Court File Number: 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

- AND -

HER MAJESTY THE QUEEN

Respondent

- AND -

CANADIAN CIVIL LIBERTIES ASSOCIATION
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CANADIAN COUNCIL FOR REFUGEES
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MEMORANDUM OF ARGUMENT OF THE INTERVENER CANADIAN CIVIL LIBERTIES ASSOCIATION

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I: STATEMENT OF THE CASE

1. This case is about access to justice. Accessing justice requires that litigants have a meaningful opportunity to exercise their rights, which requires a baseline of knowledge about these rights. In the circumstance of criminal law proceedings, it is fundamental that an accused's decision to compromise her liberty by pleading guilty be informed. Where an accused person compromises his liberty on the basis of fundamentally uninformed decisions, that accused has been denied access to justice. In such circumstances, the only just remedy is to vacate the guilty plea and order a new trial; to provide a restorative remedy. Upholding uninformed guilty pleas on appeal is an affront to a fair and just criminal justice system.

PART II: POSITION ON QUESTIONS IN ISSUE

2. The CCLA submits that, for a guilty plea to be sufficiently informed, the accused person must understand, or must have been reasonably informed about, the potential effect that a guilty plea may have on any reasonably foreseeable and material consequences of that plea. The CCLA further submits that an uninformed guilty plea is *per se* a miscarriage of justice and, on appeal, a new trial must always be ordered.

PART III: ARGUMENT

A. The Informational Component to a Valid Plea of Guilt

3. By its very nature, a plea of guilty is a waiver of fundamental constitutional rights afforded to accused persons: the right to silence, the right to be presumed innocent, and the right to a trial. These fundamental rights and protections protect an individual's access to justice and are woven into the fabric of our criminal justice system. By pleading guilty, an accused person waives these fundamental rights and relieves the Crown of the burden of proving the essential elements of each

offence beyond a reasonable doubt.[1] The decision to plead guilty is a critical decision that may have a long-term impact upon a person well beyond the criminal law proceeding.

4. Consequently, a waiver of these fundamental *Charter* rights must be informed.[2]. The CCLA respectfully submits that the informational component to an informed guilty plea is made up of a knowledge of the criminal consequences (such as foregoing a trial, accepting guilt, possible sentences including incarceration, and ancillary *Criminal Code* orders or similar automatic statutory punishments or consequences) and knowledge of the fact of potential material non-criminal law collateral consequences (such as impact on regulatory matters, immigration and employment status).

5. It is naïve – and unjust – to assert that an accused need only be aware of the criminal law-related consequences of a guilty plea.[3] Criminal proceedings do not exist in a vacuum. For an

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[1] The formal nature and effect of a guilty plea on the criminal trial process was succinctly canvassed by Doherty JA in *R v T(R)* (1992), 10 OR (3d) 514 (CA) at para 14, cited with approval in *R v Taillefer*; *R v Duguay*, 2003 SCC 70, [2003] 3 SCR 307 at para 85: "To constitute a valid guilty plea, the plea must be voluntary and unequivocal. The plea must also be informed, that is the accused must be aware of the nature of the allegations made against him, the effect of his plea, and the consequence of his plea[.]" [citations omitted] [*Taillefer*]

[2] This Honourable Court has recognized a "long and unbroken" line of jurisprudence, beginning with *Korponay v Canada (Attorney General)*, [1982] 1 SCR 41, that a valid waiver of a procedural safeguard, such as a *Charter* right, must be premised on "full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process": *R v LTH*, 2008 SCC 49, [2008] 2 SCR 739 at para 7 [*LTH*]. Where the procedural protections are enhanced, the standard to prove a valid waiver will be high: *LTH*, *ibid* at para 7.

[3] This restrictive approach has been adopted by the appellate courts in Alberta and Nova Scotia. See *R v Hunt*, 2004 ABCA 88, 346 AR 45 at paras 19-21 [*Hunt*]; *R v Riley*, 2011 NSCA 52, 274

accused person, the consequences of a criminal charge do not start and end in criminal court. Depending on the charge, non-criminal law collateral consequences may be of much *more* significance than simply a conviction and sentence: the employee who may be fired; the professional who may be stripped of his license to practice; the mother who may lose custody of her child; and the immigrant who may be deported to a country he has not seen in decades.[4] Indeed, this Honourable Court has recognized the potential significant impact of non-criminal law collateral consequences to accused persons, and the significance of immigration consequences in particular, by allowing such consequences to be considered in sentencing.[5]

6. It is respectfully submitted that the fact of non-criminal law collateral consequences that flow *directly* from a finding of guilt *must* be part of the suite of information provided to assist an accused in making the decision of whether to plead guilty and forgo the fair trial and its attendant protections to which they are otherwise entitled under the *Charter*. The risk of the collateral consequence occurring must be a present risk arising from a finding of guilt; it need not be a certainty.[6]

7. Accordingly, it is respectfully submitted that the informational component for a valid guilty plea must include knowledge of the criminal law consequences and the fact of reasonably foreseeable and material non-criminal law consequences.

CCC (3d) 209 at paras 31-33. This is also the approach advocated by the Respondent in this case: see Factum of the Respondent at paras 39-52.

[4] See *R v Quick*, 2016 ONCA 95, 129 OR (3d) 334 at para 29 [*Quick*].
[5] *R v Pham*, 2013 SCC 15, [2013] 1 SCR 739.
[6] See e.g. *R v Shiwprashad*, 2015 ONCA 577, 328 CCC (3d) 191 at para 72.

B. Administering the Informational Component: A Realistic, Practical Framework to Enhance Access to Justice and to Prevent Uninformed Guilty Pleas

8. The key to avoiding uninformed guilty pleas is to prevent them from occurring in the first place.

9. First, accused persons must be made explicitly aware of the criminal law-related consequences of their guilty pleas. These consequences include the required admissions (the essential elements of the offences as well as any further facts the Crown seeks to be admitted),[7] the waiver of the right to a trial, and the expected sentencing positions of the Crown and defence, along with an understanding that the sentencing judge is not bound by the positions of counsel. These consequences are the most basic and fundamental to the guilty plea and go to the true nature of the process itself.

10. Second, an accused person must also be made aware of any ancillary orders that are necessarily imposed as a result of the guilty plea or those that may be sought by the Crown following the guilty plea. These orders are well-known to counsel and the judiciary and include, among others, probation orders, DNA orders, weapons prohibitions, s. 161 orders, non-communication orders, forfeiture orders, sex offender registry orders, and victim fine surcharge orders. These orders often place restrictions on an accused's liberty and form part of the suite of penalties imposed following a finding of guilt.

11. Third, accused persons must *be alerted* to reasonably foreseeable and material non-criminal law collateral consequences of a guilty plea. These consequences are those routine consequences outside of the criminal law that attach themselves to findings of guilt, such as

[7] Crown counsel will generally seek that the accused admit a summary of the allegations, initially prepared and provided to the accused through disclosure.

immigration consequences. These collateral consequences may have a substantial impact on an accused's life, liberty, and security of the person, and could extend for years beyond the sentence.

12. There is no need to impose further legal duties on counsel or trial judges to advise accused persons as to the collateral consequences as these duties already exist.

13. Defence counsel are already under ethical obligations to inform and advise their clients on the effects of a guilty plea to the best of their ability.[8] This includes an explanation that there may be employment, licensing, custody, immigration and other consequences flowing from a guilty plea.[9] Counsel must also inquire of the accused of personal circumstances, such as immigration status, which any reasonable counsel would assume may be of material consequence to the accused. Counsel must also ask whether there are particular personal circumstances which must be considered, such as specific employment or professional regulatory concerns. An accused should be informed of these consequences.

14. Trial judges, while under no legal obligation to make inquiries prior to taking a guilty plea,[10] routinely conduct plea inquiries with accused persons. Such inquiries are vitally important when dealing with a self-represented person. The CCLA respectfully suggests that, in addition to

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[8] Michel Proulx and David Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2001) at 430-434. Proulx and Layton explicitly suggest that counsel ought to canvass with accused persons "any reasonably anticipated collateral consequences of a guilty plea, such as the impact of the plea on personal life, civil litigation, criminal charges in a foreign jurisdiction, and deportation proceedings".

[9] In order for this explanation to be meaningful and accessible, counsel should provide concrete examples of employment and other opportunities that may be restricted such as being prevented from working with children or senior citizens, and possible removal in certain circumstances.

[10] *R v Adgey*, [1975] 2 SCR 426; *R v Brosseau* (1968), [1969] SCR 181.

any other inquiries necessary to otherwise determine the validity of the plea the following procedure and inquiries[11] are crucial when dealing with self-represented accused persons:

a. Crown sentencing position: The presiding judge should ask the Crown for its sentencing position, including whether any ancillary orders would be sought. The judge should confirm the accused understands the sentencing position and any requested orders.

b. Warning as to reasonably foreseeable and material consequences: The presiding judge should warn the accused as to the possibility the guilty plea and sentence may result in certain other well-known consequences. The presiding judge should warn the accused that the guilty plea could affect his employment, his status in Canada (and may result in deportation), international travel, or any ongoing or future court proceedings (including custody, child protection, or civil actions for damages). If the accused has no criminal record, the judge should ensure the accused understands the potential for a temporary or permanent criminal record.[12]

c. Warning as to other unintended consequences: The presiding judge should warn the accused that the guilty plea could have other unintended consequences that were his responsibility to determine. A suggested standard warning is:

> A guilty plea may have other negative consequences to you in circumstances we have not discussed. You are not required to proceed with your guilty plea, you have the opportunity to determine how your plea will affect your own personal circumstances. Do you wish to proceed with your plea or do you wish to seek further information?

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[11] The CCLA has developed its suggested approach based, in part, on a standardized guilty plea comprehension form used by Legal Aid Ontario duty counsel in Toronto.

[12] While the average accused person may be aware that a criminal record could affect their employment, they may not know or comprehend the extent of the impact and the length of time and expense associated with obtaining a record suspension. This lack of knowledge may be exacerbated with respect to an accused who is marginalized or otherwise lacks resources.

15. This approach to vetting a proposed guilty plea is not onerous or time consuming. To the contrary, it consists simply of ensuring that accused persons, particularly those who are self-represented, are aware of the realistic effect of the decision to plead guilty.

C. How to Determine if a Plea Was Informed

16. The CCLA respectfully submits that assessing whether a plea was informed, either in the trial court or on appeal, will generally be a straightforward examination as to whether the informational component was provided to the accused.

17. Assessing whether the accused was aware of the criminal law consequences will be a simple exercise. The CCLA submits that a failure to understand the criminal law consequences of a guilty plea is always fatal. A misunderstanding on these elements goes to the very heart of the nature and effect of the plea.

18. Similarly, in the vast majority of cases, the analysis regarding non-criminal law collateral consequences can also be disposed of relatively easily; for example, it will be an easy factual matter to determine if the accused was advised of the immigration consequences. There may be rare cases, however, where the consequences are idiosyncratic to a specific accused which may require a reviewing court to embark upon a more detailed inquiry to consider the nature of the alleged collateral consequences to the accused person, the risk of those consequences occurring, and any information provided to the accused person in respect of these consequences, including any warnings or exhortations to seek further advice.

19. There is a practical limit to the reach of the requirement to be advised of the non-criminal law collateral consequences.[13] It is respectfully submitted that, subject to exceptional circumstances, it is just to require an accused to understand the non-criminal law collateral consequences as they were known at the time of the guilty plea.[14]

D. An Uninformed Plea is a *per se* Miscarriage of Justice

20. An accused person who enters a truly uninformed guilty plea is *blameless*. An uninformed guilty plea represents a failure to ensure the accused was informed as to the nature and consequences of their plea, as required by the *Charter*. An accused person should not bear the weight of this failure which, after all, is not the result of anything the accused did. In striking an uninformed plea the court will have ensured that an accused obtains nothing more than that to which they were originally entitled: a fair trial. The CCLA submits that the only reasonable conclusion is that an uninformed guilty plea is *per se* a miscarriage of justice.

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[13] In *Quick*, Laskin JA set the limit as consequences that "mattered" to the accused: *Quick*, *ibid* at para 33. In *T(R)*, Doherty JA limited the inquiry to those that were "legally relevant": *R v T(R)* (1992), 10 OR (3d) 514 (CA) at para 38. While it has taken the view that unanticipated consequences cannot be used to strike a guilty plea, the Alberta Court of Appeal seems to have left open the option for an accused to strike or appeal a guilty plea when the information he received from counsel was improper, negligent, or incompetent. See *Hunt*, *supra* at paras 16-17, 19. See also *R v Hoang*, 2003 ABCA 251, 339 AR 291 at paras 27, 33-34.

[14] *Lee v United States* (2017), No 16-327, slip opinion at 10 (USSC, June 23, 2017).

21. It is unnecessary and unhelpful to require that uninformed pleas proceed through the ineffective assistance of counsel framework.[15] That paradigm serves only to act as a distraction from the true issue: whether the plea was informed. What truly matters is the accused person's understanding of the effect of their plea – i.e., whether the accused was deprived of her right to a fair trial via an uninformed plea – as opposed to how their understanding or lack thereof came to be. Moreover, the ineffective assistance of counsel procedures may only serve to restrict the parties' access to justice. These claims are known to be intensely complicated, time-consuming, and expensive.[16] They would only create further delay and expense to no practical benefit. If there is a concern that counsel did not adequately assist the accused in this realm, that is a separate issue that should not rest on the shoulders of an accused. It may, for example, be more appropriately a matter for the regulatory bodies (various law societies). As mentioned, the validity of the plea and the impact on the accused and her right to justice is what ought to occupy the court's attention, not whether counsel was ineffective.

22. Similarly, a requirement that an accused demonstrate an "articulable route to an acquittal"[17] is inappropriate. On appeal or application to strike a plea at trial, the accused simply seeks to cure an unfairness to which they have been subjected. They do not seek an acquittal. Rather, the

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[15] This is the approach firmly advocated for by the Respondent in this case: see Factum of the Respondent at paras 53-65. The intervener Attorney General of Alberta adopts the same position as the CCLA: see Factum of the Attorney General of Alberta at para 25.

[16] See *R v GDB*, [2000] 1 SCR 520 at paras 26-28. Courts across Canada have devised onerous procedural protocols for dealing with allegations of ineffective assistance of counsel. See e.g. *Practice Direction Concerning Criminal Appeals at the Court of Appeal for Ontario* (March 1, 2017), r 17.

[17] The Appellant's factum provides a helpful summary of the jurisprudence adopting this standard. See Factum of the Appellant at paras 121-124.

accused seeks a restorative remedy. That is, they seek to be placed in the position he would have been in had he been properly informed of the nature and consequences of his plea. Just as an accused prior to trial is entitled to put the Crown to prove its case, so too should an appellant or applicant be afforded the same where the waiver of that right to a trial was uninformed.

23. While not every misstep during the criminal process will lead to a miscarriage of justice, compromising certain fundamental constitutional protections will fatally imperil the integrity of the process. It is respectfully submitted that an uninformed plea imperils is one such instance. This is apparent when one considers the significance of waiving a trial:

> The right to a fair trial is a fundamental pillar without which the edifice of the rule of law would crumble. No less is at stake than an individual's liberty - his right to live in freedom unless the state proves beyond a reasonable doubt that he committed a crime meriting imprisonment. This is of critical importance not only to the individual on trial, but to public confidence in the justice system.[18]

24. Maintaining an uninformed guilty plea undermines the foundational principles of our criminal justice system. It is profoundly unfair. It is a miscarriage of justice.

PART IV AND V: COSTS AND ORDER SOUGHT

25. The CCLA takes no position on the disposition of this appeal. The CCLA does not seek costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Toronto, Ontario this 26th day of September 2017.

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[18] *R v NS*, 2012 SCC 72, [2012] 3 SCR 726 at para 38.

PART VI: TABLE OF AUTHORITIES AND LEGISLATIVE PROVISIONS

Other Sources: