Court File No. 37367

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

BETWEEN :

WING WHA WONG

APPELLANT

- and -

HER MAJESTY THE QUEEN

RESPONDENT

- and -

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

INTERVENERS

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(Rules 37 and 42(1) of the *Rules of the Supreme Court of Canada*)

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PART I

A. Overview

1. Approximately 90 per cent of criminal charges in Canada are resolved by way of a guilty plea.[1] Without its routine application the system would collapse under its own pressure.[2] Many persons that plead guilty in criminal courts across this nation are self-represented. Others, especially in custody inmates, are assisted by competent duty counsel with limited time to assess their background or give advice about collateral consequences. Even when the person pleading guilty is represented by private counsel, mistakes happen.

2. Further, visible minorities and marginalized communities are disproportionately subject to pre-trial and post sentence custody,[3] making them vulnerable to collateral consequences resulting from guilty pleas. This is the human rights context in which these issues should be considered.

3. Guilty pleas carry consequences that are life-altering. Criminal procedure must be more responsive to the ways that pleas and sentences can trigger significant collateral consequences for both permanent residents and Canadians. For justice to be truly served, the plea procedure across the country must be fine-tuned to ensure that these adverse consequences are taken into account. The Court can only be satisfied that a plea is informed when the individual is advised of the statutory penalties that are relevant to their sense of liberty, legal status, and security of the person. Likewise, the sentence is more likely to be just when it factors all relevant penalties that could be triggered.

4. The more severe or life-altering the statutory consequences are that flow from the plea or sentence, the more pressing it will be to inform the individual of them as part of the plea inquiry. Judicial confirmation that the individual is aware of the consequences during the

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[1] Government of Canada, "Victim Participation in the Plea Negotiation Process in Canada" *Department of Justice*, (7 January 2015), online: www.canada.justice.gc.ca < http://www.canada.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr02_5/p0.html>

[2] *R v Anthony-Cook*, [2016] 2 SCR 204, 2016 SCC 43: https://www.canlii.org/en/ca/scc/doc/2016/2016scc43/2016scc43.html?autocompleteStr=R.%20v.%20Anthony-Cook%2C%20%5B2016%5D%202%20S.C.R.%20204%20&autocompletePos=1 at 40.

[3] Ivan Zinger, "The Changing Face of Canada's Prisons: Correctional Investigator Reports on Ethno-Cultural Diversity in Corrections," www.oci-bec.gc.ca. November 26, 2013. http://www.oci-bec.gc.ca/cnt/comm/press/press20131126-eng.aspx

plea inquiry is necessary if the penalty is mandatory or likely to be imposed even if discretionary; the penalty results in the loss of liberty, legal status, privacy, privileges, or other significant hardship; and the penalty's duration is long.

5. Counsel for the individual entering the plea has the highest obligation to inform their client of these consequences. However, the prosecutor and Judge also have key roles to fulfill. Despite working in an adversarial system, defence counsel, prosecutors and Judges have complimentary responsibilities to confirm that a plea is informed *and* that the Court has received the relevant information about the related penalties in order to impose a just sentence.

B. Statement Of The Facts

6. The ACLC adopts and relies upon the facts pleaded in the Appellant's Factum.

PART II – POSITION ON THE APPELLANT'S QUESTIONS

7. The ACLC submits that the individual pleading guilty must *at minimum* be informed of statute mandated collateral penalties that result in a loss of liberty, legal status, privacy, privileges tied to dignity, or other significant hardships.

PART III – STATEMENT OF ARGUMENT

A. Deportation Consequence

8. The deportation consequence for a permanent resident should be recognized nationally as being a relevant factor on an informed plea.[4] It has already been held by this Court in *Pham* to be relevant to the determination of a fit sentence.[5] It is clearly a relevant factor that affects the voluntariness of the plea and the fitness of the sentence. It also has a significant impact on a person's dignity and security of the person.

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[4] *R v Quick* 2016 ONCA 95, 129 OR (3d) 334: https://www.canlii.org/en/on/onca/doc/2016/2016onca95/2016onca95.html?resultIndex=1 at 33.
[5] *R v Pham*, [2013] 1 SCR 739, 2013 SCC 15: https://www.canlii.org/en/ca/scc/doc/2013/2013scc15/2013scc15.html?autocompleteStr=R.%20v.%20pham&autocompletePos=1.

9. Canada is a nation of immigrants, a large proportion of whom hold only permanent resident status. In addition, many of these permanent residents are racialized. It is well established that racialized persons are over-represented in criminal justice. Judges and lawyers must not ignore this reality.[6]

10. There are multiple reasons why the deportation consequence should be featured in the guilty plea process. First, the deportation consequence is important information that will invariably influence the accused's decision on whether to plead guilty. Deportation is life-altering for both the individual and their family.

11. Second, it is also a relevant factor in plea negotiations. For instance, a prosecutor (or Judge in a judicial pre-trial) may initially suggest a disposition of 9 months jail on a plea. However, once they are aware of and consider the relevant deportation consequence, they may be open to a sentence of just under 6 months with more onerous probation terms or a plea to another count.

12. Third, even when a plea is entered and the sentence is contested, the Judge must give this consequence serious consideration to determine a fit sentence. Failure to do so may result in an error in principle and the sentence being overturned on appeal.

B. Duty of All Justice System Participants

i) Duty of Defence Counsel

13. There are 3 legal experts in a criminal court. The Judge, defence counsel, and the prosecutor.

14. It is conceded that defence counsel have the highest obligation to inform their client of collateral consequences such as the immigration consequence of deportation pursuant to

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[6] *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995) (Co-chairs: M. Gittens and D. Cole) at 70-75; Parole Board of Canada, *Performance Monitoring Report 2008-2009* online < http://pbc-clcc.gc.ca/rprts/pmr/pmr_2008_2009/5-eng.shtml>; Shelley Trevethan & Christopher Rastin, *A Profile of Visible Minority Offenders in the Federal Canadian Correction System* (Ottawa: Correctional Service of Canada, 2004) at 3, 10-11; Office of the Correctional Investigator, *Annual Report 2012-2013* (Ottawa: OCI, 28 June 2013) at 3-4, 9. *See also* Office of the Correctional Investigator, *Annual Report 2013-2014* Ottawa: OCI, 27 June, 2014) at 2.

section 36(1)(a) of the *Immigration and Refugee Protection Act* (the "*IRPA*")[7]; and the termination of their right of appeal under section 64(2) of the *IRPA*.[8]

15. Further, defence counsel have the primary duty to make submissions to the court around the impact of any significant adverse collateral consequence on the accused to ensure that when appropriate, it is considered in the fashioning of a fit sentence. [9] However, in the interests of justice, the prosecutor and Judge also have important and complimentary roles to play.

ii) Duty of the Prosecutor

16. When aware that the accused is a permanent resident, the prosecutor *also* has an ethical and professional responsibility to inform the court of the deportation consequence.[10] Similarly, if the prosecutor is aware that the individual pleading guilty will be subject to some other significant collateral consequence as a result of the admission of guilt or sentence, they should inform the court when it could have an effect on the nature of the sentence.[11] In order to be professionally responsible, all counsel should learn about collateral consequences relevant to the voluntariness of a plea and the scope of the sentence. They should also consult with relevant legal experts as required. For federal prosecutors this can be as easy as speaking to their immigration colleagues down the hall. Likewise, federal prosecutors can educate provincial prosecutors.

17. Prosecutors should share some of the burden for two reasons. First, to ensure that the plea is informed. Second, to facilitate a fair and proportionate sentence.[12]

18. The prosecutor is a minister of justice and performs a quasi-judicial function. Therefore, the Crown's conduct before the court must always be characterized by moderation and

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[7] *Immigration and Refugee Protection Act*, SC 2001, c 27, ss. 36(1)(a). http://laws-lois.justice.gc.ca/eng/acts/i-2.5/section-36.html
[8] *Ibid* at ss. 64 (2).
[9] When defence counsel do not have the requisite knowledge or expertise, they should refer the client to speak to counsel in the relevant field.
[10] Ontario Ministry of the Attorney General, *Crown Policy Manual - 2005*, Toronto: Ontario Ministry of the Attorney General, 2005, *Role of the Crown- Preamble to the Crown Policy Manual*, at 1. https://www.attorneygeneral.jus.gov.on.ca/english/crim/cpm/2005/CPMPreamble.pdf
[11] Some collateral consequences will inform the length of the sentence or the types of conditions.
[12] This is true for all prosecutors. It is arguably fundamental to the role of a federal prosecutor who works within the sister branch of the immigration department.

impartiality.[13] The Crown's duty is to ensure that the fullest possible justice is done. The rules of professional conduct across the provinces further support the notion that the prosecution must be guided by fairness and accuracy.[14]

19. Sections of the *Criminal Code* also support the proposition that both counsel should be permitted to assist the judge in this regard.[15] Section 723 (1) indicates that a court must allow the prosecutor and the offender to make submissions with respect to any facts (or law) relevant to the sentence.[16]

iii) Duty of the Jurist

a) Informed Plea

20. The sentencing judge has a dual responsibility to ensure that (1) an individual's plea of guilt is properly informed and; (2) that the court receives accurate information about collateral consequences that may impact the imposition of a just sentence.

21. In our diverse nation, there is a clear nexus between the administration of criminal justice and inadmissibility to Canada for permanent residents or foreign nationals. There is also a correlation between the enforcement of criminal laws towards marginalized individuals and

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[13] *Boucher c The Queen*, [1954] SCJ No 54, [1955] SCR 16 at para 21: https://www.canlii.org/en/ca/scc/doc/1954/1954canlii3/1954canlii3.html?autocompleteStr=%5B1954%5D%20SCJ%20No%2054&autocompletePos=1; *R. v O'Neil Harriott,* 2017 ONSC 3393 at para 56: https://www.canlii.org/en/on/onsc/doc/2017/2017onsc3393/2017onsc3393.html.

[14] See also The Law Society of Upper Canada, "Rules of Professional Conduct", Online: http://www.lsuc.on.ca/uploadedFiles/NewRulesofProfessionalConduct-effectiveOct2014.pdf at p 77 section 5.1-3: "When acting as a prosecutor, a lawyer shall act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect."; see also Law Society of Alberta, "Code of Conduct", Online: https://dvbat5idxh7ib.cloudfront.net/wp-content/uploads/2017/01/14211909/Code.pdf at p 78 section 5.1-4; The Law Society of British Columbia, "Code of Professional Conduct for British Columbia", Online: https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/code-of-professional-conduct-for-british-columbia/ at 2.1-1; Law Society of New Brunswick, "Code of Professional Conduct", Online: http://lawsociety-barreau.nb.ca/uploads/forms/Code_of_Professional_Conduct.pdf at p 31-32 chapter 8: "When acting as an advocate for the client the lawyer shall not (viii) Deliberately refrain from informing the court of any pertinent adverse authority that the lawyer considers to be directly in point and that has not been mentioned by other counsel"; see also The Canadian Bar Association, "Collateral Consequences of Criminal Convictions", Online: <http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/Sections/CollateralConsequencesWebAccessible.pdf>.

[15] *Criminal Code of Canada*, RSC 1985, c C-46, s 723. http://laws-lois.justice.gc.ca/eng/acts/C-46/page-183.html#docCont

[16] *Ibid.*

guilty pleas. As a result, Judicial ethics and obligations governing the plea procedure should adjust accordingly.

22. A Judge should ask an individual during the plea inquiry whether they are a permanent resident and are they aware that the plea and sentence may result in deportation pursuant to the *IRPA.*[17] Similarly, Judges should also identify other relevant collateral consequences whenever relevant.

23. This common sense approach to the judicial role in the guilty plea was noted by the Ontario Court of Appeal in *Quick* in the context of regulatory penalties associated with driving offences: "*I simply observe, that before an accused pleads guilty to a driving offence, a trial judge would be well advised to ensure that the accused understands the nature and length of any license suspensions.*"[18] Certainly, given the relatively greater impact that deportation has on an individual's liberty, legal status, and security, Judges would be wise to confirm that the accused understands this grave consequence before accepting their plea and imposing a sentence.

24. The judicial responsibility can be met by notifying the self-represented individual entering the plea of the relevant penalty or collateral consequence and confirm that they understand. Alternatively, the Judge can ask defence counsel if they have canvassed this issue with their client. For instance, to verify that the plea is informed, the accused can then confirm that they are aware of the immigration consequences and have had the opportunity to obtain relevant legal advice. Once there is confirmation, the court can then invite submissions from the parties about a fit sentence taking into account this relevant factor.

25. This approach does not require the Judge to give legal advice. It is consistent with the spirit of section 606 (1.1) of the *Criminal Code,* which sets out the conditions required for a court to accept a guilty plea, including that the plea is voluntary and the accused understands the consequences of the plea.[19]

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[17] *Supra note 9,* at ss. 64(2)
[18] *Supra* note 6, at 40
[19] *Supra* note 17 at s 606 (1.1): http://laws-lois.justice.gc.ca/eng/acts/C-46/page-152.html#h-209; see also *R v Rulli,* 2011 ONCA 18: https://www.canlii.org/en/on/onca/doc/2011/2011onca18/2011onca18.html?resultIndex=1 at 2; the principle is also cited with approval by Pardu J.A. in *R v Aujla,* 2015 ONCA 325:

26. It is recognized that a failure to conduct the plea inquiry in the proposed manner in each and every case will not necessarily cause the plea to be invalidated. Nonetheless, the Supreme Court should send a signal to Judges nation-wide that the inquiry *should* be consistently done or the plea risks being struck if it is later revealed that the individual was unaware of the collateral consequence.[20]

27. Sentencing Judges should not be reticent to notify the parties that, if the offence for which the plea of guilt is entered triggers an inadmissibility hearing under section 36(1)(a) of the *IRPA*, the plea will result at minimum in the risk of deportation. They should feel similarly comfortable informing the parties that if the jail sentence imposed exceeds 6 months, then the accused loses his/her right of appeal pursuant to section 64(2) of the *IRPA*.[21]

b) Fit Sentence

28. Section 718.1 of the *Criminal Code* states that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.[22] Balancing the global negative consequences of the sentence against the moral blameworthiness of the offender is necessary to determine a fit sentence.

29. In order to meet the statutory sentencing objectives, Judges must be mindful of the collateral consequences. They must be considered as part of the sentencing calculus. As a result, Judges should receive their own continuing education about those consequences. For instance, after considering the totality of the sentencing principles with the deportation consequence in mind, the Judge will be better informed to determine whether a sentence of less than six months of jail is fit.[23]

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https://www.canlii.org/en/on/onca/doc/2015/2015onca325/2015onca325.html?resultIndex=1&searchUrlHash=AAAAAQAMY29uc2VxdWVuY2VzAAAAAAE&offset=0 at 16.

[20] *Ibid*, at s 606 (1.2)

[21] *Supra* note 9, s 64 (1).

[22] *Supra* note 17, at s 718. http://laws-lois.justice.gc.ca/eng/acts/C-46/page-181.html#docCont

[23] See *R v Nassri*, 2015 ONCA 316, 125 OR (3d) 578: https://www.canlii.org/en/on/onca/doc/2015/2015onca316/2015onca316.html?resultIndex=1 at 33-34; *R v Jahanrakhshan*, 2013 BCCA 322, 108 WCB (2d) 577: https://www.canlii.org/en/bc/bcca/doc/2013/2013bcca322/2013bcca322.html?resultIndex=1 at 36; *R v Almotairi*, 2013 BCSC 1424: https://www.canlii.org/en/bc/bcsc/doc/2013/2013bcsc1424/2013bcsc1424.html?resultIndex=1 at 1, 37. Also,

30. Writing for this Court in *Pham*, Wagner J. wrote that the deportation consequence is relevant to the application of the sentencing principles of individualization and rehabilitation. Taking into account the risk of deportation will assist sentencing judges in the execution of their statutory duties.

> In light of these principles, the collateral consequences of a sentence are any consequences for the impact of the sentence on the particular offender. They may be taken into account in sentencing as personal circumstances of the offender. … Their relevance flows from the application of the principles of individualization and parity. The relevance of collateral consequences may also flow from the sentencing objective of assisting in rehabilitating offenders (s. 718(*d*) of the *Criminal Code*). Thus, when two possible sentences are both appropriate as regards the gravity of the offence and the responsibility of the offenders, the most suitable one may be the one that better contributes to the offender's rehabilitation.[24]

31. The *Criminal Code* and common law support that Judges should be seeking out information about collateral consequences relevant to sentences. The Code provides the sentencing Judge with the authority to make inquiries to ensure that the best information is presented by counsel. Section 723 (3) states that the court may require the production of evidence that would assist it in determining the appropriate sentence.[25]

c) Notice of Other Statutory Imposed Penalties Should Be Encouraged

32. Delineating the scope of collateral consequences that the individual should be made aware of for the plea to be informed is a tougher issue. However, the plea inquiry process should be flexible to ensure that accused persons are at least informed of other important statutory penalties that are triggered by a plea of guilt or sentence for certain offences. Registrars in criminal courts in Ontario already notify individuals prior to pleading guilty to over 80 and impaired driving offences that upon conviction, the *Highway Traffic Act* mandates a driver's license suspension and surrender of their license. This is not time consuming, onerous, or complex. It is done because that penalty is mandatory and has a significant impact on a person's life, liberty, security, and ability to meet their daily needs in a modern world.

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subject to this Court's pending ruling in *R v Tran*, it may enhance the prospects of a conditional sentence should it be available and not trigger deportation.
2007 BCCA 491, 247 BCAC 109:
https://www.canlii.org/en/bc/bcca/doc/2007/2007bcca491/2007bcca491.html?autocompleteStr=R.%20v.%20TRAN&autocompletePos=5

[24] *Supra* note 7, at 11.
[25] *Ibid.*

33. Similarly, since a disproportionate number of persons that appear in criminal courts are socio-economically disadvantaged, drug addicted, and mentally ill, prior to entering a plea, individuals should be informed of other significant legal statutory consequences that necessarily flow from the plea and are derived from related *Criminal Code* provisions such as victim fine surcharges, DNA orders, offender registries, and strict probation terms.

34. When a judge is aware that a plea will trigger the application of a statutory penalty that will adversely impact an individual's life in the long-term, they should raise it with the individual or their counsel before accepting the plea. [26] This is a humane and common sense approach to ensure the plea is properly informed.[27]

d) The Racialized Context

35. Reform of the plea process is necessary because of the context in which justice is administered. Judges and counsel must be mindful that visible minorities are over-represented in the criminal justice system, especially with respect to both pre-trial and post-sentence custody. This places them in an especially vulnerable category with respect to systemic inducements to plead guilty.[28] It is essential that they not be further disadvantaged by an inadequate plea process that contributes to ill-informed pleas.

36. The criminal justice system continues to perpetuate inequality. Black persons in Canada are over-policed,[29] over-charged, less likely to secure judicial interim release[30] and disproportionately incarcerated.[31]

37. According to the 2011 National Household Survey, approximately 945,700 individuals residing in Canada identified as Black. They made up 15.1% of the visible minority population and

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[26] For instance, if a permanent resident intends to plead guilty to a sexual abuse related offence and counsel or the judge become aware that the individual is an immigrant with plans to sponsor their relatives to aid rehabilitation, the parties should confirm that the individual is aware that the conviction results in a prohibition against sponsorship under the *Immigration and Refugee Protection Regulations*, SOR/2002-227, ss. 133 (1).
[27] On the other hand, if not alerted to this nuance, the judge is not required to explore that aspect of the individual's personal plans.
[28] *Supra* notes 3 and 8.
[29] Lorne Foster et al., "Race Data and Traffic Stops in Ottawa, 2013-2015: A Report on Ottawa and the Police Districts" *York University* (October 2016) https://www.ottawapolice.ca/en/about-us/resources/.TSRDCP_York_Research_Report.pdf at 4
[30] Legal Aid Ontario "A legal aid strategy for bail," *LAO*, 2016. http://www.legalaid.on.ca/en/publications/paper-legal-aid-strategy-for-bail-2016-11.asp
[31] *Supra* note 3

2.9% of the total Canadian population. Of those Black individuals, more than half are foreign born.[32] A high proportion of such individuals are permanent residents and do not enjoy the protections against deportation that come with full citizenship.

38. Overall, people of African descent in the criminal justice system are susceptible to guilty pleas and statutory penalties such as deportation under section 36(1)(a) of the *IRPA*.[33] In short, everyone, especially the marginalized need to know the statutory consequences before entering a plea of guilt.

PART IV - COSTS

39. The Intervener does not seek costs and asks that no costs be awarded against the ACLC.

PART V – REQUEST FOR ORAL SUBMISSIONS

40. The ACLC requests permission to present 5 minutes of oral argument.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at the City of Toronto, in the Province of Ontario, this 25th day of September, 2017.

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Faisal Mirza
Dena Smith

Counsel for the Intervener,
African Canadian Legal Clinic

[32] *National Household Survey, 2011*. Immigration and Ethnocultural Diversity in Canada. Statistics Canada. http://www.statcan.gc.ca/access_acces/alternative_alternatif.action?t=99-010-XWE2011001&k=286&l=eng&loc=http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-010-x/99-010-x2011001-eng.pdf

[33] *R. v Hall*, [2002] 3 S.C.R. 309, 2002 SCC 64 at para 59. https://www.canlii.org/en/ca/scc/doc/2002/2002scc64/2002scc64.html?autocompleteStr=R.%20v%20Hall%2C%20%5B2002%5D%203%20S.C.R.%20309%2C%202002%20SCC%2064&autocompletePos=1
The economic and other deprivations sustained as a result of pre-trial confinement all act as coercive measures that inhibit the accused person's will to resist. He is rendered more likely to plead guilty, and, as a result, to waive the various safeguards against unjust conviction that the system provides.

PART VI – AUTHORITIES CITED

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Immigration and Refugee Protection Act, SC 2001, c 27, ss. 36(1)(a), 64(1), 64(2)	14, 27, 14 and 22
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Law Society of Alberta, "Code of Conduct," section 5.1-4	18
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The Canadian Bar Association, "Collateral Consequences of Criminal Convictions."	18
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R v Aujla, 2015 ONCA 325 at para 16	25
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Office of the Correctional Investigator, *Annual Report 2013-2014* Ottawa: OCI, 27 June, 2014) at 2.	9
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Trevethan, Shelley and Rastin, Christopher. "A Profile of Visible Minority Offenders in the Federal Canadian Correction System" (Ottawa: Correctional Service of Canada, 2004) at 3, 10-11	9
Zinger, Ivan "The Changing Face of Canada's Prisons: Correctional Investigator Reports on Ethno-Cultural Diversity in Corrections," November 26, 2013.	2, 35-36

Court File No. 37367

WING WHA WONG **Appellant**	**-AND-**	**HER MAJESTY THE QUEEN** **Respondent**
	-AND-	**AFRICAN CANADIAN LEGAL CLINIC** **Intervener**

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

FACTUM OF THE INTERVENER THE AFRICAN CANADIAN LEGAL CLINIC

(Rules 37 and 42(1) of the *Rules of the Supreme Court of Canada)*

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