SCC File No. 39855

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

EARL MASON

Appellant
(Respondent)

-and-

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent
(Appellant)

-and-

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF SASKATCHEWAN, CANADIAN COUNCIL FOR REFUGEES, CANADIAN ASSOCIATION OF REFUGEE LAWYERS, SOCIAL PLANNING COUNCIL OF WINNIPEG, CANADIAN MUSLIM LAWYERS ASSOCIATION, UNITED NATIONS HIGH COMMISION FOR REFUGEES, AMNESTY INTERNATIONAL CANADIAN SECTION (ENGLISH SPEAKING), COMMUNITY & LEGAL AID SERVICES PROGRAM, ASSOCIATION QUÉBÉCOISE DES AVOCATS ET AVOCATES EN DROIT DE L'IMMIGRATION and CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

Interveners

FACTUM OF THE INTERVENER THE CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

(Rule 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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PART I – OVERVIEW

1. The need for certainty around the interpretation and scope of section 34(1)(e) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "*IRPA*"), which could have disastrous consequences for non-citizens accused of violent crimes, requires this Honourable Court to consider the impacts of its decision on the criminal justice system. Without that certainty, accused persons will not be able to make meaningful decisions on the resolution of criminal charges, nor will defence counsel be able to provide useful advice. A broad interpretation of section 34(1)(e) that would allow for non-convictions to result in deportation has the potential to upend the plea negotiation process and remove the benefits of finality from joint resolutions of charges.

PART II – POSITION ON QUESTION IN ISSUE

2. The CLA addresses the following issue arising in this appeal, identified by the Appellant Earl Mason: whether section 34(1)(e) should be interpreted to apply to acts of common criminality committed in Canada, given that Parliament intended for section 34(1)(e) to have a "national security" nexus.

PART III – ARGUMENT

3. The FCA's interpretation of section 34(1)(e) to include non-convictions for acts of criminality committed in Canada will detrimentally impact a defence lawyer's ability to properly advise a client considering a guilty plea or other resolution to criminal charges, as well as hamper the proper functioning of the criminal justice system. Interpreting section 34(1)(e) of the *IRPA* requires a consideration of (1) the impacts on accused persons and defence lawyers; (2) the importance of finality in the criminal justice system; and (3) the need for deference to criminal justice system decision-makers.

A. Impacts on accused persons and defence lawyers

4. Under the FCA's interpretation of section 34(1)(e), a permanent resident or foreign national could be found inadmissible and removed from Canada for merely being arrested for or accused of engaging in acts of violence unrelated to national security that would or

might endanger the lives or safety of persons in Canada. This is the case even if an accused person is acquitted or the case is settled by way of an alternative disposition or stayed. Any conviction or finding of guilt for violent offences could also trigger the application of section 34(1)(e), but the CLA's primary concern is the potential for *non-convictions* to result in immigration consequences for accused persons, while also hindering the ability of defence counsel to advise their clients, provide relevant information to sentencing judges, or engage in meaningful plea bargaining with Crown counsel.

5. A fundamental element of the defence lawyer's ethical duty to their clients and to the administration of justice is advising all relevant parties about the possible consequences of a plea deal, regardless of whether the deal results in a conviction.

6. For any guilty plea, section 606(1.1) of the *Criminal Code*, R.S.C. 1985, c. C-46 (the "*Code*"), mandates that a court may only accept the plea if it is satisfied that, among other things, the accused is making the plea voluntarily, and understands the nature and consequences of the plea. The sentencing judge will need to make this determination at the sentencing hearing, with input from either defence counsel or the accused as to whether the plea is voluntary, informed, an unequivocal.

7. As the majority of this Court recognized in *R. v. Wong*, 2018 SCC 25, citing the Ontario Court of Appeal in *R. v. T.(R.)*, 10 O.R. (3d) 514 (CA) at p. 519, for a plea to be informed, an accused person "must be aware of the nature of the allegations made against him, the effect of his plea, and the consequence of his plea", including the "sufficiently serious legal interests" of immigration consequences: paras. 3-4.

8. It is up to the defence lawyer to provide this information to the client or refer them to an immigration lawyer for advice if necessary. The failure to receive advice on immigration consequences can render a guilty plea uninformed and form the grounds to strike the plea, if the accused can demonstrate subjective prejudice in that they would have either not pleaded guilty, or pleaded guilty on different conditions: *Wong*, at para. 6. The failure to provide advice could also result in the accused person making an ineffective assistance of counsel claim against the lawyer.

9. Legal advice about the consequences of a conviction will often be straightforward. One of the "benefits" of sections 36(1) and (2) of the *IRPA* to an accused person considering a guilty plea is that they can receive advice on the certain consequences of a particular sentence. For example, any foreign national or permanent resident considering a guilty plea to fraud over $5000 can weigh in the balance the certainty that they will be found inadmissible for serious criminality under section 36(1)(a) of the *IRPA*, since the maximum term of punishment imposed by section 380(1)(a) of the *Code* makes that finding a foregone conclusion. After conviction and sentencing, the person will have no ability to challenge the inadmissibility finding, and their deportation from Canada is virtually certain. An accused person receiving this advice may decide to try their chances at a trial, since the sentencing judge will have no discretion to vary their sentence and avoid deportation.

10. Immigration consequences, in the criminal context, are typically understood as a risk of deportation due to a conviction or sentence considered to constitute "criminality" or "serious criminality" under the *IRPA*. Unlike the section 380(1)(a) fraud over $5000 example, there are many *Code* offences which offer judges flexibility in sentencing for non-citizens, in order to avoid a finding of criminality or serious criminality after conviction.

11. In *R. v. Pham*, 2013 SCC 15, a case involving a person at risk of deportation due to the length of sentence imposed for production and possession of marijuana for the purposes of trafficking, Chief Justice Wagner emphasized the importance of individualization and parity in sentencing, and held that collateral immigration consequences may be considered as part of the "personal circumstances of the offender" in the sentencing process: paras. 8-11. Where possible, sentencing judges may exercise their discretion to consider collateral immigration consequences for non-citizens and vary sentences accordingly, if the sentence imposed remains proportionate to the gravity of the offence and the degree of responsibility of the offender: *Pham*, para. 14.

12. It is incumbent on the defence lawyer to advise a sentencing judge of the impacts of their decision on non-citizens. Where a sentencing judge has the flexibility to vary the length of a sentence, defence counsel can make submissions on the appropriateness of

a shorter sentence in the particular circumstances of their client's case, explaining the immigration consequences and detailing any hardship the client would face upon return to their home country, including family separation, lack of medical care, or risk of persecution. If a sentencing judge is unaware of the immigration consequences of the sentence imposed, because they were not told by defence counsel or for some other reason, appellate courts may intervene to the reduce the sentence in appropriate cases: *Pham*, para. 24.

13. The FCA's interpretation of section 34(1)(e) of the *IRPA* lacks the certainty of sections 36(1) and (2), which allow defence counsel to make submissions to sentencing judges on the consequences of a finding of criminality or serious criminality. Most sentencing judges are aware or should be aware of these consequences, and the consequences are easily understandable, as the nature of the offence or the length of the sentence will dictate the result after a conviction.

14. Defence counsel are now in a position where they will have to advise sentencing judges that non-citizens could still be deportable under section 34(1)(e) of the *IRPA* if they are considered to have engaged in acts of violence that would or might endanger the lives or safety of persons in Canada, even if a sentence of less than six months is imposed. While a legal opinion could be obtained on the likelihood of deportation, it would only be speculative, and in any event, under the FCA's interpretation of section 34(1), *any* outcome of a criminal charge for a violent act could result in deportation from Canada.

15. A conviction from a guilty plea or after trial is only one of the possible outcomes of a criminal charge. Indeed, defence lawyers spend most of their days trying to prevent their client from being convicted. The FCA's interpretation of section 34(1)(e) prevents defence lawyers from making useful submissions to sentencing judges on the immigration consequences of a sentence, but it also significantly impairs the ability of defence lawyers from advising their clients or engaging in plea bargaining.

16. While the best outcome for an accused person facing trial is undoubtedly an acquittal, defence lawyers may also negotiate with the Crown to obtain another disposition, which could include non-convictions like an absolute or conditional discharge,

alternative measures like drug treatment court or mental health court, a peace bond, a stay of proceedings, or a withdrawal of the charge or a decision to not approve a charge (in jurisdictions with charge approval). Any of these dispositions would obviously be a good outcome for an accused person otherwise at risk of deportation due to a conviction or the length of sentence imposed.

17. The difficulty with the FCA's interpretation of section 34(1)(e) is that defence lawyers are now unable to provide non-citizens accused of violent crimes with meaningful advice about immigration consequences flowing from a non-conviction resolution to a criminal charge, like a peace bond or alternative measures. Accused persons will consequently lack the information they so urgently need to make an informed decision about whether to enter into a plea agreement.

18. For example, after plea negotiations, counsel could land on a joint position of a peace bond under section 810 of the *Code* to resolve a domestic assault charge. In a serious case that was likely to result in conviction, most defence lawyers would have no hesitation in recommending that the client accept the deal, particularly if a conviction would otherwise result in immigration consequences. However, under the FCA's interpretation of section 34(1)(e), it would be impossible to advise the client on possible immigration consequences of a peace bond, as it would be predicated on the risk presented by the accused of endangering the safety of someone in Canada and potentially trigger their removal from Canada. The inability to receive this advice may result in cases proceeding to trial that should have been resolved.

B. The importance of finality in the criminal justice system

19. The benefits of resolution discussions and joint submissions on sentence are well-recognized, and relevant to the disposition of this appeal.

20. The FCA's interpretation of section 34(1)(e) of the *IRPA* hampers a defence lawyer's ability to provide advice, and the accused person's need to make an informed decision, but it will also impact on the plea negotiation process. Without any certainty about the potential for an accused person to be caught in the net of section 34(1)(e),

defence lawyers cannot negotiate plea agreements effectively, and Crown counsel cannot make informed decisions about whether or how to resolve a criminal charge.

21. Defence lawyers are ethically obligated to obtain the benefit of any remedy or defence they can for the client, within the bounds of the law: see, e.g. Rule 2.1-3(e) of the *Code of Professional Conduct for British Columbia*. During plea negotiations, this ethical obligation translates into providing information to the prosecutor that could inform their charge assessment decision, or beneficially influence their position on sentence.

22. There are many reasons why a prosecutor might agree to a disposition other than a guilty plea, and information from defence counsel about the personal circumstances of the accused is essential to the decision-making process. As provided in the British Columbia Crown Counsel Manual, Charge Assessment Guidelines:

> Justice does not require that every provable offence must be prosecuted. The resources of the criminal justice system are not unlimited. If reasonable alternatives are available, they should be pursued. Prosecution should be reserved for cases requiring the full force of the criminal justice system, with all its available sanctions.

23. Similarly, the Public Prosecution Service of Canada's Desk Book, "Decision to Prosecute, s. 3.2: The public interest" ("PPSC Desk Book"), provides as follows:

> Even if there is sufficient evidence to proceed with a prosecution, Crown counsel should proceed only if, considering all of the circumstances, a prosecution would best serve the public interest. In some cases there may be an appropriate alternative to prosecution. For example, based on the assessment of the public interest as a result of a careful consideration of the factors below, Crown counsel may conclude in certain cases that there are more effective ways to address the offending conduct and to reduce the likelihood of recidivism, such as the use of alternative measures (or extrajudicial measures for a young person), referral to a Restorative Justice program or other diversionary responses. In other cases, such as where an offender has been rehabilitated and there is no need to address general deterrence and denunciation, proceeding with a prosecution may not be in the public interest.

24. Both the British Columbia Crown Counsel Manual and the PPSC Desk Book set out a number of factors to consider under both the likelihood of conviction and public interest components of the charge approval test, including but not limited to the admissibility, availability, and reliability of evidence for trial; the need to reduce overrepresentation of Indigenous people in the criminal justice system; whether bias, racism or systemic discrimination played a role in the person coming into contact with the criminal justice system; whether the public interest is better served by resolving the case through restorative justice measures or alternative measures, and the personal circumstances of the accused.

25. The more vulnerable the accused person, the more likely it is that their personal circumstances will be relevant to the Crown's charge assessment decision. For example, a person facing immigration consequences for an offence committed while experiencing a mental health crisis will likely be treated differently than a citizen without that barrier. Defence counsel may advocate for treatment instead of punishment, and the Crown may agree, when it is clear that alternative measures will better serve the public interest.

26. This Court has recognized on numerous occasions the benefits of resolution discussions between Crown and defence counsel. In *R. v. Anthony-Cook*, 2016 SCC 43, at para. 1, Justice Moldaver described resolution discussions as "essential… Properly conducted, they permit the system to function smoothly and efficiently". In *Wong*, at para. 3, Justice Moldaver observed that "[t]he plea resolution process is also central to the criminal justice system as a whole". Similarly, the PPSC Desk Book, at 3.7, "Resolution Discussions", notes that "[e]arly and meaningful resolution discussions can benefit all participants in the criminal justice system and advance the administration of justice". This is because of the potential for resolution discussions to result in a joint submission on sentence or other outcome for the case, without the need for a trial.

27. Resolving cases without a trial is "commonplace and vitally important to the well-being of our criminal justice system, as well as our justice system at large" (*Anthony-Cook* at para. 25). Resolution offers a host of systemic benefits, including the benefits of certainty to all parties and participants, and the saving of previous court resources in a

system overburdened by delay. As summarized by the British Columbia Court of Appeal in *R. v. Cheema*, 2019 BCCA 268 at paras. 20-21:

> As Justice Moldaver explained in *Anthony-Cook*, resolution discussions between Crown counsel and defence counsel are essential to the smooth and efficient functioning of the criminal justice system. Joint submissions often result from these discussions and provide significant benefits to the Crown, the accused, the public at large and the administration of justice. The near-certainty associated with joint submissions allows the Crown to avoid taking flawed cases to trial and encourages accused persons to cooperate. In addition, a joint submission might result in a more lenient sentence for an accused than would otherwise be expected, minimize the stress and costs associated with trials and offer the accused an opportunity to make amends. Most importantly, joint submissions provide a degree of certainty to all concerned that the benefits underlying the agreement will be respected, which has been described as an "instrumental feature" of the criminal justice system: *R. v. Faulkner*, 2018 ONCA 174 at para. 103; *Anthony-Cook* at paras. 36–40; *R. v. Dunkers*, 2018 BCCA 363 at paras. 38–40.
>
> In *Dunkers*, this Court recognized that such arrangements also benefit other justice system participants:
>
> > [Joint submissions] also provide benefits to victims, witnesses, and the criminal justice system at large. For cases with horrific and difficult facts, victims and witnesses obtain some comfort in being spared the emotional and psychological cost of a trial. From an administrative perspective, guilty pleas save precious time, resources and expenses that can be directed towards other matters.

28. The benefits of resolution discussions and joint submissions between defence and Crown counsel to the criminal justice system cannot be overstated. This is why maintaining the finality of guilty pleas is "important to ensuring the stability, integrity, and efficiency of the administration of justice": *Wong*, at para. 3. As observed by the British Columbia Provincial Court in *R. v. Moore*, 2004 BCPC 560 at para. 22, cited with approval by the British Columbia Court of Appeal in *R. v. Alec*, 2016 BCCA 282 at para. 78:

> To permit accused persons to vacillate between claims of innocence, guilt and renewed claims of innocence would cause great mischief. It would create chaos in the criminal justice system if it were permitted to occur regularly because it would interfere with the willingness of Crown to enter

> into discussions with counsel for the accused surrounding resolution of outstanding charges.

29. The FCA's interpretation of section 34(1)(e) risks the resolution process descending into the "chaos" described by the court in *Moore*. While the evil identified by the court was in the context of striking guilty pleas, the possible consequences, i.e. the unwillingness of Crown to enter into resolution discussions, are relevant here. Where there is no benefit of certainty for an accused person upon the resolution of a criminal charge, if they will suffer immigration consequences regardless of the outcome, there will be a corresponding lack of desire to engage in any plea bargaining and they may choose instead to proceed to trial. Without the benefits of certainty to the accused associated with a plea bargain, an essential component of the criminal justice system loses its efficacy.

C. The need for deference to criminal justice system decision-makers

30. As described above, there are many reasons why the Crown and defence may agree to resolve a criminal charge without a trial, or why Crown counsel will not approve a charge or decide to withdraw a charge. Accused persons may also be acquitted by a judge or jury after a trial, or a trial judge may enter a stay of proceedings or not commit a person to stand trial after a preliminary inquiry. It is impossible for anyone outside of those decision-making processes to fully comprehend the factors that went into that decision, unless written reasons are provided.

31. The finality of those decisions warrants deference to all of the decision-makers involved. Matters of prosecutorial discretion are reviewable only for abuse of process: *R. v. Anderson*, 2014 SCC 41 at para. 51. As this Court observed at para. 37, "prosecutorial discretion is a necessary part of a properly functioning justice system". Charge assessment decisions made by Crown counsel "are entitled to reasonable deference and should not be overturned or second-guessed": BC Charge Assessment Guidelines, *supra*. Similarly, defence counsel are entitled to a "strong presumption" that they are competent in advancing the interests of their clients: *R. v. S.G.T.*, 2010 SCC 20 at para. 37. As held by the New Brunswick Court of Appeal in *R. v. Gardiner*, 2010 NBCA 46 at para. 10, "appellate judges are likewise duty bound to apply that deferential approach".

32. To allow for unproven charges to result in deportation that were otherwise resolved to the satisfaction of all participants does a disservice to the deference owed to decision-makers involved. In order to function smoothly, the criminal justice system requires accused persons, defence counsel, the Crown, and the courts to have certainty around the consequences associated with the resolution of charges, and for reviewing courts and tribunals to approach resolutions with deference. The FCA's interpretation of section 34(1)(e) removes that certainty and the systemic benefits that flow from finality. For these reasons, the CLA respectfully urges this Court to consider the impacts of the interpretation of section 34(1)(e) on the criminal justice system and the potential chaos it could cause.

PART IV AND V – COSTS AND ORDER REQUESTED

33. The CLA is a non-profit organization, represented on this appeal by counsel acting *pro bono*. The CLA does not seek costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of September, 2022

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PART VII – TABLE OF AUTHORITIES

JURISPRUDENCE

1. *R. v. Wong*, 2018 SCC 25
2. *R. v. Pham*, 2013 SCC 15
3. *R. v. Anthony-Cook*, 2016 SCC 43
4. *R. v. Cheema*, 2019 BCCA 268
5. *R. v. Moore*, 2004 BCPC 560
6. *R. v. Alec*, 2016 BCCA 282
7. *R. v. Anderson*, 2014 SCC 41
8. *R. v. S.G.T.*, 2010 SCC 20
9. *R. v. Gardiner*, 2010 NBCA 46

OTHER MATERIALS

1. Rule 2.1-3(e) of the *Code of Professional Conduct for British Columbia*
2. British Columbia Crown Counsel Manual, Charge Assessment Guidelines
3. Public Prosecution Service of Canada's Desk Book, "Decision to Prosecute, s. 3.2: The public interest" and 3.7, "Resolution Discussions",