "refugee claimant" for many years in Canada due to delays in processing their claim or because they were successful on an appeal or judicial review and the matter has not yet been re-determined.

[16] *IRPA* at ss 101(1)(f), 101(2)(a).

[17] *IRPA* at s. 113(e)(i).

serious criminality in the circumstances described above only receive a stay of removal. They are not eligible to apply for permanent residence as Protected Persons and they cannot sponsor their overseas family members to join them in Canada.[18]

21. These consequences are not remote. Both the risk of deportation for permanent residents or being found ineligible for the refugee claim process are direct and foreseeable consequences of conviction and/or sentencing for certain kinds of offences that render individuals inadmissible on the grounds of serious criminality.

22. There are a range of other relevant immigration consequences that are triggered by the convictions of certain kinds of offences. It is submitted that in some cases, depending on the circumstances, an accused should be able to invalidate their plea if they were not informed of these consequences prior to making their plea.

23. For example, for some foreign nationals, the consequences of a criminal conviction could be severe. A foreign national who is convicted of any indictable offence or two summary conviction offences not arising from the same incident is inadmissible to Canada and will almost certainly be the subject of a removal order.[19] Upon issuance of a removal order, the removal order would be in force and the person could be removed from Canada. A person who is studying would be unable to finish their program and a person who is employed would lose their job.[20] If the foreign national has applied for permanent residence, the application would be refused due to the person being inadmissible to Canada.

24. A criminal conviction can impact a citizen's or a permanent resident's ability to sponsor a relative to Canada.[21] For a person in a relationship who was in process of applying to sponsor their relative, this may be a significant consequence.

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[18] *IRPA* at s 112(3)(b).

[19] This is the combined effect of IRPA at ss 36(2), 44(1), 44(2), and 45(d) and the decision of the Federal Court of Appeal in *Cha v Canada (Minister of Citizenship and Immigration),* 2006 FCA 126.

[20] Upon issuance of the removal order, the removal order comes into force pursuant to *IRPA* at ss. 48 and 49. The person is subject to removal from Canada immediately subject only to a right to apply for a Pre-Removal Risk Assessment, a process where the person's risk of persecution or torture or other forms of cruel or inhumane treatment is assessed.

[21] *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*], ss 133(1)(e); with exceptions granted under *IRPR* s 133(2).

25. For these other types of consequences that may not be presumed to be serious, more information relating to the particular circumstances of the accused may be required to determine, on an objective test, whether there is a realistic possibility a reasonable and properly informed person, put in the same situation, would not have pled guilty if they had known about the consequence.[22]

26. An objective test to determine the significance of the consequence provides courts flexibility in determining whether the consequence is one of which the accused should have been informed, taking into account the circumstances of the accused and the nature of the consequence. This avoids an attempt to ascertain what a particular accused's subjective intention might have been had they known the information.

B. Level of awareness of the consequence

27. It is submitted that if a consequence is established as legally relevant, and one that was significant to a person in the accused's circumstances, the next step would be to consider whether the accused was sufficiently informed of that consequence. This is generally a factual exercise. The legal issue that arises is in determining the level of knowledge required for an informed plea.

28. The question of Mr. Wong's level of awareness of the immigration consequences did not arise as it was common ground that Mr. Wong had no awareness that an immigration consequence could result from his conviction. Nevertheless, CARL submits that this Honourable Court should take the opportunity presented by this appeal to provide guidance as to the level of awareness of collateral consequences required for a guilty plea to be considered informed.

29. Both the Courts of Appeal in BC and in Ontario have issued decisions in the context of immigration consequences suggesting that an accused who is aware that there is a possibility of some immigration jeopardy, without specific knowledge about the precise immigration consequence, has been sufficiently informed.[23] For example, in the case of *R v Tyler*, where the accused was on an IAD-imposed stay of a removal order, the BC Court of Appeal held that given

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[22]For example, in *R v Meehan*, 2013 ONSC 1782, the Court overturned a guilty plea of a foreign national who was on a work permit in Canada and not informed of the immigration consequences of his conviction – in his case, the Court determined that it was a serious consequence as it impacted his future plans to become a permanent resident of Canada. In *R v Harvey*, 2017 ONSC 4500 the Court overturned the guilty plea where the accused, a foreign national, with children in Canada, was not informed that as a result of his conviction he would be found to be inadmissible on his application to be sponsored by his spouse in Canada.

[23] *R v Tyler,* 2007 BCCA 142; [*Tyler*]; *R v Kitawine,* 2016 BCCA 161; and *R v Shiwprashad*.

that the accused had already gone through an immigration process related to his criminality, he knew that a further conviction could have immigration consequences and impact his ability to remain Canada. The Court of Appeal concluded that it did not matter that the accused was not aware that the conviction would lead to an automatic cancellation of his stay without any right of appeal:

> Does the ignorance of an automatic effect of the conviction vitiate the plea? If that were so, then pleas could be struck on the basis that the outcome was not precisely anticipated. That kind of certainty is not to be expected in the criminal process, especially where judges are free to depart from bargains struck by counsel, within certain reasonable limits.[24]

30. It is submitted that reliance on the rationale that an accused is not entitled to know the precise outcome is misplaced.[25] This rationale should not be applied to circumstances in which, at the time the accused is making their plea, there *is* a specific, serious, knowable and direct consequence of the very plea they are making.[26] The Ontario Court of Appeal in *R v Shiwprashad,* also held that it was sufficient that the accused knew "that deportation was a potential consequence of his guilty plea although he may not have appreciated precisely how limited his options were to avoid that consequence."[27] The conclusion that it is sufficient for an accused to have a general idea that there could be immigration consequences is incongruent with the requirement that an accused be informed of the consequences of their plea.

31. For example, if an accused person had been convicted of a similar offence in the past, and therefore understood from experience that there was a possible term of imprisonment associated with the offence but had only a vague and non-specific idea as to the possible criminal consequences, they would not be deemed to have had a sufficient level of awareness of the

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[24] *Tyler* at para 24.

[25] This Honourable Court's decision in *R v Lyons,* [1987] 2 SCR 309 [*Lyons*], is cited in a number of these cases. The issue in *Lyons* is not analogous. The case involved a number of *Charter* issues – one of them was whether s 7 of the *Charter* was violated by the failure of the Crown to notify the accused prior to his plea that a dangerous offender application would be brought after his conviction. First, *Lyons* is distinguishable in that it was considering the lack of notification in terms of a s 7 violation. Second, the issue in *Lyons* was not that the accused was not informed of the possibility of a dangerous offender application being brought, but rather that the accused was not informed of the Crown in their particular case contemplating bringing an application after he was convicted. The Court found that the accused was not entitled to know this precise outcome. In the context of collateral immigration consequences this would be akin to an accused wanting to know prior to making their plea whether the Minister's Delegate was planning to prepare a s 44 report on their inadmissibility.

[26] Section 68(4) of *IRPA* provides that a stay of removal ordered by the Immigration Appeal Division will be automatically cancelled by operation of the law where a person, during the period of their stay of removal, is convicted of a subsequent offence that amounts to serious criminality as defined in *IRPA* at s 36(1)(a).

[27] *Shiwprashad,* at para 3.

consequences of their plea. To permit similarly uninformed pleas in respect of immigration consequences would be to impoverish the protections afforded to an accused when making the momentous decision on a guilty plea.

32. CARL submits that a general understanding that one might be exposed to *some* jeopardy is insufficient to render a plea informed. Specific information on the particular immigration consequence of the plea is required. This is particularly the case where the immigration consequence could be more severe than the criminal penalty. As set out above, risk of deportation for permanent residents and being rendered ineligible for refugee protection, are examples of grave consequences that flow directly from being convicted of certain offences.

C. Prejudice is in giving up right to trial

33. CARL agrees with the Appellant's position, following the reasoning of the Ontario Court of Appeal in *Quick* and *R v Rulli*[28], that once it has been established that an accused was not informed of a serious, legally relevant consequence prior to pleading guilty, the prejudice lies in having given up their right to a trial.[29]

PART IV – SUBMISSION ON COSTS

34. CARL seeks no costs and respectfully requests that none be awarded against it.

PART V – ORDER SOUGHT

35. CARL makes no submissions as to the outcome of the appeal but respectfully requests that it be determined in light of the foregoing submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED
DATED this 22nd day of September, 2017.

Lobat Sadrehashemi

Lorne Waldman

Counsel for the Intervener,
Canadian Association of Refugee Lawyers

[28] *R v Rulli,*2011 ONCA 18 at para 2 [*Rulli*].
[29] *Quick* at para 38; *Rulli*,

PART VI – TABLE OF AUTHORITIES:

	CASES	REFERRING PARA(S)
1	*Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126.	23
2	*Jae Lee v. United States*, 582 U.S. (2017).	19
3	*Padilla v Kentucky*, 559 US 356 (2010).	19
4	*R v Harvey*, 2017 ONSC 4500.	25
5	*R v Kitawawine*, 2016 BCCA 161.	29
6	*R v Lyons*, [1987] 2 SCR 309.	30
7	*R v Meehan*, 2013 ONSC 1782.	25
8	*R v Pham*, 2013 SCC 15, [2013] 1 SCR 739.	7
9	*R v Quick*, 2016 ONCA 95, 129 OR (3d) 334.	4,5,6,12,14,33
10	*R v Rulli*, 2011 ONCA 18.	33
11	*R v Shiwprashad*, 2015 ONCA 577, 328 CCC (3d) 191.	19, 29, 30
12	*R v Taillefer*, 2003 SCC 70, [2003] 3 SCR 307.	10, 12, 14
13	*R v Tyler*, 2007 BCCA 142.	29, 30
14	*R v Wong*, 2016 BCCA 416.	5, 13, 14

	Statutory Provisions	**Referring paras**
	Immigration and Refugee Protection Act, SC 2001, c 27, sections 21(2), 25, 35, 36(1), 36(2), 37, 38, 44(1), 44(2), 45(d), 46(1)(c), 48, 49, 64(2), 68(4), 95, 101(1)(f), 101(2), 112(3)(b), 113(e)(i), 115(2).	18, 20,23, 30
	Immigration and Refugee Protection Regulations, SOR/ 2002-227, section 133.	24

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